

FIRST CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SAVE SHARKS COVE ALLIANCE,
MALAMA PUPUKEA-WAIMEA,
HAWAII'S THOUSAND FRIENDS, LARRY
McELHENY, JOHN THIELST, AND CORA
SANCHEZ,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU;
CITY COUNCIL OF THE CITY AND
COUNTY OF HONOLULU; DEPARTMENT
OF PLANNING AND PERMITTING OF
THE CITY AND COUNTY OF
HONOLULU; HANAPOHAKU LLC; DOES
1-10,

Defendants.

CIVIL NO. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

DEFENDANT CITY AND COUNTY OF
HONOLULU'S ANSWER TO PLAINTIFFS
SAVE SHARKS COVE ALLIANCE,
MALAMA PUPUKEA-WAIMEA,
HAWAII'S THOUSAND FRIENDS, LARRY
McELHENY, JOHN THIELST, AND CORA
SANCHEZ'S FIRST AMENDED
COMPLAINT FILED FEBRUARY 27, 2019;
CERTIFICATE OF SERVICE

DEFENDANT CITY AND COUNTY OF HONOLULU'S ANSWER TO PLAINTIFFS SAVE SHARKS COVE ALLIANCE, MALAMA PUPUKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, AND CORA SANCHEZ'S FIRST AMENDED COMPLAINT FILED FEBRUARY 27, 2019

COMES NOW Defendants CITY AND COUNTY OF HONOLULU, CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU, and DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU (*collectively*, the "City"), by and through their attorneys, PAUL S. AOKI, Acting Corporation Counsel, and BRAD T. SAITO and MELE N. COLEMAN, Deputies Corporation Counsel, and hereby answers Plaintiffs' SAVE SHARKS COVE ALLIANCE, MALAMA PUPUKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, AND CORA SANCHEZ's *First Amended Complaint*, filed herein on February 27, 2019 ("Complaint") as follows:

FIRST DEFENSE

The Complaint fails to state a claim against the City for which relief may be granted.

SECOND DEFENSE

1. The City admits the allegations contained in paragraphs 66, 140, 147, and 193 of the Complaint.
2. The City denies the allegations contained in paragraphs 7, 12, 14, 17, 18, 38, 40, 43, 54, 83, 87, 90-92, 97-99, 101, 113, 123, 144, 149-150, 158-163, 170, 173, 190, 199-201, 208-212, 216-219, 222, 227, 231-235, 241, 243-248, and 264 of the Complaint.
3. The City is without knowledge or information sufficient to form a reasonable belief as to the allegations contained in paragraphs 3, 15, 20-26, 29, 30-31, 34-35, 45-49, 55, 59, 61, 65, 68-71, 74, 81, 93, 95, 100, 103-112, 114, 131, 171-172, 223-226, and 268-270 of the Complaint, and, therefore, denies these allegations.

4. The allegations contained in paragraph 6, 11, 28, 32-33, 37, 42, 89, 96, 115, 155, 176-185, 187-189, 194, 196-198, 203-207, 214-215, 221, 230, 237-240, 250-253, 256-258-261, and 263 of the Complaint are Plaintiffs' legal arguments, legal conclusions, and/or characterizations of the law. No response to these allegations is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis. In addition, to the extent that these allegations attempt to argue, characterize and/or incorporate any statutes, ordinances, administrative rules, court opinions, City Council Resolutions, and/or government-issued permits (collectively, "Legal Authorities"), the City affirmatively states that these Legal Authorities speak for themselves, and, therefore, denies all allegations in the Complaint that are inconsistent with these Legal Authorities, and, any attempts to characterize the same.

5. The allegations contained in paragraph 1 of the Complaint are Plaintiffs' characterization of this action. No response to these allegations is required. However, to the extent that a response may be necessary, the City responds to these allegations as follows:

- a. The City admits only that it approved Application No. 2018/SMA-41 pursuant to Resolution No. 18-245, CD1, FD1 ("Resolution") on November 14, 2018. The City affirmatively states that the Resolution speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the Resolution, and, any attempts to characterize the same.
- b. The remaining allegations in paragraph 1 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

6. As to the allegations in paragraph 2 of the Complaint regarding the Pupukea Marine Life Conservation District (“MCLD”), the City affirmatively states that the MCLD is defined by § 13-34-1 of the Hawai‘i Administrative Rules (“HAR”). The HAR speaks for itself; therefore, the City denies all allegations in the Complaint that are inconsistent with the HAR, and, any attempts to characterize the same. Regarding the allegations in paragraph 2 of the concerning the Project Site, the Project’s Surrounding Areas, and/or the environmental impacts of the Project, the City affirmatively states that the Project Site, Surrounding Areas, and the environmental impacts are as described in the Permit and Final Environmental Impact Statement (“FEIS”) for the Project. The City denies all allegations in the Complaint that are inconsistent with the Permit and FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 2 of the Complaint consist entirely of legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

7. The allegations in paragraph 4 of the Complaint regarding Developer’s “illegal activities” are vague and ambiguous because they do not adequately describe the “development” in issue or the basis for Plaintiffs’ believe that such development is illegal. The City is, therefore, without knowledge or information sufficient to form a reasonable belief as to these allegations, and, therefore, denies the same. In addition, to the extent that any allegations in paragraph 4 of the Complaint assert legal arguments and/or legal conclusions, the City affirmatively states that no response to these allegations is required; and, therefore, also denies these allegations on that basis.

8. As to the allegations contained in paragraph 5 of the Complaint, the City affirmatively states that the City Land Use Ordinance (“LUO”) and Zoning Maps speak for

themselves, and, therefore, denies all allegations that are inconsistent with the LUO and City Zoning Maps, and, any attempts to characterize the same.

9. As to the allegations contained in paragraph 8 of the Complaint, the City affirmatively states that DPP issued SMA (Minor) Permit No. 2017/SMA-21 (ASK) (“SMA (Minor) Permit”) to Hanapohaku, LLC on August 2, 2017 pursuant to, *inter alia*, Chapter 25 of the Revised Ordinances of Honolulu, 1990 (*as amended*) (“ROH”). The City also affirmatively states that the SMA (Minor) Permit and the ROH speak for themselves, and, therefore, denies all allegations in the Complaint that are inconsistent with the SMA (Minor) Permit or ROH, and, any attempts to characterize the same.

10. As to the allegations in paragraph 9 of the Complaint, the City affirmatively states that Hanapohaku’s SMA (Minor) Permit Application and the SMA (Minor) Permit issued by DPP speak for themselves, and, therefore, denies all allegations that are inconsistent with the SMA Minor Permit Application or the SMA Minor Permit, and, any attempts to characterize the same. The remaining allegations in paragraph 9 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

11. As to the allegations contained in paragraph 10 of the Complaint, the City admits only that Malama Pupukeya-Waimea (“MPW”) filed a petition for a contested case appeal of the SMA Minor Permit, and, that MPW’s petition has not been resolved. The City denies all other allegations in paragraph 10 of the Complaint.

12. As to the allegations contained in paragraph 13 of the Complaint, the City affirmatively states that the FEIS and Department Communication No. 695 (inclusive of its Attachments) speak for themselves, and, therefore, denies all allegations in the Complaint that

are inconsistent with the FEIS and Department Communication No. 695, and, any attempts to characterize the same. The remaining allegations in paragraph 13 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

13. As to the allegations contained in paragraph 16 of the Complaint, the City admits only that former City Council Chair Ernie Martin's term ended in or around December, 2018. The City is without knowledge or information sufficient to form a reasonable belief as to the remaining allegations in paragraph 16 of the Complaint, and, therefore, denies these allegations.

14. As to the allegations contained in paragraph 19 of the Complaint, the City affirmatively states that the Complaint speaks for itself, and, therefore, denies all allegations that are inconsistent with the Complaint and any attempts to characterize the Complaint.

15. As to the allegations contained in paragraph 27 of the Complaint, the City affirmatively states that it is a municipal corporation and political subdivision of the State of Hawai'i. The City also affirmatively states that the Hawai'i State Constitution, Hawai'i Revised Statutes ("HRS"), Revised Charter of the City and County of Honolulu, 1973 (2017 Ed) ("RCH") and ROH speak for themselves, and, therefore, denies all allegations that are inconsistent with, or attempt to characterize the same.

16. As to the allegations contained in paragraph 36 of the Complaint, the City affirmatively states that HAR §13-34-1 speaks for itself, and, therefore, denies all allegations that are inconsistent with said HAR, and, any attempts to characterize the same.

17. As to the allegations in paragraph 39 of the Complaint, the City admits only that it owns and manages Pupukea Beach Park ("Park"). With respect to the allegations in paragraph 39 of the Complaint regarding the Park "Master Plan," the City affirmatively states that

Townscape, Inc. prepared a document entitled, "Pupukea Beach Park Master Plan" for the City in or around 2015 ("Master Plan"). The Master Plan speaks for itself; therefore, the City denies all allegations that are inconsistent with the Master Plan and any attempts to characterize the same. The remaining allegations in paragraph 39 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

18. As to the allegations in paragraph 41 of the Complaint, the City affirmatively states that the physical conditions and uses of the Park are dynamic and changing. Furthermore, the condition and uses of the Park speaks for themselves. Therefore, the City denies all allegations in the Complaint that are inconsistent with the actual condition and uses of the Park, and, any attempts to characterize the same. The remaining allegations in paragraph 41 of the Complaint are legal arguments and/or conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies said allegations on that basis.

19. As to the allegations contained in paragraph 44 of the Complaint, the City affirmatively states that to the best of its information and belief, Pahoe Road is privately-owned. The city is without knowledge or information sufficient to form a reasonable belief as to the remaining allegations in paragraph 44 of the Complaint, and, therefore, denies said allegations.

20. As to the allegations in paragraph 50 and 51 of the Complaint, the City affirmatively states that the SMA (Minor) Permit and Developers responses to the Draft EIS for the Project speak for themselves, and, therefore, denies all allegations that are inconsistent with the SMA (Minor) Permit or the Developer's responses to the Draft EIS comments, and, any attempts to characterize the same. The City is without knowledge or information sufficient to

form a reasonable belief as to the remaining allegations in paragraphs 50 and 51 of the Complaint, and, therefore, denies these allegations.

21. As to the allegations contained in paragraph 52 of the Complaint regarding the 6 ft. high chain-link fence, the City affirmatively states that Developer has not installed the fence, as required by the SMA (Minor) Permit. Regarding the allegations in paragraph 52 of the Complaint that attempt to quote and/or characterize the SMA (Minor) Permit, the City affirmatively states that the SMA (Minor) Permit speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the SMA (Minor) Permit, and, any attempts to characterize the same. Finally, regarding the allegations in paragraph 52 of the Complaint concerning the “wooden planters,” the City affirmatively states that it is without knowledge or information sufficient to form a reasonable belief as to these allegations, and, therefore, denies the same.

22. As to the allegations contained in paragraph 53 of the Complaint, the City affirmatively states that the Final EIS (including the plans and comments for the same) speaks for itself, and, therefore, denies all allegations that are inconsistent with the same and any attempts to characterize the FEIS.

23. As to the allegations contained in paragraph 56 of the Complaint, the City affirmatively states that the phrase, “Pupukea Road Neighborhood” is vague and ambiguous. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to the allegations in paragraph 56 of the Complaint, and, therefore, denies the same.

24. As to the allegations in paragraph 57 of the Complaint, the City affirmatively states that it is without knowledge or information sufficient to form a reasonable belief as to whether a “large semi-tractor-trailer” and delivery trucks block Pupukea Road every day when

making deliveries to Foodland. However, the City specifically denies that the Foodland deliveries create a “special danger.” The allegations in paragraph 57 of the Complaint concerning the traffic impacts of the Project on the “Pupukea Road Neighborhood,” call for speculation and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City affirmatively states that the impacts of the Project are described in the FEIS, which speaks for itself. Therefore, the City denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same. The City is without knowledge or information sufficient to form a reasonable belief as to the remaining allegations in paragraph 57 of the Complaint, and, therefore, denies these allegations.

25. As to the allegations in paragraph 58 of the Complaint concerning the physical reconfiguration of the Foodland parking lot, the City affirmatively states that the Project documents (i.e., applications, plans, and FEIS) speak for themselves, and, therefore, denies all allegations that are inconsistent with the Project documents, and, any attempts to characterize the same. With respect to the allegations in paragraph 58 concerning the impacts of the Foodland parking lot reconfiguration, the City affirmatively states that these allegations call for speculation and assert legal arguments and/or legal conclusions to which no response is required; to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

26. As to the allegations in paragraph 60 of the Complaint concerning the physical condition of Kamehameha Highway, the City affirmatively states that the physical condition of Kamehameha Highway speaks for itself, and, therefore, denies all attempts to characterize Kamehameha Highway, and, all allegations that are inconsistent with the true and actual

condition of Kamehameha Highway. The allegations in paragraph 60 of the Complaint which describe Kamehameha Highway as “the sole artery from Wahiawa to Kaneohe” are vague and ambiguous, call for speculation, and present an incomplete hypothetical. The City is thus, without knowledge or information sufficient to form a reasonable belief as to these allegations, and, therefore, denies the same. Finally, with respect to the allegations in paragraph 60 of the Complaint concerning stop signs and stop lights along Kamehameha Highway, the City affirmatively states that the City and State’s inventories of stop signs and stop lights speak for themselves, and, therefore, denies all allegations in the Complaint that are inconsistent with said inventories and/or the true and actual state of Kamehameha Highway and its intersections.

27. As to the allegations in paragraph 62 of the Complaint, the City affirmatively states that the State of Hawaii Sea Level Rise Vulnerability and Adaptation Report (“Report”) speaks for itself, and, therefore, denies all allegations that are inconsistent with the Report and any attempts to characterize the same. The remaining allegations in paragraph 62 of the Complaint are legal conclusions and/or legal arguments to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies said allegations on that basis.

28. The allegations in paragraph 63 of the Complaint call for speculation and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City affirmatively states that the impacts of the Project are described in the FEIS, which speaks for itself; therefore, the City denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same.

29. As to the allegations contained in paragraph 64 of the Complaint regarding the

FEIS, the City affirmatively states that the FEIS and the administrative record on the same speaks for itself, and, therefore, denies all allegations that are inconsistent with the FEIS and administrative record, and, any attempts to characterize the same. The allegations in paragraph 64 of the Complaint regarding “traffic hazards” call for speculation and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies said allegations on that basis. Finally, with respect to the allegations in paragraph 64 of the complaint pertaining to the actions of the State Department of Transportation, the City affirmatively states that it is without knowledge or information sufficient to form a reasonable belief as to the truth or falsity of these allegations, and, therefore, denies the same.

30. As to the allegations contained in paragraph 67 of the Complaint, the City affirmatively states that it admits only those facts contained in Finding of Fact No. 7 in the *Stipulated Findings of Fact, Conclusions of Law, and Decision and Order* attached to the Complaint as Exhibit “A” (“FOF 7”). The City denies all other allegations in paragraph 67 of the Complaint and any attempts to characterize the facts contained in FOF 7.

31. As to the allegations contained in paragraph 72 of the Complaint, the City admits that DPP issued three separate and successive permits (i.e., SMA Permit Nos. 2015/SMA-24, 2015/SMA-47 and 2015/SMA-61) for development on Parcels 68, 69, and 70 between March, 2015 and January, 2016. In addition, the City admits that DPP’s decision to issue three successive permits for development on Parcels 68, 69, and 70 did not comply with HRS Chapter 205A and ROH Chapter 25 because the DPP Director’s decisions on the second and third SMA (Minor) permits did not include a thorough review of the projects’ cumulative impacts and valuations. To the extent that paragraph 72 of the Complaint characterizes the City’s actions as

“wrongful” for reasons other than those specified in paragraph 31 of this Answer, the City denies those allegations.

32. As to the allegations in paragraph 73 of the Complaint, the City affirmatively states that MPW filed a petition for a contested case hearing and appeal regarding SMA (Minor) Permits Nos. 2015/SMA-24, 2015/SMA-47 and 2015/SMA-61 with DPP on March 9, 2016. DPP also affirmatively states that said petition was timely as to Permit No. 2015/SMA-61 but was not timely as to Permit Nos. 2015/SMA-24 or 2015/SMA-47.

33. As to the allegations contained in paragraph 75 of the Complaint pertaining to the revocation of the SMA (Minor) Permits, the City affirmatively states that DPP revoked SMA (Minor) Permit Nos. 2015/SMA-24, 2015/SMA-47 and 2015/SMA-61 by a letter dated May 2, 2016. DPP’s May 2, 2016 letter speaks for itself; therefore, DPP denies any and all allegations in the Complaint that are inconsistent with the letter, and, any attempts to characterize the same. Furthermore, regarding the allegations in paragraph 75 of the Complaint concerning the City’s enforcement actions, the City affirmatively states that DPP made a proper exercise of its discretionary enforcement powers and denies any and all allegations in the Complaint which attempt to characterize the City’s enforcement as “meaningless” or inappropriate in any manner.

34. As to the allegations in paragraph 76 of the Complaint, the City affirmatively states that DPP moved to dismiss MPW’s appeal of the SMA (Minor) Permits as moot because, *inter alia*, DPP revoked the SMA (Minor) Permit in issue and ordered Hanapohaku to restore the project site(s) to their pre-approval condition(s).

35. As to the allegations contained in paragraph 77 of the Complaint, the City affirmatively states that MPW’s contested case appeal was resolved pursuant to the Stipulated Findings of Fact, Conclusions of Law and Decision and Order entered in DPP Case No.

2016/GEN-4 on January 7, 2019 (“Stipulated Order”). The Stipulated Order speaks for itself; therefore, the City denies all allegations in the Complaint that are inconsistent with the Stipulated Order and any attempts to characterize the same.

36. Paragraph 78 of the complaint attempts to incorporate by reference all “allegations of fact, legal claims, findings, and conclusions” in the Stipulated Order. These allegations are vague and ambiguous and are not properly incorporated into the Complaint. Therefore, the City denies all allegations in paragraph 78 of the Complaint on this basis. In addition, the City affirmatively states that the Stipulated Order speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the Stipulated Protective Order, and, any attempts to characterize the same.

37. The allegations in paragraph 79 of the Complaint are vague and ambiguous because they do not identify or adequately describe the specific “development activities” in issue. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to the allegations in paragraph 79 of the Complaint, and, therefore, denies these allegations.

38. The allegations contained in paragraph 80 of the Complaint lack foundation and are vague and ambiguous because they do not adequately identify or describe the “several failed, incomplete, or rejected applications” in issue. Under these circumstances, the City responds to these allegations by affirmatively stating that DPP’s files and records regarding Developer’s permit applications speak for themselves; therefore, City denies all allegations that are inconsistent with DPP files and records regarding Developer’s applications for permits for the Project Site, and, any attempts to characterize the same. With respect to the allegations in paragraph 80 of the Complaint concerning Developer’s “After-the-Fact SMA Minor Permit

Application,” the City affirmatively states that the application speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the application, and, any attempts to characterize the same.

39. As to the allegations in paragraph 82 of the Complaint, the City affirmatively states that SMA (Minor) Permit No. 2017/SMA-21 speaks for itself, and, therefore, denies all allegations that are inconsistent with SMA (Minor) Permit No. 2017/SMA-21, and, any attempts to characterize the same.

40. As to the allegations in paragraph 84 of the Complaint, the City affirmatively states that MPW’s September 22nd, 2017 petition for appeal speaks for itself, and, therefore, denies all allegations that are inconsistent with the petition and any attempts to characterize the same. The City also affirmatively states that the timeliness of MPW’s petition for appeal is a legal conclusion to which no response is required; however, to the extent that a response to this allegation may be necessary, the City denies the allegation on that basis.

41. Paragraph 85 of the Complaint attempts to improperly incorporate by reference “all of the allegations of fact and legal claims made” in MPW’s petition for appeal. No response to these allegations is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

42. As to the allegations contained in paragraph 86 of the Complaint, the City affirmatively states that MPW has made one or more informal requests for the appointment of a hearings officer to preside over its appeal from the DPP Director’s decision to approve SMA (Minor) Permit No. 2017/SMA-21. The City denies all attempts to characterize these requests as “numerous.”

43. As to the allegations contained in paragraph 88 of the Complaint, the City admits only that DPP accepted Developer's application for an SMA (Minor) Permit during the pendency of MPW's appeal. The City specifically denies any all allegations in the Complaint which attempt to characterize DPP's acceptance the application in issue.

44. As to the allegations contained in paragraph 94 of the Complaint, the City denies that its records fail to provide an appropriate accounting of the fines imposed against Developer. The City is without knowledge or information sufficient to form a reasonable belief as to the remaining allegations in paragraph 94 of the Complaint, and, therefore, denies said allegations.

45. As to the allegations contained in paragraph 102 of the Complaint, the City admits only that DPP did not require that Developer pay all fines imposed for violations on the Project Site as a condition precedent to its acceptance of Developer's SMA (Major) Permit Application for processing. The City denies all other allegations in paragraph 102 of the Complaint.

46. As to the allegations contained in paragraph 116 of the Complaint that refer to, attempt to incorporate, and/or characterize the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations that are inconsistent with the FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 116 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

47. As to the allegations contained in paragraphs 117, 119, 122 of the Complaint, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations that are inconsistent with the FEIS, and, any attempts to characterize the same.

48. The allegations in paragraph 118 and 120 of the Compliant call for speculation

and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

49. As to the allegations contained in paragraph 121 of the Complaint that refer to, attempt to incorporate, and/or characterize the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations that are inconsistent with the FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 121 of the Complaint call for speculation and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

50. As to the allegations contained in paragraph 124 of the Complaint, the City affirmatively states that the impacts of the Project are as described in the FEIS, which speaks for itself. Therefore, the City denies all allegations that are inconsistent with the FEIS and any attempts to characterize the same. In addition, to the extent that the allegations in paragraph 124 of the Complaint call for speculation and/or constitute legal arguments and/or legal conclusions, the City also denies these allegations on that basis.

51. As to the allegations in paragraph 125 of the Complaint concerning the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations in the FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 125 of the Complaint call for speculation and are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

52. The allegations in paragraph 126 of the Complaint concerning the “contaminates

of concern” are vague and ambiguous because they lack foundation and/or an adequate explanation of the factual basis for these allegations. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to these allegations, and, denies the same. The remaining allegations in paragraph 126 of the Complaint are legal arguments and/or legal conclusions to which no response is necessary; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

53. As to the allegations contained in paragraph 127 of the Complaint regarding the EIS and its marine study, the City affirmatively states that the EIS and its marine study speaks for itself, and, therefore, denies all allegations that are inconsistent with the EIS and marine study, and, any attempts to characterize the same. The remaining allegation sin paragraph 127 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegation son that basis.

54. As to the allegations contained in paragraph 128 of the Complaint regarding the FEIS and Appendix C thereto, the City affirmatively states that the FEIS (inclusive of Appendix C) speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 128 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

55. The allegations in paragraph 128 of the Complaint are vague and ambiguous because they lack foundation and do not adequately identify the “tests” in issue. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to the

allegations in paragraph 129 of the Complaint, and, therefore, denies these allegations. In addition, to the extent that the allegations in paragraph 129 of the Complaint may be based on information in the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same.

56. The allegations in paragraph 129 of the Complaint that refer to and/or otherwise incorporate the “test results” and/or “observations” are vague and ambiguous because they lack foundation and do not adequately identify the “test results” and/or “observations” in issue. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to these allegations, and, denies these allegations on that basis. In addition, to the extent that the allegations in paragraph 129 of the Complaint may be based on information in the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same.

57. The allegations in paragraph 130 of the Complaint are vague and ambiguous because they lack foundation and do not adequately identify the “tests” in issue. Therefore, the City is without knowledge or information sufficient to form a reasonable belief as to the allegations in paragraph 130 of the Complaint, and, therefore, denies these allegations. In addition, to the extent that the allegations in paragraph 130 of the Complaint may be based on information in the FEIS, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same. The remaining allegations in paragraph 130 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies said allegations on

that basis.

58. As to the allegations contained in paragraphs 132-139 of the Complaint, the City affirmatively states that the Draft EIS, OEQC Notice, and public comments on the Draft EIS speak for themselves, and, therefore, denies all allegations that are inconsistent with the Draft EIS, OEQC Notice, and public comments, and, any attempts to characterize the same. The remaining allegations in paragraphs 132-139 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

59. With respect to the allegations in paragraphs 141-142 of the Complaint that quote or otherwise attempt to incorporate the ROH, the City affirmatively states that the ROH speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the ROH, and, any attempts to characterize the same. The remaining allegations in paragraphs 141-142 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

60. As to the allegations contained in paragraph 143 of the Complaint, the City affirmatively states that "Developer's representations" speak for themselves, and, therefore, denies all allegations that are inconsistent with "Developer's representations" and any attempts to characterize the same. The remaining allegations in paragraph 143 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

61. As to the allegations in paragraph 145 of the Complaint, the City affirmatively states that DPP transmitted its report to the City Council and draft resolution recommending

approval of the SMA application via Dept. Com. 695 on or about October 23, 2018.

62. As to the allegations contained in paragraph 146 of the Complaint, the City affirmatively states that the ROH speaks for itself, and, therefore, denies all allegations that are inconsistent with the ROH, and, any attempts to characterize the same. In addition, with respect to the legal arguments and/or legal conclusions in paragraph 146 of the Complaint, the City affirmatively states that no response to these allegation is required, and, therefore, denies these allegations on that basis.

63. The allegations contained in paragraph 148 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

64. As to the allegations contained in paragraph 151 of the Complaint, the City affirmatively states that HRS Chapter 205A speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with HRS Chapter 205A, and, any attempts to characterize the same.

65. As to the allegations in paragraph 152 of the Complaint, the City affirmatively states that the Oahu General Plan speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the general plan, and, any attempts to characterize the same. The remaining allegations in paragraph 152 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

66. As to the allegations contained in paragraph 153-154 and 156-157 of the Complaint, the City affirmatively states that the North Shore Sustainable Communities Plan ("NSSCP") speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with

the NSSCP, and, any attempts to characterize the same. The remaining allegations in paragraph 153-154 and 156-157 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

67. As to the allegations contained in paragraph 164 of the Complaint, the City affirmatively states that the ROH speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the ROH, and, any attempts to characterize the same. The remaining allegations in paragraph 164 of the Complaint are legal arguments and/or legal conclusions to which nor response is required; however, to the extent that a response to these allegation may be necessary, the City denies these allegations on that basis.

68. As to the allegations contained in paragraph 165 of the Complaint, the City affirmatively states that Resolution 18-245 and Department Communication No. 695 speak for themselves, and, therefore, denies all allegations in the Complaint that are inconsistent with Resolution 18-245 and Department Communication No. 695, and, any attempts to characterize the same. The remaining allegations in paragraph 165 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

69. As to the allegations contained in paragraphs 166-168 of the Complaint, the City admits only that Resolution No. 18-245, CD1 was heard by the City Committee on Zoning and Housing on November 7, 2018. With respect to the allegations in paragraph 166-168 of the Complaint regarding said the November 7, 2018 meeting of the Committee of Zoning and Housing, the City affirmatively states that the record of proceedings speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the record of

proceedings, and, any attempts to characterize the same.

70. As to the allegations contained in paragraph 169 of the Complaint, the City affirmatively states that the Honolulu City Council, chaired by former Council Chair Ernie Martin, approved the SMA (Major) Permit pursuant to Resolution No. 18-245, CD1, FD1 on November 18, 2018.

71. The allegations in paragraph 174 of the Complaint are Plaintiffs' characterization of their action; no response to these allegations is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

72. As to the allegations in paragraph 175 of the Complaint, the City reasserts and incorporates by reference, all of the above-responses.

73. As to the allegations contained in paragraph 186 of the Complaint, the City reasserts and incorporates by reference, all of the above responses.

74. As to the allegations contained in paragraph 191 of the Complaint, the City reasserts and incorporates by reference, all of the above responses.

75. As to the allegations contained in paragraph 192 of the Complaint, the City affirmatively states that HRS Chapter 205A speaks for itself, and, therefore, denies all allegations that are inconsistent with HRS Chapter 205A, and, any attempts to characterize the same.

76. As to the allegations contained in paragraph 195 of the Complaint, the City affirmatively states that the North Shore Sustainable Communities Plan was adopted pursuant to Ordinance 11-3 on or about May 3, 2011.

77. As to the allegations in paragraph 202 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

78. As to the allegations in paragraph 213 of the Complaint, the City reasserts and incorporates by reference, all of the above responses.

79. As to the allegations contained in paragraph 220 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

80. As to the allegations contained in paragraph 228 of the Complaint, the City reasserts and incorporates by reference all of the above-responses.

81. Paragraph 229 of the Complaint improperly attempts to incorporate by reference Plaintiffs' "comments and other community and agency comments, submitted on the Environmental Impact Statement Preparation Notice [and] Draft EIS." The City denies these allegations on the basis that they are not properly incorporated into the Complaint. In addition, the City affirmatively states that the allegations in paragraph 229 of the Complaint are vague and ambiguous because they do not adequately describe the substance of the comments in issue or the purposes for which these comments are asserted; therefore, the City is without knowledge or information sufficient to form a reasonable belief as to these allegations, and, therefore, also denies these allegations on that basis.

82. As to the allegations in paragraph 236 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

83. As to the allegations contained in paragraph 242 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

84. As to the allegations contained in paragraph 249 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

85. As to the allegations contained in paragraphs 254 and 255 of the Complaint, the city affirmatively states that the HAR speak for itself, and, therefore, denies all allegations that

are inconsistent with the HAR, and, any attempts to characterize the same.

86. As to the allegations contained in paragraph 262 of the Complaint regarding Developer's "studies of ground water and ocean water, and recent testing of the drainage ditch[,]” the City affirmatively states that said studies and tests speak for themselves, and, therefore, denies all allegations in the Complaint that are inconsistent with and/or attempt to characterize the same. The remaining allegations in paragraph 262 of the Complaint are legal arguments and/or legal conclusions to which no response is required; however, to the extent that a response to these allegations may be necessary, the City denies these allegations on that basis.

87. As to the allegations contained in paragraph 265 of the Complaint, the City affirmatively states that the FEIS speaks for itself, and, therefore, denies all allegations in the Complaint that are inconsistent with the FEIS, and, any attempts to characterize the same.

88. The allegations in paragraph 266 of the Complaint are Plaintiffs' characterization of their action. No response to these allegations is required. However, to the extent that a response to these allegations may be necessary, the City affirmatively states that it is without knowledge or information sufficient to form a reasonable belief as to these allegations, and, therefore, denies these allegations.

89. As to the allegations in paragraph 267 of the Complaint, the City reasserts and incorporates by reference all of the above responses.

90. The City denies each and every allegation in the Complaint that is not specifically admitted, denied, or affirmatively responded to in the above-responses.

THIRD DEFENSE

All of the City's official acts at issue in the above-captioned matter were done or performed in compliance with the law.

FOURTH DEFENSE

All official documents in issue were issued and/or approved by the City in compliance with the law.

FIFTH DEFENSE

The Court lacks subject matter jurisdiction over Plaintiffs' claims, in whole or in part.

SIXTH DEFENSE

Plaintiffs' lack standing to bring this action, in whole or in part.

SEVENTH DEFENSE

One or more of Plaintiffs' claims are not ripe.

EIGHTH DEFENSE

One or more of Plaintiffs' claims are barred by the primary jurisdiction doctrine.

NINTH DEFENSE

The City cannot be held liable on any claim based on acts or omission in performing or failing to perform a discretionary function or duty.

TENTH DEFENSE

One or more Plaintiffs have failed to exhaust their administrative remedies.

ELEVENTH DEFENSE

One or more Plaintiffs do not have standing or a private right of action to bring the claims in the Complaint.

TWELFTH DEFENSE

The relief sought by Plaintiffs would violate the separation of powers doctrine.

THIRTEENTH DEFENSE

Plaintiffs' claims and/or requested relief would violate the political question doctrine.

FOURTEENTH DEFENSE

One or more of Plaintiffs' claims are barred by the applicable statute of limitations.

FIFTEENTH DEFENSE

The City's conduct which is at issue in this case was, at all times, lawful, reasonable, and proper.

SIXTEENTH DEFENSE

One or more of Plaintiffs' claims against the City are barred by the doctrines of estoppel, waiver, consent, and/or laches.

SEVENTEENTH DEFENSE

The City gives notice that it may rely on the defense of unclean hands on the part of Plaintiffs.

EIGHTEENTH DEFENSE

Plaintiff's claims against the City may be barred by their own misrepresentations and/or misconduct.

NINETEENTH DEFENSE

The City may rely upon the defenses set forth in Rule 8(c), 9, and 12(b) and (h) of the Hawaii Rules of Civil Procedure.

TWENTIETH DEFENSE

The City reserves the right to assert any other affirmative defenses that become known through further discovery and/or investigation.

PRAAYER FOR RELEIF

WHEREFORE, the City prays for the following:

- A. That the Complaint be dismissed with prejudice;
- B. That the City be awarded reasonable attorney's fees and costs;
- C. That the Court declare the City actions and approvals at issue in this case lawful in all respects; and
- D. That this Court order and award the City such other and further relief as it may deem just and proper, whether at law or in equity.

DATED: Honolulu, Hawaii, May 6, 2019.

PAUL S. AOKI
Acting Corporation Counsel

By 

BRAD T. SAITO
Deputy Corporation Counsel
Attorney for Defendants
City and County of Honolulu;
City Council of the City and County of
Honolulu; Department of Planning and
Permitting of the City and County of Honolulu

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

SAVE SHARKS COVE ALLIANCE,
MALAMA PUPUKEA-WAIMEA,
HAWAII'S THOUSAND FRIENDS, LARRY
McELHENY, JOHN THIELST, AND CORA
SANCHEZ,

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU;
CITY COUNCIL OF THE CITY AND
COUNTY OF HONOLULU; DEPARTMENT
OF PLANNING AND PERMITTING OF
THE CITY AND COUNTY OF
HONOLULU; HANAPOHAKU LLC; DOES
1-10,

Defendants.

CIVIL NO. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2019, a copy hereof was served upon the following
in the manner specified below:

Served via U.S. Mail:

MARGARET DUNHAM WILLE
TIMOTHY VANDEVEER
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Attorneys for Hanapohaku LLC

DATED: Honolulu, Hawaii, May 6, 2019.



BRAD T. SAITO
Deputy Corporation Counsel
Attorney for Defendants
City and County of Honolulu;
City Council of the City and County of
Honolulu; Department of Planning and
Permitting of the City and County of Honolulu