DISSENT BY ACOBA, J.

I would grant the motion for reconsideration filed by Respondent/Defendant-Appellee Turtle Bay Resort, L.L.C. (Respondent). After concluding that a twenty-year lapse in the development of the project herein required the Department of Planning and Permitting (the DPP) to consider whether a Supplemental Environmental Impact Statement (SEIS) was required, this court should have remanded the case to the DPP for a determination as to whether "significant effect[s]" on the surrounding area would be caused by the project. Hawai‘i Administrative Rule (HAR) § 11-200-26 (Supp. 2005).[1] Thus, I would remand this case to the DPP to make appropriate findings as to that question.[2]

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[1] HAR § 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 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.)

[2] HAR § 11-200-27 (Supp. 2005) states in relevant part, "The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required."

I.

As was explained in the opinion of the Intermediate Court of Appeals (ICA), see Unite Here! v. City & County of Honolulu, 120 Hawai'i 457, 461, 209 P.3d 1271, 1275 (App. 2009), and this court's majority opinion, see Unite Here! v. City & County of Honolulu, No. 28602, 2010 WL 1408403, at *6 (Haw. Apr. 8, 2010), "[Respondent] submitted [the subdivision application] to the DPP, seeking subdivision approval for approximately 744 acres of its 808-acre property. In response to the subdivision application, the DPP received two letters in January 2006, asking that the DPP require the preparation of a SEIS before approving the subdivision application." (Brackets omitted.) (Formatting altered.) However, "[t]he DPP responded [by stating] that, because no specific time limit had been imposed on the project at the time of the project's initial approval, the DPP felt it could not require a SEIS to address changes in the conditions surrounding the project caused by the passage of time." Unite Here!, 2010 WL 1408403, at *7 (brackets omitted). The DPP further concluded that there must be a change in the project before a SEIS could be required. Id. at *10. As a result, the DPP made no findings or determinations with respect to alleged significant effects that may have affected the viability of an Environmental Impact Statement (EIS) that had been adopted twenty years before. Id. at *8.

In denying the request for a SEIS, the conclusions of law of the circuit court of the first circuit (the court) similarly stated in relevant part as follows:

> 1. The law provides that courts are supposed to give deference to the expertise of agencies that deal with administrative issues. The [] court is not to substitute its judgment for the judgment of an agency. If the decision of the agency meets the "rule of reason" and the decision is not "arbitrary or capricious," the [] court shall not substitute its judgment for that of the agency.
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> 2. The DPP's decision that a [SEIS] is not required for the [p]roject meets the rule of reason standard[ ] and was not arbitrary or capricious. The timing of the [p]roject 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.
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> 3. [The p]laintiffs' concerns that form the basis of their claims in this litigation were basically expressed for the first time in the filings before this [c]ourt. However, even if the [c]ourt were to review those concerns, the [c]ourt 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[] SEIS.

Id. at *16 (some brackets omitted) (emphases omitted and emphases added). Thus, the only statements with regard to significant effects on the surrounding area were made by the court and the majority of this court.

II.

I agreed with the majority that the DPP was wrong in concluding that a change in the timing of the project could not trigger the need for a SEIS. The passage of twenty years between the start of the project and commencement of one of the project's largest construction phases meant that further review was needed to assess whether "changes in circumstances and the passage of

time[,]" id. at *34 n.1 (Acoba, J., concurring), would lead to effects not anticipated by the original EIS. As both the majority and concurring opinions concluded, timing is a relevant factor in determining the continued validity of an EIS. See id. at *32 (Acoba, J., concurring) (stating that "an [EIS] cannot exist in perpetuity"). This court has stated that "[a]dministrative conclusions of law [] are reviewed under the de novo standard inasmuch as they are 'not binding on an appellate court.'" Peroutka v. Cronin, 117 Hawai'i 323, 326, 179 P.3d 1050, 1053 (2008) (citing Bumanglag v. Oahu Sugar Co., 78 Hawai'i 275, 279, 892 P.2d 468, 472 (1995) (block format and citation omitted)) (emphasis omitted). The majority's decision that timing is a factor in determining whether to require a SEIS relied on its interpretation of the relevant Hawai'i Administrative Rules. However, "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." Unite Here!, 2010 WL 1408403, at *33 (Acoba, J., concurring).

III.

Upon reconsideration, I agree with Respondent's argument, contained in its motion for reconsideration, that by directly addressing the issue of whether there would likely be a "significant environmental effect[,]" this court usurped the DPP's role. In a similar context, it has been said that

appellate courts should not make findings that are committed to an agency's function.

> [Another] reason for requiring findings--preventing judicial usurpation of administrative functions--applies to administrative agencies with much greater force than it does to trial courts sitting without juries. The basic difference is that the limitations on fact-finding by the reviewing court are greater when administrative action is reviewed than when judicial action is reviewed. No serious harm is done if an appellate court after reversing the trial court's determination of law makes the necessary findings and the right law so as to render a judgment. But when an agency because of erroneous law makes findings on the wrong issues, the reviewing court would usurp the administrative power if it were to make its own findings. The Supreme Court has stated the applicable principle: "[W]here the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative action." [Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 34 (1943).]

Rife v. Akiba 81 Hawai'i 84, 87-88, 912 P.2d 581, 584-85 (App. 1996) (quoting 2 Kenneth Culp Davis, Administrative Law Treatise § 16.05 (1958) (footnotes omitted)) (emphasis added); accord Gray v. Admin. Dir. of the Court, State of Hawaii, 84 Hawai'i 138, 931 P.2d 580 (1997). It is the role of the court and this court to review the determinations of an agency, not to make those determinations on appeal. Cf. Briones v. State, 74 Haw. 442, 465, 848 P.2d 966, 977 (1993) ("Appellate courts neither find facts . . . nor judge credibility, nor weigh the evidence."); Helbush v. Helbush, 108 Hawai'i 508, 516, 122 P.3d 288, 296 (App. 2005) (stating that "appellate courts ought not enter findings of fact"); Application of Akina Bus Serv., Ltd., 9 Haw. App. 240, 244, 833 P.2d 93, 95 (1992) ("An appellate court will decline to consider the weight of the evidence presented or to review the findings of fact by passing upon the credibility of witnesses or

conflicts in the testimony." (Citing In re Application of Kaanapali Water Corp., 5 Haw. App. 71, 678 P.2d 584 (1984).)). By deciding what the likely impact of the project would be, due to changes in the surrounding area, this court assumed the role of the DPP.

As the concurrence previously noted, "[a]n 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." Unite Here!, 2010 WL 1408403, at *34 (Acoba, J., concurring). In the instant case, the DPP's wrong conclusion as to the SEIS requirements led it to believe that it was unnecessary to make any determinations as to unanticipated effects the project may have had on the surrounding area. However, it does not follow that because the DPP made an erroneous conclusion of law, it is to be precluded from making the necessary factual determinations under the correct rule of law. In not remanding this case to the DPP, this court has "substitute[d] its own judgement for that of the" DPP. Dole Hawai‘i Div.-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990).

Similarly, the DPP's conclusion that if the project has not changed, then it need not look for possible significant effects on the surrounding area, Unite Here!, 2010 WL 1408403, at

*11, prevented it from making determinations as to whether the EIS contained "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) (citation omitted)). Had the DPP correctly apprehended the law and the appropriate scope of its review of the subdivision application, it would have made determinations regarding whether there were significant impacts requiring a SEIS. In other words, it would have taken a "hard look," id. at 182 n.12, 914 P.2d at 1375 n.12 (other citation omitted), as to whether a SEIS was required. Thus, this court should remand this case to the DPP for further determination as to whether the changes in the timing of the project will result in effects not anticipated by the original EIS.

IV.

Furthermore, it cannot be said reasonably that this court needed to make the factual determinations regarding the impact of the project before it could decide whether the DPP's conclusions of law were accurate. As this court has noted, "courts are reluctant to 'second guess' the decision-making body

regarding the sufficiency of an EIS." Obayashi Hawaii Corp., 81 Hawai'i at 182, 914 P.2d at 1375.

> [I]t is not the province of this court "to substitute its judgment for that of an agency within the executive branch of government . . . ." Obayashi Hawaii Corp., 81 Hawai'i at 182 n.12, 914 P.2d at 1375 n.12. The flip side of this caution, however, is that this court "must ensure that the agency has taken a 'hard look' at environmental factors." Id. at 182 n.12, 914 P.2d at 1375 n.12 (quoting Stop H-3 Ass'n v. Lewis, 538 F. Supp. [149,] 159 [(D.Haw. 1982)]).

Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 342, 167 P.3d 292, 335 (2007) (ellipsis in original).

In Sierra Club, the plaintiffs challenged a determination by the Department of Transportation (DOT) that improvements to Kahului Harbor necessary to accommodate the Superferry project were exempt from the requirement of an Environmental Assessment (EA) pursuant to Hawai'i Revised Statutes (HRS) § 343-6(a)(7) and HAR § 11-200-8. Id. at 304-06, 167 P.3d at 297-99. In that case, this court did not disagree with the DOT's determination that the harbor improvements fell within a class of actions exempt from the EA requirement. Nevertheless, this court noted that, in addition to the determination as to whether an action falls within an exempt class, HRS § 343-6(a)(7) required the agency to determine whether the action would have significant impacts on the environment. Id. at 316, 167 P.3d at 309. "In other words, an agency making an exemption determination must, at least implicitly, determine that the action will probably have minimal or no significant effects on the environment--not merely that it fits the description of the exemption category." Id. (internal quotation

marks omitted). Sierra Club ultimately concluded that, because the DOT did not fully consider whether the overall project would "probably have minimal or no significant impacts, both primary and secondary, on the environment[,]" the DOT's determination that the harbor improvement was exempt from the EA requirement was wrong. Id. at 342, 167 P.3d at 335.

However, unlike Sierra Club, the instant case does not involve the requirement that agencies at least "implicitly[] determine that the action will probably have minimal or no significant effects on the environment[.]" Id. at 316, 167 P.3d at 309 (internal quotation marks omitted). That requirement is derived directly from the language of HRS § 343-6(a)(7) and acts to limit the legislature's delegation of power to the Environmental Council. HRS § 343-6(a)(7) restricts the Environmental Council's ability to create categories of exempt actions, limiting the exemptions to only those actions that will have minimal environmental impacts. In direct contrast, the instant case does not involve issues relating to exemptions, and, thus, the "minimal or no significant effects" standard from HRS § 343-6(a)(7) is not relevant to this case.

V.

Rather, to resolve the issues in this case, the language of HAR §§ 11-200-26 and 11-200-27, which governs the determination of whether a SEIS is required, must be considered. HAR § 11-200-26 provides in part that "[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." (Emphasis added.) That rule further states that "[i]f 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[.]" HAR § 11-200-26. As explained supra, the question of which "characteristics" of the project an agency must consider in determining whether a SEIS is required is purely a matter of interpreting the law.

Thus, the inquiry into whether or not the DPP actually considered changes in the project's "size, scope, location, intensity, use, and timing[,]" HAR § 11-200-26, did not require this court to examine the likely environmental effects caused by the change in the project's timing.[3] Thus, I disagree with the

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[3] Nothing in our case law suggests that this court may assume an agency's role as finder of fact on appeal. In In re Tax Appeal of Subway Real Estate Corp. v. Dir. of Taxation, 110 Hawai'i 25, 129 P.3d 528 (2006), this court reversed the Tax Appeal Court's holding that the Taxpayer was not liable for general excise tax income derived from the subleasing of property to a franchise restaurant. In doing so, this court was called upon to construe the relevant tax provisions of HRS chapter 237 and determine whether the subleasing agreement at issue amounted to "taxable business activity." Id. at 29, 129 P.3d at 532. De novo review of the conclusions of the Tax Appeal Court was required, as opposed to applying a deferential standard. Id. at 30, 129 P.3d at 533 (citing In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi, 103 Hawai'i 359, 364, 82 P.3d 804, 809 (2004); Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998)).

Similarly, this court's decision in Konno v. County of Hawai'i, 85 Hawai'i 61, 937 P.2d 397 (1997), does not stand for the proposition that an agency's failure to apply the proper legal standard means that this court may usurp the agency's role on appeal. In Konno, this court held, inter alia, that the County of Hawai'i "violated civil service statutes and the Hawai'i Constitution when it privatized the operation of the [County's] landfill." Id. at 76, 937 P.2d at 412. Furthermore, Konno reversed the agency's

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conclusion implicit in the majority's rejection of the motion for reconsideration that it was somehow necessary for the majority to examine the environmental impacts to reach the conclusion that the DPP did not follow the proper procedures.

Furthermore, in Sierra Club, the DOT did have an opportunity to consider whether the harbor improvements would "probably have minimal or no significant effects on the environment[,]" Sierra Club, 115 Hawai'i at 341, 167 P.3d at 334, but for whatever reason, declined to do so. And while both the instant case and Sierra Club required this court to examine whether the agency followed proper procedures, this court's decision in Sierra Club did not engage in factual determinations regarding the environmental impact of the harbor improvements.

Rather, in Sierra Club this court examined the DOT's exemption letter setting forth the DOT's reasoning for its decision, and concluded that the agency had "studiously restrict[ed] its consideration of environmental impact[s] to the physical harbor improvements themselves[,]" and avoided the principle determination of whether there would be significant environmental effects. Id. at 342, 167 P.3d at 335. In other words, this court discerned from the face of the DOT's EA

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conclusion of law as to whether the privatization of the landfill operations violated this State's collective bargaining laws. Id. at 77-79, 937 P.2d at 413-15. However, in contrast to the instant case, this court's conclusions in Konno were reached only after the agency had already made determinations on the same issues and had been given an opportunity to reach the proper conclusion.

exemption determination that the DOT had not followed the proper procedures in granting the exemption. Notably, in Sierra Club, this court did not step into the DOT's shoes and examine whether or not the harbor improvements would actually have a significant impact on the surrounding environment. Nor was it necessary to do so in order to reach the conclusion that the DOT had not fully considered the environmental impacts.

Moreover, the exemption issue did not need to be remanded to the DOT for any further findings. The DOT had already determined that the harbor improvements were exempt from the EA requirement. The circuit court had granted summary judgment in favor of the DOT on the basis that the improvements fell within a valid exemption to the EA requirement. Id. at 305, 167 P.3d at 298. In concluding that the DOT had not met the standard for EA exemptions, this court was required to vacate the award of summary judgment, and order entry of summary judgment in favor of the plaintiffs who challenged the exemption. Id. at 343, 167 P.3d at 336. Thus, the decision that the exemption was invalid meant that there was nothing left for the DOT to find with regard to the harbor improvements.

In contrast, in the instant case the DPP was not able to adequately address the central issue of a change in the project's timing; nor was it given the opportunity to assess the relevant facts inasmuch as much of the information regarding the changes were raised for the first time before the court. This

was the result of the DPP's erroneous conclusion regarding the applicable law, which in turn caused it to focus on the "wrong issues[.]" Rife, 81 Hawai'i at 88, 912 P.2d at 585.

VI.

However, Sierra Club is relevant to the instant case inasmuch as it held that "[t]he applicable standard of review requires that this court determine, as a matter of law, whether or not [the agency] has followed the correct procedures and considered the appropriate factors in making its determination that . . . [an action] should be exempted from the requirements of HRS chapter 343." Sierra Club, 115 Hawai'i at 342, 167 P.3d at 335 (emphasis added). See also HAR § 11-200-27 ("The accepting authority or approving agency in coordination with the original accepting authority shall be responsible for determining whether a supplemental statement is required."). The majority in Unite Here! applied this same "hard look" approach to SEISs, stating that, because "the court must ensure that the agency has taken a 'hard look' at environmental factors[,] . . . its action will only be set aside if the court finds the action to be 'arbitrary and capricious,' given the known environmental consequences." Unite Here!, 2010 WL 1408403, at *31 (quoting Obayashi Hawaii Corp., 81 Hawai'i at 182 n.12, 914 P.2d at 1375 n.12.) (emphasis omitted).

It is true that this court "must ensure that the agency has taken a 'hard look' at environmental factors[,]" id. at *20

(quoting Obayashi Hawaii Corp., 81 Hawai‘i at 182 n.12, 914 P.2d at 1375 n.12). However, this court does not assume an agency's role to determine whether it has "taken a 'hard look' at the environmental factors." Id. Rather, to ensure that the agency has taken a hard look, this court decides whether the agency, "as a matter of law," has applied the proper legal standard. Sierra Club, 115 Hawai‘i at 342, 167 P.3d at 335.

If it is plain that the agency did not apply the proper legal standard, then the agency's decision will be vacated on appellate review, no further inquiry will be required, and remand for fact finding would result. If the agency has applied the proper legal standard, this court then determines whether the action of the agency was arbitrary or capricious. In the instant case, because this court made the threshold determination that the DPP did not apply the correct legal standard, the case should have been remanded to the DPP to apply that standard. Giving agencies the opportunity to make findings is not the "blind deference" to agency determinations that this court warned against in Sierra Club, 115 Hawai‘i at 317, 167 P.3d at 310. Deference connotes that the agency has made a determination on the matter. However, the facts in the instant case plainly indicate that the DPP did not make any findings with regard to changes in the project's timing.

VII.

As previously stated, while DPP was processing Respondent's subdivision application, it received letters that the project would impact the surrounding area in ways not previously assessed by the original EIS and that a SEIS would have to be commissioned. Unite Here!, 2010 WL 1408403, at *6. The DPP refused to commission a SEIS "because no specific time limit had been imposed on the project at the time of the project's initial approval, [and] the DPP felt it could not require a[] SEIS to address changes in the conditions surrounding the project caused by the passage of time." Unite Here!, 2010 WL 1408403, at *33 n.1 (Acoba, J., concurring) (brackets, citation, and internal quotation marks omitted). Consequently, the DPP never took a "'hard look' at environmental factors." Obayashi Hawaii Corp., 81 Hawai'i at 182 n.12, 914 P.2d at 1375 n.12 (quoting Stop H-3, 538 F. Supp. at 159). However, it does not follow that, because the DPP misapprehended the law and failed to make relevant findings, this court was required to then make additional determinations as to whether a SEIS was required.

After addressing certain threshold issues, the majority began its analysis by examining the language of the applicable HAR provisions. Unite Here!, 2010 WL 1408403, at *27-28. The majority concluded that, "[b]ased on the plain language of subsection 26, every EIS is inherently 'qualified,' or limited, by, inter alia, 'the timing of the action,' i.e., some sort of

time frame." Id. at *27 (citing HAR § 11-200-26). The majority said, "For an EIS to meet its intended purpose, it must assess a particular project at a given location based on an explicit or implicit time frame." Id. The majority's conclusion was reached without having to rely on any of the information in the record regarding changes to the surrounding area.

Nor can it be said reasonably that the DPP applied the proper standard, but did so incorrectly. Although the DPP looked to HAR §§ 11-200-26 and 11-200-27 in attempting to ascertain the proper standard for SEIS determinations, it entirely omitted any mention of the "timing" factor, which appears prominently in the language of HAR § 11-200-26. The complete omission of any discussion or consideration of the timing characteristic in HAR § 11-200-26 cannot be construed simply as a misapplication of the law. Misapplication connotes that the relevant law was actually applied. Manifestly, it was not. If the DPP had made any conclusions with regard to the timing of the project, this court would have had to engage in an examination of the facts that the DPP relied upon in reaching its conclusion. We did not, because the DPP made no findings with regard to changes in the project's timing.

Inasmuch as the majority's subsequent conclusions as to the effects of the project's timing on the surrounding area were not necessary to the conclusion that the DPP erroneously interpreted the law, and the DPP's role (and not this court's

role) was to assess the potential impact of the changed circumstances, see discussion supra, I would grant Respondent's motion for reconsideration, and remand to the DPP for a determination of such potential impact in light of HAR §§ 11-200-26 and 11-200-27.