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Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

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,
CORR SANCHEZ, and SURFRIDER
FOUNDATION,

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANT/COUNTERCLAIM
PLAINTIFF HANAPOHAKU LLC'S
MEMORANDUM IN OPPOSITION TO
COUNTERCLAIM DEFENDANTS'
JOINT RENEWED MOTION FOR
JUDGMENT ON THE PLEADINGS,
FILED SEPTEMBER 28, 2020;
DECLARATION OF BRETT R. TOBIN;
EXHIBITS "1"- "3"; CERTIFICATE OF
SERVICE

HEARING:

Date: October 28, 2020

Time: 10:15 a.m.

Judge: Honorable James H. Ashford

Trial Date: February 22, 2021

DEFENDANT/COUNTERCLAIM PLAINTIFF HANAPOHAKU LLC'S
MEMORANDUM IN OPPOSITION TO COUNTERCLAIM
DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT
ON THE PLEADINGS, FILED SEPTEMBER 28, 2020

I. INTRODUCTION

In this second bite at the apple, Plaintiffs get no closer to achieving their goal of eliminating Hanapohaku's Counterclaims. Plaintiffs seek a dismissal based on a doctrine that has never been applied in Hawai'i state courts, and for which no test has therefore been articulated by Hawai'i courts. Even if adoption of the *Noerr-Pennington* doctrine as a general matter could be supported, this case presents a poor vehicle for doing so. This is because the claims do not necessarily trigger any First Amendment protections, and even if they did, there are numerous factual disputes regarding the baselessness of Plaintiffs' claims. Such a set of circumstances simply does not lend itself to a ruling as a matter of law.

This Court articulated three topics for further discussion relating to the *Noerr-Pennington* doctrine. First, whether it applies to common law claims as well as statutory claims. Second, whether the doctrine acts as a defense to liability or an immunity from suit. And third, if the doctrine does apply, is the sham litigation exception triggered in this case. Hanapohaku contends (1) that the *Noerr-Pennington* doctrine applies solely to statutory claims as it is a doctrine of statutory construction; (2) that it is a defense to liability that should be litigated like any other defense; and (3) that to the extent the Court is inclined to adopt the doctrine, the sham litigation exception applies on these facts or, at the very least, dismissal is inappropriate because the issue is a question of fact. As such, Plaintiffs' Renewed Motion for Judgment on the Pleadings should be denied in its entirety.

II. BACKGROUND

As this Court is now familiar, Defendant Hanapohaku LLC (“Hanapohaku”) is proposing to develop a Rural Community Center (the “Project”) in-keeping with—and expressly contemplated by—the 2011 North Shore Sustainable Communities Plan. In seeking permits for the Project, Hanapohaku completed all the necessary steps and frequently even exceeded requirements in an effort to make sure the Project is a success and that it is done with the support of the community.

The Plaintiffs in this case—a vocal but small minority of that community that is opposed to the Project—exercised their rights to engage in that process for years and they were always given ample opportunity to do so through community meetings, town hall events, and in public hearings. Neither Hanapohaku, nor anyone else, ever attempted to block those participatory rights or stifle public debate in any way.

In seeking approval for the Project, Hanapohaku submitted an Environmental Impact Statement (“EIS”) Preparatory Notice for the Project on April 11, 2017 with a full comment period of 30 days. *See* Counterclaim at Para. 10. This was done even though only an Environmental Assessment is needed for an SMA Major Permit, not a full EIS. *Id.*

Hanapohaku then submitted a Draft EIS for the Project on November 13, 2017, with a full comment period of 45 days. *Id.* at Para. 11. A Final EIS for the Project was submitted by Hanapohaku and accepted by the Department of Planning and Permitting (“DPP”) on July 11, 2018. *Id.* at Para. 12. Neither Plaintiffs nor anyone else filed a timely challenge to that Final EIS. *Id.*

Hanapohaku submitted a Special Management Area (“SMA”) Major Permit Application for the Project to DPP on July 20, 2018. *Id.* at Para. 13. And DPP transmitted its findings and

recommendations to the Honolulu City Council (“City Council”) on October 23, 2018. *Id.* at Para. 14.

The Zoning and Housing Committee of the City Council held a hearing on the SMA Major Permit Application on November 7, 2018 and approved the measure by a **unanimous 5-0 vote**. *Id.* at Para. 15. The City Council then held a full public hearing on the SMA Major Permit Application on November 14, 2018 and granted the permit by a **unanimous 9-0 vote**. *Id.* at Para. 16.

With their extensive political engagement efforts having comprehensively failed, on January 11, 2019, Plaintiffs decided to sue Hanapohaku, the City and County of Honolulu, the City Council, and DPP seeking to block the approved Project (the “Complaint”) despite not having sufficient legal grounds for doing so. *See id.* at Para. 17. The Complaint alleged claims against Hanapohaku for Violation of Hawai‘i Revised Statutes (“HRS”) § 321-11(18) and Hawai‘i Administrative Rules (“HAR”) Title 11 Ch. 50 and for Public Nuisance. *Id.* at Para. 18.¹

On February 27, 2019, Counterclaim Defendants filed a **First Amended Complaint** (“FAC”) adding new claims against Hanapohaku for Violation of Hawai‘i Constitutional Rights and Water Pollution and seeking injunctive relief. *Id.* at Para. 20. This was done without an adequate legal basis and, in particular, without sufficient scientific data to support an attack on the EIS or the SMA Major Permit Application. *Id.* at Para. 25.

¹ HRS § 321-11(18) indicates that food establishments are subject to health rules, but the HAR provisions cited in the Complaint were from HAR Title 11, Ch. 50, Subchapter 8 which had already been repealed in its entirety long before the Complaint was filed. *See* Counterclaim at Para. 19.

Thus, the purpose of this sham lawsuit was not to vindicate any particular rights, but instead to force Hanapohaku into litigation as a way of indefinitely delaying the Project with the ultimate hope that Hanapohaku might either **run out of money or abandon** the Project entirely—cynically hoping to accomplish through attrition and delay, that which Plaintiffs did not have the community or political support to achieve through legitimate means.

At the same time, Plaintiffs—through the use of social media and otherwise—engaged in a **public smear campaign containing libelous and untrue statements** about Hanapohaku, its principals, and the Project in an effort to try to **draw support for their legal defense fund** and to **poison public sentiment** against the Project and Hanapohaku. *Id.* at Para. 27.

Despite this, Hanapohaku did not file its Counterclaims immediately. Instead, they sought limited discovery to illuminate what support Plaintiffs had for their claims at the time they were filed. On May 20, 2019, Hanapohaku issued document requests seeking any and all scientific studies or data supporting the claims in the FAC that Plaintiffs had in their possession on the date it was filed. *Id.* at Para. 21.

On July 15, 2019, Plaintiffs made a document production in which the sum total of the “scientific” support consisted of just **two pages** of unverified water sampling data of unknown origin reflecting testing done on January 30, 2019 in a report dated February 26, 2019—a day before the FAC was filed. *Id.* at Para. 21. This illustrated the utter lack of grounds for the suit and Hanapohaku’s Counterclaims followed on September 27, 2019.

Testimony from the **individual Plaintiffs** has further illustrated the lack of a legitimate basis for the lawsuit. Nevertheless, Plaintiffs now seek to immunize themselves from responsibility for their actions and the harm they have caused and will continue to cause.

III. STANDARD

It is well-settled under Hawai‘i law that “[a] motion for judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain.” *Baehr v. Lewin*, 74 Haw. 530, 546, 852 P.2d 44, 52 (1993). In proceeding on such a motion, the burden is on the moving party to demonstrate “that no material issue of fact remains to be resolved” and that they are therefore entitled to judgment as a matter of law. *Ruf v. Honolulu Police Dep’t*, 89 Hawai‘i 315, 319, 972 P.2d 1081, 1085 (1999). Such motions are rarely granted under the notice pleading standards of Hawai‘i state courts and should be denied unless “it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief.” *Blair v. Ing*, 95 Hawai‘i 247, 252, 21 P.3d 452, 457 (2001).

IV. ANALYSIS

A. No Hawai‘i Court has Applied the *Noerr-Pennington* Doctrine to Common Law Claims

As Hanapohaku set forth in its opposition to Plaintiffs’ initial motion, it is still true that no Hawai‘i state court decision has ever applied the *Noerr-Pennington* doctrine in any context. Only one Hawai‘i state court decision even mentions *Noerr-Pennington*, but it does not apply it or analyze it in any way. *See Perry v. Perez-Wendt*, 129 Hawai‘i 95, 102, 294 P.3d 1081, 1088 (Haw. Ct. App. Feb. 8, 2013). Thus, no Hawai‘i state court has issued a decision applying *Noerr-Pennington* to statutory or common law claims. Nothing has changed in that regard, and given the various applications and tests that other jurisdictions have employed, it should give this Court pause before wading into this arena without any guidance from a Hawai‘i appellate court.

Even in Hawai‘i Federal Courts, its application has been limited to cases involving statutory claims, not common law tort claims. *See Lesane v. Hawaiian Airlines, Inc.*, 2020 U.S.

Dist. LEXIS 33317 at * (D. Haw. Feb. 27, 2020) (stating that the “*Noerr-Pennington* doctrine does not bar state common law claims”) (citing *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1141 n.2 (9th Cir. 2013)).

Plaintiffs lean heavily on Judge Otake’s comment that “the *Noerr-Pennington* doctrine would also arguably extend to Plaintiff’s fraud claim.” *Id.* at *11. Curiously, Plaintiffs even go so far as to say that this reference is “unquestionably not *dicta*” displaying an apparent misunderstanding of what that word means. The textbook definition of *dicta* is a statement made by the court that was not necessary to decide the case. This is as clear an example of that as one could hope to find. Judge Otake affirmed Judge Mansfield’s dismissal of the fraud claim under Rule 12(b)(6). *Id.* Thus, her ruling in no way relied on or applied the *Noerr-Pennington* doctrine. The fact that the court even used the word “arguably” and then went on to say “[a]ssuming it does not . . . dismissal of the fraud claim was proper” makes this even more apparent. There can be no serious argument as to whether this was *dicta* and, as *dicta*, it carries no precedential value whatsoever.

Limiting the *Noerr-Pennington* doctrine to statutory claims makes sense given its historical origins in the anti-trust context and how it has subsequently been applied.

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. The *Noerr-Pennington* doctrine arose in the antitrust context and initially reflected the Supreme Court’s effort to reconcile the Sherman Act with the First Amendment Petition Clause.

Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006) (emphasis added).

As the court in *Sosa* goes on to explain, the *Noerr-Pennington* doctrine thus arose as a principal of **statutory construction** that the Supreme Court subsequently expanded into other **statutory** contexts. *Id.* at 930. But it was and remains, “a generic rule of **statutory** construction,

applicable to any **statutory** interpretation that could implicate the rights protected by the Petition Clause.” *Id.* at 931 (emphasis added). As the Ninth Circuit stated:

Under the *Noerr-Pennington* rule of **statutory** construction, we must construe **federal statutes** so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the **statute** clearly provides otherwise.

Id. (emphasis added).

Hanapohaku acknowledges that a good number of jurisdictions have taken the *Noerr-Pennington* doctrine beyond those constraints in certain contexts. However, Hawai‘i is not one of them. And even if one were to argue for extension of the doctrine to Hawai‘i courts, this case is a poor vehicle for doing so.

Plaintiffs here are suing Hanapohaku for (1) violation of the right to a clean and healthful environment; (2) water pollution; and (3) public nuisance. The last claim in particular seems utterly ill-suited for *Noerr-Pennington* analysis as it is difficult to see how one group of non-governmental parties suing another non-governmental party for the tort of nuisance could ever remotely implicate the Petition Clause of the First Amendment.

Importantly, it was Plaintiffs who chose to file suit against Hanapohaku, rather than just suing governmental entities. That choice was not an exercise of First Amendment rights, it was a suit claiming harm at the hands of Hanapohaku, just like any other garden variety tort suit. The First Amendment is not remotely implicated by that.

B. The *Noerr-Pennington* Doctrine is a Defense, Not an Immunity

As the Ninth Circuit stated in *Nunag*, the *Noerr-Pennington* doctrine is merely “a defense to liability, implied into various federal statutes to protect the right of petitioning [It] is no more a protection from litigation itself than is any other ordinary defense, affirmative or otherwise and constitutionally grounded or not.” 711 F.3d at 1140. Thus, the issues raised by

the doctrine—i.e., whether the underlying suit is baseless or not—can be litigated through the course of a lawsuit just as any other claims or defenses are. As Plaintiffs appear to have conceded this point, Hanapohaku will not belabor the issue.

C. The Sham Litigation Exception Would Apply Here

If the Court is inclined to allow Plaintiffs to raise the *Noerr-Pennington* doctrine as a defense in this case, the sham litigation exception to that doctrine would apply. As courts have noted, while “*Noerr-Pennington* is a powerful shield, it is not absolute.” *Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc.*, 806 F.3d 162, 178 (3d Cir. 2015).

Moreover, the cases applying the *Noerr-Pennington* doctrine acknowledge that the thorny issue of whether or not a case constitutes a “sham” is a **question of fact**, making them ill-suited for disposition on a motion for judgment on the pleadings in any event. *See Lesane v. Hawaiian Airlines, Inc.*, 202 U.S. Dist. LEXIS 38981 at *16 (D. Haw. March 6, 2020); *Protect Our Mountain Environment, Inc. v. District Court of County of Jefferson*, 677 P.2d 1361, 1368-69 (Colo. 1984) (holding that courts should give the parties “a reasonable opportunity to present all material pertinent to the motion and should treat the motion as one for summary judgment”); *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028, 1037 (C.D. Cal. 2007) (“[W]hether something is a genuine effort to influence governmental action, or a mere sham, is a question of fact.”).

The Supreme Court has set forth a **two-part test** for determining whether a lawsuit constitutes a sham litigation. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993). Under the first prong, the court tests whether the lawsuit is objectively baseless. *Id.* If the lawsuit fails under the objective test, the inquiry moves to the subjective motivation of the party bringing the suit to gauge whether the case conceals an attempt to

interfere “through the use of the government *process*—as opposed to the *outcome* of that process.” *Id.* (emphasis in original). In other words, if a baseless lawsuit is brought to obtain goals simply through the **process** of litigation rather than the **result** of that process, the *Noerr-Pennington* doctrine provides no protection.

As discussed above, courts have held that whether the sham exception applies is a question of fact that is inappropriate for a motion for judgment on the pleadings—particularly a renewed motion, brought more than a year after the counterclaims were filed. Even summary judgment is not appropriate where, as here, there are facts in dispute. *Rock River Communs., Inc. v. Universal Music Group, Inc.*, 745 F.3d 343, 352 (9th Cir. 2014) (citing *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253-54 (9th Cir. 1982)).

Plaintiffs contend that their lawsuit is not objectively baseless as a matter of law. Motion at p. 2. But—in addition to being an *ipse dixit* statement that carries no weight—this misstates the standard. A court should only rule on the objective baselessness prong as a matter of law where “there is no dispute over the predicate facts of the underlying legal proceeding”. *Prof'l Real Estate Inv'rs, Inc.*, 508 U.S. at 63; see also *In re Flonase Antitrust Litig.*, 795 F. Supp. 2d 300 (E.D. Pa. 2011).

In *Rock River*, the court found that triable issues of fact precluded summary judgment on the sham litigation exception after **discovery uncovered evidence** tending to show that the lawsuit was baseless. 745 F.3d at 351-53. The Ninth Circuit ruled that a reasonable jury, taking all the evidence in the light most favorable to Rock River, could conclude that the litigation position was objectively baseless. *Id.* at 352.

Similarly, in *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc.*, the court held that a decision on the sham litigation exception “is better reserved until after discovery.” 164 F. Supp.

3d 1117, 1134 (D. Minn. 2016) (citing *Scooter Store, Inc. v. SpinLife.com, LLC*, 777 F. Supp. 2d 1102, 1115 (S.D. Ohio 2011)). The court there also ruled that the party seeking to establish the applicability of the sham litigation exception “is not required to show that the litigation threatened was actually meritless.” *Id.* at 1134. Instead, the party “must only allege facts to plausibly establish that [the] litigation activity was objectively baseless.”

Here, Hanapohaku has alleged that Plaintiffs’ lawsuit is baseless and discovery taken to date has supported those allegations. As noted previously, Hanapohaku did not even bring its Counterclaims until limited discovery had shown that the “scientific” support relied on by Plaintiffs consisted of just two pages of unverified water sampling data taken after the original complaint had already been filed.

Since the filing of the Counterclaims, even more evidence of the baselessness of the suit has emerged. When asked whether Plaintiff Save Sharks Cove Alliance had conducted any environmental analysis, Plaintiff John Thielst testified that he knew some samples had been taken but that this was only after the lawsuit had already been filed. *See* Excerpt of Thielst Deposition Transcript (“Thielst Tr.”) at p. 37:22 - 38:4, attached hereto as Exhibit 1 to the Declaration of Brett R. Tobin (“Tobin Decl.”). Thielst also stated that he believed traffic studies were not conducted until afterwards despite the FAC alleging definitively that traffic had been worsened by the Project. *See* Ex. 1, Thielst Tr. at 37:8-21.

Similarly, Plaintiff Larry McElheny testified that while water runoff from the Project was an area that concerned him, he did not review the plans for the Project to see if they provided mitigation for runoff before filing suit. *See* Excerpt of McElheny Deposition Transcript (“McElheny Tr.”) at p. 26 – 29, attached hereto as Exhibit 2 to the Tobin Decl. McElheny

acknowledged that because he was a party to a lawsuit, “someone could probably argue that I was remiss because I didn’t check out their mitigation before I signed on.” *Id.* at p. 28:22-25.

With respect to the EIS—the alleged inadequacy of which serves as a lynchpin to the FAC—McElheny testified that he just “thumbed through it” and looked at the pictures prior to filing suit. *Id.* at p. 66:16-21. When asked how he purportedly knew that the EIS did not address community concerns he relied on statements from “friends and acquaintances”. *Id.* at p. 42:22 – 43:16.

Further testimony illustrated that the Plaintiffs are driven not by supposed violations by Hanapohaku, but by an improper desire to hold them to standards above and beyond what the law requires. For example:

- Plaintiff Cora Sanchez testified that her understanding of the purpose of the lawsuit was to address “violations” on the part of Hanapohaku, but when asked to identify an example of a violation, she could not name a single one. *See* Excerpt of Sanchez Deposition Transcript (“Sanchez Tr.”) at p. 9:22 – 10:6, attached as Exhibit 3 to the Tobin Decl.
- Thielst stated that while he was aware that the property for the Project is commercially zoned and that the Project is actually **less** dense than what would be allowed under the zoning rules, he still thought it should be further reduced. *See* Ex. 1 at p. 53:21 – 54:21.
- Thielst stated that he would support an effort to down-zone the parcels in question to prevent commercial activity entirely—something the lawsuit would nor, and could not, accomplish—thus illustrating that the real goal is to improperly prevent development entirely. *Id.* at p. 18:22 – 19:14.

- Thielst testified that even if the Project satisfied the guidelines set forth in the North Shore Sustainable Communities Plan (“NSSCP”), he would want it held to a higher standard. *Id.* at p. 59 – 65. This is so even though the FAC alleges that failure to comply with the NSSCP is a basis for the suit.
- Thielst stated that he did not think any food trucks should be allowed at the Project despite no known regulation that would support such a ban. *Id.* at p. 39:12-14.
- Sanchez also stated that she wanted no food trucks at the Project even though she acknowledged that they serve residents. *See* Ex. 3 at p. 50-51.
- McElheny similarly stated that he did not think a single food truck at the Project would be acceptable while acknowledging that local community members dine at those businesses. *See* Ex. 2 at p. 22 – 24.

At the very least, this evidence shows that there are genuine disputes regarding the predicate facts underlying Plaintiffs’ FAC. When those facts are viewed in the light most favorable to Hanapohaku, even summary judgment would be inappropriate, let alone an outright dismissal.

Plaintiffs contend that Hanapohaku insufficiently alleged that the FAC is a sham and that this is grounds for dismissal. There are at least two problems with this. First, it does not make practical sense that certain “magic words” be included for a claimant to avoid a motion to dismiss. Second, that is particularly so when the supposed basis for these magic words comes from cases applying a doctrine that has never been applied by a Hawaii state court let alone articulated from the standpoint of pleading requirements. Insofar as this Court were inclined to

require specific allegations that the sham litigation exception to the *Noerr-Pennington* doctrine applies, Hanapohaku should be given leave to amend to add such allegations.

In short, Hanapohaku continues to contend that the *Noerr-Pennington* doctrine is inapplicable to this case. But even if the doctrine were applied, Hanapohaku has raised sufficient factual issues to preclude dismissal. Instead, Plaintiffs should be left to their proof of establishing the applicability of the *Noerr-Pennington* defense through the normal course of litigation.

V. CONCLUSION

For the foregoing reasons, Counterclaimant Hanapohaku respectfully requests that the Court deny Counterclaim Defendants' Renewed Motion for Judgment on the Pleadings in its entirety.

DATED: Honolulu, Hawai'i, October 20, 2020.

/s/ Brett R. Tobin
TERRENCE M. LEE
BRETT R. TOBIN

Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

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,
CORA SANCHEZ, and SURFRIDER
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CITY AND COUNTY OF HONOLULU;
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HANAPOHAKU LLC; DOES 1-10,

Defendants.

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

DECLARATION OF BRETT R. TOBIN

Trial Date: Not set

DECLARATION OF BRETT R. TOBIN

I, BRETT R. TOBIN, hereby declare as follows:

1. I am over the age of eighteen years and I make this declaration on my personal knowledge and would be competent to testify on the matters stated herein.
2. I am an attorney, duly licensed to practice law in the State of Hawai'i and am one of the attorneys for Defendant HANAPOHAKU LLC ("Hanapohaku").
3. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the deposition transcript of John W. Thielst, taken November 26, 2019.
4. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of the deposition transcript of Larry McElheny, taken November 13, 2019.

5. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the deposition transcript of Cora Sanchez, taken November 13, 2019.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, October 20, 2020.

/s/ Brett R. Tobin
BRETT R. TOBIN

1 IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

2 STATE OF HAWAII

3

4 SAVE SHARKS COVE) CIVIL NO. 19-1-0057-01 JHA
 5 ALLIANCE, MALAMA) (Declaratory and
 6 PUPUKEA-WAIMEA,) Injunctive Relief)
 7 HAWAI'I'S THOUSAND)
 8 FRIENDS, LARRY McELHENY,)
 9 JOHN THIELST, AND CORA)
 10 SANCHEZ,)

11 Plaintiffs,)

12 vs.)

13 CITY AND COUNTY OF)
 14 HONOLULU; CITY COUNCIL)
 15 OF THE CITY AND COUNTY)
 16 OF HONOLULU; DEPARTMENT)
 17 OF PLANNING AND)
 18 PERMITTING OF THE CITY)
 19 AND COUNTY OF HONOLULU;)
 20 HANAPOHAKU LLC;)
 21 DOES 1-10,)

22 Defendants.)

23 DEPOSITION OF JOHN W. THIELST

24 Taken on behalf of Defendant Hanapohaku LLC at the
 25 offices of Sullivan Meheula Lee LLLP, Pacific
 Guardian Center, Makai Tower, 733 Bishop Street,
 Suite 2900, Honolulu, Hawaii, 96813, commencing at
 1:10 p.m. on Tuesday, November 26, 2019.

26 REPORTED BY: JOAN IZUMIGAWA, CSR No. 136

27 EXHIBIT 1

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1 Q. It says you're a 32-year North Shore
2 resident who has owned since 2013. That's right?
3 A. Correct.
4 Q. It says that you have "a particular concern
5 and interest in protecting the park, MLCD, the
6 adjoining shoreline and ocean, surfing sites,
7 residential neighborhoods, and coastal and
8 environmental resources." Is that --
9 A. Correct.
10 Q. What is that particular concern?
11 A. Well, I -- I mean, it's a marine sanctuary.
12 When that piece of property -- in my mind, when that
13 piece of property was made -- zoned commercial back
14 in whenever that was -- 70-something, 74, '78 -- the
15 technology of those days wasn't as well defined as it
16 is today. I think we're a lot smarter today than we
17 were 40 years ago. That wasn't a marine sanctuary
18 when that was originally made into a commercial
19 property, and I think nowadays, with the concerns
20 about environment, we need to be -- protect that kind
21 of stuff better than we have in the past.
22 Q. Okay. So you think it should not be zoned
23 commercial, then?
24 A. You know, it was zoned commercial before I
25 ever came along so -- but I think as long as what's

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1 built there is done correctly and follows the letter
2 of the law and the codes and does everything they can
3 do to maintain that there's no impact to the marine
4 sanctuary, then I -- I mean, I can't argue that it's
5 commercial. I think it was a wrong decision.
6 Q. So would you support an effort to down-zone
7 that -- those parcels, then? To make them
8 noncommercial sites?
9 MS. BUNN: Objection.
10 MR. VANDEVEER: Objection. Hypothetical.
11 MS. BUNN: Hypothetical.
12 THE WITNESS: Can I answer?
13 MR. VANDEVEER: You can.
14 A. Yes, I would.
15 Q. BY MR. TOBIN: Now, you purchased your
16 property on Pahoe Road in 2013, correct?
17 A. No. 2003.
18 Q. Okay. So I just want to -- so is this in
19 paragraph 25 -- is that a typo, then? I just want to
20 make sure.
21 A. Yeah, it must be a typo because we bought
22 it -- we've lived there 15 years.
23 It's page 8?
24 Q. Correct.
25 A. No, that's -- we bought the property in

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1 2003; we started building in '04; we moved in, in
2 '05. So that's a typo.
3 Q. Okay. So the property across the way there
4 that -- the parcels that are at issue in this case,
5 they were zoned commercial at the time that you
6 purchased, correct?
7 A. Correct.
8 Q. And did you know that at the time?
9 A. I knew that.
10 Q. Did that concern you at the time that you
11 purchased the property?
12 A. Yes.
13 Q. But you bought it, anyway?
14 A. Yes, we did.
15 Q. Do you think that it affected the value of
16 your property when you bought it? Do you think it
17 was cheaper because of that?
18 A. I don't believe so.
19 Q. Can you turn to page 13. There's a number
20 of paragraphs under the subheading "The Pahoe Road
21 Neighborhood." Do you remember reviewing these parts
22 at all?
23 A. I remember looking at them, yes.
24 Q. In paragraph 45 it discusses that "the Pahoe
25 Road neighbors became upset by the increase in

Page 21

1 traffic, noise, disturbances, littering, trespass
2 into their yards, lack of privacy, effect on property
3 values, and unsanitary practices of the Developer's
4 tenants." Have I read that correctly?
5 A. Yes.
6 Q. What do you think that means in terms of --
7 what's the lack of privacy?
8 A. Well, originally there was no screening up;
9 it was just exposed to the whole road. There was no
10 barriers up until we complained very heavily and
11 wrote the letter that is mentioned there. They
12 didn't -- there was no barriers between Pahoe Road
13 and the parcel, the development, so people could come
14 driving -- you know, they drove up our road to enter
15 that property. People could walk across the street
16 and go in people's yards. People were turning around
17 in neighbors' driveways. Just all of it.
18 Q. There's no requirement that there be a
19 border between properties, correct?
20 A. No, not really.
21 But there's also a law that you can't
22 overburden a road, either.
23 Q. Does that apply to public roads or private
24 roads?
25 A. Both.

1 everybody"?

2 A. There's -- that has happened.

3 Q. Have you ever contributed to those

4 conversations?

5 A. Yes.

6 Q. Has there ever been anything that you said,

7 "No, I don't think that's a good idea to post"?

8 A. Not that I recall.

9 Q. Do you recall specifically any -- what

10 particular posts you might have weighed in on?

11 A. Nothing specific, no.

12 Q. What do you see as the purpose of that

13 social media effort?

14 A. Getting -- it's just like any other -- What

15 do you call it? -- social media. It's helping

16 getting the word out about what's happening.

17 Q. So those posts on the social media accounts,

18 those are speaking for the Save Sharks Cove Alliance,

19 right?

20 A. In some accounts, yeah.

21 Q. Because it's one thing for Joe Wilson to

22 post on Joe Wilson's Facebook page, right? But it's

23 another thing if he posts on the Save Sharks Cove

24 Alliance account, right?

25 A. Correct.

1 Q. Do you know, is there a member list for the

2 Save Sharks Cove Alliance?

3 A. A specific list?

4 Q. Yeah.

5 A. Not really. It's a pretty loose group.

6 Q. Would it concern you if there were -- there

7 was information being posted on the Save Sharks Cove

8 Alliance site that was inaccurate?

9 A. Yes.

10 Q. Would it concern you if it was disparaging

11 or slanderous in any way?

12 A. Of course. But I don't -- I don't think

13 there has been, in my opinion.

14 Q. But you're not on Facebook, right?

15 A. No.

16 Q. And you don't control the account?

17 A. No.

18 Q. How would -- how does Save Sharks Cove

19 Alliance receive funding for this lawsuit, if you

20 know?

21 A. Through fundraisers.

22 Q. Are you familiar with a GoFundMe page

23 supporting that legal effort?

24 A. Yes.

25 Q. Have you ever contributed to it?

1 A. Yes.

2 Q. Do you know, does that money that's -- goes

3 through that GoFundMe page, does that go to Malama

4 Pupukea-Waimea, or does it go to Save Sharks Cove

5 Alliance?

6 A. I believe it goes to -- I'm not sure how

7 that works.

8 Q. But you've donated?

9 A. I have donated.

10 Q. Have you received any paperwork regarding

11 tax implications of that donation or anything like

12 that?

13 A. No.

14 Q. How much have you donated?

15 A. 4 or 5 thousand.

16 Q. Are you related to a Wesley Thielst?

17 A. Yes.

18 Q. Who is that?

19 A. That's my father.

20 Q. And Megan Thielst?

21 A. That's my daughter.

22 Q. Do you think -- anyone who contributes to

23 that GoFundMe page, would you consider them to be a

24 member of the Save Sharks Cove Alliance?

25 A. No.

1 Q. Why not?

2 A. Because they're contributing to a cause that

3 they think is right, and it doesn't necessarily have

4 to be a member to do that.

5 Q. How many people, roughly, do you think are

6 members of the Save Sharks Cove Alliance?

7 A. I -- I don't know.

8 Q. Did you take part or have you at any time

9 taken part in any traffic studies relating to this

10 project?

11 A. Me personally?

12 Q. Yes.

13 A. No, I have not.

14 Q. Do you know if Save Sharks Cove Alliance

15 has?

16 A. Yes.

17 Q. Do you know when those were conducted?

18 A. No.

19 Q. Do you know if it was before or after the

20 lawsuit was filed?

21 A. I believe after.

22 Q. I think I know the answer to this question,

23 but were you personally involved in any environmental

24 analysis that was conducted relating to this project?

25 A. No, I wasn't.

1 Q. Do you know if Save Sharks Cove Alliance
 2 conducted any such environmental analysis?
 3 A. I know there has been some samples taken. I
 4 don't know who took them.
 5 Q. Do you know if that was before or after the
 6 lawsuit was filed?
 7 A. After.
 8 MR. TOBIN: Why don't we take a quick break.
 9 (Recess: 1:52 p.m. to 1:58 p.m.)
 10 Q. BY MR. TOBIN: Okay. So we're back on the
 11 record.
 12 You're still under oath. You understand
 13 that?
 14 A. Can I ask a question?
 15 Q. Of course.
 16 THE WITNESS: What are you doing on your
 17 computer?
 18 MR. HODGE: Taking some notes.
 19 THE WITNESS: Why are you taking notes when
 20 we have a court reporter?
 21 MR. TOBIN: I don't think -- he's obviously
 22 free to take whatever notes, as are you, as are any
 23 other people in this room. I don't think it's
 24 pertinent to the deposition.
 25 Q. BY MR. TOBIN: Mr. Thielst, do you patronize

1 any of the businesses at the project site?
 2 A. I do not.
 3 Q. Ever?
 4 A. I think one time my wife talked me into
 5 going down to the breakfast thing, but it was well
 6 before all this started, so it was probably 5 or 6
 7 years ago.
 8 Q. So you haven't been to any of the food
 9 trucks that have been on the site in the last 5
 10 years?
 11 A. No.
 12 Q. In your opinion, how many food trucks would
 13 be acceptable on that site?
 14 A. None.
 15 Q. Do you know if your wife frequents any of
 16 those businesses?
 17 A. She does not.
 18 Q. Do you have any other family members in the
 19 area?
 20 A. Not any more.
 21 Q. Does your wife make jewelry?
 22 A. Yes, she does.
 23 Q. Do you know if she has ever tried to sell
 24 any of her jewelry to any business establishments on
 25 the site?

1 A. Not that I'm aware of.
 2 Q. Would you say she designs jewelry primarily
 3 for visitors or for local residents?
 4 A. Boutiques in Haleiwa, and she sells it
 5 privately online.
 6 Q. Would you be in favor of her selling her
 7 jewelry at that project site?
 8 A. No, I would not.
 9 Q. Why not?
 10 A. The -- I just -- because of the whole thing
 11 that -- everything that's going on.
 12 Q. Can you --
 13 A. I would think it would be somewhat of a
 14 conflict of interest.
 15 Q. But if she could sell more jewelry at that
 16 site, then that would benefit you, wouldn't it?
 17 A. Sure, it would, but I'd rather her not.
 18 Q. Mr. Thielst, is your home connected to a
 19 sewer system?
 20 A. Sewer system?
 21 Q. Yes.
 22 A. Not a city and county, no.
 23 Q. What kind of waste --
 24 A. It's a septic system.
 25 Q. When was it installed?

1 A. When we built the house: 2004 or '05.
 2 Q. Do you know where any of the wastewater from
 3 your septic system ends up?
 4 A. In 2 seepage pits.
 5 Q. Underground?
 6 A. Underground.
 7 Q. Is there any leach field at all?
 8 A. The way it was designed, it's seepage pits
 9 because of the -- the -- the way it percolates. We
 10 had -- we had to go down very far to get good
 11 percolation.
 12 Q. Do you have any system for monitoring to
 13 make sure you're not contaminating any of the
 14 water --
 15 A. No.
 16 Q. Why not?
 17 A. It's not called for.
 18 Q. It's not required?
 19 A. It's not required by homeowners. I don't
 20 know what the law says about commercial properties.
 21 Q. Mr. Thielst, have you ever considered
 22 donating your property to be used as parkland?
 23 A. No.
 24 Q. Why not?
 25 A. Because that's where I live.

1 questions on this exhibit that you like at the
 2 conclusion of my questioning.
 3 MS. BUNN: Well, to the extent that you are
 4 purporting it to be about "the project," could you
 5 just define "the project" for us?
 6 MR. TOBIN: I don't think I'm obligated to
 7 do that.
 8 MR. LAU: Object to the form of the
 9 question. Vague, ambiguous.
 10 MR. VANDEVEER: I'll join in that objection,
 11 as well.
 12 Q. BY MR. TOBIN: Okay. Then below that it
 13 discusses the Pupukea EIS prep. Do you see that?
 14 A. Which number?
 15 Q. Well, it goes through a list of 13, and then
 16 it restarts.
 17 A. Okay.
 18 Q. Okay. Did you review the draft EIS for this
 19 project?
 20 A. I went through it, yes.
 21 MS. BUNN: Object to the form of the
 22 question. There was no draft EIS.
 23 Q. BY MR. TOBIN: Was the EIS prepared by G70?
 24 A. As far as I know.
 25 Q. And that was the entity that was

1 A. No, I have not.
 2 Q. Do you have any opinion about his work?
 3 A. I don't know his work.
 4 Q. Other than this, right?
 5 A. Other than that.
 6 Q. Is there another company besides G70 that
 7 you would have recommended do the EIS instead?
 8 A. I'm not familiar with any other companies
 9 that -- that do it.
 10 Q. But you're critical of the EIS that was
 11 conducted in this case, right?
 12 A. Yes, I am.
 13 Q. So you feel that G70 did not do an adequate
 14 job?
 15 A. I think it was pushed. I don't know how
 16 exactly -- I don't know the process, the EMS or SMAs
 17 or whatever. So I don't know how the process works.
 18 I just know the responses that were -- came back to
 19 me were very vague, boilerplate, and nonresponsive.
 20 Q. And those were responses provided by G70?
 21 A. I imagine so.
 22 Q. Did you consider whether or not to include
 23 G70 in this lawsuit as a party?
 24 A. Did I?
 25 Q. Yes.

1 specifically recommended by MPW; is that correct?
 2 A. Rephrase the question?
 3 Q. Was that the entity that was specifically
 4 recommended by MPW, if you know?
 5 A. I don't understand the question. I don't
 6 know what you're asking.
 7 Q. Are you aware whether or not MPW made a
 8 recommendation as to which entity should conduct the
 9 EIS?
 10 A. For the developer?
 11 Q. Correct.
 12 A. I have no idea.
 13 Q. Are you familiar with G70 through your work
 14 with Coffman?
 15 A. Yes.
 16 Q. What sort of work do you do with them?
 17 A. We -- we're -- they're an architectural firm
 18 so -- we do mechanical engineering, electrical
 19 engineering.
 20 Q. Do you have a general opinion about G70?
 21 A. Yeah. Good firm.
 22 Q. Do you feel they do good work generally?
 23 A. The work we've done with them has been good.
 24 Q. What about Jeff Overton in particular? Have
 25 you worked with him?

1 A. No.
 2 Q. Why not?
 3 A. Never thought of it.
 4 Q. Now, in number 1 there under the "Pupukea
 5 EIS Prep," it says, "Design of new and final plan is
 6 still much too dense for the local rural areas and
 7 especially being directly across the street" from "a
 8 marine sanctuary."
 9 A. Which number are you looking at?
 10 Q. Number 1 on the next -- so you go through
 11 13, and then you restart.
 12 MR. VANDEVEER: I'm just going to -- just a
 13 small objection. It actually says "across the street
 14 form a marine sanctuary."
 15 MR. TOBIN: Yeah. I saw that. I wasn't
 16 going to call out Mr. Thielst's typographical mistake
 17 in this instance, but now that it's on the record, it
 18 does say "form."
 19 Q. BY MR. TOBIN: You see that, yes?
 20 A. Yes.
 21 Q. Okay. But we discussed earlier that those
 22 parcels are zoned B-1, right?
 23 A. B-1? No. I don't believe we ever brought
 24 up B-1.
 25 Q. But they're zoned -- they're commercially

1 zoned, right?
 2 A. Commercially zoned, yes.
 3 Q. Are you aware that the density allowed on
 4 that property is actually substantially greater than
 5 what the project calls for?
 6 A. Yes, I do.
 7 Q. But in your view, it's still too dense?
 8 A. I go back to what I said before. We're
 9 smarter than we were 40 years ago, and I don't -- and
 10 today I would -- that would never, ever be zoned
 11 commercial.
 12 Q. But it is?
 13 A. But it is.
 14 Q. And the project calls for a density that's
 15 less than one-third of what is allowed under that
 16 zoning provision, correct?
 17 A. I don't know the exact numbers.
 18 Q. Does one-third sound about right to you?
 19 A. I don't know the numbers.
 20 Q. But you know it's less?
 21 A. I know it's less.
 22 Q. Now, number 2 refers to Haleiwa being the
 23 business hub of the area and communicates that that's
 24 where the business should be concentrated, right?
 25 A. Correct.

1 Q. Not at Shark's Cove?
 2 A. In my opinion.
 3 Q. But you're familiar with the North Shore
 4 Sustainable Communities Plan?
 5 A. Yes.
 6 Q. Have you read it?
 7 A. I've skimmed it. I'm not going to read
 8 all -- however many.
 9 Q. I grant you it's a very long document.
 10 Were you involved at all in creating the
 11 North Shore Sustainable Communities Plan?
 12 A. No, I wasn't.
 13 Q. Sat on any community boards that gave input,
 14 anything --
 15 A. I wasn't --
 16 Q. -- like that?
 17 A. -- even on the North Shore then.
 18 Well, wait. When was it -- I take that
 19 back. I got here in '87. But no, I was not involved
 20 in that.
 21 Q. I'm going to give you a copy of what's
 22 previously marked as Exhibit 3, and that's the North
 23 Shore Sustainable Communities Plan.
 24 A. Mm-hm.
 25 Q. I believe if you look at the front, it's

1 dated May 2011.
 2 A. So I -- yes, I was here.
 3 Q. Do you have any sort of general opinions
 4 about the North Shore Sustainable Communities Plan?
 5 Do you think it is a good plan? Do you think
 6 there's -- do you have problems with it?
 7 A. I think overall -- from what I read, I think
 8 overall it's a good plan. I think there's some
 9 contradictions in it.
 10 Q. Do you have any specific examples?
 11 A. Well, I don't remember exactly where it
 12 states that the business district -- I forget how
 13 it's worded -- should be limited to Haleiwa and
 14 Waialua.
 15 Q. Okay. How does -- what's the contradiction
 16 there?
 17 A. I just -- well -- and then later on it talks
 18 about the -- you know, the area that we're talking
 19 about in question.
 20 Q. If you could turn to page 3-48 of this
 21 document.
 22 A. Okay.
 23 Q. I'm looking at the section 3.6 entitled
 24 "Commercial Areas."
 25 A. Mm-hm.

1 Q. Do you see that? Okay.
 2 So it says, "A variety of commercial areas
 3 are present throughout the North Shore. These vary
 4 in size and type from small, individual, freestanding
 5 stores, groups of small stores along a main street in
 6 Hale'iwa and Waialua, to small commercial centers."
 7 So that contemplates that not all the
 8 business is going to be concentrated in Haleiwa and
 9 Waialua, right?
 10 A. That's not the way I read it. I interpret
 11 it that it's in Haleiwa and Waialua.
 12 Q. It says, "These vary in size and type" --
 13 Right? -- "from small, individual, freestanding
 14 stores, groups of small stores along a main street in
 15 Hale'iwa and Waialua, to small commercial centers."
 16 You interpret that to mean that everything
 17 should be in Haleiwa and Waialua?
 18 A. That's the way I read it.
 19 Q. The next sentence says, "For purposes of
 20 this Sustainable Communities Plan, the various types
 21 of commercial uses are defined and designated in
 22 three categories: Country Town, Rural Community
 23 Commercial Center, and Country Store." See that?
 24 A. Yeah.
 25 Q. So those would not all be in Haleiwa and

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1 Waialua, right?

2 A. They could be.

3 Q. Well, let's get through this, then. "As the

4 largest of the three commercial types, country towns

5 are the region's primary commercial districts, and

6 include a wide range of commercial establishments and

7 civic activities to serve both area residents and

8 visitors. The rural community commercial center is a

9 smaller cluster of retail and service businesses, and

10 country stores are freestanding neighborhood

11 establishments."

12 Okay. So there's 3 different categories,

13 right?

14 A. Yeah.

15 Q. Now, if you look on the next page, 3.6.2 is

16 the heading for "Country Towns," right?

17 A. Yes.

18 Q. And it lists Haleiwa as one? At the

19 beginning of the third paragraph there.

20 A. Yes.

21 Q. And Waialua as the other, right? On the

22 next page.

23 A. Correct.

24 Q. Okay. Now, if you could go to 3-57, section

25 3.6.3, which is entitled "Rural Community Commercial

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1 Center."

2 A. Okay.

3 Q. Okay. Have you reviewed this section of the

4 plan before?

5 A. I have.

6 Q. Take a look at the last sentence of that

7 first paragraph. "The area between the existing

8 Foodland market and the adjacent commercially zoned

9 properties between Pupukea Road and Pahoe Road is

10 designated as a Rural Community Commercial Center."

11 See that?

12 A. Yeah.

13 Q. That's one of the 3 categories of

14 commercial --

15 A. I don't have to agree with it.

16 Q. Well, I think you do have to agree that

17 that's what it says?

18 A. I agree that that's what it says.

19 Q. So this plan contemplates a commercial

20 center at that site, right?

21 A. Correct.

22 Q. And in fact, this is the only location

23 that's listed within that category of rural community

24 commercial centers?

25 A. It is.

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1 Q. So it is actually -- this plan is

2 contemplating and encouraging that there will be

3 commercial activity at that site?

4 A. And I go back to what I've said numerous

5 times: We're smarter today than we were when it was

6 made a commercial site.

7 Q. But this is 2011, right?

8 A. Yeah.

9 Q. So this is long after the original zoning

10 took place?

11 A. It should never have been zoned commercial

12 way back in the 70s.

13 Q. Okay. But then again, this isn't the 70s.

14 This is 2011 and they're still saying "commercial

15 center."

16 A. I still say we're smarter than we were in

17 2011.

18 Q. Now, this also states -- if you look at the

19 second sentence of that first paragraph, it says,

20 "Located along highways and major thoroughfares,

21 these centers also attract visitors and residents

22 from outside the immediate community. Commercial

23 establishments may include grocery stores, sundries

24 stores, restaurants and other services and shops

25 catering to residents and visitors to the region."

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1 Right?

2 A. Yes.

3 Q. So it contemplates that this rural community

4 commercial center will be used by visitors, right?

5 A. It does, but it doesn't say one iota -- a

6 single word about lunch trucks.

7 Q. Okay. Which means it doesn't prevent them,

8 either, right?

9 A. No. I would say it does.

10 Q. How?

11 A. Because they weren't thought of then.

12 Q. There were no food trucks in 2011?

13 A. They weren't -- not in that area, there

14 wasn't.

15 Q. So the North Shore Grille wasn't there at

16 that time?

17 A. Actually, that might have been one, yes.

18 Q. Okay. So -- but it's your view that they

19 weren't considered?

20 A. They're not mentioned.

21 Q. Right. Which means they're not prohibited,

22 right? There's nothing in this plan, as far as you

23 know, that prohibits food trucks, right?

24 A. I think if they were going to be allowed,

25 they would have been mentioned.

1 Q. So you think anything that was going to
2 happen has to be specifically called out and allowed;
3 versus if it's not mentioned, it's prohibited?

4 A. Yeah.

5 MS. BUNN: Objection. Argumentative.

6 Q. BY MR. TOBIN: Okay. But if you go back to
7 the email that we were looking at, there you said a
8 maximum of 3 was okay, right?

9 A. I did.

10 Q. When I asked you why you changed your mind,
11 it's not because the North Shore community plan bans
12 food trucks. It's because you think that there has
13 been a proliferation, right?

14 A. Yes.

15 Q. Okay. In fact, your email, if you go back
16 to that exhibit, you also recognize that there will
17 be visitors that will go to this --

18 A. There has always been visitors to the North
19 Shore, but with the buildup of some of these lunch
20 wagons and destination spots and more tour companies,
21 there's way more tourists and visitors to the North
22 Shore than there has ever been.

23 Q. So let's go back to that email. Number 4
24 under the EIS prep part, so the second list on page
25 2. It says, "The North shore is a rural area and

1 does not need a development of this size and scale to
2 serve the local residents as is required by the
3 original master plan." Right?

4 A. (The witness moves head up and down.)

5 Q. So that contradicts the North Shore
6 Sustainable Communities Plan, right? It's calling
7 for a commercial center there.

8 A. Mm-hm.

9 Q. Yes?

10 A. Yeah, it does. Yeah.

11 Q. Now, number 7 on your list: "Two story
12 business buildings are not something that belongs
13 along Kam Highway directly across from Sharks cove."
14 That's what it says, right?

15 A. Yes.

16 Q. If you go back to the community plan --

17 A. No, I know what it says in the community
18 plan.

19 Q. It specifically says 2-story buildings,
20 right?

21 A. This is my opinion.

22 Q. Okay. So in your view, a developer is
23 required to meet your personal -- John Thielst's
24 specifications, not the North Shore Sustainable
25 Communities Plan?

1 MS. BUNN: Objection.

2 MR. VANDEVEER: Objection. Misstates the
3 testimony.

4 MS. BUNN: And argumentative.

5 A. I would like to see it meet the community's
6 requirements, specifically the local community right
7 there around Shark's Cove.

8 Q. BY MR. TOBIN: But if a developer is trying
9 to develop a project on that site, a commercially
10 zoned site, how are they supposed to come up with a
11 plan other than looking at these sorts of documents,
12 the North Shore Sustainable Communities Plan?

13 MR. VANDEVEER: Objection. Calls for a
14 legal conclusion.

15 MS. BUNN: Join.

16 MR. LAU: Join.

17 THE WITNESS: Am I supposed to answer?

18 MR. VANDEVEER: Go ahead.

19 A. They should be reaching out to the
20 community. They should be -- yeah. I mean, looking
21 at that plan, that plan doesn't necessarily mean it's
22 right for that area. That's just a plan. Change --
23 plans change all the time.

24 Q. BY MR. TOBIN: Right. This is actually
25 past, right? This is --

1 A. No, I'm not -- I'm just saying --

2 Q. -- an ordinance?

3 A. It's a -- it's -- yeah. But it doesn't mean
4 it's right, it's correct.

5 Q. Well, it hasn't been changed, though? It's
6 still operative, right?

7 A. Yeah.

8 Q. One of the claims in your lawsuit is that
9 this project doesn't follow this plan?

10 A. I don't think it does.

11 Q. But then you also want it to follow
12 additional requirements, right?

13 A. I don't know how many times I've got to say
14 it. I don't believe as proposed this development is
15 the right development to be across the street from
16 Shark's Cove, which is a marine sanctuary.

17 Q. So when you develop projects at Coffman --

18 A. You know what? Quit bringing Coffman in.
19 This is a personal lawsuit. Coffman has nothing to
20 do with this.

21 Q. That's your employer, right? That's
22 where --

23 A. Yeah.

24 Q. -- you work? That's what you do?

25 A. Yeah.

* * * * *

1
2
3
4 I, JOAN IZUMIGAWA, Certified Shorthand
5 Reporter, CSR No. 136, do hereby certify:

6 That on Tuesday, November 26, 2019, at 1:10
7 p.m., appeared before me JOHN W. THIELST, the witness
8 whose 79-page deposition is contained herein; that
9 prior to being examined, he was duly sworn or
10 affirmed to tell the truth, the whole truth, and
11 nothing but the truth pursuant to Act 110 or the 2010
12 session of the Hawaii State Legislature;

13 That the deposition was taken down by me in
14 machine shorthand at the time and place stated herein
15 and was thereafter reduced to writing under my
16 supervision; that the foregoing is a true and correct
17 transcript of the proceedings had; that pursuant to
18 Rule 30(e) of the Hawaii Rules of Civil Procedure, a
19 request for an opportunity to review and make changes
20 to this transcript was made by the deponent or a
21 party prior to the completion of this deposition.

22 I further certify that I am not attorney for
23 any of the parties hereto nor in any way interested
24 in the outcome of the pending cause.

25 Dated this 2nd day of December 2019 in
Honolulu, Hawaii.

23
24
25


JOAN IZUMIGAWA, CSR 136

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

---:---

SAVE SHARKS COVE ALLIANCE,)	Civil No.
MALAMA PUPUKEA-WAIMEA,)	19-1-0057-01 (JHA)
HAWAII'S THOUSAND FRIENDS,)	(Declaratory and
LARRY McELHENY, JOHN THIELST)	Injunctive Relief)
and CORA SANCHEZ,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
CITY AND COUNTY OF HONOLULU;)	
CITY COUNCIL OF THE CITY AND)	
COUNTY OF HONOLULU;)	
DEPARTMENT OF PLANNING &)	
PERMITTING OF THE CITY AND)	
COUNTY OF HONOLULU;)	
HANAPOHAKU LLC,)	
)	
Defendants.)	
_____)	

DEPOSITION OF LARRY McELHENY

Taken on behalf of Defendant Hanapohaku, LLC at
Sullivan Meheula Lee, LLLP, Pacific Guardian Center,
Makai Tower, 733 Bishop Street, Suite 2900, Honolulu,
Hawaii, commencing at 9:08 a.m. on November 13, 2019
pursuant to Notice.

EXHIBIT 2

Before: WILLIAM T. BARTON, RPR, CSR NO. 391

1 Q. If it were up to you would you eliminate
2 food trucks at that site altogether?
3 A. If it was up to me? Yeah. Yes. I would.
4 Q. So not even a single food truck would be
5 acceptable to you?
6 A. No, sir.
7 Q. The business that you referred to Mr.
8 Naylor's was it Chet's?
9 A. Chet Naylor.
10 Q. Was that a food truck?
11 A. Yes.
12 Q. Do you have a problem with that business?
13 A. I think if I thought long and hard about it
14 and where it might lead eventually, I would have a
15 problem with that, yes. At the time not so much.
16 Q. You never voiced that to Mr. Naylor that,
17 hey, I don't think there should be a food truck here?
18 A. You know, to be honest with you I think Mr.
19 Naylor and I may have had a conversation along those
20 lines. But I can't remember for sure. But he's the
21 kind of guy you see in the bank and you talk story.
22 So it may have taken place a conversation like that.
23 Q. You mentioned your son's a fireman?
24 A. He's a firefighter at Sunset, yes.
25 Q. And that he may go to the food trucks on

1 occasion?
2 A. I suspect that he does, yeah.
3 Q. So if the firemen at that Sunset station are
4 utilizing these businesses is that serving the local
5 community?
6 A. It depends on -- I would say if there is a
7 formula, and I believe there eventually that's where
8 this will lead, somebody a judge or somewhere along
9 the line the developer is going to have to decide
10 what percentage of their customers comply with the
11 law. And it may be 51 percent it may be 80 percent
12 residents, I'm not sure. It's unclear at this time.
13 But just as an example, if it's legal for
14 two out of ten customers to be tourists, then the
15 other eight local residents, the firemen, would fall
16 under the that percentage if you understand what I'm
17 getting at.
18 Q. Okay.
19 A. Did that answer your question?
20 Q. Yeah. That's fine. But certainly there are
21 local community members who are using the businesses
22 at that site, right?
23 A. I would have to agree with you. I don't
24 know the percentage. I don't know people personally
25 that go there. But I can't imagine them not going

1 there.
2 Q. You mentioned witnessing the runoff. That
3 culvert that you described, where is that located?
4 A. Kahuku side of the fire station where the
5 out fall was.
6 Q. Was that culvert put in by the developers on
7 Pahaku or was that preexisting?
8 A. I think it's preexisting.
9 Q. Where does it draw from? Does it draw
10 solely from this property? Or does it draw from
11 anything uphill of that?
12 A. Well, not anything. I'm not a hydrologist.
13 So I can't tell you specifically. But I saw, I've
14 seen it in person on several occasions. And there is
15 some video that I saw just recently that clearly
16 shows the runoff from the subject property goes down
17 next to the highway. And there is a, I don't know
18 what you call it, like a manhole that goes down and
19 then it comes out at the culvert.
20 Q. A storm drain?
21 A. Storm drain, yes.
22 Q. Are you aware of any aspects of the proposed
23 project that would, that are designed to help prevent
24 runoff?
25 A. I'd say generally just from what little I

1 know about the proposal -- you know, to tell you the
2 truth I can't answer that. I'm not well enough
3 informed.
4 Q. If the proposal did include mitigation
5 measures to help prevent runoff, would you, would
6 that in any way alter your views on this project?
7 A. That's kind of speculation I think on my
8 part. I'm not sure that I would want to do that.
9 It's almost like you're trying to negotiate with me.
10 In other words, if we do this would you be more
11 supportive of the project. And I don't think this is
12 the venue to do that.
13 Q. Let me rephrase then. I can represent to
14 you, which means I'm telling you this is what's in
15 the proposed project, that there are plans for
16 mitigation of runoff. So with that representation
17 does that alter your views on the proposed project at
18 all?
19 MR. LAU: I'm going to object to the form of
20 the question as vague and ambiguous. Assumes facts
21 not in evidence.
22 MS. BUNN: Join.
23 MR. VANDEVEER: I'll join.
24 A. I just don't feel comfortable answering the
25 question on the basis that I explained.

1 Q. Right. Now, if runoff is one of the things
2 that you're concerned about, and it is, right?

3 A. I would say runoff is one element that in my
4 opinion threatens the natural environment across the
5 highway.

6 Q. So then why didn't you review the proposed
7 project plans to see if it was going to address that
8 issue?

9 MS. BUNN: Objection. Misstates the
10 testimony.

11 MR. VANDEVEER: I'll join in that as well.

12 MR. LAU: Objection. Argumentative.

13 A. Can you restate the question again, please.

14 Q. Right. We've established that runoff is an
15 area that you have concerns about. So if you have
16 concerns about that why didn't you review the
17 proposed project plans to see if it would address
18 that concern?

19 MR. VANDEVEER: Same objection.
20 Argumentative.

21 MS. BUNN: Same objection.

22 MR. LAU: Same objection.

23 A. I'm going to try and answer the question.
24 It's -- I think this is one of the reasons why the
25 lawsuit exists in the first place. That's not my

1 A. I think you're trying to -- when you -- do
2 you have legal assistants that help you in your work?

3 Q. This is not my deposition. So the question
4 is to you.

5 A. I would say in my mind I've delegated that
6 responsibility to the other plaintiffs. I will say
7 that my personal firsthand observation of the runoff
8 that I saw coming off that property concerns me.

9 Q. Right. No, I understand you're concerned.
10 But then why didn't you check to see if the project
11 would address that?

12 MS. BUNN: Objection. Argumentative.

13 MR. VANDEVEER: Join.

14 MS. BUNN: And asked and answered.

15 MR. LAU: Same objection.

16 A. I think my answer is the same. Am I
17 expected as a citizen to go through that EIS and
18 check every page and make sure that it's up to snuff
19 and meets all the federal and state and county
20 requirements? That's I think in a sense that's what
21 you're asking me to do.

22 Now granted I'm a party to a lawsuit. And
23 someone could probably argue that I was remiss
24 because I didn't check out their mitigation before I
25 signed on. But I don't think that's a fair, I don't

1 kuliana. I have a family to take care of. I have
2 commitments to bigger -- I have other issues that I'm
3 focusing on. Other plaintiffs are focusing on the
4 runoff and environmental issues. My focus is on the
5 law, the zoning, the North Shore Sustainable
6 Communities Plan and the character of my
7 neighborhood.

8 Q. But you are a plaintiff in this lawsuit,
9 correct?

10 A. That's true.

11 Q. So you're filing a lawsuit against
12 Hanapohaku, correct?

13 A. And the City.

14 Q. Correct. But Hanapohaku, yes?

15 A. Yes.

16 Q. And one of the areas of concern that you
17 have is runoff, right?

18 A. That's true.

19 Q. But you filed a lawsuit before even seeing
20 whether or not the project would address that
21 concern?

22 MR. VANDEVEER: Objection. Misstates the
23 testimony. It's also argumentative.

24 MS. BUNN: Join.

25 MR. LAU: Join.

1 think that's a fair way to look at it.

2 Q. Why don't you think it's fair?

3 A. Why don't I think it's fair?

4 Q. Yes.

5 A. I think I've explained myself two or three
6 times.

7 Q. So if somebody sued you because they thought
8 that your house had runoff issues but they never
9 actually checked to see if you did, would you be okay
10 with that?

11 MR. VANDEVEER: Objection. Calls for
12 speculation.

13 MS. BUNN: Objection. Improper
14 hypothetical.

15 MR. LAU: Join in the objection.

16 A. Repeat the question, please.

17 Q. If somebody sued you for something you were
18 doing with your property but they hadn't actually
19 checked to see if you were doing anything wrong,
20 would you have a problem with that?

21 MS. BUNN: Same objection.

22 MR. VANDEVEER: Same objection.

23 MR. LAU: Join.

24 A. I guess the problem would show up when the
25 judge had to decide the case. You know, in this day

1 there are issues with runoff. Now there are issues
2 with traffic. You're not aware whether or not the
3 project is actually going to address those issues.

4 A. You're asking me --

5 MR. LAU: Objection to the form of the
6 question. Calls for a legal conclusion.

7 A. I'm not qualified to answer that question.

8 MS. BUNN: Join.

9 MR. VANDEVEER: Join.

10 Q. Do you recall if you reviewed any scientific
11 studies relating to water pollution or runoff issues
12 prior to filing the lawsuit?

13 A. I personally may have skimmed quickly,
14 briefly over a page talking about micro blah, blah,
15 blah. But that's not my area of expertise. I'm more
16 of a big picture generalist concerned community
17 member.

18 I defer, I'm proud and I'm honored to
19 associate with people whose reputations speak for
20 themselves, and I defer to their opinions on many of
21 these issues.

22 Q. And we've touched on this a little bit. Did
23 you actually review the proposed project site plans
24 prior to filing this lawsuit?

25 A. I looked through the EIS. I think they

1 regarding the minimum amount of time that must be
2 spent in reviewing a permit?

3 A. I can't answer that.

4 Q. Now, you were a member of the Save Sharks
5 Cove Alliance; is that correct?

6 A. Yes.

7 Q. What is your role in that organization?

8 MS. BUNN: Objection. Lacks foundation.

9 MR. VANDEVEER: Join.

10 A. It's my understanding that that label or
11 that term in a sense covers the supporters and the
12 participants of this lawsuit. My role is as a
13 member. I consider myself a member of that alliance.

14 Q. Is there a person who is in charge generally
15 of this Save Sharks Cove Alliance?

16 MR. LAU: Objection to the form of the
17 question. Ambiguous.

18 MS. BUNN: Join.

19 MR. VANDEVEER: Join.

20 A. Not that I know of. There's no formal
21 structure. There's no president that I know of.

22 Q. How are decisions made then within that
23 organization?

24 A. I'm not sure that -- I don't know.

25 Q. How was the decision made to file this

1 have, they had fold out renderings. I really can't
2 remember exactly what I reviewed. I did not go
3 through the EIS page by page.

4 And I'll tell you one of the reasons that I
5 didn't was because I was put off by the lack of
6 response to our concerns. People submitted numerous
7 letters expressing concerns, myself included. And
8 the answers were not forthcoming.

9 So I kind of figured why waste my time?

10 Q. How do you know that those concerns weren't
11 addressed if you didn't review it?

12 A. Friends who, friends and acquaintances who
13 submitted questions said so. And if I remember
14 correctly, my concern about the joint development
15 agreement, I commented in that regard and I don't
16 think I received a adequate response.

17 Q. Okay. Do you believe that the permit
18 process here was fast tracked in any way?

19 A. Seems like it to me.

20 Q. What's your basis for that?

21 A. Well, the time. The short approval time.

22 Q. How long was the approval process? Do you
23 recall?

24 A. I can't say for sure.

25 Q. Do you know if there were any rules

1 lawsuit then?

2 A. That's not the only plaintiff.

3 Q. Right. But it's one of them, right? In
4 fact, you just said it's a term that covers the
5 participants in this lawsuit.

6 A. All right.

7 Q. So how did it decide, how did it go about
8 deciding to file this lawsuit?

9 A. I think you're mixing apples and oranges.

10 In my understanding, and once again I'm not an
11 attorney, the Save Sharks Cove Alliance as far as I
12 know is an informal group that supports and
13 participates in this lawsuit without an
14 organizational structure. And that's about all I can
15 honestly say.

16 Q. Okay. So you said it's a group that covers
17 the participants in this lawsuit. That was what you
18 said earlier, right?

19 A. Includes I think would be.

20 Q. That's fine. If the Save Sharks Cove

21 Alliance makes a statement is it speaking on behalf
22 of all the participants in this lawsuit?

23 MR. LAU: Objection to the form of the
24 question. Calls for a legal conclusion.

25 MS. BUNN: Join.

1 Q. If that were the case would you still think
 2 it's a junk EIS?
 3 A. If it's a junk EIS it's a junk EIS no matter
 4 who requests or recommends it.
 5 Q. Is there another planner you would have
 6 recommended instead?
 7 A. It's not my forte to recommend planners but
 8 I know of other planners. I personally am not that
 9 impressed with Mr. Overton's record, especially in
 10 our neighborhood.
 11 Q. Did you attend any public meetings before
 12 DPP regarding this project?
 13 A. I think the one in Haleiwa was run by DPP.
 14 Q. And you said you testified at that?
 15 A. Yes.
 16 Q. Now, you mentioned that you, I think, well,
 17 you can provide whatever characterization you want,
 18 that you looked through the EIS but maybe not in
 19 detail. Is that fair?
 20 A. No detail whatsoever. Just, you know,
 21 thumbed through it. Look at the pictures.
 22 Q. Did you provide any comments in response to
 23 that?
 24 A. Yes, I did.
 25 Q. What were those comments?

1 A. There's a statement in there, there's two
 2 statements about the joint development agreement.
 3 And very confusing when you read them. It seems like
 4 they are self-contradictory. And if I remember right
 5 that's what my comment. I questioned why those two
 6 contradictory statements were in there. And I don't
 7 believe I got a reply.
 8 Q. Okay. Do you recall when the DPP accepted
 9 the FEIS?
 10 A. No.
 11 Q. Do you recall whether or not you filed a
 12 contested case or lawsuit regarding that EIS in 60
 13 days of its acceptance?
 14 A. I did not.
 15 Q. Why not?
 16 A. Could be any number of reasons. If I was
 17 too busy. I assumed someone else was handling that
 18 issue. My mother was sick in the hospital.
 19 Q. But you believe the FEIS is flawed, right?
 20 You said that several times?
 21 A. Yeah.
 22 Q. But you allowed the developer to go ahead
 23 and proceed, go before the City Council and incur the
 24 cost of that. And only after that process went
 25 through did you attack the EIS; is that right?

1 A. You're --
 2 MS. BUNN: Objection. Argumentative.
 3 MR. VANDEVEER: Join.
 4 Q. The FEIS was accepted by DPP before the City
 5 Council started to review it, correct?
 6 A. As far as I know.
 7 Q. But you didn't file a lawsuit until after
 8 the full City Council process had run its course?
 9 A. I think that's a true statement.
 10 Q. Why is that?
 11 MS. BUNN: Asked and answered.
 12 MR. VANDEVEER: Join.
 13 A. I'll share with you my personal response.
 14 I'm not speaking for the other plaintiffs. I'm not
 15 speaking for any organization. I'm speaking for
 16 myself.
 17 I expect the government to do its job and I
 18 cannot ride herd on every detail of every proposal
 19 that gets submitted. That's not my job.
 20 Q. I think you can understand the frustration,
 21 right? If somebody is going through a process, they
 22 get approval of one step, they proceed to the next
 23 step and you then go back and attack step one, you
 24 could have done that before they even got to step
 25 two?

1 MR. VANDEVEER: Objection. Argumentative.
 2 MR. LAU: Objection to the form of the
 3 question.
 4 MS. BUNN: I join in those objections and
 5 object that I don't hear a question.
 6 A. What's the question?
 7 Q. Can you understand that frustration?
 8 A. I don't understand the relevance of that
 9 question. I mean, if they're frustrated, you know,
 10 they're big people, they know what they're doing.
 11 They're supposed to.
 12 Q. So then since they're big they can just
 13 swallow that incurred cost that they incurred from
 14 having to go through that extra step?
 15 MR. VANDEVEER: Objection.
 16 MS. BUNN: Objection.
 17 MR. LAU: Objection to the form of the
 18 question. Argumentative.
 19 A. I didn't say that.
 20 MS. BUNN: Join.
 21 Q. Let's talk about the City Council. Did you
 22 attend any City Council meetings related to this
 23 project?
 24 A. No, sir.
 25 Q. So you didn't attend the zoning committee

C E R T I F I C A T E

I, WILLIAM T. BARTON, Certified Shorthand Reporter, do hereby certify:

That on November 13, 2019 at 9:08 a.m., there appeared before me LARRY McELHENY, the deponent whose deposition is contained herein; that prior to being examined was first by me duly sworn;

That the deposition was taken down by me in machine shorthand and was thereafter reduced to typewriting; that the foregoing represents, to the best of my ability, a true and correct transcript of the deposition in the foregoing matter.

That pursuant to Rule 30(e) of the Hawaii Rules of Civil Procedure, a request for an opportunity to review and make changes to this transcript:

 X Was made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

 Was not made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

 Was waived.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the outcome of the cause named in the caption.

Dated this 20th day of November 2019 in Honolulu, Hawaii.



WILLIAM T. BARTON, CSR No. 391
Certified Shorthand Reporter

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

---:---

SAVE SHARKS COVE ALLIANCE,)	Civil No.
MALAMA PUPUKEA-WAIMEA,)	19-1-0057-01 (JHA)
HAWAII'S THOUSAND FRIENDS,)	(Declaratory and
LARRY McELHENY, JOHN THIELST)	Injunctive Relief)
and CORA SANCHEZ,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
CITY AND COUNTY OF HONOLULU;)	
CITY COUNCIL OF THE CITY AND)	
COUNTY OF HONOLULU;)	
DEPARTMENT OF PLANNING &)	
PERMITTING OF THE CITY AND)	
COUNTY OF HONOLULU;)	
HANAPOHAKU LLC,)	
)	
Defendants.)	
_____)	

DEPOSITION OF CORA SANCHEZ

Taken on behalf of Defendant Hanapohaku, LLC at
Sullivan Meheula Lee, LLLP, Pacific Guardian Center,
Makai Tower, 733 Bishop Street, Suite 2900, Honolulu,
Hawaii, commencing at 2:00 a.m. on November 13, 2019
pursuant to Notice.

EXHIBIT 3

Before: WILLIAM T. BARTON, RPR, CSR NO. 391

1 make sure I finish my question before you start
2 answering. Does that make sense?

3 A. Yes.

4 Q. Sometimes people have a tendency to
5 anticipate or want to finish the sentence but we're
6 going to try to avoid that, okay?

7 From time to time your attorney may make an
8 objection to a question I ask. Generally speaking,
9 you should still answer the question unless your
10 attorney instructs you not to, okay?

11 Does that make sense?

12 A. Yes.

13 Q. If at any time you do not understand a
14 question that I've asked, please just ask me to
15 rephrase it because if you answer a question I'm
16 going to assume you understood it.

17 Does that make sense?

18 A. Yes.

19 Q. You'll have an opportunity to review the
20 transcript that's being taken down after it has been
21 prepared, and you can make changes to that transcript
22 if you think that it doesn't accurately reflect what
23 happened in this deposition.

24 But if you make any substantive changes, I'm
25 allowed to make a comment on that in court if

1 necessary. Do you understand that?

2 A. Can you say that again?

3 Q. Sure. So, the court reporter is taking down
4 what we say. He will generate a written transcript
5 of these proceedings. You will have a chance to
6 review that transcript. And then sign off on it if
7 you approve it and make any changes that you feel
8 need to be made. Maybe he misheard a word that you
9 said. That's fine.

10 But if you change an answer from no to yes,
11 that's a substantive change. I would be able to
12 comment on that if your transcript was ever used in
13 court. Do you understand that?

14 A. Yes.

15 Q. I generally take a break about every hour.
16 But if you need breaks more frequently than that,
17 that's fine. Just let me know if at any point you
18 need to step out for a few minutes. The only thing I
19 ask is that if I'd asked you a question, you answer
20 that question and then you take the break, okay?

21 A. Was that a question?

22 Q. Yes. Is that okay? Do you understand that?

23 A. Yes.

24 Q. So all those instructions make sense?

25 A. Yes.

1 Q. Okay. Great. Ms. Sanchez, what did you do
2 to prepare for your deposition today, if anything?

3 (Pause.)

4 Q. Did you talk to anybody about your
5 deposition before coming?

6 A. Rephrase that question.

7 Q. Did you meet with your attorneys, for
8 example?

9 A. Yes.

10 Q. About how many times would you say you met
11 with them?

12 A. Once.

13 Q. Was that in person or over the phone?

14 A. In person.

15 Q. Did you speak with anyone else other than
16 your attorneys, other people that are affiliated with
17 the lawsuit or friends, neighbors anything like that?

18 A. Rephrase the question.

19 Q. Sure. Aside from your attorneys did you
20 talk to anybody else about your deposition in
21 anticipation of it to try, whether it's to recall
22 things or remember what was going on about any
23 particular incidents, reviewing any documents?

24 A. Can I ask my attorney a question?

25 Q. If you need to consult with him we can go

1 off the record and you can discuss it with him
2 outside our presence if you need to. That's fine.

3 MR. VANDEVEER: You want to go off record?

4 THE DEPONENT: Yeah.

5 MR. VANDEVEER: Sure.

6 (Whereupon, a recess was taken from 2:14
7 p.m. to 2:15 p.m.)

8 Q. All set? Did you speak with anyone anybody
9 other than your attorneys in preparing for your
10 deposition today?

11 A. Yes.

12 Q. Who?

13 A. Larry McElheny.

14 Q. Did you speak with him today?

15 A. No.

16 Q. Did you go over documents, review any papers
17 beforehand?

18 A. No.

19 Q. No? At any point were you asked to produce
20 or provide any documents to your attorney?

21 A. No.

22 Q. Ms. Sanchez, what is your understanding of
23 what this lawsuit is about?

24 A. Violations of the current your company
25 that's planning a mall at Sharks Cove.

1 Q. A mall at Sharks Cove you said?
 2 A. Uh-huh (affirmative).
 3 Q. What violations specifically?
 4 A. I can't give you specific information.
 5 Q. Can you give me one example?
 6 A. No.
 7 Q. Do you recall that there was a original
 8 complaint filed and then there was an amended
 9 complaint filed shortly after that?
 10 Do you remember that?
 11 A. I remember that there was a complaint filed.
 12 Q. Did you read that complaint before it was
 13 filed?
 14 A. This complaint here?
 15 Q. Yeah.
 16 A. Can you point to it?
 17 Q. We'll get to that. Do you recall reading
 18 the complaint before it was filed?
 19 A. No.
 20 Q. But do you recall reading it at any point?
 21 A. No.
 22 Q. Do you know specifically which claims are
 23 being alleged in that lawsuit?
 24 A. We've went over those with my attorneys but
 25 I can't give you any specifics.

1 Q. Your attorneys are Mr. Vandevveer and Ms.
 2 Wille?
 3 A. Uh-huh (affirmative).
 4 Q. Just to be clear, if you ever think that my
 5 question is asking for you to tell me stuff that they
 6 told you, it's not. Don't do that.
 7 Do you believe you have been personally
 8 harmed by the project at Sharks Cove?
 9 A. Rephrase the question.
 10 Q. Right. So, there is a project at Sharks
 11 Cove right now. There's operational businesses going
 12 on, correct? Do you believe those businesses being
 13 on that site does that personally harm you in any
 14 way?
 15 A. I don't know.
 16 Q. Now, you do not actually live right adjacent
 17 to the project site; is that right?
 18 A. No.
 19 Q. You say you live in Waialua; is that
 20 correct?
 21 A. Uh-huh (affirmative).
 22 Q. Make sure you speak up.
 23 A. Yes.
 24 Q. Do you generally track what's going on in
 25 this lawsuit when things are filed or any

1 developments, that sort of thing?
 2 A. Yes.
 3 Q. That's through your attorneys, or do you
 4 look things up online?
 5 A. My attorneys.
 6 Q. Are you currently employed?
 7 A. Yes.
 8 Q. What's your field of work?
 9 A. I am a bookkeeper.
 10 Q. Bookkeeper, okay. How long have you been in
 11 that position?
 12 A. Thirty-one years.
 13 Q. And is that, are you with a company?
 14 A. My own company.
 15 Q. What sorts of -- do you work for businesses
 16 or individuals?
 17 A. Work for small businesses on the North
 18 Shore.
 19 Q. Do you work for any of the small businesses
 20 operation at Sharks Cove?
 21 A. No.
 22 Q. Have you at any time in the past?
 23 A. Have I been their bookkeeper?
 24 Q. Yeah. Have you been a bookkeeper for any of
 25 the businesses that operated at Sharks Cove?

1 A. No.
 2 MR. LAU: What was that?
 3 THE DEPONENT: No.
 4 MR. LAU: I can barely hear.
 5 MR. VANDEVEER: Speak up as much as
 6 possible.
 7 Q. I'm going to hand you what's previously been
 8 marked Exhibit 1. This is the amended complaint.
 9 Everybody already has.
 10 MR. VANDEVEER: We have them all.
 11 Q. This is the amended complaint in this case.
 12 We discussed it earlier and you were asking if we
 13 have it. We do. It's here. Does this document
 14 appear familiar to you at all?
 15 A. I have an email with this.
 16 Q. Okay. That's fine. I want to direct you to
 17 paragraph 26.
 18 A. Excuse me, paragraph 26?
 19 Q. Paragraph 26. It's on page 8. If you could
 20 just review that briefly, that paragraph. Then I'll
 21 ask you some questions.
 22 (Pause.)
 23 Q. Do you recall reading that before?
 24 A. Yes.
 25 Q. So, it mentions that you have a particular

1 location?
 2 A. Chet Naylor is a director on the Board of
 3 Directors of the nonprofit. That's why we had the
 4 meeting there.
 5 Q. And he operates a business there at that
 6 site?
 7 A. He has a Sharks Cove grill I believe it's
 8 called.
 9 Q. So are you opposed to the use of food trucks
 10 at that site?
 11 A. I don't particularly like food trucks in
 12 general because of their appearance.
 13 Q. Okay. So would you prefer that they are
 14 zero, would you be okay with one, two? Is there a
 15 number that --
 16 A. I don't like food trucks.
 17 Q. Because of their appearance?
 18 A. Because of their appearance.
 19 Q. Do you know if any of your family members
 20 patronize the businesses at that site?
 21 A. Not that I'm aware of.
 22 Q. Have any of your family members ever been
 23 employed by any of the businesses at that site?
 24 A. Not that I'm aware of.
 25 Q. Are you related to Ryder Sanchez?

1 A. Ryder is my husband's great nephew.
 2 Q. Do you know if he ever was employed by any
 3 of the businesses at that site?
 4 A. I believe I was told by Leanne McNamara that
 5 Ryder had been employed there.
 6 Q. So these businesses are providing employment
 7 for local individuals. Do you believe that to be a
 8 service to the community?
 9 A. When my dentist was there he was serving the
 10 community, yes.
 11 Q. But the food trucks are not?
 12 A. I'm sure they're providing the service.
 13 They're serving food, yes.
 14 Q. To residents?
 15 A. To residents, yes.
 16 Q. Ms. Sanchez, is your home connected to a
 17 sewer system?
 18 A. I don't believe so, no.
 19 Q. You have a septic system or cesspool?
 20 A. It's a rental.
 21 Q. You're renting it?
 22 A. Yes.
 23 Q. You don't own it?
 24 A. No.
 25 Q. Do you own any property on the North Shore?

1 A. No.
 2 Q. That was a no?
 3 A. That was a no.
 4 MR. TOBIN: I'm just about finished. Let me
 5 take a quick break and go through my notes. We'll go
 6 off the record.
 7 (Whereupon, a recess was taken from 3:37
 8 p.m. to 3:42 p.m.)
 9 MR. TOBIN: Back on the record. I don't
 10 have any further questions for you, Ms. Sanchez. I
 11 appreciate your time today. As I said at the
 12 beginning, you'll be presented with the transcript.
 13 Would you like that sent to your counsel?
 14 MR. VANDEVEER: Yes. Please send it to me.
 15 (Deposition concluded at 3:45 p.m.)
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1 I, CORA SANCHEZ, hereby certify that I have
 2 read the foregoing typewritten pages; and
 3 corrections, if any, were noted by me; and the same
 4 is now an accurate and complete transcript of my
 5 testimony.
 6
 7 Dated at _____ Hawaii
 8 this ____ day of _____, 2019
 9
 10 _____
 11 CORA SANCHEZ
 12
 13
 14 Signed before me this ____ day
 15 of _____, 2019.
 16
 17
 18 _____
 19 Witness to Deponent's Signature
 20
 21 Save Sharks Cove Alliance, et al. vs.
 22 City and County of Honolulu, et al.
 23 Civil No. 19-1-0057-01 (JHA), November 13, 2019
 24 by William T. Barton, RPR, CSR.
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C E R T I F I C A T E

I, WILLIAM T. BARTON, Certified Shorthand Reporter, do hereby certify:

That on November 13, 2019 at 2:00 a.m., there appeared before me CORA SANCHEZ, the deponent whose deposition is contained herein; that prior to being examined was first by me duly sworn;

That the deposition was taken down by me in machine shorthand and was thereafter reduced to typewriting; that the foregoing represents, to the best of my ability, a true and correct transcript of the deposition in the foregoing matter.

That pursuant to Rule 30(e) of the Hawaii Rules of Civil Procedure, a request for an opportunity to review and make changes to this transcript:

 X Was made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

 Was not made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

 Was waived.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the outcome of the cause named in the caption.

Dated this 20th day of November 2019 in Honolulu, Hawaii.

WILLIAM T. BARTON, CSR No. 391
Certified Shorthand Reporter

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,
CORR SANCHERZ, and SURFRIDER
FOUNDATION,

Plaintiffs,

vs.

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

Defendants.

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

CERTIFICATE OF SERVICE

Trial Date: Not set

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served upon the following on the date indicated below and by the method indicated:

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DATED: Honolulu, Hawai'i, October 20, 2020.

/s/ Brett R. Tobin
TERRENCE M. LEE
BRETT R. TOBIN

Attorneys for Defendant/Counterclaim Plaintiff
HANAPOHAKU LLC

Save Sharks Cove Alliance, et al. v. City and County of Honolulu, et al.; Civil No. 19-1-0057-01
(JHA); CERTIFICATE OF SERVICE

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Case ID: 1CC191000057

Title: SAVE SHARKS COVE ALLIANCE VS C & C OF HONOLULU

Filing Date / Time: TUESDAY, OCTOBER 20, 2020 08:56:54 PM

Filing Parties: Brett Tobin

Case Type: Circuit Court Civil

Lead Document(s):

Supporting Document(s): 164-Memorandum in Opposition

Document Name: 164-DEFENDANT/COUNTERCLAIM PLAINTIFF HANAPOHAKU LLC'S MEMORANDUM IN OPPOSITION TO COUNTERCLAIM DEFENDANTS' JOINT RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS, FILED SEPTEMBER 28, 2020; DECLARATION OF BRETT R. TOBIN; EXHIBITS "1"- "3"; 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.

This notification is being electronically mailed to:

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The following parties need to be conventionally served:

ALL PARTIES-RE DOCKET ONLY-NOT PARTY RE SERVICE REQUIREMENT
