

NO. 28602

IN THE SUPREME COURT 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,

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

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CIVIL NO. 06-1-0867

KEEP THE NORTHSORE 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.

**BRIEF OF AMICUS CURIAE FIRST HAWAIIAN BANK
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BRIEF OF AMICUS CURIAE FIRST HAWAIIAN BANK

I. INTRODUCTION

Amicus Curiae First Hawaiian Bank ("FHB Amicus") files this amicus brief to urge this Court to affirm the decision of the Intermediate Court of Appeals ("ICA") because of the negative resulting impacts an adverse decision would have on Hawaii's economy and Hawaii's lenders. The heaviest impact would be laid on our construction industry, an industry which is one cornerstone of our economy.

In this amicus brief, FHB does not address the legal issues that have been addressed by other parties; instead FHB Amicus directs this Court's attention to the practical effect that an adverse decision will create: That is to create a cloud of uncertainty over every construction project in Hawaii because of the potential for unforeseen delays in the project.

Thus, FHB Amicus concentrates its efforts on aiding this Court in understanding the impact of its decision on Hawaii's construction projects, lenders, and on Hawaii's economy as a whole.

II. FACTUAL BACKGROUND

FHB Amicus adopts by reference the background descriptions in Defendant Kuilima Resort Company's ("Kuilima") Answering Brief, filed December 6, 2007; Defendants-Appellees City and County of Honolulu and Henry Eng's, Director of Department of Planning and Permitting, (the "City") Answering Brief, filed December 4, 2007; and Kuilima's Answer to Brief of Amicus Curiae filed by Conservation Council for Hawaii on March 17, 2008.

This is essentially a case where a community organization is attempting to stop the construction of a development that has already received numerous entitlements, is already in the later regulatory stages, and has expended millions of dollars in proceeding simply because this particular community organization has decided that it doesn't want the development. Kuilima and its predecessor sought and obtained approvals, development rights, and other entitlements from the City and State, that included the acceptance of the revised Environmental Impact Statement ("EIS") in 1985. Consolidated Record on Appeal ("CROA") 4/85-386. 5/1-817. Over the past twenty years, Kuilima, relying on those approvals, rights, and entitlements, has spent well in excess of \$100 million in developing the project surrounding the existing Turtle Bay Resort (the "Project") and in placing an additional \$400 million in financing on the property. CROA 3/137, 4/12-15.

In January 2006, the Department of Planning and Permitting ("DPP") received two letters simply alleging a change in timing and requesting a Supplemental EIS be prepared without presenting any supporting evidence. CROA 4A/474-475, 538. The DPP investigated the matter, consulting with various other regulatory agencies and departments and determined

that an SEIS was not required because there had not been a substantive change in the Project resulting in significant environmental impacts. CROA 4/16-20, 27-38.

As a result the lawsuit was brought seeking a declaratory judgment that an SEIS be prepared and an injunction prohibiting Kuilima from any further construction. CROA 2/55. The trial court, however, granted Kuilima's Third Motion for Summary Judgment finding that the "timing of the Project has not substantively, or essentially changed . . . even if the timing had substantively changed . . . such change is not likely to have a significant effect." CROA 12/14. The ICA affirmed the trial court's decision that an SEIS is not required under Hawaii Administrative Rules ("HAR") 11-200-26 and 11-200-27 (the "SEIS Rules") because there had been no change in the Project, explaining that such an condition precedent is the only way that the SEIS Rules can be interpreted without exceeding their enabling authority found in Hawaii Revised Statutes ("HRS") Chapter 343. Unite Here! Local 5 v. City and County of Honolulu, 120 Hawai'i 457, 465, 206 P.3d 1271, 1279 (2009).

III. DISCUSSION

Out of concern for the resulting negative impact on Hawaii's economy and Hawaii's lenders that an adverse decision in this case would have, FHB Amicus urges this Court to affirm the ICA's decision. Should this Court issue an adverse decision, the heaviest impact would undoubtedly be felt by Hawaii's construction industry; an industry that is a cornerstone of Hawaii's economy.

A. An Adverse Decision Will Create Uncertainty.

Lenders hate uncertainty. This case poses the potential scenario that even when a property owner/ borrower obtains acceptance of its EIS, almost any person can soon thereafter, even outside of the timeframe provided for in HRS § 343-7, file litigation seeking a supplemental EIS ("SEIS") for any alleged change in the surrounding community. Such litigation would

certainly cause a lengthy construction delay and cause construction to come to a grinding halt. The potential for such an unforeseen and lengthy delay to a project adds much uncertainty for a lender and just as the old Wall Street maxim that says the market hates uncertainty, that maxim equally applies to a Main Street lender. The uncertainty that a project, at any moment, could be halted indefinitely or for a lengthy period of time is a cloud on that project. Take for example a housing development, in the event that this Court issues an adverse decision, a lender will lose all certainty in the development process, being no longer able to foresee and protect itself against potential construction delays that may be brought at any time and by any person. Thus, the lender may be required to price in a delay, and the higher interest rate on the loan would ultimately result in a higher price for the home buyer or an economic downfall for the developer.

B. An Adverse Decision Will Impact Construction Loans and the Construction Industry.

In Hawaii, the loan most impacted by this case would be a construction loan. To understand the risks posed to a construction lender by the potential for unlimited and unexpected delays because of litigation filed "willy nilly" requires an understanding of a construction loan.

For all loans, a bank must determine the source of repayment of its loan. For most loans, the source of repayment is the borrower's income stream, whether it be from the job or the business. Generally, there is a historical experience of the income stream which can comfort the bank that the income stream will be adequate to repay the bank loan. A typical construction loan for a development of, say, a residential housing project, however, is different from other loans made by a bank. This is because the source of repayment for a construction loan comes from the sale of homes built with the construction loan and not from the borrower's income stream. Thus, the underwriting is more forward looking than historical, which, inherently, poses greater risks.

In an FDIC study titled The Banking Crisis of the 1980s and Early 1990s: Summary and Implications (hereinafter referred to as "The Banking Crisis"),¹ the FDIC wrote that "[t]raditionally, decisions to extend loans that are collateralized by commercial real estate property are evaluated by lenders primarily on the borrower's ability to generate earnings from the investment sufficient to cover existing debt payments. This is a fundamental tenet of the lending function." See The Banking Crisis at 155. In other words, the construction loan is to be repaid from the sale of homes being built with the construction loan. In that manner, the construction loan is similar to a loan to an automobile dealer where the loan is repaid from the sale of automobiles purchased by the dealer with the loan proceeds. In both cases, the loan is repaid from the sale of the inventory.

The FDIC further explained, however, that lending to a developer under a commercial real estate loan has "... traditionally been quite risky." See The Banking Crisis at 138. In part, that risk stems from the characteristics of the typical construction loan. Therein lays the critical difference between the construction loan to the housing developer to build its inventory of housing units and the loan to the automobile dealer to purchase its inventory of automobiles. The loan to the automobile dealer to purchase a car for sale to the public is not made until after the manufacturer has completed the production of the car so the lender has no risk the car will not be finished but bears the risk that the car will not be sold. On the other hand, a construction loan is made before the products – the homes – are completed; in fact, it is made to complete the homes. Thus, the construction lender has two risks: the risk that the homes will not be completed timely and the risk that the developer will not be able to sell the homes.

¹ In the context of the study, the FDIC was focused on office, retail and industrial properties but their comments would apply equally to housing, condominium, hotel, and other development projects because all bear the same characteristics.

construction budget, and any indefinite or lengthy delay may lead to an increase in project costs which means an inadequate construction budget, higher interest costs, a softer market thereby affecting sales, which all will contribute to an economic pitfalls for the borrower which will inevitably impact the lender.

E. The Negative Ramifications That Will Result From An Adverse Decision.

FHB Amicus believes that it would be helpful to examine the interminable damage that will be caused by delay to a project if it is possible to delay a project simply by alleging a change in circumstances sufficient to trigger a need for an SEIS.

1. Construction Costs Increase.

Inflation, whether in the form of increased wages, higher trust fund taxes, higher unemployment insurance assessments, higher medical care costs, higher material costs, all may combine to render a construction budget out of date. Normally, a borrower with a certain timeline is able to plan for inflationary factors but a two to three year litigation and SEIS delay cannot be accounted for and it is likely that delay will lead to a construction budget that is no longer viable, especially if material changes to the project are required. Not only may construction material costs increase but a delay may lead the project into the midst of labor unrest which may further delay construction as well as increase costs. Thus, the borrower will have to generate additional capital to pay for the increased costs or request the lender for additional funds which exposes the lender to additional risks because the lender cannot assess whether the project can re-commence construction without material changes to construction plans, which would cost more money. If the SEIS provides for material changes to the project, not only will this require extra money and basically a new loan, the economic vitality of the project could be eviscerated leaving the lender with the Hobson's choice of a loan with little chance of repayment or funding a larger loan with a questionable repayment future.

2. Increased Maintenance Costs for the Borrower.

A typical construction loan is disbursed in increments accounting for construction progress. A delay in the midst of construction will cause increased security costs to avoid vandalism of a project which bears a resemblance to a deserted site once construction comes to a grinding halt. Because construction is halted before completion, there will be increased maintenance costs due to the project being exposed to the elements which may result in a deterioration of the physical components of the construction.

3. Increased Cost of Funds.

A lender is in the business of lending money. Money is the lender's inventory just as an automobile dealer's inventory is automobiles. Just as the automobile dealer's inventory is purchased from the auto manufacturer, the lender purchases its inventory from the public in the form of deposits and pays interest on those deposits. Thus, a lender borrows from the public to have cash available to lend to borrowers. If the interest the lender has to pay to the public increases during a lengthy delay period, the lender's cost of funds increases and such increase is passed onto the borrower in the form of a higher interest rate, which will impact the borrower's ability to repay the loan.

4. Impact of Delay on Sales.

When a construction loan is funded, not all the units have been sold. Generally, a prudent lender will wait until 50% to 80% of the units have been presold prior to funding but repayment of the loan depends on closing the sale of approximately 80% of the units. When a project is delayed by litigation and perhaps, the need to obtain and seek approval of a SEIS and the project changes to accommodate the SEIS, then it will be difficult to persuade people to purchase and close the yet unsold units.

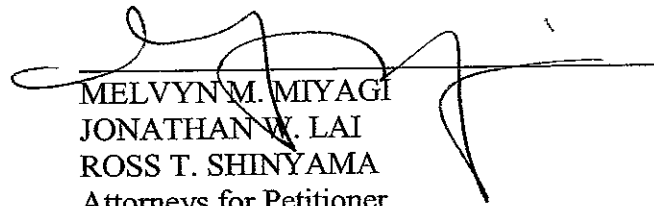
5. Impact of Delay on Sales and Lost Opportunities.

We all have been taught of the time value of money. Just as the hotel room that is not rented for a night means a night of lost occupancy which can never be recovered, money loaned to a borrower who cannot repay the loan because the project is delayed is money that is not earning income for the bank, which is a lost opportunity for the bank which cannot be recaptured. With most loans, when a lender makes a loan, it expects that the repayment will be made timely from the borrower's income, whether it be from the job or a business. But in a construction loan, the repayment of the loan comes from the sales of the homes being built, not from the borrower's income from other projects. If the timeline for completion of the project delays the borrower's ability to sell the project homes to generate earnings to pay the bank debt, the lender will now have a defaulted loan. Thus the subtle and balanced tension between the need for an EIS and the need for finality to proceed with the project will be unduly disrupted so that the see saw or balancing act between two competing needs will be de-leveled to a point of economic disruption. Lenders, and their banking regulators, do not like defaulted loans. Lenders are expected to manage credit risks. If every construction project poses the threat of an unanticipated SEIS, lenders will either have to charge more for the risk or limit its exposure to the construction lending market. At a time, when, on a daily basis, businesses and politicians decry the lack of lending to borrowers, we should not be imposing an additional burden to making a loan to a credit worthy borrower. The engine of economic growth is credit availability. Without it, businesses cannot grow and hire workers. Without it, the construction industry which was "the major source of job creation in the recent boom," cannot find its footing in this economic environment and foster our recovery. See First Hawaiian Bank's Economic Forecast, 2009-2010 Ed. at 1.

IV. CONCLUSION

Based on the foregoing, FHB Amicus respectfully requests that this Court affirm the decision of the Intermediate Court of Appeals.

DATED: Honolulu, Hawaii, December 15, 2009.


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CERTIFICATE OF SERVICE

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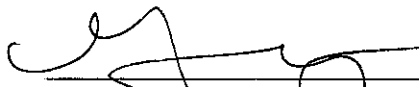
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