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NO. 29035

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; MAUI TOMORROW, INC., a Hawaii non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association, Plaintiffs-Appellants/Cross-Appellees/Appellees/Cross-Appellants,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; BRENNON MORIOKA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; HAWAII SUPERFERRY, INC., Defendants-Appellees/Cross-Appellants/Appellants/Cross-Appellees.

2009 MAY 13 AM 11:09
FILED
K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

APPEAL AND CROSS-APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 05-1-0114)

ORDER DENYING MOTION FOR RECONSIDERATION
(By: Acoba, Duffy, JJ., and Circuit Judge Town, in place of Levinson, J., recused; and Nakayama, J., Dissenting, With Whom Moon, C.J., Joins)

Upon consideration of the motion for reconsideration filed on April 13, 2009 by Defendants-Appellees/Cross-Appellants/Appellants/Cross-Appellees the State of Hawaiʻi Department of Transportation (DOT); Brennon Morioka, in his capacity as Director of DOT; Michael Formby, in his capacity as Director of Harbors of DOT, requesting that this court review its opinion filed on March 16, 2009, the Hawaii State Legislature's Amicus Curiae Brief, filed on April 16, 2009, and the record herein,

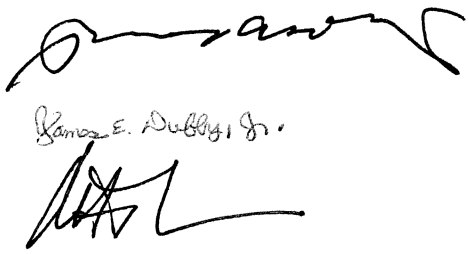
IT IS HEREBY ORDERED that the motion for reconsideration is denied.

It should be noted that the issues of severability raised in the DOT's motion for reconsideration and in the Hawaii

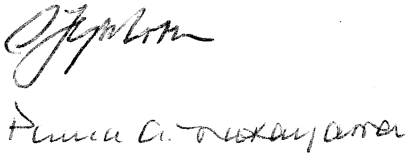
State Legislature's amicus curiae brief in support of the motion were the first time these issues were raised in this entire litigation. Neither DOT nor Superferry presented the argument of severability in defense of Act 2's constitutionality before the circuit court or before this court on appeal in its written briefs or in oral argument. As such, this argument is deemed waived.

DATED: Honolulu, Hawai'i, May 13, 2009.

Mark J. Bennett, Attorney General of Hawaii, and Dorothy Sellers, Solicitor General, for defendants-appellees/cross-appellants/appellants/cross-appellees State of Hawaii, Department of Transportation on the motion



Girard D. Lau, First Deputy Solicitor General, and Deirdre Marie-Iha, Deputy Solicitor General, for amicus curiae Hawaii State Legislature

DISSENT BY NAKAYAMA, J., IN WHICH MOON, C.J., JOINS

While I concur with the majority's conclusion that Act 2 constitutes unconstitutional special legislation, having filed a dissenting opinion on the issue of attorney's fees being awarded against the State based on the private attorney general doctrine, I would grant the motion for reconsideration of that issue.