

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.

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KUILIMA RESORT COMPANY, a Hawaii  
general partnership,

Counterclaim Plaintiff,

vs.

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

Additional Counterclaim  
Defendants.

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

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

FIRST CIRCUIT COURT

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

JEAN R. KIKUMOTO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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CIVIL NO. 06-1-0867

KEEP THE NORTH SHORE COUNTRY, a  
Hawaii non-profit corporation, and SIERRA  
CLUB, HAWAII 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 KEEP THE NORTH SHORE COUNTRY AND  
SIERRA CLUB, HAWAII CHAPTER'S OPPOSITION TO LAND USE  
RESEARCH FOUNDATION OF HAWAII, HAWAII DEVELOPERS' COUNCIL,  
AND HAWAII LEEWARD PLANNING CONFERENCE'S MOTION FOR  
LEAVE TO APPEAR AND FILE A BRIEF OF *AMICUS CURIAE*, FILED  
DECEMBER 2, 2009, OR, IN THE ALTERNATIVE,  
MOTION TO STRIKE BRIEF of *AMICUS CURIAE* FILED BY LAND USE  
RESEARCH FOUNDATION OF HAWAII, HAWAII DEVELOPERS' COUNCIL,  
AND HAWAII LEEWARD PLANNING CONFERENCE**

**MEMORANDUM IN SUPPORT OF MOTION**

**CERTIFICATE OF SERVICE**

Of Counsel:  
ALSTON HUNT FLOYD & ING  
Attorneys at Law  
A Law Corporation

WILLIAM S. HUNT           1259-0  
LAURA P. COUCH         7860-0  
1001 Bishop Street, Suite 1800  
Honolulu, Hawai'i 96813  
Telephone: (808) 524-1800  
Facsimile: (808) 524-4591

COAST LAW GROUP LLP  
RORY R. WICKS, ESQ.       Cal. Bar #085340  
MARCO A. GONZALEZ, ESQ.   Cal. Bar #190832.  
[Admitted *Pro Hac Vice*]  
169 Saxony Road, Suite 204  
Encinitas, California 92024  
Telephone: (760) 942-8505  
Facsimile: (760) 942-8515

Attorneys for Plaintiffs-Appellants  
KEEP THE NORTH SHORE COUNTRY  
and SIERRA CLUB, HAWAII CHAPTER

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RESEARCH FOUNDATION OF HAWAII, HAWAII DEVELOPERS' COUNCIL,  
AND HAWAII LEEWARD PLANNING CONFERENCE**

Pursuant to Rule 27(a) of the Hawai'i Rules of Appellate Procedure, Plaintiffs-Appellants Keep the North Shore Country ("North Shore") and Sierra Club, Hawai'i Chapter ("Sierra Club") (collectively, "Plaintiffs-Appellants"), by and through its attorneys, Alston Hunt Floyd & Ing, hereby file their opposition to Land Use Research Foundation of Hawaii, Hawaii Developers' Council, and Hawaii Leeward Planning Conference's (collectively, "LURF") Motion for Leave to Appear and File a Brief of *Amicus Curiae*, filed December 2, 2009.

Alternatively, in the event this Court has already granted LURF leave to file its Brief of *Amicus Curiae* (the "Amicus Brief"), North Shore and Sierra Club hereby move this Court for an order striking the Amicus Brief as it improperly references and relies upon matters not part of the appellate record and exceeds the page limits set forth by the Hawai'i Rules of Appellate Procedure, Rule 40.1, regarding briefs pertaining to a writ of certiorari. The Motion to Strike is made pursuant to Rules 10(a), 27(a), and 28(g) of the Hawai'i Rules of Appellate Procedure, Hawai'i Revised Statutes § 641-2, and is based on the memorandum attached hereto and the records and pleadings on file herein. Pursuant to Hawai'i Rules of Appellate Procedure Rule 51, North Shore and Sierra Club also request this Court to impose sanctions for the attorneys' fees incurred by Appellants in the preparation of this Motion to Strike.

DATED: Honolulu, Hawai'i, December 7, 2009.



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WILLIAM S. HUNT  
LAURA P. COUCH  
RORY R. WICKS  
MARCO A. GONZALEZ

Attorneys for Plaintiffs-Appellants  
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SIERRA CLUB, HAWAII CHAPTER

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## MEMORANDUM IN SUPPORT OF MOTION

### I. INTRODUCTION

Land Use Research Foundation of Hawaii, Hawaii Developers' Council, and Hawaii Leeward Planning Conference (collectively, "LURF") filed a Motion for Leave to Appear and File a Brief of *Amicus Curiae* on December 2, 2009 (the "Motion re Amicus Brief"). The Motion re Amicus Brief included a document marked as Exhibit A, which purports to be a copy of the Brief of *Amicus Curiae* (the "Amicus Brief") LURF wishes to file with this Court.<sup>1</sup>

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<sup>1</sup> As of the filing of this Opposition, Appellants Keep the North Shore Country ("North Shore") and Sierra Club, Hawai'i Chapter ("Sierra Club") are informed and believe that this Court has not yet taken action on the Motion re Amicus Brief and the brief attached thereto as Exhibit A has not been filed with the Court. Out of an abundance of caution, however, North Shore and Sierra Club have styled their Opposition as a Motion to Strike in the Alternative, in the event the Court has permitted Exhibit A to the Motion re Amicus Brief to be filed.

The Amicus Brief is improper, does not conform to the Hawai'i Rules of Appellate Procedure, and leave to file such document must be denied. Alternatively, in the event the brief has already been accepted by the Court for filing, it must be stricken. To summarize:

- In relying upon the information set forth in Appendices A, B, and C, the brief relies heavily upon information outside the record on appeal, in violation of Hawai'i Revised Statutes ("H.R.S.") § 641-2, Hawai'i Rules of Appellate Procedure ("HRAP") Rule 28(g) and 28(b)(3), (7), and
- The brief exceeds the page limit set forth in HRAP Rule 40.1 governing writs of certiorari in the Supreme Court.

For these reasons and as set forth in more detail below, leave to file the Amicus Brief should be denied, or, alternatively, the Amicus Brief should be stricken by this Court.

## II. ARGUMENT

### A. **The Amicus Brief Relies Largely Upon Matters Not Part of the Record on Appeal and Not Properly Before this Court**

H.R.S. § 641-2 provides, in relevant part:

**... Every appeal shall be taken on the record, and no new evidence shall be introduced in the supreme court.** The appellate court may correct any error appearing on the record, but need not consider a point that was not presented in the trial court in an appropriate manner.

(Emphasis provided.) HRAP Rule 10(a) provides that the record on appeal consists of the following categories relevant herein:

- (1) the documents filed in the court or agency appealed from;  
...
- (4) the transcripts prepared for the record on appeal;  
... and
- (6) the indexes prepared by the clerk of the court appealed from.

LURF is bringing its new argument and "evidence" very late to the game. Appendices B and C to the Amicus Brief were not filed in the trial court below, are not part of the transcripts prepared for the record on appeal, and are not in the indexes prepared by the clerk of the court below. They are not part of the record and may not be considered. H.R.S. § 641-2; *Pickering v. State*, 57 Haw. 405, 408-409, 557 P.2d 125, 128 (1976) (evidence outside the record may neither be appended nor referred to in appellate brief and Supreme Court may not consider such evidence for purposes of appellate review). Further, they are not "constitutional provisions, statutes, ordinances, treaties, regulations, or rules" pertaining to points of error which HRAP Rule 28(b)(8) permits to be set out in an appendix. Appendix B consists of "Draft Recommendations of the University of Hawai'i Environmental Impact Statement Study," by Karl Kim, Denise Antolini, Peter Rappa, Nicole Lowen, and Scott Glenn. The document is a **draft, it is not a final document**. By the same token, Appendix C consists of *Kuilima Resort Company's Status Report Regarding the Kuilima Expansion Project*. It is a filing by Kuilima Resort Company in a different proceeding and does not consist of any official findings subject to consideration by this Court. *Scott v. Maria*, 19 Haw. 389 (Haw. Terr. 1909) (the Supreme Court cannot pass on the effect of evidence admitted under different pleadings than those on which the case was tried). By attempting to put these documents before the court for review and analysis, LURF is improperly attempting to introduce "new evidence" to the Supreme Court.

HRAP Rule 28(a)(10) permits parties to file an addendum to any brief filed with this Court, but the rule mandates that "[a]nything that is not part of the record shall not be appended to the brief, except as provided by this rule." There is nothing in HRAP Rule 28 which permits attachment of Appendices B and C to the Amicus Brief. The Amicus Brief is improper

and leave for filing such improper document should not be granted. Alternatively, if the Amicus Brief has been given leave for filing, it should be stricken in its entirety.<sup>2</sup>

Courts should not permit parties to file briefs that do not conform with the applicable rules of appellate procedure and review. By the same token, a brief which references items improperly appended and not part of the record on appeal must be stricken. *Orso v. City & County of Honolulu*, 35 Haw. 37, 514 P.2d 859 (1973) (court ordered defendant-appellant city to file a new opening brief without attachments other than those which were part of the record on appeal and eliminating all references to such attachments in the brief). Here, LURF has intentionally and blatantly breached several of the Hawai'i Rules of Appellate Procedure by presenting documents for this Court's consideration not part of the record otherwise not subject to this Court's consideration on appeal.

**B. The Brief Exceeds the Page Limit Set forth in HRAP Rule 40.1 regarding Writs of Certiorari to the Supreme Court**

Not only does LURF's Amicus Brief improperly rely on matters outside the record on appeal, but it is 16 pages in length, far in excess of the 12 page limit for briefs pertaining to a writ of certiorari to the Supreme Court. HRAP Rule 40.1. For this reason, also, the Amicus Brief should be stricken.

**III. CONCLUSION**

HRAP Rule 28(g) requires that all briefs of *amicus curiae* comply with the applicable provisions of HRAP Rule 28(b). Because the Amicus Brief does not so conform, leave to file should be denied.

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<sup>2</sup> It is important to note that the entire Amicus Brief must be stricken, not simply Appendices B and C, because the Amicus Brief relies heavily upon Appendices B and C throughout its argument.

Alternatively, if filing of the Amicus Brief has already been permitted, HRAP Rule 30 provides that when a brief is not in conformity with the rules, the brief may be stricken and sanctions levied. Here, it is appropriate to strike the Amicus Brief and, if a new filing is permitted, such filing must eliminate all references or inferences to the improper material. Sanctions should also be imposed for the attorneys' fees incurred by Appellants in the preparation of this Motion to Strike pursuant to HRAP Rule 51.

DATED: Honolulu, Hawai'i, December 7, 2009.



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WILLIAM S. HUNT  
LAURA P. COUCH  
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MARCO A. GONZALEZ

Attorneys for Plaintiffs-Appellants  
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10,

Defendants.

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was duly served upon the following individuals via U. S. Mail, Postage Pre-Paid to their last known addresses as follows:

CARRIE OKINAGA, ESQ.  
Corporation Counsel  
DON S. KITAOKA, ESQ.  
LORI K. K. SUNAKODA, ESQ.  
Deputies Corporation Counsel  
530 S. King Street, Room 110  
Honolulu, Hawaii 96813

Attorneys for Defendant-Appellees  
CITY AND COUNTY OF HONOLULU and  
HENRY ENG, Director of Department of  
Planning and Permitting in his official capacity

KENNETH R. KUPCHAK, ESQ.  
GREGORY W. KUGLE, ESQ.  
MARK M. MURAKAMI, ESQ.  
Damon Key Leong Kupchak Hastert  
Pauahi Tower, Suite 1600  
1003 Bishop Street  
Honolulu, Hawaii 96813

Attorneys for Plaintiff/Counterclaim  
Defendants-(Nominal) Appellees  
UNITE HERE! LOCAL 5 and ERIC W. GILL  
and Plaintiff-(Nominal) Appellee  
TODD A. K. MARTIN

TERENCE J. O'TOOLE, ESQ.  
SHARON V. LOVEJOY, ESQ.  
LANE HORNFECK MCKAY, ESQ.  
WIL K. YAMAMOTO, ESQ.  
DENNIS E. PHILLIPS, ESQ.  
Starn O'Toole Marcus & Fisher  
Pacific Guardian Center – Makai Tower  
737 Bishop Street, Suite 1900  
Honolulu, Hawaii 96813

Attorneys for Defendant-Appellee  
KUILIMA RESORT COMPANY

VERNON Y. T. WOO, ESQ.  
City Financial Tower  
201 Merchant Street, Suite 2302  
Honolulu, Hawaii 96813

Counsel for *Amici Curiae*  
NORTH SHORE CAREER TRAINING CORPORATION,  
the Laie Community Association, and the Kahuku  
Community Association

ISAAC H. MORIWAKE, ESQ.  
Earthjustice  
223 S. King Street, Suite 400  
Honolulu, Hawaii 96813

Attorney for *Amici Curiae*  
CONSERVATION COUNCIL FOR HAWAII,  
SURFRIDER FOUNDATION, HAWAII'S  
THOUSAND FRIENDS, LIFE OF THE LAND,  
MAUI TOMORROW FOUNDATION, AND KAHEA

DAVID Z. ARAKAWA, ESQ.  
Land Use Research Foundation of Hawaii  
700 Bishop Street, Suite 1928  
Honolulu, Hawaii 96813

Counsel for *Amici Curiae*  
LAND USE RESEARCH FOUNDATION OF  
HAWAII, HAWAII DEVELOPERS' COUNCIL  
and HAWAII LEEWARD PLANNING CONFERENCE

DAVID L. CALLIES, ESQ.  
Benjamin A. Kudo Professor Law  
William Richardson School of Law  
2515 Dole Street  
Honolulu, Hawaii 96822

Of Counsel for *Amici Curiae*  
LAND USE RESEARCH FOUNDATION OF  
HAWAII, HAWAII DEVELOPERS' COUNCIL  
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