NO. 28602

IN THE INTERMEDIATE COURT OF APPEALS 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,

Counterclaim Defendants.

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

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

FIRST CIRCUIT COURT

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

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STATE OF HAWAI'I

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.

DEFENDANT/COUNTERCLAIM-PLAINTIFF/ APPELLEE KUILIMA RESORT COMPANY'S ANSWERING BRIEF

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COUNTER-STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

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I. CONCISE STATEMENT OF THE CASE

A. Nature of the Case

Kuilima Resort Company ("Kuilima") files this Answering Brief in response to KEEP THE NORTH SHORE COUNTRY ("KNSC") and THE SIERRA CLUB ("Sierra Club")'s (collectively "Plaintiffs") appeal of the Circuit Court of the First Circuit's Amended Final Judgment (the "Judgment"). The Circuit Court properly granted summary judgment and entered Judgment against Plaintiffs. See CROA 12/9-17 (Appendix A); CROA 12/278-282 (Appendix B). The Judgment should be affirmed.

Plaintiffs' First Amended Complaint ("Amended Complaint") challenged Kuilima's development of its master-planned resort community at the Turtle Bay Resort (the "Project"), located in Kahuku, Oahu, Hawaii. CROA 2/41-55. Plaintiffs asserted a single claim in their Amended Complaint – that the City and County of Honolulu Department of Planning and Permitting ("DPP") must require a supplemental environmental impact statement ("SEIS") due to a purported change in the timing of the Project, and alleged environmental changes in the region since the acceptance of the Project's environmental impact statement (the "EIS"). CROA 2/51-55. The Circuit Court, Judge Sabrina S. McKenna, granted Kuilima's Third Motion for Summary Judgment (re: Burden of Proof);[1] and denied Plaintiffs' Motion for Summary Judgment. CROA 12/9-17.

Plaintiffs challenge Kuilima's development Project, which the City and State entitled in 1986 based in part on the EIS. Since the entitlements, and until this litigation began in January 2006, the Project proceeded forward. Plaintiffs emphasized at the trial level that the lapse in time from 1986, without completion of the Project, is a "change" in the Project that, coupled with alleged changes in the regional environment over that time, requires an SEIS. What Plaintiffs now argue is essentially the same, but is disguised as a different argument. Plaintiffs continue to rely on alleged regional changes in environmental conditions since the acceptance of the EIS, but now argue that those changes, by themselves, form a stand-alone basis to require an SEIS under the last sentence of HRS §11-200-27. This misinterpretation of the SEIS Rules is just another argument that the lapse of time is enough to require an SEIS.[2]

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[1] The City and County of Honolulu and Director Henry Eng joined in Kuilima's Motions. CROA 6/131-144.

[2] Kuilima does not take issue with an argument that, as a matter of policy, EISs should

While the Project slowed down in the 1990s (part of the general economic decline in those years), the Project still proceeded forward, with significant work and significant funds expended. From DPP's acceptance of the EIS, and until this litigation, the Project received little or no opposition. In fact, the City reaffirmed the Project when, in May 1999, it was incorporated into the Ko`olau Loa Sustainable Communities Plan. In February 2000, the City Council confirmed the validity of the Project's entitlements and directed Kuilima to move forward more quickly – and Kuilima is doing just that. Indeed, the Project has continued to push forward – per the original project description.

Now, in 2007, Kuilima finds itself defending the right to complete the Project for which it is entitled and which it has continued to develop, from claims that too much time has passed since the EIS was accepted.

Plaintiffs ask this Court to rule that the Circuit Court erred when it determined that Plaintiffs failed to meet their burden to show that an SEIS is required for the Project under Hawaii Revised Statutes ("HRS") Chapter 343 ("HEPA") and the Hawaii Administrative Rules ("HAR") §§ 11-200-26 and 11-200-27 (along with HAR §§ 11-200-2 "SEIS Rules"). OB at 19. Those sections specify the limited circumstances under which further environmental review can be required of a previously-reviewed project. The SEIS Rules allowing a supplemental EIS, however, exceed their statutory authority. HEPA specifically provides that once an EIS is accepted for an action, that's it — no additional EIS — supplemental or otherwise — may be required. See HRS § 343-5(g). Even if applicable, Plaintiffs' heavy burden under HAR §§ 11-200-26 and 27 was to prove that (1) there has been a *substantive change in the Project*, and (2) that such change in the Project will *likely result in a significant environmental effect*.

SEIS Rules § 11-200-26 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***

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have an end date. Indeed, the Hawaii legislature considered legislation this past legislative session to do just that—to impose time limitations on EISs, but on a prospective basis. The legislation was not enacted. In any event, there is no end date on Kuilima's EIS. Any end date on an EIS would have to be on a prospective basis. It would be unfair and inappropriate to impose an end date on a retroactive basis to EISs previously accepted, because the land owner, the public and the government would have no certainty regarding a project's ability to move forward in reliance on the EIS.

> ***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.

(Emphasis added). So there must be (a) a substantive "change" in the action (*i.e.*, the Project) that may have a "significant" environmental effect;[3] (b) the change must be such that it makes the Project essentially a different action than what was previously considered; and (c) the change in the action must be one "resulting in" individual or cumulative impacts not originally disclosed. Otherwise no SEIS is required, and the original EIS "shall be deemed to comply with this chapter." Agencies may not require further environmental review unless the stated conditions are met.

Section 11-200-27 provides further explanation of what may constitute a change, but still requires a change, or "modification", in the action:

> 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). This section also clarifies that the anticipated environmental impacts must be "new or different" from what was originally disclosed or previously dealt with. The last sentence of this section further identifies what warrants anticipating new or different impacts. It is this last section on which Plaintiffs solely rely.

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[3] "Significant effect" is defined as: "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the state's environmental policies or long-term environmental goals and guidelines as established by law, or adversely affect the economic or social welfare, or are otherwise set forth in section 11-200-12 of this chapter." HAR § 11-200-2.

The Circuit Court ruled the Project is the "action." It determined that Plaintiffs did not show the Project "changed substantively" or that the alleged change is one "likely resulting in" a "significant effect" on the environment not originally considered or previously dealt with. CROA 12/9-17.[4] The Court also found that the DPP took a "hard look" in making its decision, and reasonably decided an SEIS is not required for the Project. The Court further found such decision was not "arbitrary or capricious." CROA 12/12-15.

This Court should affirm the Circuit Court's Judgment because:

1. There is no evidence of a *substantive change in the Project*. There is no evidence the alleged change in the timing of the Project will *likely result in significant impacts not originally disclosed or previously dealt with*. Moreover, applying the "rule of reason" to the DPP's decision, and considering the agency's extensive record and review of the planning and permitting process for this Project, the DPP's decision not to require an SEIS for the Project was neither *arbitrary* nor *capricious*.

2. Kuilima's Subdivision Application cannot form the basis for requiring an SEIS because it is not an "action" under the SEIS Rules, is not a discretionary appproval, and if considered alone is exempt from the environmental review process.

3. Plaintiffs' claims are time-barred: (1) Under HRS § 343-7(a), because Plaintiffs did not file suit within 120 days after the Project started or when they knew or reasonably should have known of the alleged "new circumstances and evidence" regarding traffic and species; and (2) Under HRS § 343-7(b) and (c) because Plaintiffs did not file suit within 30 or 60 days after having actual knowledge of the DPP's determination that an SEIS was not required.

4. The SEIS Rules exceed their statutory authority under HEPA. The plain language of HEPA imposes clear and specific limits on the rule-making authority by mandating that once a statement (*i.e.*, an EIS) has been accepted with respect to an action, no "other" statement shall be required for that action. In addition, the SEIS Rules exceed HEPA's enabling authority. Accordingly, no authority exists to require Kuilima to prepare an SEIS.

5. HEPA does not create a private right of action to require an SEIS. Under the SEIS Rules, the determination of whether to require an SEIS is delegated only to the "accepting authority" or "approving agency." Furthermore, under the SEIS Rules, an SEIS is to be treated like an EIS in certain respects, but does not include judicial review of the agency determination that an SEIS is not required, like that available for review of an EIS determination.

Accordingly, based on the applicable standard of review, this Court should affirm the

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[4] Citation to the Record on Appeal shall be referred to by "ROA" and to the Consolidated Record on Appeal as "CROA" then Volume #/Page #(s). Citations to Deposition Transcripts shall be referred to by "Depo." then Page #:Line #(s).

Circuit Court's Judgment.

B. Course and Disposition of Proceedings Below

Unite Here! Local 5 ("Labor Union"), a labor organization representing 350 employees at the Resort, filed a Complaint in Civil No. 06-1-0265-02 (SSM) ("Union Complaint") in the Circuit Court of the First Circuit against the City and Kuilima (ROA 1/1-26) to require Kuilima to prepare a SEIS and to enjoin the DPP from processing permits and approvals for the Project. ROA 1/22-23. KNSC was formed after the Circuit Court denied the Labor Union's motion for preliminary injunction. CROA 4/39-40. KNSC is made up of individuals, many of whom are North Shore residents and/or property owners. Plaintiffs' Amended Complaint is similar to the Complaint filed by the Labor Union[5] in the Circuit Court of the First Circuit. CROA 2/41-136. Plaintiffs asserted only one claim — that a purported change in the *timing* of the Project's development, and alleged *environmental changes in the region* around the Project related to that timing, require the DPP to require an SEIS under HAR §§ 11-200-26 and 11-200-27. CROA 2/50-55 (emphasis added).

On October 11, 2006, Kuilima filed four dispositive motions: (1) Kuilima Resort Company's First Motion for Summary Judgment (Re: Statute of Limitations) (hereinafter "MSJ re: Statute of Limitations"), (Appendix C); (2) Defendant Kuilima Resort Company's Second Motion for Summary Judgment (Re: Non-Discretionary Actions) (hereinafter "MSJ re: Non-Discretionary Actions"), (Appendix D); (3) Defendant Kuilima Resort Company's Third Motion for Summary Judgment (Re: Burden of Proof) (hereinafter "MSJ re: Burden of Proof"), (Appendix E); and (4) Defendant Kuilima Resort Company's Motion for Judgment on the Pleadings (collectively "Kuilima's Motions"), (Appendix F). CROA 3/17-227.

On October 26, 2006, Plaintiffs filed their Motion for Summary Judgment ("Plaintiffs' MSJ"). CROA 6/162-207. Kuilima and the City opposed Plaintiffs' Motion. CROA 9/34-428. Kuilima's Memorandum in Opposition ("Kuilima's Opp.") is attached as Appendix G.

On November 13, 2006, Judge McKenna granted Kuilima's MSJ re: Burden of Proof, and denied Plaintiffs' MSJ, finding Plaintiffs failed to meet their burden of proving an SEIS is required for the Project. On December 5, 2006 Judge McKenna entered Findings of Fact and

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[5] Although the Labor Union was a party in the Circuit Court actions, through consolidation of its action with this action started by KNSC, its claims were dismissed, and it is *not* a party to this appeal. ROA 9/9-12.

Conclusions of Law:

> An EIS that is *accepted* with respect to a particular action shall satisfy the requirements of the chapter [HRS Chapter 343] and *no other statement for the proposed action shall be required*. CROA 12/9-17.
>
> . . .
>
> The EIS for the Project was *accepted* in October 1985. CROA 12/13.
>
> . . .
>
> 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 1999; *the public had an opportunity to participate with respect to the adoption of that plan*. CROA 12/13.
>
> . . .
>
> 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. CROA 12/14.
>
> . . .
>
> 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*. CROA 12/14 (emphases added).
>
> . . .
>
> Plaintiffs' concerns that form the basis of their claims in this litigation were basically expressed for the first time in the filings before the 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. CROA 12/15.
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> . . .
>
> *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. CROA 12/15.

Judge McKenna's Order attached as Appendix "B", filed on December 5, 2006. CROA 12/9-17.

On June 4, 2007, the Court filed the Amended Final Judgment, attached as Appendix "A", dismissing all claims filed in the Labor Union action in Civil No. 06-1-0265-02 (SSM) and all claims in the KNSC & Sierra Club action in Civil No. 06-1-0867-05 (SSM). CROA 12/278-282.

C. Facts Material to the Appeal

1. Highlights of Project Development Activity and Project Entitlements

The Project began in the mid-1980s when Kuilima's predecessor, Kuilima Development Company ("KDC"), sought and obtained approvals, development rights, and entitlements from the City and State. In connection with its development applications, Kuilima prepared and submitted its EIS for the Project to the Department of Land Utilization ("DLU") on October 7, 1985. CROA 5/4. The DLU, DPP predecessor in interest accepted it on October 30, 1985. CROA 4/217. As part of the exacting land use control and environmental review processes governing development on Oahu, KDC acquired several government permits and approvals:

1. Zone change for rezoning of the subject property to be compatible with the Ko'olau Loa Development Plan and Land Use Map enacted as City Zoning Ordinance No. 86-99, Unilateral Agreement and Declaration for Conditional Zoning, dated September 23, 1986, as amended by Amendment to the Unilateral Agreement, dated December 30, 1988 ("Unilateral Agreement"). CROA 4/85-106, 141-201.

2. State land use reclassification, reclassifying 236 acres from Agriculture District to Urban District for resort and golf course uses, approved through Land Use Commission Order, dated March 27, 1986. CROA 4/107-140.

3. Shoreline Management Area Use Permit ("SMP") and Shoreline Setback Variance, approved through City Resolution No. 86-308, on October 1, 1986. CROA 4/203-216.

(collectively, the "Project Entitlements").[6]

KDC began work on the Project consistent with the Project Entitlements. A chart, attached as Appendix H, highlights some of the activity in connection with development of the Project through the 1990s during which time the Project suffered difficulties connected with the statewide economic downturn.

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[6] The Project Entitlements conferred on Kuilima the right to proceed with the Project (CROA 4/142, 203, 5/29, 36) and imposed conditions on the Project as a result of environmental issues identified in the EIS. These conditions include, among other things, construction of a wastewater treatment plant capable of treating a minimum of 1.3 million gallons per day and which would support the entire built-out Project, development of water resources and the Opana wells to serve the entire Project, improvements to roadways, implementation of shuttle buses, creation of several public park sites, public parking, shoreline access easements, improvements to the neighboring Punahoolapa Marsh (including the protection and preservation of four indigenous Hawaiian water birds), preparation of an Urban Design Plan and Landscape Master Plan, and preparation of an archaeological mitigation plan (collectively, "Project Conditions"). CROA 4/108-201.

In March 1999, Kuilima continued with the Expansion Project. Just two months later, in May 1999, the City reaffirmed the Project when, by Ordinance, after extensive public participation, it adopted the Ko'olau Loa Sustainable Communities Plan, which reaffirmed and incorporated the Project's master plan with its full entitlements. CROA 4A/356-357, 4/237-359. In February 2000, the Honolulu City Council's Zoning Committee, in formal session, confirmed that Kuilima's Project Entitlements were valid and existing and directed Kuilima to move the Project forward without delay. CROA 4/361-364. In 2003, Kuilima publicly sought from the City necessary permits to renovate the existing hotel and to construct the Ocean Villas condominium, expending almost $100 million in completing that work. In short, Kuilima has publicly and visibly continued to push forward with the Project – per the original Project description. CROA 4/11-15 (Makaiau Aff.).

On November 6, 2005, Kuilima submitted its Site Development Master Application Form ("Subdivision Application") for the Project to the DPP. CROA 4A/466-471. Following the Project Entitlements, the DPP previously approved six (6) other subdivision applications for the Project, as noted in Appendix H. The DPP granted tentative approval of the Subdivision Application on September 29, 2006. CROA 4/33 (Siu-Li Aff.). A chart, attached as Appendix I, highlights some of the approvals and other activity in connection with development of the Project since 1999.

2. The EIS and the Entitlement Documents Did Not Have Specific Deadlines for the Construction of the Project

While the Project may have slowed due to "unforeseen economic conditions"[7] during the economic downturn of the 1990s, the Project "timing" did not substantively change. CROA 12/14. As detailed in the EIS, Kuilima proposed an "***approximate*** phasing of the development for the resort." CROA 5/43 (emphasis added). Neither the EIS nor the Project Entitlements imposed a timing condition. In fact, the Unilateral Agreement (also made part of the SMP) provided:

> Development of the project shall ***generally*** be based on the submitted schedule, identified as Exhibit III, attached hereto and incorporated herein. ***Development may deviate from this schedule*** due to the occurrence of changed economic

[7] In September 1997 and again in November 2001, through its status reports adopted by the DLU, the City recognized and accepted that unforeseen economic conditions delayed the Project. CROA 4/219, 228.

conditions, lawsuits, strikes or other unforeseen circumstances. . . .

CROA 4/143 (emphases added).

3. The DPP Has an Extensive Administrative Record for the Project

As the "accepting authority" of the Project's EIS, the DPP has continued to monitor and enforce the applicable Chapters and Provisions of the Revised Ordinances of Honolulu 1990 ("ROH") and other applicable building codes, ordinances, and related rules and regulations in relation to the Project. CROA 4/18-19 (Pierson Aff.).

As part of its responsibility as the "approving agency" for the Project, the DPP circulated the permit, land use, and other development-related applications for the Project to the various divisions within the DPP and other governmental agencies involved in discrete portions of development approvals. CROA 9/400 (Siu-Li Aff.). These divisions include the: (a) Planning Division, responsible for monitoring the conditions in unilateral agreements and zoning declarations and for processing and review of various zoning change, shoreline management area permit and shoreline setback variance permit applications; (b) Land Use Permits Division, responsible for processing and review of EIS's and various land use, shoreline management area permit and shoreline setback variance permit applications; and (c) Site Development Division, responsible for processing and review of applications for subdivision approval and for grading and grubbing permits, as well as administering and enforcing regulations relating to grading, grubbing, stockpiling, soil erosion and sedimentation activities (as part of the Civil Engineering Branch). CROA 4/33 (Siu-Li Aff.), CROA 4/19-20 (Pierson Aff.), 4A/479-480 (Siu-Li Depo. 13:17-14:17), CROA 4/512 (Wataru Depo. 9:8-24).

Each division of the DPP that has reviewed applications submitted by Kuilima maintains a record of the Project related to the issues for which the division is responsible. CROA 4/26 (Lau Aff.) The DPP maintains a collective record on the Project that is voluminous. CROA 4/26 (Lau Aff.). In reviewing the various permit, land use, and other development-related applications to the DPP the various DPP divisions have reviewed the administrative record and ensured Kuilima's compliance with the Project Entitlements, Project Conditions and existing law. CROA 4/29 (Challacombe Aff.), CROA 4/33 (Siu-Li Aff.). In addition to 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.)), the DPP circulated applications to, and sought input

from, applicable departments of the State government, including the Departments of Health, Transportation, and Land and Natural Resources. CROA 4/20 (Pierson Aff.), 4/33 (Siu-Li Aff.).

4. The DPP Reviewed Requests For An SEIS but Determined No SEIS is Required

Between December 30, 2005 and January 2006 the DPP received the following letters regarding alleged changed environmental conditions and a request for an SEIS for the Project:

- December 30, 2005 letter from the Ko'olau Loa Neighborhood Board seeking information about the timing of the SMP, social and cultural impact analysis for the Project, and performance of the Project Conditions. CROA 4A/535-536.
- January 5, 2006 letter[8] from Eric Gill of Labor Union concerning the Project's Subdivision Application, and asserting, among other things, that an SEIS is required because the EIS had allegedly lapsed and because of alleged changes. CROA 4A/474-475.
- January 6, 2006 letter from Ben Shafer requesting a new EIS and SMP for the Project because of the length of time from the initial approval. CROA 4A/538.

None of these letters provided the DPP with any evidence or factual data supporting their conclusory statements. CROA 9/405 (Challacombe Aff.). Based on the DPP's ongoing review of the Project and various applications, and based on the DPP's extensive administrative record, the DPP concluded that there has not been a substantive change in the Project resulting in significant environmental impacts, and that an SEIS was not required. CROA 4/18-19 (Pierson Aff.), 4A/528 (Pierson Depo. 49:14-20), 4/36-37 (Takahashi Aff.), 9/402-406 (Challacombe Aff.).

The DPP responded to the letters, stating among other things that no mandatory timeframe was imposed on development of the Project, that the City could not retroactively impose time limits on the Project or unilaterally rescind a Project entitlement, and that the City must continue to process a subdivision application as long as the applicant is following procedures and satisfying the rules, regulations and ordinances. CROA 4A/472-473. The mere passage of time, alone, does not result in a substantive change in a project resulting in significant environmental impacts. This is particularly true where a project, such as the Kuilima Project, is not expressly qualified or limited by timing. CROA 4A/528 (Pierson Depo. 49:25); 4A/473. The DPP has concluded, based on in its experience and on the administrative record, that there

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[8] This letter and the DPP's denial formed the basis of the Labor Union's lawsuit against Kuilima. ROA 1/1-32.

has not been a substantive change in the Project likely resulting in significant environmental impacts not originally considered or previously dealt with and, as a result, an SEIS is not warranted at this time. See CROA 4A/528 (Pierson Depo. 46:1-49:20).

Plaintiffs did not submit a letter to the DPP or otherwise ask for an SEIS. 9/405 (Challacombe Aff.), CROA 4A/315 (Mikulina Depo. 78:16-80:7). It was only in this litigation that Plaintiffs brought up a broad array of "environmental concerns" regarding the Project's ongoing development. CROA 2/41-55.

5. Plaintiffs' Knowledge of the Project and Related Environmental Issues

a. Plaintiffs Knew of the Project Description in the EIS and the Project Entitlements

Plaintiffs have known since the mid-1980s of the Project and the Project Entitlements. CROA 4A/152, 155, 158 (Lucky Depo. 12:9, 25:6-29:21, 34:9-37:25), 4A/197-198 (Douglass Depo. 60:11-62:19). KNSC Officer Schuyler "Lucky" Cole, testified that during the 1980s, he was involved with Keep the Country Country ("KTCC"), an organization that opposed approval of the Kuilima Project Entitlements, and that he served as President and Vice President of the Sunset Beach Community Association and the head of its land planning committee from 1986 – 1990. CROA 4A/152-153 (Lucky Depo. 12:12-14:3). Lucky Cole further testified that he made presentations to community groups about his opposition to the Project, evaluated a preliminary draft of the EIS and even considered challenging the Project in the courts at the time but opted not to do so. CROA 4A/155-156, 158 (Lucky Depo. 25:6-26:22, 34:24-35:8).

Douglass Cole, KNSC's 30(b)(6) representative, testified that he, too, was generally aware of the Unilateral Agreement and governmental approvals of the Project of the mid-1980s, which he recalls as a "hot topic in the community at the time." CROA 4A/197 (Dougalss Depo. 60:8-19).

Likewise, the Sierra Club knew about the Project and commented on the EIS. CROA 5/205. The Sierra Club's designated HRCP Rule 30(b)(6) representative testified that he knew that "there was going to be an expansion" at the Resort in the mid-1980s and was aware that development had been ongoing at the Resort after 1986. CROA 4A/265 (Ching Depo. 22:18-23:5).

b. Plaintiffs Knew the DPP Decided an SEIS Is Not Required

Members of KNSC and the Sierra Club knew of the Union's litigation and the DPP's

determination that no SEIS is required. On February 9, 2006, KNSC Director, Mr. Riviere, attended the Ko'olau Loa Neighborhood Board meeting (CROA 4A/222 (Riviere Depo. 15:20-16:7)) and heard the DPP's response letter dated February 8, 2006 read aloud. CROA 4A/21. On March 15, 2006, Mr. Gill attended and discussed the Labor Union's lawsuit for injunctive relief at a Sunset Beach Community Association ("SBCA") meeting. CROA 4A/192 (Douglass Depo. 38:7-40:5), 4A/3-4. KNSC director, Douglas Cole, was President of the SBCA, presided over the meeting, and voted to send a letter to the mayor opposing the approvals. CROA 4A/192 (Douglass Depo. 38:13-16), 4A/5-6. Mr. Cole also admitted that he had been in constant contact with the Labor Union following Mr. Gill's letter submission to the DPP (CROA 4A/191-192 (Douglas Depo. 36:24-40:14)) and had even considered "joining the [Labor Union's] suit as a friendly party in support of the injunction." CROA 4A/3. Additionally, Lucky Cole admitted that he heard rumors and read a Honolulu Advertiser article in February 2006 about the Union's lawsuit. CROA 4A/154-155 (Lucky Depo. 21:17-22:16).

Likewise, the Sierra Club was actively aware of the DPP's decision not to require an SEIS for the Project. The Sierra Club had been continuously communicating with the Labor Union from December 22, 2005 to February 16, 2006 via email (CROA 4A/7-13) and assisted the Labor Union in formulating its position regarding an SEIS in response to the Union's request for help in opposing the Project. CROA 4A/306 (Mikulina Depo. 42:6-45:21). On January 4, 2006, one day prior to Mr. Gill's letter submission to the DPP, Sierra Club director Jeff Mikulina met with Labor Union representatives to look for a "hook" to challenge the Project. CROA 4A/306 (Mikulina Depo. 45:21). A chart that outlines the interactions that occurred evidencing Plaintiffs' knowledge of the DPP's decision not to require an SEIS is attached as Appendix J"

c. The Alleged Environmental Issues Raised by Plaintiffs Have Been Known to Plaintiffs, or Have Been Public Knowledge, for a Long Period of Time

Plaintiffs have known of the purported "new circumstances and evidence" of environmental impacts they now allege for a long period of time. Specifically, Plaintiffs allege significant environmental impacts on traffic, green sea turtles and monk seals. See OB at 9-10. These are not new issues that have suddenly come to Plaintiffs' attention, nor are they, as Plaintiffs would have the Court believe, issues that have suddenly surfaced as part of a "recently

reactivated"[9] Project. These issues have been known to Plaintiffs for many years and/or are island-wide issues that have been the subject of public debate for years.

i. The Traffic Issues Plaintiffs Raise are Not New

The traffic congestion or "gridlock" referenced by Plaintiffs (OB at 7) is not a "new circumstance." Plaintiffs admitted they have had these concerns about traffic for many years, going back to the late 1980s and throughout the 1990s. CROA 4A/164-165 (Lucky Depo., 61:18-63:24), 4A/201 (Douglass Depo. 74:9-77:13), 4A/267 (Ching Depo. 31:7-32:9), 4A/239-240 (Riviere Depo. 82:24-87:16). Indeed, KNSC and the Sierra Club's HRCP Rule 30(b)(6) witnesses testified that traffic is a paramount concern underlying Plaintiffs' action here. 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).

To support their claim that traffic is a new environmental concern, Plaintiffs cite to information that has largely been in the public domain and part of public debate for several years.[10] The Project's impact on traffic, however, is something that *was originally* considered in the EIS and has been previously dealt with through the EIS and various ongoing traffic updates – as contemplated in the EIS.[11] CROA 5/13-14, 36-37, 126-141, 157-158, 813, 853.[12] The EIS also contemplated the impact of increased tourism and visitors. CROA 5/13-14, 26-28, 39, 115-118, 129, 134, 165-175, 186-187, 638-800, 4/319-323.

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[9] In the Amended Complaint, Plaintiffs used the term "reactivated" and alleged the Project restart was "recent." CROA 2/43.

[10] These include: (1) a Traffic Impact Analysis Report dated July 1991 (CROA 8/340-361); (2) the Department of Transportion Highway Planning Branch's traffic counts dated August 2000 (CROA 4/525); (3) the Laniakea Beach Park Traffic Impact Analysis Report dated 2005 (CROA 4A/106, 131; ROA 7/8); (4) Kuilima's Traffic Report Update dated September 2005 (CROA 4/22; ROA 4A/401); (5) a Hawaii Department of Business, Economic Development and Tourism report on traffic dated December 2002 (CROA 4A/107, 100, 131-132); and (4) anecdotal and vague recollections of increased traffic going back more than a decade. See CROA 4A/107-110, 117, 132-135, 142, 143, 4A/228 (Riviere Depo. 41:8-42:2)(referring in testimony to Hawaii Tourism Authority traffic studies dating back one year and two years, respectively), 4A 200/201 (Douglass Depo. 71:25-72:11, 75:6-77:13)(testifying that he "believes" many people visit the North Shore area and that "based on personal experience and just observation" drives along the North Shore take "a lot longer now").

[11] For a detailed explanation of how the EIS and the various reports have dealt with traffic, including an explanation of the differences between the reports. See Okaneku Affidavit pp.5-8. CROA 9/84-87 (Okaneku Aff.).

[12] The EIS recognized "[t]he increase in traffic in the area will be primarily due to the increase in the defacto population . . . ." CROA 5:134.

ii. The Presence of Turtles and Monk Seals are Not New, and the Impacts Have Already Been Dealt With

The EIS originally disclosed and previously dealt with endangered and threatened species. CROA 5/66. Hawaiian monk seals were designated endangered on November 23, 1976. 41 Fed Reg. 51611 (1976); CROA 9/169. Green sea turtles were listed as "threatened" on July 28, 1978. 43 Fed Reg 328/00 (1978); CROA 9/172. Plaintiffs raise no concerns about endangered and threatened species that could not have been raised when the EIS was accepted in 1985. The EIS specifically discussed the impacts of dredging a portion of Kawela Bay on *Chelonia mydas* or green sea turtles. CROA 5/66. Moreover, Hawaiian monk seals and green sea turtles are respectively endemic and indigenous to the Hawaiian archipelago and, thus, were both known to exist throughout the Hawaiian Islands (which includes the coastline near the Project) at the time the EIS was prepared by Kuilima. CROA 9/78 (Guinther Aff.).

II. STANDARD OF REVIEW

An appellate court reviews an award of summary judgment under the same standard applied by the circuit court. Yoneda v. Tom, 110 Hawai`i 367, 371, 133 P.3d 796, 800 (2006) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992)). Therefore, this Court reviews the circuit court's grant or denial of summary judgment *de novo* (stepping into the shores of the Circuit Court). Sierra Club v. Department of Transportation, 115 Hawai`i 299, 312, 167 P.3d 292, 305 (2007)(hereinafter "Superferry")(quoting Hawaii Community Federal Credit Union v. Keka, 94 Hawai`i 213, 221, 11 P.3d 1, 9 (2000)).

Additionally, the Circuit Court properly reviewed the DPP's decision not to require an SEIS by applying the "rule of reason" and "arbitrary and capricious" standard; this Court should likewise apply this standard to the DPP's decision.

Under the SEIS Rules, the DPP is charged with deciding whether an SEIS should be required for the Project. It is clear under Hawai`i law that the Court may not substitute its judgment for the decision of an agency regarding the sufficiency of an EIS. By extension, it is clear that a Court may not substitute its judgment for the DPP's decision not to require an SEIS. The parallel federal case law regarding National Environmental Policy Act ("NEPA") is in accord. Instead, the Court is to review the agency's decision under the "rule of reason" standard, and may only overturn the DPP's decision if the Court finds it was "arbitrary and capricious."

A. Under the "Rule of Reason" Standard Hawaii Courts May Overturn an

Agency's Decision on the Environmental Consequences of an Action Only if the Agency's Decision is Found to be "Arbitrary and Capricious"

No Hawaii case expressly examines the standard to be applied by a Court in reviewing an agency's decision not to require an SEIS. Hawaii Courts have, however, reviewed an agency's decision to accept an EIS as final under the "rule of reason" standard, and afford great deference to an agency's decision. See Price v. Obayashi Hawaii Corp., 81 Hawai'i 171, 183, 914 P.2d 1364, 1376 (1996). As applied to consideration of the adequacy of an EIS, the rule of reason has been stated as follows:

> In making such a determination a court is to be governed by the 'rule of reason,' under which an EIS . . . will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

Life of the Land v. Ariyoshi, 59 Haw. 156, 164–165, 577 P.2d 1116, 1121-1122 (1978) (citation omitted).

The Price Court applied the "rule of reason" and, relying on federal case law, indicated an agency's decision may be set aside only if it is found to be "arbitrary and capricious." Specifically, the Price Court relied on Stop H-3 Ass'n v. Lewis, 538 F. Supp. 149, 159 (D. Haw. 1982), aff'd in part, rev'd in part by 740 F.2d 1142 (9th Cir. 1984), cert. denied by Yamasaki v. Stop H-3 Ass'n, 471 U.S. 1108 (1985) to explain the Court's narrow role in evaluating EIS challenges:

> Stop H-3 Ass'n emphasized this position by stating that:
>
> > "A court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a 'hard look' at environmental factors. If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be '***arbitrary and capricious***,' given the known environmental consequences.
> >
> > The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies. 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, 81 Hawai'i at 182 n.12, 914 P.2d at 1375 n.12 (emphasis added) (citations omitted).

The Hawai'i Supreme Court later confirmed in an environmental case that under

HRS § 91-14(g), the "arbitrary and capricious" standard governs a court's review of an agency's exercise of discretion. See Sierra Club v. Office of Planning, State of Haw., 109 Hawai`i 411, 414, 126 P.3d 1098, 1101 (2006). Indeed, even though a claim is brought as an original action under HRS Ch. 343, it does not prevent the application of HRS § 91-14:

> [W]e do not feel that by treating Appellants' action as an appeal under HAPA we have prejudiced Appellants or have denied them any due process rights. Here, although Appellants sue in an original action, the substance of their claim is a review of an agency decision. The mere designation of the suit as an original action will not render the provisions under HAPA inapplicable.

McGlone v. Inaba, 64 Haw. 27, 33 636 P.2d 128, 163 (1981) (no longer good for one unrelated holding, based on Director, Dept. of Labor and Industrial Relations v. Kiewit Pacific Co., 104 Hawai'i 22, 27, 84 P.3d 530, 535 (App. 2004)); see also Superferry, 115 Hawai`i at 315, n.21, 167 P.3d at 308, n.21.

Further, the decision whether to subject a project to the environmental review process is an exercise of an agency's discretion because of the highly subjective nature of the agency's decisions. "'[S]ignificant effect' is a relative concept. The quality and gravity of the effect on the environment which may be caused by a proposed activity varies according to the circumstances involved. Any determination, therefore, is highly subjective." McGlone, 64 Haw. at 35, 636 P.2d at 164.

Thus, it is clear that Hawaii law requires a court to review an agency's decision on an EIS based on the "rule of reason," and may only overturn the agency's decision if the court finds the decision to be "arbitrary and capricious." Parallel federal case law indicates these standards also apply in the context of SEISs.

B. The "Rule of Reason" and "Arbitrary and Capricious" Standards Govern the Court's Review of an Agency's Decision on the Need for an SEIS

The issue of the standard of review to be applied in reviewing an agency's decision on the need for an SEIS has been addressed by parallel federal cases. "[I]n instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance." Price, 81 Hawai'i at 182 n.12, 914 P.2d 1375 at n.12.

In Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375-376 (1989), the U.S. Supreme Court clarified that the "arbitrary and capricious" standard is the appropriate standard

of review when a Court reviews an agency's decision not to require an SEIS under NEPA.[13] First, the Marsh Court explained the "rule of reason," which the parties agreed is to guide the agency's decision on whether to prepare an SEIS:

> Application of the "rule of reason" thus turns on the value of the new information to the still pending decision making process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal actio[n]" to occur, and if the new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. at 374. The Marsh Court cautioned, however:

> [A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. 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. On the other hand, and as the petitioners concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval.

Id. at 373-374 (footnotes omitted).

Addressing the issue on which the petitioners disagreed — a court's standard of review of the agency's decision — the Marsh Court held that the review of an agency's decision not to require an SEIS is "controlled by the 'arbitrary and capricious' standard" Id. at 375.

> As we observed in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), in making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." This inquiry must "be searching and careful," but " the ultimate standard of review is a narrow one." Ibid. When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its

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[13] The federal law on SEIS's, contained in 40 CFR § 11502.9(c), is different than Hawaii's Rules contained in HAR §§ 11-200-26 and 27:

> (c) Agencies: (1) Shall prepare supplemental statements 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(c) (2006). The relevant SEIS Rules instead require that significant environmental effects *result from* changes to the Project. *See* HAR §§ 11-200-26 and 27.

> own qualified experts even if, as an original matter, a court might find contrary views more persuasive. On the other hand, in the context of reviewing a decision not to supplement an EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance — or lack of significance — of the new information.

Id. at 378. However, if an agency's decision regarding an SEIS is not arbitrary or capricious, it may not be set aside.

Here, the express language of the SEIS Rules requires deference to the DPP's decision. HAR § 11-200-26 expressly reserves the decision on whether an SEIS is required to the "accepting authority" or the "approving agency" — here the DPP. Similarly, the U.S. Supreme Court in Marsh based its holding on the intent of the NEPA scheme to have the ***agency*** examine the significance of the alleged environmental impact, not the court:

> The question presented for review in this case is a classic example of a factual dispute the resolution of which implicates substantial agency expertise. . . . Because analysis of the relevant documents "requires a high level of technical expertise," we must defer to "the informed discretion of the responsible federal agencies."

Marsh, 490 U.S. at 376-377. As set forth below, under the "rule of reason" the DPP's decision was not "arbitrary and capricious." [14]

III. ARGUMENT

A. An SEIS is Not Required for the Project — Plaintiffs Misinterpret and Misapply the SEIS Rules, and Have Not Met Their Burden

Plaintiffs rely on the last sentence of HAR § 11-200-27, and ignore application of other

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[14] The SEIS rules do *not* require the DPP to make a separate, additional "independent determination." Rather, as discussed *supra*, the DPP is required to take a "hard look" in making its decision. Plaintiffs' reliance on a letter from the EC that references "independent determination" is misplaced. That is not a standard of review. The EC's reference to an "independent determination" (CROA 8/297) is essentially the DPP's responsibility to "make an appropriate inquiry and determination as to the necessity of an SEIS" — the "hard look" standard.

In addition, Plaintiffs reliance on Stop H-3 is misplaced. See OB at 22. Stop H-3 states that a "reasoned determination," not an "independent determination," is required - "[w]hen new information comes to light the agency must consider it, evaluate it, and make a *reasoned determination* [based on a variety of factors] whether it is of such significance as to require implementation of formal NEPA filing procedures." Stop H-3, 538 F.Supp. at 168-169 (emphasis and brackets added). Again, this is already addressed by the "hard look" standard and is not a separate or additional standard the DPP must meet.

provisions of §§ 11-200-2, 26 and 27, to support their position that the DPP was obligated to require an SEIS. Application of the well-established rules of statutory construction to the SEIS Rules, however, makes clear that the Circuit Court's and DPP's interpretations of the SEIS Rules are correct — that before an SEIS is required, there must be a ***substantive change in the action likely resulting in significant new, different or increased impacts not originally disclosed or previously dealt with***. In short, HAR §§ 11-200-2, 26, and 27 require an initial determination of a substantive change in the Project[15] *before* the environmental impacts are considered in determining whether an SEIS is required Neither increased environmental impacts nor new circumstances or evidence alone, without a substantive change in the Project, is sufficient to require an SEIS. Hawaii's SEIS Rules significantly differ from NEPA in this regard.

The Circuit Court and the DPP correctly interpreted the SEIS Rules and, applying the correct standard of review, the Circuit Court correctly determined that Plaintiffs did not meet their burden of proof to show an SEIS was required. Based on the undisputed facts before the Circuit Court: (a) there is no "substantive change" to the action; (b) there are no "significant effects" on the environment likely "resulting from" the alleged change; and (c) there are no alleged environmental impacts from the Project that were not originally disclosed or previously dealt with. CROA 12/9-17. Further, even if the Court were to apply Plaintiffs' incorrect interpretation, Plaintiffs have failed to provide sufficient evidence of increased environmental impacts.

1. To Require an SEIS There Must be a Substantive Change in the Action Likely Resulting in Significant New, Different or Increased Impacts Not Originally Disclosed or Previously Dealt With

The "General Provisions" in HAR §11-200-26 govern when an SEIS may be required:

> **General Provisions**: 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

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15 "Action" means "any program or ***project*** to be initiated by an agency or applicant." HAR § 11-200-2 (emphasis added).

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.***

(Emphasis added). It is undisputed that "may" have a significant effect means "likely" to have a significant effect.[16]

Thus, under the plain terms of HAR §11-200-26 (the umbrella section governing the SEIS Rules) the DPP is required to conduct a two-step inquiry to determine whether an SEIS is required:

1. Whether the action (the Project) has *changed substantively* in size, scope, intensity, use, location or timing? and *if so*,
2. Will the change in any of these characteristics *likely* have a *significant effect* and *result in* individual or cumulative impacts not originally disclosed in the EIS?

If the DPP answers the first question in the negative, no further inquiry is necessary as "no other statement [for the Project] shall be required." Id. If the DPP answers the first question in the affirmative (*i.e.*, finding there is a substantial change in one of the aforementioned characteristics), then the DPP is required to determine whether the change will likely result in a "significant effect" and "individual or cumulative impacts not originally disclosed" in the original EIS.

The requirement that there be a change in the action is further made clear by §11-200-2: ""Supplemental statement' means an additional environmental impact statement prepared for an ***action*** for which a statement was previously accepted, but ***which has since changed substantively*** . . . ." (Emphasis added).

HAR §11-200-27, "Determination of Applicability", provides further specifics for determining if an SEIS is required, but still requires the threshold determination of a substantive change:

. . . Proposing agencies or applicants shall prepare for public review supplemental

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[16] The mere *possibility* of a significant new or different effect is not enough. It must be ***likely*** that there will be a significant effect resulting from the substantive change to the Project. See Kepoo v. Kane, 106 Hawai'i 270, 288-89, 103 P.3d 939 957-58 (2005) (under the statutory language requiring an EIS if the proposed action "may" have a significant effect on the environment, the proper inquiry is whether the proposed action will "likely" have a significant effect on the environment).

> 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 disclosed.

The last sentence — on which Plaintiffs heavily rely — and the use of the phrase "shall be warranted," identifies what may be anticipated to be "new or different environmental impacts." This is clear from the well-established rules of statutory construction. The last sentence *does not* provide a stand-alone basis to require an SEIS.

In sum, HAR §11-200-27 can also be broken down into several steps:

1. Has the proposed action for which a statement was accepted been modified? If "no", then no EIS is required. If "yes" proceed to question 2.
2. Has the proposed action been modified to the extent that new or different environmental impacts are anticipated? If "no" then no SEIS is required. If "yes" then determine whether an SEIS is "warranted."
3. An SEIS is "warranted"[17] when:
    a. When the scope of an action has been substantially increased,
    b. When the intensity of environmental impacts will be increased,
    c. When the mitigating measures originally planned are not to be implemented, or
    d. Where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.

Plaintiffs' interpretation of the SEIS Rules ignores these important provisions of the rules, and renders significant parts of the SEIS Rules superfluous. Further, Plaintiffs' reliance on

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[17] "Warranted" is defined as "justification for an action or a belief, grounds." The American Heritage Dictionary 1364 (2nd College Edition 1991). The use of different words in §11-200-27, "shall prepare" and "shall be warranted", is further evidence that "warranted" does not mean "required." If there is a substantive change in the Project, a finding of any one of these circumstances may *warrant* an SEIS because new or different environmental impacts could reasonably be anticipated, but would not necessarily require an SEIS. "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).

an alleged determination by the Environmental Council ("EC") that the Project requires an SEIS is misplaced and misleading. The DPP, as the "accepting authority" or "approving agency"—not the EC—"shall be responsible for determining whether a supplemental statement is required." HAR §11-200-27. The EC agreed: "the responsibility for requiring an SEIS falls squarely on the approving agency, which is the DPP." CROA 9/92-94. The EC also agreed that it acted on limited information in making its decisions regarding an SEIS for the Project. CROA 9/92, 395. It also improperly took action based on information from a single party to this litigation, with no notice to or opportunity for Kuilima to be heard on the issue, as explained by Kuilima in its letters to the EC on the issue. CROA 9/424-426, CROA 9/424. Significantly, in July 2006, the EC retreated from its position regarding an SEIS for the Project and changed the scope of its investigative committee's task to "conduct a prospective review of the issues concerning supplemental EAs/EISs including EIS shelf life and not to focus on current/retrospective Turtle [B]ay SEIS issues currently in litigation." CROA 9/44, 1180.

2. Plaintiffs' Reliance upon NEPA and the CEQA in this Context is Misplaced

Plaintiffs argue that the NEPA and California Environmental Quality Act ("CEQA") support their contention that an SEIS is required when "there is a project change, a change in the intensity of environmental impacts, ***or*** new circumstances or evidence." OB at 28 (emphasis added). The plain language of these regulations, however, is completely different from Hawaii's SEIS Rules. Under CEQA § 21166, a Supplemental Environmental Impact report shall be required when:

> (a) *substantial changes are proposed* in the project which will require major revisions of the environmental impact report; ***or***
>
> (b) *substantial changes occur* with respect to the circumstance under which the project is being undertaken which will require major revision in the environmental impact report; ***or***
>
> (c) *new information*, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

CAL. PUB. RES. CODE § 21166 (2007) (emphasis added).

Similarly, NEPA regulations (40 CFR §11502.9) provide that agencies:

> Shall 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.

Thus, unlike Hawaii's SEIS Rules which require a two step analysis, NEPA 40 CFR § 11502.9 and CEQA § 21166 only require a one step determination.

Further, the leading U.S. Supreme Court case interpreting NEPA's SEIS requirements makes clear that an SEIS need not be prepared "every time new information comes to light after the EIS is finalized. 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, 490 U.S. at 373. Plaintiffs' interpretation that any "new circumstance or evidence" triggers an SEIS would similarly endlessly prolong Hawaii's environmental review process by always making new information outdated and precluding the possibility of certainty on environmental rules. Such interpretation of the SEIS rules is in direct conflict with the purpose of HEPA. See HRS §343-1 and HRS §343-5 (a review should be made at the earliest time possible). Accordingly, Plaintiffs' interpretation of the SEIS rules violates the reasonable interpretation rule and leads to an absurd result.

3. Plaintiffs Did Not 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*

It is Plaintiffs' burden to come forward with evidence, sufficient to defeat summary judgment, of a substantive change in the Project resulting in the likelihood of a significant new environmental issue. Plaintiffs' claim that the DPP must sua sponte evaluate any and all possible changes and impacts is unsupported and ignores relevant case law establishing their burden. Plaintiffs must allege facts, and come forward with evidence, of a substantive change in the Project likely resulting in significant new, different or increased impacts not originally considered or previously dealt with. Only then should the Court shift its focus and review whether, based on the rule of reason, the agency's decision not to require an SEIS was arbitrary and capricious.[18]

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[18] See e.g., Biodiversity Associates v. U.S. Forest Service Dept. of Agriculture, 226 F. Supp. 2d 1270, 1308 (D. Wyo. 2002) (burden belongs to Plaintiff); National Audubon Soc. v. Hoffman, 132 F.3d 7, 18 (2d Cir. 1997) (the party challenging the agency's decision not to require an EIS must show a "substantial possibility" that the action may have a significant environmental impact); Senville v. Peters, 327 F.Supp.2d 335, 356 (D. Vt. 2004) (recognizing

Only if the Plaintiffs meet their burden does the Court then review whether, based on the rule of reason, the agency's decision not to require an SEIS was arbitrary and capricious. See e.g., Biodiversity Associates v. U.S. forest Service Dept. Agriculture, 226 F. Supp. 2d at 1270, 1308 (D.Wyo. 2002); Senville v. Peters, 327 F.Supp.2d 335, 356 (D. Vt. 2004); Pokorny v. Costle, 464 F. Supp. 1273 (D.C. Neb. 1979).

Here, whether the Project has changed in "size, scope, intensity, use, location or timing," and whether such changes will likely result in significant impacts not originally disclosed, are decisions for the DPP. HAR §§ 11-200-26 and 27.

a. There is No *Substantive Change in Kuilima's Project.*

In their Opening Brief, Plaintiffs assume that they have come forward with sufficient evidence to meet their initial burden for the Court to consider whether the DPP took a "hard look." Plaintiffs' only allegation in the Circuit Court of a "change" in the Project was an alleged change in "timing." CROA 2/54, 6/162-207. Plaintiffs argue that increased traffic, other planned developments near the Project, and the existence of endangered or threatened species constitute "new circumstances or evidence." OB at 7-10. But these are not *changes in the Project*, nor do they *result from* a change in the Project.

When asked what information they had about changes in the Project, each of Plaintiffs' deposition witnesses admitted they had no personal knowledge or evidence of changes in the Project, with the exception of their claim regarding timing. CROA 4A/228-229, 230-231, 244 (Riviere Depo. 41:1-42:18, 46:3-50:16, 102:2-104:12), CROA 4A/310-312, 318, 320 (Mikulina Depo. 58:5-68:9, 92:16-24, 98:7-100:16, 101:10-106:16. When asked what had changed sufficient to require an SEIS, Officer Lucky Cole responded "I still have the feeling, that the *North Shore community has changed* over the past 21 years on a number of levels, a number of areas. The *environment up there has changed.* There will be new impacts to investigate." CROA 4A/165-166 (Lucky Depo. 62:18-69:22) (emphases added). However, Mr. Lucky Cole could produce no actual evidence of these changes let alone a change to the Project.

Similarly, Sierra Club Director Jeff Mikulina admitted he did not know of any changes in the Project's scope, intensity, or use, stating "[y]eah, I don't remember being too aware of the

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this burden in the context of a party's claim that an SEIS should be required, and upholding the agency's decision not to supplement a 17-year-old EIS as to one section of a highway, but finding inadequate the agency's environmental assessment document created for another section of the highway). *See* Burden Motion for further discussion in this regard.

change in the size itself of the Project . . . I know some things are moving around. I don't know how the scope has changed in the project . . . Again, I don't know enough about the most recent iteration of the project to see how that's changed." CROA 4A/312 (Mikulina Depo. 67:2-17). Director Douglas Cole stated he "believes" many people visit the North Shore area and that "based on personal experience and just observation" drives along the North Shore take "a lot longer now." CROA 4A/201 (Douglas Depo. 75:6-77:3).

Indeed, Plaintiffs confirmed in their answers to interrogatories that they had no specific evidence of a change in the Project. CROA 4A/106, 114-115, 129-130, 138-139.

The DPP determined, and the Circuit Court found, there has been no change in the Project — in timing of the Project or otherwise. CROA 4A/472-473, 539, 12/9-17. The EIS detailed only an "approximate phasing of the development for the resort." CROA 5/43. Neither the EIS nor the governmental entities in the Project Entitlements imposed a timing condition.

Plaintiffs did not meet their burden of showing a substantive change in Kuilima's Project.

b. Nonetheless, the DPP Took a "Hard Look" at the Project and Reasonably Determined that No SEIS is Required

Since 1985, as the accepting authority for the Project, 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. CROA 4/18-19 (Pierson Aff.). The DPP's review is, by necessity, based on what is allowed in these permits.[19] Each relevant division of DPP has reviewed such permits and applications, and maintains a record of the Project that is voluminous. CROA 4/26 (Lau Aff.). As part of its responsibility, the DPP circulated the permit, land use, and other development-related applications for the project to the various divisions within the DPP and other governmental agencies involved in portions of development approvals. These include the: (a) Planning Division, responsible for monitoring the conditions in unilateral agreements and zoning declarations and for processing and review of various zoning change, shoreline management are permit and shoreline setback various permit applications; (b) Land Use Permits Division, responsible for processing and review of EIS's and various land use, shoreline management area permit and shoreline setback variance permit applications; and (c) Site Development Division responsible for processing and review of applications for subdivision approval and for grading

[19] The Project Entitlements have no timing requirement or expiration date.

and grubbing permits, as well as administering and enforcing regulations relating to grading, grubbing, stockpiling, soil erosion and sedimentation activities (as part of the Civil Engineering Branch). CROA 4/33, 18 (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), 4/512 (Wataru Depo. 9:8-24). These also include applicable departments of the State government, including the Departments of Health, Transportation, and Land and Natural Resources. CROA 4/20 (Peirson Aff.), 4/33 (Siu-Li Aff.).

Each division of the DPP that has reviewed applications submitted by Kuilima maintains a record of the Project related to the issues for which the division is responsible. The DPP's collective record for this Project is voluminous. CROA 4/26 (Lau Aff.). In reviewing Kuilima's various development related applications and requests for approvals, the DPP divisions have reviewed the administrative record and ensured Kuilima's compliance with the Project Entitlements, Project Conditions and existing law. CROA 4/17 (Pierson Aff.), 28-29 (Challacombe Aff.).

The DPP also considered the December 30, 2005 letter from the Ko`olau Loa Neighborhood Board seeking information about the timing of the Project (CROA 4A/535-536); the January 5, 2006 letter from Eric Gill asserting an SEIS is needed (CROA 4A/474-475), and the January 6, 2006 letter from Ben Shafer requesting a new EIS and SMP for the Project because of the length of time from the intial approval. CROA 4A/538. None of these letters provided the DPP with any factual data or evidence to support their conclusory statements. Neither of the Plaintiffs submitted anything to the DPP before this lawsuit that evidenced a change or resulting significant environmental effect. CROA 4A/314, 327 (Mikulina Depo. 75:13-77:5, 127:13-128:13), 4A/235, 67:22-68:15 (Riviere Depo.), 9/405 (Challacombe Aff.).

Plaintiffs take city deposition testimony generally out of context in their Opening Brief. On September 28, 2006, the depositions of Arthur Challacombe (CROA 8/278-292), James Pierson (CROA 8/322-339), and Mario Siu-Li (CROA 8/304-321) were taken. On October 11, 2006, another deposition of Mario Siu-Li was taken. (CROA 8/298-303). The excerpts of these depositions referenced by Plaintiffs in their Opening Brief ("OB") are taken out of context. See OB at 8, 13; compare CROA 8/280 (Challacombe Depo. 81:2-82: 25), 8/290-91, 316-317; CROA 31/5-25, 31/2-22, 9/128, 406.

Based on the DPP's ongoing review of the Project and various applications, and based on the DPP's extensive administrative record, the DPP concluded there has not been a substantive

change in the Project resulting in significant environmental impacts, and that an SEIS is not required. CROA 9/404-406 (Challacombe Aff.).

c. Plaintiffs Did Not Show That a Substantive Change in the Project Will *Likely Result in a Significant Impact Not Originally Disclosed or Previously Dealt With*

Plaintiffs allege that traffic and endangered/threatened species either constitute "new circumstance or evidence" or "increased environmental impacts. These and other alleged environmental impacts are addressed in detail in Kuilima's MSJ re: Burden of Proof (CROA 3/218-224 (Appendix E at pp. 23-29)) and Kuilima's Opp. (CROA 9/55-69 (Appendix G at pp. 16-30)).

i. Traffic

Even if there were a change in the Project, traffic issues, including congestion, were originally disclosed and previously dealt with in the EIS. CROA 5/126-141. Moreover, traffic is an island-wide issue, and North Shore traffic congestion or "gridlock" is a regional problem with bottle-necks in areas away from the Resort and over which Kuilima has no control.[20] These regional traffic problems cannot be a result of the Project.

The Project's impact on traffic is something that was originally considered in the EIS and has been dealt with through various ongoing studies as contemplated in the EIS. CROA 5/13-14, 36-38, 126-141, 157-158, 8/2-853. Traffic was predicted to be bad at times (CROA 5/140); it is bad at times. Mitigation measures are to be implemented and have received ongoing consideration. CROA 9/83. The traffic issues were originally considered or previously dealt with – Plaintiffs have relied on information that has been known, in some instances, for 15 years. CROA 4A/164-165 (Lucky Depo. 61:18-63:24), 4A/201 Douglass Depo. 74:9-77:13), 4A/267 (Ching Depo. 31:7-32:9), 4A/239-240 (Riviere Depo. 82:24-87:16). Plaintiffs present no evidence that a Project developed in 2006 will have significant new, different or increased traffic impacts as compared to an identical Project developed in 1996. Plaintiffs suggest that an increase in tourists or visitors has caused the increase in traffic, however, it was also contemplated and expected that tourism would increase on the North Shore. CROA 5/13-14, 26-28, 39, 115-118, 129, 134, 165-175, 186-187, 4/247-253, 319-323.

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[20] Plaintiffs reference "pipeline developments," but the review process for other development projects ***since*** Kuilima obtained its entitlements ***must take into account all previously permitted projects, including the Project.***

Plaintiffs have failed to show any change with respect to the Project likely resulting in new, different or increased traffic impacts. Since Plaintiffs have no credible evidence of a change in the Project and/or significant new, different or increased impacts, Plaintiffs have chosen to nitpick the adequacy of existing traffic studies and reports. Plaintiffs also choose to ignore the administrative process and the fact that traffic is being addressed on an ongoing basis through the proper administrative channels with the City and State Department of Transportation ("DOT").

Plaintiffs' challenge to the EIS's traffic analysis of future traffic impacts is a challenge to the adequacy of the EIS, and is time-barred under HRS § 343-7(c) – and should have been raised before the expiration of the statutory limitations period – more than 20 years ago. To the extent Plaintiffs challenge subsequent studies and reports, Plaintiffs' challenge is also time-barred since even the most recent study or report Plaintiffs cite to is dated September 2005, more than seven months prior to the filing of Plaintiffs' Amended Complaint on June 7, 2006.[21]

Moreover, Plaintiffs' contentions that the EIS traffic analysis and subsequent studies regarding congestion, when the resort is operating 4,000 hotel rooms, are inadequate are simply false. The 1985 Report, the 1991 Report, and 2005 Report all contemplated the same overall density of the Project (*i.e.*, approximately 4,000 hotel and resort condominium units). CROA 9/84-86 (Okaneku Aff.). Chief Challacombe of the DPP did not opine that a change in regional traffic made the 1985 Traffic Report "not sufficient" as Plaintiffs suggest. OB at 12. He made the statement that "a 20 year old traffic study is not sufficient" in the context of explaining that traffic reports are generally required to be updated periodically because of *changes in the region* and as part of the ongoing development process. This does not mean an updated traffic report was required because of a *change in the Project* or otherwise because of the SEIS Rules. CROA 9/140-141 (Challacombe Depo. 80:20-82:16).

Plaintiffs' criticisms of Kuilima's traffic studies are a factual dispute that belongs before an administrative agency, and they should not be permitted to litigate a factual dispute that requires a high level of technical expertise, particularly since traffic is an ongoing issue that continues to be addressed through various administrative agencies. As discussed supra in

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[21] Kuilima has subsequently created three *addendums* to its September 2005 traffic report, the most recent of which is dated August 2006. CROA 9/330-349. The addendums are *part of* the September 2005 traffic report.

Section II, the Court must apply the rule of reason and defer to the expertise of the DPP and DOT. See Marsh, 490 U.S. at 376-377; Citizens to Preserve Overton Park, 401 U.S. at 416 (Although the court's review "is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency."); Price, 81 Hawai'i at 182, 914 P.2d at 1375 ("courts are reluctant to second guess the decision-making body regarding the sufficiency of an EIS").

ii. Turtles and Monk Seals

Further, even if there had been a change in the Project, the presence of Hawaiian monk seals and green sea turtles do not require an SEIS. Their presence does not *result from* a change in the Project, and Plaintiffs otherwise fail to show how any change will change the impact on these animals as a species, generally, or their critical habitats.[22] Further, the presence of these animals was well-known when the EIS was prepared and reviewed, and either were dealt with or could have been dealt with in the EIS. CROA 5/58-69. At that time, these animals were already listed as endangered and threatened. 41 Fed. Reg. 51611 (1976); 43 Fed. Reg. 32800 (1978); CROA 9/169-184. At that time, these animals were endemic and indigenous throughout the Hawaiian Islands. CROA 9/78 (Guinther Aff.), 8/432-434. At that time, these animals were seen in the area around the Project. CROA 8/432-434. In short, the presence of these animals is not new.

As for monk seals, Plaintiffs have not shown the presence of these animals is new. Plaintiffs rely on reported "sightings" or "observations," but these sightings include multiple sightings of the same animals, and actually reflect only 11 animals since 1984, with 4 being sighted in 2006. CROA 8/434. Further, an increase in sightings may reflect an increase in awareness which results in an increase in *reports* of sightings. This is not sufficient for an SEIS. Rather, an increase in sighting is not proof of an actual increase in numbers. CROA 9/79 (Guinther Aff.). Nor does the birth of a monk seal pup on the beach mandate an SEIS. Envtl. Protection Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1010-11 (9th Cir. 2006) ("NEPA regulations direct the agency to consider the degree of adverse effect on a species, not the impact on individuals of that species" and holding that potential harm to a small number of endangered

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[22] Indeed, it is difficult to imagine how either species' critical habitats may be impacted because the Project is not within, or even near, either species' critical habitats. See 50 CFR § 226.201 (designating the Northwestern Hawaiian Islands as the Hawaiian monk seal critical habitat); 50 CFR § 226.208 (designating Puerto Rico as the green sea turtle critical habitat).

spotted owls was not a significant impact).

The alleged "new circumstances or evidence" regarding turtles and seals are not different or increased environmental impacts. Endangered or threatened species such as the Hawaiian monk seals and the green sea turtles are issues that existed in 1985 and were considered in the EIS, and have already been addressed and dealt with. Accordingly, Plaintiffs' challenge regarding the green sea turtles and seals is a challenge to the adequacy of the original EIS and, as explained in further detail in Section III.C infra, is clearly time-barred under HRS § 343-7(c).[23] Any challenge to the EIS on the grounds of its alleged failure to consider impacts on endangered or threatened species should have been raised before expiration of the statutory limitations period.

B. Kuilima's Subdivision Application is Not the "Action" under HEPA and Does Not Otherwise Trigger an Agency's Obligation to Determine if an SEIS Should be Required

Plaintiffs urge this Court to apply a three-part test for determining if an EA should be required at the outset of a project[24] to Kuilima's Subdivision Application. OB at 39. No authority supports its proposition that such a test should apply. The Subdivision Application by itself cannot trigger an SEIS because it is not an "action," is not within the shoreline area and is exempt from HEPA. Further, as applied to the larger Project, the Subdivision Application is a ministerial approval beyond the framework of HEPA.

1. Kuilima's Subdivision Application is Not the "Action" Under HEPA

a. The Subdivision Application Cannot be Considered Alone — It is a Component Part of the Entire Project

The Subdivision Application does not constitute an "action" under HEPA because, for the purpose of applying HEPA, the Project must be the "action." An "action" is "any program or project to be initiated by an agency or applicant." HRS §343-2 and HAR §11-200-2. Here, that

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[23] HEPA further provides for an environmental review process that involves solicitation of public comments and subsequent revision before final acceptance of an EIS. See HRS § 343-5(c).

[24] Office of Planning sets forth a three part test whereby an "***environmental assessment***" is required if the following three elements are present: (1) an applicant proposes an action specified by HRS §343-5(a); (2) the action requires approval of an agency; and (3) the action is not exempt under HRS §343-6. Office of Planning, 109 Hawai'i at 417, 126 P.3d at 1104 (emphasis added). Plaintiffs provide no authority as to why a test applicable to an EA, which is required prior to an EIS to determine if an EIS is necessary, should be applicable to an SEIS.

was the entire Project, and Kuilima's EIS thus covered the entire Project.[25] Plaintiffs ask this Court to look at only the Subdivision Application and to ignore that it is a component part of the larger Project —which is prohibited under HEPA.

Consideration of HAR §11-200-7 is a preliminary step in defining an "action" under HEPA. Superferry, 115 Hawai'i at 299, n.6, 167 P.3d at 306, n.6. HAR §11-200-7 provides that:

> [A] *group of actions* proposed by an agency or an applicant *shall be treated as a single action* when:
>
> (1) *The component actions are phases or increments of a larger total undertaking;*
>
> (2) *An individual project is a necessary precedent for a larger project;*
>
> (3) *An individual project represents a commitment to a larger project;*
>
> (4) Or the actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of action as a whole.

Here, the Project is not in the first stages of development. The Subdivision Application is not the start of this Project. An EIS has already been completed (CROA 5/1-873), and Project Entitlements have been granted. CROA 4/84-106, 107-140, 202-216. In fact, Kuilima has applied for and received numerous subdivision approvals as part of the Project development, including subdivision approvals for: (1) the Project's wastewater treatment plant and opana wells; (2) public park P-1; (3) hotel lots H-1 and H-2 and roads A and B; and (4) the Resort's golf clubhouse. CROA 4A/331, 334-337; *see* Appendices A and B generally.

The purpose of HAR § 11-200-7 is to prevent the pursuit of "projects in a piecemeal fashion." Superferry, 115 Hawai'i at 331. "Piecemealing" or "segmentation" is where a party tries to "mask the full nature of [the] project or divides up what is clearly a larger action into smaller pieces." Id. Plaintiffs' argument that the Subdivision Application is the "action" is piecemealing.[26] The "action" does not change just because its definition is being asserted by

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[25] The City agrees that the Subdivision Application is not an "action" under HEPA. "Under HRS § 343-2 and HAR § 11-200-2 "action" refers to the proposed Project in its entirety. Accordingly ... the bulk lot subdivision application does not constitute an "action" for purposes of Chapter 343-5, HRS and is merely one part of the Project or action." CROA 9/394.

[26] Plaintiffs concede in their Memorandum in Opposition to Kuilima's Second MSJ (Re: Non-Discretion) on pg. 12, that an EIS should be done "at the earliest practicable time." CROA 10/188. Logically, the "earliest practicable time" would have been upon the first application

Plaintiffs instead of by "applicants and agencies."

Moreover, if the Subdivision Application is the "action," then there has been no EA or EIS for this action and seeking an SEIS is premature. Plaintiffs did not allege in their Complaint that they were seeking an EA or EIS. See CROA 2/41-55. Furthermore, under Plaintiffs' interpretation, an EIS would need to be completed each time Kuilima submits an application to the DPP.

This Court is to apply a "rational, sensible and practicable interpretation of a statute" as opposed "to one which is unreasonable or impracticable." Keliipuleole v. Wilson, 85 Hawai'i 217, 221-222, 941 P.2d 300, 304-305 (1997). For the reasons stated above, treating the Subdivision Application as the "action" here would be "unreasonable" and "impracticable."

b. Kuilima's Subdivision Application Does Not Propose Uses Within the Shoreline

Plaintiffs argue the Subdivision Application proposes "uses within the shoreline area", and so under HRS § 343-5(a) and Att. Gen. Op. 75-14, should be considered an "action." OB at 40. Plaintiffs, however, are wrong. HRS § 205A-41 defines the "shoreline area" as "all of the land area between the shoreline and the shoreline setback line."[27] The shoreline setback line is defined as "that line established in this part ... running inland from the shoreline at a horizontal plane." HRS § 205A-41.

Plaintiffs point to nothing in the record evidencing that the Subdivision Application proposes "*uses within the shoreline area as defined in section 205A-41*" as required in HRS §343-5(a). See OB at 42. Therefore, as Plaintiffs are unable to establish that all three elements are present in the subdivision application, even under Plaintiffs' own argument, the Subdivision Application is not an "action" which requires an SEIS.

2. If the Subdivision Application Is The "Action," Then It Is Listed as Exempt from the Environmental Review Process

Kuilima's Subdivision Application falls within two of the DPP's and Office of

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submitted by Kuilima.

[27] HRS § 205A-41 states: "'shoreline area' shall include all of the land area between the shoreline and the shoreline setback line and may include the area between mean sea level and the shoreline; provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then the term "shoreline area" shall include the entire structure."

Environmental Quality Control's ("OEQC") enumerated exemptions to the HEPA framework[28] (1) it will *not* increase density; and (2) it merely readjusts boundary lines. CROA 4A/548. The Comprehensive Exemption List for the City and County of Honolulu Department of Land Utilization provides in pertinent part:

> Pursuant to EIS Regulation 1:33,[[29]] the following types of actions, where they fall within the given class of action, *shall generally be exempt* from requirements regarding preparation of an environmental assessment, negative declaration, or EIS:
>
> ...
>
> 1. Transfer of title to land.
> 2. Creation or termination of easement, covenants or other rights in structures or land.
> 3. Acquisition of land.
> 4. Subdivisions of land into lots greater than 20 acres in size.
> 5. *Readjustment of boundary lines.*
> 6. Subdivisions of a parcel of land containing two or more existing dwellings into two or more lots provided that:
>   a. Each resultant parcel contains one existing dwelling meeting the requirements of the Comprehensive Zoning Code; and
>   b. The lot area of each resulting parcel is less than that required for a two-family detached dwelling.
> 7. *Subdivisions that do not increase density.*
> 8. Consolidation of land.

CROA 4A/548 (emphases added).

The Subdivision Application merely readjusts boundary lines of the legal parcels of record to comport with the site plan already approved in Kuilima's SMP and Zoning Ordinance No. 86-99, and contemplated in the EIS. CROA 4/8-9 (Kurahashi Aff.). Comparing the maps attached to the Subdivision Application (CROA 4A/466-471) with the maps attached to the SMP

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[28] HRS § 343-6(a)(7) directs the EC to adopt rules that "establish procedures whereby specific types of actions, because they will probably *have minimal or no significant effects on the environment*, are declared exempt from the preparation of an assessment." (emphasis added). Based thereon, HAR § 11-200-8 provides that "[e]ach agency, through time and experience, shall develop its own list of specific types of actions which fall within the exempt classes, as long as these lists are consistent with the *letter and intent expressed in these exempt classes* and chapter 343." (emphasis added). The Honolulu Department of Land Utilization ("DLU") (now known as the DPP), developed the Comprehensive Exemption List for the City and County of Honolulu Department of Land Utilization, which lists specific types of actions that are exempt from the need for an environmental assessment, from a declaration that an EIS is not required, and/or from preparation of an EIS. The list was approved by the Environmental Quality Commission (now known as the OEQC) August 12, 1981. CROA 4A/546.

[29] Regulation 1:33 is now numbered as HAR § 11-200-8.

and Zoning Ordinance No. 86-99 shows that lot and roadway locations, shapes, and sizes have not changed in any material way from what the City Council approved in 1986. CROA 4A/87, 213-216. Additionally, the Subdivision Application shows no material change in lot and roadway layout from the Project maps attached to the EIS. CROA 4/60, 64-66, 82-83, 4A/467-471.

The Subdivision Application does not increase density because the density of the Project was already determined by the City Council in the SMP. CROA 4/8-9 (Kurahashi Aff.), 4/60, 64-66, 82-83, 87, 213; 4A/466-471. Unit counts were approved by the City in the Project Entitlements. CROA 4A/466-471, 4/143, 205. The Subdivision Application does not deviate from what has already been approved. Since the Subdivision Application falls within the list of exemptions, an SEIS is not required.

3. The Subdivision Application is Not a Discretionary Consent that Can Trigger an SEIS

Plaintiffs' argument that the Subdivision Application triggers an SEIS also fails because Kuilima is not seeking a discretionary consent. As explained in more detail in Kuilima's MSJ re: non-discretionary action (CROA 3/176-179, Appendix D at pp. 5-8), HRS Chapter 343 and the pertinent SEIS Rules make clear 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. This is undisputed. Plaintiffs instead argue the Subdivision Application is a discretionary permit. OB at 40-41. The Subdivision Application, part of the larger Project covered by the EIS, is not a discretionary permit.

Plaintiffs argue that under Office of Planning, the term "approval" in every statute, rule or city ordinance is to be given the same definition as the term is given in HEPA § 343-2, to mean "discretionary" consent. OB 40-41; 1109 Hawai'i 411, 125 P.3d 1098 (2006). Plaintiffs argue the definition of "approval" in HEPA — State legislation — should be applied to define the term "approval" in the *City*'s Subdivision Ordinance. OB at 41. Plaintiffs' argument leads to absurd results. The State and City are two different governmental entities. Further, Plaintiffs' position violates the well-established rule of statutory construction that definitions from one statute should not be applied to words in another. See State v. Mata, 71 Haw. 319, 330, 789 P.2d 1122, 1128 (1990) (The Hawai'i Supreme Court declined to read a definition from one HRS Chapter into another upon finding that the Chapters served different purposes and that the definitions of a term in one Chapter does not control the meaning of the term in another

Chapter.) The fundamental starting point for interpreting a statute is the language of the statute itself, and where the statute's language is plain and unambiguous; the Court's only duty is to give effect to its plain and obvious meaning. See Kaanapali Hillside Homeowners' Ass'n ex rel. Bd. Of Directors v. Doran, 114 Hawai'i 361, 369,162 P.3d 1277, 1285 (2007). Neither the Subdivision Ordinance nor the Subdivision Rules and Regulations define "approval." Approve[30], however, has a plain and unambiguous meaning - "to accept, permit or officially agree to something". American Heritage College Dictionary (3d Ed. 1993). It also defines "approval" as "the act of approving," which in turn is defined as "1. To consider right or good .... 2. To consent to officially or formally confirm or sanction." Therefore, the Court's only duty is to give effect to that definition.

Plaintiffs also argue that the Subdivision Ordinance gives the DPP Director "discretion" to grant or deny an application because the decision can be set aside only under the Zoning Board of Appeal ("ZBA")'s "abuse of discretion" standard,[31] thereby making the Subdivision Application a discretionary consent. OB at 11 and 42. The term "discretion" under the "abuse of discretion" standard, however, is not the same "discretion" for a director's discretionary consent. "Abuse of discretion" is a standard of review applicable to all approvals by the director, including ministerial approvals and discretionary approvals. Indeed, a party opposing a director's ministerial approval may appeal to the ZBA, and the ZBA must review the director's approval under the "abuse of discretion" standard. Accordingly, the "abuse of discretion" standard of review does not automatically make all approvals by a director a "discretionary consent." Applying Plaintiffs' view, any agency action subject to ZBA review would involve discretionary consent and there could be no review of a ministerial decision. This would be an absurd result.

a. Subdivisions Are Not Discretionary Approvals Where the Subdivision Application Conforms to the Explicit Requirements of the Local Subdivision Ordinance

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

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30 Approval is the noun of approve.

31 The standard of review for the ZBA's review of a director's approval under the Subdivision Ordinance is identical to the ZBA's general standard of review. Both provide that a director's approval shall be reviewed under the "abuse of discretion" standard. ROH § 22-3.7; Department of Land Utilization, Rules of the Zoning Board of Appeals, Section 22-8.

subdivision application conforms to the explicit requirements of the local subdivision ordinance. See PTL, L.L.C. v. Chisago County Bd. Of Comm'rs, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003) ("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") citing Reynolds, Laurie, Local Subdivision Regulation: Formulaic Constrains in an Age of Discretion, 24 Ga. L. Rev. 525, 530 n.24 (1990) (further 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"). See also Plan Comm'n for Floyd County, Indiana v. Klein, 765 N.E.2d 632, 641 (Ind. 2002) ("If the requirements in the [subdivision] ordinance have been met, the plan commission must approve the plat. A plan commission's role in this regard is purely ministerial, and the commission has no discretion to deny an application that meets the requirements of the applicable subdivision control ordinance.") (Citation omitted).

b. The Honolulu Subdivision Ordinance Creates a Non-Discretionary Duty to Grant a Subdivision Application That Conforms to the Subdivision Ordinance and Regulations

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, CROA 4A/553. The DPP's authority is limited to confirming that a subdivision application conforms to (1) the state and city general plans and development plans and (2) the requirements of applicable state and city laws, rules, and regulations applicable to or relating to the subdivision. ROH § 22-3.4; CROA 4A/553. ROH § 22-3.5 spells out what the DPP may require from subdivision applicants. ROH § 22-3.5, CROA 4A/553. If a subdivision application conforms to the requirements of ROH Chapter 22, the DPP has no discretionary authority to deny it. Id.

The Subdivision Regulations, in turn, require that the Director *shall*[32] act on and approve a subdivision application where it conforms to the Subdivision Regulations. Subdivision

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[32] "The word 'shall' must be given a compulsory meaning . . . and is inconsistent with a concept of discretion." Vollemy v. Broderick, 91 Hawai'i 125, 129-130, 980 P.2d 999, 1003-04 (App. 1999) (citing Black's Law Dictionary 1375 (6th ed. 1990)); see also Gray v. Administrative Dir. Of the Court, 84 Hawai'i 138, 150, n.17, 931 P.2d 580, 592, n.17 (1997) ("[t]he word 'shall' is generally construed as mandatory in legal acceptation").

Regulations § 2-203, CROA 4A/576-577 (emphasis added). The Subdivision Regulations make clear that the Director may only *dis*approve a subdivision application if it does not comply with the Subdivision Regulations: "Disapproval by the Director means the preliminary map does not conform to all or portions of the requirements of these rules and regulations." Subdivision Regulations § 2-203(b), CROA 4A/577.[33]

Accordingly, the Subdivision Ordinance creates a non-discretionary duty to approve the Subdivision Application if it conforms to the Subdivision Ordinance and the Subdivision Regulations. In sum, the Subdivision Application is a non-discretionary stage of the Project, where an SEIS can no longer inform discretionary agency decision-making. The SEIS rules no longer apply.

C. Plaintiffs' Claims are Time-Barred Under HRS §§ 343-7(a), (b) and (c)

Plaintiffs' claims are barred by HRS § 343-7. Plaintiffs' claims are time-barred under HRS § 343-7(a) because Plaintiffs failed to file suit within 120 days after the "proposed action" (*i.e.*, the Project) started, "restarted"[34] or when Plaintiffs knew or reasonably should have known of the alleged change in timing. Similarly, Plaintiffs' claims are time-barred under HRS §§ 343-7(b) and (c) because Plaintiffs did not file suit within 30 or 60 days, respectively, after learning of the DPP's position that no SEIS was required.

1. The Time Limitations Set Forth in HRS § 343-7 Are Mandatory, Jurisdictional, and Strictly Enforced

As an initial matter, the statute of limitations ("SOL") prescribed in HRS § 343-7 are

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[33] The determination that the DPP has the discretion to deny a subdivision application that conforms to the Subdivision Ordinance and Subdivision Regulations would confer to the DPP the authority to usurp the City Council's land use policy authority and arbitrarily amend the zoning ordinance by denying subdivision applications.

> To allow the board to deny approval of a preliminary [subdivision] plat that proposes a permitted use and complies with the regulations specified for that use would, in effect, allow the board to arbitrarily amend the zoning ordinance simply by denying applications for subdivision approval. Such a practice would deprive landowners of adequate guidance in the preparation of preliminary plats and would allow capricious actions based on subjective criteria rather than express zoning provisions enacted to guide land-use decisions.

PTL, 656 N.W.2d at 573 (citations omitted).

[34] In the Amended Complaint, Plaintiffs used the term "reactivated" and alleged the Project restart was "recent." CROA 2/43.

mandatory, jurisdictional, and strictly enforced by Hawaii courts.[35] See Waianae Coast Neighborhood Bd. v. Hawaiian Elec. Co., 64 Haw. 126, 128, 637 P.2d 776, 778 (1981) (dismissing plaintiff's complaint filed outside the statutory limitations period).[36] This is so challenges to a project under HEPA will be initiated within a *very short* time - to provide a balance between certainty to land owners and environmental concerns, and protection from ill-timed and ill-conceived environmental challenges. This intent is supported by legislative history, which also recognizes the limited window within which an interested party can file an environmental challenge against a project. HRS § 343-7(a) is intended to "allow interested parties sufficient opportunity to initiate a challenge before the project is long underway." S.C.Rep. No. 979 (1979).

Indeed, this makes sense, as "interested parties" could otherwise attack a project at any point or repeatedly (as in this case). Here, development has been ongoing for 20 years and the Project has now reached a stage such that an SEIS can no longer inform agency decision-making and an SEIS is no longer applicable.[37] Therefore, it is both logical and fair that a project, like this one should have more certainty rather than less certainty as the project progress over time.

2. Plaintiffs' Complaint is Time-Barred Under HRS § 343-7(a) Because Plaintiffs Did Not File Suit within 120 Days After the Proposed Action Was Started, "Restarted", or When They Knew or Reasonably Should Have Known of the Alleged Change or "New Circumstances and Evidence" Regarding Traffic and Species

Under HRS § 343-7(a), Plaintiffs' Complaint is time-barred because Plaintiffs did not file suit within 120 days of when the "proposed action" was "started", restarted or when they knew of the alleged change in the Project's timing. HRS § 343-7(a) provides in relevant part:

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[35] HRS § 343-6(b) was renumbered as § 343-7(b). See Sensible Traffic Alternatives and Resources, Ltd. v. Federal Transit Admin. Of U.S. Dep't of Transp., 307 F. Supp. 2d 1149, 1162, n.8 (D. Haw. 2004).

[36] Each subsection uses the term "shall," which compels a mandatory and strict application under basic statutory interpretation principles. See Coon v. City and County of Honolulu, 98 Hawai'i 233, 256, 47 P.3d 348, 371 (2002). HRS § 343-7(a) is intended to "allow interested parties sufficient opportunity to initiate a challenge before the project is long underway." S.C.Rep. No. 979 (1979) (emphasis added). This intent is supported by legislative history, which also recognizes the limited window within which an interested party can file an environmental challenge against a project. Indeed, this makes sense, as "interested parties" could otherwise attack a project at any point or repeatedly (as in this case).

[37] See Section IV.C, supra.

> (a) Any judicial proceeding, the subject of which is the lack of assessment[38] required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the *proposed action is started* ....

HRS § 343-7(a) (emphasis, brackets, and footnote added). The application of HRS Chapter 343 to an SEIS request raises two basic questions – what is the "proposed action" and what does "started" mean for purposes of this case?

a. The Entire Project Is the "Proposed Action," as a Group of Component Actions Shall be Treated as a Single Action under HAR § 11-200-7

The entire Project is the "proposed action" for purposes of HEPA, including HRS § 343-7(a), because the Project is the program or project initiated by Kuilima and the component parts or phases are all part of the total undertaking. See HRS § 343-2, HAR §§ 11-200-2, and 11-200-7. CROA 4/205-212. This is consistent with the legislative intent to "allow interested parties to initiate a challenge before the project is long underway." S.C. Rep. No. 979 (1979). Allowing any component part of a project, such as the Subdivision Application, to re-trigger the SOL would undermine the purpose of HRS § 343-7(a) and contravene HAR § 11-200-7, particularly since the Subdivision Application is but one of many subdivision applications Kuilima has submitted, and many of these applications have already been approved by the DPP (CROA 4A/331, 334-337). Accordingly, the entire Project is the proposed action.

b. Plaintiffs Did Not File Suit Within 120 Days After the Project Started

The word "started" can mean a few different things – including the Project's approvals obtained at the original EIS stage, the alleged restart of the Project, or the time at which Plaintiffs

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38 In the Amended Complaint, Plaintiffs did not allege that an environmental assessment ("EA") is required; nor have they pled any authority or other basis for such a requirement. See. CROA 2/41-55. Additionally, HAR §§ 11-200-26 and 11-200-27 provide only for an SEIS. In addition, no request for an EA is required for the SOL period to run. In Bremner v. City and County of Honolulu, 96 Hawai'i 134, 146, 28 P.3d 350, 362 (App. 2001), the Intermediate Court of Appeals held a complaint was untimely and outside the 120-day SOL where the plaintiff did not file suit seeking an EA until more than one year after passage of the zoning ordinance he challenged. The plaintiff in Bremner apparently did not "request" an EA, and nowhere did the Court provide that HRS § 343-7(a) required an actual request for an EA or EIS by a private party to trigger the SOL period. See id. at 145, 28 P.3d at 361.

"knew or should have known" of the alleged change in the Project's timing. Plaintiffs' claims are barred under HRS §343-7(a) because Plaintiffs did not file suit within 120 days after the Project started. As discussed supra the Project or "action" "started" in 1985 or 1986 when the EIS and the Project Entitlements were approved, and arguably restarted in 1999. CROA 4/84-201, 203-217. Plaintiffs' Amended Complaint, however, was filed on June 7, 2006, more than 120 days after the Project "started" or "restarted". CROA 2/41-136.

c. Plaintiffs Did Not File Suit Within 120 Days After They Knew or Should Have Known the Project Changed

Although no reported Hawaii case appears to have directly addressed the definition of the term "start" or the application of HRS § 343-7(a) to an SEIS request, the California Supreme Court applying California's counterpart to HRS §343-7(a)[39] held that the SOL period for a challenge to an agency's noncompliance began to run when "plaintiff knew or reasonably should have known that the project underway differs substantially from the one described in the [original EIS]." Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agric. Ass'n, 42 Cal. 3d 929, 940, 727 P.2d 1029, 1036, 231 Cal. Rptr. 748, 755 (1986); See also Cummings v. San Bernardino Redevelopment Agency, 125 Cal.Rptr.2d 42, 44-45 (Cal. App.Ct., 2002) (The "knew or should have known" standard applied to bar the plaintiff's complaint seeking a supplemental or additional environmental impact report ("EIR") for the sale and development of an industrial recycling facility 18 years after the original EIR).

i. Plaintiffs Have Known for a Long Time About the Alleged Increased "Intensity of Impacts", "New Circumstances and Evidence" and That the Project was Moving Forward

Although Kuilima denies Plaintiffs' contention that increased "intensity of impacts" and "new circumstances and evidence" are sufficient to require an SEIS (OB at 7-9), Plaintiffs have known about the alleged increased "intensity of impacts" and "new circumstances and evidence" raised in their OB for many years. Plaintiffs admit that "traffic" has been an ongoing problem

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[39] Cal.Pub.Resources Code § 21167 provides in pertinent part: "An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, *or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project.*" (Emphasis added.)

"since 1985" (OB at 7) and that they have known about it for several years. CROA 4A/164-165 (Lucky Cole Depo. 61:18-63:24), 4A/201 (Douglas Depo. 74:9-77:13), 4A/267 (Ching Depo. 31:7-32:9), 4A/239-240 (Riviere Depo. 82:24-87:16). Specifically, Lucky Cole admitted:

> I'm saying the traffic has gotten to the point in the last five years ... it's more apparent now than it was in '96 ... but that doesn't mean we've suddenly had a surge of growth."

CROA 4A-165 (Lucky Cole Depo. 63:12-24). Additionally, Mr. Ching admitted that the 1985 EIS contemplated endangered species. CROA 4A/278 (Ching Depo. 75:23-76:15). Plaintiffs admit knowing that the Project was moving forward in the form of new construction, improvements, and other actions by Kuilima. CROA 4A/159 (Lucky Depo. 40:4-42:24), 4A/226 (Riviere Depo. 33:3-35:22). Lucky Cole testified that he "knew the [Project] approvals were still there" and that he observed improvements to the Resort's existing hotel in the last four to five years CROA 4A/159 (Lucky Depo. 39:3-4:16) and that he periodically raised the topic of whether the Project Entitlements would lapse with members of the City Council, over a 10-year period up until as recently as 2004. CROA 4A/159 (Lucky Depo. 41:16-42:3).

Moreover, Plaintiffs testified that they thought the Project was to be built by 1996. CROA 4A/142. When the Project moved forward beyond that timeframe, they knew or should have known that their alleged "change" had occurred in timing. The law places the burden of public participation squarely upon a party who seeks to challenge governmental decisions. See, e.g., Bremner, 96 Hawai`i at 146, 863 P.2d at 362.

ii. Plaintiffs and the Public Had Notice That the Project Was Moving Forward

The public had notice that the Project was moving forward between 1999 and 2003. Where an act was "the subject of public meetings and public records," and there was no attempt to conceal the act, "a diligent plaintiff should have been able to discover whether a cause of action existed." Utility Cost Mgmt. v. Indian Wells Valley Water Dist., 26 Cal. 4th 1185, 1197-99, 36 P.3d 2, 10-11 114 Cal. Rptr. 2d 459, 470 (2001) (holding plaintiff's claim was barred by the applicable statute of limitations).

Although Kuilima disputes that the Project ever stopped – even assuming for sake of argument that it did – it restarted approximately six years ago. There were at least five critical events between 1997 and 2003 that demonstrated as a matter of public record that the Project was moving forward and/or there was a change in the timing. Either way the Court looks at it,

Plaintiffs' challenge based on the alleged change in the timing of the Project is belated and time-barred. For example:

1. On at least two separate occasions between September 1997 and November 2001, the City recognized and accepted that the Project was delayed due to "unforeseen economic conditions." See CROA 4/218-236;

2. The Sustainable Communities Plan in 1999 described the Project in detail, confirmed the Project master plan and unit counts and concluded that the Project should be maintained. See CROA 4/319-323. The Sustainable Communities Plan underwent public notice and comment, as well as public hearing, and was ultimately adopted in Ordinance No. 99-72. See CROA 4/356-367. and ROH § 24-7;

3. The Zoning Committee Meeting in February 2000 confirmed that the Project was alive and well. At this meeting, a Kuilima representative testified that Kuilima was "proceeding with several significant developments at the Resort as a whole," and Council members pressed Kuilima to move forward with the Project or face down zoning. CROA 4/362-363;

4. The SMP for Renovations in 2003 involved at least two public hearings and ample opportunity for public comment. See CROA 4/669;

5. The SMP for Renovations and Final EA Report in 2003 required additional public hearing and comment and specifically stated that the renovations were "within a small portion of an approximately 740-acre site of a master planned resort development which received City Council approval of an SMA Use Permit [in 1986]." CROA 4/393-394;

Additionally, Kuilima performed construction and other work in reliance on the Project from 2001 to present, including nearly $100 million in renovations to the Resort's hotel and construction of the Ocean Villas condominiums. See CROA 4/11-15 (Makaiau Aff.).

Either way the Court looks at it, Plaintiffs' challenge based on the alleged change in the timing of the Project is belated and time-barred. Accordingly, Plaintiffs' Complaint is time-barred because Plaintiffs did not timely file their Complaint 120 days after the Project restarted or after they knew or reasonably should have known of the alleged change in the timing of the Project or the "new circumstances or evidence."

3. Plaintiffs' Complaint is Time-Barred Under HRS § 343-7(b) Because Plaintiffs Did Not File Suit within 30 Days After Having Actual Knowledge of the DPP's Determination that an SEIS Was Not Required

HRS §343-7(b) provides, in pertinent part:

> A judicial proceeding based upon a determination that an EIS is not required for a proposed action must be initiated within 30 days of publication of such

determination or the complaint is time-barred."

If the Court determines that HRS § 343-7(b) applies, Plaintiffs' Complaint is also time-barred because Plaintiffs did not file suit within 30 days after having "actual knowledge" of the DPP's determination that an SEIS was *not* required.

Plaintiffs argue that the thirty-day time period has not expired because DPP failed to file a notice with the OEQC. OB at 38. In cases where formal publication does not occur, however, the statute of limitations runs from the date of "actual knowledge." The legislature has expressly provided that "[n]o agency rule, order, or opinion shall be valid or effective against any person or party nor may it be invoked by the agency for any purpose until it has been published or made available for public inspection as herein required, *except where a person has* ***actual knowledge*** *thereof.*" HRS § 91-2 (emphasis added). Accordingly, if a person has actual knowledge of an agency rule, order, or opinion, it shall be effective as to that person.

Plaintiffs concede that they had actual knowledge of the DPP's determination that an SEIS was not required as early as January 19, 2006. OB at 39. Members of KNSC admitted to having "actual knowledge" on several other occasions. See CROA 4A/3-4, 7-13, 4A/120, 142-143, 4A/191-192 (Douglas Depo. 37:15-41:5), 4A/153 (Lucky Cole Depo. 16:14-17:7), 4A/222-226 (Riviere Depo. 16:7-20:6).[40] At the very latest, members and/or directors of KNSC had "actual knowledge" of the DPP's decision by March 15, 2006, when Mr. Gill reported on the DPP's response at a Sunset Neighborhood Board meeting. CROA 4A/21. Even under the application of the latest date, Plaintiffs' Complaint is squarely outside the 30-day time limit of HRS § 343-7(b).

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[40] Between December 2005 and February 2006, Directors of KNSC received numerous emails, telephone calls, and visits from the Union concerning the Union's challenge to the Project. CROA 4A/7-13, 120, 191-192 (Douglass Depo. 37:15-41:5), 4A/222 (Riviere Depo. 16:7-20:6). On January 31, 2006 the Union received DPP's notification that no SEIS was required; CROA 4A/472. Douglass Cole, a director of KNSC, considered "joining the [Union] suit as a friendly party in support of the injunction" on or about March 8, 2006. CROA 4A/3. Additionally, KNSC Director Riviere admitted to attending the February 9, 2006 Ko`olau Loa Neighborhood Board Meeting in which the DPP's February 8, 2006 letter was read aloud. CROA 4A/222 (Riviere Depo. 15:16-16:6). The minutes of that meeting state that "according to DPP there is no recourse to ask for environmental studies." CROA 4A/21-23. The application of any of these dates to Plaintiffs' Complaint places the Complaint squarely outside the 30-day time limit of HRS § 343-7(b).

4. Plaintiffs' Complaint Is Also Time-Barred Under HRS § 343-7(c) Because Plaintiffs Did Not File Suit Within 60 Days After Having Actual Knowledge of the DPP's Determination That an SEIS Was Not Required

HRS § 343-7(c) provides, in pertinent part, that:

> [a]ny judicial proceeding, the subject of which is the acceptance of an environmental impact statement required under [HRS] section 343-5, shall be initiated within sixty days after the public has been informed pursuant to [HRS] section 343-3 of the acceptance of such statement.

The Federal District Court in Hawaii construed HRS § 343-7(c) in Sensible Traffic Alternatives and Resources, Ltd. In that case, Judge Susan Mollway 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 Resources, Ltd., 307 F. Supp. 2d at 1160.

If the Court chooses to apply HRS § 343-7(c), Plaintiffs' Complaint is still time-barred. Again, Plaintiffs did not file within 60 days after Plaintiffs knew of the DPP's determination. As discussed earlier, HRS § 91-2 provides that "actual knowledge" of the agency's decision will suffice where publication has not occurred. Plaintiffs knew as early as January 2006 and at the latest by March 15, 2006 of the DPP's determination. Accordingly, Plaintiffs' Complaint is untimely, and Kuilima is entitled to summary judgment.

D. The SEIS Rules Exceed Their Statutory Authority and Accordingly No Cause of Action Exists to Require Kuilima to Prepare an SEIS

HRS § 343-5(g) provides: "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.*" (emphases added). Despite this clear proscription on other statements, the SEIS Rules purport to establish that a supplemental statement *can* be required. Although the EC is empowered with authority to adopt rules that implement the purposes of HEPA,[41] HEPA imposes clear and specific limits on that rule-making authority through its mandate that once a statement (*i.e.*, an EIS) has been accepted with respect to a Project, ***no "other" statement*** shall

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[41] Despite Plaintiffs' assertions to the contrary, quoting the "Findings" provisions of HRS § 343-1), the actual, explicitly stated purpose of HEPA 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.

be required for that Project.[42]

As explained in more detail in Kuilima's Motion for Judgment on the Pleadings (CROA 3/24 (Appendix F at 3)) and Reply re Kuilima's Motion for Judgment on the Pleadings, attached as Appendix K at 5-10 (CROA 11/29-34), Plaintiffs cite no authority, and Kuilima could find no authority, for the argument that an SEIS falls within the definition of a "statement" under HRS Chapter 343 – particularly in light of the plain language of HRS § 343-5(g).

Kuilima has no argument with a policy decision to allow for the requirement of an SEISs, but as of now the SEIS Rules are *ultra vires*. While HEPA permits the EC to "adopt, amend, or repeal" necessary rules for the purposes of HEPA, including an EIS and EA, this does not include an SEIS. See HRS § 343-6(a). Specifically, the plain language of HRS § 343-6(a) enumerate nine items for which the EC is to adopt rules, including an EIS and an EA. See HRS § 343(a)(1)-(9). The nine items, however, do not include an SEIS. If the legislature had intended to include an SEIS then it would have done so under HRS § 343-6(a), but it did not.

It is black letter law that administrative rules and regulations may not violate or exceed their statutory authority. "The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rule-making procedures." HRS § 91-7 (2006).[43] Indeed, "[i]t is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement." Agsalud v. Black, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985); Morgan v. Planning Dep't, 104 Hawai`i 173, 184, 86 P.3d 982, 993 (2004) (stating that "[a]n administrative agency can only wield powers expressly or implicitly granted to it by statute."); Stop H-3 Ass'n v. State Dep't of Transp., 68 Haw. 154, 161, 706 P.2d 446, 451 (1985) (stating that "[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state Legislature and may only exercise this power within the framework of the statute under which it is conferred"); Jacober v. Sunn, 6 Haw. App. 160, 168, 715 P.2d 813, 819 (1986) (stating that an agency "may not enact rules and regulations which enlarge, alter, or restrict the provisions of the act being administered"). As recently as 2002, the Hawaii Supreme

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[42] Plaintiffs argue that an SEIS is a "statement" under HRS Chapter 343, see OB at 40, and thus implicitly concede concede that HRS § 343-5(g) prohibits requiring an SEIS once an EIS has been accepted.

[43] HRS § 343-6 provides that "the council shall adopt, amend, or repeal necessary rules for the purposes of this chapter in accordance with [HRS] [C]hapter 91."

Court struck down a county agency's rule because the rule exceeded its enabling authority.[44] Coon, 98 Hawai'i at 251, 47 P.3d at 366.

Accordingly, while the legislature may allow for SEIS's in the future, they are prohibited now, and there is no authority on which to require Kuilima to prepare an SEIS.

E. HEPA Does Not Create a Private Cause of Action to Require an SEIS

Assuming, *arguendo*, that an SEIS can be required without violating HEPA,[45] Hawaii law affords Plaintiffs neither an express nor an implied private cause of action to challenge the DPP's decision not to require an SEIS. This argument was fully addressed below in Kuilima's Motion for Judgment on the Pleadings (CROA 3/22-29 (Appendix F at 1-8)) and Reply re Kuilima's Motion for Judgment on the Pleadings (CROA 11/25-29 (Appendix K at 1-5)); however, Plaintiffs seems to misunderstand the point of Kuilima's argument. On the issue of whether there is a private cause of action to require an SEIS, Kuilima raised one argument below – that HEPA creates neither an express nor an implied cause of action to require an SEIS.

Plaintiffs' Opening Brief addresses two arguments that Kuilima has not made below. First, Plaintiffs argue that they have standing. See OB at 35-36. Standing, however, is an entirely separate question from whether a private cause of action exists. See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 465, n.13 (1974) (holding that because no private right of action exists to enforce compliance with the Federal Rail Passenger Service Act of 1970, "questions of standing and jurisdiction became immaterial"); Bernhardt v. County of Los Angeles, 279 F.3d 862, 868, n. 4 (9th Cir. 2002) ("Whether a party has standing is distinct from whether she has asserted a cause of action"). Kuilima's argument below is that a private cause of action does not exist to require an SEIS.

Second, Plaintiffs attempt to further confuse the relevant issues by making an argument that Plaintiffs should be "adjudged aggrieved", which was not addressed below and is presently not before the Court. See OB at 37-38. Plaintiffs have not explained how this has anything to

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[44] In Coon, the Court held that a Honolulu Department of Housing and Community Development ("Housing Department") leasehold conversion rule was invalid because it "conflict[ed] with the plain language" of the ordinance it sought to implement. Coon, 98 Hawai'i at 251, 47 P.3d at 366. Specifically, the Court held that the leasehold conversion of condominium units could not be premised on a Housing Department rule that had improperly reduced the statutory minimum number of applicants required to trigger leasehold conversion. See id.

[45] *See* Section III.D *supra*.

do with whether a private cause of action exists to require an SEIS.

In addressing Kuilima's argument that there is no private cause of action to require an SEIS, Plaintiffs rely on the statute of limitation provisions under HEPA, *i.e.*, HRS § 343-7(a)-(b), and the use of the term "assessment" and "statement" to explain that the "usual meaning of these words" includes a private cause of action to contest an agency's failure to prepare an EA to determine whether an SEIS must be prepared. See OB at 49. Plaintiffs also argue that an "implied" statutory right to sue exists under Pele Defense Fund v. Paty, 73 Haw.578, 837 P.2d 1247 (1992), and that under Sensible Traffic, a private cause of action to compel an SEIS exists under HEPA. OB at 49. Plaintiffs misconstrue the law.

Pele Defense Fund does provide a statutory right to bring an action, but only in the context of enforcing the duties and obligation of a trustee of a public trust land under the Hawaii State Constitution. Pele Defense Fund, 73 Haw. at 601, 606, 837 P2.d at 1262, 1264. In addition, Sensible Traffic did not hold that a private cause of action to compel an SEIS exists under HEPA, rather it held the plaintiffs' claim alleging failure to prepare an SEIS was really a challenge to the acceptance of an EIS, for which an express cause of action exists pursuant to HRS 343-7(c). Sensible Traffic, 307 F.Supp.2d at 1161. Perhaps this Court will follow that approach, but it is not obligated to do so. If that ruling is applied here, the applicable SOL for challenging the acceptance of an EIS — 60 days under HRS § 343-7(c) — bars Plaintiffs' claims. The SOL ran long ago.

Under the SEIS rules, the determination of whether to require an SEIS is delegated only to the "accepting authority or approving agency in coordination with the original accepting authority." See § 11-200-27. HAR § 11-200-29 provides in what respects an SEIS is to be treated like an EIS, but does not include judicial review of the agency determination that an SEIS is not required:

> The requirements of the thirty-day consultation, filing public notice, distribution, the forty-five-day public review, comments and response, and acceptance procedures, shall be the same for the supplemental statement as is prescribed by this chapter for an EIS.

No reference is made to the availability of the judicial process for an SEIS, like that available for review of an EIS determination.

Further, no reference is made in the HARs to an EA for determination of the significance of purported environmental effects alleged to require an SEIS, as is required in connection with

an EIS. That process, when applicable, opens up the significance determination to the public process, from which judicial review may be sought under the relevant sections of HRS § 343-7. See HAR 11-200 Subchapter 6 (regarding EAs). That process, on its face, does not apply to determinations of the need for an SEIS.[46]

Here, the Hawaii State Legislature plainly and expressly provided for several types of judicial proceedings and plainly excluded a cause of action to require an SEIS. HEPA may provide for a private cause of action to challenge the lack of an EA, undertaking an action without a formal determination whether an EIS is required, the decision to require an EIS, the decision not to require an EIS, or the acceptance of an EIS. And while Kuilima is not opposed to a policy decision to allow a private right of action, on its face, HEPA does not presently recognize such a right to require an SEIS. See HRS § 343-7. Likewise, the SEIS Rules also do not expressly provide for a cause of action to require an SEIS. See HAR 11-200-26 and 27.

As explained in detail in Kuilima's Motion for Judgment on the Pleadings (CROA 3/22-29; Appendix F at 1-8) and Reply re Kuilima's Motion for Judgment on the Pleadings (CROA 11/25-29; Appendix K at 1-5), although Plaintiffs may argue they are members of the class for whose benefit HEPA was enacted, (1) the Hawaii State Legislature did *not* intend to create a private cause of action to require an SEIS, and (2) judicially creating or recognizing such an implied private cause of action would be inconsistent with the purpose of HEPA, adding yet another layer of judicial or bureaucratic review beyond what the legislature intended thereby increasing the economic challenges faced by every development. Recognizing a private cause of action would potentially subject every development to a legal challenge that an SEIS is required – regardless of the merits of the claim, the status of the Project, or what the relevant agency determines. Accordingly, the determination regarding the need for an SEIS is should be limited to the agency level and not extended to a private cause of action.

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[46] It is settled law that where the Legislature enumerates certain items, it is presumed that those items *not* enumerated are excluded. See Fought & Co., Inc. v. Steel Engineering and Erection, Inc. 87 Hawai'i 37, 55, 951 P.2d 487, 505 (1998) (stating that "[t]his court has consistently applied the rule of *expressio unius est exclusio alterius*-the express inclusion of a provision of a statute implies the exclusion of another-in interpreting statutes") (citing inter alia Keliipuleole, 85 Hawai'i at 227, 941 P.2d at 310; see also Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., 91 Hawai'i 224, 252, 982 P.2d 853, 881 (1999) ("In the absence of a clear pronouncement on the part of the Hawai'i [L]egislature," the Court should not recognize a private cause of action.).

IV. CONCLUSION

For the foregoing reasons, Kuilima respectfully urges this Court to affirm the Circuit Court's Amended Final Judgment entered on June 4, 2007.

DATED: Honolulu, Hawaii, December 6, 2007.

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APPENDIX OF RECORD BELOW (INDEX)

1. **Appendix A**: *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*, filed December 5, 2006.
2. **Appendix B**: *Amended Final Judgment*, filed June 4, 2007.
3. **Appendix C**: Kuilima Resort Company's First Motion for Summary Judgment (Re: Statute of Limitations), filed October 11, 2006.
4. **Appendix D**: Defendant Kuilima Resort Company's Second Motion for Summary Judgment (Re: Non-Discretionary Actions), filed October 11, 2006.
5. **Appendix E**: Defendant Kuilima Resort Company's Third Motion for Summary Judgment (Re: Burden of Proof), filed October 11, 2006.
6. **Appendix F**: Defendant Kuilima Resort Company's Motion for Judgment on the Pleadings, filed October 11, 2006.
7. **Appendix G**: Kuilima's Memorandum in Opposition to KNSC and Sierra Club's Motion for Summary Judgment, filed November 3, 2006.
8. **Appendix H**: Chart re subdivision approvals and other activity in connection with development of the Project through the 1990s.
9. **Appendix I**: Chart of the approvals and other activity, including those that were openly visible to the general public, in connection with development of the Project since March 1999.
10. **Appendix J**: Chart showing interactions that occurred evidencing Plaintiffs knowledge of DPP's decision not to require an SEIS.
11. **Appendix K**: Defendant Kuilima Resort Company's Reply to Motion for Judgment on the Pleadings, filed November 8, 2006.