NO. 28602

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CIVIL NO. 06-1-0265
UNITE HERE! LOCAL 5; ERIC W. GILL; TODD A. K. MARTIN,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU; a municipal corporation; KUILIMA RESORT COMPANY, a Hawaii corporation; DOE DEFENDANTS 1-10,

Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE! LOCAL 5 HAWAII, a Hawaii labor organization; ERIC W. GILL, an individual,

Counterclaim Defendants.

KUILIMA RESORT COMPANY, a Hawaii general partnership,

Counterclaim Plaintiff,

vs.

UNITE HERE!, a New York labor organization; DOE DEFENDANTS 1-10,

Additional Counterclaim Defendants.

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

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

FIRST CIRCUIT COURT

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

CIVIL NO. 06-1-0867 KEEP THE NORTH SHORE 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; DOE ENTITIES 1-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants.	)

PLAINTIFFS-APPELLANTS' REPLY BRIEF TO KUILIMA RESORT COMPANY

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I. SUMMARY OF REPLY BRIEF

This Court should (1) adjudicate that HEPA and SEIS Rules impose an obligation on all public agencies to require a SEIS "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with"; (2) reverse the judgment; and (3) remand with directions to grant appellants Keep The North Shore Country (North Shore) and Sierra Club's summary judgment motion, order the City and County of Honolulu (City) to require a Supplemental EIS, and enjoin the Kuilima Resort Company (resort owner)'s resort expansion project.

This Reply Brief rebuts Appellees' contention that the City's Department of Planning and Permitting (DPP) took a "hard look."

The Reply Brief then rebuts the resort owners' "kitchen sink" of remaining arguments: *One*, HEPA applies to the resort owner's subdivision application. *Two*, a public agency cannot only consider information regarding new circumstances and evidence presented to it by the public; a public agency must make an independent determination. *Three*, deference should not be given to DPP's interpretation of the Environmental Council (EC)'s SEIS Rules and decision to not require a SEIS. *Four*, an EIS approval that does not impose a rigid time schedule does not give the proponent "perpetuity" to complete the project without supplemental environmental review. *Five*, the project has not proceeded forward. *Six*, the project was not "reaffirmed" when the DPP issued the Ko'olau Loa Sustainable Communities Plan. *Seven*, there is implied in HEPA a private cause of action to require a SEIS. *Eight*, the new circumstances and evidence of traffic gridlock and species are "new." *Nine*, North Shore raised the new circumstance and evidence regarding traffic before filing the lawsuit. *Ten*, the lawsuit was timely filed.

II. DPP DID NOT TAKE A HARD LOOK

Appellees largely ignore the Opening Brief (pp. 7-10, 14-16 and 33-35) which sets forth the hard evidence that DPP did not take a hard look at the new circumstances and evidence of likely increased impacts to traffic and species.[1] The hard evidence establishes the following:

The time period of DPP's "administrative process" was at best two weeks, from on about January 5, 2006, when DPP received the first letter dated January 5, 2006, to January 19, 2006,

[1] The resort owner argues DPP took a "'Hard Look' at the Project." That is not the relevant issue. The relevant issue is whether DPP took a "hard look" at the new circumstances and evidence.

when the DPP Director signed the January 19, 2006, letter first disclosing DPP was not requiring a SEIS. (ROA CV1:149; CV3:203-204.)

DPP's entire "administrative record" for the two-week "administrative process" consists of only two writings:[2] DPP's Environmental Check List for the subdivision application, and the DPP Director's January 19, 2006 letter. (*Id.*; ROA CV10:180 n. 1, 200, 205-209.) Neither shows DPP took a "hard look" at whether "new circumstances" or "new evidence" require a SEIS. (*Id.*)

DPP did not circulate the issues of new circumstances and evidence to "various divisions within (DPP) and other governmental agencies." (ROA CV9:400.)[3]

Only two City employees have knowledge of DPP's decision to not require a SEIS, DPP Senior Planner Siu-Li and DPP Planner Peirson. (ROA CV8:304, 308, 326; CV9:145.)

DPP Planner Peirson prepared the January 19, 2006 letter which first disclosed DPP was not requiring a SEIS. (ROA CV8:326.) His deposition testimony is quoted verbatim in the Opening Brief (pp. 33-34) and establishes the following: Planner Peirson admitted that when he prepared the DPP Director's January 19, 2006, letter to Mr. Shafer, he did not look at the EIS:

> "Q. Did you review [the EIS] at any time before this lawsuit was filed?
>
> A. No." (ROA CV4A:519.)

He admitted he did not look at new circumstances and evidence, but only whether there had been a "substantive change to the project":

> "Q. . . . [L]et's just focus on your knowledge, of any investigation or consideration given by anybody at DPP between late 2005 when the subdivision application was filed, and the January 31st letter to determine whether a supplemental EIS needs to be filed? Are you aware of any consideration or investigation that was done?
>
> A. . . . [W]e looked at what the applicant was proposing to do and what the original approvals were from 1986 *to determine if there was a substantive change to the project.*" (ROA CV10:216; italics added.)

---

[2] The resort owner argues DPP has an "extensive administrative record" for the "project." (Resort Owner's Brief at pp. 9-10.) That is not the relevant issue. The relevant issue is what is the administrative record for DPP's decision to not require a SEIS.

[3] The resort owner argues 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 . . ." (Resort Owner's Brief at p. 9.) That is not the relevant issue. The relevant issue is that the City did not take a "hard look" at the new circumstances and the new evidence because it did not, among other things, circulate the new circumstances and the new evidence "to the various divisions within the DPP and other governmental agencies."

The letter Planner Pierson prepared did not address the new circumstances and new evidence. (ROA CV1:149; CV3:204; CV4:18; CV6:120.)

Senior Planner Siu-Li prepared DPP's reply to the second letter, from Mr. Gill. (ROA CV8:308.) His testimony is also quoted verbatim in the Opening Brief (pp. 34-35) and establishes the following: Senior Planner Siu-Li admitted that when he prepared the DPP Director's January 31, 2006, letter to Mr. Gill, he did not visit the project site:

> "Q. . . . [H]ave you ever gone out to the project site?
>
> A. No, I haven't gone to the site." (ROA V11:302; ROA CV8:302.)

He did not review the 1985 EIS:

> "Q. . . . [D]id you go back and actually review the -- let's start there, 1985 environmental impact statement?
>
> A. No." (ROA V11:314; CV8:314.)

He did not review the 1986 Special Management Permit:

> "Q. Did you go back and review the original special management permit?
>
> A. No." (*id.*)

He testified the only information available to him was the following:

> "Q. And what information was available at that time?
>
> A. The only thing that was available was the -- the letter from -- I believe it was *a letter from Mr. Shafer, the response from out Department, and thesubdivision application that we were processing.*" (ROA CV10:207; ROA CV8:308; ROA CV11:308; italics added.)
>
> ". . . Q. Anything else that you had, other than your own review of the subdivision application, when you drafted your letter of January 31st?
>
> A. Nothing else, I believe." (ROA CV9:151.)

He testified the only thing he did was to determine if the "subdivision application was not changing the existing condition of the properties":

> "Q. And between the end of November and January 31st, what, if anything, had you or your Department done to determine whether a supplemental environmental impact statement would be required for this project?
>
> A. Essentially, at the time we had the subdivision application, we also knew that the project also had a conditional use permit for joint development. So in our eyes, *the subdivision application was not changing the existing condition of the properties.*" (ROA V11:309-310; ROA CV8:309-301; ROA CV9:150.)

Finally, Senior Planner Siu-Li admitted no investigation had been conducted:

> "Q. When you signed your declaration back on March 31st [2006], its correct isn't it, that as far as you knew, the DPP had not done any investigation to determine whether or not the project would result in changes in environmental impacts in the community?
>
> THE WITNESS: No actions were taken base -- to find more information about that, you know. Based on what we had, which as basically, the letters from Eric Gill and from Ben Shafer, you know, that wasn't considered to be sufficient to justify requiring a supplemental EIS." (ROA CV9:164.)

The letter Senior Planner Siu-Li prepared did not address the new circumstances and evidence. (ROA CV1:148-149.)

Indeed, Appellees' briefs admit DPP looked only at whether "there has been a substantive change in the Project." (City's Brief at p. 24; Resort Owner's Brief at pp. 10-11.)

There is no triable issue because DPP did not take a "hard look."

III. APPLIES TO THE SUBDIVISION APPLICATION

The Opening Brief (pp. 39-47) explained that HEPA applies to the subdivision application because it is a non-exempt action seeking a discretionary consent.

HEPA clearly applies to the resort owner's subdivision application. The "triggering use" to create an action may be very small in comparison to a proposed project, but it is still a "trigger" for environmental review under HEPA. *Kahana Sunset Owners' Association v. County of Maui,* 86 Hawai'i 66, 71, 947 P.2d 378, 383 (1997) (installation of drainage line under county highway triggered need for environmental assessment for 312 unit residential development); *Citzens for Protection of North Kohala Coastline v. County of Hawai'i,* 91 Hawai'i 94, 979 P.2d 1120 (1999) (an underpass easement under State highway triggered need for environmental assessment for entire resort complex); *Sierra Club v. Office of State Planning,* 109 Hawai'i 411, 126 P.3d 1098 (2006) (construction of sewage and water transmission lines under state highway triggered environmental assessment for 1247 acre subdivision).

The City's Brief (pp. 12-17) does not contest HEPA applies. Indeed, the City has always taken the position that HEPA applied to the resort owner's subdivision application: the City did not join in the resort owner's summary judgment motion which claimed HEPA did not apply (ROA CV10:338-341); the City's most knowledgeable employees admitted DPP did not determine the application was exempt (ROA CV9:127, 162); and affidavits of five DPP

employees (filed in support of the resort owner's summary judgment motions) did not declare the application was exempt, or that DPP had an exemption list, or that the resort owner's application met an exemption on DPP's exemption list. (ROA V4:15-37.)

The resort owner ignores the following twelve (12) points in the Opening Brief which establish HEPA applies: (1) The Attorney General concludes a subdivision application is an action subject to HEPA. (2) Senior Planner Siu-Li admits HEPA applies to subdivision applications. (3) Parallel California CEQA law provides a subdivision application is subject to CEQA. (4) Honolulu's Subdivision Ordinance refers to the granting of a subdivision application as an approval. (5) DPP Senior Planner Siu-Li admits the decision to grant or deny a subdivision involves part discretionary approval. (6) Parallel CEQA law provides a land use decision which is part discretionary triggers the application of CEQA. (7) DPP's Environmental Check List for the subdivision application indicates the project involves a "shoreline setback area." (8) DPP Senior Planner Siu-Li admits the subdivision application proposes a use within the shoreline area. (9) The City and the State Department of Health concluded the subdivision application will result in lots smaller than twenty-acres (ROA V8:237, 240). (10) The resort owner admits its subdivision application could never satisfy an exemption for "subdivisions of land into lots greater than 20 acres in size." (11) The exemption argument is not supported by admissible evidence of a DPP exemption list. (12) The exemption argument is not supported by admissible evidence that the subdivision application met an exemption on a DPP exemption list.

Finally, the resort owner comes up with a new contention, that HEPA can never require a SEIS because of the resort owner's "interpretation" that an "action" is an "entire Project" not a "component part of the larger Project" and HEPA "prohibits" environmental review for the "component" subdivision application. (Resort Owner's Brief at pp. 30-32.) The resort owner's "interpretation" is once again wrong and is directly contradicted by express statements of Legislative intent contained in the Legislature and EC's requests that DPP require a SEIS for the project, directly contradicted by parallel Federal and State law, would bar any Hawaiian public agency from ever requiring a Supplemental EIS, and would once again place Hawai'i way out on a limb, far outside the mainstream of American environmental law.

IV. A PUBLIC AGENCY MUST MAKE AN INDEPENDENT INVESTIGATION

The Opening Brief (pp. 12-13) explained it is EC's interpretation an agency must make an "independent investigation" whether new circumstances or new evidence require a SEIS.

The resort owner ignores the Opening Brief and contends the opposite, that a public agency need only consider "new circumstances and evidence" presented to it by the public. (Resort Owner's Brief at p. 10.)

The resort owner's contention is once again wrong. The Court can give deference to an agency's interpretation of its own rule. *Camara v. Agsalud,* 67 Hawai'i 212, 216, 685 P.2d 794, 797 (1984) (*Camara*). In this case, the Court should give deference to EC's interpretation of its own rule that an agency must make an independent determination. The Court should also give deference to EC's conclusion that DPP's position "it should not require a SEIS unless some third party proves to DPP that it is required . . . does not appear to be correct." (ROA CV8:297.)

V. DEFERENCE SHOULD NOT BE GIVEN TO DPP

Appellees' contention the Court should give deference to DPP's decision to not require a SEIS is wrong. A Court can give deference to an agency's interpretation of its own rule (*id.*), however, DPP is not interpreting its own rule, but rather EC's rule. A Court can also give deference to an agency's discretionary determination if it involves the agency's expertise and experience in its particular field (*In re Waikoloa Sanitary Sewer Co., Inc.,* 109 Hawai'i 263, 271, 125 P.3d 484, 492 (2005)) but DPP has no expertise and experience in interpreting EC's rules. Deference belongs to the EC's determinations, not those of DPP.

VI. THE RESORT OWNER DOES NOT HAVE PERPETUITY TO COMPLETE THE PROJECT WITHOUT SUPPLEMENTAL ENVIRONMENTAL REVIEW

The resort owners' contention that if EIS approval does not have specific deadlines, the proponent of the project has "perpetuity" to complete the project without supplemental environmental review under HEPA (Resort Owner's Brief at pp. 8-9) is wrong.

The resort owner's legal citation is to H.A.R. § 11-200-26, which, with the definition of "statement" of HRS § 343-2, provides no support for the resort owner's argument:

> A[**n**] [**environmental impact**] statement . . . is usually qualified by the . . . time of the action . . . A[**n**] [**environmental impact**] statement that is accepted . . . shall satisfy the requirements of this chapter, and no other [**environmental impact**] statement . . . shall be required, to the extent that the action has not changed substantively in . . . timing . . . (HRS § 343-2 in bold.)

The resort owner also ignores the Opening Brief (p. 44) which explained the resort owner's argument was expressly rejected by parallel California law.

A proponent of a project does not have "perpetuity" to complete a project without supplemental environmental review even if EIS approval does not have specific deadlines.

VII. THE PROJECT HAS NOT PROCEEDED FORWARD

The resort owner's argument that the resort expansion project has "proceeded forward" is not correct. After more than twenty-two (22) years, construction has not yet started on all major components of the project. (ROA CV4:217-235; *see* CV3:136-137, 142-143, 200-201; CV4:12-14, 21, 394.) All 1,450 new hotel rooms, 2,054 of the 2,063 new condos, the shopping center, clubhouse, tennis center and equestrian center have not been constructed. (*Id.*) And, drainage, water and traffic infrastructures, and all public improvements, have not been completed. (*Id.*)

VIII. THE PROJECT WAS NOT REAFFIRMED

The resort owner's contention its project was "reaffirmed" when "by Ordinance . . . (the City Council) adopted the Ko'olau Loa Sustainable Communities Plan" is wrong.

A document entitled "Ko'olau Loa Sustainable Communities Plan" (Plan) dated May 1999 was part of the summary judgment motions. (ROA CV4:236-359.) The Plan was apparently prepared by DPP. (*Id.*) The Plan is, by its own terms, out of date as of 2004. (ROA CV4:346.) A City ordinance adopting the Plan is not part of the record. (ROA CV4:236-359.)

The Plan consists of 143 pages. (*Id.*) DPP mentions the resort expansion project on only 5 of the 143 pages (ROA CV4:252, 258, 318-320), and states nothing more than the following:

> Maintain existing plans to establish a major resort destination at Kuilima to provide a major source of jobs, improve shoreline access and use opportunities for residents, and create other amenities for use by residents and visitors. (ROA CV4:258.)
>
> Plans to establish a major resort at Kuilima should be maintained. It will provide a major source of jobs for Ko'olau Loa and North Shore residents, significantly improve shoreline access and use opportunities for residents, and include other amenities that can be enjoyed by residents and visitors alike. (ROA CV4:319.)

The project was not "reaffirmed."

IX. THERE IS IMPLIED IN HEPA A PRIVATE CAUSE OF ACTION

The resort owner largely ignores the Opening Brief (p. 49) which explains there is implied in HEPA a private cause of action to require a Supplemental EIS.

The resort owner first contends there can be no implied cause of action because HEPA does not "expressly" provide for a cause of action. (Resort Owner's Brief at p. 48.) The resort

owner is in essence arguing there can never be an "implied" cause of action under any Hawaiian law. The argument is directly contradicted by *Pele Defense Fund v. Paty,* 73 Hawai'i 578, 602, 837 P.2d 176, 180 (1972) (*Pele Defense Fund*), and is wrong.

The resort owner next contends *Pele Defense Fund* only applies to the specific fact pattern "of enforcing the duties and obligation of a trustee of a public trust land under the Hawaii State Constitution." (Resort Owner's Brief at p. 47.) The resort owner's contention is once again wrong. The *Pele Defense Fund* holding speaks for itself.

The resort owner next contends *Sensible Traffic Alternatives and Resources, Ltd. v. Federal Transit Administration,* 307 F.Supp.2d 1149, 1161 (D. Hawai'i 2004) does not really hold a private cause of action to compel a SEIS exists under HEPA. (Resort Owner's Brief at p. 47.) The contention is wrong. The holding of *Sensible Traffic Alternatives* speaks for itself.

The resort owner's argument is also directly contradicted by parallel NEPA law and parallel CEQA law which allow a private party to bring a cause of action to compel a SEIS. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 363, 374, 109 S.Ct. 1851, 1854, 1859, 104 L. Ed. 2d 377, 386, 392 (1989) (*Marsh*); *Temecula Band of Luiseno Mission Indians v. Rancho California Water District,* 43 Cal.App.4th 425, 437, 50 Cal.Rptr.2d 769 (1996). Once again, adoption of the resort owner's "interpretation" would place Hawai'i far out on a limb, far outside the mainstream of American environmental law.

Finally, the resort owner's argument results in an absurd conclusion: although HEPA and the SEIS Rules require a SEIS for new circumstances and evidence, no one can bring a civil lawsuit to require a public agency to require a SEIS for new circumstances and evidence. That is absurd.

X. THE NEW CIRCUMSTANCES AND EVIDENCE ARE NEW

Under NEPA, "new circumstances" means a circumstance which "comes to light after the EIS is finalized" and "new evidence" means evidence "developed after the completion of the EIS." *Marsh, supra,* 490 U.S. at 363, 374, 109 S.Ct. at 1854, 1859, 104 L. Ed. 2d at 386, 392.

In this case, the resort owner's contention that new circumstances and evidence of likely increased impacts to traffic and species is not new (Resort Owner's Brief at pp. 13-14) is wrong. The evidence of impacts to traffic and species is "new" because it came to light and was

developed after the EIS was completed and finalized.[4] (ROA CV4:22, 275, 436, 525; CV4A: 100-143, 164-180, 199, 201, 224, 228-234, 262, 272, 275, 286, 288, 401; CV5:66, 129-140; CV7:8; CV8:253-277, 282, 290-291, 340-431, 433, 628-636; CV9:62, 83, 169-184, 330-349; CV10:50 V11:95, 180-201, 253-277, 282, 290-291, 362-431, 433, 628-629.)

XI. NORTH SHORE BROUGHT UP THE NEW CIRCUMSTANCES AND EVIDENCE BEFORE THE LAWSUIT WAS FILED

North Shore gave DPP a written letter before the lawsuit was filed requesting a SEIS based on new circumstances and evidence of traffic impacts (ROA V3:204.) Indeed, the resort owner admitted that North Shore's representative Gil Riviere did the following:

> . . . Gill Riviere, . . . a current representative of KNSC met with DPP representatives in April 2006 . . . Mr. Riviere presented a letter dated April 19, 2006, in which he purported to analyze traffic studies from Kuilima's 2005 Traffic Impact Analysis Report Update, Kuilima's 1991 Traffic Impact Analysis Report, Kuilima's 1985 Traffic Impact Analysis Report, a 2005 Hawaii Tourism Visitor Activity Study, Department of Business and Economic Development statistics for 2005, and a draft of the Oahu Regional Transportation Plan 2030." (ROA CV3:204, 220.)

XII. THE LAWSUIT WAS TIMELY FILED

The resort owner ignores the Opening Brief (pp. 38-39) which explains that the lawsuit was timely filed under the 120-day statute of limitations of HRS § 343-7(a) because it was filed within 120 days of DPP's "decision to . . . approve the action" that is, within 120 days of the Director's January 19, 2006, letter stating DPP was not requiring a SEIS.

The resort owner does not discuss the Opening Brief (pp. 38-39) which explains that HRS § 343-7(b)-(c) establish 30 and 60 day statutes of limitation which run from the date "after the public has been informed of such determination pursuant to section 343-3," that is, after an agency files a notice with the Office of Environmental Quality Control (OEQC). In this case, those statutes of limitation cannot apply because DPP never filed a notice with OEQC.

The resort owner argues the lawsuit is barred by HRS § 343-7(b)(c) because Appellants did not file the lawsuit within 30 or 60 days of acquiring "actual knowledge" DPP was not requiring a SEIS. (Resort Owner's Brief at pp. 42-44.) To make the argument, the resort owner

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[4] The resort owner argued the existence of turtles and monk seals in "the Hawaiian archipelago" is not new. That is not the relevant issue. The relevant issue is the presence of turtles and monk seals at the project site since the EIS was approved in 1985.

argues for an "interpretation" of HRS § 343-7(b)-(c), that the language "after the public has been informed of such determination pursuant to section 343-3" does not mean "when an agency files a notice with OEQC" but means the "date of a party's actual knowledge." The resort owner's only legal citation for this argument is to HRS § 91-2 which provides:

> Public information. . . . (b) No 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.

However, whether DPP's decision to not require a SEIS is "valid or effective" is not the relevant issue. The relevant issue is what is the statute of limitations for a private cause of action to compel an SEIS when the agency has not filed the required notice with OEQC. No Court has ever held that in "cases where formal publication does not occur, the statute of limitations runs from the date of 'actual knowledge'" The argument has no merit.

There is no triable issue because the lawsuit was timely filed under the 120-day statute of limitations of HRS § 343-7(a), within 120 days of DPP's "decision to . . . approve the action," and within 120 days of the Director's January 19, 2006, letter stating DPP was not requiring a SEIS.

XIII. CONCLUSION

This Court should reverse the judgment and remand with directions to grant Appellants' summary judgment motion, order the City to require a Supplemental EIS, and enjoin the resort expansion project until there is full compliance with HEPA.

Dated at Honolulu, Hawai`i, December 28, 2007.

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