

CONCURRING OPINION BY ACOBA, J.

I concur in the result.

It would seem irrefutable that an environmental impact statement (EIS) cannot exist in perpetuity. See [Unite Here! Local 5 v. City & County of Honolulu](#), 120 Hawai'i 457, 472, 209 P.3d 1271, 1286 (App. 2009) (Nakamura J., dissenting) (stating that "under . . . [the] interpretation of the applicable rules and circumstances [by Respondents/Defendants-Appellees City and County of Honolulu (City) and Kuilima Resort Company (Kuilima)], because no specific deadline was established for the project's completion, the 1985 EIS would remain valid in perpetuity"). But a construction of the provisions of Hawai'i Revised Statutes (HRS) chapter 343 that would lead to a result other than the one reached here would affirm or produce the converse of that proposition. Consequently, the reasonable resolution of this writ is to order that summary judgment be entered in favor of Petitioners/Plaintiffs-Appellants Keep the North Shore Country and Sierra Club, Hawai'i Chapter [collectively, Plaintiffs], and against Respondents/Defendants-Appellees City, Henry Eng, Director of the Department of Planning and Permitting (DPP), and Kuilima [collectively, Defendants], granting the requested declaration that a supplemental environmental impact statement (SEIS) be required.

A contrary result would also violate the legislature's underlying purpose in enacting HRS chapter 343. HRS § 343-1 (Supp. 2006) states, "It is the purpose of this chapter 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." (Emphasis added.) Manifestly, the purpose of requiring an EIS is to ensure that agencies like the DPP are able to make informed decisions regarding projects that will impact the surrounding environment.

This court has stated that an EIS will be upheld if, among other things, it contains "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." Price v. Obayashi Hawaii Corp., 81 Hawai'i 171, 182, 914 P.2d 1364, 1375 (1996) (quoting Life of the Land v. Ariyoshi, 59 Haw. 156, 164-65, 577 P.2d 1116, 1121 (1978)) (footnote and citation omitted). However, it cannot be said reasonably that "environmental concerns are given appropriate consideration in decision making," HRS § 343-1, when the information is incomplete or outdated. Nor can it be said that in cases where information is outdated, agencies are able to "balanc[e] the risks of harm to the environment against the

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benefits to be derived from the proposed action[.]” Obayashi, 81 Hawai'i at 182, 914 P.2d at 1375. It would be inconsistent with the express purpose of HRS chapter 343 to conclude that agencies may rely on an EIS in making decisions when the information contained therein is insufficient.<sup>1</sup> Thus, an EIS cannot be relied on reasonably for an indefinite period of time.<sup>2</sup>

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<sup>1</sup> In their first amended complaint, Plaintiffs requested declaratory relief, stating that, “Plaintiffs respectfully request that this [c]ourt enter judgment and provide the following relief . . . [a] declaratory judgment that a [SEIS] must be prepared for the [p]roject and submitted in accordance with [HRS chapter 343].” Plaintiffs argued that the DPP, as the reviewing authority, was required to attach further conditions on approval of the subdivision application in order to ensure that changes not addressed by the 1985 EIS were examined. Plaintiffs’ letters to the DPP specifically pointed to changes in traffic, population density, and the habitats of endangered species as examples of the changed circumstances and noted that more information should be obtained before proceeding with the project.

The DPP responded that, “because no specific time limit had been imposed on the [p]roject at the time of the [p]roject's initial approval, the DPP felt it could not require an SEIS to address changes in the conditions surrounding the [p]roject caused by the passage of time.” Unite Here!, 120 Hawai'i at 461, 209 P.3d at 1275. According to the DPP, “[b]y not imposing any time limits at the time, the City Council indicated that the project could be developed at its own pace. Further, as a matter of law, the [City] cannot retroactively impose time limits or unilaterally rescind an entitlement like an approved discretionary permit.” Id. The DPP’s response to Plaintiffs’ letters plainly constituted a denial of Plaintiffs’ request to attach new conditions to the grant of the subdivision application despite claimed changes in circumstances and the passage of time. Thus, the issue before the court was whether the DPP abused its discretion in reaching that conclusion.

<sup>2</sup> The EIS specifies that the project will be developed in three phases. As Plaintiffs explained in their first amended complaint,

37. The [p]roject proposed three phases: “Phase I generally indicates a 1986 start of construction date, Phase II, commencement between 1988 to 1989, and Phase III, commencement between 1993 to 1995.” Kuilima EIS at 31.

38. Over 20 years elapsed since completion of the 1985 EIS, over 20 years have passed since the anticipated start date of the [p]roject, and approximately 10 years passed since the last phase of the [p]roject was anticipated to be initiated.

(Emphases added.) Furthermore, the initial EIS contained traffic projections until the year 2000. Despite there being no exact date by which the project was to be completed, and allowances being made for delays due to changed economic conditions and other factors, a reasonable time limitation on the relevancy of the EIS may be inferred based on both the contents of the EIS

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Supportive of this view, Hawai'i Administrative Rules (HAR) § 11-200-13(c) limits an agency's ability to utilize previous material in making a determination to approve or deny an action.

(c) Agencies shall not, without considerable pre-examination and comparison, use past determinations and previous statements to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered.

HAR § 11-200-13(c) (emphases added). Accordingly, the DPP had a duty to make an independent determination as to whether the EIS contained sufficient information to enable it to make an informed decision regarding the subdivision application. It is not sufficient that the information had been "previously accepted." Id. The information in the EIS must be "relevant to the action then being considered." Id. In the instant case, Plaintiffs alleged numerous changes to the area surrounding the project, calling into question the relevance of the information contained in the 1985 EIS to the action proposed, namely, approval of the subdivision application.<sup>3</sup>

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<sup>2</sup>(...continued)  
itself as well as changes in the circumstances surrounding the project.

<sup>3</sup> Plaintiffs alleged numerous changed circumstances around the project. The first amended complaint stated:

22. Since 1985, much has undeniably changed in the North Shore. . . . Substantial additional residential development has also occurred or is planned, including projects in Mālaekahana (120 housing lots) and Lā'ie (550 housing units). The current portions of the [p]roject which  
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The changes that Plaintiffs alleged related directly to the sufficiency of the information contained in the EIS.<sup>4</sup> As the majority indicates, the standard to be applied to agency determinations regarding the adequacy of an EIS is the "rule of reason." Majority opinion at 64. Under the rule of reason,

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but 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.

Obayashi, 81 Hawai'i at 182, 914 P.2d at 1375 (quoting Life of the Land, 59 Haw. at 164-65, 577 P.2d at 1121) (footnote and citation omitted). This standard regarding the adequacy of an EIS relates to court review of whether the agency is sufficiently apprised as to the surrounding circumstances in order to

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<sup>3</sup>(...continued)

[Kuilima] is now proposing to undertake, 20 years after the 1985 EIS, will result in significant environmental impacts or increased intensity of impacts not previously evaluated, considered, predicted, or planned. These impacts, include, but are not limited to, environmental impacts and cumulative effects relating to increased visitor trips; increased peak and non-peak traffic; increased demand on limited water resources, wastewater capacity, electrical peak capacity, and infrastructure; increased impacts on sensitive wetland and endangered water bird habitat; and increased impacts on public access to the shoreline, visual view planes and aesthetics values.

(Emphases added.)

<sup>4</sup> Allegations in the first amended complaint relating to wildlife, traffic, and natural resources all relate to the viability of the original EIS. Such evidence goes directly to establishing that the DPP violated the rule of reason in making its determination that no further conditions would be imposed on the subdivision application. As previously stated, the DPP had an independent obligation, pursuant to HAR § 11-200-13(c) to determine whether the information in the EIS was still adequate to support an informed decision regarding the subdivision application.

determine whether a project should proceed. Such a standard is no less applicable in the instant case, where there are questions as to whether the information in the EIS is adequate to inform the DPP's decision as to whether to grant the subdivision request.

An agency's initial determination that a project's impact can be sufficiently mitigated to warrant the project's approval relies heavily on projections regarding matters such as traffic and environmental impacts. Such projections are of questionable value as the project's estimated completion is moved far into the future. See, e.g., Obayashi, 81 Hawai'i at 183, 914 P.2d at 1376 (stating that an EIS must "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") (quoting Life of the Land, 59 Haw. at 164-65, 577 P.2d at 1121).<sup>5</sup> Thus, an agency's determination of whether an EIS and the measures the EIS contains to minimize the negative impacts on the surrounding area are relevant, should be reviewed under the

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<sup>5</sup> In essence, the DPP's conclusion was that the EIS was valid as long as there were no changes to the size or scope of the project. The assumption underlying this determination is that the information contained in the EIS was sufficient to enable the agency to render an informed decision. Plaintiffs brought their action to the court challenging the declaration of the DPP that "as long as Kuilima was following the appropriate subdivision rules and regulations, the [City] was obligated to continue to process the [s]ubdivision [a]pplication." Unite Here!, 120 Hawai'i at 461, 209 P.3d at 1275. However, in its order granting summary judgment in favor of Kuilima, the court concluded that it was not required to review whether there were significant changes to the area surrounding the project.

rule of reason. In making its assessment of the agency's decision, the reviewing court must examine 1) the anticipated completion date of the project or implied completion date, 2) the extent to which the EIS addressed future changes in the circumstances surrounding the project, and 3) the extent of changed circumstances surrounding the project. Such a standard should be regarded as analogous to a review for abuse of discretion inasmuch as the rule of reason gives agencies broad discretion, but does not permit them to "exceed[] the bounds of reason or disregard[] rules or principles of law[.]" Williams v. Aona, 121 Hawai'i 1, 7, 210 P.3d 501, 507 (2009) (citation omitted).