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BEFORE THE KAUA'I PLANNING COMMISSION

COUNTY OF KAUA'I

STATE OF HAWAII

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| In the Matter of the Application of: |) Permit Nos. Z-IV-2006-27, U-2006-26, and |
| |) PDU-2006-25 |
| MERIDIAN PACIFIC |) |
| |) PETITIONERS FRIENDS OF |
| For approval of master drainage plan required |) MĀHĀ'ULEPU AND SAVE KŌLOA'S |
| by Condition 26 of Class IV Zoning Permit (Z- |) PETITION TO INTERVENE AND, |
| IV-2006-27), Use Permit (U-2006-26), and Pro- |) ALTERNATIVELY FOR DENIAL OF |
| ject Development Use Permit (PDU-2006-25) |) APPLICATIONS; DECLARATION OF |
| for a development situated at the Pau A Laka |) ELIZABETH OKINAKA; DECLARATION |
| Street/ Kiahuna Plantation Drive, 5425 Pau A |) OF COUNSEL; EXHIBITS "01"- "03"; |
| Laka Street, Tax Map Key: 2-8-014:032, and |) CERTIFICATE OF SERVICE |
| containing a total area of 27.886 acres |) |

PETITIONERS FRIENDS OF MĀHĀ'ULEPU AND SAVE KŌLOA'S PETITION TO
INTERVENE AND, ALTERNATIVELY FOR DENIAL OF APPLICATIONS

Petitioners FRIENDS OF MĀHĀ'ULEPU, a non-profit corporation and SAVE KŌLOA, an unincorporated association, (collectively, "Petitioners"), pursuant to Hawai'i Revised Statutes (HRS) chapter 91 and the Rules of Practice and Procedure of the Kaua'i County Planning Commission (Commission Rules) §§ 1-3-1 and 1-4-1 through 1-4-6, respectfully submit this petition to intervene, or alternatively for denial of Applicant MERIDIAN PACIFIC's¹ (Applicant)

¹ Kiahuna Poipu Golf Resort, LLC was listed on the initial September 15, 2006 zoning and use

request for approval of its “master drainage plan”, dated December 5, 2023, pertaining to Condition 26 of the Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25) (collectively “permits”) for the Kauanoē O Koloa development situated at the Pau A Laka Street/ Kiahuna Plantation Drive, 5425 Pau A Laka Street, Tax Map Key: 2-8-014:032, and containing a total area of 27.886 acres (“property” or “development”).

I. INTRODUCTION

The Commission should deny Applicant’s request for approval of its “master drainage plan” as referenced under Condition 26 of the permits. Condition 26 requires:

Prior to building permit approval, the Applicant shall submit a master drainage plan for all lands mauka of Po‘ipū Road rezoned under Moana Corporation Ordinance No. PM-31-79 for Planning Commission review and approval, including Kaneiōlōuma Heiau.²

At its July 11, 2023 meeting, the Commission already granted intervenor status to Petitioners on the basis of their property interests in the application of Condition 26 to the property. *See infra*. Applicant has attempted to bypass the already-scheduled contested case hearing by filing complaints against the County in circuit court (*see infra* Part II.A) and, now, by submitting a document only nominally titled a “master drainage plan”, dated December 5, 2023.

Applicant’s request is improperly before the Commission. The matter is currently pending before the Commission’s Hearing Officer and scheduled for contested case hearings. Declaration of Counsel (Counsel Decl.) ¶3. Applicant should have filed a motion in the contested case hearing in order to have its “master drainage plan” document considered.

In any case, the Commission should deny Applicant’s request for approval of its plan. grant Petitioners’ motion to intervene. Applicant’s presents a hastily thrown-together compilation of notes and documents from other Kiahuna Mauka Partners (KMP) projects under a cover page as a “master drainage plan”. Applicant’s plan is not fit for Commission approval. It is neither a *plan* nor does it include the long-term planning and scope required of a “master” plan. As a public trustee, this Commission could not approve this plan without violating its constitutional obligations.

permit approval letter.

² See Planning Commission Meeting Notice and Agenda, Tuesday December 12, 2023, at PDF page 196 (accessed Dec. 7, 2023) *available at*: www.kauai.gov/files/assets/public/v/1/boards-and-commissions/planning-commission/planning-commission-meeting-agendas/2023-12-12-planning-commission-agenda-packet.pdf (“12/7/2023 packet”).

See infra Part IV.B.3. Applicant represented to the circuit court that compliance with Condition 26 is “impossible.” Counsel Decl. ¶4; Exh. 02. Applicant is wrong. Through proper examination of applicable projects’ impacts and mitigation measures, a master drainage plan can be developed to address the lands rezoned under Ordinance No. PM-31-79 and in accord with the Commission’s public trustee obligations.

At minimum, the Commission can grant Petitioners’ motion to intervene and consolidate it with ongoing proceedings before the Hearing Officer. Petitioners could not have filed their petition seven days prior to the December 12, 2023 hearing on December 5, 2023 because that was the same day the plan was produced and submitted to the Department. 12/7/2023 Packet at PDF 152, 154. This constitutes “good cause” pursuant to Commission Rule §1-4-3 (“Untimely petitions for intervention will not be permitted except for good cause shown”).

II. BACKGROUND

A. Petitioners are currently parties to a contested case on Condition 26 before this Commission against this Applicant.

On July 3, 2023, Petitioners timely filed a petition to intervene against Applicant’s request the Commission for modification of Condition 26 and extension of its expired preliminary subdivision approval. Declaration of Elizabeth Okinaka (Okinaka Decl. ¶5).³

On July 11, 2023, the Commission held a hearing on: (1) the Planning Director’s report on Developers’ request to “modify” Condition 26; (2) Petitioners’ petition to intervene and, alternatively for denial of Applicant’s requests; and, (3) Pacific Resource Partnership’s petition to intervene in the same. At that meeting, the County determined to grant in part Petitioners’ motion to intervene in Developers’ request to modify the permits. Okinaka Decl. ¶6. The Commission determined that a contested case proceeding should be held and include Petitioners as parties.

On July 18, 2023, the County signed its Decision and Order granting in part Petitioners’ motion for intervention. Counsel Decl. ¶5. The Commission ordered:

The Petition [to intervene filed by Petitioners] is granted with regard to intervention on the application for an amendment to Z-IV-2006-27, U-2006-26 and PDU-2006-25 for

³ Petitioners’ Petition to Intervene or Alternatively for Denial of Applicants, dated July 3, 2023, located in the Commission’s agenda and packet for its July 11, 2023 regular meeting in Līhu‘e, which is available at the Commission’s website: <https://www.kauai.gov/files/assets/public/v/1/boards-and-commissions/planning-commission/planning-commission-meeting-agendas/2023-7-11-planning-commission-agenda-2-packet.pdf> (“7/11/2023 Petition”).

modification to Condition 26 and will be referred as a contested case to the Kauaʻi County Office of Boards and Commissions for assignment to a Hearing Officer. Pursuant to Rule 1-4-1, Petitioners are deemed to have standing to proceed. Protect & Pres. Kahoma Ahupuaʻa Ass’n v. Maui Planning Comm’n, 149 Haw. 304, 311-312, 489 P.3d 408 (2021); In re Hawaiʻi Elec. Light Co., 145 Haw. 1, 21-22, 445 P.3d 673 (2019); Sierra Club v. DOT, 115 Haw. 299, 320, 167 P.3d 292 (2007).

Counsel Decl. ¶5; Exh. 03 at 2. A “contested case” is a “proceeding in which legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.” HRS §91-1. The Commission determined to hold a contested case and made Petitioners a party to contested case proceedings because Petitioners’ hold legal rights, duties, and privileges that constitute property interests protected by due process.

On August 9, 2023, Applicant, proceeding as 5425 PAU A LAKA LLC and MP ELKO II, LLC (Developers) filed a complaint against the County, seeking declaratory and injunctive relief excusing Developers from complying with Condition 26. *5425 Pau a Laka LLC v. County of Kauaʻi*, Civil No. 5CCV-23-0000087 (“Civil No. 5CCV-23-0000087”).

At its September 12, 2023 meeting, the Commission determined to revoke the tentative subdivision approval for the project.⁴

On or about September 25, 2023, Friends of Māhāʻulepu learned about Developers’ circuit court action instant case from counsel for PACIFIC RESOURCE PARTNERSHIP, also an admitted intervenor in Commission proceedings against Developers’ request for modification of Condition 26.

On September 27, 2023, PACIFIC RESOURCE PARTNERSHIP moved to intervene in the circuit court proceedings.

On October 2, 2023, Petitioners moved to intervene in Civil No. 5CCV-23-0000087.

At its hearing on October 24, 2023, the circuit court determined to dismiss the complaint for lack of jurisdiction because “matters raised in the complaint are currently subject to contested case proceedings pending before the Kauaʻi Planning Commission, to which Petitioners, Plaintiffs, and the County are parties.” See “Order Dismissing Complaint for Lack of Jurisdiction,” entered October 30, 2023, Civil No. 5CCV-23-0000087.

On November 13, 2023, the Commission Hearing Officer, Harlan Kimura, held a

⁴ See Planning Commission Meeting Notice and Agenda, *available at*: www.kauai.gov/files/assets/public/v/1/boards-and-commissions/planning-commission/planning-commission-meeting-agendas/2023-9-12-planning-commission-agenda-packet.pdf.

prehearing conference for Meridian Pacific No. CC-2024-1, at which counsel for Petitioners, the County, and Applicant attended. Counsel Decl. ¶6. At that hearing, the Hearing Officer set a schedule for hearings in 2024. *Id.*

On November 14, 2023, the Hearing Officer entered a Scheduling Order. Counsel Decl. ¶7.

On or after December 5, 2023, Applicant submitted a “master drainage plan as referenced in the applicable zoning permits” for Commission approval. Counsel Decl. ¶8; 12/7/2023 Packet at PDF 152.

Applicant’s “Final” master drainage plan is dated December 5, 2023.

The Department’s “Transmittal of Agency Comments to the Planning Commission” is dated December 6, 2023. 12/7/2023 packet at PDF 248.

The Commission’s agenda for December 12, 2023 is stamped “RECEIVED ’23 DEC-6 P2:47.”⁵

B. Applicant has been unlawfully developing the parcel

On July 11, 1977, the State Land Use Commission (LUC) approved a district boundary amendment to remove 457.54 acres of lands in Poipu, Kaua’i located at TMK (4) 2-8-014:005, 007, 008, por. 019,020, 021, 026 through 036; 2-8-15:077; 2-8-029:001 through 094, from the agricultural district into the urban district under the LUC’s Decision and Order in Docket A76-418. The LUC order applies to the property.

By order dated August 5, 1997, the LUC modified and added conditions on its district boundary amendment.⁶ 7/11/2023 Petition (Exh. “14”). The LUC’s conditions include:

11. If and when required by the County of Kauai, the preparation and submission to the appropriate agencies of the County of Kaua’i of an updated master drainage plan covering the then remaining undeveloped portions of the Sports Shinko Property may be imposed by the County of Kauai as a precondition to approval by the County of Kauai of any new or

⁵ See Planning Commission Meeting Notice and Agenda, Tuesday December 12, 2023, at PDF page 152 (accessed Dec. 7, 2023) *available at*: www.kauai.gov/files/assets/public/v/1/boards-and-commissions/planning-commission/planning-commission-meeting-agendas/2023-12-12-planning-commission-agenda.pdf

⁶ See also “Order Granting Kiahuna Mauka Partners, LLC’s Motion to Amend or Modify Condition No. 9 of Decision and Order, as amended August 5, 1997; and Eric A. Knudsen Trust’s Motion to Modify Condition No. 9a of Decision and Order”, In the Matter of the Petition of Moana Corporation, Docket no. A76-418 (Mar. 25, 2004) *available at*: luc.hawaii.gov/wp-content/uploads/2014/03/A76-418_Moana-Corporation_DO-Grant-Kiahuna-Amend-Cond-9-Knudsen-9a_3-25-2004.pdf.

change in County zoning for the remaining undeveloped portions of the Sports Shinko Property or prior to approval of any County subdivision or building permit for any future development on the remaining undeveloped portions of the Sports Shinko Property, if rezoning is not required.

By letter dated September 15, 2006, the Department informed Kiahuna Poipu Golf Resort LLC that the Commission had approved the permits, which concern development on lands located at the property. The permits are subject to certain conditions including:

1. The Applicant is advised that the property is subject to the conditions of LUC Decision and Order A76-418 (D&O) and County of Kauai Ordinances No. PM-31-79, PM-148-87 and PM-334-97 (“the Ordinances”), which shall run with the land. All conditions of the Ordinances are enforceable against any party seeking to use the entitlement. The following conditions are deemed complete, ongoing or to be resolved with LUC, or not applicable to the subject property: LUC Docket A76-418 #1-6, 17, 19-22; PM-31-79, PM-148-87, and PM-334-97 #1 3, 4, 8, 15, 17, 19(c), 25.

[. . . .]

23. The Planning Commission reserves the authority to impose additional conditions, modify or delete conditions stated herein, or to revoke the subject permits through proper procedures should the applicant fail to comply with the conditions of approval or if unforeseen problems are generated by the proposed use at the project site.

24. The applicant is advised that additional government agency conditions may be imposed. It shall be the applicant’s responsibility to resolve those conditions with the respective agency(ies).

[. . . .]

26. Prior to building permit approval, the Applicant shall submit a master drainage plan for all lands mauka of Poipu Road rezoned under Moana Corporation Ordinance No. PM-31-79 for Planning Commission review and approval, including Kaneiolouma Heiau.

7/11/2023 Petition (Exhibit “13” (2006 Planning Director letter)). Condition 26 specifically references Kāneiolouma heiau, which is part of the larger Kāhuna o Kāneiolouma (“Kāneiolouma”), an important cultural site located in Po‘ipū, Kōloa, Kaua‘i and just mauka of Poipu beach. 7/11/2023 Petition ((Kaohelauii Decl. ¶7). Kāneiolouma is a 13-acre complex, which contains hale sites, fishponds, taro fields, auwai irrigation systems, and a makahiki arena dating back to the mid-1400s. Since 2012, Hui Mālama O Kāneiolouma, a local 501(c)(3) non-profit cultural organization, has held a formal stewardship agreement with the County of Kaua‘i. Fishponds at Kāneiolouma are fed by underground freshwater flows from mauka areas, including from the subject property. 7/11/2023 Petition (*Id.* ¶8). These fishponds are contiguous with nearshore waters and contribute freshwater and nutrients to the coastal ecosystem. *Id.* Kānaka Maoli traditional practitioners gather freshwater from seeps springs at the ocean in the Po‘ipū

beach area. These freshwater seeps have been greatly reduced since blasting has occurred on the property. 7/11/2023 Petition (*Id.* ¶22).

Since at least December 14, 2020, Petitioners have observed developers clearing and excavating the property. 7/11/2023 Petition (Okinaka Decl. ¶23_.

In April 2021, denuding vegetation and excavations with heavy machinery occurred on the property. 7/11/2023 Petition (Hammerquist Decl. ¶10). Denuding, rock-crushing, and excavating actions on the property occurred again in April 2022. *Id.*

On May 11, 2022, Petitioners filed a lawsuit against the County and property Developers for failing to comply with LUC conditions and violating public trust obligations to protect natural and cultural resources in *E Ola Kākou v. County of Kauaʻi*, Civil No. 5CCV-22-0000036.

On or about May 12, 2022, developers resumed work, including using explosives on the property. 7/11/2023 Petition (Hammerquist Decl. ¶19).

On June 1, 2022, Petitioners contacted State, County, and federal officials to alert them that cave structures and voids were being found on the property during Applicant’s blasting. 7/11/2023 Petition (Hammerquist Decl. ¶21; Exh. “16”). Despite guidance from FWS, blasting on the property continued. *Id.* ¶20.

In June 2022, hundreds of Kauaʻi community members gathered to protest the development and specifically blasting of the Kōloa caves at the property. 7/11/2023 Petition (Hammerquist Decl. ¶¶22-24; Exh. “04” & “05”).

Also in June 2022, Hui Mālama o Kāneiolouma officers, including Billy Kaohelauiʻi and Rupert Rowe, observed Kāneiolouma fishponds were unusually and persistently stagnant. 7/11/2023 Petition (Kaohelauiʻi Decl. ¶12). Fresh, clean water is needed for fishponds to be productive. *Id.* It is commonly known that these fishponds are fed by underground freshwater flows coming from mauka areas, including areas of the property. *Id.* Stagnating and polluted fishpond water impacts nearshore water quality and ecosystems at Poʻipū beach, which fronts Kāneiolouma, and other coastal areas. *Id.* ¶13.

On August 2, 2022, Petitioners filed a petition to intervene against the Commission’s final subdivision approval for the same property subject to the instant petition. 7/11/2023 Petition (Hammerquist Decl. ¶¶25-26; Exh. 06 (Petition to Intervene), 07 (Supplement to Petition to Intervene). That petition remains pending before this Commission.

On or about June 23, 2023, Petitioners were advised the Commission had noticed a public

hearing on Applicant's application for an amendment to its permits to allow a modification to Condition No. 26. 7/11/2023 Petition (Hammerquist Decl. ¶¶28-29; Exh. 08 (public notice)).

At its June 27, 2023 meeting, the Commission subdivision committee met to consider a preliminary subdivision extension request for the property, but determined to defer the matter to July 11, 2023 for reasons including the existing preliminary subdivision approval had expired. 7/11/2023 Petition (Hammerquist Decl. ¶30).

On June 30, 2023, Petitioners timely filed the instant petition more than seven days prior to the July 11, 2023 agency hearing as discussed above.

C. The property harbors sensitive resources and is vulnerable to stormwater runoff.

Applicant seeks the Commission's approval for an extension for its already-expired preliminary subdivision approval and to modify its zoning & use permits to relieve obligations to comply with the County's Condition 26 requiring a drainage master plan for the property.

The property is currently marketed for development of 280 vacation-rental luxury condominiums, swimming pools and water features, parking, driveways, and other hardscape structures.⁷ The developer is Meridian Pacific, a California corporation. Applicant has already sought to slough off multiple obligations to protect natural and cultural resources and prevent undue impacts on Kaua'i public infrastructure, Petitioners' constitutionally protected rights, and Kōloa's natural and cultural resources as discussed *infra*.

There are multiple culverts between the northern Wainani subdivision and the property. Okinaka Decl. ¶¶8-9. Petitioners have seen water draining from these culverts onto the property. *Id.*

The property is adjacent to the historic, public Hapa trail, which was once the major route connecting Po'ipū and Kōloa. 7/11/2023 Petition (Okinaka Decl. ¶8). Hapa trail is at a lower elevation to the property and would receive stormwater runoff from the property. *Id.* ¶9. The property serves as a sink for much of the area's stormwater runoff, including through culverts on the northern edge of the property that allow water to flow from the adjacent golf course and Wainani development project. *Id.* The property is part of the historic Kōloa field system, a traditional Hawaiian agricultural irrigation complex, with parallel and branching 'auwai, lo'i terraces, aqueducts, and other innovations. *Id.* ¶11. The property is also part of the Kiahuna complex of

⁷ See Meridian Pacific, Kauanoe o Kōloa website (accessed June 26, 2023) available at: meridianpacificltd.com/properties/kauanoe/

archaeological sites. *Id.* ¶12. The subsurface of the property is characterized by many voids, which can and likely do serve as habitat for the endangered Kaua‘i cave spider and Kaua‘i cave amphipod. *Id.* ¶13. It adjoins the singular Kōloa cave system, which is the only area in the world that these species are known to be found. *Id.* ¶14. Petitioners’ Kanaka Maoli supporters and their families have used these caves, including those on the property, for burials. *Id.* ¶15.

III. Petitioners’ rights and interests affected by the Commission’s decision

A. Petitioners constitutional rights to a clean and healthful environment and to protection of their Kānaka Maoli traditional and customary rights.

Petitioners and their officers, directors, and supporters (collectively, “Petitioners”) have constitutionally protected property rights under article XI, §§1 and 9 of the Hawai‘i constitution as beneficiaries of public trust and their rights to a clean and healthful environment as defined by land use laws implemented under authority of HRS chapter 205 and other laws defining environmental quality. Petitioners also include Kānaka Maoli traditional and cultural practitioners, whose rights are protected under article XII, §7 of the Hawai‘i Constitution.

Article XI, § 1 of the Hawai‘i Constitution provides:

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.

Id. Article XI, §9 of the Hawai‘i Constitution provides:

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.

Id.; see also *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409, 417, 235 P.3d 1103, 1121, 1127 (2010) (recognizing a substantive right to a clean and healthful environment). Article XI, § 9 is self-executing, and it “establishes the right to a clean and healthful environment, ‘as defined by laws relating to environmental quality.’” *In re Maui Elec. Co., Ltd.*, 408 P.3d 1, 13 (2017). HRS chapter 205 is one of several pertinent laws relating to environmental quality implemented by both the LUC and the County.

Petitioner SAVE KŌLOA, an unincorporated association, is based on Kaua‘i and com-

posed of Kauaʻi residents who value and have interests in the preservation of natural and cultural resources on the South Shore of Kauaʻi, including the preservation of endangered and threatened species. 7/11/2023 Petition (Okinaka Decl. ¶16). Save Kōloa founders and members are and include Kānaka Maoli traditional and customary practitioners who utilize areas within, adjacent, and near to the subject property and are lineal descendants of iwi kupuna located on the property. *Id.* ¶17. Save Kōloa members utilize the area subject to the application for recreational and aesthetic purposes, including hiking along Hapa Trail and enjoying scenic views and native wildlife species. *Id.* ¶18.

Petitioners' exercises of Kānaka Maoli traditional and customary rights include utilizing Hapa trail, which is adjacent to the property, to access the beach for gathering, fishing, swimming and other nearshore practice. 7/11/2023 Petition (Kaohelauiʻi Decl. ¶¶15-16). These rights are also exercised through visiting, memorializing, and caring for historic properties, including the three burial mounds that exist on the property, as well as heiau that were not documented in the June 2021 Cultural Surveys Hawaiʻi literature review.⁸ 7/11/2023 Petition (Okinaka Decl. ¶19). The property is known as a site of spring water, caves, and endangered native species - the peʻapeʻa makaʻole or Kauaʻi cave spider - that is revered as an ancient kupuna. 7/11/2023 Petition (Kaohelauiʻi Decl. ¶¶17).

Petitioner FRIENDS OF MĀHĀʻULEPŪ, a nonprofit corporation, is based on Kauaʻi and is comprised of Kauaʻi citizens who are entitled to a clean and healthful environment, including the protection of endangered species endemic to the South Shore of Kauaʻi. 7/11/2023 Petition (Hammerquist Decl. ¶4). Friends of Māhāʻulepū officers, directors, and supporters are and include Kānaka Maoli traditional and customary practitioners who utilize areas within, adjacent, and near to the subject property. *Id.*

Friends of Māhāʻulepū officers and directors include those that utilize the area subject to the application for recreational and aesthetic purposes, including hiking along Hapa Trail and enjoying scenic views and native wildlife species, including but not limited to endangered sea birds, the Newell Shearwater and uaʻu and ʻakēʻakē. Petitioners have also photographed a threatened species, nēnē, on the subject TMK. 7/11/2023 Petition (Hammerquist Decl. ¶5).

⁸ See Draft Archaeological Literature Review of the Proposed Kauanoē o Kōloa Project, Kōloa Ahupuaʻa, Kōloa District, Kauaʻi TMK: (4) 2-8-014:032 Lot 1, prepared for Meridian Pacific, Ltd. by W. Folk, N. Kamai, and H. Hammatt, Cultural Surveys Hawaiʻi, Inc. (Jun. 2021).

Petitioners' missions include supporting and protecting historic and culturally significant sites, including Kāneiolouma. 7/11/2023 Petition (Hammerquist Decl. ¶6). Petitioners' supporters overlap with those of Hui o Kāneiolouma, including its founding member, Billy Kaohelaui'i. Kaohelaui'i Decl. ¶6. Kānaka Maoli supporters include those whose practices include protecting aumakua, revering ancient native species, and protecting iwi kūpuna on the property. *Id.* ¶¶17-20. Kānaka Maoli officers and supporters include fishers and other nearshore gatherers, surfers, and other ocean-going activities whose cultural practices could be adversely impacted by improper drainage precautions and other uses of the property. *Id.* ¶11, 15, 18. Further blasting on the property, including to create detention or retention basins, may further impair underground hydrogeological flows to Kāneiolouma. *Id.* ¶14.

Petitioners hold rights and interests clearly distinguishable from the general public and these rights will be directly and immediately affected by the proposed insufficient master drainage plan. See Commission Rule §1-4-1.

B. Petitioners constitutional rights as nearby and adjacent property owners

Petitioners have constitutional rights affected by the Commission's decisionmaking and hold interests clearly distinguishable from the general public consequent to their ownership of and residence within adjacent property under article I, § 5 of the Hawai'i Constitution and the U.S. Constitution, amendments V and XIV. Friends of Māhā'ulepū members and supporters also include those residing in the adjacent developments of Wainani, Pili Mai, Kiahuna Golf Village and Po'ipu Estates, who are similarly concerned about the intensification of land uses and destruction of natural and cultural resources due to Applicant's actions, which also includes the intensification of traffic on Kiahuna Plantation Drive, the single road access and exit source for the near 1,100 residential units that are already occupied that rely on this sole entry and exit road. Amongst these residents are Patricia Biehn, a resident of Pili Mai, Derrick Pellen who lives in Wainani subdivision, adjacent to the parcel, TMK (4) 2-8-30:023 and Jerry McGrath, a former resident who sold and moved out of his home at 2717 Milo Hae Loop, Kōloa, Hawai'i 96756, TMK (4) 2-8-029:089 because of the persistent blasting and fugitive dust that plagued his property for more than 8 months. 7/11/2023 Petition (Hammerquist Decl. ¶7; see Commission Rule §1-4-4(2)).

Petitioners' members and supporters include residents of the adjacent Wainani and Kiahuna golf village developments, whose peaceable enjoyment of their residences will be substantially disturbed by the intensification of land uses consequent to approval of Applicant's subdivision ap-

plication. Settled Hawai'i case law recognizes nearby and adjacent landowners hold a "concrete interest" in proceedings on proposed developments so as to satisfy standing requirements, including requirements for mandatory intervenor status. See *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 419-20, 235 P.3d 1103, 1131 (2010) (recognizing adjoining landownership as a form of standing, but not a private right of action); *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 654 P.2d 874 (1982) (decision to permit development nearby land in the special management area could have an adverse impact on an adjacent landowner); *Town v. Land Use Comm'n*, 55 Haw. 538, 524 P.2d 84 (1974) (adjacent and nearby property owners had a property interest in changing the land use entitlements and adjacent and nearby landowners have legal rights as a specific and interested party in a contested case proceeding to change land use designations or entitlements); *East Diamond Head Ass'n v. Zoning Bd. Appeals*, 52 Haw. 518, 479 P.2d 796 (1971) (adjoining property owner has standing to protect property from "threatening neighborhood change"); *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969) (property owners across the street from a proposed project have a concrete interest in scenic views, sense of space and density of population).

IV. Issues sought to be raised to the Commission.

Petitioners seek to raise the following issues through intervention in the Commission's decision-making on Condition 26.

A. Applicant's "master drainage plan" is riddled with inaccuracies and includes no plan.

Applicant's "master drainage plan" (plan) consists merely in a descriptive recitation of the status of existing Kiahuna Mauka projects and inaccurate assertions about existing drainage conditions in the impacted area.

Applicant's plan does not address flooding impacts on Hapa trail. The plan does not consider existing flooding impacts on Kāneiolouma heiau, except to state that lands located at TMK (4) 2-8-014-019 will contribute runoff to Kāneiolouma. Plan at 8. These lands are not developed, and it seems unlikely that they would significantly contribute to runoff. Okinaka Decl. ¶12. Rather, it is the other developed areas that contribute to runoff and flooding, including along Po'ipū Road. During rains, Kāneiolouma Heiau and the area within which it is located area is consistently flooded, as well as the nearby beach parking lot. Okinaka Decl. ¶13.

Applicant's plan does not address impacts to underground natural flows consequent to planned excavation for subsurface storage structures on the Kauanoe o Kōloa property or other

projects. *See infra* Part B.1. Applicant’s plan does not recognize, nor address, runoff impacts on coastal ecosystems consequent to the developments Condition 26 requires to be included.

B. Improper drainage would impact adjacent and nearby public trust resources.

Development proposed for the property includes construction of copious hardscaped structures and vacation rental uses, inclusive of swimming pools, driveways, and parking spaces. The property is already a “sink” for much of the runoff in adjoining areas. *See supra* Part I. Stormwater runoff from these hardscaped areas can cause flooding on nearby and adjacent areas, including Hapa trail. Runoff can also carry pollutants from car tires, swimming pool chlorine and other chemical treatments, pesticides from landscaped areas, and other pollution incident to urbanized areas. Attempting to corral runoff into detention basins on the property by excavating sensitive subsurface areas may further impact culturally significant underground freshwater flows that feed Kāneiolouma and nearby coastal areas. All water resources are public trust resources.

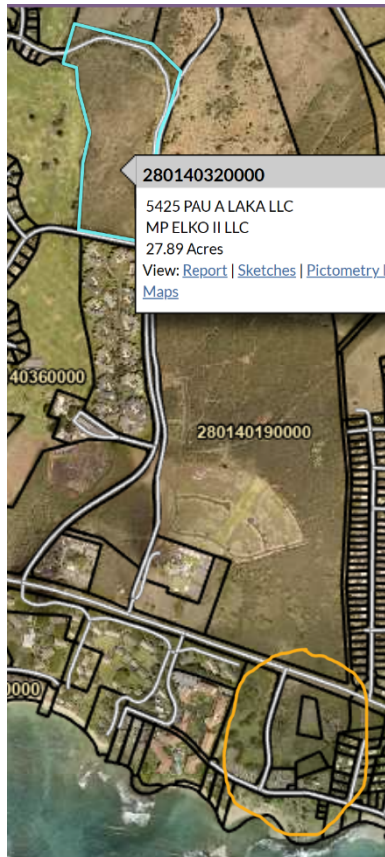
Improper drainage will impact public trust lands. Hapa trail is part of the (un)ceded lands corpus as it became part of the government lands owned by the Hawaiian Kingdom by operation of the Highways Act of 1892. This Act has been codified under HRS §264-1, which provides:

All trails, and other nonvehicular rights-of-way in the State declared to be public rights-of-way by the Highways Act of 1892, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights of way at any time hereafter, or in the future, are declared to be public trails. A public trail is under the jurisdiction of the State Board of Land and Natural Resources - unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county. All State trails once established shall continue until lawfully disposed of pursuant to Chapter 171, HRS.

Id. Petitioners hold interests, as Kānaka Maoli beneficiaries of the public trust lands corpus, in the condition of Hapa trail and submerged lands comprising the coastal ecosystem.

1. *Improper drainage will impact Kāneiolouma and nearshore resources.*

Property runoff would not only affect adjacent areas, but would travel through underground pathways towards Kāneiolouma and other coastal environs. Petitioners have sought public documents relating to the property and project and found no drainage master plan incorporating impacts to Kāneiolouma. Condition 26 specifically requires a drainage master plan that incorporates *impacts* to Kāneiolouma, which lies less than 5,000 feet away from the property. 7/11/2023 Petition (Kaohelaui’i Decl. ¶7. This is because there are underground passageways



through which freshwater passes under the property towards the ocean, including to Kāneiolouma. *Id.* ¶10. Developers’ geotechnical consultants produced a report showing the property is riddled with myriad mesocaverns and interstitial voids “commonly encountered in the basalt formation that characterizes the project site.” 7/11/2023 Petition (Exh. 10 (Geolabs report at 8)). These cave structures can provide habitat for listed species and also indicate the porous nature of the substrate underlying the property.

(Above image): County of Kaua’i Real Property map of TMK (4) 2-8-014:032, property is outlined in blue and the Kāneiolouma area is circled in orange.

Beginning in June 2022, and in the weeks after developers detonated explosives to grade the property, Kāneiolouma caretakers observed a marked decrease in freshwater flows to Kāneiolouma. 7/11/2023 Petition (Kaohelaui’i Decl. ¶12). Mauka freshwater flows are important to the functioning of fishponds along the coast, including at Kāneiolouma. *Id.* Though blasting on the property disrupted the groundwater flows, they continue to Kāneiolouma (and then to the coast). *Id.* ¶14. The underground pathway from the property to Kāneiolouma could bring pollutants and runoff into Kāneiolouma fishponds, compromising our ability to restore them for production, and degrade nearshore areas that we use for gathering and other cultural practices. *Id.* ¶13.

Failure to properly implement Condition 26 will result in inadequate planning for stormwater flow volume, dynamics, storage, pollutant treatment and/or sequestration on the parcel, and other factors that would impact Hapa trail, the nearshore areas, and Kāneiolouma. A Commission determination approve the “master drainage plan” would violate Petitioners’ rights and harm their interests.

2. No analysis of impacts to Kānaka Maoli traditional and customary rights from the proposed action.

The Commission has not prepared, nor required Applicant to prepare, an analysis of how Applicant’s proposed satisfaction of Condition 26 would impact the exercise of Kānaka Maoli traditional and customary rights. Should the Commission approve Applicant’s request, this omission would constitute a violation of article XII, §7 of the Hawai’i Constitution. *Ka Pa‘akai o*

Ka ʻĀina v. Land Use Commission, 94 Hawaiʻi 31, 7 P.3d 1068 (2000) provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" *Id.*, 91 Hawaiʻi at 46-47, 7 P.3d at 1083-84. Under *Ka Paʻakai*, the Commission must make specific findings and conclusions as to:

(1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id., 91 Hawaiʻi at 47, 7 P.3d at 1084 (emphasis added, footnotes omitted). No *Ka Paʻakai* analysis had been performed for the drainage master plan Condition 26.

3. *Commission has public trustee obligations to ensure compliance with Condition 26.*

Improper drainage master planning for the property could result in: (1) stormwater runoff and pollution flowing into adjacent areas, Kāneiolouma, and Poʻipū beach, amongst other plan; and, (2) further destruction of underground water passageways in the course of constructing detention basins. Determining compliance of Applicant's drainage master plan for the property is not a mere technical exercise in checking figures according to the rational method. It means weighing of impacts to irreplaceable public resources – and protected rights in those resources – and the costs of preventing stormwater runoff pollution. *See In the Matter of Conservation District Use Application HA-3568*, 143 Hawaiʻi 379, 387, 431 P.3d 752, 760 (2018) (*Mauna Kea II*) (An "agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawaiʻi constitution.").

Protected public trust resources is a constitutional obligation. *See e.g., Kelly v. 1250 Oceanside Partners*, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006) (county's public trustee obligations at issue where property's stormwater runoff likely contributed ocean pollution); *In re Maui Elec. Co.*, 150 Hawaiʻi 528, 546, 506 P.3d 192, 209 (2022) (Wilson, J. dissenting) ("in addition to statutory duties to consider harms outside of its usual expertise—to wit impacts to native vegetation and water runoff—the public trust doctrine requires consideration of harm to public trust resources") *citing Kauaʻi Springs, Inc. v. Plan. Comm'n of Kauaʻi*, 133 Hawaiʻi 141, 172, 324 P.3d 951, 982 (2014).

"[P]ursuant to article VIII, section 1 of the Hawaiʻi Constitution, the County is a political

subdivision of the State” and “as a political subdivision of the State of Hawai‘i, the public trust duties imposed on the [S]tate under [a]rticle XI, section 1, also apply to the County.” *Kelly*, 111 Hawai‘i at 224, 140 P.3d at 1004. The Commission is a public trustee. *See Kauai Springs*, 133 Hawai‘i at 172, 324 P.3d at 982. The Commission “must execute its statutory duties in a manner that fulfills the State’s affirmative constitutional obligations.” *Mauna Kea Anaina I*, 136 Hawai‘i at 413, 363 P.3d at 261.

Public trust duties did not end with the LUC, but were continued into the County’s obligations. Public trust “constitutional obligations are ongoing, regardless of the nature of the proceeding.” *In re Gas Co.*, 147 Hawai‘i 186, 207, 465 P.3d 633, 654 (2020); *Ching v. Case*, 145 Hawai‘i 148, 177–78, 449 P.3d 1146, 1175–76 (2019); *see also Lana‘ians for Sensible Growth v. Land Use Comm’n*, 146 Hawai‘i 496, 504–05, 463 P.3d 1153, 1162–62 (2020) (agencies have a continuing constitutional obligation to ensure measures it imposes to protect public trust resources are implemented and complied with).

The Commission has a continuing duty to monitor the subject parcel and public trust resources therein throughout its proceedings on Developers’ applications for a special use permit, zoning permit, tentative subdivision approval, grading permit, final subdivision approval, and to enforce conditions imposed on these permits. *See Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006) (article XI, § 1 public trust duty to protect coastal waters required it to “not only issue permits after prescribed measures appear to be in compliance with state regulation, but also to ensure that the prescribed measures are actually being implemented.”).

The Commission and the Planning Director’s decisions concerning public trust resources are scrutinized under a “close look” standard by the Courts. *Kauai Springs*, 133 Hawai‘i at 165, 324 P.3d at 975 (“In light of the duty imposed on the state under the public trust doctrine, we have stated we must take a “close look” at agency decisions that involve the public trust.”) *citing In re Water Use Permit Applications*, 105 Hawai‘i 1, 16, 93 P.3d 643, 658 (2004) (“*Waiahole II*”).

The Commission and its staff, including the Planning Director, “must not relegate itself to the role of a ‘mere umpire’ . . . but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.” *Mauna Kea I*, 136 Hawai‘i at 406, 363 P.3d at 254 *quoting Kelly*, 111 Hawai‘i at 231, 140 P.3d at 1011 *quoting Waiahole I*, 94 Hawai‘i at 143, 9 P.3d at 456.

V. Petitioners should be granted intervention.

A. No other relief is available for impacts to Petitioners' rights and interests

Petitioners have attempted to seek relief through public testimony to this Commission, by writing letters and seeking audiences with various agencies and the Office of the Mayor, by attempting to talk to Applicant's consultants, by participating in litigation before the circuit court and this Commission's own contested case proceedings in Meridian Pacific No. CC-2024-1.

No other proceedings address the identity and sufficiency of Applicant's hastily thrown together document as a "master drainage plan." As the circuit court determined in Civil No. 5CCV-23-00000087, this matter is properly before the Commission alone at this time.

B. Petitioners share no position with existing parties to the proceedings.

Petitioners share no position with existing parties - the Applicant or the Planning Department. The former is a proponent of its alleged compliance with Condition 26. Although the Planning Department is duty bound to protect public trust resources and native Hawaiian traditional and customary rights, their representation of these protected resources and rights are inadequate and do not substitute for that of Petitioners. *See Hoopai v. Civil Service Comm'n*, 106 Hawai'i 205, 217, 103 P.3d 365, 377 (2004) ("[Proposed intervenors] need only show that the Commission's representation of [its] interests may have been inadequate"). A "lack of adequate representation" also exists where a prospective intervenor would make a "more vigorous presentation" of a side of an argument than the government defendant because the regulation - the validity of which is being challenged - would benefit members of the prospective intervenor group. *New York Public Interest Res. Grp. v. Regents of Univ. of New York*, 516 F.2d 350, 352 (2d. Cir. 1975). Petitioners have more on-the-ground information and would make a more vigorous presentation of their rights, interests, and positions than any existing party. As lineal descendants, Kānaka Maoli traditional and customary practitioners, and Kaua'i residents who live and utilize the affected areas, Petitioners hold different interests from existing parties.

C. Intervention will not unduly delay or broaden proceedings.

Inclusion of the Petitioners would not unduly delay proceedings. The standard is not one under which any potential delay weighs against granting intervention. "Additional parties always take additional time which may result in delay, but this does not mean that intervention should be denied." 7C Wright, Miller & Kane. *Federal Prac. & Procedure*, Civil 2d. 1913 at 381-82 (2d ed. 1986). Rather, judicial bodies may consider intervention improper only where it "will 'unduly

delay' the adjudication." *Id.*; see also *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 265 F.2d 364, 367 N.1 (D.C. Cir. 1959) ("Efficient and expeditious hearing should be achieved not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence"). The Petitioners' interests are all pertinent to this proceeding and their intervention would not inject collateral, new issues, wholly unrelated to the underlying matter. See *Blackfeld Hawaii Corp. v. Travelodge Int'l, Inc.*, 3 Haw. App. 61, 641 P.2d 981 (1983); *Taylor Comm. Grp v. Southwestern Bell Tel. Co.*, 172 F.3d 385, 389 (5th Cir. 1999); *United States v. S. Florida Water Management Dist.*, 922 F. 2d 704, 711-712 (11th Cir. 1991).

Additionally, the Petitioners are organizations represented by directors and this arrangement would serve to increase the efficiency and timeliness of the Petitioners' intervention so as not to unduly delay proceedings.

D. Intervention is needed to develop a full record for the Commission.

Petitioners have invaluable information and perspectives on the proposal to relieve Applicant of full compliance with Condition 26. The Commission has yet to consider *Ka Pa'akai* analyses for the proposed actions, which require that the Commission become informed on Kānaka Maoli traditional and customary practices that would be affected by the Commission's actions. *Id.*, 91 Hawai'i at 47, 7 P.3d at 1084 (footnotes omitted). Issues Petitioners raise drainage planning also impact Kānaka Maoli traditional and customary practices in the area. For instance, Petitioners' member and supporter, Kaohelaulii conducts traditional fishing practices near the project area and would be thwarted in his abilities' to conduct these practices by vehicular traffic and parking issues caused by the new development, subdivision, and faulty drainage plans. 7/11/2023 Petition (Kaohelaulii Decl.¶18).

For many of the same reasons, Petitioners' intervention would assist in, development of a complete record for the Commission to make its required determinations about Hawaiian cultural practices, the subdivision's impacts, and feasible protections for these practices, amongst other issues that would improve the quality of life in Kōloa.

E. Petitioners' intervention would serve the public interest

The Applicant is proposing to satisfy drainage master plan requirements which impact hundreds of acres and shoreline ecosystems used by thousands of people, and in the service of forwarding a 279-unit condominium development primarily composed of luxury short term

vacation rentals and over lands that hold ancient kupuna iwi, burial caves, heiau, and listed and native species that are part of the cultural heritage of Petitioners and all of Kāua'i. The management and proper disposal and reuse of stormwater runoff is in the public interest. Conversely improper drainage management may infringe on Kānaka Maoli traditional and customary rights, the rights to a clean and healthful environment defined by HRS chapter 205 and other laws defining environmental quality, and the rights of adjacent and nearby property owners who are officers and supporters of Petitioners' groups.

In addition, Petitioners seek to uphold the integrity of environmental laws, which benefits the public at large. Petitioners' intervention will also serve to ensure public facilities are not burdened by Applicants' insufficient drainage plan. Petitioners therefore will provide a much needed community voice in the proceedings.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Commission grant their petition for intervention in the above-captioned proceedings, or alternatively to deny the challenged permit approvals.

DATED: Honolulu, Hawai'i

December 7, 2023

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
BIANCA ISAKI

/s/ Ryan D. Hurley
LAW OFFICE OF RYAN D. HURLEY, LLC
RYAN D. HURLEY
Attorneys for Petitioners FRIENDS OF
MĀHĀ'ULEPU & SAVE KŌLOA

STATE OF HAWAII

In the Matter of the Application of:

MERIDIAN PACIFIC

) Permit Nos. Z-IV-2006-27, U-2006-26, and
) PDU-2006-25
)
) DECLARATION OF ELIZABETH
) OKINAKA
)

6. At its July 11, 2023 meeting, the Commission determined to grant in part our petition to intervene in Applicant MERIDIAN PACIFIC's ("Applicant") request for approval of its

drainage plan pursuant to Condition 26 of its (1) Project Development Use Permit P.D. U-2006-25, (2) Use Permit U-2006-26, and (3) Class IV Zoning Permit Z-IV-2006-27.

7. Save Kōloa and its officers and supporters, including myself, have diligently sought to require Developers' compliance with State Land Use Commission (LUC) district boundary amendment orders applicable to the property, amended August 5, 1997.

8. On March 21, 2021, I observed the property from Kiahuna Plantation Road and saw multiple culverts between the northern Wainani subdivision and the property. I have seen water draining from these culverts onto the property.

9. Attached as Exhibit "01" is a true and correct copy of a photograph I took of culverts on the north end of the parcel located at the subject project, Tax Map Key (TMK) (4) 2-8-014-032 ("property") on or about March 21, 2023.

10. I have also observed culvert structures on the eastern edge of the property on April 26, 2021. Those culvert structures would also allow stormwater runoff to flow into or off of the property. In recent years, the culverts were filled in.

11. Hapa trail lies on the edge of the subject property and is flooded with runoff from the built environs during and after storms.

12. I have observed the lands located at TMK (4) 2-8-014-019. These lands are not developed, and it seems unlikely that they would significantly contribute to runoff.

13. I am familiar with the Kāneiolouma Heiau and the area within which it is located. During rains, this area is consistently flooded, as well as the nearby beach parking lot.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kōloa, Kauaʻi

December 7, 2023



ELIZABETH OKINAKA

Declarant

STATE OF HAWAII

DECLARATION OF COUNSEL

8. On or after December 5, 2023, Applicant submitted a “master drainage plan as referenced in the applicable zoning permits” for Commission approval as demonstrated by the submissions to the Commission in its **Planning Commission Meeting Notice and Agenda**, Tuesday

December 12, 2023, at PDF page 152 (accessed Dec. 7, 2023) *available at*:
www.kauai.gov/files/assets/public/v/1/boards-and-commissions/planning-commission/planning-commission-meeting-agendas/2023-12-12-planning-commission-agenda-packet.pdf (“12/7/2023 packet”).

DECLARANT FURTHER SAYETH NAUGHT

DATED: Honolulu, Hawai‘i December 7, 2023

/s/ Bianca Isaki
BIANCA ISAKI
Co-counsel for Petitioners



EXHIBIT “01”

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Attorneys for Plaintiffs
5425 PAU A LAKA LLC and
MP ELKO II, LLC

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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI‘I

5425 PAU A LAKA LLC, a Hawai‘i limited
liability company, MP ELKO II, LLC, a
Nevada limited liability company,

Plaintiffs,

vs.

COUNTY OF KAUA‘I,

Defendant.

CIVIL NO. 5CCV-23-000087
(Declaratory Judgment)

PLAINTIFFS 525 PAU A LAKA LLC and
MP ELKO II, LLC’S MOTION FOR
SUMMARY JUDGMENT;
MEMORANDUM IN SUPPORT OF
MOTION; DECLARATION OF LAUREL
LOO; EXHIBITS “A” – “T”; NOTICE OF
HEARING; CERTIFICATE OF SERVICE

Hearing:

Date: October 24, 2023

Time: 1:00 P.M.

Judge: Hon. Randal Valenciano

Trial Date: None Set

EXHIBIT "02"

PLAINTIFFS 5425 PAU A LAKA LLC and MP ELKO II, LLC'S MOTION FOR
SUMMARY JUDGMENT

Plaintiffs 5425 PAU A LAKA LLC (“**5425 Pau**”) and MP ELKO II, LLC (“**MP**”) (collectively, “**Plaintiffs**”), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby move this Court for summary judgment as to all claims concerning Counts I (Declaratory Relief) and II (Injunctive Relief) of the Plaintiffs’ Complaint. JEFS Civil No. 5CCV-23-0000087 dkt. 1.

The Plaintiffs are the owners and developers of certain parcels of real property situated in Koloa, Kaua‘i, Hawai‘i (collectively, the “**Property**”). The Property is part of thirteen (13) parcels that once made up a larger parcel (“**Mauka Lands**”). In 2006, a previous owner of the Property submitted a Class IV permit application to the Planning Commission, County of Kaua‘i (“**Planning Commission**”) which approved three permits (“**Permits**”), subject to certain conditions as recommended by the Planning Department, County of Kaua‘i (“**Planning Department**”). One of these conditions is for the Plaintiffs to “submit a master drainage plan for all lands mauka of Poipu Road [(e.g., the Mauka Lands)]. . . for Planning Commission review and approval.” Ex. A at 7 (emphasis added). No other property owners of the remaining parcels have been asked by Defendant County of Kaua‘i (“**County**”) to submit a master drainage plan as a condition for permit approval.

The Plaintiffs seek an order from this Honorable Court declaring that Condition 26 of the Permits is applicable only to the property owned by the Plaintiffs (i.e., the Property) and enjoining the County from requiring that the Plaintiffs prepare and submit a master drainage plan for the remaining parcels that Plaintiffs do not own.

This motion is brought pursuant to Rules 7 and 56 of the Hawai‘i Rules of Civil Procedure, Rule 7 of the Rules of the Circuit Courts of the State of Hawai‘i, the memorandum in support of motion, the declarations and exhibits, the records and files herein, and such other matters as may be presented to this Court at any hearing on this Motion.

DATED: Līhu‘e, Hawai‘i , September 26, 2023.

/s/ Laurel Loo
LAUREL LOO
DAVID J. MINKIN
JORDAN K. INAFUKU
SARA M. HAYDEN

Attorney for Plaintiffs
5425 PAU A LAKA LLC and
MP ELKO II, LLC

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI‘I

5425 PAU A LAKA LLC, a Hawai‘i limited liability company, MP ELKO II, LLC, a Nevada limited liability company,

Plaintiffs,

vs.

COUNTY OF KAUA‘I,

Defendant.

CIVIL NO. 5CCV-23-000087
(Declaratory Judgment)

MEMORANDUM IN SUPPORT OF
MOTION

MEMORANDUM IN SUPPORT OF MOTION

The County of Kaua‘i (“**County**”), via the Planning Department, County of Kaua‘i (“**Planning Department**”) and the Planning Commission, County of Kaua‘i (“**Planning Commission**”), is enforcing a permit condition based on prior ownership of the Mauka Lands. Over the past seventeen years, the ownership of the Mauka Lands has since changed from a single party to numerous parties; the Plaintiffs are the owners and developers of two (2) parcels (Parcels 32 and 41) situated in Koloa, Kaua‘i, Hawai‘i (collectively, the “**Property**”). As the Plaintiffs will demonstrate *infra*, the imposition of Condition 26 on a single property owner is unfair and requires declaratory and injunctive relief.

First, there is no genuine dispute that Condition 26 is forcing the Plaintiffs to prepare a master drainage plan to the Planning Department for the entire Mauka Lands property, when Plaintiffs own only the Property. This condition is unenforceable and inequitable by placing an unfair burden on the Plaintiffs. The requirements of Condition 26 are also impossible for the Plaintiffs to perform.

Second, there is no genuine dispute that the Plaintiffs will suffer irreparable harm if forced to comply with the Planning Department’s Condition 26.

I. STATEMENT OF PERTINENT FACTS

The Property, designated by Tax Map Key (“**TMK**”) Nos. (4) 2-8-014-032:0001 – 0019, and the other twelve (12) parcels are collectively referred to as the “Master Development.” In 2006, in connection with the Master Development, Kiahuna Poipu Golf Resort LLC, then-owner of the entire Property, applied for permits to the Planning Department. Ex. A at 1. On September 15, 2006, the Planning Commission approved, with conditions, the following permits: (1) Project Development Use Permit P.D. U-2006-25, (2) Use Permit U-2006-26, and (3) Class IV Zoning Permit Z-IV-2006-27. *Id.* at 1. The twenty-seven (27) conditions included, *inter alia*, Condition 26, which states: “Prior to building permit approval, the Applicant shall submit a master drainage plan for all lands mauka of Poipu Road [(collectively, “**Mauka Lands**”)] rezoned under Moana Corporation Ordinance No. PM-31-79 for Planning Commission review and approval, including Kānei‘olouma Heiau.” *Id.* at 7 (emphasis added). Kānei‘olouma Heiau is not located on the Property within the Mauka Lands. Ex. B.

By Warranty Deed dated May 26, 2021, between Yellow Hale, LLC, as Grantor, and 5425 Pau A Laka LLC (“**5425 Pau**”), as Grantee, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawai‘i as Document No. T-11474216, 5425 Pau obtained title to Parcel 32 of the Property.¹ Ex. C.

By Warranty Deed dated May 27, 2021, between Yellow Hale, LLC, as Grantor, and 5425 Pau, as Grantee, filed in the Office of the Assistant Registrar of the Land Court of the State

¹ We request that this Honorable Court take judicial notice of the Warranty Deeds stated *infra* as public records. See *Kaho‘ohanohano v. State*, 114 Hawai‘i 302, 328, 162 P.3d 696 (2007) (recognizing that public reports and records are appropriate for judicial notice if their “significant bears directly on the instant matter.”).

of Hawai‘i as Document No. A-78220762, 5425 Pau obtained title to Parcel 41 of the Property. Exhibit D.

By Warranty Deed dated August 10, 2021, filed in the Bureau of Conveyances of the State of Hawai‘i on August 12, 2021 as Document No. A-78940056, 5425 Pau conveyed its entire interest in the Property to MP Elko II, LLC (“*MP*”). Ex. E. Essentially, the Plaintiffs were grandfathered into the requirements of Condition 26.

The Plaintiffs, together with Kauai Hale, Inc., as Developer, submitted the Property, formerly designated by TMK No. (4) 2-8-014-032, to a condominium property regime established under and pursuant to that certain First Amended and Restated Declaration of Condominium Property Regime for Kauanoe O Koloa Condominium Project dated December 27, 2021, recorded in the Bureau of Conveyances of the State of Hawai‘i as Document No. A-80460606 (the “*Condominium*”). Ex. E.

The Plaintiffs filed their Complaint on August 9, 2023. JEFS Civil No. 5CCV-23-0000087 dkt. 1. The County filed its Answer on August 22, 2023. JEFS Civil No. 5CCV-23-0000087 dkt. 7.

To date, all the Planning Department’s conditions have been fulfilled except for Condition 26. The other owners of the Mauka Lands projects that were previously developed or in development were not required by the County to submit a master drainage plan for the Mauka Lands: Poipu Beach Estates, Pilimai at Poipu, Wainani at Poipu, Kiahuna Golf Village, Royal Pams at Poipu, Poipu Golf Course, Knudsen 50-Lot Subdivision. The carrying costs of the Condominium project without permits is subjecting the Plaintiffs to a fee of \$90,000 a month.² Ex. F. The Plaintiffs made a reasonable effort to comply with Condition 26, with approval by

² Thus far, the Plaintiffs have expended \$38,700,000.00 on the Condominium project. The interest and financing costs of the Condominium are \$983,489.00 with the Loan origination cost of \$63,894.00 come to a total of \$1,047,383.00. Ex. G.

the County Engineer, by undertaking a substantial burden of gathering drainage plans for some of the original parcels based on plans that are publicly available for the area but the cost will exceed \$200,000.00 to complete. Ex. G at 2. However, the review of the plans by the County Engineer is a lengthy process and will take months to complete. If only the Plaintiffs are required to fulfill Condition 26, which is already burdensome, the Plaintiffs will likely lose their financing for the Condominium project. Ex. H.

II. LEGAL STANDARD

Summary judgment is appropriate when the record demonstrates that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. Hawai‘i Rules of Civil Procedure (“*HRCP*”) Rule 56(c); *see also Young v. Planning Comm’n of Kaua‘i*, 89 Hawai‘i 400, 407, 974 P.2d 40, 47 (1999). The movant bears the burden of showing that (1) no genuine issue of material fact exists “with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions”; and (2) “based on the undisputed facts, it is entitled to summary judgment as a matter of law.” *Anderson v. State*, 88 Hawai‘i 241, 246, 956 P.2d 783, 788 (App. 1998) (citing *GECC Fin. Corp. v. Jaffarian*, 79 Hawai‘i 516, 521-22, 904 P.2d 530, 535-36 (App. 1995)).

Once the movant satisfies its burden of production, the burden “shift[s] to the non-moving party to respond to the motion . . . and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” *Id.* (emphasis added); *see also HRCP* 56(e) (“When a motion for summary judgment is made . . . , an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, . . . , must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the

adverse party.”). The court views the facts set forth in the record in the light most favorable to the party opposing the motion. *Bank of Honolulu, N.A. v. Anderson*, 3 Haw. App. 545, 550, 654 P.2d 1370, 1374-75 (1982); *see also Anderson*, 88 Hawai‘i at 246, 956 P.2d at 788.

III. DISCUSSION

A. Plaintiffs should only be required to submit a drainage plan for the Property, which they own, and not for the entire Mauka Lands.

The Plaintiffs are entitled to declaratory relief in the instant matter. Pursuant to Hawaii Revised Statutes (“*HRS*”) § 632-1(b) (1984),³ declaratory judgment may be granted in civil cases and where “the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.” Further, “where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.” *Application of Air Terminal Svcs., Inc.*, 47 Haw. 499, 532, 393 P.2d 60, 78 (1964) (block quote formatting and internal quotation marks omitted) (quoting *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948)).

1. Condition 26 is Inequitable and Unenforceable on its Face.

³ HRS § 632-1(b) states,

Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.

There is no question that Condition 26 is inequitable and unenforceable on its face.⁴

There are no facts or evidence to support Condition 26's requirement that the Plaintiffs, and only the Plaintiffs, submit a master drainage plan for all the Mauka Lands when Plaintiffs own only two (2) parcels (the Property) out of thirteen (13). Ex. A at 7. To date, no other property owner of a Mauka Lands parcel has been subjected to compliance with a similar permit condition requiring a master drainage plan for the entire Mauka Lands, let alone for properties that it does not own. There are no facts that provide reason or explanation as to why the Plaintiffs have been unfairly targeted to expend time, money, and resources to create a master drainage plan for all of the Mauka Lands when the Plaintiffs own only two (2) parcels out of thirteen (13) parcels.

There are no facts or evidence to support Condition 26's requirement that the Plaintiffs, and only the Plaintiffs, submit a master drainage plan for all the Mauka Lands when Plaintiffs own only several parcels (the Property) out of thirteen (13). *Id.* To date, no other property owner of a Mauka Lands parcel has been subjected to compliance with a similar permit condition requiring a master drainage plan for the entire Mauka Lands, let alone for properties that it does not own. There are no facts that provide reason or explanation as to why the Plaintiffs have been unfairly targeted to expend time, money, and resources to create a master drainage plan for all of the Mauka Lands when the Plaintiffs own only their two (2) parcels out of thirteen (13) parcels.

2. Compliance with Condition 26 is Impossible

Condition 26 is unreasonable because it is an impossible condition for Plaintiffs to satisfy. *Cf. Vaszaukas v. Zoning Bd. of Appeals of Town of Southbury*, 574 A.2d 212, 215 (Conn. 1990) (recognizing that conditions imposed by a zoning authority must be reasonable and that

⁴ *Dolan v. City of Tigard*, 512 U.S. 374, 383-88 (1994) (holding that conditions may be placed on development if the conditions have an "essential nexus" to legitimate state interests and are "roughly proportional" to the impact of the proposed development; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-37 (1984) (holding that the government's condition on building permits is a lawful land-use regulation if it substantially furthered governmental purposes that justify denial of the permit).

“[c]onditions that are impossible to satisfy are patently unreasonable[.]”⁵ The plain language of Condition 26 requires that the Plaintiffs “submit a master drainage plan” for the entire Mauka Lands; however, it provides no direction or requirement that the surrounding parcel owners provide the Plaintiffs’ access to their parcels in preparation for the drainage plan. Ex. A at 7. Condition 26 requires that the Plaintiffs’ subject themselves to the discretion of the other parcel owners who may or may not allow the Plaintiffs to access their parcel to complete the drainage plan. Compliance with Condition 26 is an impossibility simply because to complete a master drainage plan for the entire Mauka Lands requires the assistance and authorization of other landowners.

3. The Minimal Risk of Uncontrolled Drainage from the Property Does Not Justify the Master Drainage Plan Condition

In reading Condition 26, the crux the master drainage plan requirement is to avoid any uncontrolled drainage having a potential impact to the Kānei‘olouma Heiau. However, the Kānei‘olouma Heiau is not located on the Property, which is a small portion of the Mauka Lands, and does not have a connection with the Property. Further, Kānei‘olouma Heiau is not located on the Mauka Lands. Ex. B. The Hawai‘i Supreme Court has recognized that zoning conditions may be imposed for developments that fall under public trust duties or other special use permits. In *Kauai Springs, Inc. v. Planning Com’n of Cnty. of Kaua‘i*, 113 Hawai‘i 141, 146, 324 P.3d 951, 957 (2014), the permits at issue were to maintain and expand a water harvesting and bottling company that tapped into an underground spring that was several miles from the subject property at issue. The supreme court recognized that because the company’s use of water fell under public trust duties, the planning commission was correct to impose on the company the

⁵ While Hawai‘i case law has not discussed this topic, the *Vaszaukas* decision is analogous to the instant case, in that zoning conditions imposed on a variance grant that were impossible for the applicant to fulfill were deemed invalid. See *Vaszaukas*, 574 A.2d at 215.

“burden to demonstrate the propriety of its proposed use of the public trust resource” in imposing its permit conditions. *Id.* at 179-80, 324 P.3d at 989-90. Unlike the bottling company and the underground spring in *Kauai Springs, Inc.*, there is no special use or public trust connection between the proposed Condominium project on the Property and the Kānei‘olouma Heiau. Thus, to require the Plaintiffs to conduct a master drainage plan for the entire Mauka Lands without a direct connection to the Kānei‘olouma Heiau is burdensome and unreasonable. Further, the Kānei‘olouma Heiau has been owned by the County since 1987, and the County is the appropriate entity to be the steward of the heiau. The heiau is about $\frac{3}{4}$ of a mile from the Property and at least six parcels intervene between the heiau and the Property. *See* Declaration of Laurel Loo.

Based on the foregoing, this court should find that there is no issue of material fact that Condition 26 is unenforceable towards the Plaintiffs, who have already been burdened in their attempts to create a master drainage plan for property that they do not own, and that the drainage plan should apply only to the Property.⁶

B. Without Injunctive Relief, the Plaintiffs Would Be Irreparably Damaged by Condition 26

The court looks at three factors when determining whether preliminary injunctive relief is warranted: (1) whether the Plaintiff is likely to prevail on the merits; (2) whether the balance of irreparable damage favors the issuance of a temporary injunction; and (3) whether the public interest supports granting an injunction. *Nuuanu Valley Ass’n v. City and Cnty. of Honolulu*, 119 Hawai‘i 90, 106, 194 P.3d 531, 547 (2008) (citation omitted). “[T]he more the balance of irreparable damage favors issuance of the injunction, the less the party seeking the injunction has

⁶ There are also no statutory remedies available for the Plaintiffs; thus, declaratory relief is the only remedy available. *See* HRS § 632-1(b).



PLANNING COMMISSION

FRANCIS DEGRACIA, CHAIR
DONNA APISA, VICE CHAIR
GERALD AKO, SUBDIVISION COMM CHAIR
HELEN COX
GLENDA NOGAMI-STREUFERT
JERRY ORNELLAS
LORI OTSUKA

DECISION AND ORDER OF THE KAUA'I COUNTY PLANNING COMMISSION

In the Matter of Applications for (1) Preliminary subdivision extension request for application no. S-2021-7, 5425 PA'U A LAKA, LLC, for proposed 2-lot consolidation and resubdivision into 4-lots; and, (2) Amendment to Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25) for modification to Condition 26 relating to drainage requirement for a development situated at the Pau A Laka Street/ Kiahuna Plantation Drive, Tax Map Key: 2-8-014:032, and containing a total area of 27.886 acres

Petitioners Friends of Maha'ulepu and Save Kōloa's Petition to Intervene and Alternatively for Denial of Applications

At its public meeting conducted on July 11, 2023, the Kaua'i County Planning Commission ("Commission") considered the above referenced Petition to Intervene. In accordance with Rule 1-4-8 of the Rules of Practice and Procedure of the Kaua'i County Planning Commission ("Rules"), and Hawai'i Revised Statutes § 91-12, after consideration of the subject Petition and the arguments of counsel, the Commission ("Commission") issues the following Decision and Order:

1. The Petition to Intervene is denied with regard to intervention into the matter of a subdivision extension request for application no. S-2021-7, 5425 Pa'u A Laka, LLC's, extension request to file final subdivision map. Sufficiency of standing is not reached regarding these grounds. Intervention before the Commission regarding subdivision applications are limited to an application for tentative subdivision approval,

EXHIBIT "03"

which in the matter of S-2021-7, was approved by the Commission on August 10, 2021. The Motion to Defer S-2021-7 to a future agenda pending a legal opinion from the Office of the County Attorney, passed by the Subdivision Committee on July 11, 2023, is hereby approved and ratified by the full Commission.

2. The Petition is granted with regard to intervention on the application for an amendment to Z-IV-2006-27, U-2006-26 and PDU-2006-25 for modification to Condition 26 and will be referred as a contested case to the Kaua'i County Office of Boards and Commissions for assignment to a Hearing Officer. Pursuant to Rule 1-4-1, Petitioners are deemed to have standing to proceed. Protect & Pres. Kahoma Ahupua'a Ass'n v. Maui Planning Comm'n, 149 Haw. 304, 311-312, 489 P.3d 408 (2021); In re Hawai'i Elec. Light Co., 145 Haw. 1, 21-22, 445 P.3d 673 (2019); Sierra Club v. DOT, 115 Haw. 299, 320, 167 P.3d 292 (2007).

3. The referral to the Office of Boards and Commissions should include the following limiting instruction to the Hearing Officer: the matter is referred to adjudicate Petitioners' claims only where the evidence demonstrates a clear nexus between the claim and the proposed amendment to Condition 26. The proposed amendment reads as follows: "Prior to building permit approval, the Applicant shall submit a master drainage plan for its lands mauka of Po'ipū Road rezoned under Moana Corporation Ordinance No. PM-31-79, for DPW Engineering Division['s] review and approval, including any possible stormwater effects on Kaneioulouma Heiau." Any other of Petitioners' claims unrelated to the proposed amendment to Condition 26, or any other extraneous issues raised regarding the subject permits, shall not be considered during the contested case.

4. The Commission respectfully requests that the Office of Boards and Commissions make a reasonable effort to work with the Hearing Officer to commence this contested case within 60-days of the execution of this Decision and Order. The related contested case involving Intervenor Pacific Resource Partnership shall be consolidated and concurrently proceed with this matter.

5. The Parties are encouraged to Participate in mediation prior to the commencement of the contested case before the Hearing Officer. Issues for mediation shall be limited in accordance with Paragraph 2 herein. Mediation efforts shall commence and conclude within 60-days of the execution of this Decision and Order and may be consolidated with mediation concerning Intervenor Pacific Resource Partnership.

By: 
Donna Apisa Jul 18, 2023 10:51 HST

Chair, Kaua'i County Planning Commission
Date: July 18, 2023



PLANNING COMMISSION

FRANCIS DEGRACIA, CHAIR
DONNA APISA, VICE CHAIR
GERALD AKO, SUBDIVISION COMM CHAIR
HELEN COX
GLEND A NOGAMI-STREUFERT
JERRY ORNELLAS
LORI OTSUKA

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the Decision and Order of the Kaua'i County Planning Commission, in the matter of S-2021-7, 5425 Pau A Laka, LLC, and, Class IV Zoning Permit (Z-IV-2006-27), Use Permit (U-2006-26), and Project Development Use Permit (PDU-2006-25), Friends of Maha'ulepu and Save Kōloa's Petition to Intervene and Alternatively for Denial of Applications, was served on this day, via Certified Mail, Return Receipt Requested, and email, upon the following persons:

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DATED: Līhu'e, Kaua'i, Hawai'i, July 18, 2023.



LAURA K. BARZILAI
Deputy County Attorney, on behalf of
Kaua'i County Planning Commission

BEFORE THE KAUAI PLANNING COMMISSION

COUNTY OF KAUAI

STATE OF HAWAII

In the Matter of the Application for) Permit Nos. Z-IV-2006-27, U-2006-26, and
MERIDIAN PACIFIC) PDU-2006-25
)
) CERTIFICATE OF SERVICE
)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the foregoing was filed, hand-delivered or sent via U.S. mail, postage prepaid pursuant to Kauai Planning Commission Rule §1-3-3 to the following:

MERIDIAN PACIFIC
94-050 Farrington Hwy Ste E1-3
Waipahu, Hawaii 96797

DATED: Honolulu, Hawaii

December 7, 2023

/s/ Ryan D. Hurley
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