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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, CORA SANCHEZ, and SURFRIDER FOUNDATION,

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU; CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU; DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND

Civil No. 19-1-0057-01 JHA
(Declaratory and Injunctive Relief)

COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM IN SUPPORT OF MOTION; APPENDIX (TABS A-H); NOTICE OF HEARING and CERTIFICATE OF SERVICE

Hearing
Date: October 20, 2020
Time: 10:00 a.m.
Judge: Hon. James H. Ashford

Trial Date: February 22, 2021

COUNTY OF HONOLULU; HANAPOHAKU LLC; DOES 1-10, Defendants.
HANAPOHAKU LLC, Counterclaim Plaintiff, v. SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ, Counterclaim Defendants.

COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

Counterclaim Defendants SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ jointly move for judgment on the pleadings or, in the alternative, for summary judgment, on Defendant/Counterclaimants HANAPOHAKU LLC's Counterclaims Filed September 27, 2019.

This Motion is brought under Article I § 4 of the Constitution of the State of Hawai'i, the First Amendment of the Constitution of the United States of America, and Rules 7, 12(b)(6), 12(c), and 56 of the Hawai'i Rules of Civil Procedure. It is based upon the attached Memorandum, the Appendix, the files and records in this case, and other matters as may be presented at a hearing on this Motion.

DATED: Honolulu, Hawai‘i, September 28, 2020.

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, CORA SANCHEZ, and SURFRIDER FOUNDATION, Plaintiffs, v. 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) **MEMORANDUM IN SUPPORT OF MOTION**
HANAPOHAKU LLC, Counterclaim Plaintiff, v. SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ, Counterclaim Defendants.	

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On March 13, 2020, Counterclaim Defendants Save Sharks Cove Alliance ("**SSCA**"), Mālama Pūpūkea-Waimea ("**MPW**"), Hawaii's Thousand Friends ("**HTF**"), Larry McElheny, John Thielst, and Cora Sanchez (collectively, "**Save Sharks Cove**") jointly filed a motion for judgment on the pleadings (the "**First Motion**"), arguing, in part, that Counterclaimant Hanapohaku LLC's (the "**Developer**'s") Counterclaims Filed September 27, 2019 (the "**Counterclaim**") seeks to penalize Save Sharks Cove for exercising their constitutional rights to petition this Court, and should be dismissed under Article I § 4 of the Constitution of the State of Hawai'i, the Petition Clause of the First Amendment to the United States Constitution (together, the "**Petition Clauses**"), and the "***Noerr-Pennington***" doctrine.

This Court denied that portion of the First Motion, but invited the parties to confer on further briefing, and to schedule a status conference with the Court to discuss additional questions the Court may have on the Petition Clauses/*Noerr-Pennington* issue. At a status conference held August 4, 2020, the Court identified three questions for further briefing:

1. Does the *Noerr-Pennington* doctrine apply only to statutory claims or also to common law claims?

2. Does Save Sharks Cove's Lawsuit constitute "sham" litigation, such that an exception to the *Noerr-Pennington* doctrine is applicable?

3. Is the doctrine a defense from liability or an immunity from being sued?

Save Sharks Cove answers those questions as follows:

1. The *Noerr-Pennington* doctrine applies to common law claims. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Theme Promotions, Inc. v. News Am. Mktg. FSI*,

546 F.3d 991 (9th Cir. 2008).[1] Federal and state courts widely understand the doctrine to immunize petitioning activity from both statutory and common law claims. *See* Part IV.A.

2. Save Sharks Cove's Lawsuit does not constitute "sham" litigation. In accordance with *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("***PRE***"), 508 U.S. 49 (1993),[2] the Developer bears the burden to show the "sham" litigation exception applies, under a two-part test. First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," *PRE*, 508 U.S. at 60, which the Court may determine as a matter of law by examining the complaint. *See id.* at 63. Only after finding that a lawsuit is objectively baseless may the Court examine the litigant's subjective intent, focusing on whether the baseless lawsuit conceals an attempt to interfere directly with the opposing party "through the use of the government *process*—as opposed to the *outcome* of that process." *Id.* at 60-61 (citations omitted) (emphasis in original). To the extent the Developer attempted to allege objective baselessness, its allegations are contradicted by the First Amended Complaint filed February 2, 2019 (the "**FAC**").[3] Because the Lawsuit is not "objectively baseless" as a matter of law, the sham exception does not apply, and Save Sharks Cove's subjective intent in filing the suit is irrelevant. *See* Part IV.B.

3. The *Noerr-Pennington* doctrine is an immunity from liability, not suit. In that sense, it is a "defense." However, the party challenging the immunity, rather than the party asserting it, bears the burden of sufficiently demonstrating that an exception to the immunity

[1] Appended at Tabs A & B, respectively.

[2] Appended at Tab C.

[3] Appended at Tab D.

exists. The distinction has no bearing on whether the Developer's Counterclaim should be dismissed. *See* Part IV.C.

II. FACTUAL SUMMARY

A. The Lawsuit

Save Sharks Cove filed this public interest lawsuit (the "**Lawsuit**") to ensure that Defendants City and County of Honolulu, its City Council, and its Department of Planning and Permitting (collectively, the "**City**") and the Developer comply with constitutional mandates, statutes, and ordinances that protect Hawai'i's coastal zone and public trust resources. *See generally* FAC. The Developer owns commercially-zoned property neighboring the environmentally-sensitive Pūpūkea Beach Park (the "**Park**") and Pūpūkea Marine Life Conservation District (the "**MLCD**"). *See* FAC ¶¶ 1-4. MPW and HTF are non-profit organizations dedicated to protecting and preserving the marine environment and shoreline, and advocating for good government practices. *See* FAC ¶¶ 21-23. Mr. McElheny, Mr. Thielst, and Ms. Sanchez are long-time residents of the North Shore of O'ahu, with specific concerns and interests in protecting the Park, MCLD, and coastal resources. *See* FAC ¶¶ 24 -26.

In July 2018, the Developer submitted an SMA Major Permit Application, to construct a new shopping center (the "**Proposed Development**"). *See* FAC ¶ 88. The application included a "non-Chapter 343" Final Environmental Impact Statement (the "**EIS**"). *See* FAC ¶ 132. To the dismay of many community members, the City rushed the approval in the final weeks of 2018, failing to appropriately review and analyze the application. *See generally id.* As a result, Plaintiffs filed this Lawsuit, alleging ten counts against the City, and three against the Developer. *See generally* FAC.

B. The Developer's Counterclaim

The Developer filed a Counterclaim on September 27, 2019, alleging abuse of process and "interference with prospective business," and demanding $13 million in damages. *See generally* Cntrcl. The Developer alleged that Save Sharks Cove filed its FAC "without an adequate legal basis to do so and, in particular, without sufficient scientific data to support an attack on the EIS or the SMA Major Permit Application," *id.* ¶ 25, presumably referring to its earlier allegation that, in response to a document request, Save Shark's Cove "included just two pages of water sampling data." *Id.* ¶¶ 21-22. The Developer alleged Save Sharks Cove is "willfully and intentionally interfering" with its relationships with current and potential tenants by "seeking to shut down current operations and delay or prevent any future ones." *Id.* ¶¶ 31-33.

C. Save Sharks Cove's First Motion for Judgment on the Pleadings

Save Sharks Cove's First Motion, filed on March 13, 2020, contended the Counterclaim (1) seeks to penalize Save Sharks Cove for exercising their constitutional rights to petition this Court, in violation of the Petition Clauses and the "***Noerr-Pennington***" doctrine; (2) violates Hawai'i's "Anti-SLAPP" statute; and (3) fails to state claims upon which relief may be granted.

This Court granted the First Motion in part, dismissing the Developer's claim for abuse of process. The Court also invited the parties to schedule a status conference with the Court to discuss additional questions the Court may have on the Petition Clauses/*Noerr-Pennington* issue.

At the August 4, 2020 telephonic status conference, the Court identified three questions for further briefing: (1) Does the *Noerr-Pennington* doctrine apply only to statutory claims or also to common law claims? (2) Does Save Sharks Cove's Lawsuit constitute "sham" litigation, such that an exception to the *Noerr-Pennington* doctrine is applicable? (3) Is the doctrine a defense from liability or an immunity from being sued?

III. LEGAL STANDARDS

A. Motion for Judgment on the Pleadings

A Rule 12(c) motion "serves much the same purpose" as a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, "except that it is made after the pleadings are closed." *Haw. Med. Ass'n v. Haw. Med. Servs. Ass'n*, 113 Hawai'i 77, 90, 148 P.3d 1179, 1192 (2006) (citation omitted). The movant must "clearly establish that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law." *Id.* at 91, 148 P.3d at 1193 (citation and alterations omitted). Normally, the court is "required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* "[I]n weighing the allegations of the complaint as against a motion to dismiss," however, "the court is not required to accept conclusory allegations on the legal effect of the events alleged." *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985) (citation omitted).[4]

B. Claims Against Activities Protected by the Petition Clause

Courts apply a heightened pleading standard to claims against activities that are protected by the Petition Clause, such as the filing of a lawsuit. *See, e.g., Lesane v. Hawaiian Airlines, Inc.*, 2020 WL 954964, *3 (D. Haw., Feb. 27, 2020)[5] (citing *Kottle v. NW Kidney Ctrs.*, 146 F.3d

[4] The Court may consider documents referenced in the pleadings or properly subject to judicial notice without converting a Rule 12(b)(6) motion into one for summary judgment. *See, e.g., Rohrer v. Hoyte*, 145 Hawai'i 262, 450 P.3d 1287 (Haw. Ct. App. 2019) (citation omitted); *Thomas v. Sterns*, 129 Hawai'i 294, 298 P.3d 1058 (Haw. Ct. App. 2013) (citation omitted) (no conversion if extraneous document referred to in the complaint); *see also, e.g., Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (under FRCP 12(b)(6), court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice"); *accord Wong v. Takeuchi*, 88 Hawai'i 46, 52 n.4, 961 P.2d 61 (1998) (citation omitted) ("Where a Hawai'i rule of civil procedure is identical to the federal rule, the interpretation of this rule by federal courts is highly persuasive.").

[5] Appended at Tab E.

1056, 1063 (9th Cir. 1998)) ("Allegations that the sham litigation exception applies are subject to a heightened pleading standard."). When a claim challenges activities that implicate the right to petition the government, the claim must include ***specific*** allegations that the conduct constitutes an *exception* to protection under the petition clause. *Or. Nat. Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991)[6] (allegations must be specific; conclusory allegations are insufficient to strip a litigant of *Noerr-Pennington* protection) (citation omitted). In other words, when a claim burdens petitioning activities, the claimant must make "***specific*** allegations demonstrating that the *Noerr-Pennington* protections do not apply." *Lesane*, 2020 WL 954964 at *3 (citing *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988)); *see also Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd.*, 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (stating same).

This heightened standard requires "more than the usual 12(b)(6) standard." *Mohla*, 944 F.2d at 533 (citing *Franchise Realty*, 523 F.2d at 1082). This heightened protection "is necessary to avoid a 'chilling effect on the exercise of this fundamental First Amendment right.'" *Id*. The claimant bears the burden to establish the exception. *See, e.g., Evans Hotels, LLC v. Unite Here Local 30*, 433 F. Supp. 3d 1130, 1144 (S.D. Cal. 2020) (citing *Boone*, 841 F.2d at 894; *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006)).

IV. ANALYSIS

A. *Noerr-Pennington* Applies Equally to Statutory and Common Law Claims

Petition Clause immunity applies to common law claims and statutory claims alike. The *Noerr-Pennington* doctrine originally arose in the context of antitrust, through a line of cases that held that efforts to influence public officials through litigation, lobbying, publicity, and similar

[6] Appended at Tab F.

conduct are protected by the First Amendment right to petition the Government for redress of grievances, and are not violations of antitrust law. *See Eastern RR Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The protection applies even when the petitioning activity is undertaken for a disfavored motive, such as eliminating competition. *See generally id.* The United States Supreme Court extended *Noerr-Pennington* immunity to petitioning activity directed to administrative agencies and to courts, *see Cal. Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972), and to claims outside the antitrust context. *See NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). The doctrine is now widely understood to immunize petitioning activity before any branch of government, from liability for both statutory ***and*** common law claims.

In *NAACP v. Claiborne Hardware*, the Supreme Court applied the *Noerr-Pennington* doctrine to a common law tort claim for malicious interference with business interests. The case concerned a boycott of white-owned businesses in Claiborne County, Mississippi, organized by the NAACP after demands for racial equality were not met by white elected officials. *NAACP*, 458 U.S. at 889. The business owners sued the NAACP, Mississippi Action for Progress, and more than a hundred individuals for losses caused by the boycott and for injunctive relief. *Id*. at 890. At trial, the plaintiffs prevailed on three theories: (i) malicious interference with plaintiffs' businesses, (ii) unlawful secondary boycott, and (iii) violation of Mississippi's antitrust statute. *Id.* at 891. On appeal, the Mississippi Supreme Court reversed the trial court on the secondary boycott and antitrust theories, but upheld liability on the common law tort theory. *Id.* at 894.

The U.S. Supreme Court reversed: the defendants' nonviolent boycott activities -- "speech, assembly, association, and petition" -- were protected by the First Amendment. *Id* at 911. In so holding, the Court relied on *Noerr*: "It is not disputed that a major purpose of the

boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw -- and directly intended -- that the merchants would sustain economic injury as a result of their campaign." *Id.* at 914. Nonetheless, "the nonviolent elements of petitioners' activities [were] entitled to the protection of the First Amendment." *Id.*; *see also PRE*, 508 U.S. at 59 ("Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham.") (citations omitted).

Since *NAACP*, the federal circuit courts that have addressed the issue have held that the Petition Clause limits liability for the commission of common law torts. *See, e.g., Bath Petrol. Storage, Inc. v. Market Hub Partners*, 229 F.3d 1135 (2d Cir. 2000) (affirming dismissal and applying *Noerr Pennington* immunity to state-law claims of fraud and tortious interference); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128–29 (3d Cir. 1999), *cert. denied*, 528 U.S. 871 (1999) (applying *Noerr-Pennington* immunity to state common law claims); *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 310 (4th Cir. 2003) ("although originally developed in the antitrust context, the doctrine has now universally been applied to business torts"); *Video Int'l Prod., Inc. v. Warner–Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988)[7] (applying the doctrine to tortious interference with contract because "[t]here is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust"); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983) (applying doctrine to bar liability for tortious interference); *Missouri v. Nat'l Org. for Women, Inc.*, 620 F.2d 1301, 1318-19 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980) (doctrine applies to tortious infliction of economic harm).

[7] Appended at Tab G.

The Ninth Circuit is no exception. *In Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991), ONRC filed a lawsuit against the U.S. Forest Service and a logging company, seeking to prevent logging activities in Mt. Hood National Forest. *Mohla*, 944 F.2d at 532. The logging company filed counterclaims for abuse of process and interference with business relations. *Id.* ONRC moved to dismiss under the *Noerr-Pennington* doctrine, and the district court granted the motion. *See id.* at 532-33.

The Ninth Circuit affirmed. *See id.* at 531. The Ninth Circuit agreed with the district court's finding that "ONRC's claims involve the exercise of ONRC's right to petition the courts for redress against the government and are therefore protected by the First Amendment." *Id.* at 533 (internal alterations omitted). The Court then applied a heightened pleading standard to the logging company's counterclaims, requiring that they "must include allegations of the specific activities which bring [ONRC's] conduct into one of the exceptions to *Noerr-Pennington* protection." *Id.* at 533 (citing *Franchise Realty*, 542 F.2d at 1082) (internal alterations omitted). The logging company had alleged, "ONRC's complaint was filed with the knowledge that it was baseless, with no expectation of obtaining the requested relief, but for the sole purpose of delaying and impeding [company's] logging operation through the pendency of the suit itself." *Id.* at 535. That, said the Court, was a "conclusory allegation" that failed to meet the heightened pleading standard. *Id.* And although ONRC's lawsuit was unsuccessful, the logging company "failed to plead with particularity that ONRC's suit to enjoin the logging was a sham." *Id.*

Despite the clear application of the doctrine to tort claims in *Mohla*, a later case described the application of the doctrine to state law claims in the Ninth Circuit as "unpredictable." *In re Am. Cont. Corp./Lincoln Savings & Loan Securities Litig.* ("***Lexecon***"), 102 F.3d 1524, 1538 (9th Cir. 1996), *rev'd on other grounds sub nom. Lexecon Inc. v. Milberg Weiss Bershad Hynes*

& Lerach, 523 U.S. 26 (1998). The Court in *Lexecon* illustrated this "unpredictability" by contrasting *Mohla* with *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085 (9th Cir. 1995) -- a case whose reasoning was based upon *dicta* which was later rejected by the Supreme Court. *See Lexecon*, 102 F.3d at 1538 (citing *Diamond Walnut*); *and compare Diamond Walnut*, 53 F.3d at 1087-88 (relying on *dicta* in *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983)); *with BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 527-28 (2002) (rejecting *Bill Johnson's dicta*).

The *Lexecon* court ultimately concluded that it need not rule on *Noerr-Pennington* grounds, and instead dismissed for failure to state a cognizable claim on other grounds. *Id.* at 1538-39. In a footnote, the *Lexecon* court collected several federal cases that applied the doctrine to common law tort claims -- and one, a Florida case, that ostensibly did not. *See Lexecon*, 102 F.3d at 1538 n.15.[8] The court inexplicably (in light of *Mohla*) noted, "[t]he time may come when this circuit must speak definitively on the question. However, this is not the right time, or the right case, in which to do so." *Lexecon*, 102 F.3d at 1538 n.15.

It is not clear why the Court in *Lexecon* perceived *Mohla* as less than "definitive" on whether the doctrine applied to common law tort claims, but any perceived lack of definitiveness in *Mohla* was resolved by the Ninth Circuit's unambiguous holding in *Theme Promotions Inc. v. News America Marketing FSI*, 546 F.3d 991 (9th Cir. 2008). In that case, Theme, an advertising company, and News, a publisher of newspaper inserts, were engaged in a contract dispute. *See Theme Promotions*, 546 F.3d at 997-98. During litigation, News warned third parties that if they engaged in certain conduct, they would become embroiled in the litigation. *See id.* at 998. Based on those threats, Theme alleged tortious interference with prospective business advantage

[8] In fact, the Florida case found that "the current law in Florida already provides protection for the First Amendment right to petition the government." *See Fla. Fern Growers Ass'n v. Concerned Citizens of Putnam Cnty.*, 616 So.2d 562, 568 (Fla. Ct. App. 1993).

against News. *Id.* At trial, a jury returned a verdict in favor of Theme. *See id.* at 998. The district court set aside the jury verdict, however, because the claim had been based upon conduct (threats of suit against third parties) that was protected under the doctrine. *Id.* at 1006.

On appeal, the Ninth Circuit affirmed. *Id.* at 1007. Citing to the footnote in *Lexecon*, the court stated, "[w]e have previously declined to reach the question of whether the *Noerr–Pennington* doctrine applies to state law tort claims." *Id.* (citing *Lexecon*, 102 F.3d at 1538 n. 15). Observing, however, that other circuits "have been more decisive," the Court quoted the Fifth Circuit with approval: "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *See id.* (citing *Video Int'l*, 858 F.2d at 1084). "***We agree, and we hold that the Noerr–Pennington doctrine applies to Theme's state law tortious interference with prospective economic advantage claims***." *Id.* (emphasis added). Thus, if it had not been made clear earlier in *ONRC v. Mohla*, *Theme Promotions* left no doubt that *Noerr-Penningon* applies to common law tort claims in the Ninth Circuit.

Nonetheless, five years later, the Ninth Circuit, without any reference to *Theme Promotions*, oddly suggested, in a footnote, that the question was still "open:"

> Silverman's asserted *Noerr–Pennington* defense against the plaintiffs' state law claims may well fail for the same reason the anti-SLAPP motion to strike those claims fails. But as the *Noerr–Pennington* question is not properly before us, we need not address whether the doctrine provides immunity against state common law claims at all. ***That remains an open question in this circuit***, the answer to which may well depend on state law.

Nunag-Tanedo v. East Baton Rouge Parish Sch. Bd., 711 F.3d 1136, 1141 n.2 (9th Cir. 2013) (emphasis added) (citations omitted).[9]

[9] Appended at Tab H.

Footnote 2 to *Nunag-Tanedo* was plainly wrong, and plainly *dicta*. In 2008, the Ninth Circuit in *Theme Promotions* unambiguously held that *Noerr-Penninton* applied to Theme's state law tort claims, because common law torts cannot any more "permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Theme Promotions*, 546 F.3d at 1007 (citing *Video Int'l*, 858 F.2d at 1084). *Nunag-Tanedo* did not mention, much less overrule, *Theme Promotions* -- and the Court acknowledged that the *Noerr-Pennington* question was not even properly before it. *Nunag-Tanedo*, 711 F.3d at 1141 n.2

Footnote 2 to *Nunag-Tanedo* provides the context for *Lesane v. Hawaiian Airlines, Inc.*, 2020 WL 954964 (2020) (D. Haw. Feb. 27, 2020). In *Lesane*, the defendant invoked *Noerr-Pennington* immunity and sought dismissal of the plaintiff's "Counter-Counterclaim," which alleged claims of fraud and violation of HRS § 480-2. *Lesane*, 2020 WL 954964 at *1. In his Findings and Recommendations, the Magistrate Judge determined that the doctrine immunized the defendant against the HRS § 480-2 claim, and recommended dismissal. *Id.* at *3-4. He also found that the doctrine did not bar state common law claims, and instead recommended dismissal of plaintiff's fraud claim under Rule 9(b)'s heightened pleading standard. *Id.* at *4.

On objection and review, Judge Otake observed that the Magistrate Judge had relied on the *Nunag-Tanedo* footnote "for the proposition that the Ninth Circuit has yet to address whether the *Noerr-Pennington* doctrine provides immunity against state common law claims." *Id.* Judge Otake pointed out that the Magistrate Judge had "also noted that the Ninth Circuit previously held that the *Noerr-Pennington* doctrine applies to California's state law tortious interference with prospective economic advantage claims." *Id.* (citing *Theme Promotions*, 546 F.3d at 1007). Judge Otake adopted the Magistrate Judge's Findings and Recommendations, but quoted *Theme Promotions*' reasoning -- "There is simply no reason that a common-law tort doctrine can any

more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." -- and concluded that, "[b]ased on this reasoning, the *Noerr-Pennington* doctrine would also arguably extend to Plaintiff's fraud claim." *Id.* (citing *Theme Promotions*, 546 F.3d 1007 (quoting *Video Int'l*, 858 F.2d at 1084)).

At the hearing on the First Motion in this case, the Developer argued that Judge Otake's observation in *Lesane* was "absolutely 100 percent pure dicta," and while the judge said it "arguably" could work, "she hasn't done the analysis[.]" *See* Tr. Hrg. 05/12/20 at 28. But the "argument" Judge Otake referenced in *Lesane* was between the actual holding in *Theme Promotions*, and *dicta* found at footnote 2 to *Nunag-Tanedo*, which had completely overlooked and omitted *Theme Promotions.*

As Judge Otake recognized, the holding in *Theme Promotions* was clear: "the *Noerr–Pennington* doctrine applies to Theme's state law tortious interference with prospective economic advantage claims." 546 F.3d at 1007. That was unquestionably not *dicta*, and notwithstanding the *Nunag-Tanedo* footnote, U.S. District Courts in the Ninth Circuit apply *Noerr-Pennington* to common law tort claims based on *Theme Promotions*. *See, e.g., Evans Hotels*, 433 F. Supp. 3d at 1143 (dismissing claims for interference with contract and attempted extortion under *Noerr-Pennington*) (citing *Theme Promotions*); *Hard 2 Find Accessories, Inc. v. Amazon.com, Inc*., 2014 WL 6452173 (W.D. Wash., Nov. 17, 2014) (dismissing state common law claims based on *Theme Promotions*); *Cellco P'ship v. Hope*, 2012 WL 260032, *15 (D. Ariz., Jan. 30, 2012), *mod. on recon. in part*, 2012 WL 715307 (D. Ariz., Mar. 6, 2012) (dismissing tortious interference with contract counterclaim based on *Theme Promotions*).

Likewise, state courts throughout the nation apply the *Noerr-Pennington* doctrine to common law claims, including in circumstances similar to this case. *See, e.g., Jourdan River*

Estates, LLC v. Favre, 278 So.3d 1135 (Miss. 2019) (affirming trial court's application of the doctrine to all of plaintiff developer's claims, including common law tort claims); *Grand Communities, Ltd. v. Stepner*, 170 S.W.3d 411 (Ky. Ct. App. 2004) (adopting doctrine to bar claim of interference with contractual relations based on efforts to prevent developer from rezoning and developing property); *Titan America, LLC v. Riverton Inv. Corp.*, 569 S.E.2d 57 (Va. 2002) (*Noerr-Pennington* applicable against common law interference, conspiracy, and defamation claims); *Zeller v. Consolini*, 758 A.2d 376 (Conn. Ct. App. 2000) (doctrine applied to claims of tort claims brought by landowner against community members who had unsuccessfully challenged zoning for development of shopping mall); *Fraser v. Bovino*, 721 A.2d 20 (N.J. Super. App. Div. 1998) (doctrine applied against tort interference claim based on objection to land use application); *Gunderson v. Univ. Alaska, Fairbanks*, 902 P.2d 323 (Alaska 1995) (applying doctrine to torts of interference, fraud, misrepresentation); *Arim v. Gen. Motors Corp.*, 520 N.W.2d 695 (Mich. Ct. App. 1994) (applying doctrine to tort claims and rejecting contention that the doctrine is limited to federal antitrust actions); *Diaz v. Southwest Wheel, Inc.*, 736 S.W.2d 770 (Tex. Ct. App. 1987) (applying doctrine to claim of civil conspiracy); *Protect Our Mountain Environment, Inc. v. District Court of Jefferson County*, 677 P.2d 1361 (Colo. 1984).

B. The "Sham Litigation" Exception Does Not Apply

Petition clause immunity is not without limits; it does not protect activity that constitutes "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business of a competitor." *Noerr*, 365 U.S. at 144. In *PRE*, the Supreme Court observed, "[t]he courts of appeals have defined 'sham' in inconsistent and contradictory ways." *Id.*, 508 U.S. at 55. Holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *id.* at 57, the Court resolved this inconsistency by adopting a two-part test, with both objective and subjective components. *See id.* at 60.

First, to be a sham, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*[.]" *Id.* at 60. It is not enough for a lawsuit to be unsuccessful. *Id.* at 60 n.5. Objective baselessness is a high bar. *See, e.g., White v. Lee*, 227 F.3d 1214, 1232 (9th Cir. 2000) ("We do not lightly conclude in any *Noerr–Pennington* case that the litigation in question is objectively baseless, as doing so would leave that action without the ordinary protections afforded by the First Amendment, a result we would reach only with great reluctance."). Probable cause, which requires no more than a reasonable belief "that there is a chance that a claim may be held valid upon adjudication," precludes a finding of sham litigation. *PRE*, 508 U.S. at 62-63.

A court only reaches the second prong of the *PRE* test -- the subjective intent of the litigant -- if it first determines that the lawsuit is objectively baseless. *PRE*, 508 U.S. at 60. ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."). Under the subjective prong, "the court should focus on whether the baseless lawsuit conceals an attempt to interfere" through the "use of the governmental *process*," as opposed to "the *outcome* of that process." *See id.* at 60-61 (citations and internal alteration omitted; emphasis in original).

The court may determine whether a lawsuit is "objectively baseless" as a matter of law, by reviewing the pleadings before it. *See PRE*, 508 U.S. at 63. Indeed, the determination is routinely made in the context of Rule 12(b)(6) motions. *See, e.g., CSMN Investments, LLC v. Cordillera Metro. Dist.*, 956 F.3d 1276, 1287-88 & n.14 (10th Cir. 2020) (affirming dismissal of a developer's action against residents where residents' appeals of planning director's decision

were objectively reasonable, and rejecting developer's argument that it should be allowed further discovery regarding objective reasonableness because "we can determine the objective reasonableness of the appeals by examining the court filings and court rulings"); *see also, e.g.*, *Hard 2 Find Accessories*, 2014 WL 6452173 at *3 (review of complaint revealed litigant had failed to show objective baselessness); *Grand Communities*, 170 S.W.3d at 416-17 (determining from the pleadings that adjoining landowner's appeal of zoning decision was not objectively baseless, and was therefore protected from suit by developer).

Here, the Developer's Counterclaim failed to sufficiently allege that the FAC constitutes "sham" litigation. *See* Cntrcl. The allegations do not meet the "objective baselessness" test, even under a liberal notice-pleading standard, much less the heightened *Noerr-Pennington* standard. *See, e.g.*, *Sosa v. DIRECTTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (claimant must make specific allegations demonstrating that *Noerr-Pennington* protections do not apply); *see also supra* Part III.B. The Developer does not allege, even conclusorily, that the FAC is objectively baseless. *See generally* Cntrcl. It does not allege that no reasonable litigant could realistically expect success on the merits. *See id.* Nor does it allege that no objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, or that the FAC lacked probable cause. *See id.*

The *only* allegation Developer makes that arguably even addresses the "objective baselessness" prong is that Save Sharks Cove filed the FAC, "without an adequate legal basis to do so and, in particular, without sufficient data to support an attack on the EIS or the SMA Major Permit Application." Cntrcl. ¶ 25. A purported lack of "sufficient data" is not enough to demonstrate that no reasonable litigant could realistically expect success on the merits. In *Mohla*, the Ninth Circuit dismissed claims based on a similar (and in fact, more robust)

allegation: "ONRC's complaint was filed with the knowledge that it was baseless, with no expectation of obtaining the requested relief, but for the sole purpose of delaying and impeding [company's] logging operation through the pendency of the suit itself." *Id.* at 535. The Developer's allegation here is even more conclusory than the allegation in *Mohla*, and is insufficient to invoke the sham litigation exception to *Noerr-Pennington* immunity.

More substantively, the Developer's allegation is contradicted by the FAC. The scientific data supporting Save Sharks Cove's "attack" on the EIS and SMA Major Permit Application were, in large part, the very studies the Developer commissioned, attached to, and used to support, its EIS. *See* FAC ¶¶ 116-131. The Developer does not explain why the same scientific data it deemed sufficient to support its EIS and SMA Major Permit Application are now somehow insufficient to challenge them. And, despite its cramped and myopic view of the facts, the Counterclaim itself concedes that Save Sharks Cove possesses at least *some* additional data supporting their claims. Cntrcl. ¶ 22 (alleging Save Sharks Cove's document production included "just two pages" of water sampling data).

In addition to being conclusory and untrue, the Counterclaim does not specify which claims allegedly lack "sufficient data," and does not (and cannot) allege that the ***entire*** FAC is unsupported by sufficient legal authority or scientific data. It is not necessary for every claim in a lawsuit to be objectively meritorious. *See PRE*, 508 U.S. at 60 (in order to be a sham, a "***lawsuit*** must be objectively baseless" and "[i]f an objective litigant could conclude that the ***suit*** is reasonably calculated to elicit a favorable outcome, the ***suit*** is immunized under *Noerr*, and . . . [a claim] premised on the sham exception must fail") (emphasis added); *see also, e.g., Trustees of Univ. of Penn. v. St. Jude Children's Research Hosp.*, 940 F. Supp. 2d 233, 247 (E.D. Pa. 2013) ("[c]ourts have routinely held that as long as some of the claims in a complaint have a

proper basis, the lawsuit is not a sham for *Noerr-Pennington* purposes"); *Breville Pty Ltd. v. Storebound LLC*, 2013 WL 1758742, at *8 (N.D. Cal., Apr. 24, 2013) (allegation of a single objectively baseless claim does not bring the filing of entire complaint within sham exception); *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300, 311-12 (E.D. Pa. 2011) ("Plaintiffs do not need to show a realistic expectation of success on ***all*** of [the] arguments . . . . Rather, conduct is not a sham if at least one claim in the [petition] has objective merit.") (citation and internal alterations omitted); *Meridian Project Sys., Inc. v. Hardin Const. Co., LLC*, 404 F. Supp. 2d 1214, 1222 (E.D.Cal. 2005) (defendant's "allegation that a single claim is objectively baseless does not bring [plaintiff's] filing of the entire complaint within the sham exception").

Because the Developer has not alleged, and cannot make the difficult showing, that Save Sharks Cove's lawsuit is objectively baseless, Save Sharks Cove's subjective intent in filing it is irrelevant. However, it is also clear that the Developer does not, and cannot, show that Save Sharks Cove brought this lawsuit to interfere with the Developer's business through use of process, as opposed to the outcome of the process. As was the case in *Mohla*, Save Sharks Cove "was not merely exploiting the governmental process; it was genuinely seeking judicial relief." 944 F.2d at 535.

C. The Doctrine is a Defense to Liability Rather than an Immunity from Suit

The Developer relies on *Nunag-Tanedo*, *supra*, for the proposition that *Noerr-Pennington* is merely a "defense to liability" and not an "immunity," or "a protection from litigation itself," *see* Opp. to First Mot. at 7, and contends that, under *Nunag-Tanedo*, "whether the [Lawsuit] is baseless or not can be litigated through the course of the lawsuit just as any other claims or defenses are." *Id.* In other words, according to the Developer, the Counterclaim should not be dismissed at this stage, and should instead be subject to a summary judgment standard. *See id.*; *see also* Tr. Hrg. 05/12/20 at 29:15-30:25.

What the Developer apparently hopes this Court will not recognize is that whether *Noerr-Pennington* is an immunity from liability or an immunity from suit has no bearing on the issue of whether dismissal is appropriate. Lawsuits are routinely dismissed under Rules 12(b)(6) and/or 12(c) for failing to meet the pleading standard and/or the *PRE* "sham" test. *See, e.g., Evans Hotels*, 433 F. Supp. 3d 1130; *Hard 2 Find Accessories*, 2014 WL 6452173; *Mohla*, 944 F.2d 531; *CSMN Investments*, 956 F.3d 1276; *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 487 (8th Cir. 1985); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983); *Grand Communities*, 170 S.W.3d 411. As in those cases, the Developer's Counterclaim here should be dismissed.

Nunag-Tanedo does not hold otherwise. In that case, a class of Filipino teachers recruited to work in several Louisiana public schools in an alleged "bait and switch" scheme sued a California attorney, alleging that the attorney aided and abetted in human trafficking, breached his fiduciary duties, and committed legal malpractice in procuring H-1B non-immigrant visas for the teachers. *Nunag-Tanedo*, 711 F.3d at 1138. The attorney moved to strike the claims under California's Anti-SLAPP statute and the *Noerr-Pennington* doctrine, and took an interlocutory appeal from the district court's denial of the motion to strike. *Id.*

The Ninth Circuit determined it lacked jurisdiction with respect to the *Noerr-Pennington* doctrine, because denial of a motion for *Noerr-Pennington* immunity from liability is not an appealable collateral order. *See id.* at 1138 & n. 2 (citations omitted); *accord Perry v. Perez-Wendt*, 129 Hawai'i 95, 102, 294 P.3d 1081, 1088 (App. 2013) (order denying a motion to dismiss an alleged SLAPP suit was reviewable on interlocutory appeal under Hawai'i's anti-SLAPP statute, but separate question of whether claims were barred under the *Noerr-Pennington* was not reviewable on interlocutory appeal). The Court explained that, although the doctrine is

often deemed an "immunity," it is an "immunity from liability, not from trial," similar to other defenses. *Id.* at 1140. By contrast, denials of claims of absolute immunity (e.g., foreign sovereign immunity or double jeopardy) are immediately appealable because they entitle defendants to immunity from suit. *Id.* at 1139-40.

It was in that context that the Ninth Circuit stated that *Noerr-Pennington* is an "immunity from liability" as opposed to an "immunity from suit." Nothing in *Nunag-Tanedo* suggests that a court should not dismiss a claim that fails to meet the relevant pleading standard. And just as a case can be dismissed for failure to state a claim where the limitations period has expired, a case may be dismissed for failure to state a claim where the challenged conduct is protected under the Petition Clauses.

V. CONCLUSION

For the reasons set forth above and in the First Motion, Save Sharks Cove respectfully requests that the Developer's Counterclaim be dismissed with prejudice.

DATED: Honolulu, Hawai'i, September 28, 2020.

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APPENDIX

To Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings

Index to APPENDIX

To Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings

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102 S.Ct. 3409
Supreme Court of the United States

NATIONAL ASSOCIATION FOR
the ADVANCEMENT OF COLORED
PEOPLE, et al., Petitioners
v.
CLAIBORNE HARDWARE COMPANY et al.

No. 81–202.
|
Argued March 3, 1982.
|
Decided July 2, 1982.
|
Rehearing Denied Oct. 4, 1982.
|
See 459 U.S. 898, 103 S.Ct. 199.

Synopsis

White merchants who had been damaged as result of civil rights boycotts brought action against participants in the boycott and civil rights organizations. The state chancery court granted injunctive relief and damages and participants in the boycott appealed. The Mississippi Supreme Court, 393 So.2d 1290, affirmed in part and boycott participants appealed. The Supreme Court, Justice Stevens, held that: (1) boycott activity which was not itself violent was constitutionally protected; (2) persons who participated in the boycott but who were not shown to have participated in violent activity or to have ratified it could not be held liable; (3) in the absence of showing that violent activity followed the speeches, organizer who made impassioned speeches which contained references to violence against those who did not participate could not be held liable; (4) persons who could be held liable could be held liable only for the damages resulting from the violent activity, nor for all damages resulting from the boycott; and (5) there was no basis for imposing liability on civil rights organization.

Reversed and remanded.

Justice Rehnquist concurred in the result.

West Headnotes (24)

[1] **Constitutional Law** ▬ Commercial establishments

Constitutional Law ▬ Speech, press, assembly, and petition

Boycott which was intended to secure compliance by both civic and business leaders with demands for equality and racial justice and which was supported by speeches and nonviolent picketing, with participants repeatedly encouraging others to join the cause, was a form of speech or conduct ordinarily entitled to protection under the First and Fourteenth Amendments. U.S.C.A.Const.Amends. 1, 14.

59 Cases that cite this headnote

[2] **Constitutional Law** ▬ Freedom of Association

Right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrines that are not protected. U.S.C.A.Const.Amend. 1.

24 Cases that cite this headnote

[3] **Constitutional Law** ▬ Particular Issues and Applications in General

Constitutional Law ▬ Press in General

Reading aloud of names of boycott violators and publishing their names in local black newspaper in an effort to persuade others to join boycott of white businesses through social pressure and the threat of social ostracism was protected by the First Amendment; speech does not lose protected character simply because it may embarrass others or coerce them into action. U.S.C.A.Const.Amend. 1.

113 Cases that cite this headnote

TAB A

[4] **Constitutional Law** ▬ First Amendment in General

Governmental regulation which has an incidental effect on the First Amendment freedoms may be justified in certain narrowly defined instances. U.S.C.A.Const.Amend. 1.

15 Cases that cite this headnote

[5] **Constitutional Law** ▬ Unfair trade practices

Constitutional Law ▬ Labor Relations

Constitutional Law ▬ Secondary picketing

Constitutional Law ▬ Boycotts

Unfair trade practices may be restricted without violation of First Amendment, as may secondary boycotts and picketing by labor unions as part of the balance between union freedom of expression and the ability of neutral employers and consumers to remain free from coerced participation in industrial strife. U.S.C.A.Const.Amend. 1.

26 Cases that cite this headnote

[6] **Constitutional Law** ▬ Political Rights and Discrimination

Right of the states to regulate economic activity cannot justify complete prohibition against nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution. U.S.C.A.Const.Amend. 1.

15 Cases that cite this headnote

[7] **Constitutional Law** ▬ First Amendment in General

First Amendment does not protect violence. U.S.C.A.Const.Amend. 1.

39 Cases that cite this headnote

[8] **Civil Rights** ▬ Grounds and subjects; compensatory damages

State may legitimately impose damages for the consequences of violent conduct but it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by unlawful conduct may be recovered by those who are damaged by a boycott which enjoys First Amendment protection. U.S.C.A.Const.Amend. 1.

42 Cases that cite this headnote

[9] **Constitutional Law** ▬ Freedom of Association

First Amendment restricts the ability of the state to impose liability on an individual solely because of his association with another. U.S.C.A.Const.Amend. 1.

20 Cases that cite this headnote

[10] **Conspiracy** ▬ Persons Liable

Civil liability may not constitutionally be imposed merely because an individual belongs to a group, some members of which commit acts of violence; for liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individuals held a specific intent to further those illegal aims. U.S.C.A.Const.Amend. 1.

65 Cases that cite this headnote

[11] **Antitrust and Trade Regulation** ▬ Boycotts

Constitutional Law ▬ Particular Issues and Applications

Persons who participated in boycott of white businesses in an effort to secure racial equality could not constitutionally be held liable for all damages resulting from the boycott even though some violent activity which did not enjoy First Amendment protection was used by some persons participating in the boycott. U.S.C.A.Const.Amend. 1.

5 Cases that cite this headnote

[12] **Injunction** ▬ Threats, harassment, and rights of privacy

Injunction against picketing and other boycott activities engaged in by those seeking to secure racial equality had to be limited so as to restrain only unlawful conduct and only the persons responsible for the conduct of that character.

4 Cases that cite this headnote

[13] **Antitrust and Trade Regulation** ▬ Boycotts
Constitutional Law ▬ Particular Issues and Applications

Regular attendance and participation at meetings of civil rights organizations which was conducting boycott of white merchants in an effort to secure racial equality in the county was an insufficient basis upon which to constitutionally impose liability for certain violent acts engaged in by some persons participating in the boycott where no illegal conduct was authorized, ratified, or discussed at any of those meetings. U.S.C.A.Const.Amend. 1.

28 Cases that cite this headnote

[14] **Conspiracy** ▬ Persons Liable

A legal duty to repudiate or to disassociate oneself from the acts of another did not arise unless, absent the repudiation, the individual could be found liable for those acts.

1 Cases that cite this headnote

[15] **Conspiracy** ▬ Persons Liable

Mere association, by certain persons participating in boycott of white merchants in an effort to secure racial equality, with some individuals who engaged in violent activity which did not enjoy First Amendment protection was insufficient predicate for liability to the merchants for damages resulting from the unprotected activity. U.S.C.A.Const.Amend. 1.

30 Cases that cite this headnote

[16] **Antitrust and Trade Regulation** ▬ Boycotts
Constitutional Law ▬ Particular Issues and Applications

First Amendment did not preclude white merchants from recovering damages from persons who engaged in violent activity in connection with an otherwise constitutionally protected boycott by black citizens. U.S.C.A.Const.Amend. 1.

18 Cases that cite this headnote

[17] **Antitrust and Trade Regulation** ▬ Boycotts
Constitutional Law ▬ Particular Issues and Applications

In action brought by white merchants claiming damages as result of boycott by blacks protesting discrimination, First Amendment precluded imposition of liability on one of the organizers of the boycott through his active participation in the boycott, even though some participants in the boycott did engage in violent activity; to the extent that he caused white merchants to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his threats of vilification or social ostracism of those who did not participate, his conduct was constitutionally protected. U.S.C.A.Const.Amend. 1.

37 Cases that cite this headnote

[18] **Constitutional Law** ▬ "Fighting words"

"Fighting words," those that provoke immediate violence, are not protected by the First Amendment; similarly, words which create an immediate panic are not entitled to constitutional protection. U.S.C.A.Const.Amend. 1.

44 Cases that cite this headnote

[19] **Antitrust and Trade Regulation** ▬ Other particular practices
Constitutional Law ▬ Trade or Business

Emotionally charged rhetoric of boycott organizer which generally contained an impassioned plea for black citizens to unify and support and respect each other and to participate in boycott of white merchants was protected speech even though it did contain some references to physical violence

to those who did not participate where the language was not followed by acts of violence. U.S.C.A.Const.Amend. 1.

33 Cases that cite this headnote

[20] Constitutional Law Advocacy

Advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause and, when such appeals do not incite lawless action, they must be regarded as protected speech. U.S.C.A.Const.Amend. 1.

31 Cases that cite this headnote

[21] Antitrust and Trade Regulation Persons liable

Constitutional Law Violence

In the absence of evidence that boycott organizer authorized, ratified, or directly threatened acts of violence against those who did not participate in the violence, First Amendment precluded him from being held liable for any damages resulting from that violence even though there were some references in his speeches to physical violence. U.S.C.A.Const.Amend. 1.

30 Cases that cite this headnote

[22] Associations Officers, Committees, and Agents

Person who was the only paid representative in the state of NAACP was agent of the organization.

3 Cases that cite this headnote

[23] Antitrust and Trade Regulation Boycotts

In the absence of evidence that civil rights organization gave its field representative any actual or apparent authority to commit acts of violence or to threaten violent conduct in connection with boycott of white merchants and in the absence of evidence that the organization had knowledge of or ratified any acts of violence, the organization could not constitutionally be held liable for any acts of violence in connection with the boycott. U.S.C.A.Const.Amend. 1.

11 Cases that cite this headnote

[24] Associations Torts and wrongful conduct

Because civil rights organization regularly provided bond and legal representation to indigent black persons throughout the country, fact that it posted bond and provided legal representation for boycott participants who had been arrested in connection with violent acts could not support a finding that the organization had ratified that conduct so as to permit it to be held liable for the damages resulting from that conduct. U.S.C.A.Const.Amend. 1.

23 Cases that cite this headnote

****3411** *Syllabus* [*]

***886** In 1966, a boycott of white merchants in Claiborne County, Miss., was launched at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred black persons. The purpose of the boycott was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing, but some acts and threats of violence did occur. In 1969, respondent white merchants filed suit in Mississippi Chancery Court for injunctive relief and damages against petitioners (the NAACP, the Mississippi Action for Progress, and a number of individuals who had participated in the boycott, including Charles Evers, the field secretary of the NAACP in Mississippi and a principal organizer of the boycott). Holding petitioners jointly and severally liable for all of respondents' lost earnings during a 7-year period from 1966 to the end of 1972 on three separate conspiracy theories, ****3412** including the tort of malicious interference with respondents' businesses, the Chancery Court imposed damages liability and issued a permanent injunction. The Mississippi Supreme Court rejected two theories of liability but upheld the imposition of liability on the basis of the common-law tort theory. Based on evidence that fear of reprisals caused some black citizens to withhold their

patronage from respondents' businesses, the court held that the entire boycott was unlawful and affirmed petitioners' liability for all damages "resulting from the boycott" on the ground that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.

Held:

1. The nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. Pp. 3422–3427.

(a) Through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change. Pp. 3422–3425.

(b) While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case. Pp. 3425–3427.

***887** 2. Petitioners are not liable in damages for the consequences of their nonviolent, protected activity. Pp. 3427–3430.

(a) While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered. Pp. 3427–3429.

(b) Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. 3430–3429.

3. The award for all damages "resulting from the boycott" cannot be sustained, where the record discloses that all of the respondents' business losses were not proximately caused by violence or threats of violence. Pp. 3430–3436.

(a) To the extent that the Mississippi Supreme Court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the "precision of regulation" demanded by that Amendment. Pp. 3430–3432.

(b) Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either "store watchers" who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott "enforcers." Pp. 3432–3433.

(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence. His acts, being insufficient to impose liability on him, may not be used to impose liability on the NAACP, his principal. Moreover, there is no finding that Evers or any other NAACP member had either actual or apparent authority from the NAACP to commit acts of violence or to threaten violent conduct or that the NAACP ratified unlawful conduct. To impose liability on the NAACP without such a finding would impermissibly burden the ****3413** rights of political association that are protected by the First Amendment. Pp. 3433–3436.

393 So.2d 1290 (Miss.), reversed and remanded.

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* Briefs of *amici curiae* urging reversal were filed by *John Vanderstar, Charles S. Sims,* and *Phyllis N. Segal* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold,* and *George Kaufmann* for the American Federation of Labor and Congress of Industrial Organizations; and by *Paul S. Berger, David Bonderman,*

Leonard B. Simon, and *Nathan Z. Dershowitz* for the American Jewish Congress.

Opinion

Justice STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Miss., that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical ***889** factors in the boycott's success presents us with the question whether the state court's judgment is consistent with the Constitution of the United States.

I

In March 1966, black citizens of Port Gibson, Miss., and other areas of Claiborne County presented white elected officials with a list of particularized demands for racial equality and integration.[2] The complainants did not receive a satisfactory response and, at a local National Association for the Advancement of Colored People (NAACP) meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area. On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity. We recount first the course of that litigation and then consider in more detail the events that gave rise to the merchants' claim for damages.

A

The complaint was filed in the Chancery Court of Hinds County by 17 white merchants.[3] The merchants named two corporations and 146 individuals as defendants: the NAACP, a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that implemented ***890** the federal "Head Start" program; Aaron Henry, the President of the Mississippi State Conference of the NAACP; Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott.[4] The complaint sought injunctive relief and an attachment of property, as well as damages. Although it alleged that the plaintiffs were suffering irreparable injury from an ongoing conspiracy, no preliminary relief was sought.

****3414** Trial began before a chancellor in equity on June 11, 1973.[5] The court heard the testimony of 144 witnesses during an 8-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of ***891** 130 of the defendants on three separate conspiracy theories.[6] First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy.[7] Second, the chancellor found a violation of a state ***892** statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was ****3415** directed.[8] Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.[9] The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.[10]

***893** Five of the merchants offered no evidence of business losses. The chancellor found that the remaining 12 had suffered lost business earnings and lost goodwill during a 7-year period from 1966 to 1972 amounting to $944,699. That amount, plus statutory antitrust penalties of $6,000 and a $300,000 award of attorney's fees, produced a final judgment of $1,250,699, plus interest from the date of judgment and costs. As noted, the chancellor found all but 18 of the original 148 defendants jointly and severally liable for the entire judgment. The court justified imposing full liability on the national organization of the NAACP on the ground that it had

failed to "repudiate" the actions of Charles Evers, its Field Secretary in Mississippi.

In addition to imposing damages liability, the chancellor entered a broad permanent injunction. He permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obscene language to or about any person" because that person continued to patronize the respondents; from "picketing or patroling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property. [11]

***894** In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment. 393 So.2d 1290. It held that the secondary boycott statute was inapplicable because it had not been enacted until "the boycott had been in ****3416** operation for upward of two years." [12] The court declined to rely on the restraint of trade statute, noting that the "United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, 15 U.S.C. § 1 (1970), after which our statute is patterned." [13] Thus, the court rejected two theories of liability that were consistent with a totally voluntary and nonviolent withholding of patronage from the white merchants.

The Mississippi Supreme Court upheld the imposition of liability, however, on the basis of the chancellor's common-law tort theory. After reviewing the chancellor's recitation of the facts, the court quoted the following finding made by the trial court:

> "In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ('enforcers,' 'deacons,' or 'black hats') in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse ***895** from the complainants." App. to Pet. for Cert. 39b (quoted 393 So.2d, at 1300).

On the basis of this finding, the court concluded that the entire boycott was unlawful. "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other." [14] In a brief passage, the court rejected petitioners' reliance on the First Amendment:

> "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.*, at 1301.

The theory of the Mississippi Supreme Court, then, was that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott. [15] To the trial court, such a finding had not been necessary. [16]

Although the Mississippi Supreme Court affirmed the chancellor's basic finding of liability, the court held that respondents ***896** "did not establish their case" with respect to 38 of the defendants. [17] The court found that MAP was a victim, rather than a willing participant, in the conspiracy and dismissed—without further explanation—37 individual defendants for lack of proof. Finally, the court ruled that certain damages had been improperly awarded and that other damages had been inadequately proved. ****3417** The court remanded for further proceedings on the computation of damages. [18]

We granted a petition for certiorari. 454 U.S. 1030, 102 S.Ct. 565, 70 L.Ed.2d 473. At oral argument, a question arose concerning the factual basis for the judgment of the Mississippi Supreme Court. As noted, that court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats. Such a finding was not necessary to the trial court's imposition of liability and neither state court had identified the evidence actually linking the petitioners to such an agreement. In response to a request from this Court, respondents filed a supplemental brief "specifying the acts committed by each of the petitioners giving rise to liability for damages." Supplemental Brief for Respondents 1. That brief helpfully places the petitioners in different categories; we accept respondents' framework for analysis and identify these classes as a preface to our review of the relevant incidents that

occurred during the 7-year period for which damages were assessed. [19]

***897** First, respondents contend that liability is justified by evidence of participation in the "management" of the boycott. [20] Respondents identify two groups of persons who may be found liable as "managers": 79 individuals who regularly attended Tuesday night meetings of the NAACP at the First Baptist Church; and 11 persons who took "leadership roles" at those meetings. [21]
Second, respondents contend that liability is justified by evidence that an individual acted as a boycott "enforcer." [22] In this category, respondents identify 22 persons as members of the "Black Hats"—a special group organized during the boycott—and 19 individuals who were simply "store watchers."

Third, respondents argue that those petitioners "who themselves engaged in violent acts or who threatened violence have provided the best possible evidence that they wanted the boycott to succeed by coercion whenever it could not succeed by persuasion." *Id.*, at 10. They identify 16 individuals ***898** for whom there is direct evidence of participation in what respondents characterize as violent acts or threats of violence.

Fourth, respondents contend that Charles Evers may be held liable because he "threatened violence on a number of occasions against boycott breakers." *Id.*, at 13. Like the chancellor, respondents would impose liability on the national NAACP because Evers "was acting in his capacity as Field Secretary of the NAACP when he committed these tortious and constitutionally unprotected acts." *Ibid.*

****3418** Finally, respondents state that they are "unable to determine on what record evidence the state courts relied in finding liability on the part of seven of the petitioners." *Id.*, at 16. With these allegations of wrongdoing in mind, we turn to consider the factual events that gave rise to this controversy.

B

The chancellor held petitioners liable for all of respondents' lost earnings during a 7-year period from 1966 to December 31, 1972. We first review chronologically the principal events that occurred during that period, describe some features of the boycott that are not in dispute, and then identify the most significant evidence of violent activity.

In late 1965 or early 1966, Charles Evers, the Field Secretary of the NAACP, helped organize the Claiborne County Branch of the NAACP. The pastor of the First Baptist Church, James Dorsey, was elected president of the Branch; regular meetings were conducted each Tuesday evening at the church. At about the same time, a group of black citizens formed a Human Relations Committee and presented a petition for redress of grievances to civic and business leaders of the white community. In response, a biracial committee—including five of the petitioners and several of the respondents—was organized and held a series of unproductive meetings.

The black members of the committee then prepared a further petition entitled "Demands for Racial Justice." This petition ***899** was presented for approval at the local NAACP meeting conducted on the first Tuesday evening in March. As described by the chancellor, "the approximately 500 people present voted their approval unanimously." [23] On March 14, 1966, the petition was presented to public officials of Port Gibson and Claiborne County.

The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens." [24] As described by the chancellor, the purpose of the demands "was to gain equal rights and opportunities for Negro citizens." [25] The petition further provided that black leaders hoped it would not be necessary to resort to the "selective buying campaigns" that had been used in other communities. [26] On March 23, two demands that had been omitted ***900** from the original petition were added, one of which provided: "All stores must employ Negro clerks and cashiers." [27] This supplemental petition stated that a response was expected by April 1.

A favorable response was not received. On April 1, 1966, the Claiborne County ****3419** NAACP conducted another meeting at the First Baptist Church. As described by the chancellor:

> "Several hundred black people attended the meeting, and the purpose was to decide what action should be taken relative to the twenty-one demands. Speeches were made by Evers and others, and a vote was taken. It was the unanimous vote of those present, without dissent, to place a boycott on the white merchants of Port Gibson and Claiborne County." App. to Pet. for Cert. 15b.

The boycott was underway. [28]

In September 1966, Mississippi Action for Progress, Inc. (MAP), was organized to develop community action programs in 20 counties of Mississippi. One of MAP's programs—known as Head Start—involved the use of federal funds to provide food for young children. Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but in February 1967 the directors ***901** of MAP authorized their Claiborne County representatives to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant. A large portion of the trial was devoted to the question whether MAP participated in the boycott voluntarily and—under the chancellor's theories of liability—could be held liable for the resulting damages. The chancellor found MAP a willing participant, noting that "during the course of the trial, the only Head Start cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of the boycott and wanted to honor it.*" [29]

Several events occurred during the boycott that had a strong effect on boycott activity. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. On April 4, 1968, Dr. Martin Luther King, Jr., was assassinated in Memphis. The chancellor found that this tragic event had a depressing effect on the black community and, as a result, the boycott "tightened." [30]

***902** One event that occurred during the boycott is of particular significance. On April 18, 1969, a young black man named Roosevelt Jackson was shot and killed during an encounter with two Port Gibson police officers. [31] Large crowds immediately gathered, first at the hospital and later at the church. Tension in the community neared a breaking point. The local police requested ****3420** reinforcements from the State Highway Patrol and sporadic acts of violence ensued. The Mayor and Board of Aldermen placed a dawn-to-dusk curfew into effect.

On April 19, Charles Evers spoke to a group assembled at the First Baptist Church and led a march to the courthouse where he demanded the discharge of the entire Port Gibson Police Force. When this demand was refused, the boycott was reimposed on all white merchants. One of Evers' speeches on this date was recorded by the police. In that speech—significant portions of which are reproduced in an Appendix to this opinion—Evers stated that boycott violators would be "disciplined" by their own people and warned that the Sheriff could not sleep with boycott violators at night.

On April 20, Aaron Henry came to Port Gibson, spoke to a large gathering, urged moderation, and joined local leaders in a protest march and a telegram sent to the Attorney General of the United States. On April 21, Evers gave another speech to several hundred people, in which he again called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." [32]

As noted, this lawsuit was filed in October 1969. No significant events concerning the boycott occurred after that ***903** time. The chancellor identified no incident of violence that occurred after the suit was brought. He did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.

Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed. [33]

One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black

Hats" or the "Deacons."[34] The names of persons who violated ***904** the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed ****3421** paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[35]

The chancellor also concluded that a quite different form of discipline had been used against certain violators of the boycott. He specifically identified 10 incidents that "strikingly" revealed the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[36] The testimony concerning four incidents convincingly demonstrates that they occurred because the victims were ignoring the boycott. In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged. None of these four victims, however, ceased trading with white merchants.[37]

***905** The evidence concerning four other incidents is less clear, but again it indicates that an unlawful form of discipline was applied to certain boycott violators. In April 1966, a black couple named Cox asked for a police escort to go into a white-owned dry cleaner and, a week later, shots were fired into their home. In another incident, an NAACP member took a bottle of whiskey from a black man who had purchased it in a white-owned store. The third incident involved a fight between a commercial fisherman who did not observe the boycott and four men who "grabbed me and beat me up and took a gun off me."[38] In a fourth incident, described only in hearsay testimony, a group of young blacks apparently pulled down the overalls of an elderly brick mason known as "Preacher White" and spanked him for not observing the boycott.[39] Two other incidents discussed by the chancellor are of less certain significance. Jasper Coleman testified that he participated ***906** in an all-night poker game at a friend's house on Christmas Eve 1966. The following morning he discovered that all four tires of his pickup truck had been slashed ****3422** with a knife. Coleman testified that he did not participate in the boycott but was never threatened for refusing to do so. Record 13791. Finally, Willie Myles testified that he and his wife received a threatening phone call and that a boy on a barge told him that he would be whipped for buying his gas at the wrong place.

Five of these incidents occurred in 1966. The other five are not dated. The chancellor thus did not find that any act of violence occurred after 1966.[40] In particular, he made no reference to any act of violence or threat of violence—with the exception, of course, of Charles Evers' speeches—after the shootings of Martin Luther King, Jr., in 1968 or Roosevelt Jackson in 1969. The chancellor did not find that any of the incidents of violence was discussed at the Tuesday evening meetings of the NAACP.[41]

II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the federal ***907** questions necessarily decided by that court.[42] We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

[1] Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.[43] The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint ***908** or lost." *Ibid.* In emphasizing ****3423** "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues,"

id., at 295, 102 S.Ct., at 437, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488:

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."
>
> THE CHIEF JUSTICE stated for the Court in *Citizens Against Rent Control* : "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U.S., at 296, 102 S.Ct., at 437.

[2] The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," *id.*, at 364, 57 S.Ct., at 259, Chief Justice Hughes, writing for the Court, stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices ***909** under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*, at 365, 57 S.Ct., at 260.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 99, 60 S.Ct., at 742. Cf. *Chauffeurs v. Newell*, 356 U.S. 341, 78 S.Ct. 779, 2 L.Ed.2d 809. In *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

[3] Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, ****3424** names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott ***910** through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 325, 89 L.Ed. 430.

In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling."[44] Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed

leaflets near respondent's home that were critical of his business practices.[45] A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. *Id.*, at 418, 91 S.Ct., at 1577. This Court reversed. THE CHIEF JUSTICE explained:

> "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected ***911** by the First Amendment. *E.g., Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider v. State, supra; Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.*, at 419, 91 S.Ct., at 1577.
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> In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.[46]

****3425** In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." *Thomas v. Collins, supra*, at 530, 65 S.Ct., at 322. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. ***912** Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

[4] **[5]** The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672.[47] A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834; *NLRB v. Retail Store Employees*, 447 U.S. 607, 100 S.Ct. 2372, 65 L.Ed.2d 377. The right of business entities to "associate" to suppress competition may be curtailed. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB v. Retail Store Employees, supra*, at 617–618, 100 S.Ct., at 2378 (BLACKMUN, J., concurring in part). See *Longshoremen v. Allied International, Inc.*, 456 U.S. 212, 222–223, and n. 20, 102 S.Ct. 1656, 1662–1663, and n. 20, 72 L.Ed.2d 21.

***913** While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75, 85 S.Ct. 209, 215, 13 L.Ed.2d 125. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and

****3426** their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the Sherman Act did not proscribe the publicity campaign. *Id.*, at 137–138, 81 S.Ct., at 529. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.*, at 138–139, 81 S.Ct., at 530. Noting that the right of the people to petition their representatives in government "cannot properly be made to depend on their intent in doing so," the Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.*, at 139–140, 81 S.Ct., at 530. This conclusion was not changed by the fact that the railroads' anticompetitive *purpose* produced an anticompetitive*effect*; ***914** the Court rejected the truckers' Sherman Act claim despite the fact that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action." *Id.*, at 143, 81 S.Ct., at 532.

[6] It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself. [48]

In upholding an injunction against the state supersedeas bonding requirement in this case, Judge Ainsworth of the Court of Appeals for the Fifth Circuit cogently stated:

> "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This ***915** view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." *Henry v. First National Bank of Clarksdale*, 595 F.2d 291, 303 (1979) (footnote omitted).

****3427** We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment. [49]

B

The Mississippi Supreme Court did not sustain the chancellor's imposition of liability on a theory that state law prohibited a nonviolent, politically motivated boycott. The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed. [50] In particular, we ***916** consider here the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected. [51]

[7] The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.' " *Samuels v. Mackell*, 401 U.S. 66, 75, 91 S.Ct. 764, 769, 27 L.Ed.2d 688 (Douglas, J., concurring). Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405. [52] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may

give rise to ***917** damages liability and on the persons who may be held accountable for those damages.

In *Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, the Court considered a case in many respects similar to the one before us. The case grew out of the rivalry between the United Mine Workers (UMW) and the Southern Labor Union (SLU) over representation of workers in the southern Appalachian coal fields. A coal company laid off 100 miners of UMW's Local 5881 when it closed one of its mines. That same year, a subsidiary of the coal company hired Gibbs as mine superintendent to attempt to open a new mine on nearby property through use of members ****3428** of the SLU. Gibbs also received a contract to haul the mine's coal to the nearest railroad loading point. When he attempted to open the mine, however, he was met by armed members of Local 5881 who threatened Gibbs and beat an SLU organizer. These incidents occurred on August 15 and 16. Thereafter, there was no further violence at the mine site and UMW members maintained a peaceful picket line for nine months. No attempts to open the mine were made during that period.

Gibbs lost his job as superintendent and never began performance of the haulage contract. Claiming to have suffered losses as a result of the union's concerted plan against him, Gibbs filed suit in federal court against the international UMW. He alleged an unlawful secondary boycott under the federal labor laws and, as a pendent state-law claim, "an unlawful conspiracy and an unlawful boycott aimed at him ... to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." *Id.*, at 720, 86 S.Ct., at 1135. The federal claim was dismissed on the ground that the dispute was "primary" and therefore not cognizable under the federal prohibition of secondary labor boycotts. Damages were awarded against the UMW, however, on the state claim of interference with an employment relationship.

This Court reversed. The Court found that the pleadings, arguments of counsel, and jury instructions had not adequately ***918** defined the compass within which damages could be awarded under state law. The Court noted that it had "consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes" and had sustained "a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation." *Id.*, at 729, 86 S.Ct., at 1140. To accommodate federal labor policy, however, the Court in *Gibbs* held: "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Ibid.* The Court noted that in *Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025, damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants. " 'Thus there [was] nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.' " 383 U.S., at 730, 86 S.Ct., at 1141 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 249, n. 6, 79 S.Ct. 773, 781, n. 6, 3 L.Ed.2d 775).

[8] The careful limitation on damages liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. That limitation is no less applicable, however, to the important First Amendment interests at issue in this case. Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

[9] The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his ***919** association with another. In *Scales v. United States*, 367 U.S. 203, 229, 81 S.Ct. 1469, 1486, 6 L.Ed.2d 782, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a ****3429** defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' " *Ibid.* (quoting *Noto v. United States*, 367 U.S. 290, 299, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836). [53] Moreover, in*Noto v. United States* the Court emphasized that this intent must be judged "according to the strictest law," [54] for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which

he does not necessarily share." *Id.*, at 299–300, 81 S.Ct., at 1521.

In *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266, the Court applied these principles in a noncriminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.*, at 185–186, 92 S.Ct., at 2348. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.*, at 186, 92 S.Ct., at 2348 (quoting *United States v. Robel*, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508). "The government has the burden ***920** of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U.S., at 186, 92 S.Ct., at 2348 (footnote omitted). [55]

[10] The principles announced in *Scales, Noto*, and *Healy* are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. [56] "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)." *Carroll v. Princess Anne*, 393 U.S. 175, 183–184, 89 S.Ct. 347, 353, 21 L.Ed.2d 325.

III

[11] The chancellor awarded respondents damages for all business losses that were sustained during a 7-year period beginning in 1966 and ending December 31, 1972. [57] With the exception ***921** of Aaron Henry, ****3430** all defendants were held jointly and severally liable for these losses. The chancellor's findings were consistent with his view that voluntary participation in the boycott was a sufficient basis on which to impose liability. The Mississippi Supreme Court properly rejected that theory; it nevertheless held that petitioners were liable for all damages "resulting from the boycott." [58] In light of the principles set forth above, it is evident that such a damages award may not be sustained in this case.

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "*part* of the boycott activity" and "*contributed* to its almost complete success." [59] The court broadly asserted—without differentiation—that " '[i]ntimidation, threats, social ostracism, vilification, and traduction' " were devices used by the defendants to effectuate the boycott. [60] The court repeated the chancellor's finding that "the volition of *many* black persons was overcome out of sheer fear." [61] These findings are inconsistent with the court's imposition of all damages "resulting from the boycott." To the extent that the court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the "precision of regulation" demanded by that constitutional provision.

***922** The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence. As respondents themselves stated at page 12 of their brief in the Mississippi Supreme Court:

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott."

This assessment is amply supported by the record. [62] It is indeed inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation. Moreover, the fact that the boycott "intensified" following the shootings of Martin

Luther King, Jr., and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured ***923** prominently in the boycott's success. The chancellor made no finding that any act of ****3431** violence occurred after 1966. While the timing of the acts of violence was not important to the chancellor's imposition of liability, it is a critical factor under the narrower rationale of the Mississippi Supreme Court. That court has completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.[63] It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

[12] This case is not like *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity.[64] The violent conduct present in that case was pervasive.[65] The Court in *Meadowmoor* stated that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.*, at 293, 61 S.Ct., at 555. The Court emphasized, however:

> ***924** "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*
>
> Such "insubstantial findings" were not present in *Meadowmoor.* But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a 7-year span. No losses are attributed to the voluntary participation of individuals determined to secure "justice and equal opportunity."[66]
>
> The court's judgment "screens reality" and cannot stand.[67]

[13] **[14]** Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that ****3432** any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The Sheriff testified that he was kept ***925** informed of what transpired at the meetings; he made no reference to any discussion of unlawful activity.[68] To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute "guilt by association," since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a "guilt *for* association" theory. Neither is permissible under the First Amendment.[69]

[15] **[16]** Respondents also argue that liability may be imposed on individuals who were either "store watchers" or members of the "Black Hats." There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. As established above, mere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is ***926** an insufficient predicate for liability. At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966, meeting at which the vote to begin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, *supra.* Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See *supra*, at 3420; Appendix to this opinion.

[17] For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings

or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification **3433 or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. Respondents point to Evers' speeches, however, as justification for the chancellor's damages award. Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric *927 lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

[18] It is clear that "fighting words"—those that provoke immediate violence—are not protected by the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031. Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470. [70] This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on *928 "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447, 89 S.Ct., at 1829. See *Noto v. United States*, 367 U.S., at 297–298, 81 S.Ct., at 1520 ("the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). See also *Whitney v. California*, 274 U.S. 357, 372, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (Brandeis, J., concurring).

[19] **[20]** The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. **3434 Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S., at 270, 84 S.Ct., at 720. [71]

*929 **[21]** For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence. [72] The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred. [73]

The findings are constitutionally inadequate to support the damages judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers. [74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

***930** Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

[22] The associational rights of the NAACP and its members have been recognized repeatedly by this Court. [75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. [76] Cf. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

****3435** **[23]** **[24]** The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, president of the Mississippi State Conference of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. Record 4930. [77] Similarly, there is no evidence that the NAACP ratifieds ***931** or even had specific knowledge of—any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. *Id.*, at 4896. The NAACP supplied no financial aid to the boycott. *Id.*, at 4940. The chancellor made no finding that the national organization was involved in any way in the boycott. [78]

To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. As Justice Douglas noted in *NAACP v. Overstreet*, 384 U.S. 118, 86 S.Ct. 1306, 16 L.Ed.2d 409, dissenting from a dismissal of a writ of certiorari found to have been improvidently granted:

> "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the ***932** additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates v. Little Rock*, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E.g., DeGregory v. New Hampshire*, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 543–546, 83 S.Ct. 889, 892, 9 L.Ed.2d 929; *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462–463, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware v. Board of Bar Examiners*, 353 U.S. 232, 245–246, 77 S.Ct. 752, 759, 1 L.Ed.2d 796) and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one ****3436** who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216) and with the specific intention to further those purposes. See *Elfbrandt v. Russell*, [384 U.S., at] 11 [86 S.Ct., at 1238]; *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992." *Id.*, at 122, 86 S.Ct., at 1308.

The chancellor's findings are not adequate to support the judgment against the NAACP.

IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are

associated with conspiratorial activity. [79] And ***933** yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means. [80]

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully ***934** identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

****3437** Justice REHNQUIST concurs in the result.

Justice MARSHALL took no part in the consideration or decision of this case.

APPENDIX TO OPINION OF THE COURT

Portions of speech delivered by Charles Evers on April 19, 1969 (Record 1092–1108):

"Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.)

***935** "We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

"Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

"Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty. You're guilty because

you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him.

"We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

***936** "We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.
"Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ****3438** ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

"Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

"All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to ***937** deny us the right to even exist. (Tell'em about it.) And we ain't coming back, white folks. (We ain't.)

"You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks.

"We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, 'Naw, brother, we ain't coming.' 'Have you got rid of all those bigots you got on your police force?' 'No.' 'Have you hired Negroes in all them stores?' 'No.' 'Well, we ain't coming back.' (Right) That's all we gonna do. You know, what they don't realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

"We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, 'This is your thing, do what you want to do.' (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be disobedient ***938** now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, 'You know what, Evers is down there with his goon squad, ...' Now, we know Claiborne County, —'with his goon squad harassing poor ole niggers.'

"Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause)

****3439** "Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

"Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer ***939** to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

"Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

"Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.)

"I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't ***940** going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

"Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and ****3440** we ain't coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our ... (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them."

All Citations

458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See *Krulewitch v. United States*, 336 U.S. 440, 447–449, 69 S.Ct. 716, 720, 93 L.Ed. 790 (concurring opinion).

2 Port Gibson is the county seat and largest municipality in Claiborne County.

3 The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were Aldermen in Port Gibson, Record 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, *id.*, at 15160; respondents Abraham and Hay had served on the school board, *id.*, at 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, *id.*, at 840.

4 The complaint also named 52 banks as "attachment defendants." The banks answered that the NAACP had $16,800 on deposit in Mississippi.

5 As a result of the plaintiffs' prayer for an attachment in equity, jurisdiction existed in Chancery Court. The trial judge ruled: "It was incumbent upon this court to hear the case in full once jurisdiction was assumed. To have heard the portions of this matter sounding in equity, only, and to have transferred the questions of tort liability and damages to the circuit court would have been contrary to the maxim 'equity delights to do complete justice, and not by halves.' " App. to Pet. for Cert. 56b. The defendants thus were denied a jury trial on the liability issues. Although the court recognized that it had power to empanel a jury, it declined to exercise its discretion to do so. *Ibid.* The Mississippi nonresident attachment statute that provided the basis for equitable jurisdiction has since been declared unconstitutional by both Federal District Courts in Mississippi. *MPI, Inc. v. McCullough*, 463 F.Supp. 887 (ND Miss.1978); *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F.Supp. 925 (SD Miss.1977).

Commencement of trial was delayed by collateral proceedings in federal court. See *Henry v. First National Bank of Clarksdale*, 50 F.R.D. 251 (ND Miss.1970), rev'd, 444 F.2d 1300 (CA5 1971), cert. denied, 405 U.S. 1019, 92 S.Ct. 1284, 31 L.Ed.2d 483. The District Court entered a preliminary injunction restraining the state proceedings on the theory that the merchants sought to infringe the defendants' First Amendment rights. The Court of Appeals reversed, holding that the mere commencement of a private tort suit did not itself involve "state action" for purposes of 28 U.S.C. § 1343(3).

6 App. to Pet. for Cert. 2g. Of the original 148 named defendants, 16 were dismissed by stipulation of counsel (12 had died, 2 were minors, 1 was *non compos mentis*, and 1—the Reverend Dominic Cangemi—was dismissed by agreement without explanation). One defendant was dismissed because he had been misidentified in the complaint. The chancellor dismissed one defendant—state NAACP leader Aaron Henry—because "the complainants failed to meet the burden of proof as to [his] wrongdoing." *Id.*, at 28b. Thus, except for the defendants dismissed by stipulation or because of misidentification, the plaintiffs prevailed on the merits in the trial court against all but one of the defendants.

7 Although the bulk of the court's discussion of the defendants' common-law tort liability focused on the presence of a civil conspiracy, the chancellor did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi. The court apparently based its first theory of liability on the ground that the "malicious interference by the defendants with the businesses of the complainants as shown by the evidence in this case is tortious *per se*, and this would be true even without the element of conspiracy." *Id.*, at 42b (footnote omitted). In Mississippi, "[e]ither an individual or a corporation, whether acting in conjunction with others, or not," may be liable in an action for "malicious interference with a trade or calling." *Memphis Laundry-Cleaners v. Lindsey*, 192 Miss. 224, 239, 5 So.2d 227, 232 (1941). The chancellor in this case stated that the necessary element of malice is established by proof of "the intentional performance of an act harmful to another without just or lawful cause or excuse." App. to Pet. for Cert. 42b, n. 8. The repeated references to the presence of a conspiracy might be explained by the court's finding that each of the defendants—with the exception of Aaron Henry—was jointly and severally liable for the plaintiffs' losses. As noted, an element of the plaintiffs' common-law action was the defendants' intentional performance of an "unprivileged" act harmful to another. The chancellor stated that the evidence clearly established that "certain defendants" had committed "overt acts which were injurious to the trade and business of complainants." *Id.*, at 39b. The court continued: "Where two or more persons conspire together, the conspiracy makes the wrongful act of each person the joint acts of them all," *id.*, at 41b; "[i]t follows that each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of the law, an act for which each is jointly and severally liable." *Ibid.* Thus, the presence of a conspiracy rendered all of the "conspirators" liable for the wrongful acts of any member of that conspiracy.

8 See Miss.Code Ann. § 97–23–85 (1972). The chancellor found: "The testimony in the case at bar clearly shows that the principal objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure

upon governing authorities to grant defendants' demands or, in the alternative, to suffer economic ruin." App. to Pet. for Cert. 51b. As noted, however, many of the merchants themselves were civic leaders. See n.3, *supra.*

9 See Miss.Code Ann. § 75–21–9 (1972). The court made clear that under this theory intentional participation in the concerted action rendered each defendant directly liable for all resulting damages. "As a legal principle, it is sufficient to show that the concert of action on the part of the defendants was deliberately invited, and that the defendants gave their adherence to the scheme and participated in it." App. to Pet. for Cert. 54b. The same was true of the court's secondary boycott theory; "since an illegal boycott is an invasion of a property right, the members of the boycotting combination are liable for the resulting damages." *Id.*, at 53b.

10 In its discussion of the secondary boycott statute, the court rejected an argument that the statute was unconstitutional under the First and Fourteenth Amendments. Noting as a "basic premise" that "secondary boycotts are unlawful under both United States and Mississippi law," the court stated that "conduct and communication which are illegal are not protected by the constitutional provisions relating to freedom of speech." *Id.*, at 46b. In imposing liability under the state restraint of trade statute, the chancellor added: "After a careful consideration of the constitutional claims of defendants, the Court finds that none of the acts or conduct of defendants was shielded or protected by the Constitution of the United States or the Constitution of the State of Mississippi." *Id.*, at 55b–56b. Finally, in assessing damages, the court stated: "Defendants base their defense on the concept that the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States. This Court has hereinbefore found that the conduct of the defendants was unlawful and unprotected." *Id.*, at 62b.

11 *Id.*, at 19g. Following the entry of judgment, the defendants moved for relief from Mississippi's 125-percent supersedeas bonding requirement. Although the Mississippi Supreme Court denied the motion, a federal court enjoined execution of the Chancery Court judgment pending appeal. *Henry v. First National Bank of Clarksdale*, 424 F.Supp. 633 (ND Miss.1976), aff'd, 595 F.2d 291 (CA5 1979), cert. denied, 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756.

12 393 So.2d, at 1300.

13 *Id.*, at 1301.

14 *Ibid.*

15 The court did not specifically identify the evidence linking any of the defendants to such an agreement.

16 As noted, liability under the secondary boycott and restraint of trade statutes could be found on the basis of an entirely voluntary and nonviolent agreement to withhold patronage. See n. 9, *supra.* It is not clear whether—in its imposition of tort liability—the trial court rested on a theory similar to that ultimately advanced by the Mississippi Supreme Court. In finding an unlawful civil conspiracy—which rendered each conspirator liable for the actions of others, see n. 7, *supra*—the chancellor arguably believed that it was necessary to connect all defendants to an agreement to use force or violence to effectuate the conspiracy. See App. to Pet. for Cert. 40b–41b. The chancellor made no factual finding, however, that such an agreement existed.

17 393 So.2d, at 1302.

18 Concerning the permanent injunction entered by the chancellor, the court stated: "Although the granting of injunction has been assigned as error, the error has not been argued, and NAACP, et al. say, at the conclusion of their brief '... the injunctive aspects of the case are now moot....' " *Id.*, at 1293. Despite this finding, the court did not vacate the injunction.

19 Respondents acknowledge that "[t]he basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal force, violence and threats.' " Supplemental Brief for Respondents 1–2.

20 Respondents argue that anyone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics...." *Id.*, at 2. Respondents thus would impose liability for the managers' *failure* to act; respondents argue that, despite evidence that boycott "enforcers" caused fear of injury to persons and property, "they were not taken from their posts and replaced by a system of voluntary compliance; there is no evidence that any of the petitioners even admonished them for their enforcement methods; the successful system of paramilitary enforcers on the streets and 'rhetorical' threats of violence by boycott leaders was left in place for the duration." *Id.*, at 5.

21 These groups are not meant to be exclusive.

22 "Once the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and of military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores." *Id.*, at 8.

23 App. to Pet. for Cert. 15b.

24 *Id.*, at 10b.

25 *Id.*, at 12b.

26 The petition stated:

"We hope it will not be necessary to resort to the kind of peaceful demonstrations and selective buying campaigns which have had to be used in other communities. It takes manpower, time and energy which could be better directed at solving these problems which exist in Port Gibson and Claiborne County by mutual cooperation and efforts at tolerant understanding.

"No one likes to have to resort to picketing and other kinds of demonstration—just as no one likes to be the target of this kind of demonstration. But this sort of thing is inevitable unless there can be real progress toward giving all citizens their equal rights. There seems sometimes to be no other alternative.

"Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This implies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs." *Id.*, at 9b.

27 *Id.*, at 13b.

28 Although Evers' speech on April 1, 1966, was not recorded, the chancellor found: "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him.* According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP." *Id.*, at 17b–18b (footnote omitted).

29 *Id.*, at 22b (emphasis in original). The chancellor also noted that MAP's Board of Directors "did not seek help from local law-enforcement officers, nor did they complain to United States authorities for protection of their cooks from possible reprisals arising from trade with the white merchants"; and that "MAP employees in Claiborne County continued to take an active part in the NAACP activities and to support the boycott by picketing and marching." *Id.*, at 23b. The Mississippi Supreme Court rejected the chancellor's findings and concluded that MAP was not a willing participant in the boycott, thus absolving it from liability.

30 *Id.*, at 25b. One of the respondents awarded the most in damages, Barbara Ellis—a partner in Ellis Variety Store—testified that the store was boycotted from April 1, 1966, until January 27, 1967. On the latter date, the store agreed—apparently at the urging of a biracial committee—to hire a black cashier. Record 1183. The boycott was reimposed on April 17, 1968, after the death of Martin Luther King, Jr., but again was lifted on May 1, 1968. *Id.*, at 1184. The boycott finally was reimposed on April 19, 1969, the day following the shooting of Roosevelt Jackson. *Ibid.*

31 The officers had gone to Jackson's home to arrest him. A scuffle ensued and Jackson was shot by a white officer allegedly while being held by a black officer.

32 App. to Pet. for Cert. at 27b.

33 Record 1146. The Sheriff of Claiborne County testified: "There were pickets off and on from April, 1966 to 1970." *Id.*, at 1060. When asked to describe "how they conducted themselves, what they did, what they went about doing," he stated: "Most of them carried or either had signs on their shoulders and they walked up and down the streets in front of the stores. They wouldn't always picket the same stores at the same time. At different times they might picket M&M then they would move up and picket Claiborne Hardware down Market Street to other businesses. Most of the time it was teenagers and at the last it was little bitty fellows, as young as about six years old. That was '69 and '70." *Ibid.* The Sheriff also testified that the boycott was "tight" in April 1966, April 1968, and April 1969. *Id.*, at 1152.

34 Evidence concerning the aims and practices of the "Black Hats" is contradictory. Respondents describe them as a "paramilitary organization." Petitioner Elmo Scott, a member of the group, testified concerning instructions that were given to him: "It was given to the Deacons to give respect to the people that was on the street and, regardless of what they say back to you, for you not to use bad language to them or not to curse them or no kind of way, just talk to them in the right manner of way." *Id.*, at 2985. It is undisputed that the "Black Hats" were formed during the boycott, that members of the organization engaged in "store watching" and other "enforcement" activities, and that some individuals who belonged to the group committed acts of violence.

35 App. to Pet. for Cert. 19b.

36 *Id.*, at 35b.

37 On August 22, 1966, birdshot was fired into the home of James Gilmore, a black man who ignored the boycott. He immediately grabbed a shotgun, leapt into his car, pursued the vehicle from which he believed the shots had come, forced

it to the side of the road, and apprehended three young black men who were active supporters of the boycott. They were indicted, tried, and convicted, but the convictions were set aside on appeal. *Whitney v. State*, 205 So.2d 284 (Miss.1967). Gilmore continued to patronize white merchants after the incident.

In June 1966, while Murriel Cullens was having a beer in Wolf's Store, a brick was thrown through the windshield of his parked car. He had been patronizing white merchants and continued to do so thereafter. Record 14049. In November 1966, shotgun pellets were fired into the wall of his mother's home. She had received a number of threatening telephone calls criticizing her for patronizing white stores. She continued to do so after the incident. *Id.*, at 14003. At trial, Laura Cullens testified, in response to a question whether she had been scared: "No indeed. I haven't had a bone in me scared in my life from nobody. And I have always told them, they say, 'You're just an uncle tom.' And I say, 'Well, uncle tom can be blue, black, green or purple or white. If I feel I am in the right, I stand in that right and nobody tells me what to do.' " *Id.*, at 14017.

James Bailey, who was a teenager at the time of the incident, testified that he had noticed that an elderly black lady named Willie Butler traded with a white merchant and had groceries delivered to her home. He testified that he destroyed flowers in her garden to punish her for violating the boycott. *Id.*, at 3656. He stated that he acted on his own initiative and that Mrs. Butler continued to trade with the merchant. *Id.*, at 3660, 3741.

38 *Id.*, at 13868. One of his assailants testified that the incident resulted from an automobile accident, rather than the boycott. *Id.*, at 3656.

39 "Preacher White" had died by the time of trial. No witness admitted being present at what respondents' counsel characterized as "the spanking of Preacher White." *Id.*, at 3696. The Port Gibson Chief of Police testified, however, that White had come in and complained that a group of young blacks had pulled his overalls down and whipped him. *Id.*, at 2176. In describing this incident, the chancellor stated that Preacher White "was stripped of his clothing and whipped by a group of young blacks because he refused to honor the boycott." App. to Pet. for Cert. 37b.

40 In describing the "atmosphere of fear" existing during the boycott, the chancellor emphasized the participation of petitioner Rudy Shields. He stated:

"Defendant Rudolph J. (Rudy) Shields, formerly of Chicago, was the principal figure in several altercations. He boasted that he was 'the most jailed person in the Claiborne County boycott.' This man was the acknowledged leader of the 'Deacons.' " *Id.*, at 35b.

See also Supplemental Brief for Respondents 10–13. The record indicates that Shields was in Port Gibson for approximately eight months during 1966. Record 4993.

41 The chancellor did find—and apparently believed this fact to be significant—that the NAACP provided attorneys to black persons arrested in connection with acts arising from the boycott. App. to Pet. for Cert. 38b. The NAACP provided legal representation to the three black persons arrested in August 1966 following the Gilmore shooting.

42 Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 1038, 43 L.Ed.2d 328.

43 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.Const., Amdt. 1. First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697.

44 Specifically, petitioner contended that respondent "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes." 402 U.S., at 416, 91 S.Ct., at 1576.

45 One of petitioner's officers testified at trial that he had hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." *Id.*, at 417, 91 S.Ct., at 1576.

46 See *Watts v. United States*, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664 ("The language of the political arena, like the language used in labor disputes, see *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 58, 86 S.Ct. 657, 660, 15 L.Ed.2d 582 (1966), is often vituperative, abusive, and inexact"). See also *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284; Farber, Commercial Speech and First Amendment Theory, 74 Nw.U.L.Rev. 372 (1979).

47 "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S., at 376–377, 88 S.Ct., at 1678 (footnotes omitted).

48 In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325, the Court unanimously rejected Alabama's effort to oust the NAACP from that State. The State claimed, in part, that the NAACP was " 'engaged in organizing, supporting and financing an illegal boycott' " of Montgomery's bus system. *Id.*, at 302, 84 S.Ct., at 1311. Writing for the Court, Justice Harlan described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law." *Id.*, at 307, 84 S.Ct., at 1313. In *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1317 (CA8 1980), cert. denied, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 49, Judge Stephenson stated that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott."

49 We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See *Hughes v. Superior Court*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985.

50 "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see ... whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295; see also *One, Inc. v. Olesen*, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352. We must 'make an independent examination of the whole record,' *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686.

51 Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. *New York Times Co. v. Sullivan, supra*, at 265, 84 S.Ct., at 718.

52 See also *Carroll v. Princess Anne*, 393 U.S. 175, 184, 89 S.Ct. 347, 353, 21 L.Ed.2d 325; *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629.

53 See *United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Elfbrandt v. Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321; *Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992.

54 "*Strictissimi juris.*" 367 U.S., at 299, 81 S.Ct., at 1521.

55 In *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561, the Court vacated an injunction, directed against an entire police department, that had resulted from 20 specific incidents of police misconduct. The Court held that such collective responsibility should be limited to instances in which a concerted design existed to accomplish a wrongful objective. *Id.*, at 373–376, 96 S.Ct., at 605.

56 Of course, the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. See *infra,* at 3432–3433.

57 It is noteworthy that the portion of the chancellor's opinion discussing damages begins by referring expressly to the two theories of liability that the Mississippi Supreme Court rejected:

"The complainants proved, in this record, that they suffered injury to their respective businesses as the direct and proximate result of the unlawful secondary boycott and the defendants' actions in restraining trade, all of which was accomplished by defendants through a conspiracy." App. to Pet. for Cert. 57b (footnote omitted).

In a footnote, the chancellor added that "any kind of boycott is unlawful if executed with force or violence or threats." *Id.*, at 57b, n. 21.

58 393 So.2d, at 1307.

59 *Id.*, at 1302 (emphasis added).

60 *Id.*, at 1300 (quoting trial court; see App. to Pet. for Cert. 39b).

61 393 So.2d, at 1300 (emphasis added).

62 The testimony of Julia Johnson—although itself only a small portion of a massive record—perhaps best illustrates this point:

"Q. How did you observe the boycott?

"A. I just stayed out of the stores, because I had my own personal reasons to stay out of the stores. There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. So that's what I wanted. And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not hired because I'm black or white, but just hired.
"Q. And this was your reason for observing the boycott?
"A. Yes, it was.
"Q. And you were in favor of the boycott?
"A. Yes, I was in favor of the boycott.
"Q. And it wasn't because somebody threatened you?
"A. No, it wasn't because nobody threatened me.
"Q. You weren't afraid?
"A. Was I afraid?
"Q. Yes.
"A. No, I was not afraid." Record 15476.
It is clear that losses were sustained because persons like Julia Johnson "wanted justice and equal opportunity." *Id.,* at 6864 (testimony of Margaret Liggins). See *id.*, at 6737, 12419, 13543–13544.

63 It is also noteworthy that virtually every victim of the acts of violence found by the chancellor testified that he or she continued to patronize the white merchants. See *supra*, at 3421, and n. 37.

64 In *Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, the Court stated that if "special facts" such as those presented in *Meadowmoor* "appeared in an action for damages after picketing marred by violence had occurred," they might "support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U.S., at 731–732, 86 S.Ct., at 1141.

65 As described by the Court: "Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U.S., at 291–292, 61 S.Ct., at 554.

66 See n. 62, *supra.*

67 For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

68 See Record 1172. The strongest evidence of wrongdoing at the meetings was presented by petitioner Marjorie Brandon, who served at times as the local NAACP secretary. She testified that "in the meetings there were statements saying that you would be dealt with" if found trading in boycotted stores. *Id.*, at 5637. She stated that she understood "dealt with" to mean "they would take care of you, do something to you, if you were caught going in." *Ibid.* Her testimony does not disclose who made the statements, how often they were made, or that they were in any way endorsed by others at the meetings. A massive damages judgment may not be sustained on the basis of this testimony; the fact that certain anonymous persons made such statements at some point during a 7-year period is insufficient to establish that the Association itself possessed unlawful aims or that any petitioner specifically intended to further an unlawful goal.

69 A legal duty to "repudiate"—to disassociate oneself from the acts of another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts. As our decisions in *Scales, Noto*, and *Healy* make clear, see *supra*, at 3430, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals. Cf. *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 391–395, 102 S.Ct. 3141, 3150–3152, 73 L.Ed.2d 835.

70 "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S., at 52, 39 S.Ct., at 249.

71 In *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664, the petitioner was convicted of willfully making a threat to take the life of the President. During a public rally at the Washington Monument, petitioner stated in a small discussion group:
" 'They always holler at us to get an education. And now I have already received my draft classification as 1–A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' " *Id.*, at 706, 89 S.Ct., at 1400.
This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708, 89 S.Ct., at 1401.

72 There is evidence that Evers occasionally served as a "store watcher," but there is no suggestion that anything improper occurred on those occasions.

73 See n. 69, *supra.*

74 Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

75 Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; *Bates v. Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 81 S.Ct. 1333, 6 L.Ed.2d 301; *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325.

76 There is no question that Charles Evers—as its only paid representative in Mississippi—was an agent of the NAACP.

77 In a footnote to his discussion of the NAACP's liability, the chancellor wrote:
"Aaron E. Henry, a prominent black leader in the State of Mississippi, who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP, testified that the NAACP 'absolutely did not approve of the way the boycott was being conducted in Port Gibson.' There is also evidence in the record tending to show that Evers was called to account by the national NAACP because of the manner in which the boycott was conducted. However, the NAACP took no action whatever to curb Evers' activities in this connection." App. to Pet. for Cert. 42b, n. 9.
Henry's testimony concerning Evers' having been "called to account by the National NAACP" concerned Evers' failure to make proper reports and Henry's understanding that there was a personality clash between Evers and an executive of the NAACP. Record 4905, 4907. We have found no evidence in the record that any representative of the national NAACP was advised of any facts concerning the manner in which the Port Gibson boycott was conducted.

78 The chancellor did find that the NAACP had posted bond and provided legal representation for arrested boycott violators. Since the NAACP regularly provides such assistance to indigent black persons throughout the country, this finding cannot support a determination that the national organization was aware of, and ratified, unauthorized violent conduct. Counsel for respondents does not contend otherwise.

79 In discussing the doctrine of criminal conspiracy, Justice Jackson noted:
"The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history." *Krulewitch v. United States*, 336 U.S., at 448, 69 S.Ct., at 720 (concurring opinion).

80 "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." 1 A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

546 F.3d 991
United States Court of Appeals,
Ninth Circuit.

THEME PROMOTIONS, INC., a California corporation, dba Theme Co-op Promotions, Plaintiff–counter–defendant–Appellee,
v.
NEWS AMERICA MARKETING FSI, a Delaware corporation, Defendant–counter–claimant–Appellant.
Theme Promotions, Inc., a California corporation, dba Theme Co-op Promotions, Plaintiff–counter–defendant–Appellant,
v.
News America Marketing FSI, a Delaware corporation, Defendant–counter–claimant–Appellee.

Nos. 06–16230, 06–16341.
|
Argued and Submitted April 14, 2008.
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Filed Aug. 20, 2008.
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Amended Oct. 10, 2008.

Synopsis
Background: Advertising company that offered joint promotions of complementary products sued publisher of coupon booklets inserted in newspapers, alleging that publisher's extension of its first refusal agreements with packaged good companies to indirect purchasers of inserts such as advertising company violated federal antitrust law and state laws, including California's Cartwright Act. Following initial grant of summary judgment for publisher which was partially reversed and remanded on appeal, 35 Fed.Appx. 463, and advertising company's withdrawal of its federal claims, jury returned verdict for advertising company on state law claims. Parties filed post-trial motions. After the United States District Court for the Northern District of California, Vaughn R. Walker, J., ruled on such motions, parties appealed.

Holdings: The Court of Appeals, Thomas, Circuit Judge, held that:

[1] substantial evidence supported jury's definition of relevant market, for purposes of claim under Cartwright Act, as encompassing sales of advertising inserts to packaged goods companies;

[2] evidence supported jury determination that first refusal agreements affected substantial share of relevant market;

[3] evidence supported jury determination that first refusal agreements caused antitrust injury to advertising company;

[4] separate damages awards for tort and antitrust claims were not duplicative;

[5] intentional interference claim was barred by *Noerr-Pennington* doctrine; and

[6] advertising company was not entitled to restitution.

Affirmed.

Opinion, 539 F.3d 1046, amended and superseded.

West Headnotes (31)

[1] Antitrust and Trade Regulation Rule of reason

The rule of reason analysis applicable to Cartwright Act claims under California law measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects. West's Ann.Cal.Bus. & Prof.Code § 16720.

4 Cases that cite this headnote

[2] Antitrust and Trade Regulation Exclusive dealing arrangements/agreements/distributorships

Under rule of reason analysis applicable to Cartwright Act claims under California law,

exclusive dealing contract is proscribed when it is probable that performance of contract will foreclose competition in substantial share of affected line of commerce. West's Ann.Cal.Bus. & Prof.Code § 16720.

3 Cases that cite this headnote

[3] **Antitrust and Trade Regulation** Rule of reason
Antitrust and Trade Regulation Market Power; Market Share

A rule of reason analysis for an antitrust claim under the Cartwright Act requires a threshold inquiry into the defendant's market power. West's Ann.Cal.Bus. & Prof.Code § 16720.

2 Cases that cite this headnote

[4] **Antitrust and Trade Regulation** Market Power; Market Share

Evidence of restricted output and supracompetitive prices is direct evidence of market power, as required to establish antitrust claim under Cartwright Act. West's Ann.Cal.Bus. & Prof.Code § 16720.

6 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Relevant Market

To establish circumstantial evidence of market power, for purposes of Cartwright Act claim under California law, plaintiff must first define relevant market and then show that defendant plays enough of a role in that market to impair competition significantly. West's Ann.Cal.Bus. & Prof.Code § 16720.

13 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Product market

"Relevant market," for purposes of Cartwright Act claim under California law, is identified by considering commodities reasonably interchangeable by consumers for same purposes. West's Ann.Cal.Bus. & Prof.Code § 16720.

2 Cases that cite this headnote

[7] **Antitrust and Trade Regulation** Product market

"Relevant market," for purposes of Cartwright Act claim under California law, includes all sellers or producers who have actual or potential ability to deprive each other of significant levels of business. West's Ann.Cal.Bus. & Prof.Code § 16720.

2 Cases that cite this headnote

[8] **Antitrust and Trade Regulation** Restraints and misconduct in general

Substantial evidence supported jury's definition of "relevant market," in antitrust action under Cartwright Act brought by advertising company that offered joint promotions of complementary products against publisher of coupon booklets inserted in newspapers, as encompassing sales of advertising inserts to packaged goods companies; evidence showed that inserts were single most important promotional vehicle used to distribute coupons, and that inserts had unique benefits including reaching large national audience. West's Ann.Cal.Bus. & Prof.Code § 16720.

7 Cases that cite this headnote

[9] **Antitrust and Trade Regulation** Exclusive dealing arrangements/agreements/distributorships

Whether an exclusive dealing arrangement substantially forecloses competition in violation of the Cartwright Act antitrust provisions cannot be determined by a rigid mathematical analysis alone; the analysis must take into account other factors. West's Ann.Cal.Bus. & Prof.Code § 16720.

[10] **Antitrust and Trade Regulation** Restraints and misconduct in general

Evidence, including testimony that coupon insert publisher held 40-60% of the insert publishing market, supported jury determination that publisher's extension of its first refusal agreements with packaged good companies to include indirect purchasers of inserts, such as advertising company that offered joint promotions of complementary packaged goods, affected substantial share of relevant market encompassing sales of advertising inserts to packaged goods companies, as required for advertising company to establish antitrust claim against publisher under Cartwright Act. West's Ann.Cal.Bus. & Prof.Code § 16720.

2 Cases that cite this headnote

[11] **Antitrust and Trade Regulation** Injury to Business or Property
Antitrust and Trade Regulation Causation

"Antitrust injury" is defined not merely as injury caused by an antitrust violation, but more restrictively as injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

3 Cases that cite this headnote

[12] **Antitrust and Trade Regulation** Injury to Business or Property
Antitrust and Trade Regulation Causation

In order to find that antitrust injury exists, court must examine both nature of injury and whether injury is causally related to antitrust violation.

1 Cases that cite this headnote

[13] **Antitrust and Trade Regulation** Injury to Business or Property

Coercive activity that prevents choice between market alternatives, including agreements to restrain trade, may constitute "antitrust injury."

1 Cases that cite this headnote

[14] **Antitrust and Trade Regulation** Causation

If an injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition, there is no "antitrust injury," even if defendant's conduct is illegal.

[15] **Antitrust and Trade Regulation** Causation

Injury will not qualify as an "antitrust injury" unless it is attributable to anti-competitive aspect of practice under scrutiny, since it is inimical to antitrust laws to award damages for losses stemming from continued competition.

1 Cases that cite this headnote

[16] **Antitrust and Trade Regulation** Restraints and misconduct in general

Substantial evidence supported jury finding that coupon insert publisher's conduct of extending its first refusal agreements with packaged good companies to include indirect purchasers of inserts, such as advertising company that offered joint promotions of complementary packaged goods, caused "antitrust injury" to advertising company, as required for advertising company to establish restraint of trade claim under Cartwright Act; advertising company presented evidence that right of first refusal agreements forced it to purchase inserts from publisher rather than publisher's competitor, and that such restriction of choice resulted in financial harm, loss of business, and reduction of company's own competitive presence in the market. West's Ann.Cal.Bus. & Prof.Code § 16720.

[17] **Antitrust and Trade Regulation** Causation

For injury to be "antitrust injury," it must be causally related to antitrust violation; harm may not be derivative and indirect, or secondary, consequential, or remote.

2 Cases that cite this headnote

[18] **Torts** Business relations or economic advantage, in general

Under California law, coupon insert publisher's extension of its right of first refusal agreements with packaged good companies to third parties purchasing inserts indirectly, which interfered with prospective economic advantage of advertising company that offered joint promotions of complementary products by forcing its customers to purchase inserts from publisher rather than publisher's competitor, was wrongful independent of such interference, as required for advertising company to establish claim for negligent interference with prospective economic advantage against publisher; extension of right of first refusal was unlawful restraint of trade under Cartwright Act. West's Ann.Cal.Bus. & Prof.Code § 16720.

4 Cases that cite this headnote

[19] **Torts** Improper means; wrongful, tortious or illegal conduct
Torts Pleading

Plaintiff seeking to recover damages for interference with prospective economic advantage under California law must plead and prove that defendant's conduct was wrongful by some legal measure other than fact of interference itself.

10 Cases that cite this headnote

[20] **Antitrust and Trade Regulation** Admissibility

Testimony of advertising company's president in company's antitrust action against publisher of advertising inserts, indicating that he was under the impression that company had a good relationship with packaged goods companies that were its customers, did not comment on internal decisions of packaged goods companies or their executives and, therefore, was not speculative or lacking in foundation, as would render it inadmissible.

[21] **Damages** Nature and theory of compensation

Under California law, jury's separate damages awards for antitrust and tort claims were not

impermissibly duplicative, in action by joint promotion advertising company against coupon insert publisher challenging publisher's right of first refusal agreements with packaged good companies; awards arose from separate legal harms, as antitrust damages resulted from anti-competitive right of first refusal agreements, while damages for negligent interference with prospective economic advantage resulted from publisher's intentional misrepresentations.

1 Cases that cite this headnote

[22] **Damages** Nature and theory of compensation

General rule of compensatory damages under California law bars double recovery for same wrong.

11 Cases that cite this headnote

[23] **Constitutional Law** Noerr-Pennington Doctrine

The essence of the *Noerr–Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct. U.S.C.A. Const.Amend. 1.

70 Cases that cite this headnote

[24] **Constitutional Law** Noerr-Pennington Doctrine

Conduct incidental to lawsuit, including pre-suit demand letter, falls within protection of *Noerr–Pennington* doctrine.

57 Cases that cite this headnote

[25] **Antitrust and Trade Regulation** Litigation; sham litigation

Pre-suit letters threatening legal action may be restricted by law, notwithstanding *Noerr–Pennington* doctrine, where they include representations so baseless that the threatened litigation would fall into the doctrine's "sham litigation" exception.

44 Cases that cite this headnote

[26] **Antitrust and Trade Regulation** Litigation; sham litigation

Pre-suit letters from coupon insert publisher to its customers, indicating that if customers failed to place all of their insert orders with publisher pursuant to right of first refusal agreements, including joint promotions sold through third party advertising company, they could become embroiled in ongoing litigation between advertising company and publisher, did not threaten sham litigation, and therefore, *Noerr-Pennington* doctrine barred advertising company's claim alleging intentional interference with prospective economic advantage under California law; suit between publisher and advertising company settled, indicating that it was not objectively baseless, and a future suit by publisher against customers to enforce its right of first refusal agreement was potentially meritorious.

10 Cases that cite this headnote

[27] **Antitrust and Trade Regulation** Monetary Relief; Damages

Advertising company that offered joint promotions to packaged goods companies, after prevailing on its claim that coupon insert publisher's extension of its right of first refusal agreements with packaged good companies to third parties indirectly purchasing inserts was an

unfair competitive practice under California's Unfair Competition Law (UCL), was not entitled to restitution in the amount of publisher's profits from nine transactions in which advertising company was forced to purchase inserts from publisher as a result of publisher's right of first refusal agreements; requested amount was not restitutionary in nature, but rather in nature of non-restitutionary disgorgement, and advertising company could not claim an ownership interest in all of publisher's profits from the nine disputed insert orders. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

18 Cases that cite this headnote

[28] Antitrust and Trade Regulation Injunction

District court may deny motion for permanent injunctive relief in antitrust case where injunction would hinder, rather than promote, competition in market.

4 Cases that cite this headnote

[29] Antitrust and Trade Regulation Particular cases

Following jury determination that coupon insert publisher's extension of its right of first refusal agreements with packaged good companies to third parties indirectly purchasing inserts, including advertising company that offered joint promotions to packaged goods companies, violated California's Cartwright Act and Unfair Competition Law (UCL), advertising company was not entitled to permanent injunction preventing publisher from enforcing its right of first refusal agreements; in light of ambiguous market definition, trial court was not convinced that allowing publisher to enforce its agreements in the future would injure competition, or that an injunction would protect competition. West's Ann.Cal.Bus. & Prof.Code §§ 16720, 17200.

5 Cases that cite this headnote

[30] Federal Civil Procedure Form and sufficiency of amendment; futility

Leave to amend complaint will not be granted where amendment would be futile. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

28 Cases that cite this headnote

[31] Declaratory Judgment Particular Contracts

Advertising company that offered joint promotions of complementary products to packaged good companies was not entitled to declaratory judgment stating that it was not bound by first refusal agreements between coupon insert publisher and packaged goods companies; there was no controversy over whether advertising company was bound by such agreements, and a declaration that advertising company was not bound would not have completely resolved controversy between publisher and advertising company, which involved whether first refusal agreements forced advertising company to purchase inserts from publisher rather than publisher's competitor. 28 U.S.C.A. § 2201(a).

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of California; Vaughn R. Walker, District Judge, Presiding. D.C. Nos.

CV–97–04617–VRW, CV–97–04617–VRW.
Before: STEPHEN S. TROTT, SIDNEY R. THOMAS, and RICHARD A. PAEZ, Circuit Judges.[1]

ORDER

The opinion previously filed in this case is amended as follows.

On pp. 11074–75 [539 F.3d 1046] of the slip opinion, the following sentence is inserted before the sentence beginning "News argues that the evidence actually shows....":

> "Theme further presented evidence that, while the right of first refusal agreements purported to lower prices, prices could have been lower still if the market were rid of such agreements."

The following language is deleted:

> "Although both parties are able to point to evidence supporting their positions, the evidence of restricted choice between market alternatives is sufficient to establish that the injury suffered by Theme was the type the antitrust laws were intended to prevent."

In lieu of the deleted passage, the following language is inserted:

> "However, a jury could reasonably believe Theme's evidence that the right of first refusal agreements were harmful to competition over News' evidence that they were procompetitive, and thereby conclude that Theme suffered an injury of the type the antitrust laws were intended to prevent."

The panel has voted to deny the petition for rehearing. Judges Thomas and Paez voted to reject the suggestion for rehearing en banc and Judge Trott so recommended.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on ***997** the suggestion for rehearing en banc. Fed. R.App. P. 35(b).

With the amendments, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No future petitions for rehearing will be entertained.

OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether right of first refusal agreements between a publisher of advertising tools and packaged goods companies violate California antitrust and tort law. We conclude that the jury verdict in favor of Plaintiff was supported by substantial evidence in the record, and we affirm.

I

News America Marketing FSI, Inc. ("News") is one of two publishers of an advertising tool called a free-standing insert ("insert"). An insert is a multi-colored advertising booklet inserted into a Sunday newspaper that contains coupons promoting products—like cereal and soft drinks—sold by packaged goods companies. Although packaged goods companies advertise and promote their products with a variety of advertising tools, inserts are the primary tool that packaged goods

companies use to distribute coupons nationally. The other major company that sells, publishes, and distributes inserts is Valassis Communications ("Valassis").

It is common for a packaged goods company to enter into a right of first refusal agreement with either News or Valassis to meet its insert needs. In an right of first refusal agreement with News, a packaged goods company agrees to first offer all (if the agreement is a "100% right of first refusal agreement") or a set percentage (if the agreement is a "share right of first refusal agreement") of its insert business to News. Under the agreement, News must accept this business unless it cannot accommodate the date requested by the packaged goods company. In return for the greater volume of sales promised by the right of first refusal agreement, News discounts the insert prices.

Theme Promotions, Inc. ("Theme") is an advertising company that offers promotional programs to packaged goods companies. Theme specializes in related-item merchandising, or "tie-ins", that involve the joint promotion of complementary products from two different packaged goods companies (for example, a particular brand of popcorn with a particular brand of cola). Theme often uses inserts in its related-item promotions. Because Theme is contractually bound to two or more packaged goods companies for each related-item promotion, and because Theme is responsible for the execution of the promotions, Theme—and not the packaged goods companies—often purchases the inserts from either News or Valassis.

Theme itself has entered into right of first refusal agreements with News (before 1996) and Valassis (since 1996) to get lower insert prices. In June 1995, Theme entered into a right of first refusal agreement with News for its insert business. When a dispute arose between the parties, the agreement was voided, and Theme entered into a right of first refusal agreement with Valassis. News subsequently sued Theme and Valassis for intentional interference with contractual relations. The lawsuit settled in 1997. Since 1996, Theme's preferred supplier of inserts has been Valassis, in part because Valassis offers Theme "extras" like better page position for its coupons, and rebates for promotional programs brought to Valassis.

During the course of the litigation with Theme and Valassis, News took the position that any right of first refusal agreements applied not only to inserts ***998** purchased directly by packaged goods companies for their own single product promotions, but also to inserts purchased indirectly by third-party suppliers of promotional services such as Theme. News communicated this position to packaged goods companies (Benevia and Van de Kamp, in particular) that had been told by Theme that they were free to place their orders with Valassis as long as the orders were placed through Theme. News advised these packaged goods companies that placing an order with Valassis would be a breach of contract and could embroil the packaged goods company in the lawsuit between News and Theme. Theme characterizes this as News' "aggressive [right of first refusal] enforcement strategy."

In 1997, News formalized its position that its right of first refusal agreements with packaged goods companies applied to inserts purchased by third-party suppliers such as Theme. News added language to its right of first refusal contracts providing that the packaged goods company "agrees that it will abide by terms and pay the rates set forth in this agreement for all [inserts] placed with News America irrespective of whether client places such advertisements directly through an advertising agent or another third-party compiler."

Between 1997 and 1999, Theme's preference to purchase inserts from Valassis, and News' right of first refusal agreements with packaged goods companies, clashed in at least 9 instances. In 1997, Theme put together an insert tie-in program between Benevia's sugar substitute Equal and Maxwell House Coffee. Benevia had a 100% right of first refusal agreement with News. Although Theme preferred to purchase the inserts from Valassis, News told Benevia that under the right of first refusal agreement, the inserts had to be purchased from News. The insert program was ultimately placed with News. Benevia did not participate in additional Theme programs. Similar issues arose in tie-in programs with Van de Kamp, Nabisco, Smuckers, Campbells, Hormel, and International Home Foods. In some cases, the insert order was ultimately placed with News; in others, it was placed with Valassis. In most cases, the packaged goods company did no further business with Theme after the contested promotion.

On December 18, 1997, Theme brought an action against News in the district court for the Northern District of California, for violations of, *inter alia,* federal antitrust laws, the Cartwright Act, Cal. Bus. & Prof.Code § 16720, and the Unfair Competition Act, Cal. Bus. & Prof.Code § 17200, and for tortious interference with prospective economic advantage. The district court dismissed Theme's federal and state antitrust claims with prejudice, and eventually granted summary judgment in favor of News. Theme appealed to this Court, and we reversed the dismissal of the federal and state antitrust and unfair competition claims, and the state law tortious interference claim. *See Theme Promotions, Inc. v. News America FSI,*

35 Fed.Appx. 463 (9th Cir.2002).

On remand, Theme filed a motion for leave to amend, seeking to substitute a declaratory judgment claim for its antitrust claims. The district court denied the motion. Theme eventually withdrew all of its federal antitrust claims with prejudice. The case went to trial in August, 2005 on claims of restraint of trade and monopolization in violation of the Cartwright Act, unlawful and unfair business practices in violation of the Unfair Competition Act, negligent interference with prospective economic advantage, and intentional interference with prospective economic advantage. During the trial, Theme attempted to assert a boycott claim, but the district ***999** court granted News' motion for judgment as a matter of law ("JMOL") with respect to that claim.

After a three-week trial, the jury returned a verdict in favor of Theme, finding that: (1) two provisions of News' right of first refusal agreements unreasonably restrained trade in violation of the Cartwright Act, and that Theme was entitled to $1,000,000 in damages (before trebling); (2) News had engaged in unlawful and unfair business practices in violation of the Unfair Competition Act; (3) News had negligently interfered with Theme's prospective economic advantage regarding relationships with Benevia, Van de Kamp, and Campbells, and that Theme was entitled to damages in the amounts of $154,111, $1, and $496,023; (4) News had intentionally interfered with Theme's prospective economic advantage regarding relationships with Benevia and Van de Kamp, and that Theme was entitled to damages in the amounts of $132,992 and $800,353. The jury also assessed punitive damages totaling $2,500,000 against News for threats of litigation against Van de Kamp and Benevia. The jury returned a verdict against Theme on its combination to monopolize claim as well as its intentional and negligent interference claims with respect to Nabisco, Smuckers, Hormel, and International Home Foods, and its intentional interference claims with respect to Campbells.

Following trial, News renewed its motion for JMOL, or in the alternative, for a new trial. Theme moved for a permanent injunction prohibiting News' further enforcement of its right of first refusal agreements and for an award of restitution under the Unfair Competition Act. The district court set aside the jury verdict on the intentional interference claims and the related punitive damages award, holding the alleged threats of litigation were privileged. It also set aside the negligent interference claim relating to Benevia. The court denied JMOL on the Cartwright Act claim and otherwise affirmed the jury verdict. The court denied Theme's post-trial motions.

The parties subsequently submitted a joint proposed form of judgment, but disagreed about whether the remaining jury award for negligent interference regarding Theme's relationship with Campbells was duplicative of the award for the Cartwright Act violation. In an order dated May 25, 2006, the district court ruled that the awards were not duplicative.

On June 1, 2006, final judgment was entered, awarding Theme a total of $3,496,024 in damages. News appealed, challenging the district court's order denying in part News' motion for JMOL or new trial and the order resolving the issue of duplicative recovery. Theme cross-appealed, challenging the order granting in part News' motion for JMOL, the trial ruling granting News' motion for JMOL on Theme's boycott claim, the order denying Theme's motion for leave to amend its complaint, and the order denying injunctive relief and restitution. These issues are before us now.

II

We review the district court's grant or denial of a renewed motion for JMOL de novo. *See Josephs v. Pac. Bell,* 443 F.3d 1050, 1062 (9th Cir.2006); *Johnson v. Paradise Valley Unified Sch. Dist.,* 251 F.3d 1222, 1226 (9th Cir.2001). We must decide whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict. *See Pavao v. Pagay,* 307 F.3d 915, 918 (9th Cir.2002). Antitrust standing is a question of law we review de novo. *Glen Holly Entm't Inc. v. Tektronix* ***1000** *Inc.,* 343 F.3d 1000, 1005 (9th Cir.2003).

We review the district court's denial of a motion to amend a complaint, evidentiary rulings, award of damages, and ruling on a motion for new trial for abuse of discretion. *See Chappel v. Lab. Corp.,* 232 F.3d 719, 725 (9th Cir.2000) (motion to amend); *Obrey v. Johnson,* 400 F.3d 691, 694 (9th Cir.2005) (evidentiary rulings); *McLean v. Runyon,* 222 F.3d 1150, 1155 (9th Cir.2000) (award of damages); *Dorn v. Burlington N. Santa Fe R.R. Co.,* 397 F.3d 1183, 1189 (9th Cir.2005) (injunctive relief).

Likewise, we review the district court's choice of remedies, decision to deny equitable relief, and decision to deny permanent injunctive relief for abuse of discretion. *See United States v. Alisal Water Corp.,* 431 F.3d 643, 654 (9th Cir.2005) (choice of remedies); *Rabkin*

v. Oregon Health Scis. Univ., 350 F.3d 967, 977 (9th Cir.2003) (equitable relief); *Cummings v. Connell,* 316 F.3d 886, 897 (9th Cir.2003).

III

The district court did not err in declining to grant JMOL in favor of News on Theme's Cartwright Act restraint of trade claim, or on Theme's negligent interference with prospective economic advantage claim. The district court also did not err in refusing to grant News' alternative motion for a new trial. Nor did the district court err in holding that the jury's awards of antitrust and tort damages were not duplicative.

A

The district court did not err in denying News' motion for JMOL on Theme's Cartwright Act restraint of trade claim. In reviewing the district court's denial of the motion, our role is to evaluate whether the evidence of a Cartwright Act violation, construed in the light most favorable to Theme, permits only one reasonable conclusion: that News did not violate the Cartwright Act. *See Pavao,* 307 F.3d at 918. In order to benefit from the favorable inferences available to the nonmoving party under a motion for JMOL, Theme must have presented "substantial evidence"—defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"—that News violated the Cartwright Act. *See Syufy Enter. v. Am. Multicinema, Inc.,* 793 F.2d 990, 992 (9th Cir.1986).

The Cartwright Act makes unlawful a "trust," defined as a combination of capital, skill, or acts by two or more persons or businesses to restrict trade, limit production, increase or fix prices, or prevent competition. Cal. Bus. & Prof.Code §§ 16702, 16720 *et seq.* The California Supreme Court has stated that the purpose of the Cartwright Act is to prevent any action which "has as its Purpose or Effect an unreasonable restraint of trade." *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.,* 22 Cal.3d 302, 148 Cal.Rptr. 918, 583 P.2d 777, 784 (1978).

[1] [2] California courts have determined that vertical restraints of trade, including exclusive dealing contracts, are not *per se* unreasonable but instead are subject to a "rule of reason" analysis.[2] *See Fisherman's Wharf Bay Cruise Corp. v. Superior Ct.,* 114 Cal.App.4th 309, 7 Cal.Rptr.3d 628, 649 (2004). The rule of reason ***1001** analysis "measures whether the anticompetitive aspect of a vertical restraint outweighs its procompetitive effects." *Exxon Corp. v. Superior Ct.,* 51 Cal.App.4th 1672, 60 Cal.Rptr.2d 195, 200 (1997). This approach recognizes that exclusive dealing contracts may harm competition, but may also have the effect of enhancing competition. *See Omega Envtl., Inc. v. Gilbarco, Inc.,* 127 F.3d 1157, 1162 (9th Cir.1997).[3] Under the rule of reason analysis, an exclusive dealing contract is "proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce." *Fisherman's Wharf,* 7 Cal.Rptr.3d at 649.

[3] [4] [5] A rule of reason analysis requires a threshold inquiry into the defendant's market power. *Roth,* 30 Cal.Rptr.2d at 712. Evidence of restricted output and supracompetitive prices is direct evidence of market power. *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1475 (9th Cir.1997). To establish circumstantial evidence of market power, a plaintiff must first define the relevant market and then show that the defendant plays enough of a role in the market to impair competition significantly. *Exxon,* 60 Cal.Rptr.2d at 201.

The district court instructed the jury that for Theme to prevail on its Cartwright Act restraint of trade claim, it would have to prove by a preponderance of the evidence that: (1) News agreed to provisions constituting an unreasonable restraint of trade;[4] (2) the purpose and effect of these provisions was to restrain competition; (3) the anticompetitive effect of the provisions outweighed any beneficial effect on competition; (4) Theme was harmed; and (5) News' conduct was a substantial factor in causing Theme's harm. The court instructed the jury on how it should identify the relevant market and how it should determine whether News' right of first refusal agreements foreclosed competition in a substantial share of that market.

News now argues that Theme failed to provide sufficient evidence to support the jury's relevant market definition and the jury's conclusion that News foreclosed competition in a substantial share of that market. News also argues that there is insufficient evidence in the record of an antitrust injury, a standing requirement, and of causation. Because antitrust injury and proximate cause are closely related concepts, we address both issues together. The record includes sufficient evidence that News foreclosed competition in the relevant market, and that Theme suffered an antitrust injury as the result of

News' anticompetitive actions.

1

[6] [7] The district court instructed the jury that for Theme to succeed on its Cartwright Act claim, it had to prove by a preponderance of the evidence that the relevant market is the sale of inserts to ***1002** packaged goods companies. The definition of the relevant market is a question of fact for the jury. *Forsyth,* 114 F.3d at 1476. A relevant market is identified by considering "commodities reasonably interchangeable by consumers for the same purposes." *Exxon,* 60 Cal.Rptr.2d at 201 (quoting *United States v. E.I. duPont de Nemours & Co.,* 351 U.S. 377, 395, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)). Put another way, the relevant market includes all sellers or producers who have actual or potential ability to deprive each other of significant levels of business. *Forsyth,* 114 F.3d at 1476 (citing *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.,* 875 F.2d 1369, 1374 (9th Cir.1989)).

Determining the relevant market can involve a complicated economic analysis, including concepts like cross-elasticity of demand, and "small but significant nontransitory increase in price" ("SSNIP") analysis. *See United States v. Oracle Corp.,* 331 F.Supp.2d 1098 (N.D.Cal.2004) (Walker, C.J.). Cross-elasticity of demand measures the percentage change in quantity that consumers will demand of one product in response to a percentage change in the price of another. *Forsyth,* 114 F.3d at 1483 (Wallace, J., concurring). When demand for the commodity of one producer shows no relation to the price for the commodity of another producer, it supports the claim that the two commodities are not in the same relevant market. *Forsyth,* 114 F.3d at 1477.

Similarly, a SSNIP analysis asks whether a monopolist in the proposed market could profitably impose a small but significant and nontransitory price increase. *Oracle,* 331 F.Supp.2d at 1112. If a significant number of customers would respond to a SSNIP by purchasing substitute products, the SSNIP would not be profitable for the hypothetical monopolist. *Id.* If a monopolist could not profitably impose a SSNIP, the market definition should be expanded to include those substitute products that constrain the monopolist's pricing. *Id.*

[8] The evidence of the relevant market for Theme's Cartwright Act claim is substantial enough that we cannot hold that the jury reached an unreasonable conclusion. To support the jury's finding, Theme highlights record testimony that inserts are the single most important promotional vehicle used to distribute coupons, and that inserts have unique benefits including reaching a large national audience. Theme also emphasizes that in 1994, when the price of inserts rose from approximately $4.00 per thousand to around $7.00 per thousand, the percentage of inserts in the coupon market also rose. This evidence—when viewed in the light most favorable to Theme—supports the jury's finding. We conclude that a reasonable jury could infer that the relevant market is the sale of inserts to packaged goods companies.

2

[9] The district court also instructed the jury that for Theme to succeed on its Cartwright Act claim, it had to prove by a preponderance of the evidence that News' right of first refusal agreements "foreclose competition in a substantial share of that relevant market." California courts have instructed that "a market share of 16 percent fails 'conspicuously to pass the threshold test establishing the defendant's market power.' " *Roth,* 30 Cal.Rptr.2d at 713 (quoting *Redwood Theatres, Inc. v. Festival Enter., Inc.,* 200 Cal.App.3d 687, 248 Cal.Rptr. 189, 199 (1988)). We have determined that a 45–70% market share may be enough to establish a substantial share of the relevant market where it is accompanied by other factors like fragmentation of competition and high entry barriers. *Syufy,* 793 F.2d at 995. Whether an exclusive ***1003** dealing arrangement substantially forecloses competition cannot be determined by a rigid mathematical analysis alone; the analysis must take into account other factors. *Fisherman's Wharf,* 7 Cal.Rptr.3d at 650–51.

[10] The best evidence supporting the jury's conclusion that News foreclosed competition in a substantial share of the market is testimony by expert witnesses, News executives, and Theme's president, that News held 40–60% of the national insert publishing market between the late 1990s and 2004. Theme also points to evidence—primarily the testimony of its own president about Theme's decision not to enter the insert publishing business—that there were significant barriers to entrance into the insert market. This testimony suggests that the large capital investments and high economies of scale necessary to reach an efficient level of output, coupled with the existence of current right of first refusal contracts, would prohibit new entrants into the market. Theme also submitted evidence that when a third insert

supplier briefly entered the market in the 1990s, it was marginalized by News and Valassis and eventually purchased by News.

News did not effectively counter this evidence. Therefore, we conclude that a reasonable jury could determine that News' actions affected a substantial share of the relevant market.

3

News argues that Theme failed to produce substantial evidence of antitrust injury and causation, which are closely related concepts. *See Kolling v. Dow Jones & Co.,* 137 Cal.App.3d 709, 187 Cal.Rptr. 797, 807 (1982); *Morales–Villalobos v. Garcia–Llorens,* 316 F.3d 51, 55 (1st Cir.2003). Several factors are relevant in considering whether a plaintiff has established antitrust standing. The most important is whether the plaintiff has established an antitrust injury. *Amarel v. Connell,* 102 F.3d 1494, 1507 (9th Cir.1997).

[11] [12] "Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Glen Holly,* 343 F.3d at 1007–08 (internal quotation marks omitted). In order to find that an antitrust injury exists, we must examine both the nature of the injury and whether the injury is causally related to the antitrust violation. *Datagate, Inc. v. Hewlett–Packard Co.,* 941 F.2d 864, 867 (9th Cir.1991).

[13] [14] [15] An injury will not qualify as an antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny, "since it is inimical to [the antitrust laws] to award damages for losses stemming from continued competition." *Amarel,* 102 F.3d at 1508 (quoting *Atl. Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990)). If the injury flows from aspects of a defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal. *Glen Holly,* 343 F.3d at 1008. Coercive activity that prevents choice between market alternatives, including agreements to restrain trade, is one form of antitrust injury. *Id.,* 343 F.3d at 1011; *Amarel,* 102 F.3d at 1509.

[16] To support its claim that it suffered an antitrust injury, Theme points to evidence that News' right of first refusal agreements forced Theme to purchase inserts from News instead of from Valassis (to which it would have paid lower prices). Theme argues that this restriction of choice between market alternatives resulted in financial harm. Theme also argues ***1004** that it was harmed by a general increase in insert prices caused by the reduction of Theme's own competitive presence in the market. Specifically, Theme points to testimony that its programs increased insert output while reducing insert costs, and that News' conduct resulted in fewer packaged goods companies running programs with Theme. Theme further presented evidence that, while the right of first refusal agreements purported to lower prices, prices could have been lower still if the market were rid of such agreements. News argues that the evidence actually shows that the reduction in Theme's business was caused by Theme's own poor business practices, and that Theme was harmed by News' *procompetitive* actions. However, a jury could reasonably believe Theme's evidence that the right of first refusal agreements were harmful to competition over News' evidence that they were procompetitive, and thereby conclude that Theme suffered an injury of the type the antitrust laws were intended to prevent.

[17] For an injury to be an antitrust injury, it must also be causally related to the antitrust violation. The harm may not be "derivative and indirect" or "secondary, consequential, or remote." *Amarel,* 102 F.3d at 1511–12; *Kolling,* 187 Cal.Rptr. at 808 (internal quotation marks omitted). Here, the evidence establishes that Theme would have placed all of its insert orders with Valassis were it not for News' right of first refusal agreements with the packaged goods companies. The antitrust injury suffered by Theme—the reduction in choice of market alternatives causing reduced output of inserts and higher prices—was the direct result of News' antitrust violation.[5] As a result, we affirm the district court's denial of JMOL in favor of News on Theme's Cartwright Act claim.

B

[18] The district court did not err in denying News' motion for JMOL on Theme's negligent interference with prospective economic advantage claim. The district court instructed the jury that to establish negligent interference with prospective economic advantage, Theme would have to prove by a preponderance of the evidence that: (1) Theme and a particular packaged goods company were in an economic relationship that probably would have resulted in an economic benefit to Theme; (2) News knew

of the relationship; (3) News knew or should have known that the relationship would be disrupted if it failed to act with reasonable care; (4) News failed to act with reasonable care; (5) News engaged in independent wrongful conduct apart from the interference itself; (6) the relationship was actually disrupted; (7) Theme was harmed; and (8) News' wrongful conduct was a substantial factor in causing Theme's harm. *See Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937, 950 (2003) (identifying elements of the tort of intentional interference with prospective economic advantage). News argues that there is insufficient evidence in the record to establish that News engaged in independent wrongful conduct.

[19] A plaintiff seeking to recover damages for interference with prospective economic advantage must plead and prove that the defendant's conduct was "wrongful by some legal measure other than the fact of interference itself." *Id.* 131 Cal.Rptr.2d 29, 63 P.3d at 950 (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.,* 11 Cal.4th 376, 45 Cal.Rptr.2d 436, 438, 442, 902 P.2d 740 (1995)). The district court instructed the jury that conduct is wrongful "if it is proscribed by some constitutional, ***1005** statutory, regulatory, common law, or other determinable legal standard." Because the jury's verdict on Theme's Cartwright Act claim was supported by substantial evidence in the record, this element is satisfied.[6]

C

[20] News argues that regardless of whether the jury's verdict was supported by substantial evidence in the record, a new trial is required because its substantial rights were affected by an evidentiary error. Specifically, News argues that the testimony of Theme's president as to the internal decisions of packaged goods companies regarding whether to do repeat business with Theme lacked foundation and was speculative. In addition, News argues that the testimony of Theme's president was the only evidence Theme supplied on the element of causation, and that therefore its admission could not have been harmless error.

To succeed on this issue, News must establish that the district court abused its discretion by allowing the contested testimony. *Obrey,* 400 F.3d at 693. This it cannot do. While Theme's president testified repeatedly that he was under the impression that Theme had a good relationship with the packaged goods companies, and that he could think of no reason the packaged goods companies would not continue to do business with Theme, he did not actually comment on the internal decisions of packaged goods companies or their executives. This testimony was neither lacking in foundation nor speculative.

Had the district court's decision to admit the testimony of Theme's president been error, a new trial would have been appropriate only if the verdict was more probably than not tainted by the error. *Id.* at 699–700. While Theme did rely heavily on its president's testimony to establish the causation element of its antitrust claim, other evidence—including the "before and after" picture of Theme's business provided by Theme's damages expert—also helped to establish causation. News has not shown that any error more probably than not tainted the jury's verdict. As a result, we affirm the district court's denial of the motion for a new trial.

D

[21] Finally, News argues that the district court erred by ruling that the jury's awards of antitrust damages and tort damages were not duplicative. The jury awarded Theme $1,000,000 in compensatory damages under the Cartwright Act, and $496,023 in compensatory damages on its negligent interference with prospective economic advantage claim regarding Campbells. News argues that these awards were impermissibly duplicative because both were based on the loss of future profits with respect to the relationship with Campbells.

[22] The general rule of compensatory damages bars double recovery for the same wrong. *Krusi v. Bear, Stearns, & Co.,* 144 Cal.App.3d 664, 192 Cal.Rptr. 793, 798 (1983). The California Supreme Court has held that a plaintiff is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. *Tavaglione v. Billings,* 4 Cal.4th 1150, 17 Cal.Rptr.2d 608, 847 P.2d 574, 580 (1993). We have held that one act by a defendant may ***1006** create two legal harms; where the statutes forbidding the act were enacted for different purposes, and where they prescribe different types of damages, there is no double recovery. *Nintendo of Am., Inc. v. Dragon Pac. Int'l,* 40 F.3d 1007, 1011 (9th Cir.1994).

The $1,000,000 damages figure and the $496,023

damages figure are for separate legal harms: an antitrust violation and a tort. The two injuries did not arise from the same act: one was the result of anticompetitive right of first refusal agreements; the other was the result of intentional misrepresentations. The laws proscribing these acts serve different purposes. News argues, however, that both awards were intended to compensate for the same economic harm: loss of future profits from the interruption of business relationships. The record, however, does not establish that the two awards were intended to compensate for the same economic harm. To reach that conclusion would require speculation about the jury verdict.

Theme's damages expert provided the court with one analysis of the profits Theme would have earned from its relationships with Nabisco, Benevia, Van de Kamp, Smuckers, Campbells, Hormel, and International Home Foods, "but for the conduct complained of:" $2,797,600. The particular number attributed to the relationship with Campbells was $496,000. The jury returned a verdict of $496,023 specifically relating to the tort of interference with the Campbells relationship, and a verdict of $1,000,000 for the harm arising from anticompetitive behavior. Given these separate awards, the district court did not commit reversible error in denying News' motion.

IV

We next address the issues raised in Theme's cross-appeal. Theme argues that the district court erred in vacating the jury's verdict on Theme's intentional interference with prospective economic advantage claims on privilege grounds. Theme also argues that the district court erred in denying Theme's motion for restitution and its motion for an injunction. Finally, Theme argues that the district court erred in denying Theme's motion to amend its complaint to add an action for declaratory relief, and in terminating the related motion for summary judgment. We affirm the district court on each issue.

A

The jury rendered a verdict in favor of Theme on its intentional interference with prospective economic advantage claims with respect to its relationships with Benevia and Van de Kamp, and awarded damages of $700,353 and $132,992 respectively, as well as punitive damages of $1,250,000 on each claim. The district court dismissed these claims and damage awards on the grounds that News' conduct—threatening litigation against Benevia and Van de Kamp—was privileged under the *Noerr–Pennington* doctrine. Theme argues that the district court erred in applying the *Noerr–Pennington* doctrine instead of California privilege law. Theme also argues that News' conduct was not privileged under either doctrine. We disagree.

[23] The essence of the *Noerr–Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct. *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 929 (9th Cir.2006). The doctrine derives from two Supreme Court cases holding that the First Amendment Petition Clause immunizes acts of petitioning the legislature from antitrust liability. *Id.* (citing *Eastern R.R. Presidents Conference v. Noerr Motor* ***1007** *Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)). The doctrine has since been applied to actions petitioning each of the three branches of government, and has been expanded beyond its original antitrust context. *Id.* at 930; *Amarel,* 102 F.3d at 1518.

We have previously declined to reach the question of whether the *Noerr–Pennington* doctrine applies to state law tort claims. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 102 F.3d 1524, 1538 n. 15 (9th Cir.1996) ("The time may come when this circuit must speak directly on the question."). Other circuits, however, have been more decisive. *See, e.g., Video Int'l Prod., Inc. v. Warner–Amex Cable Commc'ns, Inc.,* 858 F.2d 1075, 1084 (5th Cir.1988). In explaining its decision to extend *Noerr–Pennington* to tortious interference with contracts, the Fifth Circuit stated, "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Id.* at 1084. We agree, and we hold that the *Noerr–Pennington* doctrine applies to Theme's state law tortious interference with prospective economic advantage claims.

Theme argues that *Noerr–Pennington* cannot appropriately be applied here because choice of law principles set forth in Federal Rule of Evidence 501 establish that state privilege law must be applied in a diversity action where sate law provides the rule of decision. *See Star Editorial, Inc. v. U.S. Dist. Ct.,* 7 F.3d 856, 859 (9th Cir.1993) (stating that in a civil action in

which state law provides the rule of decision, the privilege of a witness shall be determined in accordance with state law). Although Theme is correct, it misses the point. The *Noerr–Pennington* doctrine has been articulated as a principle of statutory construction rather than as a privilege. *See Sosa,* 437 F.3d at 930–32. More importantly, because *Noerr–Pennington* protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal. *See Video Int'l,* 858 F.2d at 1084. There is no reason that *Noerr–Pennington* and California privilege law cannot both apply to Theme's intentional interference claims, and we hold that the district court properly considered both doctrines.

[24] [25] Conduct incidental to a lawsuit, including a pre-suit demand letter, falls within the protection of the *Noerr–Pennington* doctrine. *Sosa,* 437 F.3d at 936–38. Pre-suit letters threatening legal action may nevertheless be restricted by law where they include representations so baseless that the threatened litigation would fall into the "sham litigation" exception. *Id.* at 940–41. The Supreme Court has endorsed a two-part test for sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits. *Liberty Lake Invs., Inc. v. Magnuson,* 12 F.3d 155, 157 (9th Cir.1993) (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993)). Only if the challenged litigation is objectively baseless may we consider the litigant's subjective motivation. *Id.* The question then is "whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.*

[26] In rendering its verdict for Theme on the intentional interference claims, the jury based its determination solely on a finding that News had threatened litigation against Benevia and Van de Kamp. ***1008** The only evidence in the record supporting this aspect of the jury's verdict is the letters from News to the packaged goods companies indicating that if the packaged goods companies failed to place their insert orders with News, they could become embroiled in then-ongoing litigation between News and Theme. The question then is whether these pre-suit letters threatened "sham litigation."

We begin by analyzing whether the underlying litigation was objectively baseless. The letters from News to the packaged goods companies can be understood as threatening litigation in two ways. First, the letters can be interpreted as threats to include the packaged goods companies in the ongoing litigation between News and Theme. The fact that this ongoing litigation settled suggests that the original suit was not objectively baseless. Second, the letters can be interpreted as threats of some contemplated future lawsuit against the packaged goods companies for breach of contract. We agree with the district court that a suit by News to enforce its right of first refusal agreements was potentially meritorious. Because the threatened litigation was not objectively baseless, we do not analyze News' subjective motivation. *See id.* at 157. As a result, we affirm the district court's conclusion that *Noerr–Pennington* bars Theme's intentional interference claims.[7]

B

[27] In rendering its verdict for Theme, the jury found that News had engaged in an unfair competitive practice under California's Unfair Competition Law ("UCL").[8] Cal. Bus. & Prof.Code § 17200 *et seq.* Theme subsequently moved for an award of "restitution" under section 17203 of the UCL. The district court denied the motion for restitution, finding that the requested amount—News' insert profits from nine transactions in which Theme was forced to purchase inserts from News as a result of News' right of first refusal agreements with packaged goods companies—was not "restitutionary in nature." We agree.

The UCL prohibits unlawful and unfair business practices. Cal. Bus. & Prof.Code § 17200 *et seq.* Section 17200 "borrows" violations of other laws and makes them independently actionable as unfair competitive practices. *Korea Supply Co.,* 131 Cal.Rptr.2d 29, 63 P.3d at 943. In addition, a practice may be proscribed under section 17200 as "unfair" even if it is not specifically proscribed by some other law. *Id.* While the scope of conduct covered by the UCL is broad, the remedies are limited. *Id.* Section 17203, in part, allows courts to make orders or judgments "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." The California Supreme Court has determined that this phrase allows awards of restitution, but not awards of non-restitutionary disgorgement. *Id.* at 949.

The California Supreme Court has explained that restitution orders are "orders compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an

ownership interest in the property or those claiming through that person." *Kraus v. Trinity* ***1009** *Mgmt. Servs., Inc.,* 23 Cal.4th 116, 96 Cal.Rptr.2d 485, 999 P.2d 718, 725 (2000). While disgorgement orders may include a restitutionary component, they may be impermissibly broad because they require the "surrender of all profits earned as a result of an unfair business practice regardless of whether those profits represent money taken directly from persons who were victims of the unfair practice." *Id.* The California Supreme Court has held that nonrestitutionary disgorgement is akin to a damages remedy: relief that is not allowed under the UCL. *Korea Supply Co.,* 131 Cal.Rptr.2d 29, 63 P.3d at 948.

Theme requested "restitution" in the amount of $929,187: the amount by which its damages expert determined that News had profited on nine insert orders that Theme placed with News because of News' right of first refusal agreements with packaged goods companies. The district court determined that an award of this amount would not be restitutionary in nature because had Theme not purchased the inserts from News, it would have had to purchase them from Valassis, and Valassis presumably would have profited from the sales as well. Because the profits would have gone to either News or Valassis, the district court concluded that Theme could not claim an ownership interest in the profits.

We agree with the district court, to an extent. We agree that the "restitution" amount identified by Theme is not entirely restitutionary in nature. However, the more salient question is whether News' profits were property taken from Theme, or—as News argues—property taken from the packaged goods companies. Evidence in the record suggests that, on some occasions, the packaged goods companies paid News directly; on other occasions, Theme paid News for the packaged goods companies. The evidence is insufficient to support a finding that Theme had a property interest in all of News' profits from the nine disputed insert orders. For this reason, we hold that the district court did not abuse its discretion in denying Theme's motion for restitution.

C

Following trial, Theme moved for a permanent injunction against News based on both its Cartwright Act and UCL claims. Theme's requested injunction would have prevented News from enforcing its right of first refusal agreements. The district court denied the motion. Theme again moved for an injunction pending appeal; the district court again denied the injunction.

[28] California law provides for injunctive relief under both the Cartwright Act and the UCL. The United States Supreme Court has stated that courts faced with an antitrust violation are required to take action to restore competition in the market. *See, e.g., United States v. E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 326, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961). The Supreme Court has also recognized that the purpose of antitrust laws "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). Thus, we have recognized that a district court might appropriately deny a motion for injunctive relief where the injunction would hinder, rather that promote, competition in the market. *Pac. Coast Agric. Export Ass'n v. Sunkist Growers, Inc.,* 526 F.2d 1196, 1209 (9th Cir.1975).

[29] In denying Theme's motions, the district court noted that the record "was sufficiently ambiguous with respect to the market definition [and] sufficiently ambiguous with respect to the antitrust injury, ***1010** that it would not reasonably support an injunction going forward." The court was not convinced that allowing News to enforce its right of first refusal agreements in the future would injure competition, or that an injunction would protect competition. The record supports the district court's conclusions. News supplied evidence that right of first refusal agreements result from competition between News and Valassis, and that an injunction would only serve to put News at a competitive disadvantage. The district court therefore did not abuse its discretion in denying Theme's motions for permanent injunction.

D

After we reversed the initial dismissal of Theme's claims and remanded to the district court, Theme filed a motion for leave to amend its complaint (for the second time) to replace its antitrust claims with a cause of action for declaratory relief, seeking a judicial statement that Theme is not bound by News' right of first refusal agreements with packaged goods companies. Simultaneously, Theme filed a motion for summary judgment, arguing that the issue was a pure question of contract law. The district court denied the motion for leave to amend, holding that the amendment would be futile, and terminated the related

motion for summary judgment as moot.

[30] A party may amend its complaint with the court's leave, and leave shall be freely given where "justice so requires." Fed.R.Civ.P. 15. We apply this policy liberally, but leave to amend will not be granted where an amendment would be futile. *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir.1987). A court may only grant a declaratory judgment where there is an "actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). In addition, the Supreme Court has stated that a declaratory judgment is only appropriate where it would completely resolve the concrete controversy. *Calderon v. Ashmus,* 523 U.S. 740, 749, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998).

[31] Theme's motion for leave to amend made plain that there was no actual case or controversy. As the district court noted, Theme admitted that there was no controversy over whether Theme was contractually bound by right of first refusal agreements to which it was not a party. Moreover, a declaration that Theme was not contractually bound by any of News' right of first refusal agreements with the packaged goods companies would not have completely resolved the controversy between News and Theme. Because declaratory relief was not available, Theme's amendment would have been futile. As a result, the district court did not abuse its discretion in denying the motion for leave to amend or in terminating the related motion for summary judgment.

V

We affirm the judgment of the district court in its entirety. The district court appropriately rejected News' motions for JMOL, new trial, and damage reduction. The district court correctly set aside the jury verdict in favor of Theme on its claim of intentional interference with prospective economic advantage because that claim was barred by the *Noerr–Pennington* doctrine. The district court properly denied Theme's request for restitution and injunctive relief. It appropriately denied as futile Theme's motion to amend its complaint to include a claim for declaratory relief.

AFFIRMED.

All Citations

546 F.3d 991, 2008 Daily Journal D.A.R. 15,687

Footnotes

1 Judge Paez was drawn to replace Judge Ferguson pursuant to General Order 3.2(g).

2 Theme argues that even if News' actions were legal under a rule of reason analysis, they were illegal *per se* as a secondary boycott under section 16721.5 of the Cartwright Act. Because there is no evidence in the record that News required packaged goods companies to refuse to do business with Theme if Theme purchased Inserts from Valassis, the district court was correct in concluding that this argument fails. *See* Cal. Bus. & Prof.Code § 16721.5.

3 Because California's Cartwright Act is patterned after federal antitrust acts like the Sherman Antitrust Act, California courts often cite federal antitrust cases when interpreting the Cartwright Act. *See Roth v. Rhodes,* 25 Cal.App.4th 530, 30 Cal.Rptr.2d 706, 712 (1994).

4 The specific contractual provisions identified by the district court were:
(1) "News America FSI, Inc ('News') and Client agree that in consideration for News' offering the rates set forth below Client shall give News a right of first refusal to contract all free standing insert programs (Co-op or Solo) of Client for [time period]" and
(2) "Client agrees that it will abide by the terms and pay the rates set forth in this Agreement for all free standing insert advertisements placed with News, irrespective of whether Client places such advertisements directly, through an advertising agent or another third party compiler."

5 Theme presents alternative causation theories, which we need not address.

6 Because the independent wrongful conduct element is satisfied by the Cartwright Act violation, we need not address Theme's argument that News made an actionable misrepresentation to the packaged goods companies, and that the actionable misrepresentation is independent wrongful conduct. We therefore do not address News' argument that

Theme was not harmed by any misrepresentation.

7 California Civil Code section 47(b), which creates an absolute privilege for statements made in a judicial proceeding regardless of malice, might also apply here. *See Laffer v. Levinson, Miller, Jacobs, & Phillips,* 34 Cal.App.4th 117, 40 Cal.Rptr.2d 233, 237 (1995). Because we hold that the *Noerr–Pennington* doctrine bars Theme's intentional interference claim, we need not address this question.

8 News does not challenge this verdict.

113 S.Ct. 1920
Supreme Court of the United States

PROFESSIONAL REAL ESTATE INVESTORS, INC., et al., Petitioners
v.
COLUMBIA PICTURES INDUSTRIES, INC., et al.

No. 91–1043.
|
Argued Nov. 2, 1992.
|
Decided May 3, 1993.

Synopsis

Movie studios brought copyright infringement action against hotel operators, challenging rental of videodiscs to hotel guests, and operators filed antitrust counterclaims. After grant of summary judgment for operators on infringement claim was affirmed on appeal, 866 F.2d 278, the United States District Court for the Central of California, William P. Gray, J., granted summary judgment for studios on counterclaim, and operators appealed. The Court of Appeals, 944 F.2d 1525, affirmed, and certiorari review was sought. The Supreme Court, Justice Thomas, held that objectively reasonable effort to litigate cannot be "sham," within meaning of exception to *Noerr* doctrine immunity from antitrust liability, regardless of plaintiff's subjective intent.

Affirmed.

Justice Souter, concurred and filed opinion.

Justice Stevens, concurred in judgment and filed opinion in which Justice O'Connor, joined.

West Headnotes (8)

[1] Antitrust and Trade Regulation Petitioning government

Although those who petition government for redress are generally immune from antitrust liability, such immunity is withheld when petitioning activity, ostensibly directed toward influencing governmental action, is mere sham to cover attempt to interfere directly with business relationships of competitor.

295 Cases that cite this headnote

[2] Antitrust and Trade Regulation Litigation; sham litigation

Objectively reasonable effort to litigate cannot be "sham," within meaning of exception to *Noerr* doctrine immunity from antitrust liability, regardless of plaintiff's subjective intent.

382 Cases that cite this headnote

[3] Antitrust and Trade Regulation Private parties

In order to constitute "sham" litigation, within meaning of exception to *Noerr* doctrine immunity from antitrust liability, lawsuit must be objectively baseless in sense that no reasonable litigant could realistically expect success on merits, and such baseless lawsuit must conceal attempt to interfere directly with business relationships of competitor through use of governmental process, as opposed to outcome of that process, as anticompetitive weapon.

974 Cases that cite this headnote

[4] Antitrust and Trade Regulation Political subdivisions; municipalities

Even if antitrust plaintiff defeats defendant's claim to *Noerr* immunity by demonstrating that defendant's attempt at obtaining governmental redress was mere sham, plaintiff must still prove substantive antitrust violation; proof of sham

deprives defendant of immunity, but does not relieve plaintiff of obligation to establish all other elements of his claim.

49 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Private parties

To constitute "sham" litigation, within meaning of exception to *Noerr* doctrine immunity from antitrust liability, antitrust defendant's prior claims for judicial relief must have been so baseless that no reasonable litigant could reasonably have expected to secure favorable relief.

516 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Private parties

Existence of probable cause to institute copyright infringement proceedings precluded, as matter of law, finding that plaintiff had engaged in sham litigation, such as would deprive it of immunity from claim that copyright suit constituted antitrust violation, regardless of copyright holder's subjective intent in bringing suit.

92 Cases that cite this headnote

[7] **Action** Acts or omissions constituting causes of action in general

Probable cause to institute civil proceedings requires no more than reasonable belief that there is chance that claim may be held valid upon adjudication.

59 Cases that cite this headnote

[8] **Antitrust and Trade Regulation** Private parties

Where there is no dispute as to predicate facts of underlying legal proceeding, court being asked to determine whether underlying proceeding was sham litigation, depriving party of *Noerr* immunity from antitrust liability in the instant action, may decide probable cause for bringing underlying proceeding as matter of law.

49 Cases that cite this headnote

****1922** *Syllabus*[*]

Although those who petition government for redress are generally immune from antitrust liability, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover ... an attempt to interfere directly" with a competitor's business relationships, *id.,* at 144, 81 S.Ct., at 533. Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), which held copyrights to the motion pictures recorded on PRE's videodiscs and licensed the transmission of those motion pictures to hotel rooms, sued PRE for alleged copyright infringement. PRE counterclaimed, alleging that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade in violation of §§ 1 and 2 of the Sherman Act. The District Court granted summary judgment to PRE on the copyright claim, and the Court of Appeals affirmed. On remand, the District Court granted Columbia's motion for summary judgment on PRE's antitrust claims. Because Columbia had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's

intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the lawsuit was a sham because Columbia did not honestly believe its infringement claim was meritorious, the court found that the existence of probable cause precluded the application of the sham exception as a matter of law and rendered irrelevant any evidence of Columbia's subjective intent in bringing suit.

Held:

1. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental ***50** action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Id.,* at 140, 81 S.Ct., at 531. Thus, neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 503, 108 S.Ct. 1931, 1938, 100 L.Ed.2d 497. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, *Noerr, supra,* 365 U.S., at 144, 81 S.Ct., at 533, through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382. This two-tiered process requires a plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Pp. 1925–1929.

2. Because PRE failed to establish the objective prong of *Noerr's* sham exception, summary judgment was properly granted to Columbia. A finding that an antitrust defendant claiming *Noerr* immunity had probable cause to sue compels the conclusion that a ****1923** reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Here, the lower courts correctly found probable cause for Columbia's suit. Since there was no dispute over the predicate facts of the underlying legal proceedings—Columbia had the exclusive right to show its copyrighted motion pictures publicly—the court could decide probable cause as a matter of law. A court could reasonably conclude that Columbia's action was an objectively plausible effort to enforce rights, since, at the time the District Court entered summary judgment, there was no clear copyright law on videodisc rental activities; since Columbia might have won its copyright suit in two other Circuits; and since Columbia would have been entitled to press a novel claim, even in the absence of supporting authority, if a similarly situated reasonable litigant could have perceived some likelihood of success. Pp. 1929–1931.

3. The Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation, because such matters were rendered irrelevant by the objective legal reasonableness of Columbia's infringement suit. P. 1931.

944 F.2d 1525 (CA 9 1991), affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined. ***51** SOUTER, J., filed a concurring opinion, *post*, p. ——. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. ——.

Attorneys and Law Firms

Patrick J. Coyne, Washington, DC, for petitioners.

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Opinion

Justice THOMAS delivered the opinion of the Court.

This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), as that doctrine applies in the litigation context. Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." *Id.,* at 144, 81 S.Ct., at 533. We hold that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's hotel rooms and assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room ***52** viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE ****1924** counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1–2,[1] and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see 17 U.S.C. § 109(a), and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see 17 U.S.C. § 101 (1988 ed. and Supp. III). As a result, summary judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to ***53** "perform the copyrighted work[s] publicly." § 106(4). Ruling that such rental did not constitute public performance, the District Court entered summary judgment for PRE. 228 USPQ 743, 1986 WL 32729 (CD Cal.1986). The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. 866 F.2d 278 (CA9 1989). See 17 U.S.C. § 101 (1988 ed. and Supp. III).

On remand, Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra.* Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990–1 Trade Cases ¶ 68,971, p. 63,242, 1990 WL 56166 (CD Cal.1990), the District Court granted the motion:

> "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.,* at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F.2d 1525 (CA9 1991). After rejecting PRE's other allegations of anticompetitive conduct, see *id.,* at 1528–1529,[2] the court focused on ***54** PRE's contention that the copyright action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of ... judicial processes": either " 'misrepresentations ... in the adjudicatory process' " or the pursuit of " 'a pattern of baseless, repetitive claims' " instituted " 'without probable cause, and regardless ****1925** of the merits.' " 944 F.2d, at 1529 (quoting *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513, 512, 92 S.Ct. 609, 613, 612, 30 L.Ed.2d 642 (1972)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." 944 F.2d, at 1530. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" because "a suit brought with probable

cause does not fall within the sham exception to the *Noerr–Pennington* doctrine." *Id.,* at 1531, 1532. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id.,* at 1533. It accordingly rejected PRE's request for further discovery on Columbia's intent.

***55** The courts of appeals have defined "sham" in inconsistent and contradictory ways.[3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 508, n. 10, 108 S.Ct. 1931, 1941, n. 10, 100 L.Ed.2d 497 (1988). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

II

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite ***56** ..., establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under which either "indifference to ... outcome," *ibid.,* or failure to prove that a petition for redress of grievances "would ... have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability ****1926** under the sham exception. We decline PRE's invitation.

[1] Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), that "the Sherman Act does not prohibit ... persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.,* at 136, 81 S.Ct., at 529. Accord, *Mine Workers v. Pennington,* 381 U.S. 657, 669, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions ... that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people ... freely inform the government of their wishes." *Noerr,* 365 U.S., at 137, 81 S.Ct., at 529. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. *Id.,* at 138, 81 S.Ct., at 530.

Noerr, however, withheld immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor." *Id.,* at 144, 81 S.Ct., at 533. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

[2] In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), we elaborated on *Noerr* in two relevant ***57** respects. First, we extended *Noerr* to "the approach of citizens ... to administrative agencies ... and to courts." 404 U.S., at 510, 92 S.Ct., at 611. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar ... competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "institut[ing] ... proceedings and actions ... with or without probable cause, and regardless of the merits of the cases." *Id.,* at 512, 92 S.Ct., at 612 (internal quotation marks omitted). We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.[4]

Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose ... was to destroy [their] competitors." 365 U.S., at 138, 81 S.Ct., at 530. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the ... campaign to influence governmental action." *Id.,* at 143, 81 S.Ct., at 532. ***58** We reasoned that "[t]he right of the people to ****1927** inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.,* at 139, 81 S.Ct., at 530. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington,* 381 U.S., at 670, 85 S.Ct.,

at 1593.

Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims ... which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U.S., at 513, 92 S.Ct., at 613. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] ... competitors from meaningful access to adjudicatory tribunals and so ... usurp[s] th[e] decisionmaking process." *Id.,* at 512, 92 S.Ct., at 612.

Since *California Motor Transport,* we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 380, 93 S.Ct. 1022, 1031, 35 L.Ed.2d 359 (1973) (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S., at 500, n. 4, 108 S.Ct., at 1937, n. 4. And we have explicitly observed that a successful "effort to influence governmental action ... certainly cannot be characterized as a sham." *Id.,* at 502, 108 S.Ct., at 1938. See also *Vendo Co. v. Lektro–Vend Corp.,* 433 U.S. 623, 645, 97 S.Ct. 2881, 2894, 53 L.Ed.2d 1009 (1977) (BLACKMUN, J., concurring in result) (describing a successful lawsuit as a "genuine attemp[t] to use the ... adjudicative process legitimately" ***59** rather than " 'a pattern of baseless, repetitive claims' "). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, *e.g., FTC v. Superior Court Trial Lawyers Assn.,* 493 U.S. 411, 424, 110 S.Ct. 768, 775, 107 L.Ed.2d 851 (1990); *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913–914, 102 S.Ct. 3409, 3425–3426, 73 L.Ed.2d 1215 (1982). Cf. *Vendo, supra,* 433 U.S., at 635–636, n. 6, 639, n. 9, 97 S.Ct., at 2889–2890, n. 6, 2891 n. 9 (plurality opinion of REHNQUIST, J.); *id.,* at 644, n., 645, 97 S.Ct., at 2894, n., 2894 (BLACKMUN, J., concurring in result). Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 743–744, 103 S.Ct. 2161, 2170–2171, 76 L.Ed.2d 277 (1983). Our decisions therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Noerr,* 365 U.S., at 140, 81 S.Ct., at 531, quoted in *Pennington, supra,* 381 U.S., at 669, 85 S.Ct., at 1593.

Our most recent applications of *Noerr* immunity further demonstrate that neither *Noerr* immunity nor its sham exception turns on subjective intent alone. In *Allied Tube, supra,* 486 U.S., at 503, 108 S.Ct., at 1938, and *FTC v. Trial Lawyers, supra,* 493 U.S., at 424, 427, and n. 11, 110 S.Ct., at 775, 777, and n. 11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to ****1928** seek favorable legislation or to influence governmental action. Cf. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 101, n. 23, 104 S.Ct. 2948, 2960, n. 23, 82 L.Ed.2d 70 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice"). In *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's "purposes were to delay [the ***60** plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate ... administrative and legislative fora." *Id.,* at 381, 111 S.Ct., at 1354 (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a 'sham.' " *Ibid.* Accord, *id.,* at 398, 111 S.Ct., at 1363 (STEVENS, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr.* And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real 'intelligible guidance.' " *Allied Tube, supra,* 486 U.S., at 508, n. 10, 108 S.Ct., at 1941, n. 10.

III

[3] [4] We now outline a two-part definition of "sham"

litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr,* and an antitrust claim premised on the sham exception must fail.[5] Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere ***61** *directly* with the business relationships of a competitor," *Noerr, supra,* 365 U.S., at 144 81 S.Ct., at 533 (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni,* 499 U.S., at 380, 111 S.Ct., at 1354 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See *Omni, supra,* at 382, 111 S.Ct., at 1355; *Allied Tube,* 486 U.S., at 500, n. 4, 108 S.Ct., at 1937, n. 4; *Noerr, supra,* 365 U.S., at 144, 81 S.Ct., at 533; *Vendo Co. v. Lektro–Vend Corp., supra,* 433 U.S., at 645, 97 S.Ct., at 2894 (BLACKMUN, J., concurring in result). The word "genuine" has both objective and subjective connotations. On ****1929** one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, *supra,* at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.[6]

***62** IV

[5] We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. See 944 F.2d, at 1529.

[6] [7] The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the commonlaw tort of wrongful civil proceedings,[7] requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. *Stewart v. Sonneborn,* 98 U.S. 187, 194, 25 L.Ed. 116 (1879); *Wyatt v. Cole,* 504 U.S. 158, 176, 112 S.Ct. 1827, 1837–1838, 118 L.Ed.2d 504 (1992) (REHNQUIST, C.J., dissenting); T. Cooley, Law of Torts *181. Cf. *Wheeler v. Nesbitt,* 24 How. 544, 549–550, 16 L.Ed. 765 (1861) (related tort for malicious prosecution of criminal charges). Probable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim ***63** may be held valid upon adjudication" (internal quotation marks omitted). *Hubbard v. Beatty & Hyde, Inc.,* 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961); Restatement (Second) of Torts § 675, Comment *e,* pp. 454–455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See *Crescent City Live Stock Co. v. Butchers' Union Slaughter–House Co.,* 120 U.S. 141, 149, 7 S.Ct. 472, 476, 30 L.Ed. 614 (1887); *Wheeler, supra,* 24 How., at 551; *Liberty Loan Corp. of Gadsden v. Mizell,* 410 So.2d 45, 48 (Ala.1982). Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr* 's sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. *Stewart, supra,* 98 U.S., at 194; *Wheeler, supra,* 24 How., at 551; 2 C. ****1930** Addison, Law of Torts § 1, ¶ 853, pp. 67–68 (1876); T. Cooley, *supra,* at *184. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

[8] The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. *Crescent, supra,* 120 U.S., at 149, 7 S.Ct., at 476; *Stewart, supra,* 98 U.S., at 194; *Nelson v. Miller,* 227 Kan. 271, 277, 607 P.2d 438, 444 (1980); *Stone v. Crocker,* 41 Mass. 81, 84–85 (1831); J. Bishop, Commentaries on Non–Contract Law § 240, p. 96 (1889). See also *Director General of Railroads v. Kastenbaum,* 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146 (1923) ("The question is not whether [the defendant] thought the facts to ***64** constitute probable cause, but whether the court thinks they did"). Columbia enjoyed the "exclusive righ[t] ... to perform [its] copyrighted" motion pictures "publicly." 17 U.S.C. § 106(4). Regardless of whether it intended any monopolistic or predatory use, Columbia acquired this statutory right for motion pictures as "original" audiovisual "works of authorship fixed" in a "tangible medium of expression." § 102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." *Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 429, 104 S.Ct. 774, 782, 78 L.Ed.2d 574 (1984).

When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.,* 749 F.2d 154 (1984); *Columbia Pictures Industries, Inc. v. Aveco, Inc.,* 612 F.Supp. 315 (MD Pa.1985), aff'd, 800 F.2d 59 (CA3 1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 USPQ, at 746; 866 F.2d, at 280–281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, Copyright: Principles, Law and Practice § 5.7.2.2, pp. 616–619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 8.14[C][3], pp. 8–168 to 8–173 (1992). The Seventh Circuit expressly "decline[d] to follow" the Ninth Circuit and adopted instead the Third Circuit's definition of a "public place." *Video* ***65** *Views, Inc. v. Studio 21, Ltd.,* 925 F.2d 1010, 1020, cert. denied, 502 U.S. 861, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning an infringement suit against PRE. Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably "warranted by existing law" or at the very least was based on an objectively "good faith argument for the extension, modification, or ****1931** reversal of existing law." Fed. Rule Civ. Proc. 11. By the time the Ninth Circuit had reviewed all claims in this litigation, it became apparent that Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success. A court could reasonably conclude that Columbia's infringement action was an objectively plausible effort to enforce rights. Accordingly, we conclude that PRE failed to establish the objective prong of *Noerr*'s sham exception.

Finally, the Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation. As we have held, PRE could not pierce Columbia's *Noerr* immunity without proof that Columbia's infringement action was objectively baseless or frivolous. Thus, the District Court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Contra, *Grip–Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (CA7 1982), cert. denied, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983). Such matters concern Columbia's ***66** economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," Fed.Rule Civ.Proc. 56(c), and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

So ordered.

Justice SOUTER, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante,* at 1928. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable cause," a standard which, as the Court explains it in this case, requires a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Ante,* at 1929 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a chance of being held valid upon adjudication."

Having established this identity of meaning, however, the Court proceeds to discuss the particular facts of this case, not in terms of its own formulation of objective baselessness, but in terms of "probable cause." Up to a point, this is understandable; the Court of Appeals used the term "probable cause" to represent objective reasonableness, and it seems natural to use the same term when reviewing that court's conclusions. Yet as the Court acknowledges, *ante,* at 1930, since there is no dispute over the facts underlying the suit ***67** at issue here, the question whether that suit was objectively baseless is purely one of law, which we are obliged to consider *de novo.* There is therefore no need to frame the question in the Court of Appeals's terms. Accordingly, I would prefer to put the question in our own terms, and to conclude simply that, on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits.

My preference stems from a concern that other courts could read today's opinion as ****1932** transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal antitrust law. I do not understand the Court to mean anything of the sort, however, any more than I understand its citation of Rule 11 of the Federal Rules of Civil Procedure, see *ante,* at 1931, to signal the importation of every jot and tittle of the law of attorney sanctions. Rather, I take the Court's use of the term "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits, and on that understanding, I join the Court's opinion.

Justice STEVENS, with whom Justice O'CONNOR joins, concurring in the judgment.

While I agree with the Court's disposition of this case and with its holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *ante,* at 1926, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits."[1] There might well be lawsuits that fit the latter definition ***68** but can be shown to be objectively *unreasonable,* and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected.[2] With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.

As the Court recently explained, a "sham" is the use of "the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 380, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991). The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries ***69** imposed on its competitor by the legal process alone. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that either infringes the plaintiff's patent or copyright or violates an exclusive franchise granted by a governmental body.

****1933** The case before us today is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, respondents

invoked the federal court's jurisdiction to determine whether they could lawfully restrain competition with petitioners. The relief they sought in their original action, if granted, would have had the anticompetitive consequences authorized by federal copyright law. Given that the original copyright infringement action was objectively reasonable—and the District Court, the Court of Appeals, and this Court all agree that it was—neither the respondents' own measure of their chances of success nor an alleged goal of harming petitioners provides a sufficient basis for treating it as a sham. We may presume that every litigant intends harm to his adversary; moreover, uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. Thus, the Court's disposition of this case is unquestionably correct.

I am persuaded, however, that all, or virtually all, of the Courts of Appeals that have reviewed similar claims (involving a single action seeking to enforce a property right) would have reached the same conclusion. To an unnecessary degree, therefore, the Court has set up a straw man to justify its elaboration of a two-part test describing all potential shams. Of the 10 cases cited by the Court as evidence of ***70** widespread confusion about the scope of the "sham" exception to the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), see *ante,* at 1925, n. 3, 5 share three important characteristics with this case: The alleged injury to competition was defined by the prayer for relief in the antitrust defendant's original action; there was no unethical conduct or collateral harm "external to the litigation or to the result reached in the litigation";[3] and there had been no series of repetitive claims. Each of those courts concluded, as this Court does today, that allegations of subjective anticompetitive motivation do not make an otherwise reasonable lawsuit a sham.[4]

In each of the five other cases cited by the Court, the plaintiff alleged antitrust violations more extensive than the filing of a single anticompetitive lawsuit. In three of those cases the core of the alleged antitrust violation lay in the act of petitioning the government for relief: One involved the repetitive filing of baseless administrative claims,[5] another involved ***71** extensive evidence ****1934** of anticompetitive motivation behind the lawsuit that followed an elaborate and unsuccessful lobbying effort,[6] and in the third a collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly tried to put the plaintiff out of business.[7] In each ***72** of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington,* in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases—in which the Courts of Appeals did state that a successful lawsuit could be a sham—did not involve lobbying, but did contain much broader and more complicated allegations than petitioners presented below.[8] Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single ***73** lawsuit, have produced less definite rules. Repetitive filings, some of which are ****1935** successful and some unsuccessful, may support an inference that the process is being misused. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co. v. United States,* 410 U.S. 366, 379, n. 9, 93 S.Ct. 1022, 1030, n. 9, 35 L.Ed.2d 359 (1973); *Westmac, Inc. v. Smith,* 797 F.2d 313, 322 (CA6 1986) (Merritt, C.J., dissenting). It is in more complex cases that courts have required a more sophisticated analysis—one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

> "But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning,

would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation—except that it wanted to ***74** use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome. See *City of Gainesville v. Florida Power & Light Co.,* 488 F. Supp. 1258, 1265–66 (S.D. Fla. 1980).

"Some students of antitrust law would regard all of our examples of anticompetitive litigation as fanciful, and in all the evidentiary problems of disentangling real from professed motives would be acute. Concern with the evidentiary problems may explain why some courts hold that a single lawsuit cannot provide a basis for an antitrust claim (see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr–Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 109–10 (1977))—an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip–Pak. Still, we think it is premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws. The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, see, e.g., *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.,* 682 F.2d 660, 663–64 (7th Cir.1982), it becomes a matter of antitrust concern. This is ***75** not to say that litigation is actionable under the antitrust laws merely because ****1936** the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating. The difficulty of determining the true purpose is great but no more so than in many other areas of antitrust law." *Grip–Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (1982).

It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law. For example, a manufacturer's successful action enforcing resale price maintenance agreements,[9] restrictive provisions in a license to use a patent or a trademark,[10] or an equipment lease,[11] may evidence, or even constitute, violations of the antitrust laws. On the other hand, just because a sham lawsuit has grievously harmed a competitor does not necessarily mean that it has violated the Sherman Act. See *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 455–459, 113 S.Ct. 884, 891, 122 L.Ed.2d 247 (1993). The rare plaintiff who successfully proves a sham must still satisfy the exacting elements of an antitrust demand. See *ante,* at 1928.

In sum, in this case I agree with the Court's explanation of why respondents' copyright infringement action was not "objectively baseless," and why allegations of improper subjective ***76** motivation do not make such a lawsuit a "sham." I would not, however, use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process. Accordingly, I concur in the Court's judgment but not in its opinion.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 1 of the Sherman Act prohibits "[e]very contract, combination ..., or conspiracy, in restraint of trade or

commerce among the several States." 15 U.S.C. § 1. Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

2 The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. 944 F.2d, at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia's other allegedly anticompetitive acts. *Id.,* at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707–708, 82 S.Ct. 1404, 1414–1415, 8 L.Ed.2d 777 (1962).

3 Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co. v. Mapco, Inc.,* 958 F.2d 1552, 1560, and n. 12 (CA11 1992); *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 700 F.2d 785, 809–812 (CA2 1983), cert. denied, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Hydro–Tech Corp. v. Sundstrand Corp.,* 673 F.2d 1171, 1177 (CA10 1982); *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.,* 214 U.S.App.D.C. 76, 85, 89, 663 F.2d 253, 262, 266 (1981), cert. denied, 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982). Still other courts have held that successful litigation by definition cannot be sham. See, *e.g., Eden Hannon & Co. v. Sumitomo Trust & Banking Co.,* 914 F.2d 556, 564–565 (CA4 1990), cert. denied, 499 U.S. 947, 111 S.Ct. 1414, 113 L.Ed.2d 467 (1991); *South Dakota v. Kansas City Southern Industries, Inc.,* 880 F.2d 40, 54 (CA8 1989), cert. denied *sub nom. South Dakota v. Kansas City Southern R. Co.,* 493 U.S. 1023, 110 S.Ct. 726, 107 L.Ed.2d 745 (1990); *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.,* 749 F.2d 154, 161 (CA3 1984).
Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc. v. Smith,* 797 F.2d 313, 318 (1986) (emphasis added), cert. denied, 479 U.S. 1035, 107 S.Ct. 885, 93 L.Ed.2d 838 (1987). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip–Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466, 472 (1982), cert. denied, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983). Finally, in the Fifth Circuit, "success on the merits does not ... preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.,* 822 F.2d 518, 528 (1987), cert. denied *sub nom. Union Pacific R. Co. v. Energy Transportation Systems, Inc.,* 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988).

4 *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive ... competitors of meaningful access to the ... courts." 404 U.S., at 512, 92 S.Ct., at 612. See also *id.,* at 515, 92 S.Ct., at 614 (noting a "purpose to eliminate ... a competitor by denying him free and meaningful access to the agencies and courts"); *id.,* at 518, 92 S.Ct., at 615 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

5 A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421–422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Accord, *Hughes v. Rowe,* 449 U.S. 5, 14–15, 101 S.Ct. 173, 178–179, 66 L.Ed.2d 163 (1980) (*per curiam*). The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg, supra,* 434 U.S., at 422, 98 S.Ct., at 701.

6 In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport,* 404 U.S., at 512–513, 92 S.Ct., at 613. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed.Rule Civ.Proc. 60(b)(3) (allowing a federal court to "relieve a party ... from a final judgment" for "fraud ..., misrepresentation, or other misconduct of an adverse party"); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 176–177, 86 S.Ct. 347, 349–350, 15 L.Ed.2d 247 (1965); *id.,* at 179–180, 86 S.Ct., at 351–352 (Harlan, J., concurring).

7 This tort is frequently called "malicious prosecution," which (strictly speaking) governs the malicious pursuit of *criminal* proceedings without probable cause. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 120, p. 892 (5th ed. 1984). The threshold for showing probable cause is no higher in the civil context than in the criminal. See Restatement (Second) of Torts § 674, Comment *e,* pp. 454–455 (1977).

1 *Ante,* at 1928. See also *ante,* at 1929: "[S]ham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief"; *ante,* at 1928: "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*...." But see *ante,* at 1929: "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." And see *ante,* at 1930: "Columbia's copyright action was arguably 'warranted by existing law' " under the standards of Federal Rule of Civil Procedure 11. These varied restatements of the Court's new test make it unclear whether it is willing to affirm the Court of Appeals by any of these standards individually, or by all of them together.

2 The Court's recent decision in *Farrar v. Hobby,* 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) makes me wonder whether "10 years of litigation and two trips to the Court of Appeals" to recover "one dollar from one defendant," *id.,* at 116, 113 S.Ct., at 575, (O'CONNOR, J., concurring), would qualify as a reasonable expectation of "favorable relief" under today's opinion.

3 *Omni Resource Development Corp. v. Conoco, Inc.,* 739 F.2d 1412, 1414 (CA9 1984) (Kennedy, J.).

4 See *McGuire Oil Co. v. Mapco, Inc.,* 958 F.2d 1552 (CA11 1992) (unsuccessful action to enjoin alleged violations of Alabama's Motor Fuel Marketing Act not a sham); *Hydro–Tech Corp. v. Sundstrand Corp.,* 673 F.2d 1171 (CA10 1982) (unsuccessful action alleging misappropriation of trade secrets not a sham); *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.,* 914 F.2d 556 (CA4 1990) (successful action imposing constructive trust on profits derived from breach of nondisclosure agreement not a sham); *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.,* 749 F.2d 154 (CA3 1984) (successful copyright infringement not a sham); *South Dakota v. Kansas City Southern Industries, Inc.,* 880 F.2d 40 (CA8 1989) (successful action to enjoin breach of contract not a sham; the court was careful to point out, however, that success does not "categorically preclude a finding of sham." *Id.,* at 54, n. 30).

5 *Litton Systems, Inc. v. American Telephone & Telegraph Co.,* 700 F.2d 785 (CA2 1983), cert. denied, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984). The Second Circuit found that AT & T's continued filing of administrative tariffs long after those claims had become objectively unreasonable supported a jury's sham finding. AT & T's anticompetitive actions were in fact so far removed from the act of petitioning the government for relief that Chief Judge Oakes and Judge Meskill also held, in reliance on *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), and *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976) (plurality opinion), that tariff filings with the Federal Communications Commission were acts of private commercial activity in the marketplace rather than requests for governmental action, and thus were not even arguably protected by the *Noerr–Pennington* doctrine. *Litton Systems,* 700 F.2d, at 806–809.

6 *Westmac, Inc. v. Smith,* 797 F.2d 313 (CA6 1986), cert. denied, 479 U.S. 1035, 107 S.Ct. 885, 93 L.Ed.2d 838 (1987). Although the Sixth Circuit did hold that the genuine substance of an anticompetitive lawsuit creates a rebuttable presumption of objective reasonableness, given the facts of that case—in which the antitrust plaintiff had presented strong evidence that the defendants' lawsuit, which followed a long and unsuccessful lobbying effort, had been motivated solely for the anticompetitive harm the judicial process would inflict on it—that modest reservation was probably wise. Evidence of anticompetitive animus in *Westmac* was in fact so great that Chief Judge Merritt thought that the plaintiff *had* successfully rebutted the presumptive reasonableness of defendants' lawsuit. The delay from the defendants' combined lobbying and litigation attack had allegedly sent the plaintiff into bankruptcy, and memos from one defendant to its attorney had stated, " 'If this [lobbying activity] doesn't succeed, start a lawsuit—bonds won't sell,' " 797 F.2d, at 318, and (in a statement repeated to a codefendant), " 'if nothing else, we'll delay sale of the bonds,' " *id.,* at 322 (Merritt, C.J., dissenting) (emphasis omitted). In any event, the Sixth Circuit rule—to the extent that it would apply in a case as simple as this one—would result in the same conclusion we reach here.

7 *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.,* 214 U.S.App.D.C. 76, 663 F.2d 253 (1981), cert. denied, 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982). In that case, the antitrust plaintiff alleged a 2–decade long conspiracy to lobby, boycott, and sue it (in state licensing boards, state legislatures, the marketplace, and both state and federal courts) out of existence. In spite of those allegations, the Court of Appeals found that the defendant's actions, which primarily consisted in lobbying for the abolition of plaintiff's mail-order prescription business, were immune under *Noerr–Pennington.*

8 In *Grip–Pak, Inc. v. Illinois Tool Works, Inc.,* 694 F.2d 466 (1982) (Posner, J.), cert. denied, 461 U.S. 958, 103 S.Ct. 2430, 77 L.Ed.2d 1317 (1983), the antitrust defendant's alleged violations of several provisions of the Sherman and Clayton Acts included much more than the filing of a single lawsuit; they encompassed a broad scheme of monopolizing the entire relevant market by: purchasing patents; threatening to file many other, patently groundless lawsuits; acquiring a competitor; dividing markets; and filing a fraudulent patent application. In *In re Burlington Northern, Inc.,* 822 F.2d 518 (CA5 1987), cert. denied, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988), the plaintiffs alleged, and produced evidence to support their theory, that the defendant had filed suit solely to cause them a delay of crippling expense, and the defendants had either brought or unsuccessfully defended a succession of related lawsuits involving petitioners' right to compete. In both of these cases the Courts of Appeals ably attempted to balance strict enforcement of the antitrust laws with possible abuses of the judicial process. That they permitted some reliance on subjective motivation—as even we have done in cases alleging abuse of judicial process, see *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513–518, 92 S.Ct. 609, 613–615, 30 L.Ed.2d 642 (1972)—is neither surprising nor relevant in a case involving no such allegations.

9 *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911); *Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

10 *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951); *Farbenfabriken Bayer A.G. v. Sterling Drug, Inc.,* 307 F.2d 207 (CA3 1962).

11 *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *United Shoe Machinery Corp. v. United States,* 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1922).

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAI'I'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, AND CORA SANCHEZ, Plaintiffs, v. 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) **FIRST AMENDED COMPLAINT**; EXHIBITS "A"-"B"; SUMMONS

FIRST AMENDED COMPLAINT

Plaintiffs Save Sharks Cove Alliance, Hawai'i's Thousand Friends, Mālama Pūpūkea-Waimea, Larry McElheny, John Thielst, and Cora Sanchez (**"Plaintiffs"**) allege as follows:

INTRODUCTION

1. On November 14, 2018, despite three years of community opposition, a history of over $200,000 in assessed fines, continuing violations of the law, and the failure to demonstrate compliance with the high standards of the state and county laws that protect Hawai'i's precious coastal resources, Defendant Hanapohaku LLC (**"Developer"**) was granted a fast-track approval by Defendant City Council of the City and County of Honolulu (**"City Council"**), based on the flawed recommendation of Defendant Honolulu Department of Planning and Permitting of the City and County of Honolulu (**"DPP"**), to build an $18 million, 34,500-square-foot commercial tourist-oriented development with a cluster of six food trucks (the "**Proposed Development**") on a 2.7-acre parcel directly across from Sharks Cove, a marine protected area on the North Shore of O'ahu.

2. Sharks Cove is a heavily-visited part of the Pūpūkea Marine Life Conservation District ("**MLCD**"). The adjacent Pūpūkea Beach Park (the "**Park**"), also part of the MLCD, provides critical beach, ocean, and tide pool access for Plaintiffs, local residents, and visitors alike. The natural, cultural, and recreational resources of Sharks Cove and the Park are threatened by this Proposed Development, which: (a) includes numerous one- and two-story retail and office buildings and a 126-space parking lot; (b) is projected to generate at least 926 new daily vehicle trips (337,990 trips per year) to Kamehameha Highway, which is already over-congested; (c) will create new sewage flow of up to 10,900 gallons per day (708,501 gallons per

year); (d) will lead to increased pollution of the nearby "Class AA" marine waters; and (e) will attract 2,400 food truck customers a day (876,000 customers per year).

3. In 2018, Hawai'i welcomed over ten million visitors to the islands. Of the approximately six million tourists who visited O'ahu, an estimated 51% visited the North Shore, which is over 8,300 visitors a day -- or over 3 million tourists a year. All must traverse Kamehameha Highway, the only route connecting the North Shore community to the rest of O'ahu. The Proposed Development will result in an 11% increase in visitors, and congestion, to the Sharks Cove area.

4. After purchasing the three adjacent lots next to the Pūpūkea Foodland along Kamehameha Highway in 2014, the Developer commenced unpermitted development, subsequently found to be illegal. Since then, the Developer has continued to pursue activities in violation of environmental and public safety laws, failed to comply with numerous permit conditions, and evaded public accountability.

5. The Parcels (defined below) are zoned under the Land Use Ordinance, Revised Ordinances of Honolulu ("**ROH**") Ch. 21, as "B-1 Neighborhood Business." "The intent of the B-1 neighborhood business district is to provide relatively small areas which serve the daily retail and other business needs of the surrounding population." ROH § 21-3.110.

6. This specific limited commercial zoning is subject to additional development restrictions because the Parcels are located within the Special Management Area ("**SMA**") pursuant to the municipal law enacted in 1978 under the authority of the State Coastal Zone Management Act ("**CZMA**"), Hawai'i Revised Statutes ("**HRS**") Chapter 205A. The SMA policy is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. Special controls on development within an area along the shoreline are

necessary to avoid permanent loss of valuable resources and foreclosure of management options, and to ensure that adequate public access is provided to public owned or used beaches, recreation areas, and natural reserves, by dedication or other means." ROH § 25-1.2. All projects within the SMA require an SMA permit prior to development. *See* ROH Chapter 25; *see also, e.g., Hawai'i's Thousand Friends v. City & County of Honolulu*, 75 Haw. 237, 246, 858 P.2d 726, 731 (1993).

7. To date, the City, its City Council, and its DPP (collectively, "**City**") have not adequately enforced the state and local laws, including the SMA permitting and monitoring requirements, HRS Chapter 205A, and ROH Chapter 25, against the current and Proposed Development to ensure present and future compliance with the statutory mandate.

8. On August 2, 2017, DPP granted the Developer an "After-the-Fact SMA (Minor) Permit." An SMA Minor Permit is "an action by the agency authorizing development, the valuation of which is not in excess of $500,000.00 and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects." ROH § 25-1.3; *see also* ROH § 25-3.3(e)(2).

9. The SMA Minor Permit issued by the DPP allowed the Developer to start new, and partially retain existing, retail establishments and five food trucks on the site, and required site improvements, including grading, paved parking, management of outdoor seating, wastewater management, storm water retention, and various other improvements. The purported value for the improvements stated by developer was $368,641, allegedly below the threshold value of $500,000 for an SMA Major Permit. *See* ROH § 25-1.3.

10. Due to DPP's and the Developer's undervaluation of the activities in the application and the likely significant adverse effects on the environment, Plaintiff Mālama

Pūpūkea-Waimea ("**MPW**") filed an administrative appeal on September 27, 2017 to contest this After-The-Fact SMA Minor Permit. The appeal is still unresolved, because DPP has failed to assign a hearing officer to the matter for over sixteen months.

11. The Developer's continuing failure to comply with the conditions of the existing SMA After-the-Fact Minor Permit, including storm water runoff controls, trash and spill controls, asphalt paving requirements, and fencing along Pāhoe Road, violate the permit, Chapter 205A, and ROH Chapter 25.

12. In 2017 and 2018, while MPW's contested case hearing request on the After-the-Fact SMA Minor Permit was pending, DPP agreed to accept from the Developer a mere fraction of the fines assessed, under an opaque, decades-old policy. For the over $200,000 in assessed penalties for illegal operations on the property, DPP accepted a fine amount "adjusted to 10 percent of the actual fines accrued." By so doing, DPP undermined and enfeebled the City's oversight process and enforcement tools, and perpetuated a bad practice that encourages illegal development on O'ahu.

13. In October 2018, DPP recommended that the City Council approve an SMA Major Permit for the Proposed Development, despite the history of persistent problems, flawed procedures, and an inadequate Final Environmental Impact Statement ("**FEIS**") that: (a) failed to properly analyze the Proposed Development's impacts on traffic, pedestrian safety, marine water quality, beach access, recreation, litter, and the Pāhoe Road neighbors; (b) failed to analyze the cumulative impacts from the current traffic, wastewater, and runoff from the neighboring commercial property; and (c) failed to respond to substantial community concerns such as added congestion to Pūpūkea Road.

14. In October and November 2018, at the Developer's request, the City Council fast-tracked approval of the SMA Major Permit over a period of three weeks, with the absolute minimum allowable public notice.

15. In 2017 and 2018, the Developer, its members and members' families, and its planning consultant Group 70 International, Inc. ("**G70**"), made over $31,000 in campaign contributions to eight of the nine City Council members who fast-tracked the SMA Major Permit.

16. City Council Chair Ernie Martin received over $14,000 in campaign contributions from the Developer and G70. His term ended in December 2018.

17. In the City's rush to approve the Project, the City Council failed to act as an independent, careful, and impartial decision-maker when reviewing the proposed SMA Major Permit. Thus, the City deprived Plaintiffs of due process of law and violated the Constitution, state statutes, and local ordinances that ensure protection of public trust resources in the coastal zone and the community.

18. The Plaintiffs, having exhausted their administrative remedies, and with deep concern about the irreversible adverse impacts of the Proposed Development (especially given the Developer's history of illegal development, lack of public accountability, and political favor), file this action as a last resort to protect the public trust, the natural and public resources of Sharks Cove, the Pūpūkea Marine Life Conservation District, Pūpūkea Beach Park, and the neighboring residential communities, including the Pāhoe and Pūpūkea Road neighborhoods.

19. This action seeks declaratory and injunctive relief, attorneys' fees and costs, and civil penalties to redress violations of Constitutional, state, and local laws that protect the environment.

20. Ultimately, Plaintiffs seek declaratory and injunctive relief to ensure: (a) the Developer's -- and the City's -- full, transparent, and accountable compliance with state and county laws; (b) representations regarding lack of any significant adverse impact are accurate and enforced; and (c) that if either the Developer or the City fail to ensure that there is a lack of significant adverse impact, or fail to provide full, transparent, and accountable compliance to the public, the Plaintiffs and the North Shore community will have immediate recourse.

PARTIES

21. Plaintiff Save Sharks Cove Alliance (**"SSCA"**) is an unincorporated alliance of groups and individuals organized to protect the Sharks Cove area, including the Park, MLCD, the adjacent shoreline, and nearby residential neighborhoods. SSCA is dedicated to protecting and preserving the sensitive and fragile marine environment and shoreline, with a particular focus on saving Sharks Cove from degradation and destruction in perpetuity.

22. Plaintiff Hawai'i's Thousand Friends (**"HTF"**) is a domestic nonprofit corporation whose purpose is to monitor and evaluate environmental, land, and water use proposals. HTF is dedicated to ensuring that growth is reasonable and responsible; that appropriate planning, management, and water and land use decisions are made that protect the environment, human health, and cultural and natural resources; and that decisions are made and proposals are implemented in conformity with the law.

23. Plaintiff Mālama Pūpūkea-Waimea (**"MPW"**) is a domestic nonprofit corporation dedicated to the protection and preservation of the unique and fragile natural, cultural, social, and historic resources at and in the vicinity of Sharks Cove. MPW's mission is "working to replenish and sustain the natural and cultural resources of the Pūpūkea and Waimea ahupua'a for present and future generations through active community stewardship, education,

and partnerships." MPW formed in 2005 as a voluntary stewardship organization, in response to a failed proposal by a prior owner to build a commercial shopping center on the parcels that are now the subject of the present dispute with the new Developer.

24. Plaintiff Larry McElheny is a 40-year resident of Pūpūkea. As a long-time resident, community activist, and frequent user of North Shore ocean resources, McElheny has a particular concern and interest in protecting the Park, MLCD, the adjoining shoreline and ocean, surfing sites, nearby residential neighborhoods, and coastal and environmental resources. As a grandfather of six keiki who regularly use Sharks Cove for recreation, McElheny seeks to ensure full and safe access to the Sharks Cove tide pools where families explore, learn and enjoy a variety of recreational opportunities.

25. Plaintiff John Thielst is a 32-year North Shore resident who has owned, since 2013, property on Pāhoe Road, adjacent to the Proposed Development. As a neighbor, long-time resident, diver, and snorkeler, Thielst has a particular concern and interest in protecting the Park, MLCD, the adjoining shoreline and ocean, surfing sites, residential neighborhoods, and coastal and environmental resources.

26. Plaintiff Cora Sanchez is a 30-year North Shore resident and active participant in community efforts to preserve and protect its natural resources. As a long-time resident, community activist, and frequent user of North Shore ocean resources, Sanchez has a particular concern and interest in protecting the Park, MLCD, the adjoining shoreline and ocean, surfing sites, residential neighborhoods, and coastal and environmental resources.

27. Defendant City and County of Honolulu is a municipal corporation duly organized and existing under the Constitution, laws of the State of Hawai'i, the Revised Charter of the City and County of Honolulu, and the Revised Ordinances of Honolulu.

28. Defendants Honolulu City Council and DPP are "agencies" of the City and County of Honolulu for the purposes of HRS § 205A-6 (as noted above, together, Defendants City and County of Honolulu, Honolulu City Council, and DPP are collectively referred to as the "**City**"). The director of the DPP has the responsibility to administer and enforce the City's Special Management Area permit system. *See* ROH § 25-2.1(a).

29. Defendant Hanapohaku LLC ("**Hanapohaku**" or the "**Developer**") is a domestic limited liability company with the registered trade names The North Shore Dispensary, The Hot House, Sharks Grove, Sharks Cove Villages, and Sharks Cove Village. Hanapohaku is the owner of three parcels located at: (1) 59- 517 Kamehameha Highway, Haleʻiwa, Hawaiʻi 96712, TMK No. 5-9-011:068 (**"Parcel 68"**); (2) 59-706 Kamehameha Highway, Haleʻiwa, Hawaiʻi 96712, TMK No. 5-9-011:069 (**"Parcel 69"**); and (3) 59-053 Pāhoe Road, Haleʻiwa, Hawaiʻi 96712, TMK No. 5-9-011:070 (**"Parcel 70"**) (together, the **"Parcels"**).

30. Non-party Maurice & Joanna Sullivan Family Foundation (**"Foodland"**) is a nonprofit foundation that owns the property, identified as Tax Map Key 5-9-011:016, adjacent to the Proposed Development (**"Foodland Property"**). The Foodland Property is associated with the Proposed Development because of a joint development agreement established in 1996 between the prior owners of the Parcels and the Foodland Property and because, as of July 2018, Foodland became a co-applicant with the Developer on the SMA Major Permit.

31. Does 1-10 are persons or entities sued herein under fictitious names because their true names and/or responsibilities are presently unknown to Plaintiffs, except that they are connected in some manner with the named Defendants and/or are responsible for all or a portion of the conduct alleged herein. Plaintiffs are unable at this time to ascertain the identity of

the Doe Defendants. Plaintiffs have made diligent and good faith efforts to ascertain the identity, actions, and liability of said unidentified Defendants, including but not limited to, a review and search of documents and information presently available to them. Plaintiffs will identify said Defendants when they are discovered.

JURISDICTION AND VENUE

32. This Court has jurisdiction under HRS §§ 603-21.5 and -23, HRS § 632-1, HRS § 205A-6(c) and -33 (SMA jurisdiction, injunctive relief), and Haw. Const. art. XI, §§ 1, 9.

33. Venue is proper in this Court under HRS § 603-36(5).

FACTS

A. Sharks Cove and the Pūpūkea Marine Life Conservation District

34. The coastal and marine area surrounding and adjacent to the Sharks Cove portion of the Pūpūkea Marine Life Conservation District on O'ahu's North Shore is a spectacular, unique, and much-loved natural, biological, cultural, and recreational resource used for beach-going, surfing, diving, swimming, paddling, marine education, and traditional practices.

35. The deeper waters of Sharks Cove are well-known worldwide as a premier diving and snorkeling destination, with unique lava, limestone, and coral formations, including underwater caves, tide pools, diverse marine life such as coral, turtles, monk seals, dolphins, and whales. In the winter, large waves and crashing surf attract hordes of beachgoers seeking to watch the amazing force of Hawai'i's ocean at Sharks Cove. During the winter months, Sharks Cove is mostly un-swimmable, with the exception of the area known as the "**Tide Pools**" -- located directly across Kamehameha Highway from the Proposed Development. The Tide Pools are a large shallow flat reef where people, particularly families with children, find recreational

refuge in the calm, swimmable waters that also serve as a rich nursery for marine life. The Tide Pools are heavily influenced by visible and palpable streams of cooler underground freshwater inflows from mauka of Kamehameha Highway, including from the area of the Proposed Development. In the summer, Sharks Cove and the Tide Pools are usually calm, warm, and inviting, offering an unparalleled recreational, cultural, and spiritual experience for a constant flow of residents and visitors enjoying the area.

36. The areas knowns as Sharks Cove, Three Tables, and Waimea Bay are part of the State Pūpūkea Marine Life Conservation District, a 100-acre marine reserve that is only one of three such designated highest-level marine protected areas on O'ahu, under the jurisdiction of the State Department of Land and Natural Resources. The waters of the MLCD are designated as "Class AA" waters, the highest level of state marine water quality.

37. The MLCD is protected under the Coastal Zone Management Act ("**CZMA**"), HRS Chapter 205A, and within the SMA, ROH Chapter 25, as well as by specific regulations for the MLCD, Hawai'i Administrative Rules ("**HAR**") § 13-34.

38. The ability and capacity of the MLCD and its protected marine life to accommodate additional visitors, more intense recreational usage, marine pollution, and litter was not properly studied or disclosed by Developer or adequately considered by City Defendants who have constitutional, statutory, and public trust responsibilities.

B. Pūpūkea Beach Park

39. The shoreline area of Sharks Cove and the Pūpūkea MLCD is bordered by the popular Pūpūkea Beach Park, which is under the jurisdiction of the City and County of Honolulu and designated as within the Special Management Area. Beginning in 2011, at the urging of the community, the City funded and issued a Master Plan for the Park in 2015 but the

City has not implemented any aspect of that Master Plan. Consequently, Park maintenance is woefully under-resourced, and its infrastructure is over-used, often relying on community-led initiatives for maintenance, outreach, and renovations, making it particularly vulnerable to the additional burdens and impacts imposed by the current and proposed developments that will bring 876,000 new visitors to the area each year.

40. The Park currently has only 28 parking spaces and, due to the constricted roadside parking along Kamehameha Highway in either direction, and on nearby side streets, the parking lot is consistently in high demand and very often full of vehicles and pedestrians overflowing onto the highway.

41. The portion of the Park below Kamehameha Highway and makai of the paved parking area is a mostly-level, grassy, sandy, rocky, open area used by beachgoers, scuba- and free-divers, swimmers, snorkelers, paddlers, wildlife observers including whale watchers, ocean/wave viewers, and for native plant restoration, education and outreach, and cultural practices, among other recreational activities. The natural areas of the Park and its paved areas (which are primarily used for parking and as a recreational equipment unloading and staging area, with public bathrooms and an outdoor shower), are integral to public coastal access.

42. The Park is protected under the Coastal Zone Management Act **("CZMA"),** HRS Chapter 205A, and within the SMA, ROH Chapter 25.

43. The ability and capacity of the Park to accommodate additional visitors, recreational usage, marine pollution, and litter were not properly studied or disclosed by Developer or adequately considered by the City, which has constitutional, statutory, and public trust responsibilities.

C. The Pāhoe Road Neighborhood

44. Pāhoe Road is a private road bordering on Parcel 70 of the Proposed Development. Approximately eight residential lots are owned by residents of Pāhoe Road, which is the sole means of ingress and egress from and to their properties from and to Kamehameha Highway.

45. Starting in 2014, when Hanapohaku purchased the three Parcels and began leasing space for the operation of nine or more food trucks, the Pāhoe Road neighbors became upset by the increase in traffic, noise, disturbances, littering, trespass into their yards, lack of privacy, effect on property values, and unsanitary practices of the Developer's tenants. The Pāhoe Road neighbors shouldered the expense of retaining private counsel to write a warning letter to Hanapohaku on April 20, 2016.

46. The letter to the Developer stated that Parcels 68 and 69 have no right to any vehicle access to Pāhoe Road and demanded that "Hanapohaku immediately close all vehicular access points" from these parcels to Pāhoe Road. The letter also stated that Parcel 70, as a 1/10th owner of Pāhoe Road, had only qualified access rights to Pāhoe Road, and that Hanapohaku was "exceeding its rights and substantially interfering with the rights of the Neighbors."

47. The Pāhoe Road Neighbors' attorney further notified Hanapohaku that its proposed plan to prohibit commercial invitees' use of Pāhoe Road while allowing deliveries to the Parcels would continue to interfere with the Neighbors' rights, including blocking and delaying access to their homes, interfering with privacy and safety, creating noise and pollution, and diminishing use and enjoyment. The letter "reiterate[d] the demand that Hanapohaku

immediately cease interfering with the Neighbors' ability to use and enjoy their properties, including Pāhoe Road."

48. Due to the lack of responsiveness of the Developer, the Pāhoe Road Neighbors undertook self-help measures more than a year ago and set out orange cones and a homemade sign on their private road to discourage vehicles seeking ingress to the Parcels from driving up, turning around on, parking on, and otherwise blocking Pāhoe Road. This interim measure has been only partially successful at reducing wayward vehicles and pedestrians and this improvement is due only to the extraordinary measures of abatement taken by the Neighbors themselves. It is not a long-term solution to the trespassing and nuisance problems created by the current and Proposed Development.

49. In response to the letter and the Neighbors' repeated concerns over the Developer's -- and its tenants' and customers' -- use of Pāhoe Road and the spillover impacts of the current and future development, the Developer made two major illusory promises to the Neighbors.

50. First, the Developer promised to install a six-foot-high chain-link fence on Lot 70 along Pāhoe Road to prevent vehicular and pedestrian access (which DPP made a condition of the After-the-Fact SMA Minor Permit, governing current operations). In its response to comments by Pāhoe Road Neighbor and Plaintiff John Thielst on the Draft Environmental Impact Statement ("**Draft EIS**"), the Developer explicitly stated: "The Final EIS shows a fence with *no ingress* to or from Pāhoe Road." (Emphasis added.)

51. Second, the Developer promised to not allow any commercial use of Pāhoe Road by the current operations under the After-the-Fact SMA Minor Permit and the future

Proposed Development. In the same response, the Developer stated: "There will be *no pedestrian or vehicular access* to or from the privately owned Pāhoe Road." (Emphasis added.)

52. However, the Developer has not fulfilled these commitments and not complied with the clear condition to the After-the-Fact SMA Minor Permit, issued seventeen months ago, that requires: "A new six-foot-high chain-link fence will be installed along a portion of the north (Kahuku) boundary of the site along Pāhoe Road in accordance with Exhibit B. With the installation of the fence, Parcel 070 will *no longer have vehicular access* along Pāhoe Road." (Emphasis added.) To date, the Developer has placed only temporary, small, moveable, wooden planters along the frontage of Lot 70 and Pāhoe Road, violating the Developer's promises and the SMA conditions.

53. Furthermore, buried in its Final Environmental Impact Statement ("**FEIS**") comments to other concerned community members, the Developer revealed a lack of candor to the Pāhoe Road Neighbors and mentioned an access gate for the first time, stating "[t]here will be no *regular* access to the project site from Pāhoe Road, and the owners will commit to this condition. A *gate* on the property boundary with Pāhoe Road *will allow for* emergency access to/from the property, and *periodic maintenance access*." (Emphasis added.) Nowhere else in the plans, FEIS, or comments does the Developer properly explain to the Neighbors this inconsistent promise and disclosure regarding the "new gate" access on Pāhoe Road.

54. The issue of the traffic congestion on Pāhoe Road is not just a private concern and nuisance to the residents of that road but is a concern to everyone who uses Kamehameha Highway. When wayward tourists inevitably turn into Pāhoe Road, back up, and turn around in the narrow road multiple times a day, it causes traffic congestion and safety

hazards not only for Pāhoe Road residents, but also for all drivers and pedestrians passing the corner of Pāhoe Road and Kamehameha Highway.

55. Long-time Pāhoe Road Neighbor John Thielst joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, to ensure that the interests of his residential neighborhood, the private Pāhoe Road, and the adjacent Park and MLCD are protected from the illegal and adverse spillover impacts of the current and Proposed Development.

D. Pūpūkea Road Neighborhood

56. The Pūpūkea Road Neighborhood is comprised of approximately 500 "country" zoned lots for which two-lane Pūpūkea Road, adjacent to Foodland, is the only ingress and egresss.

57. Foodland, which operates a 21,650-square-foot food and sundry store, receives all of its truck deliveries through one narrow alleyway behind the store along Pūpūkea Road. Every day, large semi-tractor-trailer and delivery trucks block Pūpūkea Road while they back up into the narrow below-ground lane behind the store, often interfering with, and creating a hazard to, the residential, schoolbus, and handi-van traffic that use Pūpūkea Road. This creates a special danger due to the blind downhill curve adjacent to the loading lane. The Pūpūkea Road Neighborhood will be adversely impacted by the Proposed Development due to the increased traffic congestion along Pūpūkea Road and Kamehameha Highway that will worsen the impacts of this truck delivery hazard, which was not properly analyzed in the Draft EIS or FEIS, and was not mitigated in the SMA conditions.

58. The Pūpūkea Road Neighborhood will also be adversely impacted by the Proposed Development because the plan makes a significant reconfiguration of the ingress and egress to the Foodland parking lot, reducing what is currently three driveways on that TMK No.

(1) 5-9-011:016 *to only one,* the single driveway along Pūpūkea Road, and forcing other cars entering and exiting Foodland through the Developer's new driveway on the adjoining lot. This major change to traffic flow will likely increase, not decrease, traffic congestion around and inside the Foodland parking lot, and at the sole Pūpūkea Road ingress that is also the exact location of the heavy truck deliveries (adjacent to the blind curve) resulting in disruption to the access of Pūpūkea Road Neighbors to their homes and neighborhood, all of which was not properly disclosed in the FEIS and not properly reviewed in the SMA process.

59. Long-time Pūpūkea Road resident Larry McElheny joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, to ensure that the interests of his residential neighborhood, Pūpūkea Road, and the adjacent Park and MLCD are protected from the illegal and adverse spillover impacts of the current and Proposed Development.

E. Kamehameha Highway

60. Kamehameha Highway, which fronts the current and Proposed Development, is a narrow two-lane highway that is the sole artery from Wahiawā to Kāne'ohe along the North Shore and Windward O'ahu. For the approximately fifteen-mile-long stretch from Hale'iwa to Kahuku, this rural highway has no stop signs or stop lights other than at Pūpūkea Road, which was installed after Foodland's expansion in 1995.

61. Along the North Shore, Kamehameha Highway is notorious for traffic congestion, particularly at highly-visited beaches such as Laniākea, Chun's Reef, Pipeline/Ehukai Beach Park and Sunset Beach. There are frequent bottlenecks, pedestrian hazards, and traffic accidents due to the high volume of visitor traffic and pedestrians mixed with residential traffic. Residents along Kamehameha Highway from Laniākea to Sunset Beach often report that they feel like "hostages in their own homes" due to the unsafe and disprutive traffic

conditions, which now occur daily because of the three million visitors to O'ahu who go "circle island" year-round. Visitor traffic is no longer distinctly seasonal.

62. Portions of Kamehameha Highway, such as at Laniākea, Rock Piles, Sunset Beach, and Ka'a'awa are subject to shoreline erosion, severe sand loss, and overtopping of the Highway during high surf periods, which will occur with increasing frequency and severity due to sea level rise linked to climate change. According to the Hawaii Sea Level Rise Vulnerability and Adaptation Report (State of Hawai'i, December 2017), "[o]ver the next 30 to 70 years, properties located on or near Oahu's shorelines will increasingly be flooded, eroded, or completely lost to the sea. Portions of coastal roads will also become flooded, eroded, and even impassible or irreparable jeopardizing access to and from many communities. Beaches, like the Seven Mile Miracle on the North Shore will increasingly be eroded and permanently lost if hard structures such as roads and seawalls impede their landward migration." The City failed to properly analyze, in the EIS and in the SMA review process, the effect of allowing a major new commercial development along Kamehameha Highway, which is already often extremely congested and increasingly threatened by sea level rise, in light of these increased risks.

63. The Proposed Development will increase the traffic congestion and hazardous pedestrian crossings along this area of the North Shore by attracting more than 337,990 new vehicle trips a year to this area and creating a new bottleneck between Pūpūkea Road and Pāhoe Road. The increases in traffic congestion and pedestrian hazards (acknowledged by Developer's Traffic study to be as high as 48 people illegally crossing the highway during the Saturday mid-day peak *hour* alone) will not be mitigated by the proposed altered driveway routing, which eliminates two driveways to Foodland and forces all

Kamehameha Highway traffic to ingress and egress the four parcels though one single central driveway in the Proposed Development and one entrance on Pūpūkea Road.

64. These hazards will also not be mitigated by the Developer's illusory promise of a new crosswalk across Kamehameha Highway at Pāhoe Road, which itself may generate more congestion in the area. During the permitting process and in the FEIS, the Developer made numerous commitments that it would mitigate pedestrian hazards by ensuring that the State Department of Transportation would install a crosswalk for pedestrians crossing from the Development to and from the Park and MLCD. However, later in the FEIS, the Developer balked on its commitment, stating that "[a] crosswalk on Kamehameha Highway just south of Pāhoe Road is *recommended.* Installation of high visibility crosswalk markings, *perhaps* with rectangular rapid flashing beacons (RRFBs) *will be decided* in consultation with, and approval from, HDOT." (Emphasis added.) The State Department of Transportation ("**DOT**") has not approved the proposed crosswalk, which would terminate on a steep downslope on the makai side beach of the narrow highway, and it is unlikely to ever be approved. The DOT has never approved a similar crosswalk requested by the community due to the hazardous pedestrian crossings at Laniakea Beach. Furthermore, the Developer failed to disclose or analyze the likely increase in pedestrian and beach access hazards under a no-crosswalk scenario.

65. Long-time North Shore resident Cora Sanchez joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, to ensure that the interests of their use and enjoyment of the North Shore and safe access on Kamehameha Highway is protected from the illegal and adverse spillover impacts of the current and Proposed Development.

F. Developer's Unpermitted Use of the Parcels Beginning in 2014

66. On or about June 26, 2014, the Developer purchased the three contiguous Parcels, constituting 2.7 acres, which are located along Kamehameha Highway across from the Park and MLCD, and between Pāhoe Road and Pūpūkea Road.

67. Soon after purchasing the Parcels, the Developer undertook extensive unpermitted development including: (a) adding nine stationary food trucks, (b) constructing decks enclosing the trucks, (c) constructing a deck for an existing structure, (d) installing plumbing improvements and electrical and water connections, (e) erecting fences, tents, signs, and lights, (f) playing loud music, and (g) grubbing and grading the site -- all without proper building, SMA, or other required permits.

68. The rash and haphazard development resulted in an increase in traffic along Kamehameha Highway, Pāhoe Road, and an increase in pedestrian hazards from illegal crossings of the highway. The development further generated litter, and resulted in resource over-use, pollution, and other adverse effects on the neighbors' and community's access to, and use and enjoyment of, the Park, MLCD, and public and private roadways.

69. Despite numerous complaints from the community, the Developer made no real effort to reduce the impact of its activities until the community took on the heavy burden to document, investigate, complain, request meetings, and take legal action to ensure governmental enforcement of the laws protecting the environment.

G. The City's Admittedly Illegal Three SMA Minor Permit Approvals in 2015 and 2016

70. In 2015, the Developer applied for three separate SMA Minor Permits, intentionally segmenting the development into three proposals in order to conceal the true impact

of the project and avoid the additional public review associated with a SMA Major Permit application.

71. Among other things, the Developer misleadingly underestimated the valuation of the allegedly separate developments at just under $500,000 each ($498,000, $445,000, and $484,000 for Parcels 68, 69, and 70, respectively).

72. Over a ten-month period, between March 2015 and January 2016, the City wrongfully issued three separate SMA Minor Permits for Parcels 68, 69, and 70.

73. On March 9, 2016, Plaintiff MPW timely appealed the City's issuance of the three SMA Minor Permits in the matter styled *In the Matter of the Petition for Contested Case Hearing of Malama Pupukea-Waimea,* DPP No. 2016/GEN-4.

74. On April 6, 2016, at a North Shore Neighborhood Board Meeting held at Waimea Valley, with over 150 community members in attendance, the Developer's principal, Andrew Yani, repeatedly apologized to the community and promised to withdraw all three SMA Minor Permits.

75. On May 2, 2016, in response to the Developer's request, the City revoked the three SMA Minor Permits. The City further ordered that all development on the Parcels be *"removed"* and that the area be "*restored to pre-approval condition.*" (Emphasis added.) However, the City did not take meaningful enforcement action to ensure restoration of the parcel to pre-approval condition.[1]

[1] In reviewing the City's actions on the SMA Minor and SMA Major Permits, a court need not presume the validity of agency action and instead can "make its own independent findings regarding the salient facts of the . . . case." *See Hawai'i's Thousand Friends v. City & County of Honolulu*, 75 Haw. 237, 248, 858 P.2d 726, 732 (1993).

76. Instead, after the City finally assigned a hearings officer to MPW's appeal, the City attempted to have the appeal dismissed as "moot."

77. The contested case was finally resolved by stipulation among all parties on January 7, 2019. *See* Ex. A (Stipulated Findings of Fact, Conclusions of Law, and Decision and Order, *In the Matter of the Petition for Contested Case Hearing of Malama Pupukea-Waimea,* DPP No. 2016/GEN-4 (the "**Stipulation**")). In the Stipulation, the City and Developer admitted that: (a) Plaintiff MPW had standing to bring the appeal; (b) "In issuing its decisions on the three SMA Minor Permits, the Planning Director failed to conduct a thorough review of the valuation and cumulative impacts of the applications and, therefore, failed to make determinations consistent with the purposes of HRS § 205A and ROH Chapter 25;" (c) that the three SMA Minor Permits were "erroneously approved;" and (d) that "the Planning Director's decisions to issue the three SMA Minor Permits violated HRS § 205A and ROH Chapter 25."

78. Plaintiffs incorporate by reference all of the allegations of fact, legal claims, findings, and conclusions made in the Stipulation.

H. The Contested Second, After-the-Fact, SMA Minor Approval

79. The Developer neglected to remove the development activities or restore the Parcels to pre-approval condition, and the City failed to enforce its own May 2, 2016 directive.

80. Instead, on May 23, 2017, after months of submitting several failed, incomplete, or rejected applications to DPP for SMA Minor permits, the Developer reapplied for a single "after-the-fact" SMA Minor Permit (the **"After-the-Fact SMA Minor Permit"**), to allow the Developer to retain all of its existing retail establishments and the cluster of food trucks, and to allow even further development.

81. In its May 23, 2017 permit application, the Developer again misleadingly underestimated the valuation of the project at $368,641 in order to avoid the public scrutiny and environmental review associated with the SMA Major permit process for projects valued at $500,000 or more.

82. On August 2, 2017, the City approved the Developer's application, based on the determination that the project "has a stated valuation of less than $500,000, and will have no significant effect on SMA resources."

83. The City failed to conduct a thorough review of the valuation and environmental impact of the application and wrongfully issued the After-the-Fact SMA Minor Permit.

84. On September 22, 2017, MPW timely appealed the City's issuance of this After-the-Fact SMA Minor Permit and sought relief in the form of: (1) an order vacating the After-the-Fact SMA Minor Permit; (2) an order requiring Hanapohaku to pay all accumulated fines; and (3) an order instructing Hanapohaku to submit an SMA Major Permit application for the existing development and proposed new activities. *See* Ex. B (appeal of the After-the-Fact SMA Minor Permit) (the "**Appeal**").

85. Plaintiffs incorporate by reference all of the allegations of fact and legal claims made in the Appeal.

86. In the sixteen months since the Appeal was filed, MPW made numerous requests to the City to assign a hearings officer.

87. The City failed to assign a hearings officer, and to date, the City has *still* not assigned the case to a hearings officer.

88. Despite the fact that MPW's appeals of the three SMA Minor Permit approvals and the subsequent After-the-Fact SMA Minor Permit approval were *still pending and unresolved*, on July 20, 2018, the City accepted the Developer's application for an SMA Major Permit (the **"SMA Major Permit"**).

89. The City's glacial pace in dealing with MPW's appeals lies in stark contrast with the City's fast-tracking of the Developer's applications for after-the-fact approvals and more development. By failing to timely address MPW's appeals, and by unfairly prioritizing the Developer's interests over MPW's and the community's, the City deprived Plaintiffs of due process and the constitutional right to a clean and healthful environment.

90. The City should have rejected the Developer's application as incomplete under ROH § 25-5.2 based on the facts alleged in this First Amended Complaint.

91. In handling MPW's contested case for the second, After-the-Fact SMA Minor Permit, the City treated Plaintiffs unequally and unfairly by refusing to take any action whatsoever, while rushing the acceptance and approval of the Developer's SMA Major Permit.

92. Plaintiff MPW joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, because of the City's mishandling of the contested cases, which denied MPW due process and underscores the importance of ensuring that a Court intervene to require the Defendants to follow the laws that protect the interests of the residential Pāhoe Road neighborhood, Pūpūkea Road neighborhood, the adjacent Park, and MLCD from the illegal and adverse spillover impacts of the current and Proposed Development.

I. Improper Resolution of Over $200,000 in Assessed Fines Against Developer

93. In the course of its illegal operations since purchasing the property in 2014, the Developer appears to have racked up over $200,000 in assessed fines imposed by DPP.

94. The City's records do not give the public a transparent accounting of fines assessed against developers, including Hanapohaku. Periodic disclosures by the Developer to the community regarding the fines have been disjointed, misleading, and confusing. However, based on numerous inquiries, Plaintiffs have learned that the Developer did not fully pay the assessed fines and City did not refer any fines to the Corporation Counsel for prosecution.

95. Plaintiffs have been unable to determine with accuracy the current or any final resolution of the track record of fines, assessment, and payments actually made by the Developer. When the community inquired about the status of the fines at the September 25, 2018 public hearing on the SMA Major Permit, the Developer's representatives gave contradictory and vague answers.

96. DPP has enforcement discretion, but that discretion cannot be arbitrary or capricious or abused.

97. DPP has abused its discretion in administering the civil fine program in this case.

98. On information and belief, despite the wide range of enforcement tools available to DPP, in this case, DPP chose to follow a decades-old unwritten developer-friendly practice of accepting a mere fraction of the fines assessed.

99. On information and belief, DPP adjusted the fines accrued to only ten percent of the over $200,000 in assessed fines for the illegal operations on the property.

100. On information and belief, the Developer has paid less than $20,000 in actual fines -- equivalent to one month's rent from five food trucks and the retail stores -- insignificant in terms of the value of its overall commercial operations and value of the development plans.

101. The DPP's practice of settling fines for such abysmally low amounts, its failure to utilize the full range of enforcement tools authorized by law to bring developers into compliance for long-standing and numerous violations, and its unwritten fine settlement policy violates the constitutional right to a clean and healthful environment and the City's public trust responsibilities.

102. In addition, DPP did not require that all of the fines be resolved prior to DPP's acceptance of the SMA Minor and Major Permit applications. For DPP to accept a permit application from a developer with "unclean hands" and a track record of significant violations and accumulated fines imposed by the City is a violation of the public trust and a deprivation of the due process rights of the public.

103. Plaintiff HTF joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, to ensure that DPP's policies and practices regarding fines imposed on developers is brought into the public light and reformed to ensure that the penalty decisions are made in conformity with the Constitutional right to a clean and healthful environment and the public trust and that decisions are made and proposals are implemented in conformity with the law.

J. Illegal Food Truck Operations

104. Since 2014, the Developer has continuously operated, used, and/or leased space to itself and others for various office and retail establishments, including numerous food trucks on the Parcels.

105. Immediately after the Developer purchased the Parcels, a cluster of eight to ten food trucks appeared, *en masse,* at the site, without permits.

106. Since then, the food trucks have been the subject of numerous complaints regarding violations of State Department of Health ("**DOH**") rules, including poor sanitation and

food-borne illnesses, and City Building Code provisions including illegal signage and clutter. For example, in October 2017, DOH officials levied a $5000 fine on the operators of a food truck on the Developer's site, ordering the truck to close immediately for selling food without the proper permits and because the food truck owner "allegedly tore down the department's 'closed' sign and continued to operate anyway."

107. The operations of the existing five food trucks appear to violate several provisions of HAR Title 11 Chapter 50 (Food Safety Code). The food trucks are quasi-permanent and stationary, located in assigned places, and do not ever, or very rarely, leave the Parcels. The food trucks do not "return regularly [to a servicing area] for such things as vehicle and equipment cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food." HAR 11-50-2.

108. Only after Plaintiffs filed their initial Complaint in this case on January 11, 2019, did the Developer and its tenants, on January 30, 2019, attempt for the first time to move all the trucks off of the property, apparently to demonstrate compliance with DOH rules. According to community observers, though the movement was a major day-long undertaking with the food trucks encountering numerous obstacles in leaving the property, several of the trucks did not return to a food servicing area and instead spent the day parked on nearby public park land before returning to the property.

109. In apparent violation of HAR 11-50- 60(k), water is not made available for the food trucks from: "(1) A supply of containers of commercially bottled drinking water; (2) One or more closed portable water containers; (3) an enclosed vehicular water tank; or (4) An on-premises water storage tank." Instead, in at least some instances, the food trucks have reportedly used garden hoses to replenish water for food service operations.

110. In addition, on information and belief, the food trucks do not remove sewage and other liquid wastes at an approved waste servicing area or by a sewage transport vehicle in such a way that a public health hazard or nuisance is not created, in violation of HAR 11-50-63. In fact, in response to citizen complaints, in August 2017, the DOH found that the Developer's tenants had dumped grease, rancid oil, and wastewater into "the landlord's" 500-gallon wastewater pit later covered with pallets in the bushes, where the DOH inspector also noticed "human feces and toilet paper in the area." These poor sanitation practices appear to be continuing despite the past DOH inspections.

111. On information and belief, the food trucks do not keep accurate and complete records that indicate their "return regularly (to a servicing area)."

112. The food trucks are illegally using a "commissary" or "kitchen" in a former dentist office that was permitted by the DOH for only limited usage and purposes, but is reportedly utilized for dumping of grease and wastewater by several food trucks.

113. Despite these numerous violations of State Food Safety Code, the City has allowed the Developer to operate a cluster of food trucks with a blind eye, has inspected only after numerous citizen complaints, and then approved the Developer's SMA Major Permit application that includes six food trucks despite the Developer's inability to prove compliance with State and County laws, including DOH food safety rules.

114. Save Sharks Cove Alliance joined this lawsuit as a Plaintiff, and joined the other Plaintiffs, to ensure that their interests in the use and enjoyment of the residential neighborhood, the Pāhoe Road and Pūpūkea Road neighborhoods, and the adjacent Park and MLCD are protected from the illegal and adverse spillover impacts of the current operations and the future cluster of food trucks on the current and Proposed Development.

K. Water Pollution

115. Developer's current operations of retail stores and a cluster of food trucks creates two kinds of water pollution that adversely affect the Park and MLCD, recreational users, and marine life: (a) subsurface flows of polluted groundwater and (b) surface water pollution from storm water runoff. The Proposed Development will dramatically increase both kinds of polluting activities, with increased storm water runoff contaminated by traffic, litter, and six food trucks in operation, and by dramatically increased sewage on site (with a leach field designed to handle an estimated 10,900 gallons per day or 708,501 gallons per year versus 400 gallons per day currently from the existing aerobic treatment system), which will result in (treated but nonetheless) contaminated water seeping into the groundwater, subsurface ocean water, and, within a distance of only about 200 feet, into the surface waters of the Class AA ocean waters of the MLCD.

(a) Subsurface Flows of Polluted Groundwater into the Ocean

116. Subsurface water pollution is currently occurring from the site into the ocean through seepage into the pervious soil under the Parcels through a hydrological connection to the ocean. The porous subsurface carries contaminated freshwater down-gradient (at a 5% slope), "flowing" under Kamehameha Highway and then into the Park and MLCD. According to the FEIS, "[t]he pattern of increasing salinity and decreasing nutrient concentrations with distance from shore result from *concentrated input of groundwater* to the ocean at or near the shoreline throughout the region across Kamehameha Highway from the proposed site." FEIS at 3-22 (emphasis added). "The total groundwater flow along the 560-feet shoreline makai of the project area is estimated at 790,000 gallons per day." *Id.* Users of the MLCD frequently encounter the numerous cold freshwater inflows along the coastline, exactly where the polluted

groundwater from the Project now flows and would increasingly flow carrying contaminants from the Parcels into the ocean. These freshwater flows into the MLCD are so large that they often create visible floating streaks in the ocean when Sharks Cove is calm.

117. There is also a hydrological connection whereby ocean water comes mauka under the highway with the tides where it can become contaminated underneath the project site. The Developer's study of salinity from monitoring wells indicated that "ocean saltwater underlies the site at [a] depth" of around 50 feet, with "*strong tidal response* at both well sites, with amplitudes on the order of *one third to one half* of the ocean's tidal amplitude." FEIS at 3-13 (emphasis added).

118. Thus, any groundwater contamination from the site will go directly into the ocean, either through freshwater subsurface flows down-gradient or by the influence of the tidally-influenced ocean water that flows back and forth with the tide at relatively shallow depths under the site.

119. The EIS indicated that water quality contamination is already occurring under the site. The Developer attributes the current polluted condition to "inputs by human activities in the directly upgradient area," *see* FEIS at 3-11, and the Developer's own expert points to the extensive outdoor commercial activities and food trucks clustered on site for the past four years: The Nance study found that "higher nitrogen levels in the downgradient well (B-7), may reflect input from *present use of the site*." FEIS at 3-13 and 3-14 (emphasis added). The marine study also acknowledged the current contamination: "it is apparent that the concentration of NO3 in groundwater entering the ocean at Sharks Cove is as high as approximately double that which is present in upslope groundwater. This result indicates that there is [sic] added

subsidies of NO3 to groundwater from externals sources between the monitoring wells and the ocean." FEIS, App'x C at 7.

120. In addition to the contaminating activities that already pollute freshwater and ocean water under the site, the Proposed Development will attract customers and tenants who will generate a substantial level of daily effluent on site. Even if approved by DOH and even if treated at required secondary treatment levels, the Developer's proposed wastewater treatment system is not permitted to discharge effluent into the waters of the United States, which it will likely do through the above-described subsurface freshwater and ocean water connections to the Class AA waters of the MLCD, only 200 feet makai. Moreover, the Developer has no plan to disinfect the effluent, meaning any effluent that does seep into the Class AA waters of the MLCD will have very high bacterial counts and possibly other pathogens. *See* FEIS at 3-45.

121. This contamination from the current operations on the site appears to already be showing up at the shoreline of the MLCD. The marine study for the Developer "shows that existing water quality exceeds the standards for NO3 and NH4+ along transects 1 and 2 within 100 meters from shore." FEIS at 3-23. "Total nitrogen within two feet of the shoreline along Transect 2 also *exceeded the water quality standards*: chlorophyll a within 1 foot of the shore also *exceeded the HAR standard at both Transect 1 and 2*." FEIS at 3-23 (emphasis added). The FEIS acknowledges that the Project will likely increase contamination of Total Nitrogen by 4.3% and Total Phosphorus by 7% compared to existing conditions (which are already elevated due to Developer's activities over the past four years). FEIS at 3-25. Given that state water quality standards are already being exceeded, even based on this one day of sampling by the Developer's consultant, the alarm bells should have gone off for DPP and the

City Council regarding risks to water quality in the MLCD during the SMA review process. However, there is no record that the City showed any concern for this major water quality issue despite the requirements of HRS Chapter 205A to ensure no adverse effects to water quality and marine resources.

122. The FEIS upon which the City relied in granting the SMA permit also failed to provide information about the nutrient or other contaminant load increase compared to *pre-2015 commercial activities*, which would be the appropriate baseline for analysis. Without a proper baseline for comparison, the Developer concludes simply that the elevated levels of Total Nitrogen and Total Phosphorus "does not represent a significant change in the composition of groundwater released along this shoreline." FEIS at 3-25. However, even the data in the FEIS indicate measurable current and future contamination from the Project into Class AA marine waters and violations of the State Water Pollution Act, HRS Chapter 342D, including as a discharge without a proper National Pollutant Discharge Elimination System ("**NPDES**") permit.

123. The Developer's contention that "rapid mixing" and "dilution" would render the impact insignificant does not bear any legal weight when the contamination is entering Class AA water of an MLCD.

(b) Surface Flows of Polluted Storm Water from the Site into the Ocean

124. The second way in which polluted water from the site will adversely affect the MLCD is through surface flows of polluted storm water runoff from the site into the ocean. This water quality impact is already occurring through discharge of storm water runoff from the property's driveway and makai border, along the culvert of Kamehameha Highway, to the DOT's storm water drain, under the Highway through a 24" pipe, to an outlet near Pūpūkea Fire

Station. The storm water then runs into a short open culvert that drains into the sand of the Park and the Class AA waters of the MLCD.

125. As the FEIS states, "[c]urrently, there are no existing on-site drainage facilities and no defined natural drainageways. Due to the lack of a storm water collection system, storm runoff in the area generally flows across the properties and *continues offsite*. The nearest drain inlet is located south of the project site along Kamehameha Highway." FEIS at 3-44 (emphasis added). Observations of the site during rainfall events indicate that contaminated storm water frequently flows from the Parcels into the storm drain and then into the Park and the Class AA waters of the MLCD. Severe rainfall events that may cause increased run off from the site appear to more likely with erratic weather patterns in Hawai'i amplified by climate change.

126. The contaminants of concern likely include nutrients and contaminants from food waste, human and animal fecal matter, cleansers, grease, oils, pesticides, insecticides, heavy metals, and other chemicals related to the operations on the property. None of these pollutants may be discharged into the ocean without a permit and treatment under the State Water Pollution Act. Discharge of pollutants from the site directed through a channelized area to a storm drain connected to a culvert that flows out a ditch that enters the ocean is an illegal point source discharge.

127. The EIS's marine study contained numerous errors or omissions indicating that Developer did not adequately test for or disclose water quality impacts from the current and future development. The marine study sampled the water in the Sharks Cove area only on one day, May 17, 2017, typically an average to low rainfall month; the study does not indicate the precipitation records for this day or the prior days/week, not does it indicate the time of day of the samples or the tide conditions; the location of the transects does not align with the location in

the MLCD most likely to be impacted by subsurface or surface pollution from the site; the study completely neglected to sample for bacteria even though the State Water Quality Standard for marine waters is commonly known and testing for enterococcus is standard protocol; and the study did not test the area near the storm water drainage ditch.

128. In contrast, water quality testing by a professional laboratory of a sample of the storm water flow from the drainage culvert that contains waste water flowing from Developer's site on January 30, 2019 indicated *extreme exceedences* of State Water Quality Standards. Total Nitrogen was *3670* µg/L, approximately *15 times higher* than the state standard which, according to the FEIS, is between 180 µg/L and 250 µg/L. *See* FEIS, App'x C. Phosphorus was *1040* µg/L, approximately 17 times higher than the state standard of 30 µg/L to 60 µg/L. *See id.*

129. The test results indicate that several other state water quality standards – for Ammonia, Nitrate+Nitrite, and Total Kjeldahl Nitrogen -- were also exceeded during this rainfall event. Periodic observations of the drainage ditch during rainfall events also indicate other prohibited pollutants prohibited such as scum, grease, and materials that create a smelly sludge in the sand of the Park below the drainage ditch only a few feet away from the Class AA waters of the MLCD.

130. These test results reflect the high levels of current pollution coming from the Developer's site, indicate the flawed methodology of the FEIS, and also represent violations of State Water Quality Standards by the Developer.

131. Plaintiffs seek declaratory and injunctive relief to prevent Developer's current contamination of the marine waters of the MLCD, to ensure that any permits from the City have appropriate conditions requiring no discharge of pollutants into the MLCD, to set up a

water quality monitoring and transparent reporting system, and to require the Developer to apply to the DOH for an NDPES Permit.

L. Flawed EIS for the SMA Major Permit

132. In November 2017, as part of the process for seeking an SMA Major Permit for the Proposed Development, the Developer released a "non-Chapter 343" Draft EIS through the *OEQC Notice* for public comment.

133. The Developer released the Draft EIS pursuant to ROH Chapter 25, which sets out an environmental review process prepared in compliance with the environmental quality commission's rules and regulations and according to the procedures set forth in HRS Chapter 343 and its rules.

134. Plaintiffs provided extensive comments on the Draft EIS. The Developer provided inadequate responses to those comments. Key provisions of the Draft EIS, including the traffic study, the water quality study, and the marine study, grossly underestimated the adverse impacts of the Proposed Development. No proper study was conducted on the impacts of the Proposed Development on the Park or recreational access to coastal resources. These numerous flaws rendered the FEIS inadequate as a matter of law and require a new EIS and SMA review process.

135. Furthermore, although the Draft EIS acknowledged that the Proposed Development needed to be conducted under the joint development agreement with Foodland, it entirely omitted the key fact that Foodland would be a joint applicant with the Developer for the SMA Major Permit. The Developer informed the public that Foodland was a joint applicant only in July 2018 *after* the FEIS was complete. This is a fatal flaw in the entire EIS and requires a new EIS and SMA review process.

136. The Draft EIS did not survey, discuss, or analyze the direct or indirect impacts of the extensive commercial operations, parking, leach field, surface runoff, pedestrian activities, and light and heavy truck operations from or on the adjacent Foodland Property. As a result, the Draft EIS and FEIS failed to include, and the DPP failed to consider, the direct, indirect, and cumulative impacts of operations on and modifications to the Foodland Property's activities and parking lot, together with the Developer's Parcels.

137. For example, the FEIS indicated that two access driveways to the Foodland Property from Kamehameha Highway would be eliminated, forcing all commercial traffic onto either Pūpūkea Road, which is heavily used by residents and by large delivery trucks for Foodland, or through the center of the Developer's new commercial development.

138. The Draft EIS and FEIS insufficiently addressed, and the City therefore insufficiently considered, the impact of that significant modification upon internal parking lot, roadway, and highway traffic flow. Kamehameha Highway, which is the sole artery connecting coastal communities from Hale'iwa to Kahalu'u, already experiences excess volume and significant delays at the Foodland/Pūpūkea Road intersection. Thus, even arguably "minor" modifications to the Foodland Property's parking lot could have an outsized impact upon an already-overburdened highway and the connecting residential Pūpūkea and Pāhoe roads.

139. The FEIS was also defective because it failed to respond adequately and in good faith to the extensive critical public comments. The responses on the community's major concerns about impacts to coastal and neighborhood resources were consistently, and disappointingly, unresponsive, incomplete, or misleading.

N. The Improper SMA Major Permit Approval

140. DPP accepted the Developer's SMA Major Permit application and held a public meeting on September 25, 2018. *See* ROH § 25-5.3 (The agency . . . shall hold a public hearing on the application for a special management area use permit at a date set no less than 21 nor more than 60 calendar days after the date on which the application is accepted).

141. Pursuant to ROH § 25-3.3(d), DPP was required to review the proposal based on the following criteria:

> (a) The valuation or fair market value of the development; and
>
> (b) The potential effects and the significance of each effect according to the significance criteria established by Section 25-4.1.

142. Under the ROH, "[n]o development shall be approved unless the council has first found that:"

> (a) The development will not have any substantial, adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health and safety, or compelling public interest. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect and the elimination of planning options;
>
> (b) The development is consistent with the objectives and policies set forth in Section 25 3.1 and area guidelines contained in HRS Section 205A 26;
>
> (c) The development is consistent with the county general plan, development plans and zoning. Such a finding of consistency does not preclude concurrent processing where a development plan amendment or zone change may also be required.

ROH § 25-3.2(b).

143. In applying for its SMA Major Permit, the Developer represented that the Proposed Development would not appreciably increase traffic and would not cause harmful runoff/leaching into the near shore waters, or cause adverse impacts to public access to

recreational resources. Those representations, among others, lacked evidentiary support and were an insufficient basis upon which to approve the Proposed Development.

144. DPP underestimated the substantial, adverse environmental or ecological effects of the Proposed Development and took at face value the Developer's assertions and promises regarding water quality, marine, and traffic studies in the inadequate FEIS. Further, proper studies were not conducted on the potential cumulative impacts of the Proposed Development, nor were impacts on the Park, recreational access to coastal resources, or the significant modification upon internal parking lot, roadway, and highway traffic flow adequately considered.

145. DPP transmitted its findings and recommendations to the City Council within 20 working days of the close of the public hearing, on October 23, 2018.

146. According to ROH § 25-5.5, "[t]he council shall grant, grant with conditions, or deny any application for a special management area use permit within 60 calendar days after receipt of the agency's findings and recommendations thereon."

147. The City held a Zoning and Housing Committee Hearing on November 7, 2018 and held a full Council Hearing on November 14, 2018, approximately 30 days after receipt of DPP's recommendations.

148. In reviewing SMA permit applications, the City Council must follow the same ROH § 25-3.2 guidelines as those imposed upon the DPP in their review for recommendation, including:

> All development in the special management area shall be subject to reasonable terms and conditions set by the council to ensure that:
>
> (1) Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas and natural reserves is provided to the extent consistent with sound conservation principles;

(2) Adequate and properly located public recreation areas and wildlife preserves are reserved;

(3) Provisions are made for solid and liquid waste treatment, disposition and management which will minimize adverse effects upon special management area resources; and

(4) Alterations to existing land forms and vegetation; except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation or failure in the event of earthquake."

***

The council shall seek to minimize, where reasonable:

. . . (2) Any development which would reduce the size of any beach or other area usable for public recreation;

(3) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management area and the mean high tide line where there is no beach;

(4) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast; and

(5) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.

149. The Council underestimated the substantial, adverse environmental or ecological effects of the Proposed Development and did not adequately review the Developer's assertions and promises and DPP's flawed recommendations, regarding water quality, marine, and traffic studies in the inadequate FEIS. The Council did not set reasonable terms and conditions to ensure solid and liquid waste treatment, disposition, and management would minimize adverse effects upon special management area resources; nor adequate conditions to ensure that alterations to existing land forms and vegetation construction of structures would cause minimum adverse effect to water resources and scenic and recreational amenities and

minimum danger of floods, landslides, erosion, or siltation. Further, the Council did not adequately seek to minimize restrictions on public access or adverse effects on water quality.

150. The Council's approval of the SMA Major Permit was improperly granted because of the City did not fulfill its affirmative burden to find no adverse impacts.

O. O'ahu General Plan and NSSCP

151. HRS § 205A-26(2)(C) provides in relevant part that a SMA permit shall not be approved unless the authority finds that "the development is consistent with the county general plan and zoning."

152. The O'ahu General Plan was adopted (as amended) on October 3, 2002. As in the other counties, on O'ahu the General Plan is a document setting forth the City's broad policies for long-range development, with the Sustainable Communities plans serving as detailed schemes for implementing and accomplishing the development objectives and policies of the General Plan within the several parts of the City and County.

153. The North Shore Sustainable Communities Plan ("**NSSCP**") was adopted in 2011 and was the product of years of community meetings, planning, input, and participation, including that of some of the individual Plaintiffs, that resulted in a guiding document for the region. This NSSCP plan has the force and effect of law insofar as it was enacted through City ordinance and as HRS Chapter 205A requires that a development within the SMA must be consistent with the General Plan.

154. The NSSCP details the goals for the region to include "remain(ing) 'country,' with wide open space, vistas, and rural communities" as "an essential haven and respite from the urbanized areas of O'ahu." According to the NSSCP, all proposed

developments are evaluated for their fulfillment of the vision for North Shore enunciated in the NSSCP and how closely they meet the policies and guidelines selected to implement that vision.

155. The General Plan and its implementing Sustainable Communities Plans supersede zoning rules. These plans are not merely aspirational and are more akin to zoning when they are more specific regarding planning goals in the region.

156. On the three pages in the NSSCP where the Proposed Development parcel is mentioned, the overall concepts and vision of the NSSCP are articulated in greater detail. The Parcels are zoned B-1 Neighborhood Business District and the NSSCP specifically and uniquely designates these commercial Parcels, and the adjacent Foodland Property, as a "Rural Community Commercial Center." Under the NSSCP, the "Rural Community Commercial Center" is required to "*primarily serve*" residents and to meet numerous design and building restrictions intended to serve that purpose.

157. According to the NSSCP, the Rural Community Commercial Center is intended to:

- "meet the needs of the *surrounding residential communities*" (emphasis added)
- "Ensure that commercial buildings reflect the rural character and are *compatible with adjacent residential areas.*" (emphasis added)
- "Emphasize commercial and civic establishments that *serve the immediate residential community.*" (emphasis added)
- "limit country stores *primarily* to retail uses that provide *services to the surrounding community*" (emphasis added).

158. The SMA Minor and Major conditions imposed on the Proposed Development by the City are inadequate to avoid or sufficiently mitigate adverse impacts from the development or to ensure compliance with the NSSCP and its intent to primarily serve local residents and the surrounding community.

159. In its recommendation to approve the SMA Major Permit, DPP failed to ensure compliance with the intent and letter of the NSSCP by accepting, without critical review, the Developer's promises regarding future business operations that serve local residents. The recent past has proven that the Developer has seen fit to displace local businesses that serve residents (i.e. dentist and realtor) in preference to retail stores and food trucks that cater to tourists. The "mix of tenants" condition recommended by DPP and adopted by the City (Resolution 18-245, CD1 FD1, Condition "E") is vague and unenforceable, without any limitation to ensure that the businesses primarily serve the local community instead of tourists. Conditioning future permit issuance or any change of use on the right "tenant-mix" may be impossible to enforce, puts the undue burden of vigilance on the community, and will not accomplish the objectives set out in the NSSCP.

160. The conditions imposed on the Proposed Development by the City regarding additional environmental review or permit modification in the event the site is used for "visitor destination services" (Resolution 18-245, CD1 FD1, Condition "I") are also wholly inadequate to ensure compliance with the NSSCP and to protect the Plaintiffs and the community from the near certainty that this Proposed Development will become a "tourist trap" that despoils the natural beauty of the area and generates more unsafe and disruptive traffic congestion and other public nuisances along Kamehameha Highway.

161. Given the past history of violations at this site, it is highly unlikely that the Developer will self-report a violation of this or other conditions. Given the past history of lack of enforcement by DPP except in response to community complaints, it is also highly unlikely that DPP will conduct site inspections to check on potential violations of this and other

conditions or will impose, and extract, meangingful fines for violations or refer overdue fines for prosecution.

162. Therefore, these conditions – while well-intentioned – unfairly put the entire burden of monitoring, investigating, reporting, and follow upon the community at risk. This is unfair, unrealistic, and violates the spirit and letter of the SMA laws and the NSSCP.

163. In approving the SMA Major Permit, the City's approval failed to properly evaluate the impact of the Proposed Development on the SMA resources in light of the objectives, policies and guidelines of the CZMA and the rules and regulations issued thereunder, imposed inadequate conditions, and thus violated the O'ahu General Plan as implemented by the NSSCP.

P. Fast-Tracked Approval and Biased City Council Review

164. Under ROH § 25-5.5, the City Council had sixty days to review and evaluate the impacts from the proposed development and recommendations by DPP for an SMA Major Permit Application, a period that can be extended.

165. At the Developer's request, and with the explicit intercession of outgoing Council Chair Ernie Martin, the City fast-tracked the review and approval of the Proposed Development within a record three-week time span. On October 23, 2018, the Council received DPP's recommendations and proposed Resolution 18-245. On October 29, 2018, Council Chair Ernie Martin introduced Resolution 18-245 to approve the SMA Major Permit.

166. On November 7, 2018, the resolution with CD1, was heard by the Zoning and Planning Committee. Despite the fact that Council Chair Ernie Martin does not serve on the Zoning and Planning Committee, he abruptly appeared at the hearing, exerted control over the proceedings, and visibly influenced the Committee's decision-making. At the conclusion of the

hearing, Committee Chair Pine stated: "Well I'm going to go by *your* recommendation, it's *your* district."

167. Council Chair Ernie Martin responded: "So given that this probably gonna be one of my last recommendations for my district but I would ask for the members a favorable consideration."

168. Committee Chair Pine then stated: "Thank you very much Chair, with that said, we will recommend that resolution 18-245 be amended the hand-carried CD1 to include the technical amendments that was mentioned by the department leader, DPP."

169. On November 14, 2018, the City Council, chaired by Ernie Martin, approved Resolution 18-245, CDI, FD1, granting the SMA Major Permit Application.

170. Other than two softball questions asked by Chair Martin to DPP and a question by Chair Pine about Foodland, during neither the Committee nor the full Council hearing did any other Councilmembers ask any questions or exhibit any interest in the underlying factual or legal issues regarding the Proposed Development, the community's concerns, the flawed EIS, the compliance with the SMA law, or the inadequate conditions.

171. Over the two years preceding the City Council's approval, the Developer, its planning consultant G70, and family members – all of whom live in urban Honolulu and none of whom live in District 2, the district of Council Chair Martin (where the Proposed Project is located) -- had orchestrated a series of meetings and campaign contributions totaling over $31,450.

172. On information and belief, those contributions were designed to influence the City's decision on the Proposed Development.

173. The timing, extent, and targeting of the contributions to Council Chair Martin ($14,150), former Council Vice-Chair Anderson ($6,000), Council Vice-Chair and Zoning and Housing Chair Pine ($5,250), and the failure of Councilmembers (except Councilmember Brandon Elefante) to publicly acknowledge on the record the campaign contributions from the Developer deprived Plaintiffs of a fair, neutral, and independent decision-maker and thereby denied them due process of law.

174. Plaintiffs allege the following eleven counts regarding the Defendants' violations of the State of Hawai'i Constitution, statutes, and adminstrative rules; City and County of Honolulu ordinances and rules; and Hawai'i common law.

COUNT I - Against the City
(Failure To Exercise Public Trust Responsibilities To Protect Fresh and Marine Water Resources, the Park, and the MLCD in Violation of the Hawai'i Constitution, Article XI - Section 1, Article XI - Section 7, and Common Law Public Trust Doctrine)

175. Plaintiffs re-allege all prior paragraphs.

176. The Hawai'i Constitution, Article XI, Section 1 (Conservation and Development of Resources), states: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people."

177. Under the Hawai'i Constitution, Article XI, Section 7 (Water Resources), "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people."

178. As a political subdivision of the State, the City has an affirmative duty to future generations under the public trust doctine grounded in the Constitution and Hawai'i law to protect the public trust resources of Sharks Cove including: (a) freshwater resources including groundwater under the Parcels flowing into the Sharks Cove area; (b) marine waters including the Class AA waters of the MLCD; (c) the natural beauty and recreational resources of Pūpūkea Beach Park including safe public access; and (d) the natural beauty, marine life, and recreational resources of Pūpūkea Marine Life Conservation District, including safe public access.

179. The City's discretion in issuing approvals, such as SMA Minor and Major Permits, is circumscribed by its public trust responsibilities. An agency must meet its public trust responsibilities by "considering, protecting, and advancing public rights in the resource at *every stage* of the planning and decision-making process," and by making decisions "*with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.*" *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006) (citing *In re Water Use Permit Applications*, 94 Hawai`i 97, 143, 9 P.3d 409, 456 (2000)) (emphasis in original).

180. To determine whether the authority fulfilled its public trust obligations, and to provide a court sufficient basis for judicial review, the agency had duties "independent of the permit requirements," and must conduct a public trust review that provides a clear record indicating findings of fact and conclusions of law to demonstrate it fulfilled its public trust responsibilities. *Kauai Springs, Inc. v. Planning Comm'n of Cy. of Kaua'i,* 133 Hawai'i 141, 177, 324 P.3d 951, 982, 987 (2014) (citations omitted).

181. Under the public trust doctrine, "the agency must apply a presumption in favor of public use, access, enjoyment, and resource protection," and "[t]he agency is duty-

bound to place the burden on the applicant to justify the proposed water use in light of the trust purposes." *Id.* at 173, 324 P.3d at 983 (citation omitted). When private commercial uses of public trust resources are proposed, the applicant is "obligated to demonstrate affirmatively that the proposed use will not affect a protected use." *Id.* (citing *In re Wai'ola O Moloka'i*, 103 Hawai'i 401, 442, 83 P.3d 664, 705 (2003) (emphasis in original) (internal alterations omitted). Further, "a lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource." *Id.* at 174, 324 P.3d at 984.

182. The City's public trust responsibilities include "insur[ing] that all applicable requirements and regulatory processes relating to [. . . the development] are satisfactorily complied with *prior to* taking action on the subject permits." *Id.* at 177, 324 P.3d at 987 (emphasis added).

183. The public trust doctrine provides that "[i]f the impact is found to be reasonable and beneficial, then in light of the cumulative impact of existing and proposed diversions on trust purposes, the applicant must implement reasonable measures to mitigate this impact." *Id.* at 173, 324 P.3d at 983 (citation omitted). And the agency must ensure "that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources." *Id.* at 180, 324 P.3d at 990 (citation omitted). "The plain language of Article XI, Section 1 further requires a balancing between the requirements of conservation and protection of public natural resources, on the one hand, and the development and utilization of these resources on the other in a manner consistent with their conservation." *In re Matter of Conservation Dist. Use Application HA-3568*, 143 Hawai'i 379, 400, 431 P.3d 752, 773 (2018).

184. The City failed to fulfill its public trust responsibilities to protect: (a) the fresh groundwater under the Parcels that flows under Kamehameha Highway through the lands of the Park into the MLCD, (b) the marine waters of the MLCD from the polluted storm water runoff that comes from the Parcels, drains along and under Kamehameha Highway into a ditch, and then flows near the Fire Station into the Park and MLCD, and (c) the lands of the Park and marine waters of the MLCD from over-use, congestion, litter, and erosion by visitors attracted to the current and Proposed Development.

185. Plaintiffs are therefore entitled to a declaratory order and temporary, preliminary, and permanent injunctive relief that:

(a) voids and nullifes the After-the-Fact SMA Minor Permit and the SMA Major Permit;

(b) requires the City to re-do the permitting and EIS processes for the After-the-Fact SMA Minor Permit and the SMA Major Permit;

(c) imposes conditions in the After-the-Fact SMA Minor Permit and the SMA Major Permit for disclosure, monitoring, and mitigation requirements that prevent and abate current and future: (i) fresh and marine water pollution from the Developer's and Foodland's site through subsurface and stormwater flow, (ii) adverse impacts on fresh and marine water resources in the Sharks Cove area, and (iii) pollution, traffic, litter, and other adverse spillover impacts on the natural beauty, resources of, and access to the Park and MLCD.

COUNT II - Against All Defendants
(Right to a Clean and Healthful Environment in Violation of Hawai'i Constitution, Article XI, Section 9)

186. Plaintiffs re-allege all prior paragraphs.

187. Article XI Section 9 of the Hawai'i Constitution (Environmental Rights) states: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or

private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

188. The Hawai'i Supreme Court has held that this right is a substantive constitutional right and that Section 9 is self-executing. *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 417, 235 P.3d 1103, 1129 (2010).

189. The right to a clean and healthful environment is both substantive and procedural. It grants a "legitimate entitlement" to benefits "as defined by state law." *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai'i 249, 264, 408 P.3d 1, 16 (2017). Section 9 right also constitutes a property interest that is protected by the due process right to a hearing, which under certain circumstances, would be satisfied by a contested case hearing. *Id.*

190. Based on the violations contained in the other Counts of this First Amended Complaint, Plaintiffs are entitled to declaratory and injunctive relief that Defendants' actions have violated the Plaintiffs' constitutional right to a clean and healthful environment.

COUNT III - Against City
(Failure To Follow the North Shore Sustainable Communities Plan in Violation of HRS Chapter 205A and ROH Chapter 25)

191. Plaintiffs re-allege all prior paragraphs.

192. HRS § 205A-26(2)(C) provides that a SMA permit shall not be approved unless the authority finds that "the development is consistent with the county general plan and zoning."

193. The O'ahu General Plan was adopted (as amended) on October 3, 2002.

194. As part of the General Plan, regional Community Development Plans (called Sustainable Communities Plans on O'ahu) are intended to provide a relatively detailed scheme for implementing the objectives and policies of the General Plan relative to the region.

195. The NSSCP was adopted as Ordinance 11-3, Bill 61 (2010) CD2, in 2011.

196. The Hawai'i Supreme Court had held that "the county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan." *GATRI v. Blane*, 88 Hawai'i 108, 114, 962 P.2d 367, 373 (1998). The Court also held that a community plan "adopted after extensive public input and enacted into law" is part of the General Plan. *Id.* at 115, 962 P.2d at 374.

197. The NSSCP thus has the force and effect of law insofar as it was enacted through City ordinance and because HRS § 205A requires that a development within the SMA must be consistent with the General Plan.

198. The General Plan and its implementing community/regional development plans supersede zoning rules. These plans are not merely aspirational, are more akin to zoning, and are legally binding when they are more specific regarding planning goals in the region. *See, e.g., Missler v. Bd. Appeals. Cty. of Haw.*, 140 Hawai'i 13, at *9-10, 396 P.3d 1151 (2017).

199. The City's approval of the SMA Major Permit failed to properly evaluate the impact of the Proposed Development on the SMA resources in light of the objectives, policies and guidelines of HRS Chapter 205A and ROH Chapter 25, and thus violated the O'ahu General Plan as implemented by the NSSCP. The SMA Minor and Major conditions imposed on the Proposed Development by City are inadequate to avoid or sufficiently mitigate adverse impact from the development or to ensure compliance with the NSSCP and its intent to primarily serve local residents and the surrounding communities.

200. Plaintiffs are entitled to an order declaring that the Proposed Development is not consistent with the NSSCP and that the SMA Permits are null and void.

201. Plaintiffs are entitled to a temporary, preliminary, and permanent order enjoining DPP from allowing the Developer to proceed with the current and Proposed Development and requiring a new SMA Major application and process for any development that ensures consistency with the NSSCP.

COUNT IV - Against DPP
(Improper Issuance of After-the-Fact SMA Minor Permit, and Failing to Enforce the Minor Permit Conditions, in Violation of HRS Ch. 205A & ROH Ch. 25)

202. Plaintiffs re-allege all prior paragraphs.

203. HRS § 205A-2, *et. seq.,* requires all "agencies" of the State to consider the objectives, policies, and guidelines of the Coastal Zone Management Act, HRS Chapter 205A, and the rules and regulations issued thereunder and to enforce them with respect to any development within or affecting the SMA.

204. HRS § 205A-4 requires that all agencies give full consideration to the "ecological, cultural, historic, esthetic, recreational, scenic, and open space values" before and/or when taking or allowing actions that impact resources within the SMA.

205. HRS § 205A-4 also provides that the objectives and policies of HRS Chapter 205A and "any guidelines enacted by the legislature shall be binding upon actions by all agencies" affecting resources within SMA, within the scope of their authority.

206. HRS § 205A-6 provides, *inter alia*, that any person may commence a civil action alleging that any agency has failed to perform any act or duty required to be performed under Chapter 205A or, in exercising any duty required to be performed under Chapter 205A, has not complied with the Chapter's provisions.

207. DPP is the City agency which, under HRS Chapter 205A and ROH Chapter 25, has been delegated the responsibility of enforcing the CZMA and the ordinances,

rules and regulations promulgated thereunder, including processing and issuing SMA permits within this County.

208. As detailed below, DPP has failed to properly perform its duties and obligations under the CZMA and ROH 25 with respect to the After-the-Fact SMA Minor Permit issued by DPP on August 2, 2017.

209. DPP failed to properly independently consider or assess the effects and impacts of the current Development on the SMA resources in light of the objectives, policies and guidelines of HRS Chapter 205A and the rules and regulations issued thereunder when it processed and approved the After-the-Fact SMA Minor Permit.

210. Even if the After-the-Fact SMA Minor Permit was properly issued, DPP has failed to meaningfully enforce the conditions and terms thereof, as well as the CZMA, once it was issued.

211. In over seventeen months since the issuance of the SMA Minor Permit, said failures referred to in the prior paragraphs include, but are not limited to:

(a) Failing to grant MPW a contested case on its timely filed appeal despite repeated timely requests and failing to grant a hearing thereon;

(b) Failing to independently and critically assess and calculate the actual value of the Proposed Development, and all phases thereof, to accurately conclude that said value exceeded the threshold of $500,000 for requiring an SMA Major permit;

(c) Not taking a hard look at the Developer's vague and inaccurate representations, and failing to require it to carry the burden of proof to show that the Development was not having and would not have a significant adverse impact on the SMA and the bordering coastal resources and MLCD, considering cumulative impacts, including but not limited to:

- Creating underground seepage, drainage and incursion of sewage into the MLCD from its proposed leach field under all operating conditions;

- Improper use of the "commissary" located in the "old dentist office" by food trucks not authorized to dispose of wastewater or grease under the DOH permit;

- Creating significant additional traffic congestion on the already-overburdened Kamehameha Highway and neighboring Pūpūkea and Pāhoe Roads;

- Adversely affecting public access to and use of Pūpūkea Beach Park and the surrounding coastal resources by way of its customers' use of the limited public parking spaces intended exclusively for park use;

- Creating pedestrian and other safety issues on Kamehameha Highway by way of its customers' dashing across the highway to and from Pūpūkea Beach Park parking lot to the numerous food trucks on its property;

- Creating drainage and non-point source pollution from its own heavily-used food truck and other operations and its parking area, including a reported feral cat population, overflowing dumpsters and haphazard handling of waste and garbage, with the result that silt, and other fouling runoff has been entering and continues to enter the protected coastal and MLCD areas directly offshore through the storm drain system running under Kamehameha Highway; the feral-cats-related risk of toxoplasmosis contamination of important habitat for the critically-endangered Hawaiian Monk Seal within and surrounding the MLCD, which is federally designated critical habitat for the Monk Seal;

- Creating an increase in the unpermitted public use of the adjoining private road and direct undesirable impacts on the bordering residential area, including people relieving themselves along the roadway and in neighbors' yards;

- Failing to construct the promised six-foot-chain-link fence along Pāhoehoe Road as represented in the SMA application and to the neighbors;

- Failing to assure or require that the Developer was in compliance with all other State and City laws, rules and regulations prior to issuing the SMA Minor permit, including those of the State Department of Health regarding food trucks;

- Failing to review and ensure compliance with conditions such as the required trash management and spill management plans. Based on information and belief, the community is not aware of that these plans

have been submitted or implemented, and the site still appears to have trash strewn about the ground;

- Failing to ensure that food trucks regularly leave the site for mobility and serving needs;
- Failing to ensure that six-foot high trash enclosure paved and screened, as required by the LUO;
- Failing to ensure storm water mitigation for current operations as required including adequate bio-swales for the most current rainfall projections;
- Failing to ensure paved parking and access as required in an attempt to avoid the required approximately $250,000 in capital investment costs;
- Failing to ensure that landscaping plan was implemented;
- Failing to install the appropriate directional signage to limit customer confusion, spillover parking on private roads or public Highway or the Park;
- Festooning the front of the property with a series of garish "sale" signs, a clutter of merchandise along Kamehameha Highway, and strings of temporary lights in an effort to attract tourists to the site;
- Despite repeated complaints from neighbors and community associations, failing to monitor the Developer's operations and the actual conditions existing at the site to realize that the Developer was consistently and flagrantly violating the terms and conditions of said Permit, as well as other laws, rules and regulations, and to take appropriate action;
- Failing to consider and give appropriate weight to the Developer's longstanding and ongoing violations of law which were then, and are still, having a significant adverse impact within the SMA and the bordering coastal resources.

212. As a result of the acts and omissions of DPP, Plaintiffs are entitled to an order declaring the After-the-Fact SMA Minor Permit to be void and invalid. Moreover, based upon violations from prior SMA and current non-compliance, the City's decision that all development on the Parcels be *"removed"* and that the area be "*restored to pre-approval condition*" should be enforced.

COUNT V - Against DPP
(Unlawful Enforcement Fine Policy and Practice in Violation of Constitution, Art. I, Section 5, Art. XI, Sec. 9, Public Trust Doctrine, and HRS 205A and ROH Ch 25)

213. Plaintiffs re-allege all prior paragraphs.

214. The Hawai'i Constitution Article I Section 5, states that: "No person shall be deprived of life, liberty or property *without due process of law*, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." (Emphasis added).

215. This constitutional provision seeks to protect individuals from arbitrary governmental deprivation of property and liberty rights. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. *See, e.g., Sandy Beach Def. Fund v. City Council of City & Cy. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citations omitted).

216. DPP violated the Plaintiffs' constitutional due process rights, the constitutional right to a clean and healthful environment, Chapter 205A, and ROH 25 by following a secret, unwritten policy of accepting "ten cents on the dollar" after assessing fines for violations of City and County laws by developers, including this Developer.

217. In addition, DPP violated HRS 205A and ROH 25 because it did not require that all of the fines were resolved prior to DPP's acceptance of the SMA Minor and Major Permit applications. For DPP to accept a permit application from a developer with "unclean hands" and a track record of significant accumulated fines imposed by the City is a

deprivation of the Plaintiffs' due process rights of the public and a violation of the City's public trust responsibilities.

218. DPP's long-time secret practice of settling fines for abysmally low amounts, its failure to utilize the full range of enforcement tools authorized by law to bring developers into compliance for long-standing and numerous violations, and its unwritten fine settlement policy is arbitrary and capricious, violates the constitutional rights to due process, to a clean and healthful environment, and violates the City's public trust responsibilities.

219. Plaintiffs are entitled to a declaratory order and a preliminary and permanent order enjoining DPP from settling fines in such an arbitrary and capricious manner, from accepting SMA applications where fines are unresolved, and requiring a substantial re-negotiation of the over $200,000 in fines assessed against the Developer in this case.

COUNT VI - Against the City
(Approving the SMA Major Permit without Ensuring Compliance with Food Safety Code in Violation of ROH 25, HRS § 321-11(18) & HAR Title 11 Ch. 50)

220. Plaintiffs reallege all prior paragraphs.

221. To accept and process the SMA Minor and Major Permits, the City must ensure that the Developer is in compliance with all State and County laws.

222. The City either knew or should have known that the food trucks currently on the Parcels do not comply with several provisions of HRS § 321-11(18) and HAR Title 11, Chapter 50 (Food Safety Code) and should have required transparent and full proof of compliance and future monitoring as part of the SMA process.

223. The food trucks do not "return regularly" to a servicing area/operating base location for "such things as vehicle and equipment cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food" as required under HAR § 11-50-2.

Most are adjoined to permanent structures. In addition, barriers in the form of concrete blocks, signage, parking structures, fencing, tables, utility lines, and dumpsters prevent the food trucks from "return[ing] regularly."

224. Water is not made available for the food trucks from a supply of containers of commercially bottled drinking water, one or more closed portable water containers, an enclosed vehicular water tank, or an on-premises water storage tank, as required under HAR § 11-50-63(k). Past practice on site has included utilizing garden hoses to service the mobile food establishments, in clear violation of the rule.

225. The food trucks do not remove sewage and other liquid wastes at an approved waste servicing area or by a sewage transport vehicle in such a way that a public health hazard or nuisance is not created as required by HAR § 11-50-63(e).

226. Multiple food trucks appear to be impermissibly disposing of wastewater in a former dentist office structure that was permitted by the Department of Health for only limited usage and purposes as a "commissary."

227. As a result of the violations, Plaintiffs are entitled to declaratory and temporary, preliminary, and permanent injunctive relief declaring the SMA Minor Permit and the Major Permit null and void until the Developer completely and transparently demonstrates full compliance with the laws, rules, and regulations governing mobile food establishments.

COUNT VII- Against City
(Improper Acceptance of Inadequate EIS in Violation of ROH Ch 25 & HAR Title 11, Ch. 200)

228. Plaintiffs re-allege all prior paragraphs.

229. Plaintiffs also incorporate herein by reference all of their comments, and other community and agency comments, submitted on the Environmental Impact Statement Preparation Notice ("**EISPN**") and the Draft EIS.

230. For SMA Major Permits, ROH Chapter 25 requires applicants to submit an environmental review document that follows the "rules and regulations implementing HRS Chapter 343," ROH § 25-1.3, and "the procedural steps set forth in HRS Chapter 343." ROH §§ 25-3.3(c)(1), 25-4.2. An EIS prepared under ROH 25 is referred to as a "Non-343 EIS." The regulations promulgated under HRS Chapter 343 are found in HAR Title 11 Chapter 200.

231. In accepting the FEIS for the Proposed Development, the City erred by not requiring a document that conformed to HRS Chapter 343 regulations, as required by ROH § 25-1.3, § 25-3.3(c)(1), and ROH § 25-4.2.

232. The numerous procedural errors in the FEIS included:

(a) Failing to identify Foodland as a co-applicant on the Draft EIS (November 2017) or the FEIS (July 2018), in violation of HAR § 11-200-2, which defines the "Applicant" as "any person who, pursuant to statute, ordinance, or rule, officially *requests approval* from an agency for a proposed action" (emphasis added), thus misleading the public as to the true joint nature of the SMA Major Permit application (which was submitted to the City in July 2018) and the appropriate scope of the EIS, as well as underplaying the joint effects (such as traffic congestion, litter, and storm water runoff) and the cumulative impacts analysis.

(b) Failing to properly "*fully declare* the environmental implications of the proposed action and . . . discuss *all relevant and feasible consequences* of the action. In order that the public can be *fully informed* and that the agency can make a sound decision based upon the *full range of responsible opinion* on environmental effects, a statement shall include *responsible opposing views, if any, on significant environmental issues* raised by the proposal." HAR § 11-200-16 (Draft EIS Content Requirements) (emphasis added). Key sections of the Draft EIS, including the traffic study, the water quality study, and the marine study, grossly underestimated the adverse impacts of the Proposed Development. No proper study was conducted on the impacts of the Proposed Development on the Park, the Master Plan, or recreational access to coastal resources including the MLCD. The EIS also failed to include "responsible opposing views" of the community that had long been raising concerns on

these issues and lacked analysis of the impacts on the Pāhoe Road neighborhood, Pūpūkea Road neighborhood, and users of Kamehameha Highway. These numerous flaws render the FEIS inadequate as a matter of law.

(c) Failing to properly evaluate the "secondary or indirect" "impacts or effects" related to the Proposed Development, defined in HAR § 11-200-2 (Definitions) as: "effects which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include *growth inducing effects* and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." (Emphasis added); *see also* HAR § 11-200-17(i) ("secondary effects may be equally important as, or more important than, primary effects, and shall be thoroughly discussed to fully describe the probable impact of the proposed action on the environment"). An example of the failure to properly evaluate secondary or indirect impacts or effects is the gross omission in the EIS of the impacts on the infrastructure and sustainable capacity of the Park and MLCD from the increased number of vehicles, customers, and pedestrians that will use the public trust resources and coastal zone resources, including coastal access and the limited number of legal parking spaces, directly across Kamehameha Highway from the Proposed Development.

(d) Failing to properly evaluate the "cumulative impact" related to the Proposed Development, defined in HAR § 11-200-2 (Definitions) as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." An example of the failure to properly evaluate cumulative impact is the major omission in the EIS of analysis of the current and future impacts of commercial operations, particularly parking, litter, and traffic flow, at Foodland, whose parcel was purportedly within the scope of the EIS but who was not revealed to be a co-applicant on the proposed SMA Major Permit until July 2018, after the FEIS was completed, long after the close of the public comment period.

(e) Failing to adequately describe the current environmental setting and thus misleadingly characterizing the no-action alternative as assuming post-2014 acquisition operations on the property, in violation of HAR § 11-200-17(g), which provides that the Draft EIS "shall include a description of the environmental setting, including a description of the environment in the vicinity of the action, *as it exists before commencement of the action*, from both a local and regional perspective." (Emphasis added.). Given that the current operations were originally commenced without proper permits, causing DPP to order removal of illegal structures, and then were continuing only under a legally contested SMA Minor Permit (challenged in large part due to

the significant environmental impacts of those continuing operations), the no-action alternative should have looked at the baseline prior to Hanapohaku's commercial exploitation of the property. For example, DPP noted in their Findings of Fact that "as a result of existing uses and previous grubbing and grading, approximately one-third of the surfaces on the makai edge of the Hanapohaku-owned parcels are compacted." Along with illegal grubbing and grading, other existing and prior illegal uses have changed the baseline for accurate assessments of environmental impact, and that any future assessments be based upon pre-2015 baseline estimates. Therefore, the EIS should have studied the cumulative impact of the activities supposedly authorized by the After-the-Fact Minor Permit, taken together with the Proposed Development under the SMA Major Permit.

(f) Failing to properly adequately describe and analyze realistic alternatives to the Proposed Development as required by HAR § 11-200-17(f) (Draft EIS Alternatives), which requires, "[t]he draft EIS shall describe in a separate and distinct section alternatives which could attain the objectives of the action, regardless of cost, in sufficient detail to explain why they were rejected. The section shall include a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions. Particular attention shall be given to alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks." In the Draft EIS, the only proposed alternatives were an illusory alternative of the same development but delayed in time. Then in the FEIS, applicant made up another "straw" alternative that not-so-cleverly proposed an even larger development, which, though a sham, nonetheless evaded public comments as it was not disclosed in the Draft EIS. The Draft EIS did not include the obvious alternative, for example, of a commercial development *without the problematic cluster of six food trucks*, a concern raised by many commenters.

(g) Failing to properly disclose the conflicts of the Proposed Development with the North Shore Sustainable Communities Plan (NSSCP), which requires development on these Parcels to primarily serve local residents, in violation of HAR § 11-200-17(h), which requires, "[t]he draft EIS shall include a statement of the relationship of the proposed action to land use plans, policies, and controls for the affected area. Discussion of how the proposed action may conform *or conflict* with objectives and specific terms of approved or proposed land use plans, policies, and controls, if any, for the area affected shall be included. *Where a conflict or inconsistency exists, the statement shall describe the extent to which the agency or applicant has reconciled its proposed action with the plan, policy, or control, and the reasons why the agency or applicant has decided to proceed, notwithstanding the absence of full reconciliation.*" (Emphasis added.) Many comments on the Draft EIS pointed out that the Proposed Development was inconsistent with the NSSCP.

(h) The failure to properly disclose the "irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included." HAR § 11-200-17(k). And "all probable adverse environmental effects which cannot be avoided. Any adverse effects such as water or air pollution, urban congestion, threats to public health, or other consequences adverse to environmental goals and guidelines established by environmental response laws, coastal zone management laws, pollution control and abatement laws, and environmental policy." HAR § 11-200-17(l).

(i) Failure to adequately detail proposed mitigation of adverse impacts such as the illusory crosswalk on Kamehameha Highway. "Where a particular mitigation measure has been chosen from among several alternatives, the measures shall be discussed and reasons given for the choice made. Included, where possible and appropriate, should be *specific reference to the timing of each step proposed to be taken in the mitigation process*, what performance bonds, if any, may be posted, and what other provisions are proposed to assure that the mitigation measures will in fact be taken." HAR § 11-200-17(m) (emphasis added).

(j) Failing to properly "take into account all critiques and responses," as required by HAR 11-200-14, which provides, "the preparing party shall prepare the EIS, submit it for review and comments, and revise it, taking into account all critiques and responses. Furthermore, "[a]n EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." *Id.*; *see also* HAR § 11-200-18 ("The final EIS shall consist of: (1) The draft EIS revised to incorporate substantive comments received during the consultation and review processes").

(k) Failing to respond adequately to public comment on the Draft EIS. The City failed to apply the proper standard to reviewing the "acceptability" of the FEIS and the "higher standard of response" required in a FEIS for reviewing the applicant's response to public comments, that is, whether "[c]omments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement." HAR § 11-200-23(b)(3). HAR § 11-200-22 specifies that:

> The proposing agency or applicant shall respond in writing to the comments received or postmarked during the forty-five-day review period and incorporate the comments and responses in the final EIS. The response to comments shall include:
>
> (1) Point-by-point discussion of the validity, significance, and relevance of comments; and

(2) Discussion as to how each comment was evaluated and considered in planning the proposed action.

The response shall endeavor to resolve conflicts, inconsistencies, or concerns. Response letters reproduced in the text of the final EIS shall indicate verbatim changes that have been made to the text of the draft EIS. The response shall describe the disposition of significant environmental issues raised (e.g., revisions to the proposed project to mitigate anticipated impacts or objections, etc.). In particular, the issues raised when the applicant's or proposing agency's position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions.

The Developer's responses to public comments, particularly to those from the Plaintiffs, were wholly inadequate, dismissive, and "greenwashed" impacts to coastal and neighborhood resources. The responses were consistently, and disappointingly, unresponsive, incomplete, and evasive, which is the kind of "self-serving recitation of benefits and a rationalization of the proposed action" that violates the EIS regulations. The applicant's obligation to respond fully to public comments is central to the EIS process and cannot be taken lightly.[2]

(l) G70's inadequate responses were not directly only to the Plaintiffs, but also to the City's own agencies. For example, the City Department of Design and Construction (DDC) pointed out that the reconfiguration of the driveways and the inadequate traffic counts under-estimated the impact on the Pūpūkea Fire Station, which is across from Foodland. DDC's January 9, 2018 comment letter states:

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[2] On February 16, 2017, the State Office of Environmental Quality Control (OEQC) issued a "non-acceptance" letter for an FEIS to G70's Jeff Overton, the same planning consultant who prepared the EIS in this case, finding that the response to public comment in the Hawai'i Dairy Farms FEIS was inadequate: "The OEQC notes that the examples cited indicate a pattern where the applicant's response to specific concerns raised in the EISPN comment letter did not satisfactorily address the commenter's concerns. The result was that the commenter resubmitted the concerns as points for consideration in the Draft EIS, upon which the applicant had an obligation to respond to the concerns in a point-by-point manner, and does not appear to have done so."

On February 21, 2017, Jeff Overton wrote a letter to OEQC withdrawing the Hawai'i Dairy Farm EIS. On May 4, 2017, Judge Ronald Valenciano found that the Dairy and G70 had not followed the Chapter 343 EIS process properly, and the Court issued declaratory and injunctive relief that voided all prior approvals until the process was properly followed. *See Kawailoa Development LLP v. Hawai'i Dairy Farms and State Dep't of Health*, Civ. No. 14-1-0141 JRV, in the Circuit Court of the Fifth Circuit, State of Hawai'i.

"This is not correct. It appears that given the size and location of the new driveway that traffic conditions will worsen and make it more difficult exiting and entering the station when these new businesses are in service." FEIS at 6-102. G70's response was that the Fire Department had previously submitted a letter stating no concerns and simply repeated descriptive and self-serving statements about the traffic "improvements." *Id.* at 6-104. Moreover, the City Department of Transportation Services (DTS) comments on the Draft EIS stated "[s]ome of our previous comments for the EISPN were not addressed in the D[raft] EIS," including "a discussion of the existing safety and traffic operational issues from entering and exiting the loading area in back of Foodland off Pupukea Road," and asked for measures to mitigate these issues. *Id.* at 6-113. In response, G70 replied only that the information on the Foodland deliveries "had been moved" into another section of the FEIS and "[d]eliveries *should* be scheduled during off-peak times in the early afternoon to minimize delays to vehicles traveling on Pupukea Road." *Id.* at 6-115 (emphasis added).

233. These fatal flaws, among others, in the entire EIS process and in the Final EIS, failed to sufficiently explain the environmental consequences of the Proposed Development and should have led the City to reject the EIS and require a revised EIS and new SMA process.

234. As a result of DPP's reliance on the flawed EIS and failure to adequately review the FEIS, Plaintiffs are entitled to an order declaring the EIS inadequate and the SMA Major Permit to be void and invalid.

235. Plaintiffs are further entitled to temporary, preliminary, and permanent injunctive relief enjoining the City from accepting any permit application for, or processing, or issuing any further SMA approvals to Developer until such time as it has prepared an adequate EIS in compliance with ROH Chapter 25 and HAR Title 11-200.

COUNT VIII – Against DPP and the City Council
(Failing To Provide Fair and Impartial Review at the Administrative Level in Violation of Hawai'i Constitution Article I Section 5, Due Process)

236. Plaintiffs re-allege all prior paragraphs.

237. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental

deprivation of a significant property interest. *Sandy Beach Def. Fund v. City Council of City & Cy. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citations omitted).

238. When deciding whether to issue an SMA Major permit, the City Council is acting in a quasi-judicial capacity. *See id.* at 387-88, 778 P.2d at 266. When an agency or authority performs a judicial function, external political pressure can violate a parties' right to procedural due process, thereby invalidating the decision, since the due process right is at stake when outside political influence is exerted on a decision-maker. *See Kilakila 'O Haleakala v. Bd. of Land*, 138 Hawai'i 383, 400, 382 P.3d 195, 212 (2016).

239. Whereas a contested case may not be required for the SMA Major Permit in the instant case, the approving authority is nevertheless mandated to ensure that the process that is used complies with the basic components of due process (or the equivalent thereof) including an unbiased decision-maker because the approval process of the Council serves a quasi-judicial function. *See Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai'i 376, 388–90, 363 P.3d 224, 236–38 (2015).

240. DPP and the City Council deprived the Plaintiffs of due process by fast-tracking the permitting and approval of the Proposed Development at the behest of the Developer because of political opportunism. Furthermore, the Developer exerted political influence on the key decision-makers in the form of campaign contributions by the Developer and G70 without disclosure by all but one of the Council members involved, offending Plaintiffs' due process right to an impartial decision-maker and resulting in a deeply flawed process that renders the SMA Major Permit null and void.

241. As a result of the acts and omissions of DPP and the City Council failing to provide Plainiffs fair and impartial review, Plaintiffs are entitled to a declaratory order and temporary, preliminary, and permanent relief that voids and nullifies the SMA Major Permit.

COUNT IX - Against DPP and City Council
(Improperly Recommending Issuance and Improperly Issuing, the SMA Major in Violation of HRS Ch. 205A and ROH Ch. 25)

242. Plaintiffs re-allege all prior paragraphs.

243. DPP and the City Council have committed the same above-alleged failures and violations of the CZMA in processing, recommending, and issuing the SMA Major Permit to the Developer for its Proposed Development. The burden was on the City and Applicant to find no adverse impact. Plaintiffs have the burden to show only that the Proposed Development *may have an impact.*

244. In addition, the City further violated the CZMA by:

a. Failing to analyze and consider, and to require the Developer to discuss, analyze and assess, the existing conditions and the additional cumulative impacts of its proposed joint venture with Foodland to connect with and combine the adjoining Foodland property into its Proposed Development, including problematic conditions already generated and existing by reason of Foodland's operations. Said conditions and impacts include but are not limited to:

i. Already existing customer and delivery traffic congestion and safety issues on Pūpūkea Road,

ii. Increased delivery traffic, congestion and safety issues on Pūpūkea Road,

iii. Already existing traffic congestion on Kamehameha Highway at and around its intersection with Pūpūkea Road,

iv. Modified and increased traffic flow and congestion on Kamehameha Highway at and around its intersection with Pūpūkea Road,

v. Already existing non-point pollution, surface runoff, sewage and garbage generation issues potentially impacting the MLCD,

vi. Increased non-point pollution, surface runoff issues and garbage generation issues potentially impacting the MLCD, and other similar cumulative impacts created or increased by the combined operations.

b. Allowing the Developer to only discuss, analyze, and assess the adverse traffic impacts and to ignore those which it has already illegally created by way of:

i. Its initial unpermitted development and use of the property,

ii. Its activities under the initial now-invalidated three rescinded SMA Minor Permits, and

iii. Its current activities that are not even in compliance with the improperly- issued After-the-Fact SMA Minor Permit.

245. DPP failed to recommend, and the City failed to require, any community-based remedies pertaining to monitoring and enforcement, outside the vague and unenforceable measures recommended at the time the Developer seeks future development permits. DPP never took action regarding noncompliance, nor did DPP seek to terminate any uses or halt operations despite noncompliance. Due to a pattern and practice of inadequate enforcement, the community cannot rely on DPP and its proposed inverse-permitting and weak enforcement regime that disregards the current impacts of unpermitted and illegal development and rewards bad actors.

246. Although mentioned in passing, the potential impacts from "visitor destination services" (i.e. bus bays, tour vans, parking operations) was not disclosed or evaluated. This activity (some of which has also been previously conducted without permit by the Developer in the past) would also place the burden for monitoring and enforcement on the community.

247. The City's fast-track process in favor of Developer deprived Plaintiffs of a fair, neutral, and independent decision-maker and thereby denied them due process.

248. As a result of the acts and omissions of DPP and the City Council, Plaintiffs are entitled to a declaratory and injunctive order declaring the SMA Major Permit to be void and invalid.

COUNT X – Against City and Developer
(Water Pollution in Violation of HRS Chapter 205A, ROH Chapter 25, HRS Chapter 342D, HAR Title 11-54, and HAR Title 11-55)

249. Plaintiffs re-allege all prior paragraphs.

250. The Developer's current and future activities on the site are causing and will continue to cause water pollution of the MLCD through contaminated subsurface groundwater flows and through storm water runoff, in violation of the State Water Pollution Act, HRS 342D, HAR § 11-54 (Water Quality Standards), and HAR § 11-55 (Water Pollution Control). The City failed to consider these issues in issuing the Minor and Major SMA Permits, in violation of Chapter 205A and ROH Chapter 25.

A. HRS 342D & HAR 11-54: Water Quality Standards

251. The Developer's current subsurface discharges from the site violate State Water Quality Standards by discharging pollutants such as Nitrogen and Phosphorus into the Class AA waters of the MLCD through subsurface flows of freshwater and ocean water. These illegal discharges will continue or increase under the Proposed Development.

252. The Developer's current surface water flow of storm water violates State Water Quality Standards by discharging pollutants including Nitrogen and Phosphorus into the Class AA waters of the MLCD through the storm drain, culvert, and ditch that drain into the Park and MLCD. These illegal discharges will continue or increase under the Proposed Development.

253. These sources of pollution from the Developer violate the State Water Quality anti-degradation rules. HAR § 11-54-1.1(c).

254. Class AA Waters are required to be maintained in "their natural pristine state as nearly as possible with an absolute minimum of pollution," and "[n]o zones of mixing shall be permitted in this [AA] class" in waters less than 18 meters deep. HAR § 11-54-3(c)(1).

255. Marine pools, coves, and "reef flats and reef communities" are also specifically protected as Class I areas under State Water Quality Standards. HAR § 11-54-7(e); *see also* § 11-54-7(e)(2)(A)(iv) (listing Sharks Cove, Pupukea among "water areas to be protected").

256. State law also prohibits violation of recreational water quality standards for marine waters "to protect the public from exposure to harmful levels of pathogens while participating in water-contact activities." HAR § 11-54-8.

B. HRS Chapter 342D & HAR Title 11-55: Water Pollution Control

257. The Developer is currently violating the State Water Pollution Control laws, HRS Chapter 342D and HAR Title 11-54, by discharging pollutants into state marine waters without a proper NPDES permit from the DOH. The Developer's future activities on the site will continue to violate State Water Pollution Control Laws.

258. Under HAR § 11-55-01, "discharge of a pollutant" means "*any addition of any pollutant or combination of pollutants to State waters from any point source*, or any addition of any pollutant or combination of pollutants to the water of the contiguous zone or the ocean from any point source other than a vessel or other floating craft that is being used as a means of transportation. This includes additions of pollutants into State waters from: *surface runoff that is collected or channeled by man*; or discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. *Id.* (excerpted from 40 CFR 122.2) (emphasis added). "Point source" means "any discernible, confined, and discrete conveyance, including but

not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, . . . from which pollutants are or may be discharged." *Id.*

259. The surface runoff that is collected on the Developer's Parcels and then channeled along Kamehameha Highway to the storm drain and then under the Highway to the Beach and MLCD is a "discharge of a pollutant" from a "point source," which is illegal without a proper NPDES permit.

260. In addition, the subsurface contamination from the current and future operations on the Developer's Parcels that has a hydrological connection to the ocean is and will be a second "point source discharge" that requires an NPDES permit.

261. In *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980 (D. Haw. 2014) the United States District Court for the District of Hawaii found the Maui County sewage injection wells required an NPDES permit because of the hydrologic connection to the coastal waters that led to elevated levels of nitrogen and phosphorous (the same known and measured contaminants in this case): "groundwater is a conduit through which pollutants are reaching navigable-in-fact water." *Id.* at 994; *see also id.* at 996 ("It is the migration of the pollutant into navigable-in-fact water that brings groundwater under the Clean Water Act.").

262. The Developer's studies of groundwater and ocean water, and recent testing of the drainage ditch, shows pollution from the site exceeds state water quality standards. The significant effects of the discharges by the Developer need not be proven by Plaintiffs to require an NPDES permit because the law "creates a strict liability scheme that categorically prohibits any discharge of a pollutant from a point source without a permit." *Id.* at 1004 (citation and internal alterations omitted). Therefore, Defendants are in violation of the State

Water Pollution Act, HRS Chapter 342D, for failing to have proper NPDES permits for the storm water and subsurface discharges.

263. Plaintiffs have a right to enforce the State Water Pollution Act's NPDES requirements based on Constitution, Article XI, Section 9 and case law allowing citizen enforcement of state environmental laws. Defendants are subject to penalties under HRS § 342D-30.

C. HRS Chapter 205A & ROH Chapter 25: The City's Failure To Consider Water Pollution in the SMA Process

264. In granting the Minor and Major SMAs without considering these water quality impacts and violations, the City failed to ensure that the current and future development would not adversely affect water quality of protected resources. Under ROH § 25-3.2(b), "[n]o development shall be approved unless the council has first found that: (1) The development *will not* have any substantial, adverse environmental or ecological effect except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health and safety, or compelling public interest." (Emphasis added.).

265. As explained above, the Developer's own FEIS indicated current and future water quality impacts from the development on the site. In addition, numerous flaws in the EIS studies, particularly the marine study, under-estimated the actual potential impacts of the development.

266. Plaintiffs seek declaratory and injunctive relief to prevent current contamination from the site of the marine waters of the MLCD, to ensure that any SMA permits from the City have appropriate conditions requiring no discharge of pollutants into the MLCD, adequate conditions for monitoring and reporting, and to require the Developer to apply to the DOH for an NDPES Permit before the City accepts any SMA reapplication.

COUNT XI - Against Hanapohaku
(Public Nuisance)

267. Plaintiffs re-allege all prior paragraphs.

268. Developer Hanapokahu has engaged in unlawful acts or omissions that have endangered the lives, safety, health, property, or comfort of the public, by, for example, operating and/or leasing space to food trucks that violate health and safety laws, by undertaking unpermitted development, and by creating adverse impacts on the MLCD, Park, public resources, and surrounding roadways, Kamehameha Highway, Pāhoa Road, Pūpūkea Road, and nearby neighborhoods.

269. The Developer's acts or omissions have unlawfully hurt, inconvenienced, damaged, annoyed, and disturbed Plaintiffs in the enjoyment of their legal rights.

270. As a result of the Developer's acts or omissions that have created a public nuisance, Plaintiffs are entitled to declaratory relief and a preliminary and permanent order enjoining the Developer from creating a public nuisance including unpermitted development, water pollution, over-usage of the Park and MLCD, displaying signage and merchandise outside along the frontage of the Parcels, playing loud music and showing outdoor movies, allowing packaging and litter to spillover to nearby areas, attracting more vehicles and visitors to the area, and from operating and/or leasing space to food trucks on the Parcels.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. An order declaring that: (1) the City failed to exercise its Public Trust responsibilities to protect fresh and marine water resources, the Park, and the MLCD in violation of the Hawai'i Constitution, Article XI Section 1, Article XI Section 7, and the common law Public Trust Doctrine; (2) the City and the Developer violated Plaintiffs' right to a clean and

healthful environment in violation of the Hawai'i Constitution, Article XI Section 9; (3) the City failed to follow the North Shore Sustainable Communities Plan in violation of HRS 205A and ROH Ch 25; (4) DPP improperly issued the After-the-Fact SMA Minor Permit, and failed to enforce the Minor Permit conditions, in violation of HRS Ch. 205A & ROH Ch. 25; (5) DPP failed to provide meaningful enforcement through imposition of fines for violations of state and county laws, thereby denying Plaintiffs due process in violation of HRS 205A and ROH Ch. 25; (6) the City approved the SMA Major Permit without ensuring the Developer was in compliance with State food safety laws, in violation of HRS § 321-11(18) & HAR Title 11 Ch. 50 and HRS 205A & ROH Ch. 25; (7) the City improperly accepted and approved the inadequate EIS under ROH Ch. 25 & HAR Title 11, Ch. 200; (8) DPP and the City violated Article I Section 5 of the Hawai'i Constitution by failing to provide fair and impartial review; (9) DPP improperly recommended issuance of, and the City Council improperly issued, the SMA Major Permit in violation of HRS Ch. 205A and ROH Ch. 25; (10) the Developer violated Water Pollution Control Act HRS 342D, and HAR 11-55 and the City violated HRS 205A ROH 25; and (11) the Developer has created a public nuisance;

B. Temporary, preliminary, and permanent injunctive relief against Developer and the City: (1) voiding the SMA Minor, the Major Permit, and the EIS, (2) enjoining all current and future post-2015 commercial development on the Parcels, including operating and/or leasing space to food trucks and other new commercial activities, (3) mitigating past and current impacts on public trust resources including the Park and MLCD, (4) mitigating current and past impacts on the Pāhoe Road and Pūpūkea Road neighborhoods, and (5) requiring immediate compliance with all state and county law and permit conditions, based on Counts I through XI above;

C. For an order directing the Developer on behalf of itself and its successors-in-interest to take affirmative action and monitoring necessary to ensure current and on-going compliance: (1) with the applicable environmental and permit standards; (2) actions necessary to ensure compliance with the committed Level of Service (LOS) for traffic based on periodic traffic assessments; (3) such other affirmative action determined appropriate by the Court to maintain current and future compliance with the applicable laws and ordinances; and (4) transparent, strict, and specific enforcement provisions;

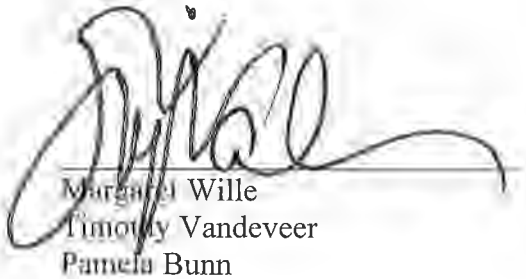
D. For an Order requiring the Developer, on behalf of itself and its successors-in-interest, to submit of an annual public report to demonstrate its compliance with the law, with a copy to be mailed to the DPP and to the attorneys of record, or as otherwise directed by the attorneys of record in this case for a ten-year period from the date of final judgment;

E. For an order awarding Plaintiffs their attorneys' fees and costs incurred;

F. Civil penalties under HRS § 205A-32; and

G. For such other and further relief as this Court deems just and proper.

Dated: Honolulu, Hawai'i, February 27, 2019.



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DEPARTMENT OF PLANNING AND PERMITTING

CITY AND COUNTY OF HONOLULU

STATE OF HAWAI'I

In the Matter of the Petition for Contested Case Hearing of MĀLAMA PŪPŪKEA-WAIMEA; Of Special Management Area ("SMA") Minor Permit Approvals for HANAPOHAKU LLC, Located at: (1) 59-712 Kamehameha Highway and 59-712A Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068 (2015/SMA61) (supersedes 2015/SMA-8); (2) 59-716 Kamehameha Highway, Hale'iwa, Hawai'i 96712. TMK No. 5-9-11:069 (215/SMA47); and (3) 59-063 Pahoe Road, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070 (2015/SMA-24).	Civil No. 2016/GEN-4 STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER Hearing: Date: November 13, 2018 Time: 9:00 a.m. Hearings Officer: Clark Hirota

STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Petitioner Mālama Pūpūkea-Waimea ("Petitioner" or "MPW"), Respondent Planning Director ("Planning Director") of the Department of Planning and Permitting ("DPP"), and Intervenor Hanapohaku LLC ("Developer") hereby stipulate as follows:

EXHIBIT A

I. FINDINGS OF FACT

1. Petitioner is a volunteer-based North Shore 501(c)(3) non-profit organization formed in 2005 to replenish and sustain the natural and cultural resources of the Pūpūkea and Waimea ahupua'a for present and future generations through active community stewardship, education, and partnerships.

2. MPW members steward and monitor the health of the Pūpūkea Beach Park and the Pūpūkea Marine Life Conservation District ("MLCD"). MPW and its members have provided thousands of volunteer hours as well as over half a million dollars (in grants, donations, and in-kind services) for improvements, oversight, educational programs and outreach, beach, shoreline, and park clean ups, biological and human use monitoring, in water fish counts, limu identification studies, water quality testing, invasive species removal and coastal restoration.

3. MPW has many board, staff, advisory board, and volunteer members who are residents of the Pūpūkea/Sunset Beach community and who are frequent users of the Sharks Cove area, including Pūpūkea Beach Park and Pūpūkea MLCD, for recreation, research, ecological, and educational purposes.

4. Developer purchased the following parcels on June 26, 2014: (1) 59-712 Kamehameha Highway and 59-712A Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068 ("Parcel 68"); (2) 59-716 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:069 ("Parcel 69"); and (3) 59-063 Pahoe Road, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070 ("Parcel 70").

5. Parcels 68, 69, and 70 are located across the two-lane Kamehameha Highway from Pūpūkea Beach Park and the Pūpūkea MLCD, and lie mostly within the Special Management Area ("SMA").

6. The aerial photo below provides a true and accurate depiction of Parcels 68, 69, and 70 from left to right, as of March 9, 2016, the date the photo was taken.

7. Beginning in late 2014 or early 2015, Developer undertook unpermitted development on Parcels 68, 69, and 70. The unpermitted development included but was not necessarily limited to food trucks, which are alleged to be stationary, decks enclosing the allegedly stationary food trucks, a wooden deck addition to an existing structure, plumbing improvements, and electrical and water connections.

8. MPW alleged the development increased traffic and pedestrian congestion, unsafe and unsanitary conditions, and created litter, parking, erosion, resource over-use, potential pollution. MPW also alleged the development resulted in restroom over-usage at Pupukea

Beach Park and adverse impacts to the SMA and Petitioner's and the community's access to and use of the Pūpūkea Beach Park and the Pūpūkea MLCD.

9. On February 26, 2015, Developer applied for an SMA Minor Permit ("2015/SMA-8") to: (1) construct a one-story retail building (820 square feet) behind the existing real estate office building; (2) add a deck to the existing real estate office building (240 square feet); (3) convert an existing dental clinic building (596 square feet) into an eating and drinking establishment with a deck for outdoor dining (240 square feet); (4) convert an existing carport into a covered dining area (356 square feet) with two outdoor dining areas (front and back); and (5) site improvements, which include 14 parking stalls, one loading stall and landscaping on Parcel 68. The Developer estimated the total valuation for the development at $498,000.

10. On March 19, 2015, the Planning Director approved SMA Minor Permit 2015/SMA-8.

11. On May 11, 2015, Developer applied for a second SMA Minor Permit ("2015/SMA-24") to construct: (1) two detached one-story retail buildings with covered patios (540 square feet and 120 square feet of covered patio); (2) a detached restroom building (419 square feet); (3) site improvements, including 10 additional parking stalls; (4) one separate loading area; and (5) landscape screening along Kamehameha Highway and Pahoe Road at Parcel 70. The Developer estimated the total valuation for the development at $484,000.

12. On June 9, 2015, Planning Director approved SMA Minor Permit 2015/SMA-24. The permit approval did not refer to the SMA Minor permit for Parcel 68.

13. On September 28, 2015, Developer applied for a third SMA Minor Permit ("2015/SMA-47") to: (1) remove the unpermitted improvements located in the front half of property; (2) build three one-story buildings and a surface parking lot in the rear of property; (3)

construct two retail buildings (820 square feet each); (4) construct a parking lot with 16 stalls, and one loading stall on Parcel 69. The Developer estimated the total valuation for the development at $445,000.

14. On November 5, 2015, the Planning Director approved SMA Minor Permit 2015/SMA-47.

15. On November 13, 2015, Developer submitted revised plans for SMA Minor Permit 2015/SMA-8. The estimated total valuation for the development was unchanged at $498,000.

16. On January 13, 2016, Planning Director approved SMA Minor Permit 2015/SMA-61, which superseded 2015/SMA-8. The permit approval did not contain any findings regarding potential cumulative impacts, or indicate that such impacts had been considered. By at least January 5, 2016, DPP should have been aware that Developer was operating the "Sharks Cove Commercial Development" as one unified project across all three parcels.

17. On March 9, 2016, MPW submitted a petition for a consolidated contested case hearing on its appeal from the Planning Director's decisions to issue the SMA Minor Permits for the project (the "Petition").

II. CONCLUSIONS OF LAW

1. The Petition was timely filed.

2. Petitioner has standing.

3. The purpose of the State of Hawai'i Special Management Area law is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." Haw. Rev. Stat. ("HRS") § 205A-21.

4. The purpose of the Revised Ordinances of Honolulu ("ROH") Chapter 25 is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. Special controls on development within an area along the shoreline are necessary to avoid permanent loss of valuable resources and foreclosure of management options, and to ensure that adequate public access is provided to pubic owned or used beaches, recreation areas, and natural reserves[.]" ROH Chapter 25-1.2.

5. "Development" in the Special Management Area without an SMA permit is unlawful. HRS § 205A-26.

6. The "Sharks Cove Commercial Development" is a "Development."

7. An SMA Minor Permit may be lawfully issued by the Planning Director only when "the valuation . . . is not in excess of $500,000, and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects." HRS § 205A-22.

8. The Planning Director and DPP staff have an affirmative duty to conduct a thorough review of permit applications and to make determinations consistent with the purposes of HRS § 205A and ROH Chapter 25.

9. No SMA permit, including an SMA minor permit, may be issued unless it is first found that:

(a) The development will not have any substantial adverse environmental or ecological effect, HRS § 205A-26(2)(A); and

(b) The development is consistent with the objectives, policies and guidelines of Chapter 205A, HRS § 205A-26(2)(B).

10. The Planning Director may not issue an SMA Minor Permit for a development unless it meets all of the tests set out above and the valuation of the development is not in excess of $500,000.00.

11. In issuing its decisions on the three SMA Minor Permits, the Planning Director failed to conduct a thorough review of the valuation and cumulative impacts of the applications and, therefore, failed to make determinations consistent with the purposes of HRS § 205A and ROH Chapter 25.

III. DECISION & ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that: The Petition is GRANTED insofar as it seeks a decision that:

A. The Planning Director erroneously approved the three SMA Minor Permits for the "Sharks Cove Commercial Development," on Parcels 68, 69, and 70 because the requirements for an SMA minor permit were not met; and

B. The Planning Director's decisions to issue the three SMA Minor Permits violated HRS § 205A and ROH Chapter 25.

DATED: Honolulu, Hawai'i January 7, 2019.

BRAD T. SAITO, ESQ.
Deputy Corporation Counsel
Attorney for Respondent
ACTING DIRECTOR, DEPARTMENT OF PLANNING and PERMITTING

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MĀLAMA PŪPŪKEA-WAIMEA

TERRENCE M. LEE, ESQ
Attorney for Intervenor
HANAPOHAKU, LLC

APPROVED & SO ORDERED

HEARING OFFICER

In the Matter of the Petition for Contested Case Hearing of MĀLAMA PŪPŪKEA-WAIMEA; Of Special Management Area ("SMA") Minor Permit Approvals for HANAPOHAKU LLC, Located at: (1) 59-712 Kamehameha Highway and 59-712A Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068 (2015/SMA61) (supersedes 2015/SMA-8); (2) 59-716 Kamehameha Highway, Hale'iwa, Hawai'i 96712. TMK No. 5-9-11:069 (215/SMA47); and (3) 59-063 Pahoe Road, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070 (2015/SMA-24), Civil No 2016/GEN-4, STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER

MĀLAMA PŪPŪKEA-WAIMEA
501(c)(3) non-profit organization
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BEFORE CITY AND COUNTY OF HONOLULU

DEPARTMENT OF PLANNING AND PERMITTING

STATE OF HAWAI'I

In the Matter of the Petition for Contested Case Hearing of MĀLAMA PŪPŪKEA-WAIMEA of Special Management Area ("SMA") Minor Permit Approval for HANAPOHAKU LLC (2017/SMA-21), Located at: (1) 59-712 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068; (2) 59-706 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:069; and (3) 59-053 Pahoe Road, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070	Docket No.: PETITION FOR A CONTESTED CASE HEARING ON APPEAL FROM THE DECISION OF THE PLANNING DIRECTOR, CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING TO ISSUE SPECIAL MANAGEMENT AREA MINOR PERMIT 2017/SMA-21 FOR THE HANAPOHAKU LLC "SHARK'S COVE DEVELOPMENT"; CERTIFICATE OF SERVICE

EXHIBIT B

PETITION FOR A CONTESTED CASE HEARING ON APPEAL FROM THE DECISION OF THE PLANNING DIRECTOR, CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING TO ISSUE SPECIAL MANAGEMENT AREA MINOR PERMIT 2017/SMA-21 FOR THE HANAPOHAKU LLC "SHARK'S COVE DEVELOPMENT"

I. INTRODUCTION

1. Petitioner Mālama Pūpūkea-Waimea ("Petitioner" or "MPW") submits this petition, pursuant to section 12-2 of the Department of Planning and Permitting ("DPP") Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area ("Part 2 Rules"), for a contested case hearing on its appeal from the Planning Director's decision to issue Special Management Area ("SMA") Minor Permit 2017/SMA-21 for "Shark's Cove Development."

2. On August 2, 2017, the Planning Director issued SMA Minor Permit to Applicant G70 Jeff Overton, as agent for Landowner and Developer Hanapohaku LLC ("Developer") for a commercial development DPP identified as "Shark's Cove Development,"(see 2017/SMA-21 (attached as Exhibit "A")), located on three contiguous parcels owned by the same Developer at: (1) 59-712 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068 ("Parcel 68"), (2) 59-706 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:069 ("Parcel 69"); and (3) 59-053 Pahoe Road, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070 ("Parcel 70").

3. For the reasons stated below, the Planning Director's decision to issue the SMA Minor Permit violates Hawai'i Revised Statutes ("HRS") Chapter 205A and Chapter 25, Revised Ordinances of Honolulu ("ROH"), and therefore is null and void.

4. Petitioner seeks an order vacating the SMA Minor Permit, requiring Developer to pay all accumulated fines, and instructing Developer to submit an application for an SMA Use Permit ("Major") that demonstrates full compliance with County, State, and Federal laws prior to the Planning Director's approval.

II. LEGAL PROTECTIONS IN THE SPECIAL MANAGEMENT AREA

5. The purpose of the State of Hawai'i Special Management Area law is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." HRS § 205A-21.

6. The purpose of ROH Chapter 25 is "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. Special controls on development within an area along the shoreline are necessary to avoid permanent loss of valuable resources and foreclosure of management options, and to ensure that adequate public access is provided to pubic owned or used beaches, recreation areas, and natural reserves . . . ." ROH Chapter 25-1.2.

7. "Development" in the Special Management Area without an SMA permit is unlawful. HRS § 205A-26. Developer does not contest that the "Shark's Cove Development" is development.

8. An SMA Minor Permit may be lawfully issued by the Planning Director only when "the valuation . . . is not in excess of $500,000, and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects." HRS § 205A-22.

9. DPP's review of Developer's inadequate application, valuations, revisions, modifications, and failure to correct misleading and inaccurate information violates HRS Chapter 205A and ROH Chapter 25.

10. DPP has an affirmative duty to thoroughly review permit applications and to make determinations consistent with the purposes of HRS Chapter 205A and ROH Chapter 25. In issuing its decision on the SMA Minor Permit, DPP failed to uphold these duties and specifically failed to conduct an independent valuation and take into account potential cumulative impacts; therefore the determinations were based on erroneous findings of material fact or were otherwise arbitrary and capricious.

III. PETITIONER

11. Petitioner Mālama Pūpūkea-Waimea is a 501(c)(3) non-profit organization registered to do business in the State of Hawai'i. Petitioner's mailing address is P.O. Box 188, Hale'iwa,

Hawai'i 96712. Petitioner's phone number is (808) 388-3825, and email is SaveSharksCove@gmail.com. Petitioner is a volunteer-based North Shore non-profit, formed in 2005, to "replenish and sustain the natural and cultural resources of the Pūpūkea and Waimea ahupua'a for present and future generations through active community stewardship, education, and partnerships." More information about Petitioner is available at www.pupukeawaimea.org.

12. For the past twelve years, Petitioner, through its volunteer members, has maintained a weekly presence at the Pūpūkea Beach Park and the Pūpūkea Marine Life Conservation District ("MLCD"), which are across the two-lane Kamehameha Highway from and virtually adjacent to the properties that are the subject of the challenged SMA Minor Permit.

13. MPW members have stewarded and monitored the health of the Pūpūkea Beach Park, MLCD, and Special Management Area. Members have worked tirelessly to increase the knowledge of and support for the ecological values, rules, and user impacts among the community, youth, visitors, and users. MPW and its members have provided thousands of volunteer hours as well as over half a million dollars (in grants, donations, and in-kind services) for improvements, oversight, educational programs and outreach, beach, shoreline, and park clean ups, biological and human use monitoring, in water fish counts, limu identification studies,

water quality testing, invasive species removal and coastal restoration. MPW also documents and reports rule violations to the State Department of Land and Natural Resources ("DLNR") Division of Conservation and Resources Enforcement ("DOCARE") through our Makai Watch volunteers. MPW is a certified member of the DLNR-DOCARE Makai Watch program.

14. MPW has many board, staff, advisory board, and volunteer members who are residents of the Pūpūkea/Sunset Beach community and who are frequent users of the Shark's Cove area, including Pūpūkea Beach Park and Pūpūkea MLCD, for recreation, research, ecological, and educational purposes, including specifically its board members who are long-time residents of the area, Denise Antolini, Roberts (Bob) Leinau, John Cutting, Jim Parsons, and Laura Parsons, as well as staff members Maxx Elizabeth Phillips and Jenny Yagodich, and advisory board member Palakiko Yagodich, whose family uses the area for traditional and cultural practices.

15. Petitioner MPW and its members are specifically, personally, and adversely affected by the "Shark's Cove Development" and its adverse impacts on the Special Management Area and therefore MPW has legal standing to bring this petition.

16. In addition, Petitioner also has standing because it suffered procedural injury when DPP erroneously treated the "Shark's Cove Development" as requiring only an SMA Minor Permit,

thereby improperly avoiding a formal public hearing and proper environmental review of the substantial adverse impacts and potential mitigation.

17. Moreover, the DPP's lack of compliance with required substantive and procedural due process for the "Shark's Cove Development" has improperly shifted the burden of proof from the Developer to the community to assess and mitigate the environmental and cumulative impacts of this development in the Special Management Area. This procedural injury and improper placement of the burden on the community violates the spirit and letter of the laws protecting Hawai'i's precious shoreline resources including HRS 205A, ROH Ch. 25, the public trust doctrine, and the precautionary principle.

IV. BACKGROUND

18. Developer purchased Parcels 68, 69, and 70 on June 26, 2014.

19. Beginning in late 2014 or early 2015, Developer undertook unpermitted development including, but not limited to, adding nine stationary food trucks, constructing at least two unpermitted decks enclosing stationary food trucks, an unpermitted wooden deck addition to an existing structure, unpermitted plumping improvements, unpermitted electrical and water connections, unpermitted fences, and unpermitted grubbing and grading.

20. This development was done with no building permits and no SMA permits, and resulted in numerous violations.

21. This development has increased traffic and pedestrian congestion, unsafe and unsanitary conditions, and created litter, parking, erosion, resource over-use, potential pollution, and restroom over-usage problems in the Special Management Area, adversely affecting Petitioner's and the community's access to and use of the Pūpūkea Beach Park and the Pūpūkea MLCD. Only after community vigilance, monitoring, and complaints to regulatory agencies and elected officials did Developer make any effort to reduce the impact of its activities. However, these significant problems persist.

22. This development has, for example, increased litter found in the Pūpūkea Beach Park and the Pūpūkea MLCD as a result of spillover litter from eateries at the "Shark's Cove Development." Members have been finding more and more rubbish in the Special Management Area from various food trucks and have observed patrons walking over with food debris and leaving it on ground. In 2014, prior to increased commercial operations at the "Shark's Cove Development," Petitioners removed 763 pounds of trash from the Pūpūkea Beach Park and the Pūpūkea MLCD. In 2015, after Developer's increased commercial operations, Petitioners removed approximately 1,500 pounds of trash. The amount of trash removed in 2016 increased to 1,617 pounds. As

of September 18, 2017, despite efforts by Developer to contain its tenants' and their customers' trash, Petitioner removed 1,686 pounds of trash (annualized, roughly 2,200 pounds/year) from Pūpūkea Beach Park and the Pūpūkea MLCD.

23. Between February 2015 and November 2015, Developer intentionally segmented the "Shark's Cove Development" by submitting three separate SMA Minor Permit applications for one unified development, thereby depriving DPP's Planning Director and staff of complete and accurate information.

24. Between March 2015 and January 2016, the Planning Director issued three similar SMA Minor Permits to the same Applicant Gregory A. Quinn, as agent for the same Landowner and Developer Hanapohaku LLC for a single unified commercial development—the "Project" DPP identified, at the time, as "Sharks Cove Commercial Development," see Jan 5, 2016 Director's review meeting (attached as Exhibit "B"), located on three contiguous parcels owned by the same Developer at: (1) 59-712 Kamehameha Highway and 59-712A Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:068 ("Parcel 68"), see 2015/SMA-61 (attached as Exhibit "C"), superseding 2015/SMA-8 (attached as Exhibit "D"); (2) 59-716 Kamehameha Highway, Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:069 ("Parcel 69"), see 2015/SMA-47 (attached as Exhibit "E"); and (3) 59-063 Pahoe Road,

Hale'iwa, Hawai'i 96712, TMK No. 5-9-011:070 ("Parcel 70"), see 2015/SMA-24 (attached as Exhibit "F").[1]

25. The inadequate applications, revisions, modifications, and failure to correct misleading and inaccurate information led to the illegal segmentation of the permitting process violating HRS § 205A and ROH Chapter 25.

26. On March 9, 2016, MPW filed a petition for a consolidated contested case hearing on appeal from the decisions of the Planning Director, City and County of Honolulu, Department of Planning and Permitting to issue three Special Management Area Minor permits for the Hanapohaku LLC "Sharks Cove Commercial Development." See Case No. 2016/GEN-4. This contested case and Developer's Petition To Intervene are still pending.

27. On April 6, 2016, over one hundred community members attended the North Shore Neighborhood Board Special Meeting for the Hanapohaku LLC "Sharks Cove Commercial Development" at Waimea Valley. At this meeting, Developer, represented by co-owner Andrew D. Yani, repeatedly apologized and promised to withdraw all three SMA Minor permits.

28. On May 2, 2016, in response to Developer's request to withdraw the three SMA minor permits, DPP revoked all three

[1] Some of these addresses appear to have changed. See Paragraph 2, supra.

permits (2015/SMA-24, 2015/SMA-47, and 2015/SMA-61), ordering that all development authorized by these approvals be removed, that the area be "restored to its pre-approval condition," and "[a]ny outstanding violations associated with those approvals must be resolved (i.e., grading, etc.)." See DPP May 2, 2016 letter (attached as Exhibit "G").

29. On May 31, 2016, Developer applied for another SMA Minor Permit 2016/SMA-36 for modifications of and additions to the commercial structures on Parcel 68, including converting the dentist's office and prefabricated container buildings into a commercial kitchen and correcting of existing violations. See 2016/SMA-36 Application File (attached as Exhibit "H").

30. Developer's May 23, 2016 valuation for SMA Minor Permit 2016/SMA-36 states that the cost of converting the dentist's office into a "commercial kitchen" would total $49,005 (commercial kitchen interior, $26,505 and commercial kitchen addition, $22,500). In addition, Developer states the cost of a related container commissary building as $25,000. See 2016/SMA-36 Application File (Exhibit "H") (J.Uno & Assoc. Inc. cost analysis at p. [3].)

31. On July 13, 2016, DPP rejected SMA Minor Permit 2016/SMA-36, stating that the appropriate remedy for the outstanding violations and future development was to obtain a Major SMA Use permit, which would require an Environmental

Assessment. See 2016/SMA-36 Application File (Exhibit "H"), see also August 29, 2016, letter from DPP to Senator Riviere (attached as Exhibit "I").

32. Despite DPP's rejection of 2016/SMA-36, Developer proceeded to illegally construct the "commercial kitchen" and made a number of other unpermitted site improvements. See 2017/SMA-21 (Exhibit "A") at 3-4.

33. On January 23, 2017, DPP issued a Notice of Violation ("NOV") to Developer for "[m]ultiple violations in Special Management Area without a Special Management Area (SMA) permit. **Structures including food trucks,** shipping containers, loading trucks, septic tanks, wooden decks and stairs, tents, eating areas with tables and benches, signs and sheds, temporary toilets, fences, walls, parking areas and all other structures **which have not been permitted must be removed.** Grading has been undertaken without the required permit. **Commercial activities which lack a SMA permit must cease . . .** correct all of the violations cited above and **restore the site to the original conditions** allowed by approved permits." See 2016/NOV-12-137 (attached as Exhibit "J")(emphasis added).

34. In response, Developer took no action to cure the violations in the NOV.

35. On February 27, 2017, DPP issued a Notice of Order ("NOO") to Developer for "multiple violations in Special

Management Area (SMA) without an SMA Use Permit." DPP ordered Developer to pay a fine of $2,000.00 by March 30, 2017 and to correct violations by March 14, 2017, after which a $500.00 daily fine would be assessed until the corrections were completed. See 2017/N00-062 (attached as Exhibit "K").

36. Developer did not comply with the NOO and continued unpermitted development and commercial activities on the site.

37. On April 19, 2017, while the MPW contested case was stayed by agreement, Developer applied for yet another SMA Minor Permit 2017/SMA-14 "to allow (retain) [sic ?] existing commercial activities including food trucks, after-the-fact grading and grubbing, construction of a parking lot, installation of an individual wastewater system, and the establishment of outdoor, covered eating and drinking areas." See 2017/SMA-14 Application File (attached as Exhibit "L") at 1.

38. On May 16, 2017, DPP rejected SMA Minor Permit 2017/SMA-14 as incomplete, finding "that application materials did not demonstrate that the Project is eligible for a minor SMA Permit" in part because the value of the food trucks was not included. "**If the food trucks leave the site each day, the application should specify that, and the value of the trucks will not need to be added to the total Project valuation. If, on the other hand, the food trucks will regularly remain in place for days at a time or cannot move at all, the value of the**

trucks must be included in the Project valuation. In site visits last year, we were led to believe that the trucks do not move on a daily basis, and in fact rarely move at all. If this is the case, the application should clearly say so. **If the new proposal involves daily movement of the trucks, the application should indicate where they will be parked every evening."** See 2017/SMA-14 Application File (Exhibit "L")(emphasis added) at 1-2.

39. On May 23, 2017, Developer re-applied for an "after-the-fact SMA Minor Permit to allow new[,] and partially retain existing[,] retail and eating establishments on the site, and to authorize site improvements" such as: clearing; grading; fill; landscaping; gravel cover; parking lot/sidewalk; ATU wastewater system; chain link fence; trash enclosure; water lines; and electrical lines. Developer estimated the total valuation for the development at $351,908. See 2017/SMA-21 (Exhibit "A") at 4.

40. Despite DPP's unambiguous directive of May 16, 2017, the valuation made no mention of the existing unpermitted food trucks that regularly remain in place for days at a time; and did not mention the already in-place complete commercial kitchen. See 2017/SMA-21 Application File (Exhibit "M"). DPP approved a plan submitted by Developer that included five food trucks, the value of which should have been included in the cost valuation

because, according to DPP, "'their use . . . is considered 'development' for the purposes of Chapter 25, ROH." 2017/SMA-21 (Exhibit "A") at 6.

41. Not only is the Developer's valuation (dated May 22, 2017) for SMA permit 2017/SMA-21 incomplete, but it is also inadequate and misleading. The valuation inexplicably reduces the cost of multiple items already installed on site. For example, on April 16, 2017, Item 1, "Temp. Erosion Control Measures, In Place Complete" was valued at $9,500.00. See 2017/SMA-14 Application File (Exhibit "L"). However, on May 22, 2017, Item 1, "Temp. Erosion Control Measures, In Place Complete" was reduced by sixty-one percent without explanation to $3,696.00. See 2017/SMA-21 Application File (attached as Exhibit "M").

42. On August 2, 2017, the Planning Director approved SMA Minor Permit 2017/SMA-21 based on her determination that the Project "has a stated valuation of less than $500,000, and will have no significant effect on SMA resources." See 2017/SMA-21 (Exhibit "A") at 1. There is no indication that DPP conducted a thorough and independent review of the "stated valuation."

43. The permit approval also violated HRS Chapter 205A-26(2)(a) and ROH Chapter 25-3.2(b)(1) because it not contain any findings regarding existing or potential cumulative impacts, or indicate that such impacts had been considered. For example,

although DPP acknowledged that the "Project generates traffic congestion," and "creates problems with vehicular and pedestrian safety," DPP did not analyze these existing direct impacts, let alone indirect, potential, and cumulative impacts. See 2017/SMA-21 (Exhibit "A") at 4. To the contrary, DPP improperly punted any analysis of traffic impacts to later stages of the permitting process, see 2017/SMA-21 (Exhibit "A") at 7, notwithstanding that **traffic impacts are environmental impacts** that must be considered at the SMA stage.

44. In another indication of its underestimation of the impacts, DPP acknowledges Developer's estimate that "each food truck serves an average of 300 to 400 customers per day." See 2017/SMA-21 (Exhibit "A") at 6. This means that the total estimated number of customers to the site is 2,000/day, or 60,000/month, or **720,000/year**. The impacts of attracting this large number of customers to the site are nowhere analyzed by DPP.

45. DPP also failed to conduct an adequate analysis of "compliance with the Unilateral Agreement (UA) executed pursuant to the provisions of the original zone change of this site to the B-1 Neighborhood Business District (Ordinance No. 78-76)." 2017/SMA-21(Exhibit A) at 7. DPP mentions only one of several aspects of the UA and ignored the Kamehemeha Highway improvements required under the UA to address traffic impacts.

The permit approval does not contain any mention of the required road improvements nor any analysis of traffic impacts and congestion resulting from the "Shark's Cove Development." See 2017/SMA-21 (Exhibit "A") at 2.

46. DPP also failed to mention or address the outstanding fines assessed against Developer for illegal development in the SMA as described in DPP's own NOV and NOO. Given the history of this developer violating DPP's orders, payment in full of the fines, now approaching $100,000, should have been a condition of the SMA Minor Permit. See NOV and NOO (Exhibits "J" and "K").

V. THE PLANNING DIRECTOR'S DECISION TO APPROVE THE SMA MINOR PERMIT FOR THE "SHARK'S COVE DEVELOPMENT" VIOLATED HRS § 205A AND ROH CHAPTER 25.

47. The Planning Director erroneously approved the SMA Minor Permit for the "Shark's Cove Development" located on the North Shore of O'ahu on Parcels 68, 69, and 70 because the requirements for an SMA Minor Permit were not met.

48. No SMA permit, including an SMA Minor Permit, may be issued unless it is first found that:

(a) The development will not have any substantial adverse environmental or ecological effect, HRS § 205A-26(2)(A); and

(b) The development is consistent with the objectives, policies and guidelines of Chapter 205A, HRS § 205A-26(2)(B).

49. The Planning Director may not issue an SMA Minor Permit for a development unless it meets all of the tests set out above and the valuation of the development is not in excess of $500,000.00.

50. The Planning Director's decision to issue SMA Minor Permit 2017/SMA-21 to "allow new and partially retain existing retail and eating establishments on the site, and to authorize site improvements including grading, paved parking, outdoor seating, wastewater management, storm water retention, and various other improvements" violated the Part 2 Rules and HRS § 91-14, and a petition for a contested case hearing regarding the decision of the Planning Director to issue the SMA Minor Permit is proper under section 12-11(a) of the Part 2 Rules. See 2017/SMA-21 (Exhibit "A").

51. The Planning Director's decision was arbitrary and capricious, and contrary to law, because she neglected to: (1) consider all available material facts, (2) properly investigate the valuation of the Project, (3) analyze obvious direct, indirect, potential and cumulative impacts prior to approval, (4) analyze the conditions of the existing Unilateral Agreement, (5) require the payment of fines directly related to the subject matter of the SMA Minor Permit, and (6) require an SMA Use Permit, in violation of HRS § 205A and ROH Chapter 25.

52. The Part 2 Rules provide for an appeal of the decision of the Planning Director to issue SMA minor permits in section 12-2(a)

> Any person who is specifically, personally, and adversely affected by an action of the director may request a hearing to appeal any part or requirement of the action, Chapter § 12-2(a).

53. This appeal is timely filed within thirty (30) calendar days after notice of SMA Minor Permit 2017/SMA-21 was published in the Office of Environmental Quality Control Notice on August 23, 2017. See http://oeqc2.doh.hawaii.gov/The Environmental Notice/2017-08-23-TEN.pdf at 11.

54. The SMA Minor Permit is invalid and void. The Developer should be required to correct all pending violations, pay all accumulated fines, and apply for an SMA Use Permit.

55. Petitioner reserves the right to amend this Petition to set out in more detail the reasons why the Planning Director's decision to issue the SMA Minor Permit must be reversed or vacated.

DATED: Honolulu, Hawai'i, September 22, 2017.

Denise Antolini
President
MALAMA PŪPŪKEA-WAIMEA

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KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

2017/SMA-21(ASK)

MINOR PERMIT:	SPECIAL MANAGEMENT AREA (SMA)
File Number:	2017/SMA-21
Project: Valuation:	Hanapohaku "Shark's Cove" Development: Including grading, parking, outdoor seating, accessory structures, and other improvements. ($368,641)
Landowner:	Hanapohaku, LLC
Applicant/Agent:	G70 (Jeff Overton)
Location:	59-706 and 59-712 Kamehameha Highway, and 59-53 Pahoe Road – Pupukea
Tax Map Keys:	5-9-011: 068, 069, and 070
Zoning:	B-1 Neighborhood Business District
Received:	May 24 and June 16, 2017

We have reviewed the Project to allow new and partially retain existing retail and eating establishments on the site, and to authorize site improvements including grading, paved parking, outdoor seating, wastewater management, storm water retention, and various other improvements. The Project is within the SMA established by Chapter 25, Revised Ordinances of Honolulu (ROH), has a stated valuation of less than $500,000, and will have no significant effect on SMA resources. Therefore, a Minor SMA Permit is hereby **APPROVED**, subject to the following conditions:

1 Development shall be in general conformance with the plan labeled as Exhibit B, which is now the approved plan for the Project, and has been made a part of the file. Any expansion or modification, including the placement of "temporary" structures, including vehicles and/or trailers, tents, and storage sheds shall require a separate evaluation under the provisions of Chapter 25, ROH by the Acting Director of the Department of Planning and Permitting (DPP).

2. If the actual valuation of the proposed work ultimately exceeds $500,000, or the Project is found to cause substantial adverse environmental or ecological effects, taking into account cumulative impacts, then the Project shall be returned to the DPP for further review under Chapter 25, ROH.

Exhibit A

3. Within 30 days of the date of this permit, the Applicant shall apply for:

   a. Grading permit(s) to correct outstanding grading violations;

   b. Building permits, as necessary, to correct outstanding building violations; and

   c. A Conditional Use Permit (CUP) for joint development of the three parcels.

4. Prior to the issuance of building permits, the Applicant shall submit for review and approval of the DPP:

   a. A trash management plan to address solid waste on the site; and

   b. A spill management plan to avoid spills of liquid waste on the site, including but not limited to gray water, petroleum products, and food liquids.

5. To minimize potential impacts of the commercial activity on the surrounding area, all activities on the site shall be limited to hours of operation between 7:00 a.m. and 9:00 p.m.

6. Artificial light from exterior light fixtures, including, but not limited to floodlights, uplights, or spotlights used for decorative or aesthetic purposes, shall be prohibited if the light directly or indirectly illuminates or is directed to project beyond property boundaries, toward the shoreline and ocean waters, except as may otherwise be permitted pursuant to Section 205A-71(b), Hawaii Revised Statutes.

7. The Applicant shall take special care when trimming or clearing woody plants taller than 15 feet in order to minimize possible impacts to potential breeding of the hoary bats. Furthermore, between June 1 and September 15, woody plants greater than 15 feet tall shall not be disturbed.

8. If, during construction, any previously unidentified archaeological sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock, or coral alignments, pavings, or walls) are encountered, the Applicant shall stop work and contact the State Historic Preservation Division (SHPD) immediately. Work in the immediate area shall be stopped until the SHPD is able to assess the impact and make recommendations for mitigative action.

9. All contruction and grading activities shall be limited to daylight hours.

10. The Director of the DPP may modify the conditions of this approval by imposing additional conditions, modifying existing conditions, or deleting conditions deemed satisfied upon a finding that circumstances related to the approved Project have significantly changed so as to warrant a modification to the conditions of approval. In the event of the noncompliance with any of the conditions set forth herein, the Director of the DPP may terminate all uses approved under this permit or halt their operations until all conditions are met or may declare this permit null and void or seek civil enforcement.

11. This application has only been reviewed and approved pursuant to the provisions of Chapter 25, ROH (Special Management Area), and its approval shall not constitute compliance with the requirements of other governmental agencies. These are subject to separate review and approval. The Applicant shall be responsible for ensuring that the final plans for the Project approved under this permit comply with all applicable provisions and requirements of other government agencies, including compliance with the provisions of the Land Use Ordinance (LUO).

Background: The current proposal may be an interim use. The Applicant has prepared an Environmental Impact Statement Preparation Notice (EISPN) entitled, "Pupukea Rural Community Commercial Center," which was published in the April 23, 2017 issue of *The Environmental Review*. The proposal explored in the EISPN is a separate "brick and mortar project." The analysis and review for the Project as described in this permit is a separate development proposal and has been reviewed on its own merits, without regard to the future proposals.

Although the Applicant has corrected some of the violations, others remain outstanding and continue to accrue fines. Correction and enforcement will be pursued by our enforcement mechanisms. The Applicant is seeking this permit, in part, to address some of these violations.

Site and Surrounding Uses: The 2.74-acre site is located along the mauka (east) side of Kamehameha Highway, between Pahoe Road and the existing Foodland grocery store and across from Pupukea Beach Park. The site consists of three lots of record, which are identified by separate tax map key parcel numbers (Parcels 068, 069, and 070). Vehicular access to Parcels 068 and 069 is currently provided from Kamehameha Highway. Vehicular access to Parcel 070 is provided from Pahoe Road. Surrounding areas to the north (Kahuku) and south (Haleiwa) along either side of the highway are in the R-5 Residential District and are developed with single-family dwellings. The area to the east (mauka) is in the Country District, and is also developed with single-family dwellings.

The site slopes gradually from the rear (mauka) to the front (makai). Storm water runoff sheet-flows from the mauka portion of the site toward Kamehameha Highway at an average slope of 5 percent, entering the storm drain within the State-owned right-of-way. The existing and proposed drainage patterns are shown on Exhibits C and D.

Existing Condition: The site contains a real estate office and carport, two retail establishments (North Shore Surf Shop and Seamaids Retail Boutique), and a commercial kitchen in a former dentist office structure. There are also eight food trucks on the site which operate daily, one of which is a trailer selling shave ice. The Applicant has stated that seven of the eight food trucks are mobile. The establishment labeled as Truck C on Exhibit B is not currently mobile. The food trucks generally operate in the same designated area every day. The areas immediately around several of the food trucks include picnic tables, shade coverings, and seats.

In addition to the above improvements, between the years 2014 to 2016, the Applicant performed the following unauthorized activities

- Grubbed and graded a 53,000-square-foot area toward the rear of the site, and covered about 37,000 square feet with a layer of recycled crushed concrete (see Exhibit B);

- Grubbed and graded 8,200 square feet in the lower area of the site and covered it with a layer of gravel;

- Installed an aerobic treatment unit (ATU) wastewater and disposal system on Parcel 068; and

- Stockpiled and later removed soils from the excavated area of the ATU wastewater system covering about 3,360 square feet (see Exhibits A and B).

Community Input: The DPP received numerous e-mails in support of and opposition to the proposal. On May 17, 2017, the Applicant made a presentation at a meeting of the Sunset Beach Community Association. The Applicant reported that between 50 to 60 individuals attended and provided a summary of written and verbal comments offered at the meeting. The comments received by the Applicant and Agent are summarized here:

- The Project generates traffic congestion.
- The Project generates noise.
- The Project generates excessive lighting and glare on adjacent properties.
- There is a need for a greater setback for structures on the property.
- The Project should comply with regulations (i.e. the fire code, sanitation requirements for treatment and disposal of wastewater.)
- The Project provides jobs.
- The Project serves both visitors and locals.
- The location of the food establishments is convenient.
- The current scale is preferable to the redevelopment proposal.
- The Project creates problems with vehicular and pedestrian safety.

[Note: The DPP must review the permit based on the criteria specified in the objectives, policies, and guidelines in Section 25-3, ROH. Therefore, not all of the community concerns can be addressed under this SMA Minor Permit.]

Proposal and Analysis: The Applicant seeks an after-the-fact SMA Minor Permit to allow new and partially retain existing retail and eating establishments on the site, and to authorize site improvements, as shown on Exhibit B. The valuation of the after-the-fact site work and the proposed new development, including clearing, grading, fill, landscaping, gravel cover, parking lot/sidewalk, ATU wastewater system, chain link fence, trash enclosure, water lines, and electrical lines is estimated at $351,908. The specific elements of the proposal are described and analyzed below:

- Storm Water Management: The proposed drainage improvements include a stone/gravel drainage collection trench and rain garden areas dispersed throughout the site. According to the Applicant, the proposed improvements will control storm water runoff, capture suspended sediment in runoff, and minimize the off-site release of runoff flows and eroded soils.

  An engineering evaluation, dated May 22, 2017, determined that storm water flows off-site will be reduced with the proposed development. This will be reviewed during the grading permit phase. The Applicant will be required to obtain grading permits for all earthwork, which insures that best management practices (BMP) as well as the City's new water quality rules, effective August 16, 2017, are implemented (if not filed prior to that date). Correction of the unpermitted grading is necessary and should be done as expediently as possible. Therefore, as a condition of approval, the Applicant is required to apply for the necessary grading permits within 30 days of the date of this approval. A separate condition related to storm water runoff is not needed at this time.

- Revegetation and Restoration: A 16,500-square-foot area in the south east (mauka) portion of the site, a portion of which formerly contained stockpiled soil from installation of the ATU, will be revegetated using a hydro-mulch seeding program. According to the Applicant, the revegetation will be designed to reduce storm water runoff, soil erosion, and sediment loss from the previously-disturbed area. The Applicant states that best management practices (BMPs), including temporary ground cover and filter sock installation to trap suspended sediments in runoff, will be employed during this restoration activity. BMPs will be required for all areas covered by the grading permits, therefore a separate condition requiring BMPs is unnecessary.

  In addition, with the first building permit, required landscaping must be provided and will include landscaping for the front yard. This will assist with BMPs for managing storm water, and to discourage unauthorized parking.

- Paved Parking and Access: A paved parking area will be created in compliance with parking requirements of the LUO, Chapter 21, ROH. The Applicant's current proposal includes an asphalt parking lot covering approximately 18,500 square feet with a total of 44 parking spaces. The parking lot will be landscaped in accordance with LUO Sec 21-4.70(b) to include a minimum of eight two-inch caliper canopy trees.

  The plans submitted with the SMA Minor Permit application are not of sufficient detail to determine compliance with the parking requirements of the LUO. This will be verified during the building permit application review based on more detailed plans. If more than 44 spaces are required, the Applicant will have to provide those spaces on site. There will be no modification of the parking requirements without modification to uses or floor area. Furthermore, the food trucks and the outdoor dining areas will be assessed as eating establishments for purposes of parking calculations. The provision of a parking lot that meets LUO requirements on site is likely to reduce unauthorized parking

along Kamehameha Highway and at the beachpark across the highway and will ensure that public access to coastal resources will not be diminished by the development.

A new six-foot-high chain-link fence will be installed along a portion of the north (Kahuku) boundary of the site along Pahoe Road in accordance with Exhibit B. With the installation of the fence, Parcel 070 will no longer have vehicular access along Pahoe Road. There is currently no official access to Parcel 070 from Kamehameha Highway. Therefore, a CUP for the joint development of the three parcels is necessary and is required as a condition of approval.

- Food Trucks: The Applicant proposes to reduce the total number of food trucks from eight to five. The three food trucks to be removed include the two food trucks adjacent to the Seamaids and North Shore Surf Shop and the shave ice trailer. Also, Food Truck C, which is currently not mobile, will be replaced with a mobile food truck (see Exhibit B). Each food truck is required to maintain a food safety certification with the State Department of Health. According to the Applicant, each food truck is required to maintain their designated seating areas (i.e., picnic tables and seating). The Applicant estimates that each food truck serves an average of 300 to 400 customers per day. Five paved parking spaces will be provided for each food truck.

  The food trucks are mobile, but because they will be present at the site each day and will be conducting commercial activities on the site, their *use* as eating and drinking establishments is considered "development" for purposes of Chapter 25, ROH. However, the trucks themselves are mobile and will regularly leave the site. Therefore, estimates of the value of the food trucks were not included in the valuation of the Project. The site plan provided with the building permit application will have to show that the food trucks can be moved and that their movement will not be obstructed by required parking spaces, poles, benches, fences, landscaping, or other structures.

- Trash Bins and Enclosures: The existing six portable trash dumpsters will remain in a trash enclosure located in the mauka (east) area of the site to manage solid waste generated from the retail and food truck operations (see Exhibit B). According to the Applicant, a private disposal service removes accumulated wastes from the trash dumpsters once a week. The trash enclosure will be six feet high and built to screen these dumpsters, as required by the LUO. The building permit plans will have to show that there is a paved path to the dumpster. The Applicant states that the trash containers will be of sufficient size to contain all waste, the containers will be kept clean, and any overflow will be cleaned up immediately. To ensure solid waste and/or debris from the site do not impact coastal resources, the Applicant is required to generate a trash management plan for review and approval by the DPP prior to the issuance of building permits. At a minimum, the trash management plan should include the design and location of trash bins throughout the site, how and when those trash bins are collected and placed in the dumpsters, and the frequency of collection by the private disposal service.

- Sanitation: Four portable toilets are located in the mauka area of the site which will be revegetated. There will be no wastewater disposal on-site from the food trucks. Liquid waste generated by each food truck will be contained within the vehicle and removed during off-site servicing, or via on-site collection by a wastewater pumping contractor. Food trucks will provide the name of the commercial entity who pumps their wastewater and frequency thereof to the landowner. Each food truck will be located on an asphalt pavement parking pad (10 feet x 24 feet), the design of which will include storm water management, gray water spill management, and petroleum leak management BMPs. The Applicant is required to generate a spill management plan for the review and approval of the DPP prior to the issuance of building permits. The spill management plan should include the frequency of wastewater pumping for each food truck, any maintenance for the portable toilets, and the details of the storm water management, gray water spill management, and petroleum leak management BMPs that will be enacted around the food truck parking areas. The DPP may consult with the Department of Facility Maintenance, Department of Environmental Services, and the DOH prior to approval of the management plan.

- Signage: A new directional sign is proposed to clearly identify the entrance to the site from Kamehameha Highway. The sign is intended to encourage on-site parking and discourage accidental commercial use of the privately-owned Pahoe Road. Signage and traffic management are not criteria specified in the objectives, policies, and guidelines of the SMA, so no condition of approval related to signage is required at this time. However, the traffic impacts associated with the improvements will be reviewed during the building permit. Furthermore, the sign will have to comply with the signage standards for the B-1 Neighborhood Business District and will require a sign permit.

- Unilateral Agreement: The development at this site is subject to compliance with the Unilateral Agreement (UA) executed pursuant to the provisions of the original zone change of this site to the B-1 Neighborhood Business District (Ordinance No. 78-76). The UA included design provisions to insure that the design is "country like" in style, emphasizing the wooden low-rise Haleiwa character. Compliance with this provision and others, will be reviewed during building permit processing to insure compliance.

- Lighting: The federally-endangered Hawaiian Hoary Bat may be present and Hawaiian seabirds may transit through the area of the Project. Outdoor lighting can be a problem for Hawaiian seabirds because unshielded light at night can disorient them. To minimize potential adverse impacts, lighting should be designed with sensors and shields, and must be directed downward. The standard condition of approval to prevent any light that directly illuminates or is directed beyond property boundaries toward the shoreline and ocean waters is imposed as a condition of approval.

As a standard condition to minimize impacts to the Hawaiian Hoary Bat, applicants are typically required to restrict tree trimming activities. Conditions of approval include the requirement that woody plants greater than 15 feet should not be disturbed, removed, or

trimmed during the bat birthing and pup rearing season (June 1 through September 15). Site clearing should be timed to avoid disturbance to the Hawaiian hoary bats and construction activities should be limited to daytime only. This is required as a condition of approval.

- Archaeology: On June 16, 2017, the Applicant submitted additional information, including an archaeological assessment. The assessment reported that the area has been disturbed by modern activity and no surface archaeological remains were found during the pedestrian survey of the parcels. Also, the subsurface testing did not yield any evidence of subsurface areaological features or deposits. However, since historic sites, artifacts, and burials can exist within previously developed areas, a standard archaeological stop-work condition requiring notification of the SHPD is imposed as a condition of approval.

Environmental Review, Chapter 343, Hawaii Revised Statutes (HRS) and Chapter 25, ROH:
The proposal is not subject to an assessment under Chapter 343, HRS, the State Environmental Impact Law. Furthermore, development that qualifies for an SMA Minor Permit does not require an assessment under Chapter 25, ROH. As proposed, the Project has been evaluated and found to qualify for a Special Management Area Minor Permit because the valuation does not exceed $500,000 and the impacts will not have a significant impact on coastal resources. If the construction cost exceeds $500,000, or the Project is found to cause substantial adverse environmental or ecological effects, taking into account cumulative impacts, this SMA Minor Permit shall became void and the Project must be further evaluated for compliance with Chapter 25.

We find the Project has a stated valuation of less than $500,000 and, subject to certain conditions of approval, will have no significant effect on SMA resources. Therefore, the development on the site will meet the objectives of the Coastal Zoning Management Program found in Chapter 205A-2, HRS, and the SMA Ordinance, found in Chapter 25-3.1.

Any person who is specifically, personally, and adversely affected by the Acting Director's action (in this case) and wants to appeal any part or requirement of the action may submit a written request for a contested case hearing to the DPP within 30 calendar days from the date of mailing, personal service, or publication of the action of the Acting Director of the DPP. Contested case hearings shall be conducted pursuant to Chapter 12 of the DPP Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area. Essentially, these Rules require that a petitioner show that the Acting Director of the DPP based her action on an erroneous finding of a material fact, and/or that the Acting Director otherwise acted in an arbitrary or capricious manner, or there are extenuating circumstances. The filing fee for the contested case hearing is $400 (payable to the City and County of Honolulu).

We have enclosed a receipt for the application fee. Should you have any questions, please contact Ardis Shaw-Kim of our staff at 768-8021.

Enclosures: Receipt Nos. 113510 and 113511
Exhibits A through D

cc: Office of Planning (Shichao-Li)

THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

SIGNATURE	Acting Director TITLE	August 2, 2017 DATE

This approval does not constitute approval of any other required permits, such as building or sign permits.

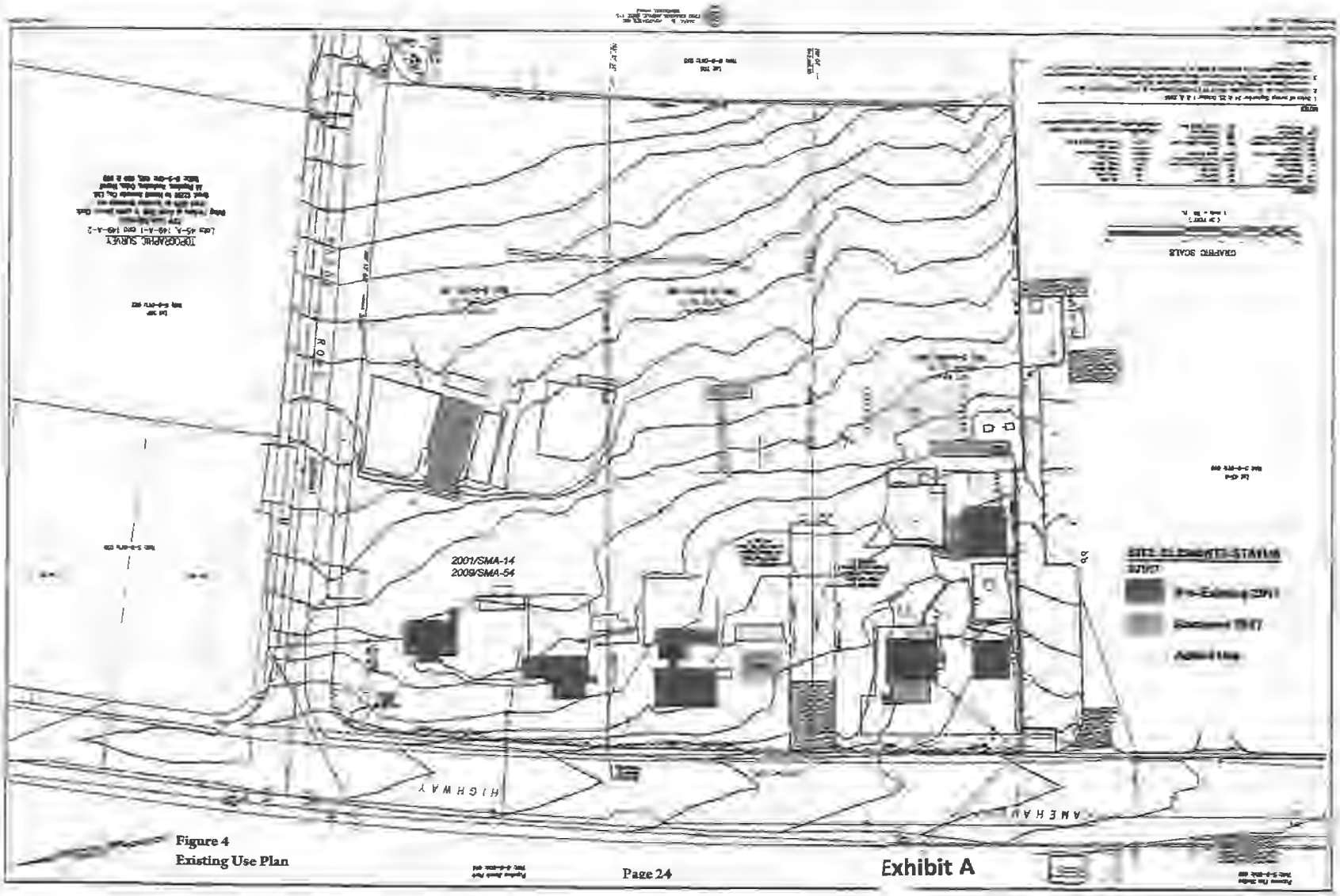

Figure 4
Existing Use Plan

Exhibit A

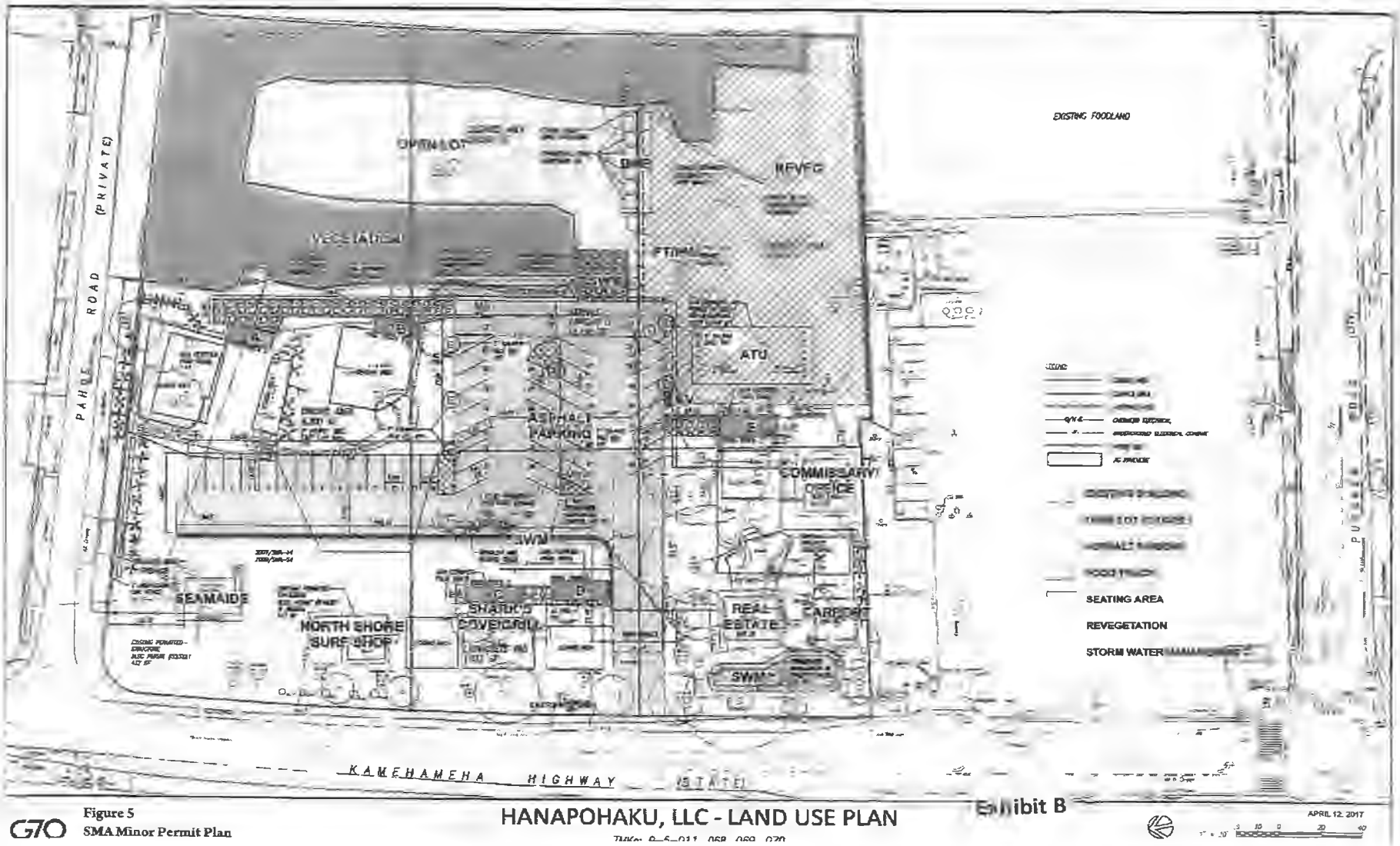

Figure 5
SMA Minor Permit Plan


TMK: 9-5-011: 070
TMK: 9-5-011: 069
TMK: 9-5-011: 068
EXISTING FOODLAND
E1
CFS/AC
AC
LEGEND:
FLOW ARROW
PAHOA ROAD (PRIVATE)
PUPUKEA ROAD (CITY)
KAMEHAMEHA HIGHWAY (STATE)
Exhibit C
GIO
1" = 20'

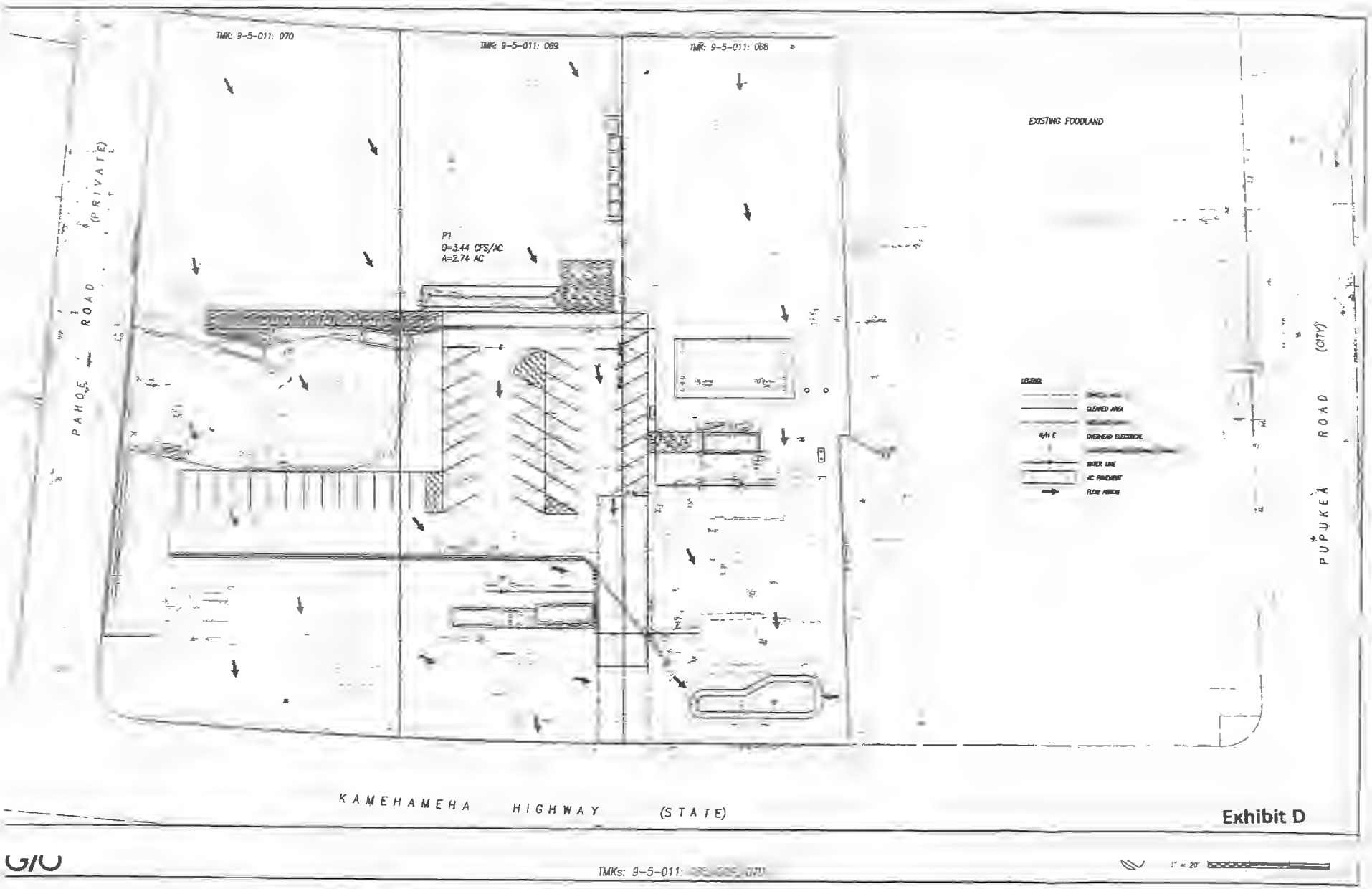
TMK: 9-5-011: 070
TMK: 9-5-011: 069
TMK: 9-5-011: 068
EXISTING FOODLAND
P1
Q=3.44 CFS/AC
A=2.74 AC
PAHOE ROAD (PRIVATE)
PUPUKEA ROAD (CITY)
KAMEHAMEHA HIGHWAY (STATE)
LEGEND:
CLEARED AREA
OVERHEAD ELECTRICAL
SEWER LINE
AC PAVEMENT
FLOW ARROW
TMKs: 9-5-011: 070
1" = 20'

Exhibit D

DEPARTMENT OF PLANNING & PERMITTING
DIRECTOR'S REVIEW MEETING
Date: January 5, 2016
Time: 1:30 p.m., 7th Floor CR

Division: LUPD **Contact:** Ardis

Name of Project: Shark Cove Commercial Development

Location: 3 lots next to Pupukea Foodland, across Sharks Cove See attached.

2015/SMA-24 (NI)

Project: Valuation:	Various Commercial Developments around 490,000 for each lot
Applicant/Agent:	Gregory A. Quinn, Architect
Tax Map Keys:	5-9-11: 68, 69, and 70
Zoning	B-1 Neighborhood Business District

Request: Minor SMPs for modification/addition to retail businesses including site work, additional retail, new waste water treatment, parking and landscaping.

Back ground: There was an old SMP application for Shark Cove Shopping Center that was withdrawn. The property was subdivided into 3 lots. The new owners are leasing land to different enterpreners for various commercial endeavors primary food trucks. SMP minor permits were issued for each of the three lots in early 2015. Two of the site plans have changed and two new SMP (revisions) minor applications have been submitted. There are a number of pending violations.

Purpose of D review? FYI

Exhibit B

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honolulupdd.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2015/SMA-61(GT)

MINOR PERMIT:	SPECIAL MANAGEMENT AREA (SMA)
File Number:	2015/SMA-61 (SUPERSEDES 2015/SMA-8)
Project:	59-712 Kamehameha – Office and Retail Buildings and Parking Lot
Valuation:	($498,000)
Landowners:	Hanapohaku, LLC
Applicant/Agent:	Gregory A. Quinn, Architect
Location:	59-712 and 59-712A Kamehameha Highway - Haleiwa
Tax Map Key:	5-9-11: 68
Zoning:	B-1 Neighborhood Business District
Date Received:	November 13, 2015

We have reviewed the SMA Permit (Minor) application (received November 13, 2015, December 21, 2015 and January 4, 2016), requesting to construct a new retail building, conversion of existing structures to an eating and drinking establishment with outdoor dining, and site improvements at the above site (Exhibits A-1 to A-6), and find that it lies within the Special Management Area (SMA) established in Revised Ordinances of Honolulu (ROH) Chapter 25. We further find that the proposed development has a stated valuation of less than $500,000 and will have no significant effect on the SMA. Therefore, a minor permit is hereby APPROVED, subject to the conditions listed below.

1. Development shall be in general conformance with application documents (labeled as Exhibits A-1 to A-6), which are now the approved plans for the project, and have been made a part of the file. Any modification to the project and/or approved plans shall be subject to the prior review of and approval by the Director of the Department of Planning and Permitting (DPP). Minor modifications shall be processed in accordance with ROH Chapter 25. Major modifications shall require a new SMA Permit (Minor).

2. If the actual valuation of the proposed work ultimately exceeds $500,000, then the project shall be returned to the Department of Planning and Permitting for further review under ROH Chapter 25.

3. If, during construction, any previously unidentified archaeological sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock, or coral alignments, pavings, or walls) are encountered, the Applicant shall stop work and contact the State

Exhibit C

Department of Land and Natural Resources, State Historic Preservation Division (SHPD) immediately. Work in the immediate area shall be stopped until the SHPD is able to assess the impact and make recommendations for mitigative activity.

4. This application has only been reviewed and approved pursuant to the provisions of ROH Chapter 25 (Special Management Area), and its approval shall not constitute compliance with the requirements of other governmental agencies. These are subject to separate review and approval. The Applicant shall be responsible for insuring that the final plans for the project approved under this permit comply with all applicable provisions and requirements of other government agencies, including compliance with the provisions of the Land Use Ordinance (LUO).

5. This SMA Permit shall supersede the previous approved SMA Permit No. 2015/SMA-8.

6. The Director may modify the conditions of this approval by imposing additional conditions, modifying existing conditions, or deleting conditions deemed satisfied upon a finding that circumstances related to the approved project have significantly changed so as to warrant a modification to the conditions of approval.

7. In the event of the noncompliance with any of the conditions set forth herein, the Director may terminate all uses approved under this permit or halt their operation until all conditions are met or may declare this permit null and void or seek civil enforcement.

The project site is located along Kamehameha Highway across from Pupukea Beach Park and adjacent to Foodland on the south. The Applicant is seeking approval to: (1) construct a one-story retail building (820 square feet) behind the existing real estate office building; (2) add a deck to the existing real estate office building (240 square feet); (3) convert an existing dental clinic building (596 square feet) into an eating and drinking establishment with a deck for outdoor dining (240 square feet); (4) convert an existing carport into a covered dining area (356 square feet) with two outdoor dining areas (front and back); and (5) site improvements, which include 19 parking stalls, one loading stall and landscaping. The proposed one-story retail building will be of wood construction with concrete slab on-grade and shed roof. The proposed wood decks will have post and pier foundations.

On March 19, 2015, SMA Permit No. 2015/SMA-8 was approved for new retail building, conversion of existing structures to an eating and drinking establishment with outdoor dining, and site improvements, as noted above. On November 13, 2015, the Applicant submitted revised plans to relocate the new retail building approximately 40 feet further mauka on the property and next to the extended driveway along the north side of the property; revise the new parking lot from three separate single-loaded parking lots into one 19-stall double-loaded parking lot located on the mauka side of the new retail building and increase the number of parking from 14 to 19 stalls.

Given the particular circumstances and conditions of this case, the proposed improvements should not have any substantial adverse land use impacts for the surrounding neighborhood. The proposed valuation of the development is less than $500,000 and will have no significant effect on the SMA.

Any person who is specifically, personally, and adversely affected by the Director's action (in this case) and wants to appeal any part or requirement of the action may submit a written request for a contested case hearing to the DPP within 30 calendar days from the date of mailing, personal service, or publication of the action of the Director of the DPP. Contested case hearings shall be conducted pursuant to Chapter 12 of the DPP Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area. Essentially, these Rules require that a petitioner show that the Director of the Department of Planning and Permitting based his action on an erroneous finding of a material fact, and/or that the Director otherwise acted in an arbitrary or capricious manner, or there are extenuating circumstances. The filing fee for the contested case hearing is $400 (payable to the City & County of Honolulu).

We have enclosed receipts for the application fees. Please contact Gerald Toyomura of our staff at 768-8056 if you have any questions.

Enclosure: Receipt Nos. 105906 and 105907
Exhibits A-1 to A-6

cc: Office of Planning (Shichao Li)

Doc 1311656

THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

Anthony K. Ching FOR Director January 13, 2016
SIGNATURE TITLE DATE

This approval does not constitute approval of any other required permits, such as building or sign permits.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: [redacted] • CITY WEB SITE: [redacted]

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2015/SMA-8(GT)

MINOR PERMIT:	SPECIAL MANAGEMENT AREA (SMA)
File Number	2015/SMA-8
Project:	59-712 Kamehameha – New retail building, conversion of existing structures to an eating and drinking establishment with outdoor dining, and site improvements.
Valuation	($498,000)
Landowners:	Hanapohaku, LLC
Applicant/Agent:	Gregory A. Quinn, Architect
Location	59-712 and 59-712A Kamehameha Highway - Haleiwa
Tax Map Key:	5-9-11: 68
Zoning	B-1 Neighborhood Business District
Date Received:	February 26, 2015 and March 17, 2015

We have reviewed the SMA Permit (Minor) application (received February 26, 2015 and March 17, 2015), requesting to construct a new retail building, conversion of existing structures to an eating and drinking establishment with outdoor dining, and site improvements at the above site (Exhibits A-1 through A-6), and find that it lies within the Special Management Area (SMA) established in Revised Ordinances of Honolulu (ROH) Chapter 25. We further find that the proposed development has a stated valuation of less than $500,000 and will have no significant effect on the SMA. Therefore, a minor permit is hereby APPROVED, subject to the conditions listed below.

1 Development shall be in general conformance with application documents (labeled as Exhibits A-1 through A-6), which are now the approved plans for the project, and have been made a part of the file. Any modification to the project and/or approved plans shall be subject to the prior review of and approval by the Director of the Department of Planning and Permitting (DPP). Minor modifications shall be processed in accordance with ROH Chapter 25. Major modifications shall require a new SMA Permit (Minor).

2 If the actual valuation of the proposed work ultimately exceeds $500,000, then the project shall be returned to the Department of Planning and Permitting for further review under ROH Chapter 25.

Exhibit D

3 If, during construction, any previously unidentified archaeological sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock, or coral alignments, pavings, or walls) are encountered, the Applicant shall stop work and contact the State Department of Land and Natural Resources, State Historic Preservation Division (SHPD) immediately. Work in the immediate area shall be stopped until the SHPD is able to assess the impact and make recommendations for mitigative activity.

4. This application has only been reviewed and approved pursuant to the provisions of ROH Chapter 25 (Special Management Area), and its approval shall not constitute compliance with the requirements of other governmental agencies. These are subject to separate review and approval. The Applicant shall be responsible for insuring that the final plans for the project approved under this permit comply with all applicable provisions and requirements of other government agencies, including compliance with the provisions of the Land Use Ordinance (LUO).

5. The Director may modify the conditions of this approval by imposing additional conditions, modifying existing conditions, or deleting conditions deemed satisfied upon a finding that circumstances related to the approved project have significantly changed so as to warrant a modification to the conditions of approval.

6. In the event of the noncompliance with any of the conditions set forth herein, the Director may terminate all uses approved under this permit or halt their operation until all conditions are met or may declare this permit null and void or seek civil enforcement.

The project site is located along Kamehameha Highway across from Pupukea Beach Park and adjacent to Foodland on the south. The Applicant is seeking approval to: (1) construct a one-story retail building (820 square feet) behind the existing real estate office building; (2) add a deck to the existing real estate office building (240 square feet); (3) convert an existing dental clinic building (596 square feet) into an eating and drinking establishment with a deck for outdoor dining (240 square feet); (4) convert an existing carport into a covered dining area (356 square feet) with two outdoor dining areas (front and back); and (5) site improvements, which include 14 parking stalls, one loading stall and landscaping. The proposed one-story retail building will be of wood construction with concrete slab on-grade and shed roof. The proposed wood decks will have post and pier foundations. We have determined that the project should not have any substantial adverse environmental or ecological effect on the SMA.

Any person who is specifically, personally, and adversely affected by the Director's action (in this case) and wants to appeal any part or requirement of the action may submit a written request for a contested case hearing to the DPP within 30 calendar days from the date of mailing, personal service, or publication of the action of the Director of the DPP. Contested case hearings shall be conducted pursuant to Chapter 12 of the DPP Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area. Essentially, these Rules require that a petitioner show that the Director of the Department of Planning and Permitting based his action on an erroneous finding of a material fact, and/or that the Director otherwise acted in an arbitrary or capricious manner, or there are extenuating circumstances. The filing fee for the contested case hearing is $400 (payable to the City & County of Honolulu).

We have enclosed a receipt for the application fee. Please contact Gerald Toyomura of our staff at 768-8056 if you have any questions.

Enclosure: Receipt No. 101576
Exhibits A-1 to A-6

cc: State of Hawaii
Office of Planning (Shichao Li)

Doc 1227045

THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

SIGNATURE	TITLE	DATE
[signature]	Director	March 19, 2015

This approval does not constitute approval of any other required permits, such as building or sign permits.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2015/SMA-47(JY)

MINOR PERMIT:	SPECIAL MANAGEMENT AREA (SMA)
File Number:	2015/SMA-47
Project: (Valuation):	59-716 Kamehameha (Community Events and Retail Buildings) ($445,000)
Owner	Hanapohaku, LLC
Applicant/Agent:	Gregory A. Quinn
Location:	59-716 Kamehameha Highway - Pupukea
Tax Map Key:	5-9-11: 69
Zoning:	B-1 Neighborhood Business District
Date Received:	September 28, 2015

We have reviewed your proposal to construct community events and retail buildings, and find that it lies within the Special Management Area (SMA) established in Chapter 25, Revised Ordinances of Honolulu (ROH). We find that the proposed development has a stated valuation of less than $500,000 and will have no significant effect on the SMA. Therefore, an SMA Permit is hereby ***APPROVED***, subject to the following conditions:

1. Development site shall be in general conformance with the application documents (received on September 28, 2015), and as shown on plans and drawings attached hereto, which are now the approved plans for the project on file with the Department of Planning and Permitting (DPP). There shall be no modification to the approved plans for the project without prior review of and approval by the Director of the DPP. Major modifications shall require a new SMA (Minor) Permit.

2 If the actual valuation of the proposed work ultimately exceeds $500,000, then the project shall be returned to DPP for further review under Chapter 25, ROH.

3 This application has only been reviewed and approved pursuant to the provisions of ROH Chapter 25, and its approval shall not constitute compliance with the requirements of other governmental agencies. These are subject to separate review and approval. The Applicant shall be responsible for insuring that the final plans for the project approved under this permit comply with all applicable provisions and requirements of other government agencies, including compliance with the provisions of the Land Use Ordinance.

Exhibit E

4. If, during construction, any previously unidentified archaeological sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock, or coral alignments, pavings, or walls) are encountered, the Applicant shall stop work and contact the State Department of Land and Natural Resources, State Historic Preservation Division (SHPD) immediately. Work in the immediate area shall be stopped until SHPD is able to assess the impact and make recommendations for mitigative action.

5. The Director of the DPP may modify the conditions of this approval by imposing additional conditions, modifying existing conditions, or deleting conditions deemed satisfied upon a finding that circumstances related to the approved project have significantly changed so as to warrant a modification to the conditions of approval. In the event of the noncompliance with any of the conditions set forth herein, the Director of the DPP may terminate all uses approved under this permit or halt their operation until all conditions are met or may declare this permit null and void or seek civil enforcement.

The project is located along Kamehameha Highway across from Pupukea Beach Park. There are currently unpermitted improvements, i.e., concrete slabs and miscellaneous small structures. Our records show that this site was part of a large shopping/community center, but was not developed.

The lot gradually slopes down towards the highway. It is in Flood Zone D, areas where flood hazards are undermined, but possible. Some site work will be required in order to construct the three structures and parking lot. Approximately half of the property will be cleared and landscaped with no other proposed structures.

The Applicant proposes to remove the unpermitted improvements located in the front half. Three one-story buildings and a surface parking lot will be constructed in the rear. There is an existing shared driveway access to the community event pavilion (1,320 square feet), two retail buildings (820 square feet each), parking lot with 16 stalls, and one loading stall. The pavilion (halau) will be open on all sides with wood posts and Dutch gable roof. It will be used for outdoor dining. The retail buildings will each have a covered front porch and will be of wood construction with wood siding and shed roof with asphalt shingles.

Any person who is specifically, personally and adversely affected by the Director's action (in this case) and wants to appeal any part or requirement of the action may submit a written request for contested case hearing to the DPP within thirty (30) calendar days from the date of mailing, personal service, or publication of the action of the Director. Contested case hearings shall be conducted pursuant to Chapter 12 of the DPP Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area. Essentially, these Rules require that a petitioner show that the Director based his action on an erroneous finding of a material fact, and/or that the Director otherwise acted in an arbitrary or capricious manner, or there are extenuating circumstances. The filing fee for a contested case hearing is $400 (payable to the City and County of Honolulu).

A copy of this approval should accompany your application(s) for construction permits.

Should you have any questions, please contact Joette Yago of our Urban Design Branch at 768-8034 or via email at [redacted].

Enclosures: Receipt No. 104649 & 104650
Exhibits A thru D

cc: Office of Planning (Shichao Li)

Doc 1296371

THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

Anthony X. Chang — FOR Director — November 5, 2015

SIGNATURE | TITLE | DATE

This approval does not constitute approval of any other required permits, such as building or sign permits.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
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KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2015/SMA-24 (NI)

MINOR PERMIT:	SPECIAL MANAGEMENT AREA (SMA)
File Number:	2015/SMA-24
Project:	59-063 Pahoe Road – two new detached one-story retail buildings with covered patios, a new detached restroom building, landscape screening, paved parking lot expansion, and new loading area
Valuation	($484,000)
Landowners	Hanapohaku, LLC
Applicant/Agent:	Gregory A. Quinn, Architect
Location	59-063 Pahoe Road - Haleiwa
Tax Map Key:	5-9-11: 70
Zoning	B-1 Neighborhood Business District
Date Received:	May 11, 2015

We have reviewed the SMA Permit (Minor) application (received May 11, 2015), for expansion of retail operations including one-story retail buildings with covered patios, a detached restroom building, landscape screening, paved parking lot expansion, and a loading area at the above site (Exhibits A-1 through A-5). The Department of Planning and Permitting (DPP) finds that the above mentioned property is within the Special Management Area (SMA) established in Revised Ordinances of Honolulu (ROH) Chapter 25. We further find that the proposed development has a stated valuation of less than $500,000 and will have no significant effect on the SMA. Therefore, a minor permit is hereby APPROVED, subject to the conditions listed below.

1 Development shall be in general conformance with application documents (labeled as Exhibits A-1 through A-5), which are now the approved plans for the project, and have been made a part of the file. Any modification to the project and/or approved plans shall be subject to the prior review of and approval by the Director of the Department of Planning and Permitting (DPP). Minor modifications shall be processed in accordance with ROH Chapter 25. Major modifications shall require a new SMA Permit (Minor).

2 If the actual valuation of the proposed work ultimately exceeds $500,000, then the project shall be returned to the Department of Planning and Permitting for further review under ROH Chapter 25.

Exhibit F

3 If, during construction, any previously unidentified archaeological sites or remains (such as artifacts, shell, bone, or charcoal deposits, human burials, rock, or coral alignments, pavings, or walls) are encountered, the Applicant shall stop work and contact the State Department of Land and Natural Resources, State Historic Preservation Division (SHPD) immediately. Work in the immediate area shall be stopped until the SHPD is able to assess the impact and make recommendations for mitigative activity.

4. This application has only been reviewed and approved pursuant to the provisions of ROH Chapter 25 (Special Management Area), and its approval shall not constitute compliance with the requirements of other governmental agencies. These are subject to separate review and approval. The Applicant shall be responsible for insuring that the final plans for the project approved under this permit comply with all applicable provisions and requirements of other government agencies, including compliance with the provisions of the Land Use Ordinance (LUO).

5. The Director may modify the conditions of this approval by imposing additional conditions, modifying existing conditions, or deleting conditions deemed satisfied upon a finding that circumstances related to the approved project have significantly changed so as to warrant a modification to the conditions of approval.

6. In the event of the noncompliance with any of the conditions set forth herein, the Director may terminate all uses approved under this permit or halt their operation until all conditions are met or may declare this permit null and void or seek civil enforcement.

7. Artificial light from exterior light fixtures, including, but not necessarily limited to floodlights, uplights, or spotlights used for decorative or aesthetic purposes, shall be prohibited if the light directly or indirectly illuminates or is directed to project across property boundaries toward the shoreline and ocean waters, except as may otherwise be permitted pursuant to Section 205A-71(b), Hawaii Revised Statutes.

The project site is located at the corner of Kamehameha Highway and Pahoe Road, across from Pupukea Beach Park. Existing retail businesses on the property include the North Shore Surf Shop and Seamaid's Sportswear Boutique. As indicated in Exhibits A-1 through A-5, the Applicant proposes the following improvements:

(1) Construct two detached one-story retail buildings with covered patios (540 square feet and 120 square feet of covered patio);
(2) A detached restroom building (419 square feet);
(3) Site improvements, including 10 additional parking stalls;
(4) One separate loading area; and
(5) Landscape screening along Kamehameha Highway and Pahoe Road.

Ten new parking stalls are being proposed in addition to the six existing parking stalls. As indicated by Exhibit A-2, a total of 16 parking stalls will be available. A new separate loading area with a 20 foot-wide driveway access off of Pahoe Road will be developed at the facing toward the property identified as TMK: 5-9-11: 22 and shall remain separate from the parking lot

expansion. The new parking and loading areas will be screened and paved with an all-weather surface in compliance with LUO Sections 21-4.70 and 21-6.130.

As indicated by Exhibit A-2, the new restroom and two new retail buildings will be located adjacent to the proposed parking lot expansion. Heights of proposed and existing buildings are indicated by Exhibits A-3 to A-5. The two new retail buildings shall be of a "country" style wooden frame construction with a shed roof, emphasizing the wooden low-rise Haleiwa character, consistent with the Unilateral Agreement (UA) executed pursuant to the provisions of the zone change Ordinance 78-76.

Wastewater generated on the property is currently disposed of in an individual waste water treatment (WWT) system. These facilities are regulated by the State Department of Health (DOH). If needed, building permit application for the improvements will be sent to the State DOH for review for compliance with WWT.

As proposed, the project is not anticipated to result in substantial adverse environmental or ecological effect to coastal resources. Further development for the site will be evaluated pursuant to SMA requirements to determine the potential for cumulative impacts the need for additional permit requirements.

Background:

1. On July 25, 1978 the property owner executed a Unilateral Agreement (UA) in consideration of a pending zone change for the property from R-6 Residential District to B-1 Neighborhood Business District. The zone change (File number 77/Z-25) was approved by Ordinance 78-76, incorporating the unilateral agreement and conditions for development.

2. The UA had three commitments: (1) insurance that the design is "country-like" in style, emphasizing the wooden low-rise Haleiwa character; (2) installation of improvements on Pahoe Road and the intersection of Pahoe Road and Kamehameha Highway; and (3) the contribution of a pro-rata share of the cost of improving Kamehameha Highway.

3. On June 27, 2001, a Special Management Permit (SMP) minor, 2001/SMA-14 was approved to allow a trailer with a covered walkway to be used as a retail establishment (Seamaid's Sportswear), an off-street parking area.

4 On October 20, 2009, an SMP minor, 2009/SMA-54, for improvements to the existing buildings, relocation of the parking area and landscaping was approved. This SMP was modified on April 9, 2010, by correspondence file No. 2010/ELOG-578 to include a fence and gate for the Seamaid's Boutique retail establishment.

In addition to the UA, the North Shore Sustainable Communities Plan (SCP) establishes a policy for maintaining the rural character of the area, including community commercial centers

Accordingly, the Applicant will be required to submit development plans consistent with these provisions. Because this is required by the UA, a separate SMP condition is not needed.

Any person who is specifically, personally, and adversely affected by the Director's action (in this case) and wants to appeal any part or requirement of the action may submit a written request for a contested case hearing to the DPP within 30 calendar days from the date of mailing, personal service, or publication of the action of the Director of the DPP. Contested case hearings shall be conducted pursuant to Chapter 12 of the DPP Part 2 Rules Relating to Shoreline Setbacks and the Special Management Area. Essentially, these Rules require that a petitioner show that the Director of the Department of Planning and Permitting based his action on an erroneous finding of a material fact, and/or that the Director otherwise acted in an arbitrary or capricious manner, or there are extenuating circumstances. The filing fee for the contested case hearing is $400 (payable to the City & County of Honolulu).

We have enclosed a receipt for the application fee. Please contact Nicholas Ing of our staff at 768-8056 if you have any questions.

Enclosures: Receipt Nos. 102743 & 102735
Exhibits A-1 to A-5

cc Office of Planning (Shichao-Li)

\
THIS COPY, WHEN SIGNED BELOW, IS NOTIFICATION OF THE ACTION TAKEN.

SIGNATURE	TITLE	DATE
	Director	June 9, 2015

This approval does not constitute approval of any other required permits, such as building or sign permits

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE (808) 768 8000 • FAX: (808) 768 6041
DEPT WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2016/ELOG-923 (ASK)
2015/SMA-24
2015/SMA-47
2015/SMA-61

May 2, 2016

Mr. Gregory Quinn
45-427 Keikikane Loop
Kaneohe, Hawaii 96744

Dear Mr. Quinn:

SUBJECT Revocation of Minor Special Management Area (SMA) Use Permits and Withdrawal of Application for Revised Minor SMA Use Permit
Hanapohaku, LLC
59-706 and 712 Kamehameha Highway
and 69-063 Pahoe Road - Pupukea
Tax Map Key 5-9-11: 68, 69, and 70

This responds to your request received April 13, 2016, to "cancel" the Minor SMA Use Permits issued to Hanapohaku, LLC for the above properties and to withdraw a pending application seeking a site plan modification for Parcel 70

In accordance with the provisions of SMA ordinance, Section 25-9.7 Revised Ordinances of Honolulu, an SMP may be revoked by the Department of Planning and Permitting at the request of the permittee.

Therefore, by this letter, the permits identified by File Numbers 2015/SMA-24, 2015/SMA-47 and 2015/SMA-61, are hereby revoked. Consequently, all improvements which were authorized by these approvals must be removed, and the area restored to its pre-approval condition. Any outstanding violations associated with those approvals must also be resolved (i.e., grading, etc.). As requested, we are also closing the application received on March 3, 2016 (File No. 2016/ELOG-511) for a Minor SMP for the Tax Map Key 5-9-11 70

Should you have any questions, please contact Ardis Shaw-Kim of our staff at (808) 768-8021.

Very truly yours,

George I. Atta, FAICP
Director

cc: Hanapohaku, LLC
Malama Pupukea-Waimea

Exhibit G

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

DOCUMENT INDEX

FILE NO. 2016/SMA-32
PROJECT: Kapolei Parkway Commercial

INDEX NO.

1 Application
2 Receipt / Response
3
4
5
6
7
8
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Exhibit H

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT WEB SITE: www.honolulupdp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2016/SMA-36(ASK)

July 13, 2016

Mr. Gregory Quinn
45-427 Keikikane Loop
Kaneohe, Hawaii 96744

Dear Mr. Quinn:

SUBJECT: Minor Special Management Area (SMA) Permit No. 2015/SMA-36
59-712 Kamehameha Highway – Haleiwa
Tax Map Key (TMK): 5-9-11: 68

The Department of Planning and Permitting (DPP) has reviewed the above-named application, received May 31, 2016, and determined that, at this time, it cannot be processed as a minor SMA Permit for reasons stated below:

1. Based on the application materials, the Project is part of and a precursor to the redevelopment of the overall Project site, which is comprised of three lots (TMKs 5-9-11: 68, 69, and 70). While the application materials discuss only the proposed development on Parcel 68, it is not clear how the proposed improvements and activities will function independently from the other two lots. We are unable to determine, based on the information you provided, that the proposed development on Parcel 68 is independent of Parcels 69 and 70.

   Previously, the Applicant obtained three separate minor SMA approvals for the three lots, but later requested that the DPP rescind the approvals. Due to this history, any application for a minor SMA Permit for any of the three lots will have to clearly show how the proposed development is distinct and separate from the developments on the other sites or show that the combined lot project costs less than $500,000. Additionally, it is important to show that uses on all three sites are authorized and have the appropriate SMA and zoning approvals. For purposes of the SMA Ordinance, Chapter 25, Revised Ordinances of Honolulu (ROH), the uses and structures on all three lots must be clarified and shown to be independent before we can move forward with a minor SMA Permit for only one.

2. The application does not demonstrate that the Project is eligible for a minor SMA Permit as defined in Chapter 25-1.3, ROH, which states:

   "Special management area minor permit" means an action by the agency authorizing development, the valuation of which is not in excess of $500,000.00 and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects." (Emphasis added.)

Essentially, the minor SMA Permit application must demonstrate that there will not be any substantial adverse environmental or ecological impacts associated with the Project. If there are any such effects, the Project cannot be reviewed under the minor SMA Permit, because it requires a Major SMA Use Permit, even if the Project valuation is less than $500,000. Therefore, the permit application must address impacts to the coastal zone resources identified in the Hawaii Revised Statutes Chapter 205A and Chapter 25, ROH. This information was not included in your application.

Additionally, the proposed work on the three sites, if they are to operate as a unified Project, cannot be segmented and evaluated under multiple minor SMA Permits because we must evaluate the potential *cumulative* impacts of the Project as a whole. Therefore, unless the three sites will be designed to operate independently in the long run, the proposed development and Project valuation must be considered for the three sites together.

The improvements suggested by the Applicant, his attorney, and consultant at the meeting with the DPP on June 15, 2016 can help address the current Notices of Violation. We understand your continued interest in developing the lots independently of one another in the short term; however, the plan submitted on May 31, 2016 cannot be approved for reasons stated above. We understand that the owners have initiated planning for long range redevelopment of the property and will eventually seek a Major SMA Use Permit to implement this future plan. As such, we recommend that the Applicant pursue the Major SMA Use Permit process in order to adequately evaluate the potential coastal zone impacts of the development on the site.

Should you have any questions, please contact Ardis Shaw-Kim of our staff at 768-8021.

Very truly yours,

FOR

George I. Atta, FAICP
Director

Enclosure: Receipt 107942
Check No. 2492

cc: Hanapohaku

OFFICIAL RECEIPT

DEPARTMENT OF PLANNING AND PERMITTING 107942

CITY AND COUNTY OF HONOLULU

Honolulu, Hawaii, June 7, 2016

Received from

Gregory Anthony Quinn Architect

Two Hundred and no/100 DOLLARS

For 2016/SMA-36 app fee

Tax Map Key 5-9-011:068

$ 200.00

DEPARTMENT OF PLANNING AND PERMITTING

Bk # 2491

GREGORY ANTHONY QUINN, ARCHITECT
45-427 KEIKIKANE LOOP
KANEOHE, HI 96744

2492

DATE 5/31/16

CHECK AMB

PAY TO THE ORDER OF. City & County of Honolulu $ 400.00

Four Hundred and no/100 DOLLARS

Bank of Hawaii

FOR Application for SMA-31-411,062
Sign Minor

⑈002492⑈ ⑆121301028⑆ 0098 3 1 1 7⑈

2016/ED09-1358

Gregory A. Quinn

ARCHITECT

'16 MAY 31 P 3:29

LETTER OF TRANSMITTAL

May 31, 2016

Dircetor, Department of Planning and Permitting
City and county oif Honolulu
650 So. King Streret
Honolulu, Hawaii 96813

Re: '59-712 Kamehameha Highway
TMK: 5-9-011:068
59-712 Kamehameha Hiughwy
Haleiwa, Hawaii 96712

Items Delivered:

One master Application for a Minor SMA permit
Two checks for minor SMA Permit fees - application review fee ($200) and permit fee ($400)
Two full size and two 11x17 copies of plansd for proposed development
Two copies of a professionally prepared cost estimate for the work shown on the enclosed plans

[Type here]
45-427 Keikikane Loop **Ph. 236-3408**
Kaneohe, Hawaii 96744 **Fax 235-4289**

CITY AND COUNTY OF HONOLULU
DEPARTMENT OF PLANNING & PERMITTING
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

LAND USE PERMITS DIVISION MASTER APPLICATION FORM

Additional data, drawings/plans, and fee requirements are listed on a separate sheet titled "Instructions for Filing." ***PLEASE ASK FOR THESE INSTRUCTIONS.***

All specified materials described in the "Instructions for Filing" and required fees must accompany this form; incomplete applications will delay processing. You are encouraged to consult with Zoning Division staff in completing the application. Please call the appropriate phone number given in the "Instructions for Filing."

Please print legibly or type the required information.

SUBMITTED FEE: $ $600

PERMIT/APPROVAL REQUESTED (Check one or more as appropriate)

Cluster:
- ☐ Agricultural
- ☐ Country
- ☐ Housing

Conditional Use Permit:
- ☐ Minor ☐ Major

☐ **Existing Use:** _____ (Indicate Type of Use)

Environmental Document:
- ☐ Environmental Impact Statement
- ☐ Environmental Assessment
- ☐ Supplemental

☐ **Minor Shoreline Structure**

☐ **Modify Approved Permit:** _____ (Indicate Reference File No.)

☐ **Plan Review Use**

Planned Development:
- ☐ Housing
- ☐ Commercial (WSD Only)
- ☐ Resort (WSD Only)

☐ **Shoreline Setback Variance**

Special District Permit:
- ☐ Minor ☐ Major

_____ (Indicate District)

☐ **Downtown Height >350 Feet**

Special Management Area Use Permit:
- ☑ Minor ☐ Major

☐ **Temporary Use Approval**

☐ **Variance from LUO Section(s):** _____

☐ **Waiver from LUO Section(s):** _____

☐ **Zoning Adjustment, LUO Section(s):** _____

☐ **HRS Section 201H-38 Project**

TAX MAP KEY(S): 5-9-011:068
LOT AREA: 36,601 sf
ZONING DISTRICT(S): B-1 **STATE LAND USE DISTRICT:** Urban
STREET ADDRESS/LOCATION OF PROPERTY: 59-712 Kamehameha Hwy
Haleiwa, Hawaii 96712

RECORDED FEE OWNER:
Name (& title, if any) Haleiwa Land LLC
Mailing Address 561 Ahina Street
Honolulu, Hawaii 96816
Phone Number 808-958-8854
Signature _____
PRESENT USE(S) OF PROPERTY/BUILDING:
Real estate office and Dental Office

PROJECT NAME (if any): _____

APPLICANT:
Name Gregory A. Culley, Architect
Mailing Address 45-427 Kokokahi Loop
Kaneohe, Hawaii 96744
Phone Number 808-[illegible]
Signature _____
AUTHORIZED AGENT/CONTACT PERSON:
Name Gregory A. Culley, Architect
Mailing Address 45-427 Kokokahi Loop
Kaneohe, Hawaii 96744
Phone Number 808-[illegible]
E-mail [illegible]@hotmail.com
Signature _____

REQUEST/PROPOSAL (Briefly describe the nature of the request, proposed activity or project):
The property contains two buildings with interior floor area and an existing carport. A deck has been constructed in the front of the existing real estate office without a permit and has been issued a Notice of Violation. The major permit is to allow a building permit approval for that work. Also included in this application is improvements to an existing building converting a dentist's office to an eatery and retailing establishment with outdoor seating and three prefab container buildings to house kitchens to support food truck operations. This is an interim development while a major SMA permit is being planned.

POSSE JOB NO. Folder/SMA-3[illegible]

REV. 2/20/2018

Gregory A. Quinn

ARCHITECT

'16 MAY 31

May 31, 2016

Director, Department of Planning and Permitting
City and county of Honolulu
650 So. King Street
Honolulu, Hawaii 96813

Re: 59-712 Kamehameha Highway
TMK: 5-9-011:068
59-712 Kamehameha Highway
Haleiwa, Hawaii 96712

Written Narrative

Parcel History:

A development was proposed which resulted in a Unilateral Agreement under which certain development concerns regarding traffic and design were addressed.

The previous owner had applied for and was granted an SMA permit for relocating a dwelling and converting it to an office in 1984 (84/SMA-65). Building permit number 207976 was issued for the work.

Permit number 505722 was issued to upgrade the electrical service to an existing building.

The parcel is a recently created parcel established in a consolidation and subdivision process in 2009 (2009/SUB-100). Prior to this action the property address was the same as it is now (59-712 Kamehameha Hwy) and the previous Tax Map Key was 5-9-011:034. Two additional addresses have been added for the buildings both proposed and existing (the restaurant building has changed from 59-712-A to 59-714 Kamehameha Hwy). The building proposed under the previously approved SMA permit was given address of 59-716 Kamehameha Hwy)

The owners applied for and obtained a minor SMA permit for a similar list of improvements (2015/SMA-08) then revised that plan for a subsequent permit (2015/SMA-061). Those permits were associated with similar improvements on the two adjacent parcels between this lot and Pahoe Road. It was viewed by the community to be a sequential development exceeding the limits of development allowed under a minor SMA permit and a request was filed for a contested case hearing. The owner's asked to rescind the minor SMA permits issued for the three lots. The community asked that a major SMA application be made to address cumulative impacts of traffic and environmental issues. That process has begun and the owners are negotiating a contract with another planning firm at this time.

[Type here]
45-427 Keikikane Loop **Ph. 236-3408**
Kaneohe, Hawaii 96744 **Fax 235-4289**

Project Description:

The proposed development is an interim solution to correct a violation issued for improvement to a structure originally included in an SMA permit issued in 1984 (84/SMA-65). The work is a twelve by twenty foot wood deck with a guardrail raised above ground accessed by a wood stair. Plans have been submitted to DPP by eplans in November 2014 (A2014-12-0081) to address the violation for building the deck prior to obtaining a building permit.

Also included in this application is an addition to an existing building converting it from a dentist's office to an eating and drinking establishment with kitchen facilities. The building permit for this restaurant alteration/addition was applied for in August of 2015 (A2015-08-0156). The restaurant use is a necessary preliminary improvement to maintain the economic viability of the property while the owners receive input from the community giving direction for development in future Major SMA Application process. It is very important to these owners to allow adequate community opinion as to what future development should be.

Also proposed is a parking lot with four parking stalls in the front to accommodate the real estate office and another parking lot with eight parking stalls in the rear to accommodate the restaurant. The restaurant will also have facilities to serve as a commissary for offsite food truck operations. The plans show additional structures to service the food truck community of the North Shore in the way of two pre-fab container storage buildings one of which will be refrigerated. A paved trash enclosure will be provided to service the uses on site.

A WaiponoPure wastewater system has already been installed. It will service the two buildings one tank serves the real estate office and two tanks will serve the restaurant. The system was designed to accommodate the proposed restaurant.

Landscaping will be provided throughout the occupied areas. The rear of the property will remain as undeveloped existing vegetation.

CITY AND COUNTY OF HONOLULU
Department of Planning and Permitting (DPP)

Aloha. We provide services and information on building permits, development projects, and planning activities for the City and County of Honolulu.

Permitting Searching DPP Home Sign In

Building Permit Search

Application Number	Building Permit No.	Issue Date	TMK	Status	Description
[illegible]/IBP12168		mmm dd, yyyy	59011068	POSSE BP subjob created	(TMK: 59011068) Hawaii Realty Professionals Building Permit
2014/IBP12594		mmm dd, yyyy	59011068	POSSE BP subjob created	(TMK: 59011068) Hawaii Realty Professionals - Sign Permit
2015/IBP08173		mmm dd, yyyy	59011068	POSSE BP subjob created	(TMK: 59011068) 59-712 A Kamehameha Hwy / 59-712 A Kamehameha - Alteration to existing office, change of use from dental office to food establishment - Building Permit
2015/IBP12340		mmm dd, yyyy	59011068	POSSE BP subjob created	(TMK: 59011068) 59 716 KAMEHAMEHA / 59-716 Kamehameha Hwy - Building Permit
A2014-12-0081		mmm dd, yyyy	59011068	Plans review in progress	(TMK: 59011068) Hawaii Realty Professionals - New deck addition to existing Office Building
A2015-08-0156		mmm dd, yyyy	59011068	Plans review in progress	(TMK: 59011068) (6/44) 59 712 & 59-712/A Kamehameha - Alteration/Addition to convert ex carport to outdoor dining area; change of use from dental office to eating/drinking establishment including alterations and a new outdoor deck dining addition
A2015-[illegible]531		mmm dd, yyyy	59011068	Job Cancelled	(TMK: 59011068) (2/6) 59-716 KAM HWY - NEW RETA BUILDING.

Submit Save as Excel Search again Go Back

City and County of Honolulu, Department of Planning & Permitting
650 So. King St., Honolulu, HI 96813 • Fax: (808) 768-6743
email: [illegible]

Screen ID: [illegible]

CITY AND COUNTY OF HONOLULU
Department of Planning and Permitting (DPP)

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Permitting Searching DPP Home Sign In

Tax Map Key

Other Permits

Permit Type	Permit No.	Description	Status	Created Date	Issue Date
Land Permit Applications	[illegible]		Created	Dec 13, 2010	mmm dd, yyyy
Notice of Violation	2014/NOV-10-229	(V 59-712 Kamehameha Hwy (link:5901068) Illegal work done unpermitted deck was built and dredging work to put in a water and sewer line well. Please investigate	Draft NOV Reviewed	Oct 29, 2014	mmm dd, yyyy
Special Management Area Minor SMP1	2015/SMA-61	SMA (Minor) Permit Application - 59-712 Kamehameha Hwy - Revised Parking Layout Haleiwa Check 2419 ($100.00) Check No 2399 ($400.00) and No 2398 ($200.00)	Approval letter mailed	Dec 22, 2015	mmm dd, yyyy
Special Management Area Minor SMP	2015/SMA-8	SMA Permit (Minor) Application - Proposed Restaurant - Haleiwa Check No 2226 ($400.00) and No 2227 ($200.00)	Approval letter mailed	Feb 27, 2015	mmm dd, yyyy

Cancel

City and County of Honolulu, Department of Planning & Permitting
650 So. King St., Honolulu, HI 96813 • Fax: (808) 768-6743
email: [redacted]

Screen ID: 750040

CITY AND COUNTY OF HONOLULU
Department of Planning and Permitting (DPP)

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Permitting Searching DPP Home Sign In

Tax Map Key

Type	No		Status	Created	
Land Permit Applications	77/?-25		Created	Dec 13, 20??	mmm dd, yyyy
Land Permit Applications	84/SMA-65	RELOCATION OF DWELLING TO CONVERTED OFFICE BLDG	Approved	Aug 9, 1984	Aug 9 1984
Land Permit Applications	84/ZBA-127	USE REGULATIONS	WITHDRAWN	Aug 20 1984	Jan 10, 1985

Submit Cancel

City and County of Honolulu, Department of Planning & Permitting
650 So. King St., Honolulu, HI 96813 • Fax: (808) 768-6743
email: [redacted]

Version 7500.10

CITY AND COUNTY OF HONOLULU
Department of Planning and Permitting (DPP)

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Permitting Searching DPP Home Sign In

Tax Map Key

TMK:	5-9-011:034	POID:	1954
Historical TMK Sequence:	99	Tax Pin:	1954
Area (sq ft):	11250		
Area (acres):	0.258		
Lot Number:			
Ohana:	(None)		

PARCEL INFO

Type	Description
Lot Restriction	None
Slide Area	None
Street Setback	NONE

FACILITIES

Facility Code	Year Built	[illegible]
01 - Single Family Dwelling	1955	0
01 - Single-Family Dwelling	1955	0

TMK SEPARATIONS

Activity Code	Census Tract	Census Block
01 - HOUSEHOLD DWELLING	10100	201

Address List:

59-712 - A KAM HWY
59-712 KAM HWY

Submit

City and County of Honolulu, Department of Planning & Permitting
650 So. King St., Honolulu, HI 96813 • Fax: (808) 768-6743
email: [illegible]

CITY AND COUNTY OF HONOLULU
Department of Planning and Permitting (DPP)

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Permitting Searching DPP Home Sign In

Building Permit (pre 1999)

Building Permit	207956	Relocation Suffix:	
Application Number:	A1984-09-0239		
Description:	JOHN DUBIEL AL,EL,PL		
Issued Date:	May 22, 1985	Created Date:	May 22, 1985
Status:	Completed	Completed Date:	Jul 18, 1986
Job Location:	59-712/A KAM HWY		

Tax Map Key

Warning

Display Format
2ND NOT CURRENT *** TMK 5-9-011:034-99 [11250 sq ft] 0.258 ac POID= 1954 59 712 KAM HWY Holdings 06/12/01/01/1800 to 06/16/2011
TAXPIN = 1954

Details

Project Name:	JOHN DUBIEL
Owner Name:	JOHN DUBIEL
Plan Maker:	P M. TROEGER
Contractor:	JEFFREY JOHNSON
Electrical Contractor:	BEHLING INC
Plumbing Contractor:	DEBBIE'S ANGELS (20260)
Accepted Value:	3500
Occupancy Group Category:	B-2 OFFICE
Occupancy Group:	12 - Office Building
Structure Code:	11 - OFFICE, 1 TO 3 STORIES
Construction Type Actual:	VN
Construction Type Min:	VN
Number Of Stories:	1
Total Floor Area:	0
Ownership Type:	Private

Residential Units / Hotel Rooms (Code: A=Add; D=Delete)

Hotel Room Code:	
Number of Rooms:	
Residential Units Code:	
Number of Units:	

Inspections (RC=Received; CP=Completed; NA=Not Applicable)

	Code	Date
Building Code Inspection:	CP	Jul 18, 1986
Electrical Code Inspection:	CP	Mar 19, 1986
Plumbing Code Inspection:	CP	May 20, 1986

Type of Work

☐New Building	☐Repair	☑Plumbing Work
☐Foundation Only	☐Demolition	☐Other Work
☐Shell Only	☐Fence	
☐Addition	☐Retaining Wall	
☑Alteration	☑Electrical Work	

☐Sidewalk ☐Curb ☐Driveway

Cancel

City and County of Honolulu, Department of Planning & Permitting
650 So. King St., Honolulu, HI 96813 • Fax: (808) 768-6743
email: [redacted]

J. UNO & ASSOCIATES

CONSTRUCTION COST CONSULTANTS

PROJECT NAME:	**HANAPOHAKU MINOR SMA PERMIT STUDY**
LOCATION:	**59-712 KAM HWY HALEIWA, OAHU, HAWAII**
TMK:	**5-9-011:068**
DATE:	**5/23/2016**
PROJECT NO:	**15-042**
PREPARED FOR:	**GREGORY QUINN**
SUBMITTAL:	**PERMIT STUDY**

J. UNO & ASSOCIATES, INC. | 1210 Ward Avenue, Suite 204 | Honolulu, Hawaii 96814 | Telephone: 808.947.6855 | www.j-uno-associates.com

C O S T A N A L Y S I S

PROJECT:	HANAPOHAKU MINOR SMA PERMIT STUDY			ESTIMATE NO.	
LOCATION:	59-712 KAM HWY HALEIWA, OAHU, HAWAII	PROJECT NO.:	15-042	DATE:	5/23/2016
ARCHITECT:	GREGORY QUINN	SUBMITTAL:	PERMIT STUDY	CHECKED BY:	
QUANTITIES BY:	T. UNO	PRICES BY:	T. UNO	DATE CHECKED:	

DESCRIPTION	QTY	UNIT	TOTAL UNIT COST	TOTAL TOTAL

PROJECT SUMMARY

PROJECT ASSUMPTIONS AND CONDITIONS

The quantity takeoffs and resulting cost estimate were made including, but not limited to, the following assumptions:

1.) Kitchen equipment by others.
2.) Lead wall lining at existing dental office to be abated.
3.) Existing waste line to cesspool.
4.) Existing overhead electrical service sufficient. Assume 200A to restaurant building.

1. CIVIL / SITEWORK	1560	SY	$90.61	$141,353
2. EXISTING REAL ESTATE OFFICE	580	SF	$39.48	$22,896
3. EATING & DRINKING ESTABLISHMENT RENOVATION	587	SF	$413.85	$242,930
SUBTOTAL, PROJECT				**$407,178**
GENERAL CONDITIONS,	10%			$40,718
PRIME CONTRACTORS MARK UP,	5%			$22,395
BONDS & INSURANCE,	1.5%			$7,054
G.E. TAX,	4.712%			$22,493
TOTAL ESTIMATED COST,				**$499,838**
ROUNDED,	**1**	**LS**		**$500,000**

C O S T A N A L Y S I S

PROJECT:	HANAPOHAKU MINOR SMA PERMIT STUDY		ESTIMATE NO:
LOCATION:	59-712 KAM HWY HALEIWA, OAHU, HAWAII	PROJECT NO.: 15-042	DATE: 5/23/2016
ARCHITECT:	GREGORY QUINN	SUBMITTAL: PERMIT STUDY	CHECKED BY:
QUANTITIES BY:	T. UNO	PRICES BY: J. UNO	DATE CHECKED:

DESCRIPTION	QTY	UNIT	TOTAL UNIT COST	TOTAL
1. CIVIL/SITEWORK				
Clear & Grub	1233	sy	$7.00	$8,631
Parking Lot Paving, Incl. Base Course	790	sy	$60.85	$48,072
Parking Lot Striping	12	stalls	$50.00	$600
Site Utilities				
New 2" Copper Water Line	190	lf	$45.00	$8,550
Backflow Preventer	1	ea	$3,000.00	$3,000
Water Line Connection	1	ea	$2,500.00	$2,500
Waipono Pure Advanced Treatment Unit	1	ea	$60,000.00	$60,000
Grease Intercepter	1	ls	$10,000.00	$10,000
SUBTOTAL, CIVIL/SITEWORK	**1560**	**SY**	**$90.61**	**$141,353**
2. EXISTING REAL ESTATE OFFICE				
Concrete Stair Landing	1	cy	$675.00	$675
Wood Deck, Railing & Stairs	246	sf	$55.00	$13,530
Renovate Restroom	1	ls	$6,000.00	$6,000
Paint Exterior	961	sf	$2.80	$2,691
SUBTOTAL, REAL ESTATE OFFICE	**580**	**SF**	**$39.48**	**$22,896**
3. EATING & DRINKING ESTABLISHMENT RENOVATION				
Demolition				
Demolish & Remove Dental Office Interior	587	sf	$8.00	$4,696
Demolish & Abate Lead-Lined Walls	120	sf	$20.00	$2,400
Demolish & Remove Existing Exterior Stair & Landing	49	sf	$15.00	$735
Renovation				
Concrete Stair Landings	1	cy	$675.00	$675
Wood Deck, Railing & Stairs	1310	sf	$55.00	$72,050
Paint Exterior	1030	sf	$2.80	$2,884
Commercial Kitchen Interior, Finishes only	279	sf	$95.00	$26,505
Dining Room Interior	213	sf	$45.00	$9,585
Restroom Interior	80	sf	$80.00	$6,400
Commercial Kitchen Addition	150	sf	$150.00	$22,500
Concrete Slab On Grade For Storage Buildings	330	sf	$15.00	$4,950
Container Commissary Building	1	ea	$25,000.00	$25,000
Container Storage Building, Dry Storage	1	ea	$5,625.00	$5,625
Container Storage Building, Cold Storage	1	ea	$16,250.00	$16,250
Mechanical, Plumbing	7	fixtures	$4,000.00	$28,000
Electrical	587	sf	$25.00	$14,675
SUBTOTAL, EATING & DRINKING ESTABLISHMENT	**587**	**SF**	**$413.85**	**$242,930**

2 LOCATION MAP
001 SCALE : NOT TO SCALE

1 VICINITY MAP
001 SCALE : NOT TO SCALE

SHEET INDEX – ARCHITECTURAL

SHEET NO	PAGE NO.	DESCRIPTION
001	1	TITLE, SHEET INDEX, VICINITY MAP LOCATION MAP, PROJECT DATA TABLE
A-101	2	SITE PLAN
A-102	3	BUILDING FLOOR PLANS,
A-103	4	BUILDING FLOOR PLANS,
A-201	4	BUILDING EXTERIOR ELEVATIONS

OFFICE, EATING AND DRINKING ESTABLISHMENT, OUTDOOR DINING FOR FOOD TRUCK USE.

TMK	LOT SIZE	ADDRESS:	FAR:	MAX ALLOWABLE FLOOR AREA:	NEW TOTAL FLOOR AREA:
5-9-011: 058	38,801 SF	58-712, 58-714, & 58-718 KAMEHAMEHA HWY	1.0	37,590 SF	4,578 SF

– NOT COUNTED FOR PARKING)	240 SF		
COVERED OUTDOOR SEATING	356 SF	356/400=0.89	0.9 STALLS
RESTAURANT – 58-714 KAMEHAMEHA HWY			
EXISTING LAND USE : DENTAL OFFICE			
PROPOSED LAND USE : EATING AND DRINKING ESTABLISHMENT	348 SF	598/400=1.49	
ADDITIONAL INTERIOR FLOOR AREA:	150 SF	150/400=0.375	
PROPOSED LAND USE : OUTDOOR DINING	2,388 SF	2238/400=5.75	
			7.6 STALLS
COMMISSARY/KITCHEN – 58-718 KAMEHAMEHA HWY (INCLUDES COLD AND DRY STORAGE)			
PROPOSED LAND USE : EATING AND DRINKING ESTABLISHMENT	840 SF	840/400=1.5	1.5 STALLS
GROUND TOTAL	4,578 SF	4,835/400=11.5	11.5 PVG STALLS 12 PVG STALLS

LOADING REQUIREMENTS – ONE LOADING STALL FOR LESS THAN 10,000 SF MIXED USE
LOADING PROVIDED ONE 12'X35' LOADING STALL

per Greg Quinsey Architect

PROPOSED [redacted] MINOR SMA PERMIT FOR:

59-712 KAMEHAMEHA HWY

Gregory A. Quinsey ARCHITECT

EXP 4/18

PRELIMINARY DESIGN

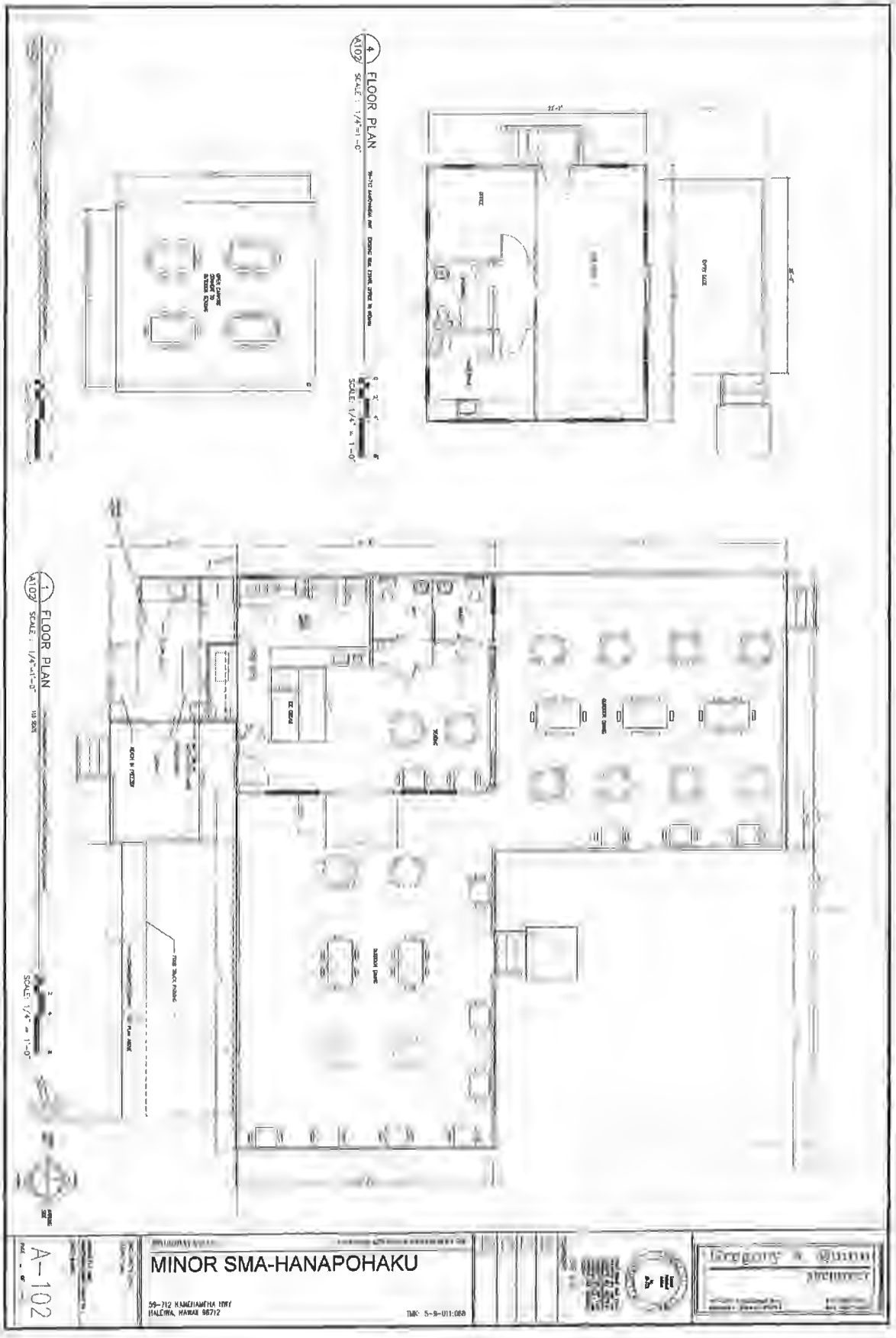
MINOR SMA-HANAPOHAKU

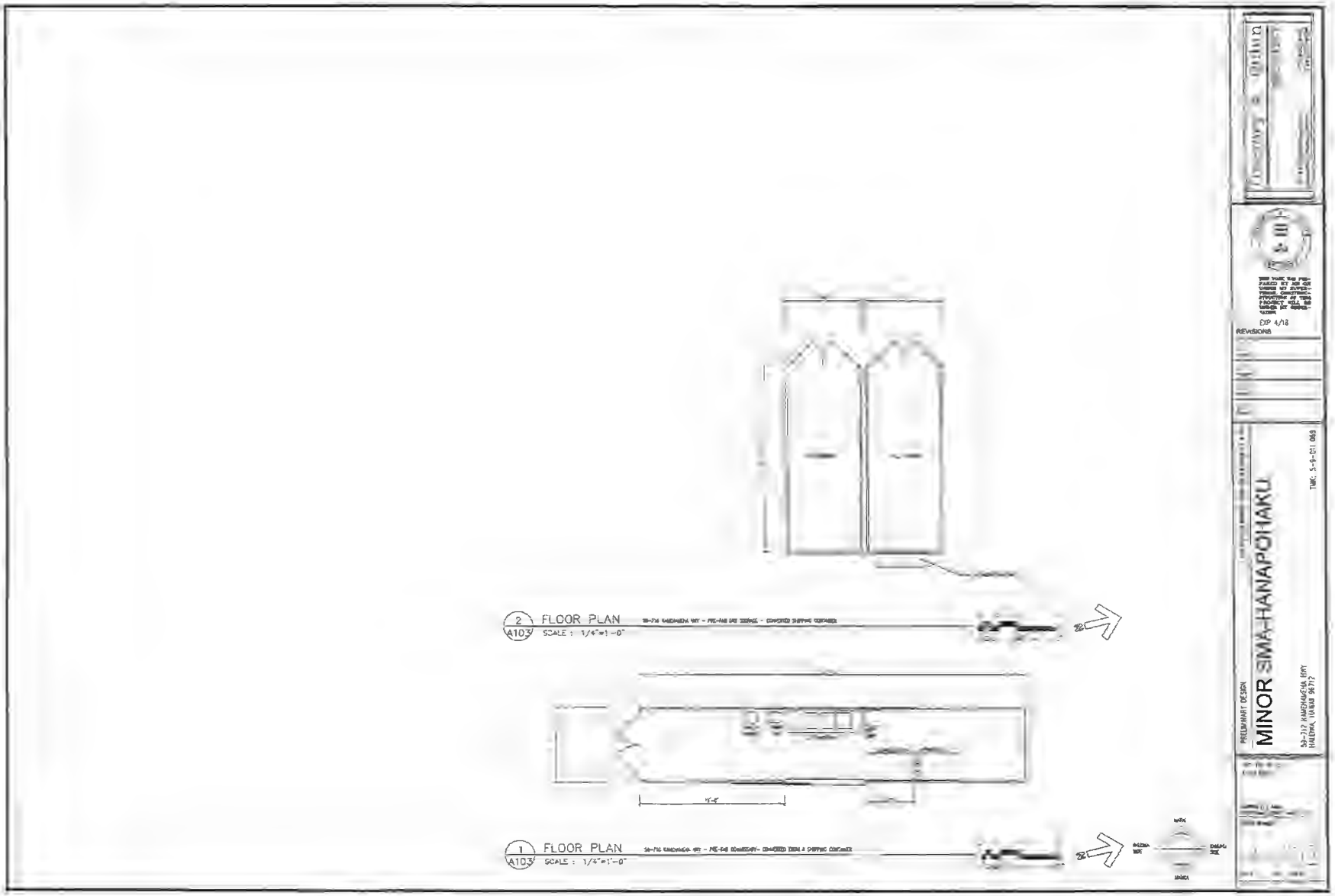
59-712 KAMEHAMEHA HWY
HALEIWA, HAWAII 96712

TMK: 5-9-011:058

001

SITE PLAN
SCALE: 1" = 20'-0"
SCALE: 1" = 20'-0"
PRELIMINARY DESIGN
PROPOSED MINOR SMA DEVELOPMENT FOR:
MINOR SMA-HANAPOHAKU
59-712 KAMEHAMEHA HWY
HALEIWA, HAWAII 96712
TMK: 5 9 011:068
REVISIONS
5-9-011:68


4 A102 FLOOR PLAN
SCALE: 1/4"=1'-0"
1 A102 FLOOR PLAN
SCALE: 1/4"=1'-0"
MINOR SMA-HANAPOHAKU
59-712 KAMEHAMEHA HWY
HALEIWA, HAWAII 96712
TMK: 5-9-011:088
A-102


2 A103 FLOOR PLAN
SCALE : 1/4"=1'-0"
1 A103 FLOOR PLAN
SCALE : 1/4"=1'-0"
PRELIMINARY DESIGN
MINOR SMA-HANAPŌHAKU
TMK: 5-4-011:068

3 A201
EXTERIOR ELEVATIONS
SCALE : 1/8"=1'-0"
SCALE: 1/8" = 1'-0"
SCALE : 1/8"=1'-0"
SCALE 1/8" = 1'-0"
PRELIMINARY DESIGN
PROPOSED MINOR SMA DEVELOPMENT FOR:
MINOR SMA-HANAPOHAKU
56-712 KAMEHAMEHA HWY
HALEIWA, HAWAII 96712
TMK : 9-01 068
A-201
Gregory
ARCHITECT

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE www.honolulu.gov • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

2016/ELOG-110(ASK)
2016/ELOG-214

August 29, 2016

The Honorable Gil Riviere, Senator
The Senate
State Capitol
415 South Beretania Street, Room 217
Honolulu, Hawaii 96813

Dear Senator Riviere:

Subject: Sharks Cove Commercial Development Update
59-712 Kamehameha Highway (Parcel 68)
59-706 Kamehameha Highway (Parcel 69)
59-063 Pahoe Road (Parcel 70) – Pupukea
Tax Map Keys 5-9-11: 68, 69, and 70

Thank you for your letters of January 11 and 26, 2016, regarding development on three lots located at the addresses listed above. This letter is to provide an update on the status of the past and pending permitting activity considered by the Department of Planning and Permitting (DPP) for the sites. We apologize for the delay in our reply. Please be assured we have been consistently working toward a resolution for these sites and hope to find an acceptable solution as we move forward.

On May 2, 2016, the DPP revoked three Minor Special Management Area (SMA) permits that had been issued at separate times for development on the three properties. Subsequently, on May 31, 2016, we received a Minor SMA application (No. 2016/SMA-36) for modifications of and additions to the commercial structures located on Parcel 68. The application indicated the owner planned to prepare a Major SMA Use permit application for redevelopment of all three of the properties together, but sought a Minor SMA permit in the interim.

Based on the history of the site and the available information, the DPP did not accept this Minor SMA permit application for processing and returned it to the Applicant. The notice, dated July 13, 2016, informed the Applicant that the appropriate remedy for the outstanding violations and future development is to obtain a Major SMA Use permit, which also requires an Environmental Assessment. Further, we notified the Applicant that pending violations cannot be

Exhibit I

corrected through Minor SMA permits, but must be sought through other means, such as removal of all unauthorized structures and uses or approval of a Major SMA Use Permit by the City Council.

On March 9, 2016, we received a request for a contested case hearing related to the Minor SMA permits, which were subsequently revoked. Even though the Minor SMA permits granted to the Applicant are null and void, the requestor of the contested case has not withdrawn its petition, so the contested case will be scheduled when the DPP secures a hearing officer to preside over the case.

DPP's enforcement actions will proceed and the owner may continue with the permitting steps needed to implement the development plans for the properties. Many of the concerns of the community, including those related to project segmentation and cumulative impacts, will be addressed during the Environmental Assessment and Major SMA Use permit processing should an application be submitted to DPP. Further, preliminary traffic studies will be a necessary component of the Environmental Assessment, and a public hearing will be held by both the DPP and the City Council during the processing of the Major SMA Use permit.

We hope this helps answer your questions. Please do not hesitate to contact me at 768-8000 should you have any questions.

Very truly yours,

George I. Atta, FAICP
Director

DEPARTMENT OF PLANNING AND PERMITTING

CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET * HONOLULU, HAWAII 96813
Fax: (808) 768-4400

Notice of Violation

Violation No.: **2016/NOV-12-137 (SV)** Date: **January 23, 2017**

Owner(s)
HANAPOHAKU LLC., Andrew Yani
526 Ahina Street
Honolulu, HI 96816

Contractor(s)	Tenant/Violator	Architect/Pro Maker
Lessee	Agent	Engineer

TMK: **5-9-011:068 59-712 KAM HWY Haleiwa 96712**
5-9-011:069 59-706 KAM HWY HALEIWA 96712
5-9-011:070 59-53 PAHOE RD Haleiwa 96712

Specific Address of Violation: **59-712 Kam Hwy; 59-706 Kam Hwy; 59-053 Pahoe Rd**

I have inspected the above-described premises and have found the following violations of City and County of Honolulu's laws and regulations governing same:

Codes and/or Ordinance(s) and Section(s)	Violation(s)
ROH 1990, as amended, Chapter 25 Section 25-6.1	**Multiple violations in Special Management Area without a Special Management Area (SMA) permit. Structures including food trucks, shipping containers, loading docks, septic tanks, wooden decks and stairs, tents, eating areas with tables and benches, signs and sheds, temporary toilets, fences, walls, parking areas and all other structures which have not been permitted must be removed. Grading has been undertaken without the required permit. Commercial activities which lack a SMA permit must cease** **Please correct all of the violations cited above and restore the site to the original conditions allowed by approved permits within the time specified below.**

STOP WORK! You are hereby ordered to stop illegal work immediately.
Please call the undersigned after the corrections have been made.

IMMEDIATE REFERRAL: Recurring Violation

You are reminded that if no action is taken within the specified time:

1. A Notice of Order will be issued by the Department of Planning and Permitting imposing CIVIL FINES for the specified violations; and/or
2. This matter may be referred to the Prosecuting Attorney and/or Corporation Counsel for appropriate action.

Special Instructions:

Inspector: Steve Cheung
Steve Cheung Phone: 768-8114
for the Director Department of Planning and Permitting

Exhibit J

JobId: 59063320 ExternalId: 059063320-001

Initial Print Date: Monday January 23, 2017 12:36 pm

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honolulu.gov • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7016 2710 0000 8740 1060

NOTICE OF ORDER

NO.: 2017/NOO-082 DATE: February 2, 2017

TO: Owner/Contractor/Lessee/Tenant:
Owner: Hanapohaku LLC
Attn: Andrew Yani
520 Ahina Street
Honolulu, Hawaii 96816

Address of Violation: 59-712 Kamehameha Highway - Haleiwa
59-706 Kamehameha Highway – Haleiwa
59-053 Pahoe Road – Haleiwa

Tax Map Key: 5-9-011: 068 (POID 491033)
5-9-011: 069 (POID 491032)
5-9-011: 070 (POID 491031)

Description: There are multiple violations in Special Management Area (SMA) without an SMA Use Permit. Structures include food trucks, shipping containers, loading trucks, septic tanks, wooden decks and stairs, tents, eating areas with tables and benches, signs and sheds, temporary toilets, fences, walls, parking areas, and all other unpermitted structures. Grading work was undertaken without the required permit. Commercial activities lack an SMA Use Permit.

The Department of Planning and Permitting (DPP) inspected the above-described structure(s) and/or premises and found a violation of one or more ordinances of the City and County of Honolulu. As a result, Notice of Violation (NOV) 2016/NOV-12-137 was issued on January 23, 2017 (copy attached). As of the date of this order, the violation described in the NOV has not been corrected. Because this is a recurring violation, accordingly, pursuant to the authority granted by the Revised Ordinances of Honolulu, you are hereby ordered to:

1. Pay a fine of $2,000 by March 30, 2017

Exhibit K

2. Correct the violation by March 14, 2017. If corrective action has not been completed by this date, a daily fine of $500 will be assessed until the correction is completed. You are responsible for contacting the inspector, Steve Cheung at (808) 768-8114, to verify the corrective action.

Checks (with the Notice of Order number noted on it) are payable to the City and County of Honolulu, and should be mailed or delivered to the Department of Planning and Permitting, 650 South King Street, 8th Floor, Honolulu, Hawaii 96813.

If the fine is not paid by the due date, this matter may be referred to the Department of the Corporation Counsel for civil remedy and/or the Prosecuting Attorney's Office for criminal prosecution. When this order becomes final, all unpaid civil fines imposed by this order shall be added to the taxes, fees, and charges specified in Section 20-3-4 of the Department of Planning and Permitting's Rules Relating to Administration of Codes. Such taxes, fees, and charges include, but are not limited to, driver's license and vehicle registration fees, fees for permits issued under the City Land Use Ordinance (e.g., sign permits, conditional use permits, and variances) and fees for building, demolition, grading, grubbing, stockpiling, trenching, and excavation permits.

If the order is issued to more than one person, each person shall be jointly and severally liable for the full amount of any fine imposed by the order.

This order shall become final thirty (30) days after mailing. Before such time, any person affected by this order may file an administrative appeal of any provision in this order. Appeals shall include all appropriate remedies and may address the addition of unpaid fines to taxes, fees, or charges collected by the City. The failure to appeal this order within the specified time may result in a waiver of the right of appeal. An appeal does not suspend any provision of the order, including the imposition of the civil fines. Copies of the appeal rules are available at the DPP and Office of the City Clerk.

Should you have any questions regarding this order, please contact our Code Compliance Branch at (808) 768-8110.

Kathy K. Sokugawa
Acting Director

KKS:ff

Attachment

[1426822]

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

DOCUMENT INDEX

FILE NO. 2017/SMA-14
PROJECT: Hanapohaku Food Trucks ETC.

INDEX NO.

1 Application and receipt

2 Cost Estimate

3 Stormwater Infrastructure Maps

4 DPP Response

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14

15

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Exhibit L

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT WEB SITE: www.honolulu.gov/dpp • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

2017/SMA-14(ASK)

NOTICE OF INCOMPLETE APPLICATION

File No.:	2017/SMA-14
Applicant:	Hanapohaku LLC
Agent:	G70
Location:	59-706 and 59-712 Kamehameha Highway and 59-53 Pahoe Road – Pupukea
Tax Map Keys:	5-9-011: 068, 069 and 070
Received:	April 19, 2017
Request:	Special Management Area (SMA) Minor Permit to allow (retain) existing commercial activities including food trucks, after-the-fact grading and grubbing, construction of a parking lot, installation of an individual wastewater system, and the establishment of outdoor, covered eating and drinking areas.

The application cannot be accepted because it is incomplete. The application materials did not demonstrate that the Project is eligible for a minor SMA Permit as defined in Chapter 25-1.3, Revised Ordinances of Honolulu (ROH), which states:

> *"Special management area minor permit" means an action by the agency authorizing development, the valuation of which is not in excess of $500,000.00, and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects.*

The following list specifies the information needed for a complete application.

1. Based on the application materials, the estimated cost is appears to be below $500,000, at about $346,875. However, it appears the value of the food trucks was not included. If the food trucks leave the site each day, the application should specify that, and the value of the trucks will not need to be added to the total Project valuation. If, on the other hand, the food trucks will regularly remain in place for days at a time or cannot move at all, the value of the trucks must be included in the Project valuation. In site visits last year, we were led to believe that the trucks do not move on a daily basis, and in fact

rarely move at all. If this is the case, the application should clearly say so. If the new proposal involves daily movement of the trucks, the application should indicate where they will be parked every evening.

2. Figure 4, the Existing Use Plan, specifies which structures were "pre-existing" in 2014. This plan should also label when the authorized structures received SMA and/or building permit approval. The description of the proposed action on page 5 limits the discussion to development actions completed during the period of 2014 to 2016. This should be expanded to include all development on the site that is not authorized or nonconforming. We note the Shark's Cove Grill was not listed as having been authorized, and based on site inspections, it does not appear to be moveable. If that is the case, it should be explicitly added to the SMA Minor Permit request. Further, the application should specify any existing structures that will require after-the-fact building permit approvals, and whether significant improvements are likely to be required to meeting building code requirements.

3. Page 7 of the application indicates that "Food Truck E" is the only food truck serviced by the on-site commissary. If other food trucks or eating establishments located off-site are associated with this commissary, the application should explain this activity. The application should also indicate the location of the commissaries that service the other food trucks.

4. Page 8 of the application indicates that several food trucks include canopy tents or umbrellas to provide shaded seating areas of approximately 400 to 500 square feet each, and that "Food Truck C" has an 831-square-foot concrete pad. Based on the scaled image labeled "Figure 5," our rough estimate, suggests the total "seating area" is closer to 9,920 square feet, or about 1,984 square feet per food truck. The application should clarify this.

5. Pages 7 and 8 of the application discuss stormwater, indicating that new stormwater management controls will be installed to manage rainfall runoff from the cleared areas of the property and the new asphalt parking area. The application does not indicate whether stormwater runoff from the site will increase, the direction of the flow, and what effects stormwater increases might have. The application must describe the current system, its location, and collection basin, point of discharge, and how it will differ from the proposed system. The application should also confirm whether the stormwater controls are sized to accommodate this particular build-out or whether they will be designed to accommodate a future, larger development.

6. Page 12 of the Application states that liquid waste from the food trucks will be contained and disposed of off-site. Are these liquids removed from the food trucks on the site? If so, what precautions will be taken to prevent or contain leaks?

7. The plans should show the required parking lot landscaping.

8 In site visits last year, DPP staff noted eight food trucks on the site. The "Land Use Plan" in the application shows five. The application should indicate how many food trucks are on the site today and specify whether the proposal involves a reduction in the observed uses on the site.

9. The application should describe whether the Project is consistent with the North Shore Sustainable Communities Plan (NSSCP) relating to policies and guidelines for the Rural Community Commercial Center (RCCC). The NSSCP defines an RCCC as a "*small cluster of commercial and service businesses located on major thoroughfares that provide a range of goods and services to meet the needs of the surrounding residential communities. Located along highways and major thoroughfares, these centers also attract visitors and residents from outside the immediate community.*" These could be grocery stores, sundries, restaurants and other services such as health related and service-oriented shops catering to residents and visitors to the region.

The application may be resubmitted when it is complete, as outlined above. Enclosed, we are returning your check (No. 42564) for the $400 processing fee and your receipt (No. 112680) for the application review fee. Should you have any questions, please call Ardis Shaw-Kim of our staff at 768-8021

For Kathy K. Sokugawa
Acting Director

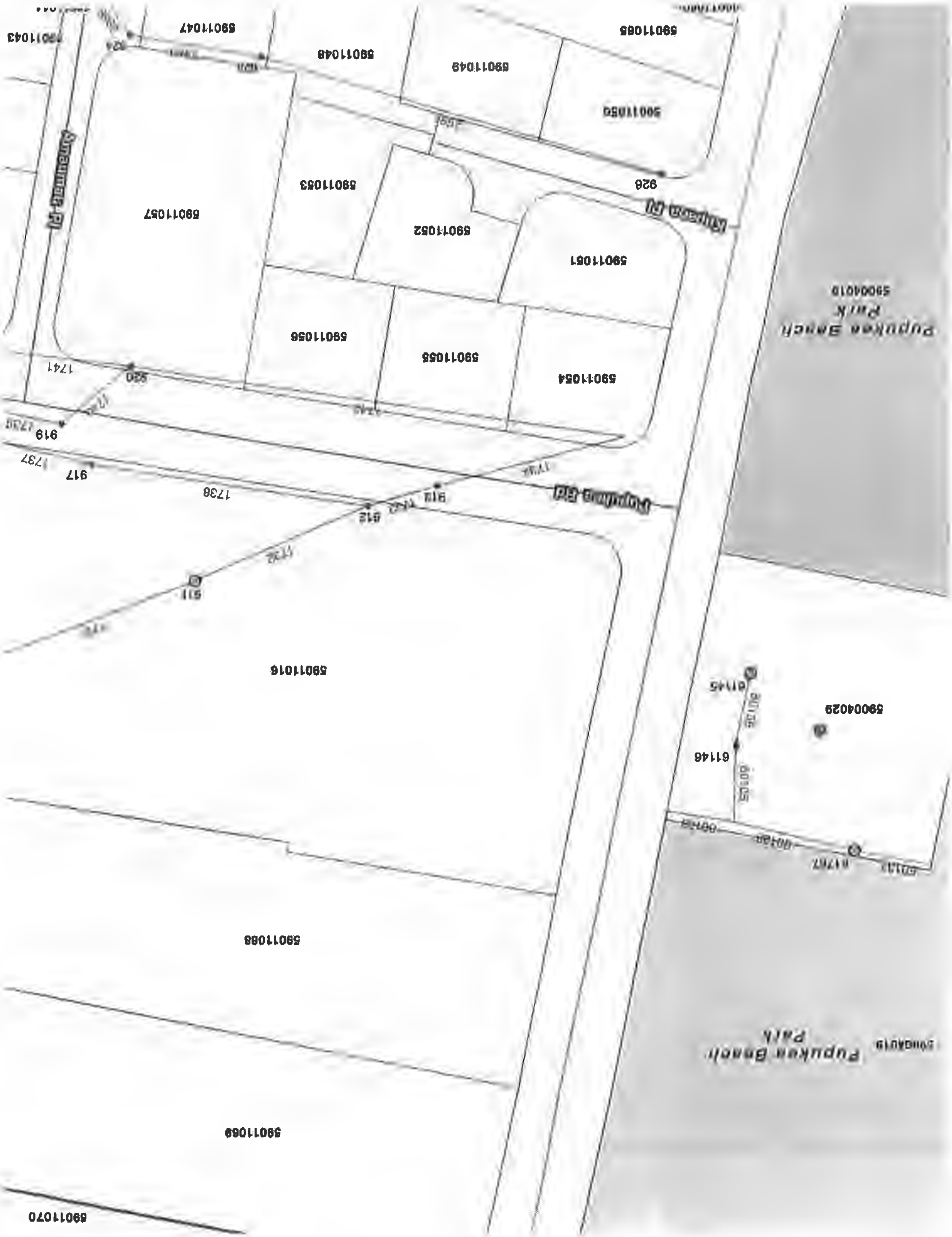
Date: May 16, 2017

Enclosures: Check No. 42564
Receipt No. 112680

Shaw-Kim, Ardis

From: Nolan, John
Sent: Monday, May 15, 2017 12:59 PM
To: Shaw-Kim, Ardis

John Nolan
Stormwater GIS Editor - Engineering Support Tech III
Department of Planning & Permitting
City & County of Honolulu
650 S King Street - 8th Floor


59011070
59011069
59011068
59011016
Pupukea Beach Park
59004029
61146
61145
61767
Pupukea Rd
911
912
913
917
919
920
926
1732
1736
1737
1741
59011054
59011055
59011056
59011051
59011052
59011053
59011057
Pupukea Beach Park
59004019
59011050
59011049
59011048
59011047
59011065
59011043

CONTRACTOR'S ESTIMATE FOR ENGINEER

SJ Construction Consulting, LLC

PO Box 37238, Honolulu, HI 96837
www.sjcivil.com; sj@sjcivil.com
Contact: Scott Jennings
Phone: 808-271-5150

Quote To: Mr. Steven Doo, P.E.
G70
925 Bethel Street, 5th Floor
Honolulu, HI 96813
Phone: 808-523-5866

Date: April 16 2017
Job Name: Hanapohaku, LLC - Interim Use Plan
Date of Plans: Plans provided 3/30/17
Estimate No.: 2017-02

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	SITE IMPROVEMENTS				
1	Temp. Erosion Control Measures, In Place Complete	1.00	LS	9,500.00	9,500.00
2	Site Clearing	1.22	AC	20,000.00	24,334.00
3	Remove Soil Stockpile	35.00	CY	62.00	2,170.00
4	Fill & Excavation	607.00	CY	40.00	24,280.00
5	Site Grading	8,200.00	SF	1.25	10,250.00
6	Entry Sign ((2' x 6' on two posts)	1.00	EA	2,589.98	2,589.98
7	Coarse Aggregate Paths to Food Trucks	5.00	EA	1,311.34	6,556.70
8	6' TALL CHAIN LINK FENCE	200.00	LF	37.00	7,400.00
9	Landscaping/Grassing	1.00	LS	12,500.00	12,500.00
10	Aggregate Base Course, In Place Complete	195.00	CY	120.00	23,400.00
11	Conc. Sidewalk/Slab, 4" Thick, In Place Complete	831.00	SF	27.00	22,437.00
12	Asphalt Pads under Trucks (5 ea @ 10' x 27.5')	153.00	SY	56.19	8,597.07
13	Asphalt Pavement, In Place Complete 1 Y, 10	2,011.00	SY	29.00	58,319.00
14	Pavement Striping	1,000.00	LF	4.50	4,500.00
	SUBTOTAL				**$216,933.75**
	SEWERAGE SYSTEM				
15	IWS system, In Place Complete	1.00	LS	70,000.00	70,000.00
	SUBTOTAL				**$70,000.00**
	DRAINAGE SYSTEM				
16	Gravel Entrance	603.00	SF	3.90	2,351.70
17	6" Percolation Trench BMP w/6" Drain Line	260.00	LF	47.00	12,220.00
18	Drain Outlet, In Place Complete	1.00	EA	3,000.00	3,000.00
19	Stormwater Basin	1,220.00	SF	3.95	4,819.00
	SUBTOTAL				**$20,039.00**

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	WATER SYSTEM				
20	2" Water Line	426.00	LF	35.00	14,910.00
	SUBTOTAL				14,910.00
	ELECTRICAL SYSTEM				
21	Electrical duct & conductor	413.00	LF	16.00	6,608.00
	SUBTOTAL				56,608.00
GRAND TOTAL					**$330,742.45**

Csep 9 9 17

16 133

NOTES:

Assumptions:

1. No rock excavation.
2. No groundwater.
3. Bid item 4 - assume no import. Assume all offhaul.
4. Bid item 10 - this was assumed to be under the asphalt.
5. Bid item 15 - as-builts were used to estimate the cost of the existing IWS system.
6. Bid items 20 & 21 - utility quanties were each reduced by 100 lineal feet to account for reduction in number of food trucks.

Exclusions:

1. Driveway on makai side is existing (not to be built or offhauled).
2. Bond.

Conditions/Comments:

1. Unit prices have been made to positively affect the contractor and should not be relied upon for true unit costs (they have been "unbalanced" to optimize cash flow).

This proposal good for thirty (30) days.

Please do not hesitate to contact me should you have any questions about this proposal.

Scott Jennings, P.E., Principal
SJ Construction Consulting, LLC
808-271-3150
sj@sjcivil.com

ESTIMATE: 2017-02 - HANAPOHAKU, LLC

HANAPOHAKU LLC
TMK (1) 5-9-011:068, 069, 070

Special Management Area Minor Permit Application

This Special Management Area Minor Permit application includes the contents required by the City and County of Honolulu Department of Planning and Permitting, pursuant to ROH Chapter 25.

April 19, 2017

CITY AND COUNTY OF HONOLULU
DEPARTMENT OF PLANNING & PERMITTING
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

LAND USE PERMITS DIVISION MASTER APPLICATION FORM

Additional data, drawings/plans, and fee requirements are listed on a separate sheet titled "Instructions for Filing." *PLEASE ASK FOR THESE INSTRUCTIONS.*

All specified materials described in the "Instructions for Filing" and required fees must accompany this form. Incomplete applications will delay processing. You are encouraged to consult with Zoning Division staff in completing this application. Please call the appropriate phone number given in the "Instructions for Filing."

Please print legibly or type the required information.

SUBMITTED FEE: $800

PERMIT/APPROVAL REQUESTED (Check one or more as appropriate):

Cluster:
- ☐ Agricultural
- ☐ Country
- ☐ Housing

Conditional Use Permit:
- ☐ Minor ☐ Major

- ☐ Existing Use: _____ (Indicate Type of Use)

Environmental Document:
- ☐ Environmental Impact Statement
- ☐ Environmental Assessment
- ☐ Supplemental

- ☐ Minor Shoreline Structure

- ☐ Modify Approved Permit: _____ (Indicate Reference File No.)

- ☐ Plan Review Use

Planned Development:
- ☐ Housing
- ☐ Commercial (WSD Only)
- ☐ Resort (WSD Only)

- ☐ Shoreline Setback Variance

Special District Permit:
- ☐ Minor ☐ Major

_____ (Indicate District)
- ☐ Downtown Height >350 Feet

Special Management Area Use Permit:
- ☒ Minor ☐ Major

- ☐ Temporary Use Approval
- ☐ Variance from LUO Section(s): _____
- ☐ Waiver from LUO Section(s): _____
- ☐ Zoning Adjustment, LUO Section(s): _____
- ☐ HRS Section 201H-38 Project

TAX MAP KEY(S): (1) 5-9-011:068, 069, 070
LOT AREA: 2.72 acres
ZONING DISTRICT(S): B-1 Neighborhood Business **STATE LAND USE DISTRICT:** Urban
STREET ADDRESS/LOCATION OF PROPERTY: _____

RECORDED FEE OWNER:
Name (& title, if any) Hanapohaku LLC
Mailing Address 59-715 Kamehameha Highway
Haleiwa, HI 96712
Phone Number 808-779-5733
Signature

PRESENT USE(S) OF PROPERTY/BUILDING:
Commercial property with a real estate office, associated carport, former dentist office, surf shop, food trucks

PROJECT NAME (if any): _____

APPLICANT:
Name Hanapohaku LLC (Andrew Yeh)
Mailing Address 59-715 Kamehameha Highway
Haleiwa, HI 96712
Phone Number 808-779-5733
Signature

AUTHORIZED AGENT/CONTACT PERSON:
Name G70 (Jeff Overton)
Mailing Address 925 Bethel Street, 5th Floor
Honolulu, HI 96813
Phone Number 808 523-5866
E-mail cupukee@g70.design
Signature

REQUEST/PROPOSAL (Briefly describe the nature of the request, proposal, activity or project): Hanapohaku LLC is pursuing a Special Management Area Minor Permit to address past actions which were completed on the property without proper review under the SMA ordinance (Revised Ordinances of Honolulu, Chapter 25). These items include vegetation clearing, earth disturbance and relocation, and substantial trash removal prior to Hanapohaku's ownership. Operations include food trucks, seating areas, tents and umbrellas, portable toilets and a hand wash station, and portable trash dumpsters. Walkways and electrical conduits are also included in the plan. This permit also includes a new asphalt parking lot, new chain link fences (200 ft) and stormwater controls that Hanapohaku is proposing to implement to support commercial activities on the property.

POSSE JOB NO. _____

REV. 1/26/2016

Summary of Fees Paid

Special Management Area Minor Permit Application

Application	$400
Processing	$200

1.0 INTRODUCTION

1.1 PROJECT INFORMATION SUMMARY

Applicant:	Hanapohaku LLC 59-716 Kamehameha Highway Hale'iwa, HI 96712 Contact: Andrew Yani Phone: (808) 779-5733
Approving Agency:	City and County of Honolulu Department of Planning and Permitting 630 South Beretania Street Honolulu, Hawai'i, 96843 Contact: Land Use Permits Division Phone: (808) 768-8000
Name of Action:	Hanapohaku LLC
Planning/Environmental Consultant:	G70 925 Bethel Street, 5th Floor Honolulu, Hawai'i 96813 Contact: Jeff Overton, AICP LEED AP Phone: (808) 523-5866
Location:	Pūpūkea, Hale'iwa, Island of O'ahu, Hawai'i (*Figure 1*)
Tax Map Keys (TMK):	(1) 5-9-011:068, 069, 070 (*Figure 2*)
Landowners:	Hanapohaku LLC
Land Area:	2.72 acres
State Land Use District:	Urban District
City and County of Honolulu:	
Zoning (Land Use Ordinance):	Neighborhood Business District (B-1)
North Shore Sustainable Communities Plan:	Rural Community Commercial Center
Special Management Area (SMA):	Entire project area within SMA (*Figure 3*)
Flood Management Zone:	Zone X – Outside of the 500 Year Flood Plain

SMA Minor Permits and Building Permits were subsequently approved (2001-2002) for the surf shop and retail store built on Parcels 69 and 70.

- North Shore Surf Shop
  Built in 2002 - 574 SF (SMA Minor Permit, Building Permit #523321)
- Seamaids Retail Boutique
  Built in 2001 - 432 SF (SMA Minor Permit, Building Permit #519387, #655836)

State Dept. of Health approval was granted (2016) for the installation of the ATU wastewater treatment and disposal unit. The ATU facility is discussed as part of the proposed action. Each of the seven food trucks operating onsite have State Dept. of Health certification, as discussed in the proposed action.

Description of Proposed Action
The owners are applying for a Special Management Area (SMA) Minor Permit to address past development actions which were completed on this property without proper review under the SMA ordinance ROH 25. In addition, the SMA Minor Permit will include the new elements required to support commercial activities on the subject property, as identified in Figure 5 – SMA Minor Permit Plan.

Development actions on this property completed during the period 2014 to 2016 which require after-the-fact SMA permitting, include the following items listed and described below,

1. **Vegetation Clearing, Soils Disturbance & Restoration**
   Several actions on the site relate to vegetation clearing and soils disturbance, trash removal, along with actions for planned restoration of non-active site areas. The subject areas on the property are shown in Figure 5.

- Vegetation Clearing & Surface Stabilization
  Non-native brush and invasive vegetation (e.g. Haole Koa, California Grass) has been cleared from this property, over an area of approximately 53,000 SF. Initial clearing was completed to remove previously dumped trash and debris dating back over three decades. Roughly 37,000 SF of this area received a layer of recycled crushed concrete to improve vehicle access/parking with minimal soil disturbance.

- Graded Area for Debris Removal
  Approximately 8,200 SF of the property was cleared and graded for debris removal and site leveling. This area has been stabilized with gravel ground cover and is being used as a seating area for operation of Food Truck G.

2. Development of New Support Facilities

To support the commercial operations on the property, two development activities will be undertaken, as described below and shown in Figure 5.

Asphalt Parking Lot (New)

To support the code requirements for commercial uses on the property, an all-weather parking surface is required. The total existing retail commercial floor area (2,088 SF) will require five (5) parking spaces and the parking area will include two (2) accessible parking spaces. Each of the DOH certified mobile food trucks will be provided with five (5) parking spaces per food truck. For the five food trucks and retail spaces, there will be a total of 44 parking spaces provided. An additional two (2) parking spaces will be for an electrical vehicle charging station. The asphalt parking lot area will be approximately 18,500 SF.

- Stormwater Management Controls (New)

To manage the rainfall runoff from the cleared area of the property and the new asphalt parking area, there will be new storm water management features installed. Three locations will include stone/gravel drainage collection trenches and rain gardens totaling approximately 1,320 SF. These control features will provide effective control of storm runoff flows, capture suspended sediment in runoff, and minimizing the offsite release of runoff flows and eroded soils.

- Chain Link Fence (New)

A new 6 ft tall chain link fence will be installed along 200 ft of the property boundary with Pāhoe Road. This new fence will restrict patrons from access to/from Pāhoe Road and the property.

- Sign (New)

A new directional sign will be installed at the driveway entrance to encourage on-site parking.

3. DOH Certified Mobile Food Truck Operations & Support Elements

To support the commercial operations on the property, several activities will be undertaken, as shown in Figures 5 and 6.

- DOH Certified Mobile Food Trucks (A-E)

As shown in Figures 4 and 5, there will be five mobile food truck operations on this commercial zoned property, as two of the seven food trucks will be removed. Each food truck maintains its own certification with the State Department of Health. (Food Truck E, Elephant Truck, is the only food truck which is attached to the onsite Commissary II). Each food truck has designated use areas with picnic tables and seating. The activity associated with the five food trucks averages 300-400 customers per day. Five paved parking spaces will be provided for each food truck (consistent with the parking standard proposed in a City resolution for Food Trucks in the Hale'iwa Special District). There will be no wastewater disposal onsite. Food trucks will identify

LUO Development Standards

The project will adhere to the Development Standards for the B-1 Neighborhood Business district zoning as defined by the LUO. The Development Standards for B-1 Zoning include the following:

Minimum lot area (square feet)		5,000
Minimum lot width and depth (feet)		50
Yards (feet)	Front	10
	Side and rear	0
Maximum building area (percent of zoning lot)		50
Maximum building height (feet)		40

Cost Estimate

A contractor's estimate for the development improvements was prepared under this permit request. SJ Construction Consulting, LLC prepared a market value pricing summary for after-the-fact site work and new development, including: clearing, grading, fill; landscaping, gravel cover, parking lot/sidewalk, IWS system, chain link fence, water line and electrical line.

The total estimated cost for these improvements was calculated at $330,742.45

Additional costs for the introduction of other new facilities on the property, include: three seating area tents ($6,000), four portable toilets ($2,400), six portable trash dumpsters ($3,900) and electric vehicle charging station ($3,833). Total cost for these additional support facilities is $16,133.

Discussion: No substantial adverse environmental or ecological impacts have been observed as a result of the existing cleared and graded areas, two office buildings, and carport, which have been in place for the past several years. The action will stabilize the cleared area with soils, install additional landscaping and hydromulch groundcover to the graded areas, and install stormwater management controls. These added measures to the property will improve the quality and quantity of runoff on-site, further reducing potential effects to coastal resources and water quality.

The operation of the food trucks results in increased activity on the subject commercial zoned properties, with an average of 300-400 customers each day. The increased activities are managed carefully to avoid creating adverse environmental or ecological effects. The food trucks are certified by the State DOH. Liquid waste produced by the food trucks is contained and properly disposed off-site. Potential leaks from petroleum and other liquid waste from the food trucks are also managed on-site to prevent soil contamination. Solid waste associated with the food trucks is managed within the on-site trash containers and dumpsters, which are serviced regularly. Patrons of the food trucks are managed within defined seating areas. Portable restrooms and hand wash stations are provided onsite, which are serviced at least twice weekly. Vehicular access is through a central driveway to avoid disturbance to the neighbors, managed onsite with an all-weather asphalt parking area. Drainage and storm runoff is onsite through best management practices and properly designed stormwater controls. Open ground areas of the site which were previously disturbed are being restored with hydromulch to stabilize soils, minimize soil erosion and runoff containing suspended sediment. The overall level of activity and operations on the site, including the managed food truck operations, does not generate adverse cumulative environmental effects.

(3) The Authority Shall Seek to Minimize, Where Reasonable:

- *Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough or lagoon;*
- *Any development which would reduce the size of any beach or other area usable for public recreation;*
- *Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management area and the mean high tide line where there is no beach;*
- *Any development which would substantially interfere with or detract from the line of sight toward the sea from the State highway nearest the coast; and*
- *Any development which would adversely affect water quality, existing areas of open water free of visible structure, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.*

Discussion: The existing buildings which have been in place since 1955, have not interfered with or detracted from the line of sight toward the sea from Kamehameha Highway, nor have they posed

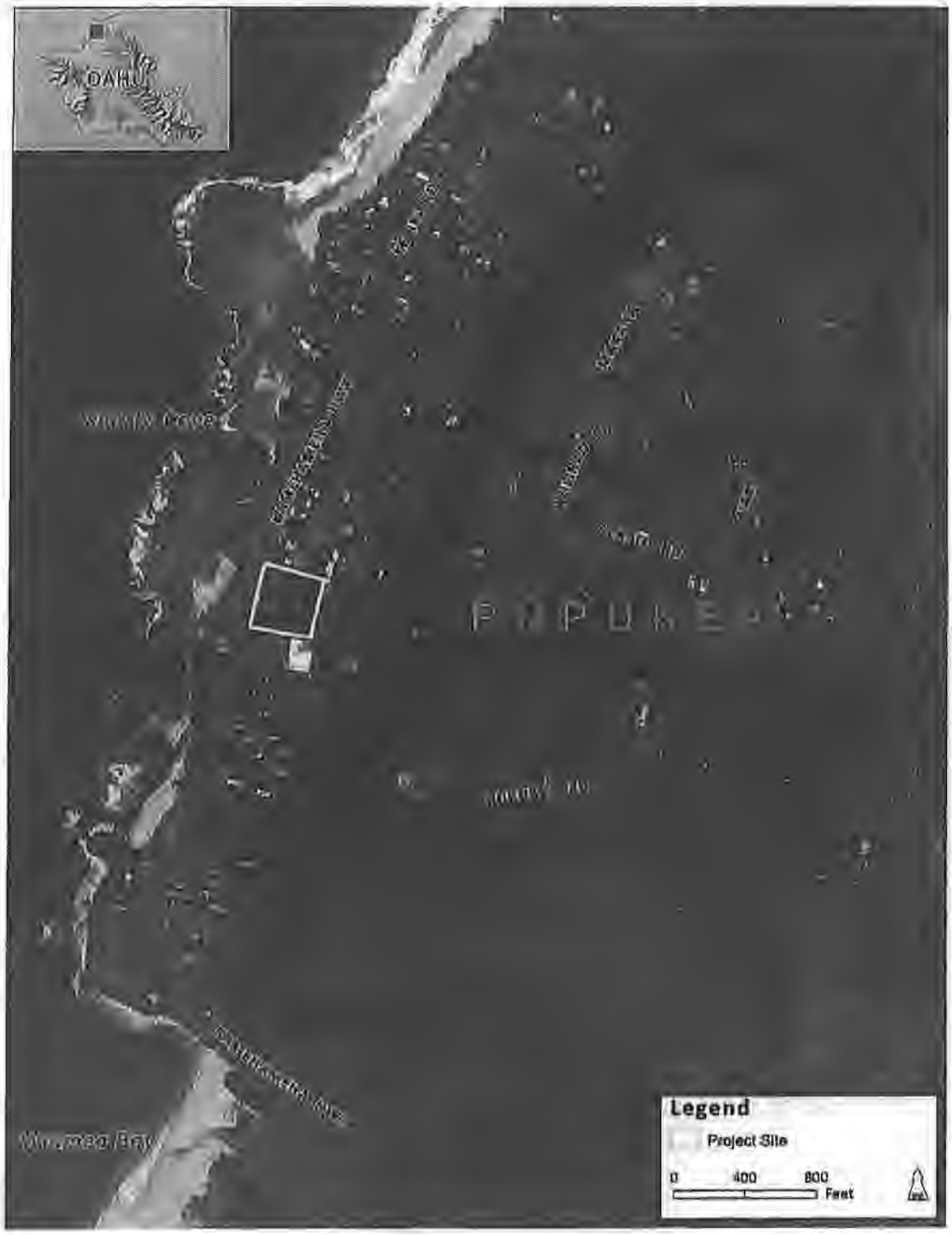


Figure 1
Location Map

Source: City and County of Honolulu GIS Data

Figure 3
City and County of Honolulu Special Management Area

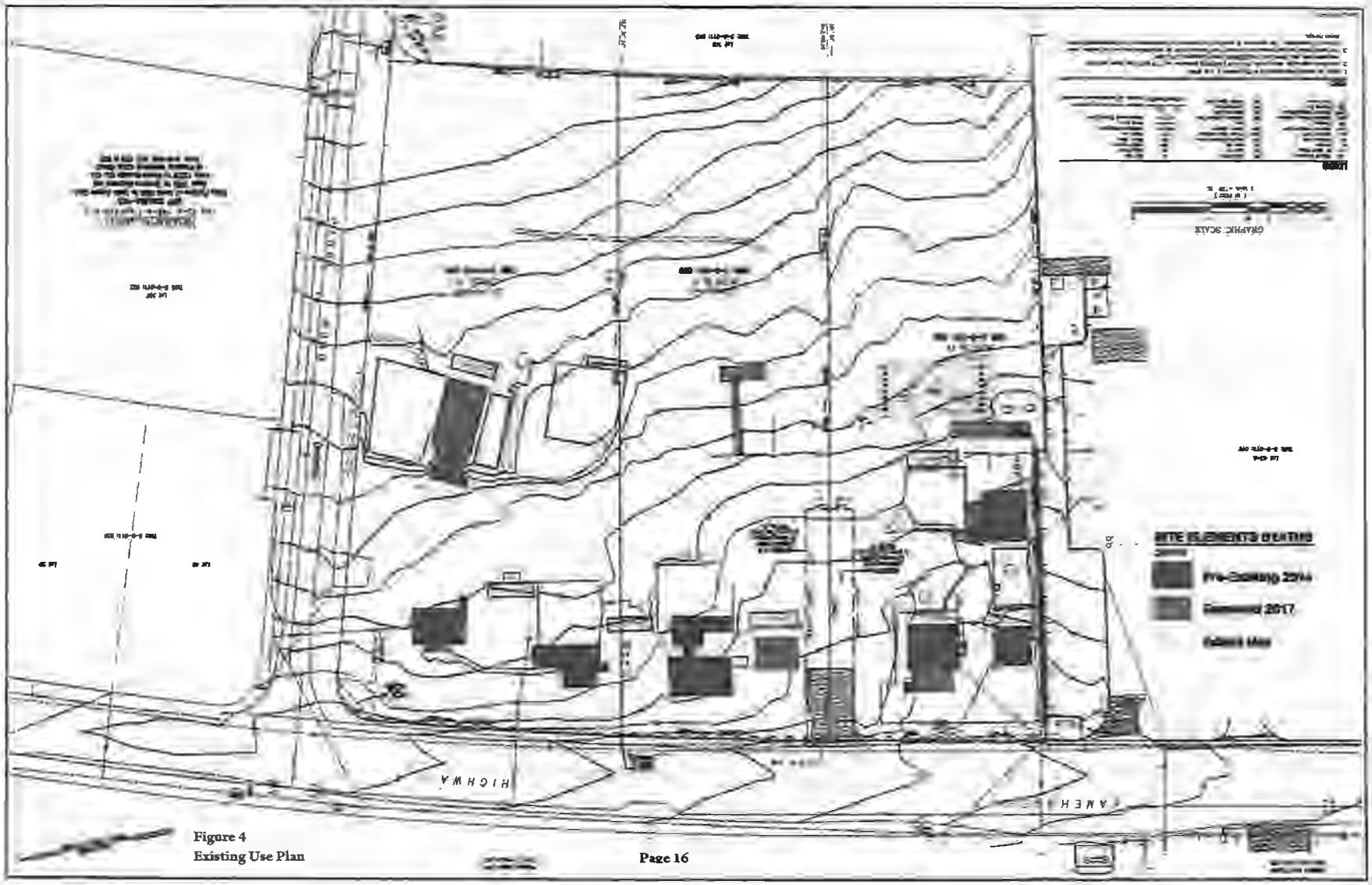


Figure 4
Existing Use Plan

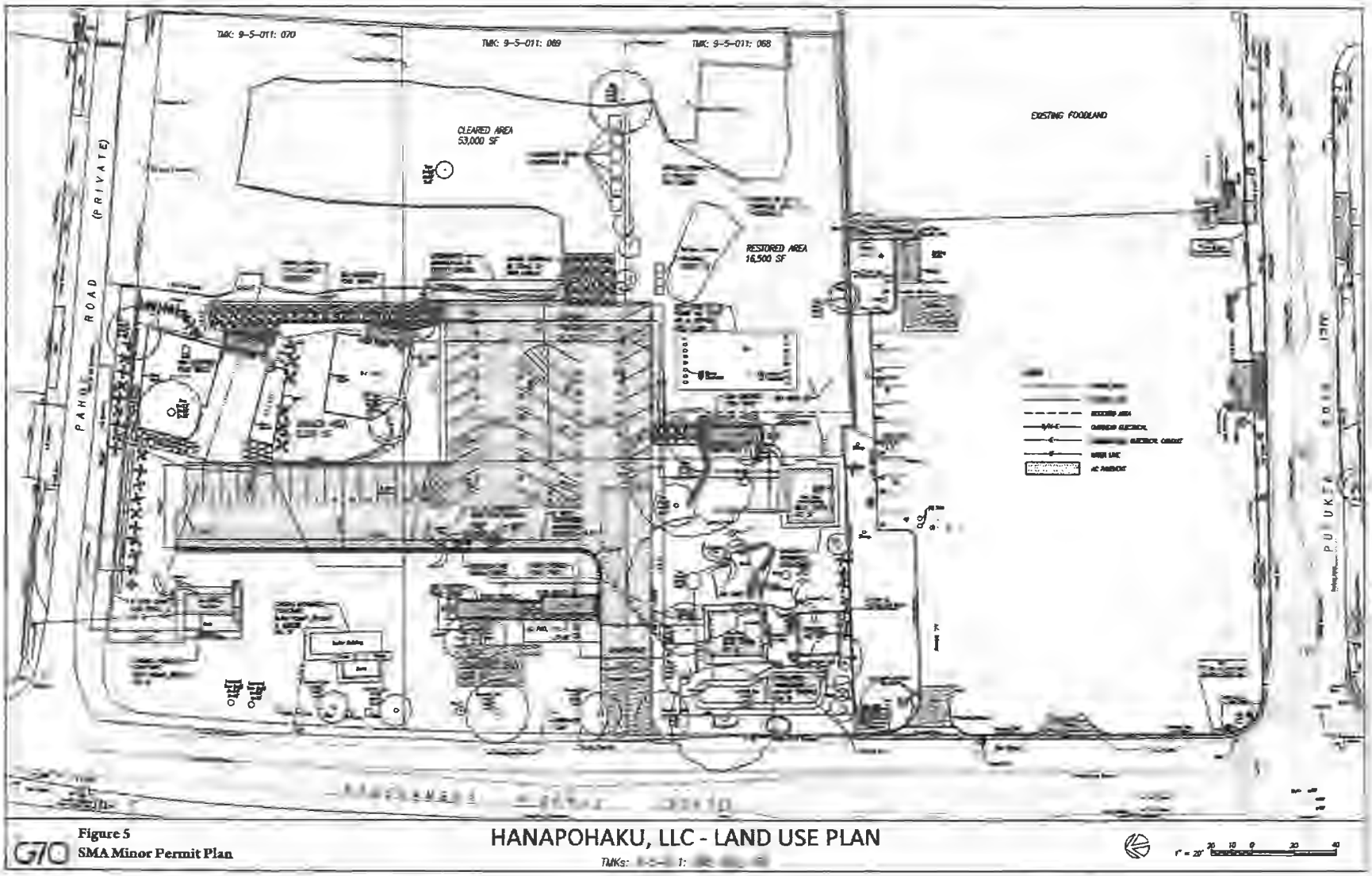


Figure 5
SMA Minor Permit Plan

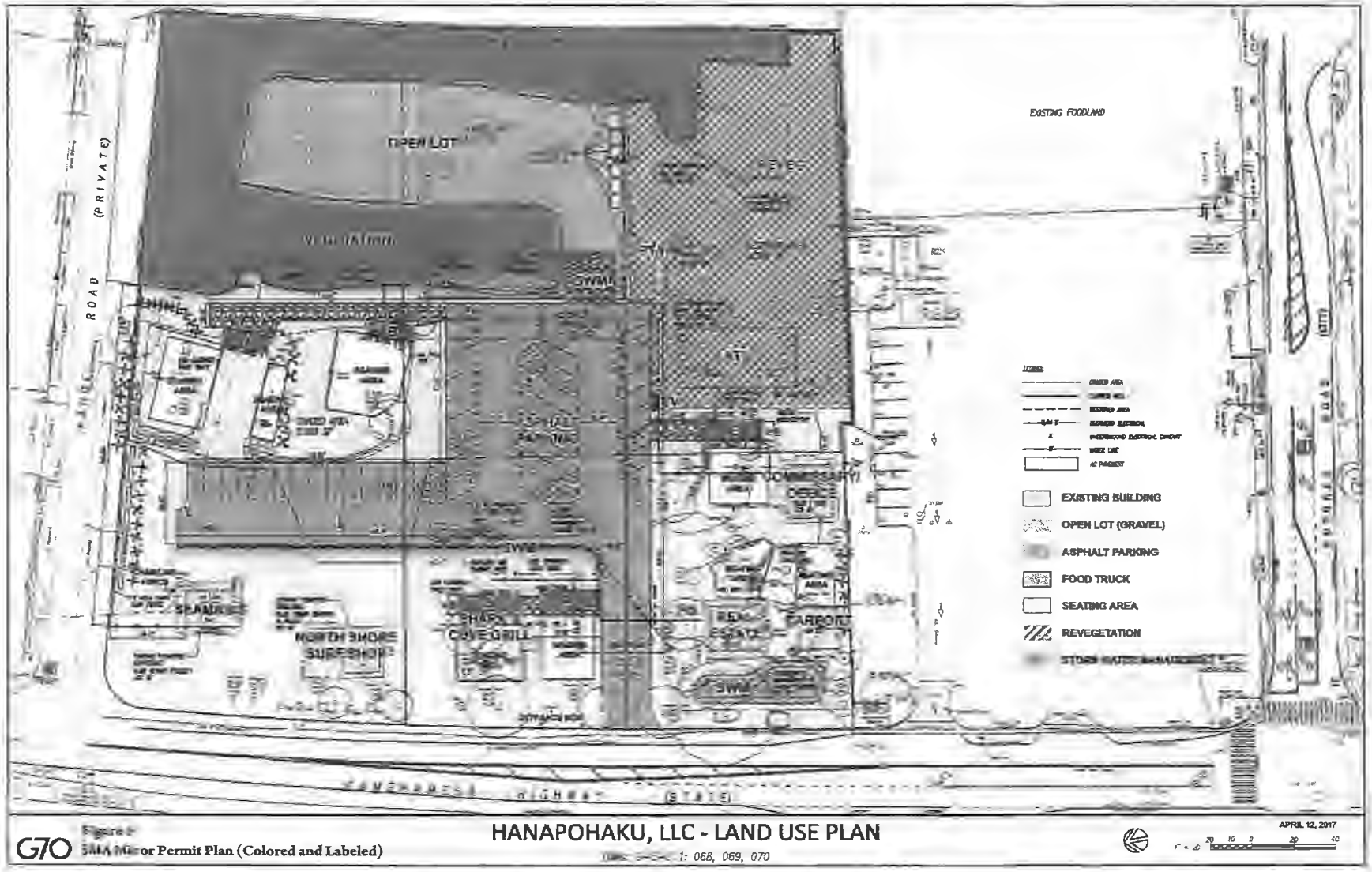


Figure 6
SMA Minor Permit Plan (Colored and Labeled)

1/2" 2"

G70 | McCully's Corner

A1
SIGNAGE AT ENTRY
04 04 2017

CONTRACTOR'S ESTIMATE FOR ENGINEER

SJ Construction Consulting, LLC

PO Box 37238, Honolulu, HI 96837
www.sjcivil.com; sj@sjcivil.com
Contact: Scott Jennings
Phone: 808-271-5150

Quote To: Mr. Steven Doo, P.E.
G70
925 Bethel Street, 5th Floor
Honolulu, HI 96813
Phone: 808-523-5866

Date: April 16 2017
Job Name: Hanapohaku, LLC - Interim Use Plan
Date of Plans: Plans provided 3/30/17
Estimate No.: 2017-02

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	SITE IMPROVEMENTS				
1	Temp. Erosion Control Measures, In Place Complete	1.00	LS	9,500.00	9,500.00
2	Site Clearing	1.22	AC	20,000.00	24,334.00
3	Remove Soil Stockpile	35.00	CY	62.00	2,170.00
4	Fill & Excavation	607.00	CY	40.00	24,280.00
5	Site Grading	8,200.00	SF	1.25	10,250.00
6	Entry Sign ((2' x 6' on two posts)	1.00	EA	2,589.98	2,589.98
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21	Electrical duct & conductor	413.00	LF	16.00	6,608.00
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GRAND TOTAL					**$330,742.45**

NOTES:

Assumptions:

1. No rock excavation.
2. No groundwater.
3. Bid item 4 - assume no import. Assume all offhaul.
4. Bid item 10 - this was assumed to be under the asphalt.
5. Bid item 15 - as-builts were used to estimate the cost of the existing IWS system.
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Exclusions:

1. Driveway on makai side is existing (not to be built or offhauled).
2. Bond.

Conditions/Comments:

1. Unit prices have been made to positively affect the contractor and should not be relied upon for true unit costs (they have been "unbalanced" to optimize cash flow).

This proposal good for thirty (30) days.

Please do not hesitate to contact me should you have any questions about this proposal.

Scott Jennings, P.E., Principal
SJ Construction Consulting, LLC
808-271-5150
sj@sjcivil.com

ESTIMATE: 2017-02 - HANAPOHAKU, LLC

OFFICIAL RECEIPT

DEPARTMENT OF PLANNING AND PERMITTING

CITY AND COUNTY OF HONOLULU

112680

Date: May 16, 20 17

Received From: Group 70 International Inc

One hundred and no/100 DOLLARS

For: 2017/DDA-14 app and fee

Tax Map Key: 5-7-011: 063, 069 and 070

$ 2,065

BW Industrial Park LLC #25566

DEPARTMENT OF PLANNING AND PERMITTING

HANAPOHAKU LLC

TMK (1) 5-9-011:068, 069, 070

Special Management Area Minor Permit Application

This Special Management Area Minor Permit application includes the contents required by the City and County of Honolulu Department of Planning and Permitting, pursuant to ROH Chapter 25.

May 23, 2017

Exhibit M

CITY AND COUNTY OF HONOLULU
DEPARTMENT OF PLANNING & PERMITTING
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

LAND USE PERMITS DIVISION MASTER APPLICATION FORM

Additional data, drawings/plans, and fee requirements are listed on a separate sheet titled "Instructions for Filing." ***PLEASE ASK FOR THESE INSTRUCTIONS.***

All specified materials described in the "Instructions for Filing" and required fees must accompany this form; incomplete applications will delay processing. You are encouraged to consult with Zoning Division staff in completing the application. Please call the appropriate phone number given in the "Instructions for Filing."

Please print legibly or type the required information.

SUBMITTED FEE: $ $600

PERMIT/APPROVAL REQUESTED (Check one or more as appropriate):

Cluster:
- ☐ Agricultural
- ☐ Country
- ☐ Housing

Conditional Use Permit:
- ☐ Minor ☐ Major
- ☐ Existing Use: _____ (Indicate Type of Use)

Environmental Document:
- ☐ Environmental Impact Statement
- ☐ Environmental Assessment
- ☐ Supplemental

☐ **Minor Shoreline Structure**

☐ **Modify Approved Permit:** _____ (Indicate Reference File No.)

☐ **Plan Review Use**

Planned Development:
- ☐ Housing
- ☐ Commercial (WSD Only)
- ☐ Resort (WSD Only)

☐ **Shoreline Setback Variance**

Special District Permit:
- ☐ Minor ☐ Major
- _____ (Indicate District)
- ☐ Downtown Height >350 Feet

Special Management Area Use Permit:
- ☒ Minor ☐ Major

☐ **Temporary Use Approval**

☐ **Variance from LUO Section(s):** _____

☐ **Waiver from LUO Section(s):** _____

☐ **Zoning Adjustment, LUO Section(s):** _____

☐ **HRS Section 201H-38 Project**

TAX MAP KEY(S): (1) 5-9-011:068, 069, 070
LOT AREA: 2.72 acres
ZONING DISTRICT(S): B-1 Neighborhood Business **STATE LAND USE DISTRICT:** Urban
STREET ADDRESS/LOCATION OF PROPERTY: _____

RECORDED FEE OWNER:
Name (& title, if any) Haleiwa Inku LLC
Mailing Address 59-716 Kamehameha Highway
Haleiwa, HI 96712
Phone Number 808-779-5733
Signature _____

PRESENT USE(S) OF PROPERTY/BUILDING:
Commercial property with a real estate office, associates carpet, former dentist office, surf shop, food trucks

PROJECT NAME (if any): _____

APPLICANT:
Name Haleiwaku LLC (Andrew Yant)
Mailing Address 59-716 Kamehameha Highway
Haleiwa, HI 96712
Phone Number 808-779-5733
Signature _____

AUTHORIZED AGENT/CONTACT PERSON:
Name G70 (Jeff Overton)
Mailing Address 925 Bethel Street, 5th Floor
Honolulu, HI 96813
Phone Number 808-393-5666
E-mail joverton@g70.design
Signature _____

REQUEST/PROPOSAL (Briefly describe the nature of the request, proposed activity or project): Haleiwaku LLC is pursuing a Special Management Area Minor Permit to address past actions which were completed on the property without proper review under the SMA ordinance (Revised Ordinances of Honolulu, Chapter 25). These items include vegetation clearing, soils disturbance and realignment, and substantial trash removal prior to Haleiwaku's ownership. Operations include food trucks, parking areas, lanai and umbrellas, portable toilets and a hand wash station, and portable trash dumpsters. Waterlines and electrical conduits are also included in the plan. This permit also includes a new asphalt parking lot, new chain link fence (200 ft), and stormwater controls that Haleiwaku is proposing to implement to support commercial activities on the property.

POSSE JOB NO. _____

REV. 2/26/2016

Summary of Fees Paid

Special Management Area Minor Permit Application

Application	$400
Processing	$200

1.0 INTRODUCTION

1.1 PROJECT INFORMATION SUMMARY

Applicant:	Hanapohaku LLC 59-716 Kamehameha Highway Haleʻiwa, HI 96712 Contact: Andrew Yani Phone: (808) 779-5733
Approving Agency:	City and County of Honolulu Department of Planning and Permitting 650 South King Street, 7th Floor Honolulu, Hawaiʻi, 96813 Contact: Land Use Permits Division Phone: (808) 768-8000
Name of Action:	Hanapohaku LLC
Planning/Environmental Consultant:	G70 925 Bethel Street, 5th Floor Honolulu, Hawaiʻi 96813 Contact: Jeff Overton, AICP LEED AP Phone: (808) 523-5866
Location:	Pūpūkea, Haleʻiwa, Oʻahu, Hawaiʻi (*Fig 1*)
Tax Map Keys (TMK):	(1) 5-9-011: 068, 069, 070 (*Figure 2*)
Landowners:	Hanapohaku LLC
Land Area:	2.72 acres
State Land Use District:	Urban District
City and County of Honolulu:	
Zoning (Land Use Ordinance):	Neighborhood Business District (B-1)
North Shore Sustainable Communities Plan:	Rural Community Commercial Center
Special Management Area (SMA):	Entire project area within SMA (*Figure 3*)
Flood Management Zone:	Zone X – Outside of the 500 Year Flood Plain

2.0 WRITTEN DESCRIPTION OF THE PROJECT

Existing Conditions
The project site is located on three parcels designated as TMK (1) 5-9-011:068, 069, and 070. The site is bounded by Kamehameha Highway to the west, Pāhoe Road and single family residences to the north and east, and the Foodland Pūpūkea grocery store to the south.

The 2.74-acre site is owned in fee by Hanapohaku LLC, and is currently developed with an existing real estate office and associated carport, a former dentist office, a surf shop and boutique retail. Currently, there are eight mobile food establishments ("food trucks") on the property which operate daily, including a shaved ice trailer. Figure 4 identifies the elements of the existing conditions on this property. The exhibit designates those elements which existed prior to the current ownership, elements which have been added to the property (2014-2016). Figure 4 also highlights elements that were removed in response to City violation notices.

Existing Facilities Permits and Approvals
There are three structures on the property which were constructed in the 1950's prior to the establishment of the Shoreline Management ordinance.

- Real Estate Office
  Built in 1955 - 572 SF (exempt from SMA, legal conforming)
- Real Estate Office Carport
  Built in 1955 - 400 SF (exempt from SMA, legal conforming)
- Dentist Office
  Built in 1956 - 572 SF (exempt from SMA, legal conforming)
  Partial Conversion to Commercial Kitchen (2016) DOH Certified (serves Food Truck E)

On July 25, 1978, the property owner (previous) executed a Unilateral Agreement in consideration of a pending zone change for the property from R-6 Residential District to B-1 Neighborhood Business District. The zone change (File number 77/Z-25) was approved by Ordinance 78-76, incorporating the Unilateral Agreement and conditions for development. Three of the commitments included in the Unilateral Agreement included: 1) insurance that the design is "country-like" in style, emphasizing the wooden low-rise Hale'iwa character; 2) installation of improvements on Pāhoe Road and the intersection of Pāhoe Road and Kamehameha Highway; and 3) the contribution of a pro-rata share of the cost of improving Kamehameha Highway. (Note: The existing permanent structures are consistent with the Country style character. Access to the site does not involve Pāhoe Road. The Unilateral Agreement highway improvements at Pāhoe Road are not relevant to the property use.)

SMA Minor Permits and Building Permits were subsequently approved (2001-2002) for the surf shop and retail store built on Parcels 69 and 70.

- North Shore Surf Shop
  Built in 2002 - 574 SF (SMA Minor Permit, Building Permit #523321)
- Seaweeds Retail Boutique
  Built in 2001 - 432 SF (SMA Minor Permit, Building Permit #519387, #655836)

  SMA Permit 2001/SMA-14
  SMA Permit 2009/SMA-54

The Shark's Cove Grill food truck began operations on the property in 2001, and has operated continuously to the present. The main element is a non-mobile food truck. Along the makai side of the food truck is a wood frame false building front, with painted plywood panels and trim. There are accessory structures associated with this facility, including a wood framed covered lanai with concrete pad to provide a service counter. This food establishment also has a wood fence surrounding an open air storage area in the rear. There is no Building Permit for this establishment and its accessory structures, and no SMA Minor Permit was granted for these structures. The owners do not intend to seek non-conforming status for these structures, will not seek after-the-fact building permits.

State Dept. of Health approval was granted (2016) for the installation of an aerobic treatment unit (ATU) wastewater treatment and disposal unit. The ATU system replaced a pre-existing wastewater system, which services the original buildings on the property built in the late 1950's. The ATU system is discussed as part of the proposed action.

Each of the food trucks operating on the site have State Dept. of Health certification, pursuant to (Sec. 11-50-85 to 91, Hawaii Administrative Rules (HAR). Each food truck is associated with an approved food establishment. Except for the Shark's Cover Grill, each food truck is moved in accordance with the rules governing mobile food establishments. Two excerpts from the rules are provided below:

> *Sec. 11-50-86 HAR. (a) Mobile food establishments shall operate out of an approved food establishment, and shall return to the approved food establishment for cleaning and servicing.*
>
> *Sec. 11-50-91 HAR. (b) All mobile food establishments shall be capable of moving from their vending site at any time. They shall be moved from their vending site to the approved food establishment for cleaning and servicing.*

Plans for the continued operation of food trucks on the property, in compliance with Sec 11-50-85 to 91, HAR, is discussed in the proposed action.

Description of Proposed Action

The owners are applying for a Special Management Area (SMA) Minor Permit to address past development actions which were completed on this property without proper review under the SMA ordinance ROH 25. In addition, the SMA Minor Permit will include the new elements required to support commercial activities on the subject property, as identified in Figure 5 – SMA Minor Permit Plan.

Development actions on this property completed during the period 2014 to 2016 which require after-the-fact SMA permitting, include the following items listed and described below.

1. **Vegetation Clearing, Soils Disturbance & Restoration**
   Several actions on the site relate to vegetation clearing and soils disturbance, trash removal, along with actions for planned restoration of non-active site areas. The subject areas on the property are shown in Figure 5.

- Vegetation Clearing & Surface Stabilization
  Non-native brush and invasive vegetation (e.g. Haole Koa, California Grass) has been cleared from this property, over an area of approximately 53,000 SF. Initial clearing was completed to remove previously dumped trash and debris dating back over three decades. Roughly 37,000 SF of this area received a layer of recycled crushed concrete to improve vehicle access/parking with minimal soil disturbance.

- Graded Area for Debris Removal
  Approximately 8,200 SF of the property was cleared and graded for debris removal and site leveling. This area has been stabilized with gravel ground cover and is being used as a seating area for operation of Food Truck G.

- DOH Approved ATU & Disposal Field
  An individual wastewater system was installed in January 2016 with review and approval by the State Dept. of Health, including an Aerobic Treatment Unit (ATU) and subsurface disposal leaching field. The ATU wastewater system has an 800 gal septic tank and 320 gal grease interceptor. The disposal system dimensions are 58 ft x 28 ft. The system receives wastewater from the real estate office and the former dentist office, which includes an office, restroom, and the commercial kitchen. No other source of wastewater is disposed in this system.

- Soil Stockpile from ATU Installation
  Soils removed in the installation of the ATU wastewater system were stockpiled at a location in the mauka portion of the property. The stockpiled soils affect an area of approximately 30 ft long and 12 ft wide, with an estimated volume of 65 CY. The soils were relocated from the site to a private agricultural property. The stockpile location will be part of the restoration area, as described below.

- Restoration Area - Ground Cover & Soils Stabilization

  Hydromulch seeding program will be undertaken to restore ground cover vegetation over approximately 16,500 SF of the property. This measure will reduce rainfall runoff, soil erosion and sediment loss from the disturbed area of the property. Best Management Practices BMPs will be implemented, including temporary ground cover and filter sock installation to trap suspended sediments in runoff.

- Best Management Practices

  Temporary Best Management Practices (BMPs) during site construction will include the following:
  - Temporary stabilized construction entrance – This BMP serves to reduce sediment transport from vehicles entering and exiting the site during construction.
  - Drain inlet/Catch basin protection – These BMP measures prevent sediment from running off into storm drains from the construction site, and instead allows on-site sediment to settle.
  - Silt fences/compost filter socks – This BMP consists of a mesh sleeve that contains compost, and is used to filtrate stormwater runoff on-site.

  Long-Term BMPs installed at the site will include the following measures, and described further below:
  - Asphalt pavement
  - Landscaping/grassing/planting
  - Vegetated swales/rain gardens/infiltration basins

2. Development of New Support Facilities

To support the commercial operations on the property, two development activities will be undertaken, as described below and shown in Figure 5.

Asphalt Parking Lot (New)

To support the code requirements for commercial uses on the property, an all-weather parking surface is required. The total existing retail commercial floor area (2,088 SF) will require five (5) parking spaces and the parking area will include two (2) accessible parking spaces. Each of the DOH certified mobile food trucks will be provided with five (5) parking spaces per food truck. For the five food trucks and retail spaces, there will be a total of 44 parking spaces provided. An additional two (2) parking spaces will be for an electrical vehicle charging station. The asphalt parking lot area will be approximately 18,500 SF. The parking lot will be landscaped in accordance with LUO Sec 21-4.70 (b) to include a minimum of eight (8) 2-in caliper canopy trees.

- Outdoor Trash Enclosure (New)

  In accordance with LUO Sec 21-4.70 (d) the outdoor trash storage area including the portable garbage dumpsters will be screened. A new 6 ft. tall wood structure wall will be built to enclose three sides of the trash storage area. The enclosure will be painted to blend with the surrounding area.

- Stormwater Management Controls (New)

  To manage the rainfall runoff from the cleared area of the property and the new asphalt parking area, there will be new storm water management features installed. Three locations will include stone/gravel drainage collection trenches and rain gardens totaling approximately 1,320 SF. These control features will provide effective control of storm runoff flows, capture suspended sediment in runoff, and minimizing the offsite release of runoff flows and eroded soils.

  The existing topographic condition allows storm runoff to sheet flow from the northeast side (mauka) towards the highway at an average slope of 5 percent, and enters the State DOT drainage system at Kamehameha Highway. The proposed earthwork will be minimized to maintain the existing flow paaterns. Sorm runoff will flow overland across undisturbed vegetation, asphalt concrete pavement, infiltration ditches, and grass swales toward a rain garden feature, and eventually the State drainage system. The addition of infiltration trenches, grass swales and rain gardens will rpove storm water quality best management practices (BMPs), which address Low Impact Development regulations. The site with improvements will yield a lower design flow per acre by increasing the path of storm runoff by use of these BMPs.

  Refer to the attached Grading & Drainage Statement (May 22, 2017) prepared by G70 Civil Engineering for details on drainage flow calculations.

- Chain Link Fence (New)

  A new 6 FT tall chain link fence will be installed along 200 ft of the property boundary with Pāhoe Road. This new fence will restrict patrons from access to/from Pāhoe Road and the property.

- Sign (New)

  A new directional sign will be installed at the driveway entrance to encourage on-site parking.

3. **DOH Certified Mobile Food Truck Operations & Support Elements**

   To support the commercial operations on the property, several activities will be undertaken, as shown in Figure 5.

- DOH Certified Mobile Food Establishments ("Food Trucks") (A-E)

  As shown in Figures 4 and 5, the plan calls for five (5) mobile food establishments ("food truck") operating on this commercial zoned property. Three of the eight (8) existing food trucks will be removed, including two food trucks adjacent to the Seamaids and North Shore Surf Shop, and the associated shaved ice trailer. Food Truck C will be replaced with a mobile food establishment which meets State Department of Health rules. Each food truck must and will maintain their own certification with the State Department of Health. Each food truck has designated use areas with picnic tables and seating. The activity associated with the five food trucks averages 300-400 customers per day. Five paved parking spaces (10 ft x 24 ft) will be provided for each food truck (consistent with the parking standard proposed in a City resolution for Food Trucks in the Hale'iwa

Special District). Each food truck site will be provided with a gravel surface access drive which connects to the all-weather parking area and driveway.

- **Food Truck Liquid Wastewater Management, Spill Containment & Parking Pad**

There will be no wastewater disposal onsite from the food trucks. Liquid wastes generated by each food truck are contained within the food truck. This wastewater is removed during off-site servicing, or via on-site collection by a pumping contractor. Food trucks will identify the commercial entity who pumps their wastewater and frequency thereof. Each food truck asphalt pavement parking pad (10 ft x 24 ft), including stormwater management, gray water spill management, and petroleum leak management BMPs. Extra precautions are taken with the installation and management BMPs of the spill collection zone for each food truck parking pad.

Pollutant Source	Appropriate Site-Specific BMP to be Implemented
General waste/litter	Waste containers will be provided of sufficient size and number to contain domestic wastes. Regularly scheduled clean up and disposal of waste in designated waste container; any overflow shall be cleaned up immediately. General waste/litter shall be removed and properly disposed of offsite at a permitted facility on a weekly basis or sooner, as necessary. Prior to offsite removal, debris shall be stored in covered dumpsters and with sediment and pollution control. Any items that could leach will be stored in covered dumpsters. Any items that could cause sediment will be confined with a compost filter sock.
Materials associated with the operation and maintenance of equipment (e.g. oil, fuel, and hydraulic leakage)	There will be no discharging of fuels, oils, and other pollutants used in the vehicle and equipment operation and maintenance. An effective means of eliminating the discharge of spilled or leaked chemicals, including fuel, from the area where operation and maintenance activities will take place shall be provided, such as: checking all vehicles at the beginning of each work day for leaks; vehicle inspections and fueling shall be in the designated fueling areas; ensuring adequate supplies are available at all times to handle spills, leaks, and disposal of used liquids; using drip pans and absorbents under or around leaky vehicles and equipment; installing compost filter socks around vehicle staging area, disposing of or recycling oil and oily wastes in accordance with federal, state and local requirements; cleaning up spills or contaminated surfaces immediately, using dry clean up measures where possible; storing chemicals in water-tight containers; eliminating the source of the spill to prevent a discharge or a furtherance of an ongoing discharge; and, no cleaning of surfaces by hosing down the area.
Sanitary Waste	Portable toilets will be positioned so that they are secured and will not be tipped or knocked over. The portable toilets will be maintained and sanitary waste will be disposed of on a weekly basis. Disposal will be done by an approved DOH pumper at DOH approved disposal sites.

- Approved Food Establishment (AFE) Assigned to Each Food Truck.

  Per the State DOH rules, *Sec. 11-50-86 HAR. (a) Mobile food establishments shall operate out of an approved food establishment, and shall return to the approved food establishment for cleaning and servicing.*

  The Approved Food Establishment (AFE) assigned to each of the five (5) food trucks operating on the property are listed below:

  A. Food Truck A (North Shore Shrimp Truck)
     AFE: Jerry's Pizza, 67-292 Goodale Avenue, Waialua, HI 96791
  B. Food Truck B (The Spot)
     AFE: Ke Nui Kitchen, 59-864 Kamehameha Hwy, Haleiwa, HI 96712
  C. Food Truck C* (Shark's Cove Grill) (* as a legal mobile food establishment)
     AFE: Ke Nui Kitchen, 59-864 Kamehameha Hwy, Haleiwa, HI 96712
  D. Food Truck D (North Shore Taco Truck)
     AFE: North Shore Tacos LLC, 54-296 Kamehameha HWY, Hauula HI 96717
  E. Food Truck E (Elephant Truck)
     AFE: Attached to the onsite Commissary II, owned by Hanapohaku LLC.

- Concrete Pad, Seating Areas, Fixed Tents and Umbrella Furniture

  Built around 2002, an 831 SF concrete pad was installed to provide seating area for Food Truck C. An aluminum tube framed tent was installed to shade the seating area. Several food trucks include canopy tents or umbrellas to provide shaded seating areas, ranging in areas from approximately 1,000 to 2,000 SF, including circulation aisles. Umbrellas for picnic tables are classified as furniture which are regularly taken down, and are not fixed improvement elements. Seating areas for each food truck are shown in Figure 5, with a summary of areas provided in the table below.

Food Truck	Approximate Seating Area (SF)
Food Truck A	1,995
Food Truck B	1,340
Food Truck C	1,495
Food Truck D	885
Food Truck E	2,620
Approximate Total Area (SF)	8,635

- Portable Toilets and Hand Washing Units

  The existing four portable toilets located on the property will be relocated to a more central position with gravel base for improved customer access and maintenance efficiency. A hand washing station will be added adjacent to the portables, with sufficient capacity to accommodate 500 persons per day. The portable toilets and hand washing units are serviced at least twice each week by the vendor, Paradise Lua.

- Portable Trash Dumpsters

  The existing six (6) portable trash dumpsters will remain located in the rear area of the property to manage municipal solid waste from the tenant retail users and food truck operations. A private carting service removes accumulated waste from the trash dumpsters once each week. An outdoor trash enclosure will be built to screen these dumpsters, as described previously.

- Potable Water and Electrical Power

  The plan includes an existing potable water line and electrical power conduit. Each of the five (5) food truck pads will be provided with daily soft connection points for potable water (via hose) and electrical power outlet (via extension cord). Per DOH rules for mobile food establishments, no permanent connections are allowed from the food truck to permanent on-site potable water lines and electrical power conduit.

4. Site Management Measures for Safety and to Minimize Nuisance Effects

To support the commercial operations on the property, several activities will be undertaken, to minimize nuisance disturbance and improve safety.

- Compliance with City and County of Honolulu Noise Ordinance (ROH Sec 41-31.1)

  No machine or device shall be used where the sound is audible at a distance of 30 feet from the device. Live music and outdoor videos will not be played at the property.

- Normal Operating Hours, Restricted Access, and Security

  Normal operating hours will be 7:00 AM to 9:00 PM. During closed hours, security service will patrol the property to prevent unauthorized entry to the property.

- Discourage Illegal Parking Along Kamehameha Highway

  The owners and tenants will continue to discourage illegal parking along the mauka shoulder of Kamehameha Highway fronting the property. Orange rubber cones have been placed along the highway shoulder. The State DOT recently installed an additional "no parking" sign on the mauka shoulder close to Pāhoe Road.

LUO Development Standards

The project will adhere to the Development Standards for the B-1 Neighborhood Business district zoning as defined by the LUO. Development Standards for B-1 Zoning include:

Minimum lot area (square feet)		5,000
Minimum lot width and depth (feet)		50
Yards (feet)	Front	10
	Side and rear	0
Maximum building area (% zoning lot)		50
Maximum building height (feet)		40

Cost Estimate

SJ Construction Consulting, LLC prepared a market value pricing summary for after-the-fact site work and new development, including: clearing, grading, fill; landscaping, gravel cover, parking lot/sidewalk, IWS system, chain link fence, trash enclosure, water lines and electrical lines. The total estimated cost for improvements as calculated at $351,908.24.

Additional costs for the introduction of other new facilities on the property, include:
three seating area tents ($6,000), four portable toilets ($2,400), six portable trash dumpsters ($3,900) and electric vehicle charging station ($3,833). Total cost for these additional support facilities is $16,133.

Based on the professional contractor's estimate prepared by SJ Construction Consulting, LLC, the total market value of after-the-fact site work and new development is less than $500,000. Pursuant to Chapter 25-1.3 Revised Ordinances of Honolulu (ROH), the Project is eligible for the SMA Minor Permit based on the Project valuation of less than $500,000.

3.0 ELIGIBILITY FOR SPECIAL MANGEMENT AREA MINOR PERMIT

The following summary presents an evaluation of the Project's eligibility for SMA Minor Permit, addressing the Project valuation, its potential environmental effects with planned mitigation measures, and the consideration of the potential cumulative effects.

Chapter 25-1.3 Revised Ordinances of Honolulu (ROH) defines the requirements for eligibility of a Project for a Special Management Area (SMA) Minor Permit, which states:

> *"Special Management Area minor permit" means an action by the agency authorizing development, the valuation of which is not in excess of $500,000, and which has no substantial adverse environmental or ecological effect, taking into account potential cumulative effects.*

Project Valuation is Less Than $500,000. As presented in Chapter 2, the professional contractor's estimate prepared by SJ Construction Consulting, LLC determined that the total market value of the Project's after-the-fact site work and new development is less than $500,000. Pursuant to Chapter 25-1.3 Revised Ordinances of Honolulu (ROH), the Project is eligible for an SMA Minor Permit based on its valuation under $500,000.

Environmental or ecological effect, taking into account potential cumulative effects. The following summary presents an evaluation of the Project's eligibility for SMA Minor Permit, addressing its potential environmental effects with planned mitigation measures, and the consideration of the potential cumulative effects.

This summary further emphasizes an evaluation of the Project's potential effects to coastal zone SMA resources, addressing the categories listed below.

A. *General Plan and Development Plan (land use designations; zoning; & unique features.)*
B. *Project site in relation to publicly owned or used beaches, parks and recreation areas; rare, threatened, or endangered species and their habitats; wildlife and wildlife preserves; wetlands, lagoons, tidal lands and submerged lands; fisheries and fishing grounds; other coastal/natural resources.*
C. *Relation to historic, cultural, and archaeological resources.*
D. *Coastal views from surrounding public viewpoints and from the nearest coastal highway across the site to the ocean or to coastal landform.*
E. *Quality of receiving waters and ground water (including potable water) resources. Describe effects on the groundwater recharge cycle within the groundwater control area, show existing and proposed well locations with pumping estimates. Describe effects on receiving waters--streams and ocean waters.*

Title 11, Chapter 200 Hawaii Administrative Rules (HAR) defines Cumulative Impact.

> *"Cumulative Impact" means the impact on the environment which results from the incremental impact action when added to the impact of past, present and reasonably foreseeable future action, regardless of what agency or person which undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.*

Discussion: The Project is eligible for a Special Management Area Minor Permit based on the information provided in the foregoing application Chapters 1 &2, and the following summary evaluation of potential environmental effects and mitigation, including consideration of the Project's potential to generate cumulative effects.

In consideration of cumulative effects, there is no knowledge of development projects in the past, present or reasonably foreseeable future at sites adjacent to the property or nearby. Across the highway at Sharks Cove in the Pupukea Beach Park, the County Play Court Rehabilitation project was completed in spring 2017, and the County Restroom Rehabilitation is nearing completion (summer 2017). There are no known future projects coming up on the adjacent lands or on areas nearby.

This summary assessment of potential environmental impacts includes information on environmental conditions and resources at the property. Environmental resource information was obtained through current on-site studies (2016-2017), In addition, applicable SMA resource information was obtained from an Environmental Assessment prepared for a prior proposal for this property (Belt Collins Associates; September 2004).

- Soils: The soils on the property are classified as Waialua Silty Clay (3 to 8% slopes), which are well drained. The Project has affected soils through vegetation clearing and limited grading (8,200 SF). Soils have been protected through the placement of recycled crushed concrete in circulation areas, which has reduced soils erosion and loss due to wind and storm runoff. Further, the Project will use hydromulch to restore ground cover and protect soils across a 16,500 SF area. BMPs will protect soils from erosion during the construction of planned improvements. There will be limited short term effects to soils, mitigated by stabilization and introduced ground cover. The Project will have minimal long term effects to soils onsite, and no cumulative effects to soils.

- Topography: The topography of the property ranges from 46 to 50 feet at the mauka boundary, to approximately 16 to 20 feet along the makai boundary. The Project will have minimal short term and long term effects to topography, and there will no cumulative effects.

- Flora/Vegetation: The natural vegetation found on the property includes haole koa thickets, guinea grass, Christmas berry and ivy gourd. The project will restore or stabilize the vegetation clearing in the mauka section of the property with hydromulch across 16,500 SF. The remaining area consists of landscaped grounds, open lot areas stabilized with crushed recycled concrete, a new parking lot, and screening planting added along Pahoe Road. Of note, the large ironwood trees along the highway frontage, over a dozen pre-existing canopy trees, and several dozen palm trees will be retained in the

Project use area. The Project will have limited short term effects to vegetation during construction. There will be beneficial long term effects through substantial revegetation areas, natural area/buffer vegetation retention, and the introduction of new landscape plantings across the property. No cumulative effects to vegetation are anticipated.

- Fauna/Wildlife: Feral mammals such as rats, mice, cats and dogs occur on the property. Avifauna on the property include approximately 12 species of introduced birds. No habitat for endangered or threatened species is found on this land. The Project will have limited short term effects such as temporary disruption of non-native fauna during construction. The Project will restore vegetation areas affected during previous clearing and limited grading. The retention of many trees and natural vegetation areas will maintain faunal habitat on the site, primarily for introduced bird species. There will be beneficial long term effects to fauna by substantial revegetation areas, natural area/buffer vegetation retention, and the introduction of new landscape plantings across the site.

The Pupukea Marine Life Conservation District is located roughly 500 ft distant. Marine life will not be affected in the MLCD due to on site measures to manage drainage, runoff and water quality (see Chapter 2 and below). No cumulative effects to terrestrial fauna and marine life are anticipated.

- Ground Water: Depth to groundwater in the sedimentary caprock aquifer is approximately 40 ft. Due to its proximity to the shoreline the water quality is moderately saline. There is no drinking water source at or downgradient of the property. The Project is supplied with potable water through the BWS to the real estate office and commissary II, with total demand of less than 800 gpd. Activities on the site will not create adverse effects to groundwater. The DOH-approved ATU system produces very high quality effluent, and represents a major environmental improvement over the old cesspool system built in the 1950's which previously served the property. Stormwater management controls and BMPs will be introduced to protect water quality at the property, including the open lot, and parking areas for vehicles and food trucks. There are no short-term or long-term adverse effects to groundwater quality anticipated, and no cumulative impacts.

- Drainage and Surface Water: There is no existing natural stream or man-made drainage way crossing the land or adjacent to the property. Drainage from the property is currently via overland flows across the site, with infiltration into the ground in open space and landscaped areas during typical rainfall events. Stormwater management controls and BMPs will be introduced to protect surface water quality at the property, including the open lot, and parking areas for vehicles and food trucks. Details of the stormwater management system are described in Chapter 2. The storm water controls will greatly improve the current management of rainfall runoff and surface water quality at this property, with beneficial environmental effects. There will be many measures implemented by the Project under County Grading Permit conditions which will strictly limit the short-term construction period erosion. The installation of on-site stormwater control measures will ensure that there will be no long-term adverse effects to surface water quality, and no resulting cumulative impacts to surface water quality.

- Historic, Archaeological and Cultural Resources: There have been several archaeological investigations conducted for this property including Pacific Legacy (2004) and Keala Pono Archaeology (2017). The findings from these studies, including subsurface testing, confirmed that the project area is not anticipated to contain archaeological resources of significance. Cultural practices and resources at this location are not affected. There will be no short-term construction phase impacts or long-term adverse effects to archaeological and cultural resources, and no cumulative impacts are anticipated.

- Coastal Views: The project will not have an adverse effect on significant coastal views, which are views in the makai direction from the park and highway. The Project is located on the mauka side of Kamehameha Highway. There will be no short-term impacts or long-term adverse effects to coastal views, and no cumulative impacts are anticipated.

- North Shore Sustainable Communities Plan: Approved in 2011, the North Shore Community, North Shore Neighborhood Board No. 27, City Planners and the Honolulu City Council all decided to designate the roughly 4.5 ac area between Pupukea Road and Pahoe Road as a "Rural Community Commercial Center". The following list highlights key aspects of the SCP guidance, with a discussion that demonstrates Plan consistency.

  - *Goods & services to meet the needs of surrounding communities*
  - *Attract visitor and residents from outside the immediate community*
  - *Grocery stores, sundries, restaurants, other services/shops catering to residents/visitors*
  - *Smaller in scale typically found "Country Town" – Haleiwa is designated a Country Town*
  - *Buildings one- and two-stories in height*
  - *Clustered commercial uses vs spreading along Highway*
  - *Reflect the rural character and compatible with adjoining area*
  - *Safe and convenient transportation and access*
  - *Emphasis on Pedestrian and bicycle friendly – crosswalks, pathways, bike racks*
  - *Locate parking behind buildings and landscaping*

Discussion: The Project will continue to provides goods and services to meet the needs of the surrounding community, including: surf boards, surfing gear, apparel, real estate services, food commissary, and five food trucks. The food trucks provide a needed variety of food choices at affordable pricing for residents and area visitors. The Project is small is scale with four one-story buildings. The Project uses are clustered to avoid spreading along the highway, and reflect the rural character of the adjoining area. A single driveway access provides safe and convenient access, and no connection to Pahoe Road to respect the neighbors. People can easily access the property as pedestrians and via bicycle, with a crosswalk nearby at the intersection of Pupukea Road. Parking is located behind buildings, and landscaping is provided in the parking area and along neighboring roadway.

Project Actions/Effects Not Applicable to SMA & Coastal Zone Resource Consideration

The Project uses and activities have effects on the site and area in categories that are not evaluated in the SMA Minor permit review, since they are not applicable to coastal zone resource considerations. These include categories such as: climate, natural hazards, roadways and traffic, acoustics/noise, air quality, hazardous substances, public services, demographic and economic conditions, non-coastal views and aesthetics, and the use of electrical power and communications.

Of these concerns, the greatest concern voiced by neighbors and the community is the vehicle traffic and circulation associated with the Project. It is recognized that Kamehameha Highway is a busy thoroughfare which becomes congested due to activities in the vicinity of the Pupukea Foodland and the Sharks Cove area. As stated previously in Chapters 1 and 2 of this application, the vehicles entering and leaving the Project site will be accommodated with the existing driveway. There will be no vehicle access via Pahoe Road. The parking area and overflow lot will accommodate the current peak use periods particularly with the reduction in the number of food trucks. Parking along the highway frontage is discouraged with the No Parking signs and tall orange cones placed along the highway. The addition of an entry sign will help orient drivers to the Project entrance. Measures are planned to also help orient pedestrians at the Project to cross at the existing highway crosswalk at Pupukea Road, and to discourage mid-block crossing.

Conclusion of the Evaluation of Environmental Effects and Potential Cumulative Impacts

The foregoing evaluation documents that the actions associated with the Project are not anticipated to generate substantial adverse environmental or ecological effects. The potential for adverse effects to coastal resources of the Special Management Area will be minimized and mitigated through the implementation of on-site mitigation measures.

This analysis further considered the potential for the Project to generate cumulative effects as an incremental impact action which, in combination with other known off-site actions, could collectively create significant effects over time. There are no planned future projects in the adjacent or nearby area. With consideration of on-site measures to minimize and mitigate potential impacts, there were no findings of potential cumulative effects to coastal resources in the Special Management Area.

4.0 CONFORMANCE TO CITY AND COUNTY OF HONOLULU SPECIAL MANGEMENT AREA GUIDELINES

(1) All Development in the Special Management Area shall be subject to reasonable terms and conditions set by the council in order to ensure:

- *Adequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles;*
- *Adequate and properly located public recreation areas and wildlife preserves are reserved;*
- *Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon special management area resources; and*
- *Alternations to existing land forms and vegetation, except crops, and construction of structures shall cause minimum adverse effect to water resources and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation or failure in the event of earthquake.*

Discussion: The boundary of the project site is located approximately 150-200 feet southeast of the public access at Pūpūkea Beach Park. The existing built structures on the site have not posed adverse effects on public access to beaches, recreation areas, or natural reserves, or caused detrimental effects to water resources and scenic and recreational amenities. The proposed uses will not adversely affect access to existing public shoreline or recreation areas. No wildlife preserves or public areas are anticipated to be affected by the action, which includes grading and landscape vegetation installations, as well as added asphalt parking areas and associated stormwater management controls. Surface runoff may increase due to the added asphalt parking lot. The proposed stormwater management controls will be installed to mitigate stormwater runoff impacts. Views from Kamehameha Highway will remain in their current state, with some seating areas relocated away from the area adjacent to the highway.

(2) No development shall be approved unless the council has first found that:

- *The development will not have any substantial, adverse environmental or ecological effect except such adverse effect is minimized to the extent practicable and clearly outweighed by public health and safety, or compelling public interests. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options;*
- *The development is consistent with the objectives and policies set forth in Section 25-3.2 and area guidelines contained in Section 205A-26, Hawai'i Revised Statues; and;*
- *The development is consistent with the County General Plan, Development Plans, Zoning and subdivision codes and other applicable ordinances.*

Discussion: No substantial adverse environmental or ecological impacts have been observed as a result of the existing cleared and graded areas, two office buildings, and carport, which have been in place for the past several years. The action will stabilize the cleared area with soils, install additional landscaping and hydromulch groundcover to the graded areas, and install stormwater management controls. These

added measures to the property will improve the quality and quantity of runoff on-site, further reducing potential effects to coastal resources and water quality.

The operation of the food trucks results in increased activity on the subject commercial zoned properties, with an average of 300-400 customers each day. The increased activities are managed carefully to avoid creating adverse environmental or ecological effects. The food trucks are certified by the State DOH. Liquid waste produced by the food trucks is contained and properly disposed off-site. Potential leaks from petroleum and other liquid waste from the food trucks are also managed on-site to prevent soil contamination. Solid waste associated with the food trucks is managed within the on-site trash containers and dumpsters, which are serviced regularly. Patrons of the food trucks are managed within defined seating areas. Portable restrooms and hand wash stations are provided onsite, which are serviced at least twice weekly. Vehicular access is through a central driveway to avoid disturbance to the neighbors, managed onsite with an all-weather asphalt parking area. Drainage and storm runoff is onsite through best management practices and properly designed stormwater controls. Open ground areas of the site which were previously disturbed are being restored with hydromulch to stabilize soils, minimize soil erosion and runoff containing suspended sediment. The overall level of activity and operations on the site, including the managed food truck operations, does not generate adverse cumulative environmental effects.

(3) The Authority Shall Seek to Minimize, Where Reasonable:

- *Dredging, filling or otherwise altering any bay, estuary, salt marsh, river mouth, slough or lagoon;*
- *Any development which would reduce the size of any beach or other area usable for public recreation;*
- *Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management area and the mean high tide line where there is no beach;*
- *Any development which would substantially interfere with or detract from the line of sight toward the sea from the State highway nearest the coast; and*
- *Any development which would adversely affect water quality, existing areas of open water free of visible structure, existing and potential fisheries and fishing grounds, wildlife habitats, or potential or existing agricultural uses of land.*

Discussion: The existing buildings which have been in place since 1955, have not interfered with or detracted from the line of sight toward the sea from Kamehameha Highway, nor have they posed adverse impacts to water quality near the site. There will be no adverse impact to public access, public beaches, or recreation areas as a result of the proposed activities. The proposed stormwater management controls will improve stormwater quality and quantity of runoff on-site.

The operation of the food trucks results in increased activity on the subject commercial zoned properties, with an average of 300-400 customers each day. The increased activities are managed carefully to avoid creating adverse environmental or ecological effects. Liquid waste produced by the DOH-certified food trucks is contained and properly disposed off-site. Potential leaks from petroleum

and other liquid waste from the food trucks are also managed on-site to prevent soil contamination. Solid waste associated with the food trucks is managed within the on-site trash containers and dumpsters, which are serviced regularly. Patrons of the food trucks are managed within defined seating areas. Portable restrooms and hand wash stations are provided onsite, which are serviced at least twice weekly. Vehicular access is through a central driveway to avoid disturbance to the neighbors, managed onsite with an all-weather asphalt parking area. Drainage and storm runoff is onsite through best management practices and properly designed stormwater controls. Open ground areas of the site which were previously disturbed are being restored with hydromulch to stabilize soils, minimize soil erosion and runoff containing suspended sediment. The overall level of activity and operations on the site, including the managed food truck operations, does not generate adverse effects to water quality, fishing areas, wildlife habitats, or agricultural uses of land.

Figure 1
Location Map

Source: GIS Data, State of Hawai'i

Figure 2
City and County of Honolulu, TMK Parcel Map of Project Area

Source: City and County of Honolulu GIS Data

Figure 3
City and County of Honolulu Special Management Area

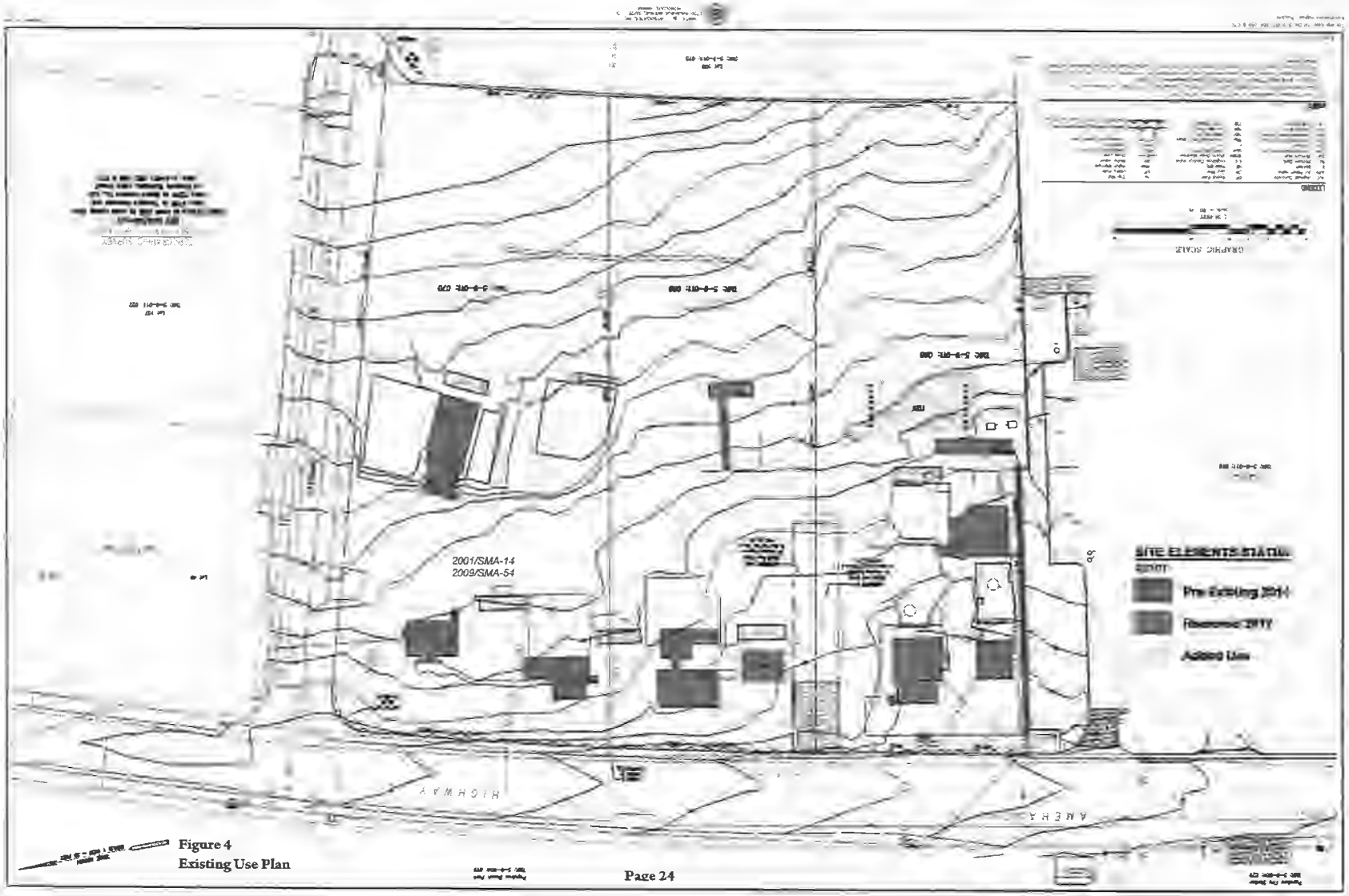


Figure 4
Existing Use Plan

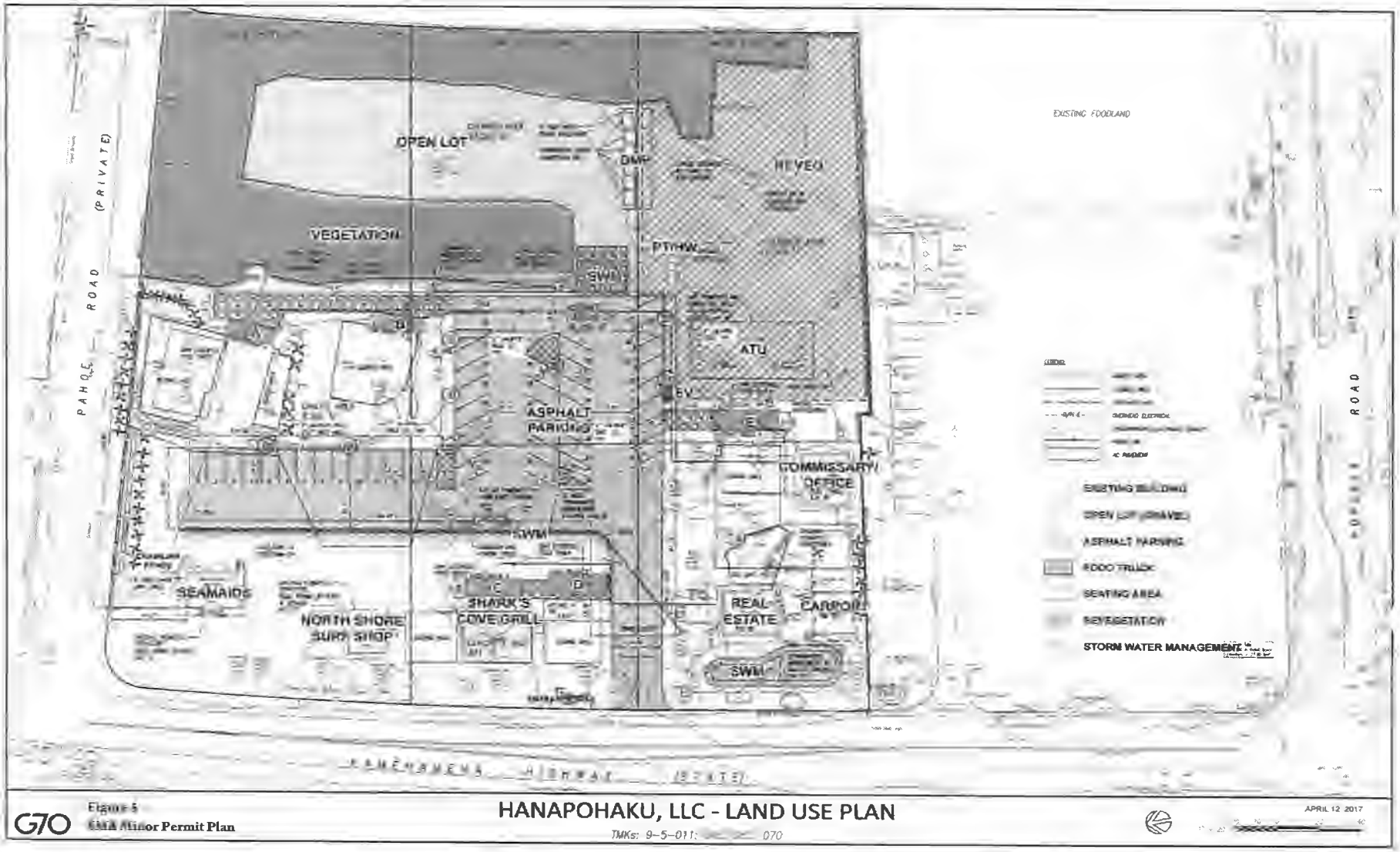


Figure 5
SMA Minor Permit Plan

HANAPOHAKU, LLC - LAND USE PLAN

TMKs: 9-5-011: 070

APRIL 12 2017

0 1/2" 1" 2"

A1
SIGNAGE AT ENTRY
04 04 2017

GTO McCully's Corner

Figure 6
Entrance Sign

CONTRACTOR'S ESTIMATE FOR ENGINEER

SJ Construction Consulting, LLC

PO Box 37238, Honolulu, HI 96837
www.sjcivil.com; sj@sjcivil.com
Contact: Scott Jennings
Phone: 808-271-5150

Mr. Steven Doo, P.E.
G70
925 Bethel Street, 5th Floor
Honolulu, HI 96813
Phone: 808-523-5866

Date: April 16 2017
Job Name: Hanapohaku, LLC - Interim Use Plan
Date of Plans: Plans provided 3/30/17
Estimate No.: 2017-02A

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
	SITE IMPROVEMENTS				
1	Temp. Erosion Control Measures, In Place Complete	1.00	LS	3,696.00	3,696.00
2	Site Clearing	1.22	AC	15,708.75	19,112.84
3	Remove Soil Stockpile	35.00	CY	61.65	2,157.75
4	Fill & Excavation	607.00	CY	36.50	22,155.50
5	Site Grading	8,200.00	SF	1.20	9,840.00
6	Entry Sign ((2' x 6' on two posts)	1.00	EA	2,583.50	2,583.50
7	Coarse Aggregate Paths to Food Trucks	5.00	EA	1,308.05	6,540.25
8	6' Tall Chain Link Fence	200.00	LF	35.65	7,130.00
9	6-foot High Wood Trash Enclosure	1.00	LS	7,777.90	7,777.90
10	Landscaping/Grassing	1.00	LS	14,849.35	14,849.35
11	Canopy Trees (2" caliper w/3' x 3' tree well)	10.00	EA	1,484.95	14,849.50
12	Aggregate Base Course, In Place Complete	195.00	CY	115.95	22,610.25
13	Conc. Sidewalk/Slab, 4" Thick, In Place Complete	831.00	SF	26.50	22,021.50
14	Asphalt Pads under Trucks (5 ea @ 10' x 27.5')	153.00	SY	56.05	8,575.65
15	Asphalt Pavement, In Place Complete	2,011.00	SY	34.45	69,278.95
16	Pavement Striping	1,000.00	LF	5.35	5,350.00
	SUBTOTAL				**$238,528.94**
	SEWERAGE SYSTEM				
17	IWS system, In Place Complete	1.00	LS	70,195.25	70,195.25
	SUBTOTAL				**$70,195.25**
	DRAINAGE SYSTEM				
18	Gravel Entrance	603.00	SF	3.90	2,351.70
19	6" Percolation Trench BMP w/6" Drain Line	260.00	LF	46.55	12,103.00
20	Drain Outlet, In Place Complete	1.00	EA	2,850.90	2,850.90

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT
21	Stormwater Basin	4,220.00	SF	3.90	16,458.00
	SUBTOTAL				**$19,711.90**
	WATER SYSTEM				
22	2" Water Line	426.00	LF	34.60	14,739.60
	SUBTOTAL				**$14,739.60**
	ELECTRICAL SYSTEM				
23	Electrical duct & conductor	413.00	LF	15.45	6,380.85
	SUBTOTAL				**$6,380.85**
GRAND TOTAL					**$351,908.24**

NOTES:

Assumptions:
1. No rock excavation.
2. No groundwater.
3. Bid item 4 - assume no import. Assume all offhaul.
4. Bid item 12 - this was assumed to be under the asphalt.
5. Bid item 17 - as-builts were used to estimate the cost of the existing IWS system.
6. Bid items 22 & 23 - utility quantities were each reduced by 100 lineal feet to account for reduction in number of food trucks.

Exclusions:
1. Driveway on makai side is existing (not to be built or offhauled)
2. Bond.

Conditions/Comments
None at this time.

This proposal good for thirty (30) days.

Please do not hesitate to contact me should you have any questions about this proposal

Jennings, P.E., Principal
Consulting, LLC
808-271-5150
sj@sjcivil.com

GRADING & DRAINAGE STATEMENT

Hanapohaku, LLC
DPP File No: 2017/SMA-14
Tax Map Keys: (1) 9-5-011:068, 069 & 070

PREPARED BY

Group 70 International, Inc.
dba G70
925 Bethel Street, 5th Floor
Honolulu, Hawaii 96813

May 22, 2017

The proposed Hanapohaku, LLC, identified as TMKs: 9-5-011:068, 069 & 070 and located in Pupukea, Haleiwa, Oahu. The site is bounded by Kamehameha Highway to the west, Pahoe Road and single family residences to the north and east, and Pupukea Foodland to the south.

The existing site has three (3) existing buildings and mobile food trucks situated along the Kamehameha Highway side of the property. The mauka portion of site is mostly undeveloped with vegetation. The existing topographic condition allows storm runoff to sheet flow from the northeast side (mauka) towards the highway at an average slope of 5-percent (5%) and enters the Hawaii Department of Transportations, Highways Division's (HDOT) drainage system.

The proposed grading for Hanapohaku, LLC will be minimized by maintaining the existing flow patterns. Storm runoff from the project site will flow overland across undisturbed vegetation, asphalt concrete pavement, infiltration ditches, and grass swales towards a rain garden and HDOT's drainage system. The addition of infiltration trenches, grass swales, and rain gardens will provide storm water quality best management practices (BMPs), which address Low Impact Development regulations. The developed site will yield a lower design flow per acre by increasing the path of storm runoff by use of these BMPs.

The existing and developed hydrologic conditions for the proposed Hanapohaku, LLC, as described below, are based upon the Rational Method, and in accordance with the City and County of Honolulu's Rules Relating to Storm Drainage Standards (January 2000), as amended:

Q	=	Runoff in cubic feet per second (CFS)
C	=	Runoff Coefficient
I	=	Rainfall Intensity, inches/hour
A	=	Drainage Area, acres

Existing Condition:

Runoff Coefficient, C: Table 2, page 22
Business Areas, C = 0.65

Time of Concentration, Tc: Plate 3, page 25
490' @ 5.00% grass surface = 20 minutes

1-Hour Rainfall Intensity, i: Plate 1, page 23
i(10) = 3.00 inches/hour for Tm(10)

Correction Factor, CF: Plate 4, page 25
Using Tc = 20 minutes, CF = 1.80

Rainfall Intensity, I:
I(10) = (3.00 inches/hour)(1.80) = 5.40 inches/hour

Design Flow per Acre, Q/acre
Q(10) = C x I(10) = (0.65)(5.40) = 3.51 CFS/acre

Proposed Condition:

Runoff Coefficient, C: Table 2, page 22
Business Areas, C = 0.85

Time of Concentration, Tc: Plate 3, page 25

200' @ 5.00% grass surface	=	14 minutes
140' @ 5.00% paved surface	=	6 minutes
75' @ 2.00% drain line	=	6 minutes
25' @ 2.00% grass surface	=	9 minutes

35 minutes

1-Hour Rainfall Intensity, i: Plate 1, page 23
i(10) = 3.00 inches/hour for Tm(10)

Correction Factor, CF: Plate 4, page 25
Using Tc = 35 minutes, CF = 1.35

Rainfall Intensity, I:
I(10) = (3.00 inches/hour)(1.35) = 4.05 inches/hour

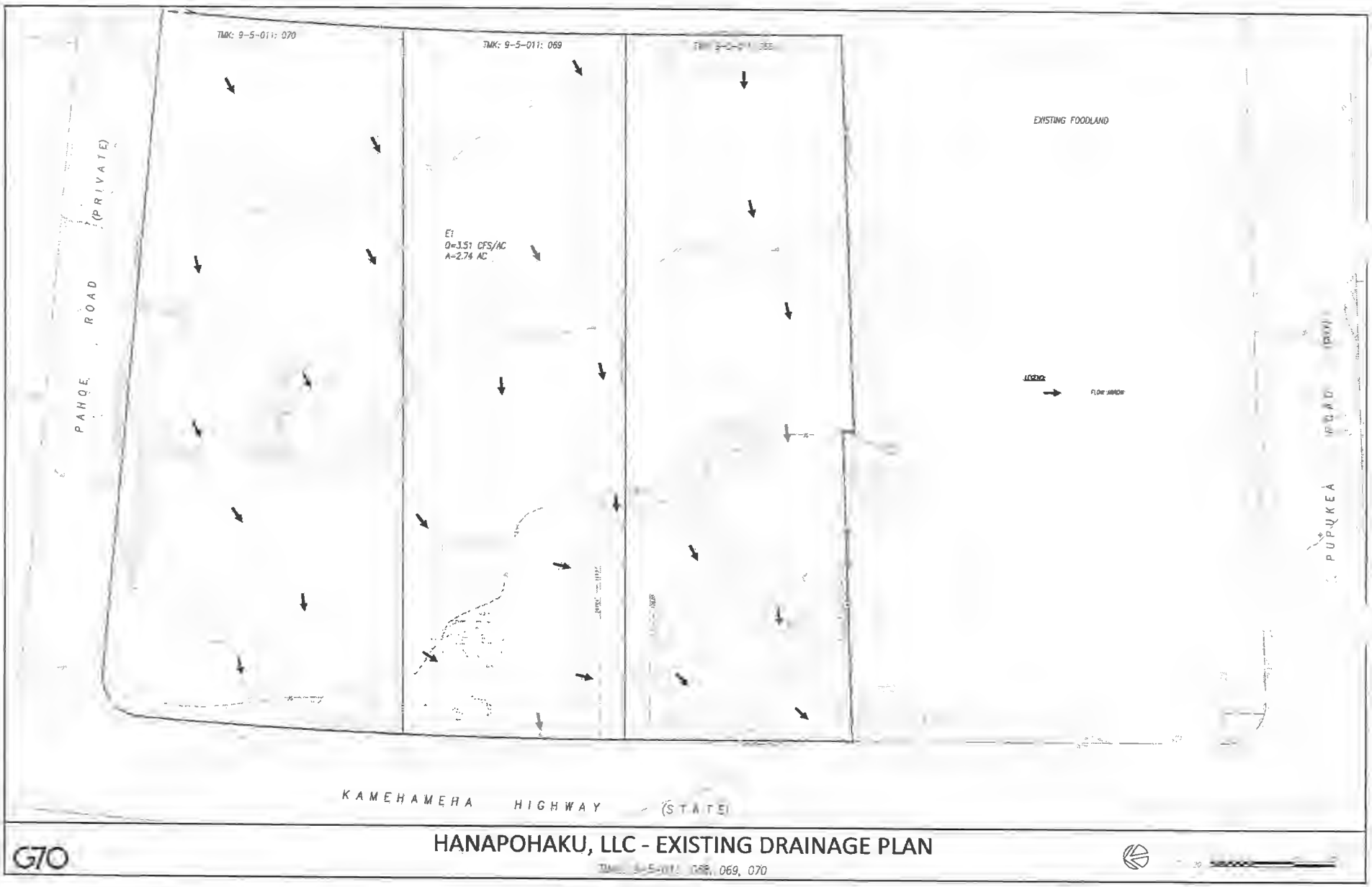
Design Flow per Acre, Q/acre
Q(10) = C x I(10) = (0.85)(4.05) = 3.44 CFS/acre

The drainage report computes the design flow per acre for developed conditions to be 3.44 CFS/acre, which indicates that the developed flows from the proposed project will not exceed the original design flows of 3.51 CFS/acre.

In conclusion, the proposed grading and drainage for Hanapohaku, LLC, as indicated on the Land Use Plan plans prepared by G70, will not result in any increase in design flows from the project to the HDOT drainage system. Therefore, the proposed development of Hanapohaku, LLC will not create any adverse drainage impacts to the surrounding properties.

GROUP 70 INTERNATIONAL, INC.
dba G70

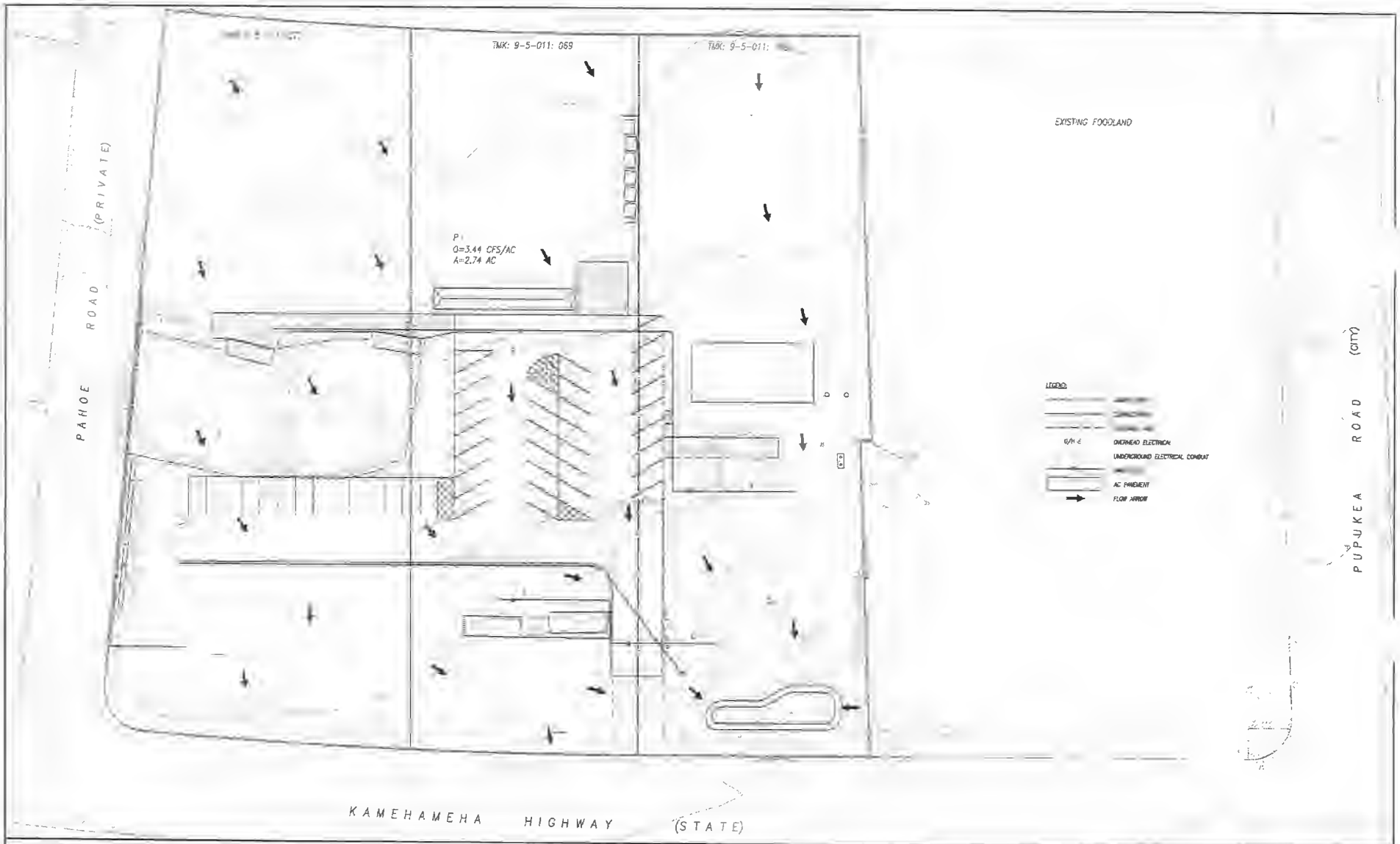
Paul T. Matsuda, PE, LEED AP
Exp. 4/30/18



G70

HANAPOHAKU, LLC - EXISTING DRAINAGE PLAN

TMK: 9-5-011: 068, 069, 070



HANAPOHAKU, LLC - PROPOSED DRAINAGE PLAN

TMKs: [illegible]

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document was duly served by hand delivery upon the party listed below, and a courtesy copy was emailed to the Applicant at Jeff@G70.design.

Ms. Kathy K. Sokugawa
Director, Planning & Permitting
City & County of Honolulu
Frank F. Fasi Municipal Building
650 South King Street, 7th Floor
Honolulu, HI 96812
By email to: ksokugawa@honolulu.gov

DATED: Honolulu, Hawai'i, September 22, 2017.

Dennis Antolini
President
MALAMA PUPUKEA-WAIMEA

MARGARET WILLE & ASSOCIATES LLLC

MARGARET DUNHAM WILLE 8522
TIMOTHY VANDEVEER 11005
P.O. Box 6398
Kamuela, Hawai'i 96743
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pam.bunn@dentons.com
erika.amatore@dentons.com

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAI'I'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, AND CORA SANCHEZ, Plaintiffs, v. 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) **SUMMONS**

SUMMONS

STATE OF HAWAI'I

TO THE ABOVE-NAMED 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; HANAPOHAKU LLC

You are hereby summoned and required to file with the court and serve upon MARGARET WILLE AND ASSOCIATES, attorneys for Plaintiffs SAVE SHARKS COVE ALLIANCE, HAWAI'I'S THOUSAND FRIENDS, MĀLAMA PUPUKEA-WAIMEA, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ, an answer to the *First Amended Complaint* which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the first amended complaint.

This Summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this Summons, personal delivery during those hours.

A failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i, FEB 27 2019.

N. MIYATA SEAL

CLERK OF THE ABOVE-ENTITLED COURT

2020 WL 954964
Only the Westlaw citation is currently available.
United States District Court, D. Hawai'i.

Reza (Ray) LESANE, Plaintiff,
v.
HAWAIIAN AIRLINES, INC.;
Mark Dunkerly, Defendants.

CIVIL NO. 19-00179 JAO-KJM
|
Signed 02/27/2020

Attorneys and Law Firms

Andre S. Wooten, Century Square, Honolulu, HI, for Plaintiff.

John S. Rhee, Cheuk Fu Lui, Paul Alston, Shannon M.I. Lau, Wendy F. Hanakahi, Dentons US LLP, Honolulu, HI, for Defendant Hawaiian Airlines Inc.

John S. Rhee, Paul Alston, Shannon M.I. Lau, Wendy F. Hanakahi, Dentons US LLP, Honolulu, HI, for Defendant Mark Dunkerley.

ORDER (1) REJECTING PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S DECEMBER 18, 2019 RECOMMENDATION TO DISMISS PLAINTIFF'S COUNTER-CLAIM TO NEW ALLEGATIONS IN COUNTER-CLAIM FILED BY DEFENDANTS AUGUST 28, 2019 AND (2) ADOPTING MAGISTRATE JUDGE MANSFIELD'S FINDINGS AND RECOMMENDATION TO DISMISS PLAINTIFF'S COUNTER-CLAIM TO DEFENDANT'S COUNTERCLAIM

Jill A. Otake, United States District Judge

***1** Plaintiff Reza Lesane ("Plaintiff") objects to Magistrate Judge Kenneth J. Mansfield's Findings and Recommendation to Dismiss Plaintiff's Counter-Claim to Defendant's Counterclaim ("F&R").[1] ECF No. 122. This matter shall be decided without a hearing pursuant to Local Rule 7.1(d). For the reasons articulated below, the Court OVERRULES Plaintiff's "Objection to the Magistrate' [sic] December 19, 2019 Recommendation to Dismiss Plaintiff's Counter-Claim to New Allegations in Counter-Claim Filed by Defendants August 28, 2019 Filed on Sept. 22, 2019," ECF No. 122, and ADOPTS the F&R.

BACKGROUND

Plaintiff commenced this action on March 19, 2019 in the Circuit Court of the First Circuit, State of Hawai'i. Defendant Hawaiian Airlines, Inc. ("Hawaiian") removed this action on April 8, 2019.

On August 15, 2019, Plaintiff filed a First Amended Complaint ("FAC"). Hawaiian responded with an Answer and Counterclaim on August 28, 2019. On September 22, 2019, Plaintiff filed an Answer to Hawaiian's Counterclaim and a Counterclaim to Hawaiian's Counterclaim.

On October 14, 2019, Hawaiian filed a Motion to Strike Plaintiff Lesane's Answer to the Counter-Claim Filed by Hawaiian, requesting in pertinent part that the Court strike or dismiss Plaintiff's Counterclaim to its Counterclaim. ECF No. 53. Following a hearing on Hawaiian's motion, Magistrate Judge Mansfield issued his F&R on December 18, 2019. ECF No. 110. He concluded that the *Noerr-Pennington* doctrine barred Plaintiff's Counterclaim to Hawaiian's Counterclaim ("Counter-Counterclaim"). *Id.* at 6. Specifically, Magistrate Judge Mansfield found that the *Noerr-Pennington* doctrine provided Defendant with immunity from Plaintiff's Hawai'i Revised Statutes ("HRS") § 480-2 claims because Plaintiff failed to adequately plead facts that Hawaiian's Counterclaim is objectively baseless, or subject to the "sham litigation" exception, and that the allegations in the Counter-Counterclaim are defenses to the Counterclaim, not facts supporting a new, independent claim. *Id.* at 7. Magistrate Judge Mansfield also determined that the *Noerr-Pennington* doctrine did not bar the common law claims set forth in the Counter-Counterclaim. *Id.* at 7-8. However, he dismissed the claims—which he construed to allege fraud—for failure to state a claim under Hawai'i law pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6). *Id.* at 8-10.

***2** On January 1, 2020, Plaintiff filed his Objection. ECF No. 122.

STANDARD OF REVIEW

TAB E

When a party objects to a magistrate judge's findings or recommendations, the district court must review de novo those portions to which the objections are made and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) ("[T]he district judge must review the magistrate judge's findings and recommendations de novo *if objection is made*, but not otherwise."). Under a de novo standard, there is no deference to the lower court's ruling; rather, the Court "freely consider[s] the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009) (alteration in original) (quotations omitted); *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

ANALYSIS

Plaintiff argues that Magistrate Judge Mansfield should not have dismissed his Counter-Counterclaim because he: (1) properly objected to the "sham" Counterclaim and should be allowed to present his defenses to the jury and (2) adequately described Hawaiian's false fraudulent statements. [2] Hawaiian counters that Plaintiff does not demonstrate that Magistrate Judge Mansfield improperly applied the *Noerr-Pennington* doctrine to the statutory claims in the Counter-Counterclaim, and that Plaintiff has yet to satisfy FRCP 9(b).

As a preliminary matter, the Court notes that the Objection is replete with arguments that Plaintiff did not present to Magistrate Judge Mansfield. "[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); *see also Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009) (holding that "a district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge"). The Court, exercising its discretion, declines to consider arguments and/or evidence that was unavailable to Magistrate Judge Mansfield when he issued the F&R. Where, as here, the F&R concerns a determination about the sufficiency of a pleading, new arguments and/or evidence are irrelevant and do not bear upon the soundness of Magistrate Judge Mansfield's analysis.

The Objection attempts to rehabilitate the Counter-Counterclaim's deficiencies, but Plaintiff's post hoc efforts fail. Although the Counter-Counterclaim consists of a mere eight paragraphs, Plaintiff now advances allegations spanning over twenty-five pages, along with inapplicable legal authority—including a *criminal* statute—in an effort to reinstate his Counter-Counterclaim.

A. Application of *Noerr-Pennington* Doctrine

***3** Magistrate Judge Mansfield concluded that the *Noerr-Pennington* doctrine precluded Plaintiff from asserting statutory liability against Hawaiian pursuant to HRS § 480-2 and that the "sham litigation" exception did not apply. Plaintiff contends that Hawaiian's Counterclaim is a sham because it "is based entirely upon the illegal, unauthorized clandestine identity theft of [his] personal medical identification information ... years after the employment relationship ended in litigation and a stipulated 'Confidential Settlement Agreement.' " Objection at 3.

"Under the *Noerr–Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (citation omitted). Litigation activities constituting "communications to the court" are "petitions." *Id.* at 933 (alteration omitted) (citation omitted). Communications include: complaints, answers, counterclaims, "and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something." *Id.* (quotations and citation omitted).

Not all petitioning activity is protected, however. When the department of the government involved is a court, the Ninth Circuit identifies three circumstances in which the sham litigation exception to the *Noerr-Pennington* doctrine applies: "where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful"; (2) "where the conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose"; and (3) "if the allegedly unlawful conduct 'consists of making intentional misrepresentations to the court, litigation can be deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " *Id.* at 938 (some internal quotations omitted); *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998).

Plaintiff "takes severe and specific exception" to Magistrate Judge Mansfield's determination that Hawaiian's

Counterclaim is not a "Sham Complaint," Objection at 2-3, but he has not explained how Magistrate Judge Mansfield erred. Indeed, Plaintiff does not even cite the applicable legal standards. And his eight-paragraph Counter-Counterclaim is devoid of "specific allegations demonstrating that the *Noerr-Pennington* protections do not apply." *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) (citation omitted). Allegations that the sham litigation exception applies are subject to a heightened pleading standard. *See Kottle*, 146 F.3d at 1063.

The sole basis for Plaintiff's Objection as to Magistrate Judge Mansfield's *Noerr-Pennington* doctrine analysis is that an illegal premise—use of his social security number, birth date, and identity past the authorization date provided for in the settlement agreement—serves as the foundation of the Counterclaim. Objection at 3. This argument is without merit.

1. Whether the Counterclaim is Objectively Baseless

Courts apply a two-part definition to determine whether a lawsuit constitutes sham litigation under this situation: (1) "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and (2) "whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor.' " *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). The suit is immunized under *Noerr-Pennington* "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome[.]" *Id.* at 60. A court may only examine a litigant's subjective motivation if the challenged litigation is objectively meritless. *See id.*

***4** Here, Hawaiian's Counterclaim is not objectively baseless because an objective litigant could conclude that the Counterclaim is reasonably calculated to elicit a favorable outcome. In the Counterclaim, Hawaiian avers that it is entitled to restitution for the medical benefits Plaintiff unjustly received as a result of Hawaiian's erroneous payment of his healthcare insurance premiums years past the date it was obligated to do so. ECF No. 39-1. If proved, Hawaiian could prevail on its Counterclaim. Neither the allegations in the Counter-Counterclaim, nor Plaintiff's bald accusations of illegitimacy and illegality, support a finding of objective baselessness. Plaintiff's characterization of Hawaiian's request for reimbursement as fraudulent pursuant to HRS § 480-2 does not, without more, except it from the protection of *Noerr-Pennington.*

2. Series of Lawsuits

The Court need not address the second situation because this dispute concerns a single action, and not "a series of lawsuits, 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose."

3. Intentional Misrepresentations to the Court

For this final situation to apply, Plaintiff's allegations must demonstrate that Hawaiian so misrepresented the truth to the Court that the entire proceeding was deprived of its legitimacy. *See Kottle*, 146 F.3d at 1063. Plaintiff alleges, in conclusory fashion, that Hawaiian's attribution of responsibility to him for its continued—albeit erroneous—payments for medical insurance premiums is "knowingly false, erroneous, misleading and fraudulent." ECF No. 44 at ¶ 58. However, this is a disputed issue that is presently the subject of a motion for summary judgment; it cannot be said to deprive the entire litigation, or even the Counterclaim, of all legitimacy.

Based on the foregoing, the Court finds that Plaintiff has not alleged sufficient facts to demonstrate that the sham litigation exception applies. Therefore, Magistrate Judge Mansfield properly concluded that Plaintiff's HRS § 480-2 claim is barred by the *Noerr-Pennington* doctrine.

B. FRCP 12(b)(6) Dismissal of Fraud Claim

Magistrate Judge Mansfield found that the *Noerr-Pennington* doctrine does not bar state common law claims and dismissed the fraud claim in the Counter-Counterclaim pursuant to FRCP 12(b)(6) because Plaintiff failed to satisfy FRCP 9(b)'s heightened pleading standard. F&R at 7-9. Magistrate Judge Mansfield relied on *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1141 n.2 (9th Cir. 2013), for the proposition that the Ninth Circuit has yet to address whether the *Noerr-Pennington* doctrine provides immunity against state common law claims. F&R at 7. Magistrate Judge Mansfield also noted that the Ninth Circuit previously held that the *Noerr-Pennington* doctrine applies to California's state law tortious interference with prospective economic advantage claims. *Id.* (citing *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008)). In *Theme Promotions, Inc. v. News America Marketing, FSI*, the Ninth Circuit agreed with the Fifth Circuit's reasoning for extending the *Noerr-Pennington* doctrine to tortious interference with contract claims: "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill

the constitutional right of petition than can a statutory claim such as antitrust." *Id.* at 1007 (quoting *Video Int'l Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988)) (quotations omitted). Based on this reasoning, the *Noerr-Pennington* doctrine would also arguably extend to Plaintiff's fraud claim. Assuming it does not, however, Magistrate Judge Mansfield's dismissal of the fraud claim was proper.

FRCP 12(b)(6) authorizes dismissal of a complaint that fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). On a Rule 12(b)(6) motion to dismiss, " 'the court accepts the facts alleged in the complaint as true,' and '[d]ismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged.' " *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988)) (alteration in original). However, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000).

***5** "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The tenet that the court must accept as true all of the allegations contained in the complaint does not apply to legal conclusions. *Id.* As such, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Id.* at 679 (citing Fed. R. Civ. P. 8(a)(2)) (some alterations in original). If dismissal is ordered, the plaintiff should be granted leave to amend unless it is clear that the claims could not be saved by amendment. *Swartz v. KPMG LLP*, 476 F.3d 756, 760 (9th Cir. 2007).

Plaintiff's allegations pertaining to fraud consist of the following:

> 52. Under the terms of the Second Settlement agreement [sic] Hawaiian Airlines knew or should have known that this Complaint's demand for Mrs. Lesane to re-imburse [sic] Hawaiian for Hawaiian' [sic] alleged error is a fraudulent request under ... the common law....
>
> ....
>
> 58. Therefore [sic] all of Defendant & Counter-Claim Plaintiff Hawaiian Airlines [sic] statements of Plaintiff and Counter-Claim Defendant Lesane being responsible for Defendant & Counter-Claim Plaintiff Hawaiian Airlines continuing to allegedly pay for medical insurance for Mr. Lesane are knowingly false, erroneous, misleading and fraudulent.
>
> 59. Consequently, the Defendant & Counter-Claim Plaintiff Hawaiian Airlines is liable for damages to Plaintiff Lesane for emotional distress and financial expenses of defending himself in court against this patently false and fraudulent claim under Section 480-2 of the Hawaii Revised Statutes and the Common Law.

ECF No. 44 at ¶¶ 52, 58-59. Notably, the gravamen of Plaintiff's Counter-Counterclaim is that Hawaiian's Counterclaim itself is fraudulent, not that Hawaiian otherwise acted fraudulently.

To establish a common law fraud claim, a plaintiff must show that there was "(1) a representation of a material fact, (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonably believed true by the other party, and (4) upon which the other party relies and acts to his or her damage." *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co.*, 116 Hawai'i 277, 298, 172 P.3d 1021, 1042 (2007). Allegations concerning fraud must be pled with particularity pursuant to FRCP 9(b). *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1232-33 (D. Haw. 2010). FRCP 9(b) requires a party alleging fraud or mistake to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc), *superseded on other grounds by* 15 U.S.C. § 78u–4. FRCP 9(b)'s purpose is threefold:

> (1) to provide defendants with adequate notice to allow them to defend the charge and deter plaintiffs from the filing of complaints "as a pretext for the discovery of unknown wrongs"; (2) to protect those whose reputation would be harmed as a result of being subject to fraud

> charges; and (3) to "prohibit [ ] plaintiff[s] from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."

Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (citations omitted) (alterations in original).

The "who, what, when, where, and how" of the alleged misconduct must accompany averments of fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation omitted); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). A plaintiff must offer something greater "than the neutral facts necessary to identify the transaction." *Vess*, 317 F.3d at 1106. He or she must identify "what is false or misleading about a statement, and why it is false." *Id.* (citation omitted). The circumstances constituting the alleged fraud must "be 'specific enough to give defendants notice of the particular misconduct ... so that they can defend against the charge and not just deny that they have done anything wrong.' " *Id.* (citations omitted).

***6** As explained by Magistrate Judge Mansfield, Plaintiff did not allege that Hawaiian made false representations, in contemplation of Plaintiff's reliance on such representations, and that Plaintiff in fact relied on those representations. F&R at 9. Beyond the absence of the basic elements of a fraud claim, Plaintiff's bare allegations did not satisfy FRCP 9(b)'s pleading requirements. Moreover, Plaintiff appears to misapprehend the function of a pleading and a brief. Plaintiff attempts to utilize his Objection to assert claims against Hawaiian, but those allegations should have been presented in a pleading, if at all. Not only did Plaintiff fail to raise those allegations in his Counter-Counterclaim and in his opposition to Hawaiian's underlying motion, he now asks this Court to reject the F&R based on allegations and evidence presented for the first time in his Objection. As previously noted, the Court declines to consider arguments and evidence that were not before Magistrate Judge Mansfield.

Even if Plaintiff had timely articulated those arguments and evidence, Magistrate Judge Mansfield did not err in dismissing Plaintiff's fraud claim. Magistrate Judge Mansfield's review—as is this Court's review—was limited to the contents of the Counter-Counterclaim. *See Swartz*, 476 F.3d at 763 ("In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice."). Plaintiff's assertions of fraud were minimal and grossly deficient. And any arguments outside the Counter-Counterclaim are irrelevant.

Plaintiff also erroneously believes that the dismissal of his Counter-Counterclaim deprived him of the ability to assert defenses to the Counterclaim. Defenses should be presented in an answer, not a counterclaim. *See* Fed. R. Civ. P. 8(c)(2) (explaining that a designation of a defense as a counterclaim, or a counterclaim as a defense, is a mistake). "The label 'counterclaim' has no magic. What is really an answer or defense to a suit does not become an independent piece of litigation because of its label." *Stickrath v. Globalstar, Inc.*, No. C07-194 1 TEH, 2008 WL 2050990, at *3 (N.D. Cal. May 13, 2008) (citation and quotation omitted). Plaintiff's Answer to the Counterclaim includes twenty defenses. ECF No. 44. Therefore, the dismissal of the Counter-Counterclaim does not impair Plaintiff's ability to defend against the Counterclaim.

In sum, Magistrate Judge Mansfield did not err in dismissing the Counter-Counterclaim because the sham litigation exception does not apply, and Plaintiff failed to state a fraud claim. Accordingly, the Court REJECTS the Objection and ADOPTS the F&R.

CONCLUSION

For the reasons articulated above, the Court HEREBY REJECTS Plaintiff's Objection to the Magistrate's December 18, 2019 Recommendation to Dismiss Plaintiff's Counter-Claim to New Allegations in Counter-Claim Filed by Defendants August 28, 2019, ECF No. 122, and ADOPTS Magistrate Judge Mansfield's Findings and Recommendation to Dismiss Plaintiff's Counter-Claim to Defendant's Counterclaim. ECF No. 110.

IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 954964

Footnotes

1 The F&R is part of a consolidated Order Denying Defendant Hawaiian Airlines Inc.'s Motion to Strike Plaintiff Lesane's Answer to the Counter-Claim Filed by Defendant Hawaiian Airlines and Findings and Recommendation to Dismiss Plaintiff's Counter-Claim to Defendant's Counterclaim and Order Denying as Moot Plaintiff Lesane's Motion for Enlargement of Time to File an Answer and Counter-Claim to the Defendant Hawaiian Airlines' Answer and Counter-Claim Filed Aug. 28, 2019. ECF No. 110.
Plaintiff's filings continue to violate Local Rule 10.2, which requires all memoranda to utilize ***14-point Times New Roman plain style***.

2 The Court disregards any request by Plaintiff to further amend his pleadings. The Court already ruled on such issues in its Order Affirming the Magistrate Judge's Order Denying Plaintiff's Second Motion to Amend the Complaint and File Cross Counter-Claim and Join Necessary Third Party Defendant Kaiser Permanente Medical Ins. Co. Inc. ECF No. 126.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Flowers v. Carville, 9th Cir.(Nev.), November 12, 2002

944 F.2d 531
United States Court of Appeals,
Ninth Circuit.

OREGON NATURAL RESOURCES COUNCIL,
Plaintiff–Counter–Defendant–Appellee,
v.
David MOHLA, etc., et al., Defendants.
and
AVISON TIMBER COMPANY, INC., Counterclaim Defendant–Third–Party Plaintiff–Appellant,
v.
Andrew KERR, Third–Party Defendant–Appellee.

No. 90–35401.
|
Argued and Submitted July 9, 1991.
|
Decided Sept. 11, 1991.

Synopsis
Action was brought against United States and contractor to enjoin logging on tract of land in national forest. Contractor filed counterclaims, alleging abuse of administrative and judicial process and interference with business relations. The United States District Court for the District of Oregon, Malcolm F. Marsh, J., dismissed counterclaims and third-party complaint, and contractor appealed. The Court of Appeals, Cynthia Holcomb Hall, Circuit Judge, held that contractor did not sufficiently allege that lawsuit was sham which would not be entitled to *Noerr -Pennington* protection of right to petition governmental bodies.

Affirmed.

West Headnotes (12)

[1] **Federal Courts** Dismissal or nonsuit in general

Court of Appeals would review district court's grant of motion to dismiss de novo.

[2] **Federal Courts** Pleadings; Dismissal

Normally, on appeal from grant of motion to dismiss, Court of Appeals accepts as true all of plaintiff's factual allegations, along with all reasonable inferences in plaintiff's favor.

1 Cases that cite this headnote

[3] **Constitutional Law** Noerr-Pennington Doctrine

Conclusory allegations are not sufficient to strip defendant's activities of *Noerr-Pennington* protection of right to petition governmental bodies. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[4] **Constitutional Law** Noerr-Pennington Doctrine

Repeated filing of baseless claims without regard to their merits may indicate that judicial and administrative processes have been abused, and thus that right to petition governmental bodies will not be protected under *Noerr-Pennington* doctrine. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[5] **Constitutional Law** Noerr-Pennington Doctrine

To state claim under sham exception to *Noerr-Pennington* protection of right to petition governmental bodies, more is required than bare

allegation of history of failed appeals. U.S.C.A. Const.Amend. 1.

21 Cases that cite this headnote

[6] **Constitutional Law** Noerr-Pennington Doctrine

Earlier administrative appeals were relevant, when determining whether claim was stated under sham exception to *Noerr-Pennington* protection of right to petition governmental bodies, only to extent that they demonstrated improper motivation in filing subsequent lawsuit. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[7] **Process** Defenses in general
Torts Business relations or economic advantage, in general

Contractor did not sufficiently allege that action to enjoin logging on tract of land in national forest was sham, and thus that *Noerr-Pennington* protection of right to petition governmental bodies was inapplicable to contractor's counterclaim for abuse of process and interference with business, even though attempt to enjoin logging was defeated on summary judgment; plaintiff was genuinely seeking judicial relief, and contractor failed to provide any specifics for its claims that complaint was filed with knowledge that it was baseless, with no expectation of obtaining requested relief, and for the sole purpose of delaying and impeding logging operation. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[8] **Constitutional Law** Political Rights and Discrimination

Noerr-Pennington protection of right to petition governmental bodies is particularly appropriate where petitioner's goals are political rather than economic. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[9] **Process** Defenses in general
Torts Business relations or economic advantage, in general

Contractor's mere allegation that plaintiff had lost series of administrative appeals prior to bringing suit to enjoin logging on tract of land in national forest was insufficient to avoid, under *Noerr-Pennington* protection of right to petition governmental bodies, dismissal of contractor's counterclaims for abuse of administrative and judicial process and interference with business relations; any pattern of baseless suits arising from 216 administrative appeals did not in itself bring subsequent suit within sham exception to *Noerr-Pennington* doctrine. U.S.C.A. Const.Amend. 1.

22 Cases that cite this headnote

[10] **Federal Civil Procedure** Construction of pleadings

Normally, when ruling on motion to dismiss, all factual allegations of party against whom motion is made must be accepted as true.

1 Cases that cite this headnote

[11] **Torts** Pleading

Heightened pleading standard applicable to complaints arising out of adverse party's petitions for governmental action cannot be satisfied by simply recasting disputed issues from underlying litigation as "misrepresentations" by adverse party. U.S.C.A.

Const.Amend. 1.

5 Cases that cite this headnote

[12] **Torts** Resort to or conduct of legal remedies

Contractor's mere allegations that plaintiff had knowingly presented misrepresentations to the court was insufficient to overcome *Noerr-Pennington* protection of right to petition governmental bodies. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

***532** William F. Lenihan, Schwabe, Williamson & Wyatt, Seattle, Wash., Mildred J. Carmack, Schwabe, Williamson & Wyatt, Portland, Or., for defendant-counterclaim-third party plaintiff-appellant.

Blair C. Stone and John W. Phillips, Heller, Ehrman, White & McAuliffe, Victor M. Sher, Sierra Club Legal Defense Fund, Seattle, Wash., for plaintiff-counter-defendant-appellee.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, ALARCON and HALL, Circuit Judges.

Opinion

CYNTHIA HOLCOMB HALL, Circuit Judge:

Avison Timber Company, Inc., (Avison) appeals the district court's grant of Oregon Natural Resources Council's (ONRC) motion to dismiss Avison's counterclaim and third-party complaint. District court jurisdiction over the counterclaim and third-party complaint was pendent to federal question jurisdiction over ONRC's complaint under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

On December 2, 1988, ONRC filed suit against the United States Forest Service seeking to enjoin the bidding on a timber contract for a tract of land in the Mt. Hood National Forest known as the Badger Resell. When ONRC learned that the contract had been awarded to Avison, ONRC amended the complaint, adding Avison as an indispensable party and seeking to enjoin logging of the Resell.

In February 1989, Avison filed counterclaims against ONRC, alleging abuse of administrative and judicial process and interference with business relations. ONRC moved to dismiss pursuant to ***533** Fed.R.Civ.P. 12(b)(6), claiming protection under the *Noerr–Pennington* doctrine. The district court dismissed the counterclaims on September 28, 1989, finding that ONRC's claims "involve the exercise of ONRC's right to petition the courts for redress against the government and are therefore protected by the First Amendment." The court found that Avison had not met the heightened pleading standards associated with the *Noerr–Pennington* doctrine.

In the original suit, the district court granted summary judgment to Avison and the Forest Service, finding that § 314 of the Forest and Rangeland Renewable Resource Planning Act, Pub.L. No. 100–446, 102 Stat. 1825 (1988), barred ONRC's challenge. We affirmed the district court's decision in a published opinion. *Oregon Natural Resources Council v. Mohla,* 895 F.2d 627 (9th Cir.), *cert. denied,* 496 U.S. 926, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990).

II

[1] [2] We review the district court's grant of ONRC's motion to dismiss de novo. *Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886, 889 (9th Cir.), *cert. denied,* 488 U.S. 965, 109 S.Ct. 489, 102 L.Ed.2d 526 (1988). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Normally we accept as true

all of the plaintiff's factual allegations, along with all reasonable inferences in the plaintiff's favor. *Hahn v. Codding,* 615 F.2d 830, 840 (9th Cir.1980).

[3] Where a claim involves the right to petition governmental bodies under *Noerr–Pennington,* however, we apply a heightened pleading standard. In *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board,* 542 F.2d 1076 (9th Cir.1976), *cert. denied,* 430 U.S. 940, 97 S.Ct. 1571, 51 L.Ed.2d 787 (1977), we required that the plaintiffs satisfy more than the usual 12(b)(6) standard, holding that "a complaint must include allegations of the specific activities" which bring the defendant's conduct into one of the exceptions to *Noerr–Pennington* protection. *Id.* at 1082. This heightened level of protection accorded petitioning activity is necessary to avoid "a chilling effect on the exercise of this fundamental First Amendment right." *Id.* Conclusory allegations are not sufficient to strip a defendant's activities of *Noerr–Pennington* protection. *Boone,* 841 F.2d at 893.

III

The *Noerr–Pennington* doctrine was originally promulgated to protect efforts to influence legislative or executive action from liability under the Sherman Act. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).[1] The protection has been expanded to apply to petitions to courts and administrative agencies, *California Motor Transp. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972),[2] as ***534** well as to preclude claims other than those brought under the antitrust laws. *See Franchise Realty,* 542 F.2d at 1082–83; *In re IBP Confidential Business Documents Litig.,* 755 F.2d 1300, 1312 (8th Cir.1985).

Noerr–Pennington protection is not absolute. The *Noerr* court recognized an exception where a publicity campaign, "ostensibly directed toward influencing governmental action ... is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr,* 365 U.S. at 144, 81 S.Ct. at 533. In *Trucking Unlimited,* the Court elaborated on the limits of *Noerr–Pennington* protection, explaining that "there are ... forms of illegal and reprehensible practice which may corrupt the administrative or judicial process and which may result in antitrust violations." 404 U.S. at 513, 92 S.Ct. at 613.

Avison argues that *Noerr–Pennington* protection is inappropriate in this case because ONRC's suit against it falls within two of the examples of illegal or reprehensible activity noted in *Trucking Unlimited.* Avison alleges that the suit was part of a "pattern of baseless, repetitive claims" and that ONRC made knowing misrepresentations to the court. We address each allegation in turn.

A

Avison's first allegation is that ONRC's suit was part of a pattern of baseless claims. Avison asserts that in 1988, "ONRC filed administrative appeals with the Forest Service of at least 216 resales of bought out and defaulted timber contracts in Oregon National Forests, including the Badger Resell," as part of a scheme "to misuse and abuse governmental and judicial processes for the sole purpose of delaying the sale of federal timber without regard to whether *bona fide* grounds for opposing such sales existed." It characterizes ONRC's filing of this lawsuit as part of this "string of baseless and repetitive actions."

[4] [5] [6] The repeated filing of baseless claims without regard to their merits may indicate that the judicial and administrative processes have been abused. *Trucking Unlimited,* 404 U.S. at 513, 92 S.Ct. at 613; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,* 690 F.2d 1240, 1254 (9th Cir.1982), *cert. denied,* 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983). To state a claim under the sham exception, however, more is required than a bare allegation of a history of failed appeals. The earlier administrative appeals are relevant only to the extent that they demonstrate that ONRC was improperly motivated in filing its lawsuit against Avison. In *Pennington,* the Supreme Court noted that genuine petitioning activities are "not illegal, either standing alone *or as part of a broader scheme itself violative of the Sherman Act.*" 381 U.S. at 670, 85 S.Ct. at 1593 (emphasis added).

[7] We therefore must examine whether Avison has sufficiently alleged that ONRC's lawsuit against it was a sham. *See In re Burlington Northern,* 822 F.2d 518, 526 (5th Cir.1987) ("The holding in *Pennington* requires attention to the narrow petitioning activity at issue. The fact finder must determine, *as to the particular petition,*

whether the petitioner was engaged in a genuine attempt to influence governmental decisionmaking.") (emphasis added), *cert. denied,* 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988).

Even though ONRC's attempt to enjoin logging of the Resell was defeated on summary judgment, *Noerr–Pennington* protection is appropriate so long as ONRC was genuinely seeking governmental action. *See Franchise Realty,* 542 F.2d at 1081 (The sham exception is "limited to situations where the defendant is not seeking official action ... so that the activities complained of are 'nothing more' than an attempt to interfere with the business relationships of a competitor."); *Coastal States Marketing v. Hunt,* 694 F.2d 1358, 1372 (5th Cir.1983) ("A litigant should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for judicial relief is a significant motivating factor underlying the suit.").

[8] ***535** As the Supreme Court has explained, "[t]he 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991) (emphasis in original). Here, the mere filing of a lawsuit was insufficient to achieve ONRC's goal of preventing the sale and cutting of old growth timber. As Avison admits, ONRC was not merely attempting to keep Avison from cutting these trees, it was attempting to keep *anyone* from doing so. In order to succeed, ONRC needed the actual relief it was requesting from the courts. Thus, ONRC was not merely exploiting the governmental process; it was genuinely seeking judicial relief.[3]

Avison concedes that ONRC wanted the injunctive relief it requested in the underlying suit. But it contends that ONRC knew it would be unable to obtain such relief. According to Avison, "ONRC's complaint was filed with the knowledge it was baseless, with no expectation of obtaining the requested relief, but for the sole purpose of delaying and impeding Avison's logging operation through the pendency of the suit itself." This conclusory allegation fails to meet the heightened pleading standard of *Franchise Realty.*

In our opinion upholding summary judgment against ONRC's claim, we began by noting that "[t]his case requires us to resolve an issue we explicitly left open...." *Mohla,* 895 F.2d at 628. The opinion later recognized that the court was required "to grapple with section 314's extraordinary language...." *Id.* at 630. These statements indicate that the question of whether ONRC's challenge was barred by § 314 was a difficult, unresolved issue at the time ONRC filed its suit to enjoin logging of the Resell. In the face of this, Avison asserts, without any specifics, that ONRC knew its position was baseless. Avison has failed to plead with particularity that ONRC's suit to enjoin the logging was a sham.

[9] This result is not changed by Avison's accusations regarding the earlier administrative appeals. Even if Avison is correct that the 216 administrative appeals constitute a pattern of baseless suits, it fails to allege with specificity how ONRC's lawsuit against it fits into that pattern. The existence of a series of baseless appeals does not in itself bring *this suit* within the sham exception. Thus, the mere allegation that ONRC lost a series of administrative appeals prior to bringing this suit is insufficient to avoid a motion to dismiss.

B

Avison also alleges that ONRC should not be entitled to *Noerr–Pennington* protection because it knowingly presented misrepresentations to the court. "Misrepresentations, condoned in the political arena, are not immunized [by *Noerr–Pennington*] when used in the adjudicatory process." *Trucking Unlimited,* 404 U.S. at 513, 92 S.Ct. at 613.

Avison argues that it should survive a motion to dismiss because it has alleged specific misrepresentations. In response to ***536** ONRC's attempts to show that the alleged misrepresentations were not misrepresentations at all,[4] Avison argues that since this is an appeal from a motion to dismiss, its allegations must be accepted as true.

[10] [11] [12] Normally, when ruling on a motion to dismiss, all factual allegations of the party against whom the motion is made must be accepted as true. However, the heightened pleading standard of *Franchise Realty* would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as "misrepresentations" by the other party. *See Omni Resource Development Corp. v. Conoco, Inc.,* 739 F.2d 1412, 1414 (9th Cir.1984) ("[N]othing more is alleged than the use of false affidavits in the state suit. That, however, is a charge that can easily be leveled, and it is thus insufficient by itself to overcome *Noerr–Pennington* immunity.") Avison's allegations of misrepresentation are therefore insufficient to overcome *Noerr–Pennington* protection.

AFFIRMED.

All Citations

Footnotes

1 In *Noerr,* the Supreme Court was presented with a claim
> that an association of railroads had violated the antitrust laws by engaging in a massive publicity campaign designed to influence legislative and executive action against the trucking industry. The Court determined that the railroads' activity did not fall within the ambit of the antitrust laws. It stressed the importance in a representative democracy of the right of persons to "freely inform the government of their wishes." 365 U.S. at 137, 81 S.Ct. at 529.... *Pennington* reaffirmed *Noerr,* holding that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

In re Burlington Northern, Inc., 822 F.2d 518, 524 (5th Cir.1987), *cert. denied,* 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 652 (1988).

2 Courts have taken a narrower view of *Noerr–Pennington* protections where petitions to adjudicatory bodies are at issue, however. *Boone,* 841 F.2d at 896.

3 In addition, where the petitioner's goals are political rather than economic, protection is particularly appropriate. In *Allied Tube & Conduit Co. v. Indian Head, Inc.,* 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), the Supreme Court recognized that "the antitrust laws should not regulate political activities 'simply because those activities have a commercial impact.' " *Id.* at 507, 108 S.Ct. at 1941, (quoting *Noerr,* 365 U.S. at 141, 81 S.Ct. at 531). As an example of this, the Court pointed to *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 914, 102 S.Ct. 3409, 3426, 73 L.Ed.2d 1215 (1982), where it had held that the First Amendment protected the nonviolent elements of a boycott organized by the NAACP. "Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits ... and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market." *Claiborne Hardware,* 458 U.S. at 914–15, 102 S.Ct. at 3426. Similarly, ONRC filed suit against the Forest Service in order to achieve a political goal of preventing the cutting of old-growth forest. The suit was not motivated by any anticompetitive purpose, except to the extent that the desires of the timber industry conflict with ONRC's political goal of preserving the forest.

4 ONRC appears to be correct that none of Avison's claims of "misrepresentation" have any merit. For example, Avison listed as the "most significant" misrepresentation ONRC's claim that its appeal was site-specific. But not only was ONRC's appeal site-specific on its face, *see Mohla,* 895 F.2d at 630 ("[i]n its administrative appeal, ONRC challenged the site-specific Badger Resell EA"), but the question of whether ONRC's appeal was site-specific in fact was the very issue before the court. Thus, by claiming that this was a "misrepresentation," Avison is effectively restating its claim that ONRC knew that its suit was baseless.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Cardtoons, L.C. v. Major League Baseball Players Ass'n, 10th Cir.(Okla.), April 7, 2000

858 F.2d 1075
United States Court of Appeals,
Fifth Circuit.

VIDEO INTERNATIONAL PRODUCTION, INC.,
Plaintiff–Appellant, Cross–Appellee,
v.
WARNER–AMEX CABLE COMMUNICATIONS,
INC., et al., Defendants–Appellees,
The City of Dallas, Defendant–Appellee,
Cross–Appellant.

No. 87–1572.
|
Oct. 31, 1988.

Synopsis
Cable television company brought antitrust, civil rights, and tortious interference with contract action against city and cable television franchisee. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, J., entered judgment following jury trial, and all parties appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) *Noerr-Pennington* doctrine precluded antitrust liability on part of franchisee; (2) *Noerr-Pennington* doctrine precluded holding franchisee liable as conspirator with city for violation of civil rights and for tortious interference with contracts; (3) in the absence of any personal corruption or other venal motive on the part of city officials, the coconspirator exception to the *Noerr-Pennington* doctrine did not apply; (4) city was immune from liability for tortious interference with contracts; (5) jury could have found city to have violated antitrust laws; (6) jury could have found city to have violated civil rights of cable television company by the manner in which it enforced its zoning laws; and (7) remand was required for reconsideration of damages.

Affirmed in part, reversed in part, and remanded.

Garwood, Circuit Judge, filed an opinion concurring in part and dissenting in part.

West Headnotes (21)

[1] Telecommunications Franchises and Licenses; Local Regulation

It is the crossing of public ways by cable television company which gives the city the right to require a franchise.

[2] Antitrust and Trade Regulation Political subdivisions; municipalities

Essence of the "*Noerr-Pennington* doctrine" is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

36 Cases that cite this headnote

[3] Antitrust and Trade Regulation Political subdivisions; municipalities

Sham exception to the *Noerr-Pennington* doctrine comes into play when the party petitioning the government is not at all serious about the object of that petition but engages in the petition activity merely to inconvenience the competitor.

19 Cases that cite this headnote

[4] Antitrust and Trade Regulation Political subdivisions; municipalities

Sham exception to *Noerr-Pennington* doctrine did not apply to cable television company which petitioned city officials to obtain favorable interpretation of zoning codes so as to preclude

competitors from operating in the city, where the intent of the cable television company was to obtain a favorable interpretation and not to prevent the competitors from gaining access to the government or to waste the competitors' resources in fighting the interpretation.

10 Cases that cite this headnote

[5] **Antitrust and Trade Regulation** Political subdivisions; municipalities

Although sometimes a sham petition may coincide in a case with illegal conspiracy with governmental officials, it need not always do so and it is the illegal conspiracy of which is at the essence of the coconspirator exception to the *Noerr-Pennington* doctrine.

4 Cases that cite this headnote

[6] **Antitrust and Trade Regulation** Political subdivisions; municipalities

Point of the *Noerr-Pennington* doctrine is to protect private parties when they petition the government for laws or interpretations of existing laws even though those private parties are pursuing their goals with anticompetitive intent.

42 Cases that cite this headnote

[7] **Antitrust and Trade Regulation** Political subdivisions; municipalities

In the absence of any showing of personal corruption or other venal motive on the part of city officials who are petitioned by cable television company for interpretation of ordinance, coconspirator exception to the *Noerr-Pennington* doctrine did not apply even though the city may have perverted zoning regulations for purpose other than that for which they were intended, where the intent of city officials was to further the best interest of the city.

2 Cases that cite this headnote

[8] **Torts** Contracts

Noerr-Pennington doctrine applies to common-law tort doctrine of tortious interference with contractual relations.

45 Cases that cite this headnote

[9] **Civil Rights** Pursuit of private or judicial remedies

Cable television company's First Amendment petitioning of city for interpretation of zoning laws did not constitute action under color of state law in the absence of showing that cable television company acted as a coconspirator with the city in violating constitutional rights of competitor. 42 U.S.C.A § 1983.

[10] **Civil Rights** Pursuit of private or judicial remedies
Civil Rights Exercise of rights

Analysis of whether party petitioning the government is a coconspirator for purposes of civil rights statute's color of state law requirement must parallel analysis of the coconspirator exception of the *Noerr-Pennington* doctrine. 42 U.S.C.A. § 1983.

3 Cases that cite this headnote

[11] **Civil Rights** Exercise of rights

Any behavior by private party which is protected from antitrust liability by the *Noerr-Pennington* doctrine is also outside the scope of federal civil rights liability. 42 U.S.C.A. § 1983.

10 Cases that cite this headnote

[12] **States**🔑What are suits against state or state officers

Cable television company was protected by the *Noerr-Pennington* doctrine from liability for tortious interference with contract of competitor resulting from cable television company's petitioning of city for interpretation of zoning ordinances.

2 Cases that cite this headnote

[13] **Municipal Corporations**🔑Nature and grounds of liability

City was immune from liability for tortious interference with contractual rights of cable television company where the alleged interference arose from the city's enforcement of its zoning ordinance, despite claim that city was performing a proprietary function because of its relationship with cable television franchisee which paid the city a 5% fee. V.T.C.A., Civil Practice and Remedies Code § 101.001 et seq.

1 Cases that cite this headnote

[14] **Federal Courts**🔑Determination of damages, costs, or interest; remittitur

Remand for retrial on issue of damages was required where jury awarded wide range of damages on three theories even though plaintiff tried the case on one set of facts demonstrating a single injury for which jury could find liability under any one or all of three theories and where some of claims of the plaintiff were being rejected by the Court of Appeals.

4 Cases that cite this headnote

[15] **Antitrust and Trade Regulation**🔑Restraints and misconduct in general

Evidence supported jury finding that city and cable television franchisee agreed to restrain competition posed by competing cable television company and other similar companies and that, in furtherance of that agreement, city had manipulated zoning ordinances to eliminate competition in violation of the Sherman Act. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

2 Cases that cite this headnote

[16] **Antitrust and Trade Regulation**🔑State Action

Noerr-Pennington protection does not apply to government. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[17] **Civil Rights**🔑Zoning, building, and planning; land use

Finding of city's violation of civil rights of cable television company through enforcement of its zoning ordinance was not precluded by argument that there was no final decision of the city because the cable television company had never brought its complaint to the city's board of adjustment, where building inspector had requested and received board of adjustment's interpretation of the zoning code in a previous case and the building inspector sent zoning violation notices to the cable television company and all its customers, without prior warning or

notice to the cable television company, giving them 15 days to cease use of the cable system. 42 U.S.C.A. § 1983.

[18] **Civil Rights**🔑Zoning, building, and planning; land use
Civil Rights🔑Grounds and subjects; compensatory damages

Jury could conclude that cable television company's decision to shut down its operations for a few days in reaction to notice from city building inspector giving it and its customers 15 days to cease use of the cable television system was a reasonable reaction and that the damages resulting from the shutdown were thus a result of the violation of its civil rights by the city in sending the violation notices. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[19] **Civil Rights**🔑Weight and Sufficiency of Evidence

Evidence supported jury determination that city's action in abruptly issuing notice of zoning violation to cable television company and all of its customers was not a reasonable time, place, or manner restriction of cable television company's speech and thus violated its First Amendment rights. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

[20] **Civil Rights**🔑Weight and Sufficiency of Evidence

Evidence sustained jury's finding that the city's violation of civil rights of cable television company was proximate cause of decline in value of the company's stock.

[21] **Damages**🔑Preventing or delaying performance of contract with third person

Value of corporation's stock or assets reflected the value of the corporation and any diminution in value represented damage to the corporation, for which it could recover, in action against city for, inter alia, tortious interference with contract, notwithstanding claim that decline in value of shares in corporation was a loss suffered by the stockholders.

Attorneys and Law Firms

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Paul K. Pearce, Jr., Niki Frank Stokols, Asst. City Attys., Dallas, Tex., for the City of Dallas.

Appeals from the United States District Court for the Northern District of Texas.

Before GOLDBERG, GARWOOD and JOLLY, Circuit Judges.

Opinion

E. GRADY JOLLY, Circuit Judge:

Video International Productions, Inc. ("VIP"), a nonfranchised cable television company in Dallas, Texas, sued the City of Dallas ("the City") and Warner–Amex Cable Communications, Inc. ("WAX"), the sole franchised cable television company in Dallas, for attempting to put VIP out of business, primarily through the use of zoning ordinances. VIP argued three theories before the district court: antitrust and civil rights

violations, and tortious interference ***1078** with a contract to sell VIP. The jury found liability under all three theories, and awarded VIP zero damages for its antitrust claim; $200,000 compensatory and $2.5 million punitive damages for its civil rights claim; and $1.245 million actual and $500,000 punitive damages for the tortious interference with contract claim. The district court granted judgment n.o.v. with regard to all claims against WAX and the tortious interference claim against the City. VIP appeals the judgment n.o.v., and also challenges the jury's zero damage award for the antitrust claim. The City cross-appeals, challenging the jury's verdict on the civil rights claim. The parties also dispute myriad smaller issues, such as pre- and postjudgment interest and attorneys' fees.

We affirm most of the judgment of the district court as relates to liability, but remand for a new trial on damages because we are unable to discern a reasonable explanation for the jury's wide-ranging verdicts under the three claims, especially after the major portion of damages under the tortious interference claim has been invalidated.

I

As we review the district court's decision to overturn a portion of the jury's verdict and the City's challenge to the remainder of that verdict, we examine the facts in the light most favorable to VIP and the jury's verdict.

VIP, a cable television business formed to supply cable services to apartment complexes in north Dallas, began operating in August 1979. VIP installed satellite dish antennae (earth stations) on the premises of various apartment complexes and, through underground cables, transmitted the satellite signals received by the satellite dishes to individual apartments. Each satellite dish served the host complex as well as neighboring but separately owned apartment complexes. The cables crossed private property lines but none of VIP's systems utilized City property or public rights of way. Because VIP operated entirely on private property, it did not obtain a cable television franchise from the City. VIP built five separate cable television systems, each with its own satellite dish, which served 28 apartment complexes and approximately 2,000 subscribers and had the potential to reach 6,000 subscribers.

In October 1980, VIP applied to the Federal Communications Commission ("FCC") for a permit to construct a cable television relay service ("CARS") station, which the FCC granted. The CARS facility would enable VIP to link its several cable television systems to transmit locally produced programs and to increase substantially its ability to establish additional cable systems in apartment complexes.

At approximately the same time that VIP had commenced its operations, the City began negotiations concerning a cable television franchise in the City. In October 1979 the City voted to franchise one cable operator for the entire city, and the City council, on November 5, 1980, awarded the franchise to WAX. WAX was given the right to operate the cable television network within the City, and in turn the City was to receive a five percent per annum franchise fee. The franchise is essentially the right to use public streets and rights-of-way for equipment installation.

The franchise agreement which the City reached with WAX contained a provision ("Section 7") that stated: "No CATV system shall be allowed to occupy or use the streets of the city or be allowed to operate within the City without a CATV franchise." The franchise agreement defined "CATV system" as:

> a system of antennas, cables, wires, lines, towers, waveguides, or other conductors, converters, equipment or facilities, designed and constructed for the purpose of producing, receiving, transmitting, amplifying and distributing, audio, video and other forms of electronic or electrical signals, located in the City. *This definition shall not include any facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management, and does not use City rights-of-way.*

***1079** Section 1.b (emphasis added). Pursuant to these provisions, building permits that the City issued to nonfranchised cable companies subsequent to reaching the franchise agreement contained restrictions which earlier building permits had not contained. Silver Screen, a competitor of VIP, obtained a building permit two days after the adoption of the franchise agreement which stated that the antennae could not serve outside the apartment

complex where it was being installed, and that Silver Screen could not charge the tenants it served without obtaining a City franchise. Afterwards, building permits issued to VIP contained similar restrictions, or such restrictions were written onto approved blueprints.

Silver Screen challenged the City's ability to impose such restrictions on cable companies that did not have a franchise. At a public hearing before the City Board of Adjustment on February 24, 1981, Silver Screen's attorney argued that the City could not require a franchise if the system did not use or cross public streets or rights-of-way. The City's chief zoning inspector testified: "We [the City] feel that a corporation coming in and making these installations is a commercial enterprise and would constitute a commercial business in an MF–1 zoning district." Silver Screen, however, wished only to relieve itself of the restriction against charging for its services; its system apparently did not cross private property lines.

At its March meeting, the City announced that the Building Inspector's office had abandoned its claim that Silver Screen could not charge for its services. Thus, Silver Screen obtained all the relief it sought. The chief zoning inspector persisted in his position, however, and was given approval of the interpretation of the zoning code that cable services could not cross public rights-of-way *or* private property lines. This interpretation was apparently based upon the categorization of cable facilities as commercial, which would then require them to fit within the "accessory use" provision of the Dallas City Code to be allowed in a residential area. An accessory use is a "use customarily incident to a main use." One of the requirements of the accessory use provision is that the thing in issue must be located on the same lot as the main use (in this case, the apartment complex it serves), and must not be across a street or alley from the main use. Dallas Development Code Sec. 51–4.217(a).

A month after the Board of Adjustment adopted this interpretation of the zoning code, Silver Screen's attorney proposed a modification to the accessory use provision to allow nonfranchised cable systems that did not cross public streets to serve separately owned apartment complexes.

There is evidence in the record of numerous telephone calls and meetings among City officials and with representatives of WAX prior to the May 18 hearing on the proposed zoning amendment. WAX representatives informed the City that they believed the proposed amendment would amend Section 7 of the franchise agreement. At the hearing before the Zoning Ordinance Advisory Committee ("ZOAC"), which makes recommendations on proposed zoning amendments, both the City official in charge of administering the franchise and an attorney from WAX testified against the proposed amendment. The WAX attorney argued that the proposed amendment would violate WAX's understanding with the City. He also noted that nonfranchised systems did not pay the City the five-percent fee as WAX did, and that they were not subject to WAX's programming restrictions. The City official testified that the amendment would allow commercial ventures in residential zones, and that nonfranchised operators would not be subject to the duties placed on the franchisee. ZOAC unanimously decided to recommend against adopting the proposed amendment.

During this time, WAX also began to compile a file on VIP's north Dallas cable business. WAX determined that VIP had a sophisticated system with the CARS license and its subscription list was limited only by the capital to expand the system. After this determination, WAX executives obtained a copy of VIP's CARS license from the FCC and then met with City officials ***1080** concerning VIP. WAX executives asked City officials to investigate VIP's zoning violations further. In July an article appeared in Cablevision Magazine regarding VIP's business and its threat to WAX. After reading the article, a WAX executive called City officials and discussed VIP's business. WAX then issued a memorandum to City officials regarding possible right-of-way violations that VIP had committed. The memo concluded "a meeting has been scheduled for 10:00 AM on July 31 in the city attorney's conference room to discuss the implications and possible courses of action to take with respect to the operation of VIP in Dallas." VIP was not invited to any of the meetings. During the following weeks, WAX and the City contacted each other several times concerning VIP's operations and possible zoning violations. On August 24 another article concerning VIP appeared in MultiChannel News and indicated that a long-time WAX competitor, the Campbell Family Partnership, was attempting to buy VIP's business. The article included a statement by one City official that "Warner–Amex and our office have been discussing [VIP] for some time." On September 2 the City council, upon a request by WAX, granted WAX permission to provide cable service to north Dallas, three years ahead of WAX's franchise schedule. On September 3, an executive with WAX informed its national office that the City had delivered zoning violations to twenty-three apartment complexes served by VIP. On September 4, WAX filed a petition with the FCC in opposition to VIP's request to transfer its CARS license to the Campbell Family Partnership which was attempting

to buy VIP at the time. In WAX's petition, it noted that the City had issued zoning violations to VIP. The sale of VIP stock to the Campbells was set to close on September 16 and the City actually served the violation notices on September 11. The apartment owners and VIP were given fifteen days to remove VIP's cables. The basis upon which the City relied for citing VIP was section 51–4.217 of the City code, which required that accessory uses be located on the same lot as the main use. The City interpreted this to mean cables could not cross private property lines. VIP, in a letter dated September 14, informed the City that the notices of violations were illegal and demanded that they be withdrawn by September 15. It also informed the City that the company's business was scheduled to be sold on September 16 and that the City was impairing VIP's ability to close the sale with the Campbell Family Partnership. On September 15, the Campbells' attorney informed VIP that they could not purchase VIP's business because of the City's zoning citations. VIP subsequently shut down its operating system for a few days. VIP shortly re-started its system, and then began negotiating with the Campbells again and entered into an agreement to sell all of its assets to the Campbells in return for the Campbells assuming VIP's liabilities. The difference between the price the Campbells paid for VIP's assets in October and the price that they had agreed to pay for the corporation's stock in August was $1.245 million.

After taking over VIP, the Campbells reactivated the system and the City filed suit against Campbell. On June 8, 1982, the City filed a motion for a nonsuit requesting that the case be dismissed because they no longer wished to prosecute the Campbells. That motion was granted and the City subsequently amended Section 7 of the franchise agreement to remove the provision that no unfranchised cable system would be permitted to operate in the City.

II

VIP sued the City and WAX for alleged antitrust and section 1983 violations, and tortious interference with the contract between VIP and Campbell Family Partnership. At trial, the jury found for VIP on all three claims and awarded damages as follows: $0 for antitrust violations; $200,000 compensatory damages and $2.5 million in punitive damages for section 1983 violations; and $1.245 million in actual and $500,000 in punitive damages for tortious interference with contract for potential plaintiffs Frank Parrish and Jack Weiss. ***1081** (Parrish and Weiss did not join the suit as plaintiffs and the defendants objected to the award of damages for tortious interference with contract because VIP was not a party to the contract in question. VIP then sought to add Parrish and Weiss as parties in this lawsuit.)

WAX and the City then moved for judgment notwithstanding the verdict, and VIP moved for judgment on the verdict and for a new trial on the issue of damages for the violations of the antitrust laws. The district court found that WAX's actions were protected by the first amendment right to petition the government (*Noerr–Pennington* immunity), that there was sufficient evidence to support the jury's finding that the City had violated VIP's first amendment right to free speech (section 1983), and that the City had not tortiously interfered with VIP's contract because it did not have the requisite knowledge of the contract. The district court did not directly address the City's antitrust liability, probably because of the zero damage award under that theory. In its discussion of WAX's liability and the *Noerr–Pennington* doctrine, however, the district court reasoned that there was insufficient evidence to find an illegal conspiracy between WAX and the City. Thus the court held that VIP was entitled to recover only $200,000 of actual damages from the City, together with reasonable attorney's fees, expenses and costs of $378,194.90 under its section 1983 action. The court denied VIP all other relief.

VIP filed this appeal, arguing that WAX's and the City's actions fell within an exception to the *Noerr–Pennington* doctrine, and that the jury's verdict against WAX should stand; that the trial court erred in concluding that there was insufficient evidence that the City had knowledge of the contract to uphold the jury's verdict on tortious interference with a contract; that the damages the jury awarded were not duplicative and that VIP is entitled to a new trial on the issue of antitrust damages; and that VIP is entitled to prejudgment interest.

The City cross-appealed, arguing that the district court lacked jurisdiction; that the City had not deprived VIP of any constitutional right to support a section 1983 claim; that the contract interference claim must fail because it was instituted by the wrong party; that a city cannot be liable for common-law intentional tort or punitive damages; that VIP had not proved various elements of its contract interference claim; that VIP had not suffered damages and had, in any event, failed to mitigate damages; that VIP was not entitled to attorneys' fees; that *Noerr–Pennington* protected the City as well as WAX; and that the City was immune from damages under the Local Government Antitrust Act of 1984.

III

To aid the analysis in this case, we think it helpful to lay out the basic scenario that VIP claims underlay the actions of WAX and the City:

WAX and the City included section 7 in the franchise agreement in order to exclude other cable companies from operating in Dallas without a franchise. This arrangement benefitted both parties since by refusing other franchises, WAX would have exclusive access to Dallas customers, and the City would receive a five percent annual fee on all of WAX's business that it would not receive on the business of unfranchised cable companies.

[1] At some stage, it became clear that the City did not have authority to require a franchise of cable companies that did not use public streets or rights-of-way to string their cables. It is not clear when the City and WAX realized this, but on appeal they concede this fact. It is the crossing of public ways that gives the City the right to require a franchise. *West Texas Utilities Co. v. City of Baird,* 286 S.W.2d 185 (Tex.Civ.App.—Eastland 1956).

According to VIP, when WAX and the City realized that they could not require a franchise of cable companies whose lines did not cross public streets, they began searching for another way to accomplish the same goal. Between WAX and the ***1082** City, they devised a theory under the zoning law that satellite dishes were commercial and thus had to fit within the "accessory use" provision of the zoning code. The dishes, therefore, could serve only those complexes where they were installed. VIP's scenario requires the inference that this categorization of satellite dishes as "commercial" was a means to accomplish the illegal goal in the franchise agreement. As we analyze the individual issues in this case, we will consider both whether the jury had sufficient evidence to support VIP's scenario and whether this scenario, if proved, fulfills the requirements of the various claims.

A.

We turn first to discuss the applicability in this case of the *Noerr–Pennington* doctrine, and the exceptions to that doctrine. WAX argues and the district court found that this doctrine protects WAX's activities from liability. VIP responds that the "co-conspirator exception" to the doctrine applies to WAX, and that the doctrine therefore does not shield WAX from antitrust and other liability.

[2] The *Noerr–Pennington* doctrine and the exceptions to it grew from two Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The essence of the doctrine is that parties who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws even though their petitions are motivated by anticompetitive intent. Thus, railroads that embark on advertising campaigns designed to convince the legislatures to pass laws detrimental to the trucking industry are not subject to antitrust liability for those actions even though their ultimate goal is to drive truckers out of business and limit competition. Similarly, "petitions" made to the executive or judicial branches of government, e.g., in the form of administrative or legal proceedings, are exempt from antitrust liability even though the parties seek ultimately to destroy their competitors through these actions.

Possible exceptions to this doctrine were first noted in *Noerr* and *Pennington* and have since developed more fully. Our reading of both the law in general and the briefs in this case indicates that there is a substantial amount of confusion over the extent of and distinction between these exceptions. We will thus explain our interpretation of these exceptions based upon their purposes.

Much of the confusion surrounding the doctrine and its exceptions arises from the lack of a definition of, and distinction between, two separate exceptions: the "sham" exception and the "co-conspirator" exception. These two separate ideas are often confusingly interchanged in the case law, and therefore also in the parties' briefs. Nonetheless, we discern these two ideas as separate and deriving from slightly different policy objectives.

[3] [4] The "sham" exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor. Thus, the sham exception is said to apply when one party has begun litigation not to win that litigation, but rather to force its competitor to waste time and money in defending itself. Similarly, a party that "petitions" the government by engaging in administrative processes only to preclude or delay its competitor's access to those processes may be

liable for antitrust damages under the "sham" exception. There is much debate about how a court can tell when a petition is not genuine. We need not busy ourselves with this problem, however, since it is apparent that, despite frequent referral to it by the briefs and the courts below, the "sham" exception does not apply in this case. WAX petitioned City officials to obtain and/or maintain a certain interpretation of the zoning code. WAX's intent was to obtain that interpretation, not to prevent VIP's gaining access to government or waste VIP's resources in fighting the interpretation. This finding is ***1083** supported by the fact that WAX succeeded in attaining its goal of a zoning code interpretation that prevented cables from crossing private property lines. Although on its own such success might not be sufficient to prove that the petitioning activity is not a sham, *see In re Burlington Northern, Inc.,* 822 F.2d 518 (5th Cir.1987) (see both majority and concurring opinions), neither party seriously contends that WAX did not seek the end for which it petitioned.

[5] Rather, VIP asserts that the "co-conspirator" exception to the *Noerr–Pennington* doctrine may apply even when the petitioner actually seeks the object of its petition. We agree that although sometimes a sham petition may coincide in a case with an illegal conspiracy with government officials, it need not always do so, and it is the illegal conspiracy that is the essence of this second exception to the *Noerr–Pennington* doctrine. We must thus examine whether such an illegal conspiracy existed between WAX and City officials sufficient to activate the co-conspirator exception.

Our reading of the cases involving the "co-conspirator" exception demonstrates that this exception has been applied in cases where a government official or body has been influenced by the petitioner through some corrupt means. *See, e.g., Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555 (5th Cir.1984). Although WAX argues that the exception will not apply unless WAX used coercion or bribery to obtain its end, we do not believe the exception is so restricted. At the same time, however, we do find that the cases indicate that the official with whom the petitioner conspires must, at a minimum, have had some selfish or otherwise corrupt motive in siding with the petitioner to result in an illegal conspiracy sufficient to activate the co-conspirator exception.

The case before us presents a new twist. In this case, the officials may have perverted the zoning regulations for a purpose other than that for which it was intended. It was not in any way a personal or selfish purpose, however; rather, it was to further the best interests of the City. That is, the City shared with WAX a desire to reduce the business of other cable companies and increase that of WAX. This mutual goal arose because the City received a five percent franchise fee from WAX that it did not receive from the other companies. The City thus had an incentive to seek out and enforce laws against other cable companies that would result in decreasing their share of the cable business and increasing WAX's share.

We will consider the propriety of the City's enforcement later in this opinion; however, we think the propriety of the City's motives is irrelevant in evaluating WAX's liability for encouraging the City to enforce its zoning code.

[6] The point of the *Noerr–Pennington* doctrine is to protect private parties when they petition the government for laws or interpretations of its existing laws even though those private parties are pursuing their goals with anticompetitive intent. To hold WAX liable because the City itself had anticompetitive intent for its own economic reasons would place too great a burden on WAX's first amendment right to petition the government. In such a case, WAX would not only have to discern the City's true motives before petitioning for its zoning interpretation, it would have to withhold its petition altogether if it determined that the City might act on it for anticompetitive reasons. Otherwise, the submission of the petition alone might subject WAX to antitrust liability if it were ultimately determined that the City acted for the anticompetitive reasons it shared with WAX and that it had no zoning interest upon which to base its enforcement. The fact that in this case the City may have shared WAX's anticompetitive intent does not remove the protection of the *Noerr–Pennington* doctrine from WAX's lobbying activities.

[7] VIP has not demonstrated any evidence of personal corruption or other venal motive on the part of the City officials who supported WAX's petitions. WAX cannot be liable, therefore, for exercising its first amendment right to petition the government. ***1084** The district court correctly excused WAX from antitrust liability in this case.

[8] Although the *Noerr–Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations. *See, e.g., Evers v. County of Custer,* 745 F.2d 1196, 1204 (9th Cir.1984); *Gorman Towers, Inc. v. Bogoslavsky,* 626 F.2d 607, 614 (8th Cir.1980), and cases cited therein. We find it easy to agree that the same rationale under antitrust law that

supports WAX's petitions to the City also serves to protect WAX from the tort claim. There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust.

[9] [10] The section 1983 claim presents more difficulty, although we ultimately arrive at the same result. The difficulty arises from the fact that section 1983 itself protects constitutional rights, so our reasoning must involve a more careful balancing of interests. In order for a private party to be liable under section 1983, it must have acted under color of state law. WAX's first amendment petitioning of the City does not constitute action under color of state law unless WAX acted as a co-conspirator with the City in violating Video's constitutional rights. *Dennis v. Sparks,* 449 U.S. 24, 26, 101 S.Ct. 183, 185, 66 L.Ed.2d 185 (1980). It is true that the evidence here supports the skeletal elements of a conspiracy between the City and WAX, that is, an agreement to accomplish an alleged illegal object and acts in furtherance of that object. But the Supreme Court noted (in the context of petitioning a court for an injunction), "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.* at 28, 101 S.Ct. at 186. The element in *Dennis* that converted the private actors into co-conspirators acting under color of law was that they engaged in a "*corrupt* conspiracy involving bribery of a judge." *Id.* at 28, 101 S.Ct. at 186 (emphasis added). As we have already concluded, there is insufficient evidence here to support the theory of a corrupt conspiracy that would deny WAX the protection of the *Noerr–Pennington* doctrine. We think that if *Noerr–Pennington* is to have its intended effect at all, an analysis of whether the petitioner is a co-conspirator under section 1983 must parallel the co-conspirator exception with *Noerr–Pennington.* This conclusion is fully consistent and consonant with the language of the Supreme Court in *Dennis* ("private parties who *corruptly conspire* with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases"). *Id.* at 29, 101 S.Ct. at 187 (emphasis added). Otherwise, first amendment petitioning could be challenged in the section 1983 context as a denial of equal protection, a taking of property without just compensation, a first amendment violation, or other constitutional claim, thus vitiating *Noerr–Pennington* protection. Further, we believe that the equation of section 1983 state action with the *Noerr–Pennington* co-conspirator exception sufficiently guards those constitutional rights that section 1983 serves to protect.

[11] Thus, we hold that any behavior by a private party that is protected from antitrust liability by the *Noerr–Pennington* doctrine is also outside the scope of section 1983 liability. To hold otherwise would effectively cast a cloud over a broad range of causes that are brought before courts, legislatures, or governmental agencies. For these reasons, the district court correctly excused WAX from section 1983 liability in this case.

B.

[12] We next address whether the City can be held liable for tortious interference with a contract under Texas common law. The contract in question is that between the shareholders of VIP and Campbell Family Partnership to sell VIP. The jury found both the City and WAX liable for ***1085** $1.245 million compensatory and $500,000 punitive damages. The district court overturned the jury's verdict in regard to WAX's liability, because it was again covered by the *Noerr–Pennington* doctrine. As to the City, the district court found there was insufficient evidence to show that the City had the requisite knowledge of the existence of the contract with which it had allegedly interfered. We agree with the district court that WAX is protected by the *Noerr–Pennington* doctrine. Although we are less certain that the jury lacked sufficient evidence upon which to find that the City had knowledge of the contract, we do not reach this issue since we find that the City's sovereign immunity prevents VIP's claim of tortious interference with a contract.

[13] Under the Texas Tort Claims Act (Tex.Civ.Prac. & Rem.Code §§ 101.001, *et seq.* (Vernons 1986)), the City is not liable for intentional torts, and contract interference is such an intentional tort. *Tippett v. Hart,* 497 S.W.2d 606 (Tex.Civ.App.—Amarillo 1973, *writ ref'd n.r.e.* 501 S.W.2d 874 (Tex.1973). Furthermore, we need not address VIP's contention that the City failed to raise its immunity in the district court, since "[W]hen the judgment of a district court is correct, it may be affirmed for reasons not given by the court and not advanced to it." *Laird v. Shell Oil Co.,* 770 F.2d 508, 511 (5th Cir.1985).

VIP argues that the City does not have sovereign immunity when it is performing a proprietary rather than a governmental function. The law is settled that a city's enforcement of its zoning code is an exercise of its police powers, a governmental function. *City of West Lake Hills v. City of Austin,* 466 S.W.2d 722, 726 (Tex.1971); *City of Hutchins v. Prasifka,* 450 S.W.2d 829, 835 (Tex.1970);

Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475 (1934).

VIP's complaint in this case arises from the City's enforcement of its zoning code, including sending out zoning violation notices which had the effect of impeding the expansion and continuation of VIP's business. These actions were clearly taken within the City's governmental-police power authority. VIP argues that the City was performing a proprietary function because of its relationship with WAX in the franchise agreement. First, however, it is clear that the actions of which VIP complains were taken pursuant to the City's zoning authority. Second, we do not think that a five percent franchise fee for a service rendered to the citizens by a private company places the government in a proprietary capacity even if the government were acting as administrator of the franchise in the actions of which VIP complains, which it was not.

C.

(1)

[14] VIP next contends that it is entitled to a new trial on the issue of antitrust damages. Although the jury found that the City and WAX were liable under the antitrust theory, they allotted zero damages to this claim. We have struggled to follow the Supreme Court's admonition to search for a view of the case that makes the jury's answers to special interrogatories consistent, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962), but we can find no view that reconciles the jury's damage awards under the section 1983 and contractual-interference tort claims with the zero damage award under the antitrust claim.

VIP tried this case as one set of facts demonstrating a single injury for which the jury could find liability under any one or all of three theories. VIP argued that it was injured by an agreement between WAX and the City that led to the issuance of the zoning violations and affected the value of VIP's business, and that this set of facts demonstrated violations of antitrust, civil rights (equal protection, due process and free speech) and Texas tort laws. The case was not presented, tried, or argued as one in which discrete damages had been suffered under each claim. Although liability arguments under each theory may have been advanced on different parts of the evidence, it seems clear that damages under each theory rested on identical facts, ***1086** that is, the loss of business and customers because of the City's application of its zoning laws as reflected by VIP's loss in revenues and value between the first and second contracts of sale to the Campbells. Thus, one would expect the jury's respective damage awards to be virtually the same. The jury's lopsided apportionment of damages therefore makes us think it likely that the jury decided the total amount it wished to award and apportioned it *among* the theories, rather than awarding duplicative damages on each separate theory in approximately the same amount. We would be less concerned that the jury divided its total damage award inconsistently among the theories if the district court (and we) had not eliminated the damage award under the claim for tortious interference with contract. It was under that theory that the jury awarded VIP the major part of its damages, and now we have eliminated that portion of the award. Because we are most uncertain, and the parties offer little plausible explanation, why the jury allotted zero damages for antitrust violations and a major sum for contract interference when both theories are supported by the same set of facts, we think equity requires that VIP should have another chance before the jury to prove whether, under the remaining two theories, VIP is entitled to greater damages than it would receive with the tort claim eliminated and no remand. Furthermore, as we have indicated, damages under the section 1983 claim are based upon identical facts as the antitrust and contract-interference claims and yet the jury returned a verdict of only $200,000. Because we are remanding on damages based upon the confusing conflict among the various awards, we think it necessary to remand for damages on both remaining theories, that is, section 1983 and antitrust, to allow the new jury to write on a clean slate, and to avoid possible duplication and other confusion.

(2)

[15] [16] This holding, of course, is based upon the fact that the jury did find that WAX and the City were liable for antitrust and civil rights violations. As previously explained, however, WAX cannot be held liable under either issue. The City's arguments that *Noerr–Pennington* protects it from antitrust liability fail, however. There was sufficient evidence for the jury to determine that WAX

and the City were engaged in anticompetitive activity in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2. In particular, the jury reasonably could have read the evidence to indicate that the City and WAX had agreed to restrain the competition posed by VIP and other similar companies and, in furtherance of this agreement, the City had manipulated the zoning ordinances to eliminate such competition. WAX, however, is protected by its position as a private party petitioning the government. *Noerr–Pennington* protection does not apply to the government, of course, since it is impossible for the government to petition itself within the meaning of the first amendment.

The City argues, however, that equity demands that the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1985 Supp.), which protects local governments completely from liability for antitrust damages, should apply retroactively. We leave this question to the district court which did not address it, because one of the factors that needs to be considered in determining the propriety of retroactive application is the financial harm a treble damage award could inflict on a municipality and its taxpayers. 130 Cong.Rec. H.12, 187 (Daily Ed. Oct. 11, 1984) (remarks of Rep. Fish). Until the jury has determined the damage award under the antitrust theory, we have no way of evaluating the harm to the municipality. Once the damage award has been determined, the district court may then evaluate the City's claim that the Local Government Antitrust Act of 1984 should apply retroactively.

D.

VIP's arguments as to prejudgment and postjudgment interest are moot now that we have set the judgment aside.

***1087** IV

A.

[17] Turning to the issues in the City's cross-appeal, we deal first with its arguments about the section 1983 claim. Many of the City's arguments relating to this claim revolve about the City's contention that it never reached a final decision regarding VIP's zoning problems because VIP did not bring its complaint to the highest authority, that is, the Board of Adjustment, for a final interpretation. We disagree that there was no "final decision" cognizable under section 1983. The building inspector had requested and received the Board of Adjustment's interpretation of the zoning code during the Silver Screen case. He had clearly made this request for guidance in his duties. According to the City, the Board of Adjustment *is* the final decision making authority on these issues. Thus, the building inspector was acting pursuant to his authority from the Board in sending out the zoning violations. *See Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir.1984). The combination of the zoning policy decision by the Board and the issuance of the violation notice by the highest City official empowered to execute it, resulted in a policy decision that can be attributed to the City. *St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). The fact that VIP could appeal for a possible variance, or could urge the Board to reconsider and change its prior expressed policy, does not render nonfinal the decision made pursuant to and in accordance with established policy. Furthermore, we agree with the district court that, as part of the first amendment violation, the building inspector's sending of zoning violation notices to VIP and all of its customers (without prior warning or notice to VIP) and informing them that they had fifteen days to cease use of the cable system gave the jury sufficient evidence to determine that this City action caused an immediate chilling effect on VIP's first amendment rights, as evidenced by the fact that numerous customers were understandably upset and informed VIP promptly that they wish to cease receiving its service. The building inspector was clearly the final authority in regard to the decision to implement established policy by sending out the violation notices. There was no effective appeal that could retract the effect that those notices had upon VIP's business and freedom of speech.

[18] The City's argument that VIP could have applied for a variance does not affect the fact that the zoning violation notices were issued pursuant to City policy with immediately resulting injury to VIP. As to damages, the jury was entitled to conclude that VIP's decision to shut down its operations for a few days was a reasonable reaction to a notice requiring it to shut down its operations, and that it may have taken some time for VIP to realize the extent of its options. When the jury considers damages on remand, it should consider whether VIP could have mitigated damages by applying for a

variance to the Board of Adjustment.

[19] There was also sufficient evidence to support the jury's section 1983 verdict on the first amendment theory, since the jury could reasonably have found that the City's actions failed to satisfy the test for time, place and manner restrictions of speech, within the meaning of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Pursuant to this authority, the City had to demonstrate *both* that the restraints furthered a substantial government interest and that they allowed reasonable alternative avenues of communication. *Id.,* 106 S.Ct. at 928. We need not decide the first prong of this test, whether the zoning regulation in this instance furthered any substantial governmental interest, since the restraint on Video's speech failed the second prong. The jury was justified in finding that the City's abrupt issuance, without notice to VIP, of zoning violation notices to it and all of its customers did not leave reasonable alternative avenues of communication. We need not address the question whether the avenues need be commercially viable, since in this case VIP's initial notice required it to shut down within fifteen ***1088** days. Clearly the jury was entitled to find that, at least for a short time, VIP's free speech was paralyzed, and also to find that VIP may have suffered long-term damages as a result of this temporary paralysis.

We repeat that on remand of the issue of damages, the jury should be instructed about mitigation of damages and be allowed to evaluate whether VIP's failure to pursue the City's avenues for relief from established policy meant that the City is not liable for the entire amount of VIP's losses between the first contract to sell and the second. On retrial, the district court should also take care to assure that the damages that the jury awards under section 1983 are not duplicative of any awarded under the antitrust claim, and should render judgment accordingly.

We agree with the district court that we need not examine the other constitutional claims (taking, equal protection) that VIP asserted to support its section 1983 claim. The first amendment violation is sufficient to support the jury's finding of liability. We are, however, for reasons we earlier noted, remanding the case for an entirely new trial on all damages, including those attributable to this section 1983 claim.

B.

[20] We believe that the explanations above make it clear that the jury was entitled to infer that the City's conduct was the proximate cause of VIP's injuries. The City offers other reasons why VIP's stock value may have declined, but it does not sufficiently exclude the jury from concluding that the City's own actions, including its arrangements with WAX, its interpretation of the zoning code, and its issuance of violation notices to VIP and its customers, played the predominant and major role in that decline.

[21] The City also argues that the only evidence of any damages suffered was the $1.245 million, which was the difference between the contract for sale of VIP before and after the zoning violation charge. The City argues that this amount was lost by Parrish and Weiss, VIP's stockholders, not VIP itself. It further argues that since there is no evidence of the amount of damages sustained by VIP, it is not entitled to any actual or punitive damages. We disagree. The value of VIP's stock or assets reflects the value of the corporation, and any diminution in value represents damage to that corporation, on which it can sue. Thus, VIP may claim its compensatory damages. The City, however, is not liable for any punitive damages. *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981).

C.

As to the attorneys' fees awarded by the district court, the validity of the amount is moot since we have set aside the damage verdicts pending a new trial. The district court should reconsider this question after the jury renders its new award.

V

We affirm the district court's well reasoned opinion on all grounds except that we find necessary a new trial on all questions of damages for the reasons we have stated. The court's instructions on damages should include the issue of mitigation. We have noted our special concern, for example, whether, after the cancellation notices were sent to VIP's customers and before the final sale to the Campbells, VIP should have appealed the building inspector's decision to the Board of Adjustment, and, if

so, whether its damages would have been reduced. The district court should consider the applicability of retroactive application of the Local Government Antitrust Act of 1984 subsequent to the jury's reevaluation of damages. The district court should also have special concern that the ultimate damages VIP receives are not duplicative. There can be no punitive damages awarded against the City, and the district court's decisions on attorneys' fees must be reconsidered after retrial. WAX, of course, is excused from all liability and all further proceedings in this case.

***1089** AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

GARWOOD, Circuit Judge, concurring in part and dissenting in part:

I concur in all of Judge Jolly's persuasive opinion except as it holds the City of Dallas liable under the Sherman Act and for First Amendment violations under section 1983 on account of the issuance by its building inspection department of notices that VIP was in violation of the accessory use provisions of the Dallas Development Code. In the context of this case, such action by the City's building inspection department is not, in my view, an adequate basis on which to impose liability because it was without any legal significance and did not constitute the City's legally final determination that a zoning violation had occurred.

The City did not cut off VIP's utilities or take any kind of physical action against VIP; it did not institute suit or procure any type of restraining order; no permit or other requests by VIP were denied by the City. VIP has not explained how the notices in question constituted legally anything more than the formal expression of opinion of the building inspection department that VIP was in violation of the zoning ordinance.[1] Under the ordinances of the City, and under Texas Local Government Code, § 211.010(c), VIP could have appealed to the City's Board of Adjustment and challenged the building inspection department's construction of the accessory use provisions of the ordinance; VIP could have also thus sought a variance from the Board of Adjustment.[2] In the event of such appeal, all action by the building inspection department or other City officials would have been entirely stayed pending resolution of the appeal.[3] Although the Board of Adjustment had previously indicated its agreement with the building inspection department's construction of the ordinance in the Silver Screen case, nevertheless VIP was not a party to that proceeding, the issue was not actually presented there, and the Board of Adjustment did not have the benefit of conflicting arguments being made to it by the parties. It was not shown to be a foregone conclusion that the Board of Adjustment would adopt the same construction of the accessory use provisions of the ordinance in an appeal by VIP, or that it would deny VIP a variance. The Board of Adjustment, which is as much an agency of the City of Dallas as is the building inspection department, is the City's final authority for interpreting its zoning ordinances and granting variances therefrom. That, coupled with the lack of any relevant legal effect of the building inspection department's violation notices, renders it inappropriate to hold the City liable merely because such notices were issued. A final decision by the City, with actual concrete legal injury, was not shown to have ever occurred. *Cf. Williamson County Regional* ***1090** *Planning Commission v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 3120, 87 L.Ed.2d 126 (1985); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 924, 926, 99 L.Ed.2d 107 (1988).

All Citations

858 F.2d 1075, 65 Rad. Reg. 2d (P & F) 715, 57 USLW 2317, 1988-2 Trade Cases P 68,305

Footnotes

1 Had the accessory use provision of the Dallas ordinance been construed to have the meaning which the building inspection department understood it to have, that would not have rendered the ordinance facially unconstitutional.

2 It is true that, under Texas Local Government Code, § 211.009(c), the building inspection department's notices may have had the legal effect of requiring a four-to-one or five-to-zero vote in VIP's favor at the Board of Adjustment in order for VIP to prevail on an appeal. However, as VIP never took an appeal, this is irrelevant.

3 Section 211.010(c) provides:

"(c) An appeal stays all proceedings in furtherance of the action that is appealed unless the

> official from whom the appeal is taken certifies in writing to the board facts supporting the official's opinion that a stay would cause imminent peril to life or property. In that case, the proceedings may be stayed only by a restraining order granted by the board or a court of record on application, after notice to the official, if due cause is shown."

It is obvious in this case that the exception "imminent peril to life or property" would not be applicable.
While the Dallas Development Code authorizes the building inspection department to have utilities disconnected in case of zoning violations, the City never did this. Although its violation notice threatened to take such action after fifteen days, the fifteen-day period was sufficient for appeal to the Board of Adjustment and such appeal by its stay provisions would have prevented any such action. I also observe that under the Dallas Development Code it is a defense to prosecution that the person prosecuted is in compliance with an order of the Board of Adjustment, even if the party's action would otherwise constitute a violation.

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711 F.3d 1136
United States Court of Appeals,
Ninth Circuit.

Mairi NUNAG–TANEDO; Ingrid Cruz; Donnabel Escuadra; Rolando Pascual; Tomasa Mari, on behalf of themselves and other similarly situated individuals, Plaintiffs–Appellees,
v.
EAST BATON ROUGE PARISH SCHOOL BOARD, Defendant,
and
Robert B. Silverman; Silverman & Associates, Inc., Defendants–Appellants.

No. 11–57064.
|
Argued and Submitted Feb. 12, 2013.
|
Filed March 27, 2013.

Synopsis

Background: Plaintiffs, teachers and Filipino nationals who were holders of H–1B visas and who had come from the Philippines to work in the United States, filed putative class action against, inter alia, California attorney and his law firm that assisted school district in recruiting plaintiffs to work in Louisiana, alleging that defendants aided and abetted human trafficking scheme in violation of Trafficking Victims Protection Act (TVPA) and Racketeer Influenced and Corrupt Organizations Act (RICO), as well as breach of fiduciary duties and legal malpractice. The United States District Court for the Central District of California, John A. Kronstadt, J., denied defendants' special motion to strike plaintiffs' second amended complaint, invoking *Noerr–Pennington* defense. Defendants appealed.

Holdings: The Court of Appeals, Berzon, Circuit Judge, held that:

[1] denial of *Noerr–Pennington* defense was not immediately appealable, and

[2] court lacked pendent jurisdiction to review denial of *Noerr–Pennington* defense.

Appeal dismissed.

West Headnotes (9)

[1] **Federal Courts** ▬ Interlocutory and Collateral Orders

Under the "collateral order doctrine," to be subject to immediate appeal an order that does not resolve the entire case must: (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

2 Cases that cite this headnote

[2] **Constitutional Law** ▬ Noerr-Pennington Doctrine

Under the *Noerr–Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[3] **Federal Courts** ▬ Defenses in general

District court's refusal to accord *Noerr–Pennington* defense to California attorney's and his law firm's purported liability, in Filipino teachers' putative class suit alleging that defendants aided and abetted human trafficking scheme by assisting school district in recruiting teachers to work in Louisiana, did not satisfy collateral order doctrine test for immediate appealability; disputed question resolved by ruling was whether defendants' conduct constituted illegal trafficking in violation of Trafficking Victims Protection Act (TVPA) and Racketeer Influenced and Corrupt Organizations Act (RICO) and professional malpractice under state common law, which was part and parcel of suit's merits, and, because *Noerr–Pennington* did not confer any right not to stand trial, ruling was reviewable on appeal from final judgment. U.S.C.A. Const.Amend. 1;

18 U.S.C.A. §§ 1589, 1590, 1592, 1594, 1961 et seq.

2 Cases that cite this headnote

[4] **Constitutional Law** ▬ Noerr-Pennington Doctrine

Noerr–Pennington doctrine is a merits defense to liability, premised on an implied limitation as to the reach of the applicable law. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[5] **Federal Courts** ▬ Immunity

Denials of claims of absolute, qualified, Eleventh Amendment, tribal, and foreign sovereign immunity, are immediately appealable because those immunity doctrines entitle the defendant to avoid facing suit and bearing the burdens of litigation, and that entitlement would be effectively lost if a case is erroneously permitted to go to trial. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[6] **Criminal Law** ▬ Preliminary or interlocutory orders in general

Denial of a double jeopardy defense to avoid a duplicative trial is immediately appealable, as the improper denial of that defense cannot be fully remedied by a post–trial appeal. U.S.C.A. Const.Amend. 5.

[7] **Constitutional Law** ▬ Noerr-Pennington Doctrine

Noerr–Pennington doctrine does not confer a right not to stand trial, but rather provides only a defense to liability, implied into various federal statutes to protect the right of petitioning. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[8] **Federal Courts** ▬ Interlocutory and Collateral Orders

Constitutional nature of the right protected is not dispositive of the collateral order inquiry for immediate appealability.

1 Cases that cite this headnote

[9] **Federal Courts** ▬ On separate appeal from interlocutory judgment or order

Court of Appeals lacked pendent jurisdiction to review district court's denial of California attorney's and his law firms' *Noerr–Pennington* defense in Filipino teachers' putative class suit alleging that defendants aided and abetted human trafficking scheme, in violation of Trafficking Victims Protection Act (TVPA) and Racketeer Influenced and Corrupt Organizations Act (RICO) and California common law, by assisting school district in recruiting teachers to work in Louisiana, because that denial was neither inextricably intertwined with, nor necessary to ensure meaningful review of, issue that was properly subject to interlocutory appeal, district court's denial of defendant's motion under California's anti–SLAPP (strategic lawsuit against public participation) statute. U.S.C.A. Const.Amend. 1; 18 U.S.C.A. §§ 1589, 1590, 1592, 1594, 1961 et seq.; West's Ann.Cal.C.C.P. § 425.16.

3 Cases that cite this headnote

Attorneys and Law Firms

***1137** Robert B. Silverman, Silverman & Associates, Inc., Pasadena, CA; Maureen Jaroscak, Law Office of Maureen Jaroscak, Santa Fe Springs, CA, for Defendants–Appellants.

Dennis B. Auerbach, Covington & Burling LLP, Washington, D.C.; Candice N. Plotkin, Covington & Burling LLP, San Francisco, CA, for Plaintiffs–Appellees.

Appeal from the United States District Court for the Central District of California, John A. Kronstadt, District Judge, Presiding. D.C. No. 8:10–cv–01172–JAK–MLG.

Before: MARSHA S. BERZON and PAUL J. WATFORD, Circuit Judges, and JAMES G. CARR, Senior District Judge. *

OPINION

BERZON, Circuit Judge:

Our question is whether the denial of a motion for immunity from liability under ***1138** the *Noerr–Pennington* doctrine is immediately appealable. We hold that it is not.

California attorney, Robert Silverman, and his firm, Silverman & Associates, Inc. (collectively "Silverman"), were sued by the plaintiffs-appellees on behalf of a class of Filipino teachers recruited to work in several school districts in Louisiana. The plaintiffs allege that Silverman aided and abetted a human trafficking scheme in violation of the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. §§ 1589, 1590, 1592, 1594, and the Racketeer Influenced and Corrupt Organizations Act ("the RICO Act"), 18 U.S.C. §§ 1961–1968; breached his fiduciary duties to members of the plaintiff class; and committed legal malpractice through his role in procuring H–1B non-immigrant visas for the teachers.

Silverman brings this interlocutory appeal from the district court's denial of his special motion to strike the plaintiffs' second amended complaint. He sought to strike the plaintiffs' state law claims on the ground that they violate California's anti-SLAPP statute,[1] Cal.Civ.Proc.Code § 425.16, and invoked *Noerr–Pennington* immunity against all of the plaintiffs' claims, including their federal statutory claims under the TVPA and the RICO Act.

As we hold in a concurrently filed memorandum disposition covering the anti-SLAPP issue, we have jurisdiction to review the denial of Silverman's anti-SLAPP motion. *See DC Comics v. Pac. Pictures Corp.,* 706 F.3d 1009, 1015 (9th Cir.2013). Although we have not previously addressed the issue, for the reasons set forth below, we now join the other circuits to have ruled on this question and hold that the denial of a motion for *Noerr–Pennington* immunity from liability is not an immediately appealable collateral order. *See Hinshaw v. Smith,* 436 F.3d 997, 1003 (8th Cir.2006); *Acoustic Sys., Inc. v. Wenger Corp.,* 207 F.3d 287, 295–96 (5th Cir.2000); *We, Inc. v. City of Philadelphia,* 174 F.3d 322, 328–30 (3d Cir.1999); *Segni v. Commercial Office of Spain,* 816 F.2d 344, 345–46 (7th Cir.1987); *cf. Kelly v. Great Seneca Fin. Corp.,* 447 F.3d 944, 947 (6th Cir.2006) (dismissing an interlocutory appeal involving a *Noerr–Pennington* defense for lack of jurisdiction). Nor do we have pendent appellate jurisdiction over the *Noerr–Pennington* issue. We therefore do not reach the merits of Silverman's *Noerr–Pennington* defense.

I.

[1] Under the collateral order doctrine, first announced in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to be subject to immediate appeal, an order that does not resolve the entire case must: "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock,* 546 U.S. 345, 349, 126 S.Ct. 952, 163 L.Ed.2d 836 (2006) (alterations in original) (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)) (internal quotation marks omitted). These criteria are satisfied by only a "narrow class of [district court] decisions that do not terminate the litigation, but are sufficiently important and collateral to the merits that they should nonetheless be treated as final." *Id.* at 347, 126 S.Ct. 952 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994)) (internal quotation marks omitted).

[2] The *Noerr–Pennington* doctrine protects the First Amendment "right of ***1139** the people ... to petition the Government for a redress of grievances." U.S. Const. amend. I. Under *Noerr–Pennington*, "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DIRECTV, Inc.,* 437 F.3d 923, 929 (9th Cir.2006) (citing *Empress LLC v. City & Cnty. of S.F.,* 419 F.3d 1052, 1056 (9th Cir.2005)). Although the doctrine was developed in the antitrust context, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), it has since been extended to other statutory schemes. *See, e.g., Bill Johnson's Restaurants, Inc. v. N.L.R.B.,* 461 U.S. 731, 742–43, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) (applying the *Noerr–Pennington* doctrine to the National Labor Relations Act); *BE & K Constr. Co. v. N.L.R.B.,* 536 U.S. 516, 526, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) (same); *see also Sosa,* 437 F.3d at 932 n. 6 (discussing cases applying *Noerr–Pennington* outside the antitrust context); *White v. Lee,* 227 F.3d 1214, 1231 (9th Cir.2000) (holding that, because it "is

based on and implements the First Amendment right to petition," the *Noerr–Pennington* doctrine "applies equally in all contexts"). Today, *Noerr–Pennington* "stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause," *Sosa,* 437 F.3d at 931 (and may also be applicable in construing the reach of common law causes of action, *see infra* note 2).

[3] A district court's refusal to accord a *Noerr–Pennington* defense to liability satisfies the first prong of the *Cohen* collateral order test. That denial conclusively determines the disputed question: whether liability may properly attach to the defendant's conduct at issue in the challenged claims, or whether the conduct is protected petitioning activity. But it fails the second and third prongs.

[4] The question resolved does not involve a "claim[ ] of right separable from, and collateral to, rights asserted in the action," *Cohen,* 337 U.S. at 546, 69 S.Ct. 1221, as required by the second prong of the *Cohen* test, *see Will,* 546 U.S. at 349, 126 S.Ct. 952. Instead, *Noerr–Pennington* is a merits defense to liability, premised on an implied limitation as to the reach of the applicable law. *See Sosa,* 437 F.3d at 931. Here, the disputed question resolved by the ruling on Silverman's *Noerr–Pennington* defense is whether the conduct for which he is being sued qualifies as petitioning activity for which liability may not be imposed under the TVPA, the RICO Act, or state common law, or whether, instead, it constitutes illegal trafficking and professional malpractice covered by those causes of action. That question is part and parcel of the merits of the plaintiffs' action.

One other circuit has stated otherwise, accepting without analysis that the question resolved in a motion for *Noerr–Pennington* immunity is ordinarily unrelated to the merits of the case. *See We, Inc.,* 174 F.3d at 325. But in this circuit, at least, the *Noerr–Pennington* doctrine is a rule of construction. So the result of its application is simply to circumscribe the reach of the cause of action, thereby determining whether there is liability. Given that function, the *Noerr–Pennington* doctrine is an interpretive doctrine that merges into the merits of the liability determination.

[5] **[6]** Nor is a ruling on *Noerr–Pennington* liability unreviewable on appeal from a final judgment, as required to satisfy the third prong of the *Cohen* test. *See Will,* 546 U.S. at 349, 126 S.Ct. 952. Denials of claims of absolute, qualified, ***1140** Eleventh Amendment, tribal, and foreign sovereign immunity, are immediately appealable because those immunity doctrines entitle the defendant to avoid facing suit and bearing the burdens of litigation. That entitlement would be "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (qualified immunity); *see also Puerto Rico Aqueduct & Sewer Auth.,* 506 U.S. at 144–47, 113 S.Ct. 684 (Eleventh Amendment immunity); *Paine v. City of Lompoc,* 265 F.3d 975, 980–81 (9th Cir.2001) (absolute immunity); *Schwenk v. Hartford,* 204 F.3d 1187, 1195 (9th Cir.2000) (qualified immunity); *Terenkian v. Republic of Iraq,* 694 F.3d 1122, 1130 (9th Cir.2012) (foreign sovereign immunity); *Doe v. Holy See,* 557 F.3d 1066, 1074 (9th Cir.2009) (same); *Burlington N. & Santa Fe Ry. Co. v. Vaughn,* 509 F.3d 1085, 1090–91 (9th Cir.2007) (tribal sovereign immunity). Similarly, the purposes underlying the Double Jeopardy Clause include the avoidance of duplicative trial. So improper denial of a double jeopardy defense cannot be fully remedied by a post-trial appeal. *See Abney v. United States,* 431 U.S. 651, 659, 661–62, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *see also Flanagan v. United States,* 465 U.S. 259, 266–67, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984) (citing *United States v. MacDonald,* 435 U.S. 850, 860 n. 7, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978)) (noting that "[d]ouble jeopardy and Speech or Debate rights are *sui generis* " in guaranteeing immunity from trial).

[7] The *Noerr–Pennington* doctrine, in contrast, does not confer a right not to stand trial. Although we have repeatedly characterized the protection afforded by *Noerr–Pennington* as a form of "immunity," *see, e.g., Sosa,* 437 F.3d at 929; *Empress LLC,* 419 F.3d at 1056; *Liberty Lake Invs., Inc. v. Magnuson,* 12 F.3d 155, 160 (9th Cir.1993); *Omni Res. Dev. Corp. v. Conoco, Inc.,* 739 F.2d 1412, 1413 (9th Cir.1984), the use of the term "immunity" in this context signals immunity from liability, not from trial. Again, unlike California's anti-SLAPP statute, which is "in the nature of an immunity from suit," *see DC Comics,* 706 F.3d at 1013; *Batzel v. Smith,* 333 F.3d 1018, 1025–26 (9th Cir.2003), the *Noerr–Pennington* doctrine provides only a defense to liability, implied into various federal statutes to protect the right of petitioning, *see Sosa,* 437 F.3d at 929, 931.

As a principle of statutory interpretation, *Noerr–Pennington* is no more a protection from litigation itself than is any other ordinary defense, affirmative or otherwise and constitutionally grounded or not. For example, a defense that a claim is barred by the statute of limitations does not provide immunity from litigation. *See Estate of Kennedy*

v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1111 (9th Cir.2002). Nor does a defense that the particular remedy plaintiffs seek is foreclosed by statute. *See Miranda B. v. Kitzhaber,* 328 F.3d 1181, 1190 (9th Cir.2003) (holding that the denial of a defense to suit based on a statutory bar to relief under § 1983 is not immediately appealable under the collateral order doctrine); *see also Burns–Vidlak ex rel. Burns v. Chandler,* 165 F.3d 1257, 1260–61 (9th Cir.1999) (holding that the denial of a defense to liability for punitive damages is not immediately appealable). Consequently, denial of a *Noerr–Pennington* defense is as effectively reviewable on appeal from the final judgment as any potentially "erroneous ruling on liability" ordinarily is. *See Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 43, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995).

The Supreme Court has cautioned against characterizing every right that "could be enforced appropriately by pretrial dismissal" as "conferring a 'right not to stand trial' " and therefore subject to immediate appeal under the collateral order ***1141** doctrine. *Digital Equip. Corp.,* 511 U.S. at 873, 114 S.Ct. 1992. Allowing interlocutory appeals of all such rights would:

> move [28 U.S.C.] § 1291 aside for claims that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim.

Id. (citations omitted). Instead, courts of appeals should "view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.*

[8] Nor is the "constitutional nature of the right [protected] ... dispositive of the collateral order inquiry." *Perry v. Schwarzenegger,* 591 F.3d 1126, 1135 (9th Cir.2009) (citing *Flanagan,* 465 U.S. at 267–68, 104 S.Ct. 1051). The Petition Clause of the First Amendment, which *Noerr–Pennington* is designed to safeguard, does not enjoy a special status, or confer any greater immunity, than that provided by other First Amendment guarantees. *See McDonald v. Smith,* 472 U.S. 479, 484–85, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). And "[t]he courts have never recognized ... that an immunity *from suit* was necessary to prevent an unacceptable chill of those First Amendment rights." *We, Inc.,* 174 F.3d at 327. Accordingly, "no possible ground remains for thinking that a defense based on that clause is any different—so far as is relevant to the issue of appealability under the collateral order doctrine—from any other affirmative defense." *Segni,* 816 F.2d at 346; *accord We, Inc.,* 174 F.3d at 328–29; *Acoustic Sys., Inc.,* 207 F.3d at 296; *Hinshaw,* 436 F.3d at 1003.

We therefore hold that denial of a *Noerr–Pennington* defense is not immediately appealable under the collateral order doctrine.

II.

[9] Nor do we have pendent jurisdiction to review the denial of Silverman's *Noerr–Pennington* defense. That denial is neither "inextricably intertwined" with nor "necessary to ensure meaningful review of" the issue which *is* properly subject to interlocutory appeal: the denial of Silverman's anti-SLAPP motion. *Swint,* 514 U.S. at 51, 115 S.Ct. 1203; *accord Hendricks v. Bank of Am., N.A.,* 408 F.3d 1127, 1134 (9th Cir.2005) (discussing pendent jurisdiction); *see also DC Comics,* 706 F.3d at 1015 (reaffirming that the denial of an anti-SLAPP motion is immediately appealable). As California's anti-SLAPP statute applies only to state law claims, *see Hilton v. Hallmark Cards,* 599 F.3d 894, 901 (9th Cir.2010), Silverman's asserted *Noerr–Pennington* defense against federal statutory liability under the TVPA and the RICO Act is severable from, and neither necessary to nor necessarily resolved by, our ruling on the anti-SLAPP motion to strike. *See id.* at 900 (citing *Batzel,* 333 F.3d at 1023). [2]

***1142** III.

For these reasons, Silverman's appeal from the district court's denial of his *Noerr–Pennington* motion is **DISMISSED** for lack of appellate jurisdiction.

All Citations

711 F.3d 1136, 13 Cal. Daily Op. Serv. 3406, 2013 Daily Journal D.A.R. 4041

Footnotes

* The Honorable James G. Carr, Senior District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

1 SLAPP stands for "strategic lawsuit against public participation."

2 Silverman's asserted *Noerr–Pennington* defense against the plaintiffs' state law claims may well fail for the same reason the anti-SLAPP motion to strike those claims fails. But as the *Noerr–Pennington* question is not properly before us, we need not address whether the doctrine provides immunity against state common law claims at all. That remains an open question in this circuit, the answer to which may well depend on state law. *See Sosa,* 437 F.3d at 932 n. 6 (discussing the application of *Noerr–Pennington* outside the antitrust context, including, in other circuits, to common law causes of action); *In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.,* 102 F.3d 1524, 1538 & n. 15 (9th Cir.1996) (declining to decide whether *Noerr–Pennington* applies to state law tort claims, but compiling "extensive case law" on both sides of the question), *rev'd on other grounds sub nom. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998).

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, CORA SANCHEZ, and SURFRIDER FOUNDATION, Plaintiffs, v. 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) **NOTICE OF HEARING MOTION AND CERTIFICATE OF SERVICE**
HANAPOHAKU LLC, Counterclaim Plaintiff, v. SAVE SHARKS COVE ALLIANCE, MĀLAMA PŪPŪKEA-WAIMEA, HAWAII'S THOUSAND FRIENDS, LARRY McELHENY, JOHN THIELST, and CORA SANCHEZ, Counterclaim Defendants.	

NOTICE OF HEARING

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NOTICE IS HEREBY GIVEN that the Motion hearing for Plaintiffs' Joint Motion for Judgment on the Pleadings, shall come on for hearing on October 20, 2020 at 10:00 a.m. before the Honorable James H. Ashford, Judge of the above-entitled Court, in his courtroom at 777 Punchbowl Street, Honolulu, Hawai'i 96813, or as soon thereafter as counsel can be heard.

DATED: Honolulu, Hawai'i, September 28, 2020.

/s/ *Pamela W. Bunn*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on the following parties listed below by electronic service through the JEFS E-Filing System:

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NOTICE OF ELECTRONIC FILING

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Title:	SAVE SHARKS COVE ALLIANCE VS C & C OF HONOLULU
Filing Date / Time:	MONDAY, SEPTEMBER 28, 2020 10:55:33 AM
Filing Parties:	Pamela Bunn
	Erika Amatore
	Margaret Wille
	Timothy Vandeveer
	Gene Lau
	Michele-Lynn Luke
	Bradford Chun
Case Type:	Circuit Court Civil
Lead Document(s):	
Supporting Document(s):	130-Motion for _____
Document Name:	130-Counterclaim Defendants' Joint Renewed Motion for Judgment on the Pleadings; Memorandum In Support of Motion; Appendix (Tabs A-H); Notice of Hearing and Certificate of Service

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

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The following parties need to be conventionally served:
ALL PARTIES-RE DOCKET ONLY-NOT PARTY RE SERVICE REQUIREMENT
