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Attorney for Plaintiffs  
Kaimana Beach Coalition, an unincorporated  
Association; Richard S. Bernstein; and  
Maile Yawata

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KAIMANA BEACH COALITION, an	)	CIVIL NO. <u>99-2440-06</u>
unincorporated association; RICHARD	)	(Other Civil Action)
S. BERNSTEIN;	)	
	)	<b>PLAINTIFF'S MEMORANDUM OF</b>
Plaintiffs,	)	<b>LAW RE BURDEN OF PROOF</b>
	)	<b>ON HEALTH AND</b>
vs.	)	<b>SAFETY EXCEPTION; CERTIFICATE</b>
	)	<b>OF SERVICE</b>
CITY & COUNTY OF HONOLULU;	)	
JEREMY HARRIS; JAN N.	)	
SULLIVAN; JOHN DOES 1-10; JANE	)	
DOES 1-10; DOE BUSINESS	)	
ENTITIES 1-10 AND DOE	)	
GOVERNMENTAL ENTITIES 1-10,	)	Hearing
	)	Date: August 26, 2004
Defendants.	)	Time: 2:00 p.m.
_____	)	

**PLAINTIFF'S MEMORANDUM OF LAW RE BURDEN OF PROOF  
ON HEALTH AND SAFETY EXCEPTION**

The Kaimana Beach Coalition, by and through its attorneys Bickerton Saunders Dang & Sullivan, hereby respectfully submits the following Bench Memorandum concerning Defendant City & County of Honolulu's ("City") burden of proof to invoke and rely upon the health and safety exception to the Stipulated Judgment filed in the above-captioned matter.

The Stipulated Judgment incorporates an injunction barring further construction on the Natatorium. The injunction states:

Defendant City and County of Honolulu (the “City”) agrees to be hereby enjoined from engaging in construction, restoration or repair activity of the “ocean-based” portion of the Waikiki War Memorial and Natatorium Restoration Project (the “Restoration Project”), except as may be necessary to protect public health and safety, or as otherwise provided in paragraph C below.

*Id.* at 2, para. A (emphasis added).

It is undisputed that the City intends to immediately undertake a \$6.1 million demolition and reconstruction project involving the pool structure (“construction activity”), and that this construction activity is enjoined by the injunction. The parties dispute the application of the clause, “except as may be necessary to protect public health and safety” (“health and safety exception”).

The City bears the burden of proof in establishing that it is entitled to invoke and rely upon the health and safety exception to proceed with the enjoined construction activities.<sup>1</sup> Insofar as the health and safety exception allows certain construction activities, it acts to modify the intended effect of the injunction. Thus, a party invoking or relying upon the health and safety exception essentially seeks to modification of the injunction. Whether a party invokes the exception or files a motion to modify the injunction, the relief sought is identical.

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<sup>1</sup> See, e.g., *Tillery v. Vines*, 131 So.2d 191 (Miss. 1961) (“The burden of proof to establish the fact that a contempt has been committed is on the party asserting it, but, if the defendant claims an exception stated in the injunction, the burden is on him to bring his acts within the exception.”)

It is axiomatic that a party seeking to modify an injunction bears the burden of proof.<sup>2</sup> Thus, the City bears the burden of proof in seeking to invoke the exception/modify the injunction.

The legal conclusion that the City bears the burden of proof<sup>3</sup> is supported by important public policy concerning environmental protection. In NEPA cases involving environmental impact assessments, for example, a court may shift the burden of proof to government agencies to establish why injunctive relief should not issue against them. *I-291 Why? Ass'n v. Burns*, 372 F. Supp. 223 (D. Conn. 1974). This so-called "NEPA exception" creates an exception for

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<sup>2</sup> See, e.g., *Pacific Rivers Council v. Thomas*, 936 F.Supp. 738 (D.Idaho,1996) (Forest Service bore burden of proof on motion to modify preliminary injunction in order to allow partial grazing on national forest land where court had entered prior order enjoining the Forest Service from turning out livestock to graze on the allotment); *Spaulding v. Estate of Frey*, 666 So.2d 935 (Fla.App.5.Dist.,1995) (At hearing on motion to dissolve temporary injunction, movant has burden of proof of change in conditions that justify dissolving injunction); *Coastal Unilube, Inc. v. Smith*, 598 So.2d 200 (Fla.App. 4 Dist.,1992) (Party moving to dissolve a temporary injunction bears burden of proof); *Burkey v. Ellis*, 483 F.Supp. 897 (N.D.Ala.E.Div.,1979) (Burden of proof in a motion to dissolve an injunction is on the movant); *Eads Coal Co. v. United Mine Workers of America Dist. 12*, 327 N.E.2d 115 (Ill.App.5.Dist.,1975) (Injunction may be dissolved as to its prospective effect where court finds that equity no longer justifies its continuance, but party seeking dissolution must make the necessary showing that he is entitled to such relief); *City of Pascagoula v. O'Connor Terminal Co.*, 203 So.2d 791 (Miss. 1967) (On motion to dissolve temporary injunction the burden of proof is upon defendant as to any affirmative matter it asserted in avoidance to the bill for injunction.); *Orlando Orange Groves Co. v. Hale*

<sup>3</sup> See, e.g., *Pacific Rivers Council v. Thomas*, 936 F.Supp. 738 (D.Idaho,1996) (Forest Service bore burden of proof on motion to modify preliminary injunction in order to allow partial grazing on national forest land where court had entered prior order enjoining the Forest Service from turning out livestock to graze on the allotment); *Spaulding v. Estate of Frey*, 666 So.2d 935 (Fla.App.5.Dist.,1995) (At hearing on motion to dissolve temporary injunction, movant has burden of proof of change in conditions that justify dissolving injunction); *Coastal Unilube, Inc. v. Smith*, 598 So.2d 200 (Fla.App. 4 Dist.,1992) (Party moving to dissolve a temporary injunction bears burden of proof); *Burkey v. Ellis*, 483 F.Supp. 897 (N.D.Ala.E.Div.,1979) (Burden of proof in a motion to dissolve an injunction is on the movant); *Eads Coal Co. v. United Mine Workers of America Dist. 12*, 327 N.E.2d 115 (Ill.App.5.Dist.,1975) (Injunction may be dissolved as to its prospective effect where court finds that equity no longer justifies its continuance, but party seeking dissolution must make the necessary showing that he is entitled to such relief); *City of Pascagoula v. O'Connor Terminal Co.*, 203 So.2d 791 (Miss. 1967) (On motion to dissolve temporary injunction the burden of proof is upon defendant as to any affirmative matter it asserted in avoidance to the bill for injunction.); *Orlando Orange Groves Co. v. Hale*

NEPA cases to the traditional balancing rules courts usually apply when deciding whether to grant a preliminary injunction.

As the California federal district court explained in *State of California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), "[t]he rationale for this NEPA injunction rule is clear. NEPA represents a declared Congressional policy requiring assessment of environmental concerns. As such, Congress has weighed the equities and determined that failure to examine environmental issues represents irreparable injury. . . . If, having established a violation of NEPA, plaintiffs are not allowed to enjoin further activities until the agency complies with NEPA, then NEPA would be an "exercise in futility." *See also Puna Speaks v. Edwards*, 554 F. Supp. 117 (D. Hawaii 1982) (balancing of harm and consideration of public interest not required).

The rationale underlying the NEPA exception, which may shift the burden of proof to the government agency, applies with equal force to the City's attempt to begin construction in violation of the injunction based on the health and safety exception. The injunction is in place to ensure the City obtains a Department of Health permit for purposes of protecting public health and safety and the environment. Like a developer seeking to begin construction before conducting a NEPA environmental assessment, the City has the burden to establish that it is entitled act in violation of the injunction by beginning construction prior to obtaining the Department of Health permit.

Dated: Honolulu, Hawaii, August 26, 2004.

  
JAMES J. BICKERTON  
Attorney for Plaintiffs

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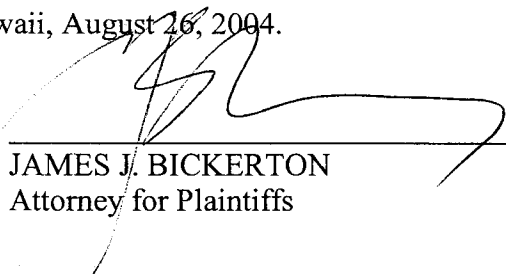
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that copies of the foregoing were duly served upon the following via hand delivery on August 26, 2004:

DAVID Z. ARAKAWA, Esq.  
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Attorneys for Defendants  
CITY AND COUNTY OF HONOLULU,  
JEREMY HARRIS and JAN N. SULLIVAN

DATED: Honolulu, Hawaii, August 26, 2004.

  
\_\_\_\_\_  
JAMES J. BICKERTON  
Attorney for Plaintiffs