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M. FERNANDEZ-KAHAKAUWILA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

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MAUI LANI NEIGHBORS, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

MAUI LANI NEIGHBORS, INC., a Hawai`i Nonprofit Corporation;  Plaintiff,  vs.  STATE OF HAWAI`I; STATE OF HAWAI`I DEPARTMENT OF LAND AND NATURAL RESOURCES; STATE OF HAWAI`I BOARD OF LAND AND NATURAL RESOURCES; WILLIAM AILA, JR. in his official capacity as chair of the State of Hawai`i Board of Land and Natural Resources; COUNTY OF MAUI; COUNTY OF MAUI PLANNING COMMISSION; COUNTY OF MAUI DEPARTMENT OF PLANNING; WILLIAM SPENCE in his official capacity as County of Maui Planning Director; JOHN DOES 1-10, JANE DOES 1-10, AND DOE PARTNERSHIPS, CORPORATIONS, GOVERNMENTAL UNITS OR OTHER ENTITIES 1-10, Defendants.	CIVIL NO. 14-1-0501 (2) (Other Civil Action) FIRST AMENDED VERIFIED COMPLAINT; EXHIBITS "A" - "F"; DECLARATION OF HARLEY ICHIRO MANNER, Ph.D.; DECLARATION OF TOM PIERCE; CERTIFICATE OF SERVICE

I hereby certify that this is a full, true and correct copy of the Original.

Clerk, Second Circuit Court

APPENDIX A

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FIRST AMENDED VERIFIED COMPLAINT

Plaintiff MAUI LANI NEIGHBORS, INC. ("**MLN**"), by and through its counsel, Tom Pierce, Attorney at Law, LLLC, alleges and avers as follows through this First Amended Verified Complaint, which supersedes the Verified Complaint, filed September 2, 2014. (This First Amended Complaint includes a new Count IX, and that is the only substantive change from the original Verified Complaint):

INTRODUCTION

1. This suit seeks declaratory, injunctive and other relief with respect to the *Central Maui Regional Sports Complex,* which is being developed by Defendant State of Hawai`i ("**State**") Department of Land and Natural Resources ("**DLNR**"). The Sports Complex is proposed for intensive, urban-type, active, recreational uses, and will consist of the following extensive urban infrastructure:

- three soccer fields;
- nine baseball/softball fields;
- lights for night time playing;
- over eight (8) acres of hardened surface area;
- parking for seven hundred (700) vehicles;
- multiple restroom facilities;
- concession stands;
- a water well and associated pumps for irrigation;
- a retention basin designed to handle the Sports Complex runoff; ***and,***
- ***a retention basin that will cover fifteen (15) to thirty-four (34) acres*** that is designed to handle all of the surface water runoff from a 357 acre portion of a development called "**Wai`ale**" being proposed by A&B Properties, Inc. ("**A&B**"),[1] which development has not received any of its necessary approvals.

(These intensive, urban uses being proposed by DLNR (including A&B's retention basin for the Wai`ale project) are collectively referred to herein as the "**Sports Complex**" or the "**Sports Complex uses**".)

2. The profound infrastructural impact of this project may be illustrated by its price tag: now $25 million, as estimated by DLNR. The funding for this "regional" Sports Complex is

[1] A&B Properties, Inc. is identified as the developer in the Final Environmental Impact Statement for Wai`ale, discussed further *infra*. However, in the recent deed of conveyance of the Property to DLNR, the owner was identified as Alexander & Baldwin, LLC. These two entities are referred to herein collectively as ("**A&B**").

a State program dubbed the *Sports Development Initiative,* which, is being led by Lieutenant Governor Shan Tsutsui (the "**Lt. Governor**"). The purpose of this Initiative is to create a new revenue source for the State by making Central Maui, and other designated places in the State, destinations for professional and amateur sports teams who are expected to travel from around the Pacific Asian Rim, and potentially from around the world, and spend extensive periods of time on Maui training or participating in large scale events. The Lt. Governor has explained that the ***Hawai`i Tourism Authority*** will be responsible for encouraging these ***nonresident*** sports teams to make Central Maui and other designated places their preferred destination for training and events.

3. In order to further the Lt. Governor's Sports Development Initiative, and assure expenditure of appropriations made for a "Central Maui Regional Park," the "**State Defendants**" (defined below) and "**County Defendants**" (defined below) have fast-tracked DLNR's Sports Complex proposal. In the process, these Defendants have ignored numerous laws and permitted a use for Central Maui that would result in significant harm to the public, including MLN's members, as summarized here and as further alleged below:

4. *First,* DLNR intends to squeeze this intensive Sports Complex on a narrow strip of land between two of the largest residential projects ever built on Maui: Maui Lani (with over 1,200 homes) and Wai`ale (with over 2,500 homes).

5. *Second,* because the land designated for the Sports Complex is within A&B's Wai`ale project, and that project will not be fully entitled or have basic infrastructure for likely five years or more, DLNR has been permitted by the County Defendants to funnel the significant traffic anticipated from the Sports Complex through an inadequate road system located within the Maui Lani project, which road system has been deemed by DLNR's own consultants to already be "over capacity."

6. *Third,* the wastewater facility that is proposed to be built by A&B to ultimately supply "tertiary effluent water" to irrigate the three soccer fields, nine baseball/softball fields and the retention basin area, will not be constructed for years (if ever). That is because it is a contested proposed component of the Wai`ale project, which has not gone through an extensive, three-phase "Project District" review process that would occur through multiple hearings before County agencies and by the ultimate decision maker, the County Council. Therefore, as a "temporary" stopgap measure, DLNR has been permitted as part of its Sports Complex special

use permit to dig a well to take ground water for irrigation from the limited-capacity Kahului Aquifer. Based on DLNR's own assessment, this ground water will be pumped at an estimated rate of ***400,000 gallons per day*** from an Aquifer that has a sustainable yield, according to DLNR, of only one million gallons per day.

7. *Fourth,* DLNR's Sports Complex uses (which will result in over eight (8) acres of hardened surface area, significantly increased traffic, and noise and lights from potentially daily sports activities carried on by anticipated "sports tourists") are the exact opposite of the designated planned uses for this narrow strip of land. This land, which abuts Maui Lani, was specifically designated for a *passive community* park by the Maui County Council ("**County Council**") through the Maui Island Plan, which Plan, adopted by ***ordinance*** in 2012, has the force and effect of law. The designated land was specifically intended by the Maui Island Plan to provide a mitigating ***buffer*** between the already intensive residential uses occurring or intended to occur in the Maui Lani and Wai`ale projects. This buffer was to include green spaces for passive activities, such as walking, and to provide true open space for the surrounding communities.

8. *Fifth,* in complete disregard of the clear and unambiguous requirements set forth in statutes, ordinances, and administrative rules, the "**County Defendants**" (defined below) have determined, and permitted, the Sports Complex uses, including the retention basin, to proceed on land specifically zoned by Maui County for "Agricultural" uses, and specifically designated as "Agriculture" by the Wailuku-Kahului Community Plan (2002) ("**WK Community Plan**"), which Plan also was adopted by ordinance by the County Council, which also has the force and effect of law, and which may only be changed by an amendment approved by the County Council.

9. *Sixth,* County Defendants claim the intensive Sports Complex uses, including the retention basin, may be permitted as a "special use" on lands zoned "Agricultural" by reading in isolation a phrase in the County's special use ordinance that provides that "playing fields, accessory buildings and structures" may be considered a permitted special use for lands zoned Agricultural because the provision in question only permits <u>*passive*</u> recreational activities with limited associated structures.[2]

[2] All constitutional allegations and challenges made herein are made only with respect to the Hawai`i Constitution, not the United States Constitution.

10. *Seventh,* during the special use permit process, the Defendant Maui Planning Commission granted the ultimate entitlement permit for the construction of significant "backbone" infrastructure for A&B's Wai`ale project, thereby reaching ultimate conclusions regarding the o Wai`ale project, including its appropriateness, and the accuracy of A&B's assumptions for the surface water capacity for the project, even though the remainder of the Wai`ale project must still be subjected to ***years*** of governmental review through the Project District change in zoning process, and even though the backbone infrastructure that has now been permitted to proceed by the Maui Planning Commission was based on ***very preliminary*** assumptions made by A&B's engineers and consultants.

11. *Eighth,* in violation of Hawai`i Revised Statutes ("**HRS**") Chapter 343, the Hawai`i Environmental Policy Act ("**HEPA**"), DLNR failed to prepare a supplemental environmental impact statement ("**EIS**") updating the EIS previously prepared by A&B for the Wai`ale project, and failed to have it approved by the accepting authority for the Wai`ale EIS, the State Land Use Commission ("**LUC**"). Instead, DLNR treated the Sports Complex project and the land on which they are proposed to be situated as if they were independent of the Wai`ale project. DLNR thus prepared only an environmental assessment ("**EA**") that was accepted by the Defendant State Board of Land and Natural Resources ("**BLNR**") which reviewed the environmental impacts in isolation from the cumulative impacts of the proposed Wai`ale development.

12. *Ninth,* The Sports Complex is part of one or more larger government projects, and DLNR's attempt to proceed based on nothing more than an EA constitutes illegal segmentation under HEPA. The State Defendants acknowledge that the Sports Complex is part of the Lt. Governor's Sports Development Initiative, which is intended to expand development of sports venues throughout the State, thus having significant cumulative impacts that have not received the necessary environmental review, ***through the required EIS***, including the Sports Complex. Further, three "regional parks" have been recently proposed by the County and State Defendants for Central Maui but have yet to receive appropriate ***comprehensive*** review under HEPA with respect to the significant impacts associated with this concentration of parks proposed for intensive use on already overburdened existing public infrastructure. On information and belief, these parks are part of a larger government project that requires an EIS before any phase or component of it may be initiated.

13. The above facts, as alleged in greater detail below, reveal an abuse of authority and a failure to follow the clear and unambiguous mandates of various environmental, planning and zoning laws. As a result, the public has been denied their rightful opportunity to comment and have a meaningful voice in the process. As a further result, DLNR's Sports Complex uses have avoided scrutiny by the elected County Council members who would have the *sole and exclusive* discretion to ultimately approve or disapprove amendments to the Maui Island Plan, the WK Community Plan, as well as changes in zoning.

14. MLN has sought from County and State Defendants, but been denied, early and efficient resolution. On July 12, 2014, MLN served the State Defendants with a cease and desist letter, a copy of which is attached hereto as **Exhibit "A" ("C&D Letter")**, which letter was simultaneously served on the County. The C&D Letter, along with exhibits attached thereto, gave the State Defendants and the County Defendants a detailed explanation of the violations of law identified herein, and demanded that DLNR, by August 1, 2014, agree to stay construction, pending conformance with the law.

15. DLNR has subsequently denied MLN's claims made in the C&D Letter and issued a press release that it will initiate construction of the Sports Complex ***on d September 2, 2014***. The State Defendants are apparently proceeding on the mistaken belief that they have a "good faith" basis to rely on the County Defendants' erroneous and abusive interpretation of the law. However, it is ***the developer*** who "assumes the risk" that the permitting agency is acting within its authority.[3] In this case, the Maui Planning Commission has as a matter of law exceeded its authority in issuing the special use permit, as further explained herein. Therefore, DLNR has no legitimate basis to proceed considering the extensive legal issues that have been brought to DLNR's attention by MLN.

16. MLN seeks the declaratory, injunctive and other relief from the Court as further set forth in the Prayer for Relief. MLN is entitled to injunctive relief (including preliminary

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[3] *See Brescia v. North Shore Ohana*, 115 Hawai'i 477, 500, 168 P.3d 929, 952 (2007), wherein the Court explained:

> [A]s this court noted in *Kepo'o v. Kane*, 106 Hawai'i 270, 295, 103 P.3d 939, 964 (2005), " '[a]gents of the government must act within the bounds of their authority; and one who deals with them assumes the risk that they are so acting.' " (quoting *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891, 894 (10th Cir.1991).).... It is well accepted that a public employee not vested with decision making authority may not bind the state in its exercise of the police power. *See Godbold v. Manibog*, 36 Haw. 206 (1942) (holding that a state cannot be estopped by the unauthorized acts or representations of its officers).

injunctive relief as will be presented to the Court by separate motion) because MLN's members have no adequate remedy at law and would suffer irreparable injury without the Court's intervention.

JURISDICTION, STANDING, AND PRIVATE RIGHTS OF ACTION

A. Jurisdiction and Venue

17. This Court has original jurisdiction to hear and adjudicate these claims pursuant to the following statutory and constitutional provisions: Hawai`i Revised Statutes ("HRS") § 46-4 (enforcement of county zoning);[4] HRS § 343-7 (actions under Hawai`i Environmental Policy Act ("HEPA")); HRS § 603-21.5(a)(3) (civil actions and proceedings); HRS § 603-21.7(a)(3) and (b) (suits in equity and related equitable relief), HRS § 603-21.9 (general powers to grant relief); HRS § 632-1 (declaratory judgment);[5] HRS § 661-1 (claims against state founded upon any statute of the State); Haw. Const., Article XI, § 9 (environmental rights); and other state law.

18. Venue is proper because the land at issue (the "**Property**") is located on the Island of, and within the County of, Maui, State of Hawai`i.

B. MLN Has Standing to Represent its Members Who Are Maui Lani Property Owners

19. MLN has an express corporate purpose of supporting, promoting and advocating for sustainable and appropriate community planning, and legal state and county zoning consistent therewith, for the Central Maui region of the Island of Maui.

20. Each and every member of MLN holds an ownership interest in real property located within Maui Lani. Maui Lani is a master planned community, located in Central Maui, on the Island of Maui, State of Hawai`i, which is intended for over 1,200 residential units.

21. MLN's members are directly and concretely affected by the acts and omissions of the Defendants (or any one or more of them), and/or have suffered injury in fact.

22. The Maui Lani community, as well as other communities in Central Maui will be directly and significantly affected by the Sports Complex uses.

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[4] *See Pavsek v. Sandvold*, 127 Hawai`i 390, 392, 279 P.3d 55, 57 (Ct. App. 2012), *as corrected* (Aug. 3, 2012) (holding HRS § 46-4 creates a private right of action in favor of a real estate owner directly affected by an alleged LUO zoning violation, but that the owner's action is subject to the doctrine of primary jurisdiction).

[5] "Controversies involving the interpretation of . . . statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right. HRS § 632-1.

23. The Maui Lani development includes three development projects that are adjacent to the Property, referred to as Traditions, Na Hoku and Legends.[6] These three projects account for almost 600 of the house lots to be located within Maui Lani, and these house lots are in close proximity to the Property, and the residents from these house lots must use the roads that will be subjected to the increased Sports Complex traffic. Almost sixty (60) of the house lots within these three projects share a common boundary with the Property.

24. Therefore, MLN has membership standing. *See, e.g., Sierra Club v. Dep't of Transp.*, 115 Hawai'i 299, 334, 167 P.3d 292, 327 (2007) ("An association may sue on behalf of its members—even though it has not itself been injured—when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.")

25. MLN also has organizational standing to sue for injury based on its own nonprofit corporation interests. *Id.*

C. MLN Has a Private Right of Action to Seek Declaratory Relief under HRS § 632-1

26. This Court has original jurisdiction to make binding adjudications of right with respect to, among other things, "[c]ontroversies involving the interpretation of ... statutes, municipal ordinances, and other governmental regulations...." HRS § 632-1. With respect to all claims for relief set forth herein, Plaintiff alleges that: (a) an actual controversy exists between contending parties; (b) antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation; (c) Plaintiffs has asserted a legal relation, status, right, or privilege in which Plaintiff has a concrete interest, which has been denied and/or violated by the defendants named herein (or any one or more of them); and, (d) no special form of remedy exists.

D. MLN Has a Private Right of Action to Challenge Zoning Violations under HRS § 46-4

27. This Court has original jurisdiction to adjudicate a claim that use of real property violates zoning. MLN, which represents members who are property owners who own lands in close proximity to, or abutting the Property, has a private right of action under HRS § 46-4. *See Pavsek v. Sandvold*, 127 Hawai'i 390, 392, 279 P.3d 55, 57 (App. 2012), *as corrected* (Aug. 3, 2012) (holding HRS § 46-4 creates a private right of action in favor of a real estate owner

[6] The location of Maui Lani, and these three development projects, and the Property, may be seen in **Exhibit D.**

directly affected by an alleged zoning violation, but that the owner's action is subject to the doctrine of primary jurisdiction). Under HRS § 46-4, MLN has no obligation to exhaust administrative remedies. *Pavsek, supra.* While under HRS § 46-4 the doctrine of primary jurisdiction applies, the Court has the obligation to assure that Plaintiff will not be unfairly disadvantaged in the process of evaluating its jurisdictional options:

> A trial court has discretion in fashioning an appropriate remedy when applying the primary jurisdiction doctrine. As an alternative to staying the proceedings pending administrative resolution of predicate issues, the court has the discretion to dismiss the case without prejudice. *However, dismissal is an appropriate remedy only if the parties would not be unfairly disadvantaged.*

Pavsek, 127 Hawai'i at 402, 279 P.3d at 67 (quoting *Jou v. Nat'l Interstate Ins. Co. of Hawaii,* 114 Hawai'i 122, 128, 157 P.3d 561, 567 (App. 2007)) (bold emphasis in original, other emphasis added, internal quotes omitted).

28. In this case, Plaintiff would be disadvantaged if the Court dismissed any of the claims for relief herein that are determined to cognizable only under HRS § 46-4 for the following reasons: (a) construction by DLNR is imminent and Plaintiff has no ability to seek ***injunctive*** relief through any administrative proceeding; (b) County Defendants before, and after receiving the C&D Letter, had an opportunity to make lawful decisions or to cure unlawful decisions with respect to DLNR's proposal and the Property but failed to do so; and (c) further efforts by Plaintiff to request a different outcome from County Defendants would be futile and would not comport with judicial efficiency.

E. MLN Has a Private Right of Action for its State Constitutional Claims

29. This Court has original jurisdiction over State constitutional questions, of which there are three: (a) State and County Defendants' acts and/or omissions have resulted in due process violations injuring MLN's members, which are protected by Art. 1, § 5 of the Hawai`i Constitution; (b) the special use permit ordinance MCC § 19.30A.060(H) is unconstitutionally and impermissibly vague and ambiguous thereby permitting unbridled discretion to the Maui Planning Commission; and (c) State and County Defendants' acts and/or omissions have resulted in violations to environmental rights of MLN's members, which are protected by Article XI, § 9 of the Hawai`i Constitution.

F. MLN Has a Private Right of Action to Challenge DLNR's Action for a Failure to Prepare a Supplemental EIS under HEPA

30. The LUC was obligated to prepare, and have the Hawai'i Office of Environmental Quality Control ("**OEQC**") publish, a declaration that a supplemental EIS was not necessary for DLNR's proposed Sports Complex uses. *See Unite Here! Local 5 v. City & County of Honolulu,* 123 Hawai'i 150, 174, 231 P.3d 423, 447 (2010) (explaining in a supplement EIS challenge that "[HRS] section 343–3 mandates the OEQC to inform the public of [an approving agency's] negative declaration upon receipt of such notification from the [approving agency]."

31. DLNR's EA, approved by BLNR, did not accomplish the statutory requirements required under HEPA. It was not intended to evaluate the need for a supplemental EIS to the Wai'ale EIS, and it was submitted to the wrong agency. Therefore, the public never had the notice it was entitled to under HEPA. *See Unite Here! Local 5, supra.*

32. For the supplemental EIS challenge, the judicial proceeding may be brought anytime within 120 days "after the proposed action is started." *Id.* (interpreting HRS § 243-7(a)). The proposed action has not started because construction of the Sport Complex has not yet been initiated.

G. MLN Has a Private Right of Action to Challenge DLNR's Action for Illegal Segmentation under HEPA

33. Under HAR § 11-200-7, a group of actions proposed by an agency shall be treated as a single action when the component actions are phases or increments of a larger total undertaking, or an individual project represents a commitment to a larger project. DLNR's Sports Complex is part of the Sports Development Initiative, and/or part of a governmental plan to build "regional sports facilities" on at least three properties in Central Maui, of which the Sports Complex is one component.

34. MLN has a timely private right of action under HRS § 343-7(a), which provides that an illegal segmentation challenge under HEPA may be brought any time within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted ***within one hundred twenty days after the proposed action is started.***

35. At the time of filing of this Complaint, none of the three proposed actions identified above have been started, and there has been no formal determination by an agency that

a statement is or is not required with respect to the Sports Development Initiative, and/or a government plan to build regional sports facilities throughout Central Maui.

H. MLN Has a Private Right of Action under Public Nuisance

36. MLN's members will suffer injury in fact from the use of the inadequate roadway system within Maui Lani by DLNR for the Sports Complex for potentially five years or more. MLN may seek declaratory and injunctive relief that will benefit its members and the public in general. Therefore, MLN has standing to bring, and a private right of action under, the doctrine of public nuisance. *Akau v. Olohana Corp.*, 65 Haw. 383, 389, 652 P.2d 1130, 1134 (1982) (holding "that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.")

THE PARTIES

37. Plaintiff MAUI LANI NEIGHBORS, INC. ("**Plaintiff**" or "**MLN**") is a Hawai`i non-profit membership corporation duly organized under the laws of the State of Hawai`i. MLN's corporate purpose includes supporting, promoting and advocating for sustainable and appropriate community planning, and legal state and county zoning consistent therewith, for the Central Maui region of the Island of Maui. MLN's members consist of property owners within the Maui Lani master planned community, located in Central Maui, on the Island of Maui, State of Hawai`i. At the time of filing this Complaint, MLN consists of over one hundred (100) members who represent over sixty (60) lots located within Maui Lani. Landowners within Maui Lani continue to enroll as members in MLN. Therefore, MLN's membership is increasing, and will continue to increase after the filing of this Complaint.

38. Defendant STATE OF HAWAI`I ("State") is a State of the United States of America, under which the other State Defendants, identified immediately below, serve.

39. Defendant DLNR is the department of the State charged with the obligation to manage, administer, and exercise control over public lands, including parks. HRS § 171-3.

40. Defendant STATE OF HAWAI`I BOARD OF LAND AND NATURAL RESOURCES ("**BLNR**") is the executive board of DLNR, and as such makes key decisions for DLNR, including decisions related to public lands, including parks.

41. Defendant WILLIAM AILA JR. ("**BLNR Chairperson**") is the chairperson of BLNR, and is assigned discretion to make certain decisions on behalf of DLNR and to implement decisions made by BLNR, including decisions related to public lands, including parks.

42. The State, DLNR, BLNR, and the BLNR Chairperson are collectively referred to in this Complaint as the "**State Defendants**".

43. Defendant COUNTY OF MAUI ("**County**") is a political corporation subject to suit pursuant to HRS § 46-1.5(22), and also subject to the delegation of certain county powers, and the limitations therein, as set forth in HRS Chapter 46.

44. Defendant DEPARTMENT OF PLANNING, County of Maui ("**Planning Department**"), is directly supervised by the Mayor of the County of Maui, Maui County Charter § 7-5(1), and consists of, among other agencies and persons, the Planning Commission and the Planning Director, and is charged with carrying out, facilitating or implementing the obligations of the Planning Commission and the Planning Director, including those obligations relating to the County General Plan, the Maui Island Plan, the Directed Growth Plan and the various community plans for the County, including the WK Community Plan.

45. Defendant MAUI PLANNING COMMISSION ("**Planning Commission**") is a part of the Planning Department, has certain obligations to carry out with respect to review and recommendations on the County Planning Documents, and has the obligation to review and approve or reject special use permits pursuant to Maui County Code ("**MCC**") § 19.510.070.

46. Defendant WILLIAM SPENCE ("**Planning Director**") is named in his official capacity only, and is the Planning Director of the Planning Department, and, among other powers and duties, he is the administrative head of the Planning Department, serves as the chief planning officer of the County, and is the technical advisor to the Mayor of the County of Maui, the Maui County Council and the Planning Commission on all planning and related matters, and performs such other duties and functions as shall be required by law or as shall be assigned by the Mayor of the County of Maui, Maui County Charter § 8-8.3.

47. The County, the Planning Department, the Planning Commission, and the Planning Director are collectively referred to in this Complaint as the "**County Defendants**".

48. The State Defendants and County Defendants are collectively referred to herein as "**Defendants**".

49. Additional Defendants John Does 1-10, Jane Does 1-10, and Doe Partnerships, Corporations, Governmental Units or Other Entities 1-10 (collectively, "Doe Defendants") are persons or entities who may be liable to Plaintiff or who may have an interest in the matter or issues pending, whose identities and capacities are presently unknown to Plaintiff. Plaintiff has reviewed the permits, records, state and federal statutes, and other documents, but is unable to ascertain whether or not all parties liable to Plaintiff are named therein. Plaintiff will identify such Doe Defendants when their names and capacities are ascertained. Plaintiff is informed and believes and thereon alleges that some of these Doe Defendants are, and at all times relevant herein, were, in some manner presently unknown to Plaintiff engaged in and/or responsible for the intentional and/or negligent acts, breaches and/or omissions alleged herein, and/or were in some manner responsible for the damages to Plaintiff and the public, as alleged herein.

FACTUAL ALLEGATIONS

A. The Property and its Relationship to Maui Lani and the Wai'ale Project

50. The Sports Complex will be located on a 65.378 acre parcel located in Central Maui recently designated by the County as tax map key number (2) 3-8-007:104 (the "**Property**").

51. The Property is immediately adjacent to the Maui Lani project where MLN's members reside and own property.[7]

52. For over a decade, A&B and other developers have been planning to develop, or have been developing, much of the land in Central Maui.

53. One of the projects that has been in the process of being developed in Central Maui is Maui Lani, a 1,000 acre master planned community that includes over 1,200 single family homes, a golf course, a school, as well as commercial uses.[8] The southeastern portion of Maui Lani contains the three residential projects referred to as Traditions, Legends and Na Hoku, which developments contain almost 600 house lots. Most of the 600 house lots have already been developed with homes, and of these homes, almost sixty (60) immediately abut the Property.[9]

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[7] *See* Exhibit 1 of C&D Letter (**Exhibit "A"**) (Central Maui Regional Park Site Plan, dated 3/8/2013).

[8] *See* Exhibit 4 of C&D Letter (**Exhibit "A"**) (showing general location of Maui Lani and location with respect to Wai'ale project).

[9] *See* **Exhibit "D"** (map identifying parts of the Maui Lani Development, including Traditions, Legends and Na Hoku, and also showing the general location of the Property).

54. While the Maui Lani project was being developed over the last decade, A&B initiated work on developing the land immediately south of Maui Lani (the "**Wai`ale**" project), which is intended for 2,550 residential units, commercial areas and recreational areas.[10]

55. The Wai`ale project incorporates two contiguous land areas separated by Waiko Road, which runs east-west (collectively the "**Wai`ale Land**").[11] The total acreage identified by A&B for the Wai`ale project at its inception was 545 acres. Of the 545 acres, a little over 422 acres of land is located immediately north of Waiko Road ("**North Wai`ale Land**"). A little over 122 acres of land is located immediately south of Waiko Road ("**South Wai`ale Land**").[12]

56. The Property is located within, and is part of, the North Wai`ale Land.

57. The Property is located within, and is part of, the proposed "**Wai`ale**" project.[13] The lands that are part of the Wai`ale project have been the subject of only ***initial*** review and entitlements, and many more years of assessment and review have been acknowledged to be necessary, both by A&B and by the County and the State.

B. Adoption of the Wailuku-Kahului Community Plan (2002)

58. State and County laws require the County to develop, adopt and follow a County General Plan, which is separated into specific parts, including the Maui Island Plan and the community plans for respective parts of Maui County, including the one that is relevant here, the WK Community Plan.

59. The Maui Island Plan and the WK Community Plan went through years of planning, and included contributions from the community, the County, the affected landowners, and the State.

60. The County General Plan, the Maui Island Plan and the respective community plans are, by State and County law, intended to be the bedrock for land use decision making in Hawai`i.

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[10] *See* Exhibits 3, 4 and 5 of C&D Letter (**Exhibit "A"**) (Wai`ale maps). *See also* Exhibit D (map of Maui Lani project).

[11] *See* Exhibit 3 of C&D Letter.

[12] *See* Exhibits 3 and 4 of C&D Letter.

[13] *See* Exhibit 4 of C&D Letter (**Exhibit A**) (regional location map showing Wai`ale and Maui Lani); Exhibit 5 of C&D Letter (**Exhibit A**) (conceptual community master plan map for Wai`ale, including the Property).

61. Amendments to the Maui Island Plan and the community plans are required where a proposed land use would be inconsistent with specific designations made with respect to specific properties therein.

62. The most recent version of the WK Community Plan was adopted by the County Council in 2002.

63. The Property lies within the area governed by the WK Community Plan.

64. The WK Community Plan specifically designates the Property for "Agriculture."

65. The County is initiating, or will soon initiate, a comprehensive update process for the WK Community Plan, which is not anticipated to be complete for a number of years, but which will, among other things, include implementation of the work accomplished through the Maui Island Plan.

C. Initiation of Maui Island Plan (Early 2000s)

66. After the adoption of the WK Community Plan, the County and the community initiated work on the Maui Island Plan ("**Maui Island Plan**"), which would carry on for about a decade before its adoption in December of 2012.

67. The Maui Island Plan, through its Chapter 8, entitled the Directed Growth Plan, included for the first time in Maui County history urban growth boundaries, as well as designated green spaces for open space, buffers and parks.

68. By late 2011, the urban growth boundaries, greenways, and other planning designations were being mapped in tentative form. However, the designations continued to be debated, including the specific classified uses for each designation.

69. By the time of adoption of the Maui Island Plan by the County Council in 2012, some of the tentative designations and classifications would change. Relevant to this action, the location of green spaces within Wai`ale would change, and the designation of which green spaces would be designated for "regional" and "community" parks would change. (The adopted version of the Maui Island Plan is described in allegations further below.)

D. The Wai`alc Final Environmental Impact Statement (November 2011)

70. In or about 2010, A&B initiated work on an environmental impact statement for the Wai`ale master planned community, including all parts of the Wai`ale Land.

71. On November 4, 2011, the Hawai`i State Land Use Commission ("**LUC**") determined the Wai`ale Final Environmental Impact Statement ("**FEIS**" or "**Wai`ale FEIS**") to be adequate.

72. The FEIS specifically identified the Property as being part of the Wai`ale master plan community.

73. The FEIS expressly informed decision makers that all of the Wai`ale Land, including the Property, would go through a change in zoning, specifically a change from Agricultural to Project District.

74. The FEIS expressed to decision makers that the Wai`ale project was intended to be consistent with the Maui Island Plan.

75. The FEIS identified a need for an open space buffer between Maui Lani and Wai`ale.

76. The FEIS included a preliminary engineering report ("**PER**") for the Wai`ale project.

77. The PER included a plan for a retention basin, with a volume of 176 acre-feet, which would cover thirty-four (34) acres of land area. The retention basin was designed to handle all of the surface water runoff calculated to be created from the 422-acre North Wai`ale Land. The retention basin was designated to be sited within the Property.[14]

78. The PER in the FEIS included certain build out assumptions for the Wai`ale project that were made in order to conclude that drainage from the project would be less in its developed state than existed in its undeveloped state.

79. The PER did not assume that the Property would be developed with ***more than eight (8) acres of hardened surface area***, as would result from development of DLNR's Sports Complex, based on DLNR's subsequent engineering report.

E. The State District Boundary Amendment (June 2012)

80. At the same time that A&B was preparing the Wai`ale FEIS, A&B also petitioned the LUC for a State district boundary amendment, pursuant to HRS Chapter 205, from State "Agriculture" to State "Urban" for all of the land designated for the Wai`ale project, including the Property (the "**Petition Area**"). The petition was filed by A&B on August 25, 2010 but would not be approved until 2012.

[14] *See* Exhibits 3 and 10 of PER, attached to Wai`ale FEIS, and attached hereto as **Exhibit "C"**.

81. Throughout the application process and the petition hearing, A&B—consistent with its representations in the EIS—identified the Property as being part of the Wai`ale project, and therefore part of the "**Petition Area**" that was being evaluated by the LUC for the district boundary amendment. A&B also represented to the LUC that the Property would be a critical part of the Wai`ale project, especially with respect to its use as a ***buffer*** between Wai`ale and Maui Lani, as well as its importance as the site for a retention basin to accept surface water runoff from a 357 acre portion of the Wai`ale development.

82. To assure consistency with County planning documents, A&B also represented at the LUC hearing that it would obtain ***for the entire Petition Area*** an amendment to the Maui Island Plan, as necessary, after its adoption in final form by the County Council, as well as an amendment to the WK Community Plan, which A&B acknowledged was necessary.

83. A&B further represented that the ***entire Petition Area*** would be submitted to the County Council for a change in zoning, which would include ***a comprehensive evaluation*** of the impacts of the entire Wai`ale project, including an opportunity for appropriate County conditions. This evaluation process would, as A&B represented to the LUC, occur through the three-phase process that is necessary for a change in zoning to County "Project District."

84. A&B also made representations to the LUC through the Wai`ale EIS, which was accepted by the LUC. Notably, A&B made ***no impact assumptions*** with respect to the Property. Instead, A&B presented the Property as essentially a mitigation area—one that would: (a) provide an open space area that would provide a "***buffer***" between Maui Lani and Wai`ale; and (b) contain the massive retention basin designed to handle surface water runoff from 357 acres of the Wai`ale development.

85. At the hearing on A&B's district boundary amendment petition before the LUC, A&B representatives, as well as the Planning Director emphasized to the LUC that decisions with respect to the park uses had not yet been made and would not be made and evaluated until the County initiated the comprehensive review process for the WK Community Plan, or as would occur during the three-phase change in zoning process to Project District.

86. Based on A&B's representations, the LUC re-designated the 545-acre Wai`ale Land from State Agriculture to State Urban by granting a state district boundary amendment ("**DBA**"). This DBA was granted through Findings of Fact, Conclusions of Law, Decision and Order, filed by the LUC on June 21, 2012 ("**LUC D&O**").

87. The conditions established by the LUC, which are part of the LUC D&O encumber the entire Petition Area (which includes the Property), are recorded on title, and run with the land. Those conditions are binding on A&B and its successors and assigns, including the current owner of the Property, the State through DLNR.

88. Among those conditions in the LUC D&O is the obligation of the landowner to proceed "***in substantial compliance***" with the representations made by the petitioner, A&B, during the LUC proceedings.

F. The Maui Island Plan (December 2012)

89. The Maui Island Plan was adopted by the County Council in December 2012.

90. The Maui Island Plan through its Directed Growth Plan identifies both a "community park" and a "regional park" for Central Maui, and provides maps showing the specific location for the community and regional parks.[15]

91. Specifically, the Maui Island Plan provides a detailed explanation of the need for a *passive* recreation *community* park, which park shall be located on the north side of Waiko Road (*i.e.*, the North Wai`ale Land), while providing for a "Central Maui Regional Park" located south of the South Wai`ale Land.

92. The Maui Island Plan explains the passive recreation community park will help provide buffer for the Maui Lani residents and help mitigate the impacts of the residential and commercial uses planned for the Wai`ale Project.

G. The County's Property Purchase from A&B for the Central Maui Regional Park Purchase (September 2013)

93. In September 2013, the County purchased 209 acres from A&B for the express purpose of developing it as a regional park. This 209 acre parcel is south of Waiko Road and south of, but immediately abutting, the South Wai`ale Land.[16]

94. The County's purchase of this land for Central Maui's *regional* park is consistent with the Maui Island Plan, which designates the location of the regional park *south* of Waiko Road.[17]

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[15] *See* Exhibit 9 of C&D Letter (providing map excerpt from Maui Island Plan).

[16] *See* Exhibit 7 of C&D Letter (**Exhibit A**) (showing the approximate boundaries of the 209 acre parcel purchased by the County). *Compare* to Exhibit 9 of C&D Letter (showing map from Maui Island Plan designating the same property for the "Central Maui Regional Park" but showing a "Community Park" designated for the Property).

[17] *See* Exhibits 6 and 9 of the C&D Letter (**Exhibit A**).

95. Unlike the Property, the 209 acres purchased by the County meets the County's 100-acre minimum lot size requirement for a "PK-3 Regional Park District."[18]

H. The Environmental Assessment for Sports Complex (June 2013)

96. In or about 2012, DLNR initiated work on an environmental assessment for the Sports Complex.

97. On June 23, 2013, the State of Hawai'i Office of Environmental Quality Control ("**OEQC**") published DLNR's finding of no significant impact ("**FONSI**") on the *Central Maui Regional Park Final Environmental Assessment* ("**Sports Complex FEA**" or "**FEA**").

98. DLNR identified BLNR as the accepting authority for the FEA. On October 11, 2013, BLNR accepted the FEA as final.

99. The FEA proposed to use the Property for, among other things, four[19](4) soccer fields; nine (9) baseball/softball fields, lights for night time playing; over eight (8) acres of hardened surface area consisting of roads and parking for 700 vehicles and related curbs and gutters; multiple restroom facilities; concession stands.

100. The FEA also explained a 5.8 acre storm water retention basin was planned to accommodate surface water runoff from the Sports Complex.[20]

101. However, another section of the FEA further explains that **A&B's** retention basin that was preliminarily described in the Wai'ale FEIS would be a "key component" of DLNR's proposed development:

> A large drainage detention basin (to be constructed by the Wai'ale developer) in the northeastern corner of the park ***is also a key component of this design***, which will allow for the retention of a larger amount of runoff, an estimated ***176 acre-feet, from the Wai'ale master planned community.***[21]

102. In its EA, DLNR failed to inform the public or decision makers about the fact that the Sports Complex was part of a larger State action, the Sports Development Initiative.

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[18] *See* MCC § 19.615.040; *see also* Exhibit 8 of C&D Letter (providing portions of relevant parts of the MCC).

[19] For reasons not known at this time, subsequent to filing the Sports Complex FEA, DLNR revised its proposal from four soccer fields to three.

[20] FEA at 5 (emphasis added).

[21] FEA at 7 (emphasis added). *See also* FEA at 9 (explaining the retention basin will be constructed "by the Wai'ale developer"); FEA at 32 ("[A] stormwater retention basin will store stormwater and help to mitigate sediment loads in runoff from the Wai'ale development to the south.).

I. Announcement of the Sports Development Initiative (Oct. 2013)

103. On October 11, 2013, the same day BLNR approved the EA, the Lt. Governor confirmed the Property was part of the Sports Development Initiative during an interview with news service *Maui Now*:

> With our new [Sports Complex] facility, we will be able to host hundreds of ***off island*** families and provide a boost to our local businesses," he stated at the time. . . .
>
> Once completed, ***the park could serve as a venue to host local, statewide, national, and international sporting events***. It has the potential to be a ***revenue generator*** for Maui and the state," said Tsutsui.[22]

104. On October 15, 2013, Governor Neil Abercrombie (the "**Governor**") held a press conference to announce a new "Sports Development Initiative." According to the official press release, the Governor appointed the Lt. Governor to "spearhead" the Initiative.

105. The press release explained that the purpose of this Initiative is "to diversify our visitor industry and generate more revenue for our state."

106. The Governor issued an official press release, dated October 15, 2013, regarding the Sports Development Initiative, and explained therein that:

> [T]he initiative will identify, promote and engage opportunities to establish Hawaii ***as a premier sports destination for professional, amateur and youth athletics***. The improvement of current facilities and development of world-class, state-of-the-art venues are also part of the initiative, intended to attract sporting events and athletic training opportunities not ***only on Oahu but throughout the state.***[23]

107. A October 15, 2013 Star-Advertiser reported as follows:

> ***Facilities improvement will be a major piece*** of the state's newly formed Sports Development Initiative, said Lt. Gov. Shan Tsutsui, who will lead the effort. Its function is to coordinate efforts throughout Hawai`i to improve the state's sports ***industry***. . . . The initiative includes working with the [Hawai`i Tourism Authority] in negotiations with the NFL for the Pro Bowl, as we as possible preseason games, Tsutsui said. . . . Abercrombie said the initiative will be ***all-encompassing*** . . . . There will also be an ***emphasis on hosting new events.*** "We [the State] can be an anchor, not just a crossroad or a bridge," Abercrombie said. "Everything from surfing to rugby to baseball. ***International in scope.***"

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[22] *See* http://mauinow.com/2013/10/11/breaking-4-7-m-released-for-central-maui-regional-park/ (emphasis and bracketed material added).

[23] *See* http://governor.hawaii.gov/blog/lt-gov-tsutsui-to-lead-new-sports-development-initiative/ (emphasis added).

(Emphasis and bracketed material added, ellipses denotes omitted content).

108. A November 26, 2013, Maui Now news article reported as follows:

> Lt. Governor Shan Tsutsui of Maui returned from a week-long trip to Korea, where he discussed economic cooperation and his Hawai`i Sports Development Initiative. . . . The [L]t. [G]overnor . . . met with the Korea Baseball Association to discuss its participation in an amateur youth baseball exchange, possibly in the summer of 2014. . . .

109. A June 25, 2014, Hawai`i News Now news story reported as follows: "Since taking on the [Lt. Governor] position, Tsutsui worked on initiatives such as . . . the Hawaii Sports Development initiative -- aiming to build a thriving sports industry in Hawaii."

110. The State has failed to prepare an EIS for the Sports Development Initiative.

J. Subdivision of the North Wai`ale Land (December 2013)

111. On October 24, 2013, the County granted A&B final approval for a consolidation-resubdivision of the North Wai`ale Land through Subdivision File Number 3.2226, entitled the "Maui Lani Subdivision." The approved subdivision includes "Lot 12-A-3," which delineates the boundaries of the 65.378 acre Property. Lot 12-A-3 has recently been designated by the County as tax map key number (2) 3-8-007:104.

112. During the subdivision process, the County did not require, among other things, consistency with the Maui Island Plan and the WK Community Plan, a Traffic Impact Analysis Report before the change in zoning, a change in zoning, an agreement with the State Department of Transportation before permitting any part of the Wai`ale project to proceed, or roadway improvements, all as were required under the LUC D&O.

K. Special Use Permit Hearing (March 25, 2014)

113. On October 10, 2013, DLNR applied to the Planning Commission ("**Planning Commission**") for a County Special Use Permit ("**SUP**") for a "regional park."

114. On March 25, 2014, the Planning Commission held a short hearing on the SUP application and approved the Sports Complex.

115. The Planning Director, acting on behalf of the Planning Commission, filed the Planning Commission's "Findings of Fact, Conclusions of Law, and Decision and Order" (the "**MPC D&O**"), dated April 7, 2014.

116. The MPC D&O explained that DLNR was requesting a County Special Use Permit to construct the various sports complex and retention basin infrastructure previously alleged herein. MPC D&O at 2.

117. The MPC D&O identified MCC § 19.510.070, entitled "Special Use Permits," as the basis of the Planning Commission's authority to grant the permit. The MPC D&O concluded that the Planning Commission could permit the Sports Complex on land zoned as Agricultural because "playing fields, accessory buildings and structures" are listed as a special use in the Agricultural District, and may be permitted through a SUP. *Id.* at 14.

118. The MPC D&O confirms that the Maui Planning Commission was expressly approving the 176 acre-feet retention basin identified in the PER in the Wai`ale FEIS, which was purportedly designed to handle all of the surface water runoff from the North Wai`ale Land after it was fully developed as part of the Wai`ale master plan:

> "The large drainage detention basin will replace the temporary retention [sic] basin ***and is also a key component of the park design***. The drainage detention basin with an estimated 176 acre-feet capacity, will allow for a larger amount of runoff from the park ***as well as the Waiale development***."

Id. at 16 (emphasis added).[24]

119. The MPC D&O stated that under the SUP rules the Planning Commission needed to find the Sports Complex uses, including the retention basin, were consistent with the Maui Island Plan. *Id.* at 9, 12. With respect to this requirement, the MPC D&O declared the uses were consistent. *Id.*

120. However, the MPC D&O fails to even acknowledge the specific parts of the Maui Island Plan, including maps, which specifically designated and classified the Property for a passive "Community Park," and designated an entirely different 209 acre parcel of land south of the Wai`ale Land for a "Central Maui Regional Park."

121. The MPC D&O acknowledged that the WK Community Plan designates the Property for Agriculture, and that the Maui Planning Commission has an obligation to assure consistency with community plans. *Id.* at 12. However, the MPC D&O nonetheless states that the

[24] The MPC D&O sometimes refers to a *detention* basin, as here in this quote, even though use of that term is inconsistent with the PER in the FEIS and the language provided in the FEA, which refer to a *retention* basin. Detention basins and retention basins work on entirely different hydrology principles and have different potential impacts on the surrounding area.

Sports Complex uses, including the retention basin, are consistent with the Agriculture designation.

122. The MPC D&O also acknowledged that the intersection that would be used by the Sports Complex within Maui Lani was already operating at the worst possible level of service, which is "LOS F." The D&O also acknowledged that traffic would increase at this intersection with the development of the Sports Complex. *Id.*

123. However, the MPC D&O nonetheless concluded that the Sports Complex could meet MCC § 19.510.070(B)(5), *i.e. that:* "The proposed project will not adversely impact the social, cultural, economic, environmental, and ecological character and quality of the area."

L. DLNR's Post-Approval Impact Reports (April 2014)

124. Subsequent to obtaining a finding of no significant impact on the Sports Complex FEA, DLNR made public three impact reports regarding the Sports Complex uses: a traffic impact report; a noise report; and, a light report.

125. DLNR did not explain why these were not provided during the environmental assessment process.

126. The noise and impact reports both recognize and identify *significant* impacts to Maui Lani landowners from noise and traffic. The light report fails to include an analysis for lay persons.

M. Conveyance of the Property from A&B to DLNR and Grant of Easements in Favor of A&B (June 26, 2014)

127. On June 26, 2014, A&B and DLNR executed and recorded with State of Hawai`i Bureau of Conveyances a "Warranty Deed with Reservation of Easements Covenants, Reservations and Restrictions" as Document No: A-52900488 (**"Deed"**).

128. The Deed conveyed the Property from A&B to DLNR subject to twenty-one (21) easements, of which seven (7) were recorded at the same time as the Deed was recorded.

129. The Deed and the seven (7) easements included a map showing the Property and the location of the easements on the ground. A true and correct copy of that map is attached hereto as **Exhibit "F"**, which map shows that a significant portion of the Property is encumbered by easements in favor of A&B specifically for the benefit of the Wai`ale Property and the Wai`ale master plan.

130. Among the seven (7) easements were Easements 3B, and Easements 4 and 5, which were "for drainage purposes, including the free flowage of storm water runoff, and the

installation of drainage equipment, including but not limited to inlet headwalls, outlet headwalls, drain inlets, storm drain manholes, underground pipes, cut-off ditches (open channels), drainage basins, roadside swales, drywells, spillways, pipe arch culverts and circular culverts (collectively, the "Drainage Systems") and access thereto."

131. The Easements 4 and 5 include specific agreements between DLNR and A&B with respect to A&B's continuing rights to use the easements for drainage purposes for the Wai`ale project. The language shows that A&B reserved the right to shed surface water from the North Wai`ale Land to the same extent as specified in the PER attached to the FEIS, and as represented to the LUC during the petition for the DBA.

132. Easements 4 and 5 prohibit DLNR from using the Property in any way that would affect A&B's drainage and retention basin rights.

133. Easements 4 and 5 provide that DLNR and A&B will cooperate in the construction of A&B's "drainage systems," and that DLNR would ultimately be required to connect the Sports Complex drainage system with A&B's drainage system.

134. In addition, Easements 4 and 5 provided that A&B would have the exact same volume of the retention basin identified in the PER in the Wai`ale FEIS (176 acre-feet). However, the easements explain that any additional retention basin volume needed by DLNR for the Sports Complex would need to be developed ***in addition*** to A&B's reserved drainage rights within the Property for the Wai`ale project.

135. The easements further provided that DLNR "shall be solely responsible to develop the Burdened Property in a manner that is compatible with the Drainage Systems."[25]

N. MLN's Efforts to Obtain a Voluntary Stay from DLNR (July/August 2014)

136. On July 12, 2014, MLN served DLNR, the County and A&B with the C&D Letter pursuant to HRS § 607-25. The C&D Letter, plus accompanying exhibits, gave the State Defendants and the County Defendants a detailed explanation of the violations of law identified herein. The C&D Letter demanded that DLNR, by August 1, 2014, agree to stay construction, pending conformance with the law. The C&D letter is attached hereto as **Exhibit "A"** and incorporated herein by reference.

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[25] Grant of Drainage Basin and Access Easements, dated June 26, recorded in the State of Hawai`i Bureau of Conveyances as Doc No: A-52900486, at 2-3 (emphasis added).

137. On July 31, 2014, DLNR ignored the C&D letter and held a publicized groundbreaking ceremony in support of the initiation of construction of the Sports Complex. The Governor, the Lt. Governor, and Maui County Mayor Alan Arakawa made public statements in support of the Sports Complex, and publicly rejected MLN's cease and desist demand. For example, when Tsutsui was asked about MLN's complaints, he stated: ". . . ***we are moving forward***. . . ."[26] The Governor publicly stated, "No-one will remember five years from now what the arguments were all about. . . ."[27]

138. On August 1, 2014, DLNR formally responded to the C&D Letter, and expressed its intention to continue development: "[T]he State of Hawai`i is committed to construction of the sports complex . . . . We have obtained all necessary approvals and we believe we have complied with all legal requirements for the park as planned. We will not be relocating the sports complex."[28]

139. Subsequently MLN, through its attorney, has made multiple requests for a voluntary stay by DLNR pending resolution, including through the C&D Letter. DLNR has rejected the requests. On August 29, 2014, DLNR issued a press release stating its intention to begin construction on September 2, 2014.

CLAIMS FOR RELIEF

COUNT I – VIOLATION OF ZONING; HRS § 46-4

140. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

141. The Sports Complex uses are not permitted by Title 19 ("Zoning") of the Maui County Code, and therefore violate zoning, as alleged herein.

A. General Allegations Common to Count I Claims

142. The scope of the County's power to zone land within Maui County is subject to the limitations set forth in HRS § 46-4 ("Zoning Enabling Statute").

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[26] *See* "Groundbreaking Held for Central Maui Regional Park, *Maui Now*, July 31, 2104, found at http://mauinow.com/2014/07/31/groundbreaking-held-for-new-central-maui-regional-sports-complex/.

[27] *Id.*

[28] *See* Letter of 8/1/2014 from W. Aila to T. Pierce, attached hereto and incorporated herein by reference as **Exhibit "B"**. *See also* Declaration of Tom Pierce, attached hereto.

143. The Zoning Enabling Statute requires counties to establish, and follow General Plans: "Zoning in all counties ***shall*** be accomplished *within the framework of a long-range, **comprehensive general plan*** prepared or being prepared to guide the overall future development of the county." HRS § 46-4 (Emphasis added); *cf.* HRS § 226-58 (the Hawai`i State Planning Act, which provides for long range planning for the State, and requires the counties to establish "general plans"); *see also Kauai Springs, Inc. v. Planning Com'n of County of Kauai*, 130 Hawai`i 407, 425, 312 P.3d 283, 301 (App. 2013) ("HRS § 46–4, inter alia, confers authority upon each county to zone, to adopt a ***comprehensive general plan*** to guide the overall future development of the county, and to exercise the zoning power by ordinance.") (emphasis added).

144. The Zoning Enabling Statute further requires the powers granted to the counties to be "construed . . . in such a manner as to promote the orderly development of each county . . . ***with a long-range, comprehensive general plan*** to ensure the greatest benefit for the State as a whole." *Id.* (emphasis added).

145. In order to assure proper implementation of the Zoning Enabling Statute, the Maui County Charter (2013) ("**Charter**") requires the County to prepare a General Plan through a specific process that includes state and public input, with final recommendations made by a citizen advisory committee that reports to the Maui Planning Commission, with that Commission making recommendations to the County Council. *Id.* § 8-8.5(1); § 8-8.5(5).

146. The Charter treats adoption of zoning laws the same as adoption of the General Plan and its subparts: both are *laws* created through adoption by ordinance affirmed by the County Council. *Id.* § 8-8.6.

147. MCC Chapter 2.80B establishes an hierarchy of planning efforts and related documents that all fall under the General Plan. These consist of: (a) "the Countywide Policy Plan;" (b) the Maui Island Plan," and, (c) the respective "Community Plans." MCC § 2.80B.030(A). *Cf.* MCC § 2.80B.030(B) ("The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the charter."); Charter § 8-8.5(6) ("The community plans generated through the citizen advisory councils and accepted by the planning commission, council, and mayor are part of the general plan.").

148. Pursuant to MCC § 2.80B.030(G), the Maui Island Plan contents must include a "Directed Growth Plan," which establishes the direction for growth for the next twenty-years,

including through specific designations and classifications made in writing and through map illustrations. MCC § 2.80B.030(G)(1)(b). The Directed Growth Plan "is the backbone of the [Maui Island Plan]." Maui Island Plan at 8-2.

149. The Maui Island Plan, the Directed Growth Plan and the WK Community Plan are not simply guidance documents. Instead, MCC Chapter 2.80B establishes that its express purpose is "to provide [County] plans that clearly identify provisions that are meant to be policy guidelines ***and provisions that are intended to have the force and effect of law***." MCC § 2.80B.010 (emphasis added).

150. County agencies may not disregard the express designations and classifications relating to specific properties that are set forth in county planning documents. Instead, ***all*** administrative actions of government agencies are expressly required to "conform to the general plan," and all the parts thereunder. MCC § 2.80B.030(B).

151. Further, all zoning within a county "must" assure consistency with general and community plans, and specific designations and classifications for Properties within those plans are "*binding on all county officials.*" *Kauai Springs,* 128 Hawai`i at 194, n.8, 284 P.3d at 967, n.8 (emphasis added).

152. The County's "Comprehensive Zoning Provisions," Title 19, Article II (MCC §§ 19.04.010 – 19.45) reiterate the mandates set forth in MCC 2.80B.030(G), and also reiterate the requisite standards set forth in the Zoning Enabling Statute: "The purpose and intent of this comprehensive zoning article is to regulate the utilization of land in a manner encouraging orderly development in accordance with the land use directives of the Hawaii Revised Statutes, the revised charter of the County, ***and the general plan and the community plans of the County***." MCC § 19.04.015(A) (Emphasis added). *Cf.* MCC § 19.04.015(C) ("The purpose and intent of this comprehensive zoning article is also to provide reasonable development standards ***which implement the community plans of the County.***") (emphasis added).

B. The Sports Complex Uses Violate Zoning Because They Are Inconsistent with the WK Community Plan Designation

153. Most of the North Wai`ale Land, which includes the Property, is specifically identified in the "Wailuku-Kahului Community Plan Land Use Matrix." This Matrix is attached to the WK Community Plan and identifies properties by tax map key number throughout the Wailuku-Kahului Community. The North Wai`ale Land is identified by tax map parcel number

(2) 3-8-007-101, which is the tax map key that used to be assigned for the unsubdivided 353.301 acres abutting Maui Lani before its recent subdivision.

154. The North Wai`ale Land, which includes the Property, is designated as "Agriculture" by the WK Community Plan, as it was adopted by the County Council in 2002.

155. The WK Community Plan's "Agriculture" designation for the Property has the force and effect of law.

156. The MCC, including the Comprehensive Zoning Provisions, requires consistency with the WK Community Plan where a property, such as here, is designated for a specific use.

157. DLNR's Sports Complex uses are inconsistent with the WK Community Plan and therefore constitute a violation of zoning, specifically, a violation of MCC Title 19.

C. The Sports Complex Uses Violate Zoning Because They Are Inconsistent with the Maui Island Plan

158. The Directed Growth Plan "is the backbone of the [Maui Island Plan]." Maui Island Plan at 8-2.

159. The Directed Growth Plan includes a specific section relating to the Wai`ale project. Maui Island Plan at 8-19 to 8-20. The section explains that "Wai`ale is the largest proposed town on the island, and the largest planned growth area proposed for the Wailuku-Kahului community plan region." Maui Island Plan at 8-19. Because of its size, the Maui Island Plan explains the importance of using greenbelts, open space and parks to prevent sprawl:

> To prevent sprawl and further urbanization of prime agricultural resource land, a hard edge must be maintained around Wai`ale Town. ***A network of greenbelts, open space, and parks will be utilized to contain urban development, maintain a clear distinction between existing*** communities and the new town, and to prevent urbanization of agricultural lands south of the site.

Id. (Emphasis added).

160. The Directed Growth Plan contains a very detailed discussion of "planned protected areas" for Wailuku and Kahului, which areas "include some of the island's most

treasured cultural, environmental, and recreational resources," and which areas "contain any number of irretrievable resources."[29]

161. The Directed Growth Plan explains that one of its purposes is to "promote the protection and availability of "passive and active recreational amenities" by identifying five categories of planned protected areas, namely: "preservation areas, regional parks, greenways, greenbelts, and sensitive lands." Maui Island Plan at 8-5.

162. The planned protected areas are identified in the Directed Growth Plan's protected areas map, Figure 8-2.[30] Maui Island Plan at 8-4. Significant here, the Directed Growth Plan delineates in or around Wai`ale four planned protected areas in its Figure 8-2, including a "Central Maui ***Community*** Park" area (also shown in the same light green) within the North Wai`ale Land, with a portion of that park abutting Maui Lani and Kuihelani Highway.

163. The Directed Growth Plan provides a matrix that, among other things, defines the basic "characteristics" of each of the five planned protected area categories. Importantly, the Directed Growth Plan tracks the definitions found in MCC Chapter.[31]

164. Specifically, the Directed Growth Plan adopts the exact same definition for "greenbelt" and "greenway" as set forth in MCC § 2.80B.020. In addition, the *park* category is defined very similarly to "park" in the MCC: "Land areas devoted to passive (picnic facilities and gathering areas) and/or active (including, but not limited to, bike paths, hiking trails, ball fields, and tennis courts) uses that serve recreational needs." Maui Island Plan at 8-5.

165. Finally, the Directed Growth Plan describes the specific intended uses, *respectively,* for the (1) Central Maui Community Park and (2) the Regional Park and County Facilities area, Maui Island Plan at 8-20, 8-25, as further summarized below.

166. *First*, the Directed Growth Plan notes that the regional and community parks for Central Maui are both "intended to maintain a significant amount of ***open space***," Maui Island

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[29] The Maui Island Plan (at 8-13) provides the following complete description of planned protected areas: Planned protected areas include some of the island's most treasured cultural, environmental, and recreational resources. These resources can come in the form of a coastal ridge, a burial ground, or an urban park. The planned protected area can be for the public's benefit and use, or to allow the natural habitat to exist in an unaltered state. The intent of the Protected Area is to provide one additional layer of protection to those areas that contain any number of irretrievable resources. The purpose and intent of each planned protected area is described after each planned growth area section.

[30] A copy is attached to the C&D Letter (**Exhibit "A"**) as Exhibit 6. See also Exhibit 9 of **Exhibit "A"** (map excerpt from Exhibit WC-1 of Maui Island Plan).

[31] Pertinent definitions are provided in Exhibit 8 to the C&D Letter (**Exhibit "A"**).

Plan at 8-25 (emphasis added), which, pursuant to the MCC, means a significant amount of the two areas must be "***essentially free of structures or impervious surfaces . . . .***" MCC § 19.04.040 (emphasis added). *See* **Exhibit 8** (providing this definition and others).

167. *Second*, the Directed Growth Plan clearly identifies for *active* recreation the regional park designated to be located ***south of the South Wai`ale Land.*** For example, it provides in one place: "A ***regional*** park will be provided to the ***South of Wai`ale*** to provide a clear separation between the new community and Ma`alaea, ***and to allow for the placement of active and passive recreational opportunities***, County baseyards and like County facilities." Maui Island Plan at 8-20 (emphasis added). And, it provides in another place that the ***southern*** "*Regional Park and County Facilities*" area "***should allow for the placement of sports fields*** with suitable topography for sports usage and may include an agricultural park and community gardens." Maui Island Plan at 8-25 (emphasis added).

168. However, the Directed Growth Plan does not designate the *community* park proposed within the North Wai`ale Land for active recreation. Instead, "A ***community*** park is . . . planned for the Wai`ale area to provide a ***clear separation*** between the new community and Maui Lani." *Id.* (Emphasis added). Consistent with this, the Plan says in another section: "The Central Maui ***community*** park will be established north of the Wai`ale planned growth area, proximate to a high concentration of existing and proposed residential and industrial uses, Pomaika`i Elementary School, and the primary employment center on the island." Maui Island Plan at 8-25 (emphasis added).

169. *Finally*, the Directed Growth Plan explains that the final boundaries, and the specific uses for each of the parks, would be finalized during the community plan update process and during the project review for Wai`ale: "The distinct boundaries of the park, ***specific location of the recreational uses***, and the ***precise amenities*** will be further defined during the [WKC] Plan update and the Wai`ale project review and approval process." Maui Island Plan at 8-25 (emphasis added). The WK Community Plan update has not started and/or is not yet complete, and A&B has not initiated a request for any of the entitlements it needs from the County for the Wai`ale Land.

170. The Maui Island Plan's passive Community Park designation and classification for the Property has the force and effect of law.

171. The MCC, including the Comprehensive Zoning Provisions therein, require consistency with the Maui Island Plan, and specifically designations and classifications set forth in the Directed Growth Plan therein.

172. DLNR's Sports Complex uses are inconsistent with the Directed Growth Plan, and thus the Maui Island Plan, and therefore constitute a violation of zoning, specifically a violation of MCC Title 19.

D. The Sports Complex Uses Violate Zoning Because They Violate MCC Chapter 19.30A

173. The County Council has designated the Property to be within the "Agricultural District."

174. Therefore, any use on the Property must comply with MCC Chapter 19.30A, which covers uses permitted within the Agricultural District.

175. Under MCC Chapter 19.30A, the only permitted uses are those permitted as: (a) "principal use" under MCC § 19.30A.050(A); *or* (b) an "accessory use" under MCC § 19.30A.050(B); *or* (c) a "special use" under MCC § 19.30A.060.[32]

176. The Sports Complex uses, including the retention basin, are not permitted as a "principal use" under MCC § 19.30A.050(A), which primarily relates to direct agricultural uses, such as raising livestock or growing crops. *See* Note 32 herein.

177. The Sports Complex uses, including the retention basin, are also not permitted under the "accessory uses" because accessory uses must be "***incidental or subordinate to, or customarily used in conjunction with a permitted principal use,***" MCC § 19.30A.050(B) (emphasis added), in this case a principal Agricultural use. *See* Note 32 herein. The uses intended for the Sports Complex and the retention basin are not intended to subordinate a principal agricultural use.

178. Finally, the Sports Complex uses are not permitted as "special uses" under MCC § 19.30A.06. Section MCC § 19.30A.060 covers a small assortment of uses that usually would take only a *small portion* of the surrounding agricultural land (*e.g.*, a telecommunications tower). *See* Note 32 herein.

179. A retention basin for a large master planned residential complex is not an identified special use under MCC § 19.30A.060.

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[32] *See* Exhibit 8 of C&D Letter (**Exhibit "A"**) (providing relevant sections of MCC § 19.30A).

180. The hardening of over eight (8) acres of land with structures, roads and vehicular parking, as proposed by DLNR through the Sports Complex project is not an identified special use under MCC § 19.30A.060.

181. The extensive *active* recreational structures and uses identified by DLNR through the Sports Complex project are not an expressly identified special uses under MCC § 19.30A.060.

182. The "playing fields, accessory buildings and structures" uses set forth in Subsection H of MCC § 19.30A.060 do not apply for the uses proposed by DLNR through the Sports Complex project, for among other reasons, the following.

183. The "playing fields, accessory buildings and structures" phrase is conditioned upon those structures being consistent with the "open land recreation uses" phrase which introduces Subsection H of MCC § 19.30A.060.[33]

184. The Sports Complex uses are not "open land recreation uses" because "open land recreation" is a defined term under the MCC that is *specifically limited to activities carried out in conjunction with scenic interests*. MCC § 19.04.040.

185. Scenic interests are not active recreational pursuits such as those proposed by DLNR. This is confirmed by the MCC, which provides separate definitions for "active recreation" and "passive recreation", which must be read to give context to the entire ordinance. Through its definitions, the MCC clearly establishes that "passive recreation," rather than "active recreation" activities occur on "open land recreation areas." MCC § 19.04.040.

186. In summary, the Sports Complex uses, including the retention basin for A&B's Wai`ale project are not permitted as principle, accessory or special uses under MCC § 19.30A, and therefore they violate MCC § 19.30A.

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[33] Subsection H provides in pertinent part:

> The following uses and structures shall be permitted in the agricultural district if a special use permit, pursuant to section 19.510.070 of this title, has been obtained . . . :
>
> > H. ***Open land recreation uses***, structures or facilities which do not meet the criteria of subsection 19.30A.050.B.11, ***including*** commercial camping, gun or firing ranges, archery ranges, skeet shooting, paint ball, bungee jumping, skateboarding, roller blading, ***playing fields, accessory buildings and structures***. . . . The following uses or structures shall be prohibited: airports, heliports, drive-in theaters, country clubs, drag strips, motor sports facilities, golf courses and golf driving ranges;

MCC § 19.30A.060. (Emphasis added).

E. The Sports Complex Uses Violate Zoning Because They Violate MCC § 19.510.070

187. MCC § 19.510.070, entitled "special use permits," sets forth the requirements that must be met for a planning commission to grant a special use permit.

188. MCC § 19.510.070(A) provides that "A special use permit shall comply with the provisions of this section and with the policies and objectives of the general plan and community plans of the county, the Hawai`i Revised Statutes, and the revised charter of the county." (Emphasis added).

189. As a matter of law, the Sports Complex uses cannot meet the compliance requirements of MCC § 19.510.070(A), for among other reasons, because: (a) those uses are inconsistent with the WK Community Plan; (b) those uses are inconsistent with the Maui Island Plan, including the Directed Growth Plan therein; (c) those uses cannot meet the requirements of MCC Chapter 19.30A relating to Agricultural Districts.

F. The Sports Complex Uses Violate Zoning Because They Violate the LUC D&O

190. The LUC D&O includes the Property within the "Petition Area" covered by the DBA, and therefore encumbers the Property through its conditions and other obligations placed on the landowner.[34]

191. The LUC D&O is recorded on title and it runs with the land, and is binding on A&B, and on A&B's successors and assigns, including DLNR as the new owner of the Property.

192. Condition 21 of the LUC D&O provides that the Wai`ale Land ***shall*** be developed "in substantial compliance with the representations" made by A&B's representatives during the DBA process.[35]

193. Any substantial deviation from the proposal made by A&B would be in violation of the LUC D&O.

194. A&B's representations to the LUC include those made in the Wai`ale FEIS. The FEIS includes the PER, which provided assumptions on hardened surface area for the North Wai`ale Land, and the related surface water runoff calculations. Any substantial deviation from those assumptions, or from the originally planned retention basin, would violate the terms of the LUC D&O.

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[34] *See* **Exhibit "E" (map from LUC D&O showing "Approved Petition Area").**

[35] LUC D&O at ¶ 21.

195. A&B also represented through the Wai`ale FEIS that the impacts related to the Wai`ale project, including the retention basin, would be further evaluated during subsequent land entitlement requests. These land entitlements, are, as confirmed by A&B, at minimum: (a) a request to the County Council for an amendment to the WK Community Plan changing the designation for the Wai`ale Land from Agriculture to Project District; (b) a request to the County Council for an amendment to the Maui Island Plan; and, (c) an application to the County Council for a change in zoning for the Wai`ale Land from Agricultural District to Project District.

196. Other representations of A&B made to the LUC were memorialized in the D&O as Findings of Fact ("FOF").

197. FOF ¶ 180 refers to A&B's representations with respect to the drainage plan and retention basins for the Wai`ale project, and concludes that based on A&B's design of the retention basin and other parts of the drainage system, stormwater runoff from the Wai`ale Land would result in "a decrease in runoff from existing conditions."

198. FOF ¶ 180 does not account for the more than eight (8) acres of hardened surface area that would result from development of DLNR's Sports Complex because the Sports Complex design had not been created when the surface water runoff assumptions were made by A&B's engineer.

199. Another representation made by A&B is memorialized in FOF ¶ 122, which expressly distinguishes between "passive recreational uses" and "active recreational uses" in its discussion of the four parks designated to be included within Wai`ale.

200. FOF ¶ 122 identifies for "active recreation" only the southern portion of the South Wai`ale Land, not the northern portion of the North Wai`ale Land where the Property is located.

201. This southern portion of the Petition Area identified in FOF ¶ 122 was shown as one of the parks in the Wai`ale project in the Wai`ale FEIS, which FEIS was presented by A&B to the LUC.[36]

202. Finally, A&B's representations to the LUC include those made through the oral testimony of its representatives during the hearing on the DBA petition.

203. Through the oral testimony, A&B confirmed an amendment to the WK Community Plan would be necessary for the 545 acre Petition Area, which includes *all* the land within the Wai`ale project, including the Property.

[36] This "southern portion of the petition area" is identified in Exhibit 7 of the C&D Letter (**Exhibit "A"**).

204. A&B also confirmed an amendment to the Maui Island Plan would be necessary for the Petition Area, if the final adopted version resulted in inconsistencies with A&B's proposed uses.

205. A&B also confirmed a three-phase change in zoning process would occur wherein the Petition Area would be subjected to careful scrutiny as the County Council evaluated whether to permit a change in zoning from Agricultural to Project District. *Cf.* MCC § 19.45.050 (providing the three phase processing procedure for Project District applications).

206. Thereafter, the LUC heard detailed testimony from the County Planning Director that further reinforced the above representations made by A&B.

207. The Planning Director confirmed that an amendment to the WK Community Plan would be necessary for the Petition Area.

208. The Planning Director further confirmed that the Maui Island Plan was in draft form and could possibly change before adoption by the County Council.

209. The Planning Director also emphasized to the LUC that the Maui Island Plan expressly provided that there would be additional evaluation of the "green park areas" identified in the Maui Island Plan that would occur during the comprehensive amendment process to the 2002 WK Community Plan, which was anticipated to begin sometime after adoption of the Maui Island Plan

210. The Planning Director explained to the LUC that the "green park areas" would also be evaluated during the change in zoning process.

211. While Condition 21 of the LUC D&O related to representations made by the Petitioner (A&B), Condition 5 required A&B to prepare a new traffic impact analysis report ("**TIAR**") *before* seeking any land entitlements, including a change in zoning.

212. All of the conditions in the LUC D&O are binding on DLNR as the successor in interest to a portion of the LUC Petition Area.

213. The Sports Complex uses proposed by DLNR violate the express conditions of the LUC D&O, including, but not limited to, the conditions set forth in the above allegations. MCC Title 19 (the Comprehensive Zoning Provisions) requires consistency with the LUC D&O, and therefore the Sports Complex uses violate zoning.

G. Conclusion with Respect to Count I Allegations

214. MLN requests relief against all named defendants herein consistent with the forgoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT II—DECLARATORY RELIEF THAT THE SPECIAL USE PERMIT IS VOID AS A MATTER OF LAW

215. A special use permit cannot be granted for a use that is neither permitted by law nor by zoning regulations. *See, e.g.*, 83 AM. JUR. 2D ZONING AND PLANNING XVIII (2014) § 814.

216. Where a permit is issued by a governing body in violation of an ordinance, even under a mistake of fact, it is void as a matter of law. *Id.* § 822.

217. A special use permit is strictly limited to those instances where the use has been "***expressly permitted by ordinance.***" *Neighborhood Bd. No. 24 v. State Land Use Comm'n ("Waianae Coast")*, 64 Haw. 265, 270-71, 639 P.2d 1097, 1101-02 (1982) (emphasis added).

218. As alleged above in Count I, the uses intended through the Sports Complex are *not* expressly permitted by the MCC.

219. As a matter of law, the Maui Planning Commission lacked the authority to grant a special use permit for the Sports Complex uses.

220. The special use permit granted to DLNR for the Sports Complex uses is void as a matter of law.

221. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT III—THE SPECIAL USE ORDINANCE IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS

222. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

223. Section 6 of the MPC D&O provided analysis and a conclusion that the Sports Complex uses (which include A&B's retention basin and over eight (8) acres of hardened surface area, and parking for 700 vehicles) were permitted on the Property even though it is part of the County Agricultural District. Specifically, the MPC D&O concluded the Sports Complex uses were specified as permitted special uses under MCC § 19.30A.060(H) because that provision includes the terms "playing fields, accessory buildings and structures."

224. MCC § 19.30A.060(H) provides in relevant part as follows:

> The following uses and structures shall be permitted in the agricultural district if a special use permit, pursuant to section 19.510.070 of this title, has been obtained . . .:
>
> H. ***Open land recreation uses, structures or facilities which do not meet the criteria of subsection 19.30A.050.B.11, <u>including</u>*** commercial camping, gun or firing ranges, archery ranges, skeet shooting, paint ball, bungee jumping, skateboarding, roller blading, ***playing fields, accessory buildings and structures.*** Certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, Hawai`i Revised Statutes. The following uses or structures shall be prohibited: airports, heliports, drive-in theaters, country clubs, drag strips, motor sports facilities, golf courses and golf driving ranges;

Id. (emphasis added).

225. The power to rezone land is within the exclusive purview of the County Council and may not be delegated. HRS § 46-4.

226. The language "playing fields, accessory buildings and structures" within MCC § 19.30A.060(H) is vague and ambiguous, gives unchecked, overbroad, and unbridled discretion to the Maui Planning Commission, and improperly confers legislative power on the Maui Planning Commission in violation of the Hawai`i Constitution and HRS § 46-4.

227. In addition, the language "playing fields, accessory buildings and structures" within MCC § 19.30A.060(H) is vague and ambiguous, and fails to give the public required notice of the intensity of uses that may be permitted by the Maui Planning Commission, and therefore violates Art. 1, § 5 of the Hawai`i Constitution, the due process clause. *See, e.g., Save Sunset Beach Coal. v. City & Cnty. of Honolulu,* 102 Haw. 465, 472-73, 78 P.3d 1, 8-9 (2003).[37]

228. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

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[37] The *Save Sunset Beach* explains:

> The usual presumption of validity may not be accorded spot zoning because of the absence of widespread community consideration of the matter. A determination of the use of a specific and relatively small parcel will affect only the parcel owner and the immediate neighbors. When that is the case, limited community interest will mean little or no public debate. ***This limited interest, in turn, elevates concern over whether the rights of the individuals affected are adequately safeguarded, and deference is inappropriate.***

(Emphasis in original; internal brackets and quotations omitted).

COUNT IV—DECLARATORY RELIEF WITH RESPECT TO INTERPRETATION OF PK-3 REGIONAL PARK DISTRICT

229. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

230. The recreational component of the Sports Complex use is declared by DLNR, the Planning Director and the Maui Planning Commission to be intended for a "regional park."

231. A regional park is a specific zoning district in the Maui County. *See* MCC § 19.615.040 (*PK-3 Regional Park District*) (which permits intensive active recreational activities as the principal use).[38]

232. A minimum lot size of one hundred acres is expressly required for a Regional Park District. MCC § 19.615.040(C)(1).

233. The Property cannot meet the minimum lot size requirement set forth in MCC § 19.615.040(C)(1) because it is only 65 acres in size.

234. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT V – VIOLATIONS OF HAWAI'I ENVIRONMENTAL POLICY ACT

235. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

236. As alleged in further detail below: (a) DLNR has an obligation to supplement the Wai'ale FEIS because the Sports Complex uses are part of the Wai'ale project, and the Sports Complex EA does not constitute as a supplementation for an EIS; and (b) State Defendants and/or County Defendants' actions or omissions constitute illegal segmentation of a larger project because the Sports Complex is part of a larger project, the Sports Development Initiative, and/or the Sports Complex is part of a larger plan to create a number of regional parks in Central Maui.

A. General Allegations Common to Count V Claims

237. The Hawai'i Supreme Court, quoting *Sierra Club v. Hawai'i Tourism Authority*, 100 Hawai'i 242, 327, 59 P.3d 877, 901 (2002) ("*Sierra v. HTA*") explained:

[38] *See* Exhibit 8 of C&D Letter (**Exhibit "A"**) (providing the text of these MCC sections, as well as the related definitions for "active recreation" and "passive recreation").

> The main thrust of HEPA is to require agencies to consider the environmental effects of projects before action is taken. It does so by providing a procedural mechanism to review environmental concerns. HRS § 343–1 (1993). The legislature explained that HEPA provides an "environmental review process [that] will integrate the review of environmental concerns with existing planning processes of the State and counties ***and alert decision makers to significant environmental effects which may result from the implementation of certain actions.***" HRS § 343–1. . . . Consequently, HEPA does not confer substantive rights or remedies. To insist that a prospective plaintiff demonstrate substantive standing pursuant to a statute that confers only procedural rights ignores the plain language . . . .

Superferry, 115 Hawai'i at 322, 167 P.3d at 315 (emphasis added).

238. HEPA is a cornerstone of the State's statutory protections of the environment. Its fundamental purpose is to ensure that state agencies fully and publicly examine the environmental impacts of certain actions before those actions proceed:

> In the "Findings and purpose" section, the legislature states its finding that "the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, ***cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.***" HRS § 343–1 (1993) . . . . The definition of FEIS describes that "[t]he initial statement [is] filed for public review" and that the final statement "is the document that has incorporated the public's comments and the responses to those comments." HRS § 343–2.

Superferry, 115 Hawai'i at 327, 167 P.3d at 320 (emphasis added).

239. Moreover, the Hawai'i Supreme Court has particularly emphasized that adherence to HEPA with respect to environmental review and planning: "[A]n environmental review process will integrate the review of environmental concerns ***with existing planning processes of the State and counties*** and alert decision makers to significant environmental effects which may result from the implementation of certain actions." *Sierra v. HTA*, 100 Hawai'i at 276, 59 P.3d at 911 (quoting from the HRS § 343-1).

240. HEPA establishes a framework for environmental review covering many categories of actions. *See* HRS § 343-5(a). These include actions that "[p]ropose the use of state or county lands or the use of state or county funds." *Id.* § 343-5(a)(1).

241. When an EIS is required, it means the applicant must prepare an extensive informational document disclosing "the environmental effects of a proposed action, effects of a

proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects." HRS § 343-2. "Effects" include ecological impacts, "such as the effects on natural resources and . . . affected ecosystems," and aesthetic, historic, cultural, ***economic, social, and health impacts, whether primary, secondary, or cumulative, and including impacts resulting from actions believed to be beneficial on balance.*** HAR § 11-200-2 (emphasis added).

242. The authority to accept a final statement rests with the agency initially receiving and agreeing to process the request for approval—in this case the LUC. HAR § 343-5(c). Acceptance of an EIS is a formal determination based on whether the statement "fulfills the definition of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement." HRS § 343-2; HAR § 11-200-23(a).

243. No development activity may commence without acceptance of a required FEIS, which "shall be a condition precedent to approval of the request and commencement of the proposed action." *Id.* § 11-200-23(d).

244. Process is the bedrock principle underlying HEPA. HEPA regulations recognize that "the EIS process involves more than the preparation of a document; it involves the entire process of research, discussion, preparation of a statement, and review." HAR § 11-200-14. This requires "at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for avoiding, minimizing, rectifying or reducing adverse impacts." *Id.* "An EIS is meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and a rationalization of the proposed action." *Id.*

B. Failure to Supplement

245. DLNR violated HEPA by failing to prepare a supplemental environmental impact statement ("**SEIS**") to the Wai`ale FEIS, which SEIS would need to be reviewed and approved by the LUC, which was the agency that reviewed and accepted the Wai`ale FEIS.

246. An EIS that has been accepted with respect to a particular action is usually qualified by certain "characteristics," identified by the HEPA rules to include: "the size, scope, location, intensity, use, and timing of the action, among other things." HAR § 11-200-26.

247. An EIS will no longer satisfy HEPA where it has changed "substantively in size, scope, intensity, use, location or timing, among other things." *Id.* Thus, the HEPA rules explain that: "If there is any change in any of these characteristics which may have a significant effect, the original statement that was changed ***shall no longer be valid*** because an essentially different action would be under consideration and ***a supplemental statement*** shall be prepared and reviewed as provided by this chapter." HAR § 11–200–2 (emphasis added). This language (*i.e.*, "shall") is mandatory, and neither DLNR nor any other agency has the discretion to provide an exception to the rule. *Cf. Unite Here! Local 5 v. City & County of Honolulu,* 123 Hawai`i, 150, 174, 231 P.3d 423, 447 (2010) ("HAR § 11–200–2 defines 'supplemental statement' as 'an additional ***environmental impact statement*** prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things'.") (emphasis added).

248. The Sports Complex uses have changed substantively in size, scope, intensity, use, location or timing, among other things, over the uses identified in the Wai`ale EIS.

249. Therefore, a SEIS is required to the Wai`ale EIS, which SEIS must be reviewed and accepted by the LUC because the LUC was the initial accepting authority.

C. Illegal Segmentation

250. HAR § 11-200-7 prohibits segmentation of a project; it instead requires all parts and phases of a project to be considered in an EA and EIS before any work commences on any portion of the project:

> A group of actions proposed by an agency or an applicant ***shall be treated as a single action*** when:
>
> (1) The component actions are ***phases or increments*** of a larger total undertaking;
>
> (2) An individual project is a ***necessary precedent*** for a larger project;
>
> (3) An individual project ***represents a commitment*** to a larger project; or
>
> (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

HAR § 11-200-7 (emphasis added).

251. The Hawai`i Supreme Court recently emphasized the importance of HAR § 11-200-7, and the harm to the public associated with segmentation or "piecemealing" of projects:

> Rules like HAR § 11–200–7 are meant to keep applicants or agencies ***from escaping full environmental review*** by pursuing projects in a piecemeal fashion. See [Office of Environmental Quality Control, State of Hawai'i, *A Guidebook for the Hawaii State Environmental Review Process* 6] at 19 [(2004)] ("The proposed action must be described in its entirety and cannot be broken up into component parts which, if each is taken separately, may have minimal impact on the environment. ***Segmenting a project in this incremental way to avoid the preparation of an environmental impact statement is against the law.***"); Kenneth A. Manaster & Daniel P. Selmi, 2 State Environmental Law § 13.10 (2006) (discussing the problem of "segmentation" or "piecemealing" of projects, including "situations ... in which the agency tries to mask the full nature of its project or divides up what is clearly a larger action into smaller pieces that will be implemented simultaneously," "where a private applicant plainly has definite plans for additional, related projects in the future," or where "a project unquestionably will give rise to later, secondary actions by other individuals[.]").

Sierra Club v. Dep't of Transp., 115 Hawai`i 299, 338, 167 P.3d 292, 331 (2007) (emphasis and bracketed material added).

252. Under HAR § 11-200-7, a group of actions proposed by an agency shall be treated as a single action when the component actions are phases or increments of a larger total undertaking, or an individual project represents a commitment to a larger project.

253. Upon information and belief, and as alleged herein, the Sports Complex violates HEPA's requirement for comprehensive review of government project because it is (a) part of a larger project relating to the State's Sports Development Initiative, which relates to State developments Statewide, and/or (b) part of a government regional park plan that, upon information and belief, is intended to build "regional sports facilities" on three or more properties in Central Maui, which properties have been recently identified for "regional parks." Therefore, all parts of these separate regional park projects, and or the Sports Development Initiative, should be treated as a single action under HEPA.

254. The FEA for DLNR's Central Maui *Regional Park* Sports Complex was accepted on June 2013. However, DLNR failed to inform the public that the Sports Complex was part of a larger project, and DLNR failed to evaluate the Sports Complex as part of a larger project,

DLNR also failed to issue a declaration that a supplement to the Wai'ale EIS was unnecessary and therefore the Sports Complex FEA has no legal effect under HEPA.

255. The County announced its purchase of 209 acres for a Central Maui Regional Park in October 2013. (However, the County failed to inform the public that it was part of a larger project.)

256. The County announced the development of another regional park on an approximately 26 acre property within Maui Lani in February 2014. (However, the County failed to inform the public that it was part of a larger project.)

257. Pursuant to HEPA, an EIS must be prepared, and accepted, adequately evaluating the environmental and social impacts of the Sports Development Initiative.

258. Pursuant to HEPA, an EIS must be prepared and accepted, adequately evaluating the environmental and social impacts of the governmental undertaking to site multiple regional parks within Central Maui.

259. Upon information and belief, development has not initiated as to the Sports Development Initiative, or with respect to the regional park scheme for Central Maui.

260. The Sports Complex uses constitute illegal segmentation in violation of the requirements set forth in HAR § 11-200-7, and development of the Sports Complex may not proceed until State and/or County Defendants have fulfilled their environmental impact statement obligations to the public as required by HEPA.

D. Conclusion as to Count V Allegations

261. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT VI – VIOLATION OF ARTICLE XI, § 9 OF THE HAWAI'I CONSTITUTION

262. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

263. Hawai'i Constitution Art. XI, § 9, 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. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

264. Through HRS § 607-25, the Hawai`i Legislature has identified statutes that are deemed "environmental quality laws" cognizable under Art. XI, § 9. *County of Hawai`i v. Ala Loop Homeowners*, 123 Hawai`i 391, 410, 235 P.3d 1103, 1122 (2010).

265. Plaintiff has alleged claims for relief that are identified as "environmental quality laws" by the Hawai`i Legislature through HRS § 607-25, including: HRS chapters 46, 205, and 343 "and ordinances or rules adopted pursuant thereto under chapter 91," including other environmental quality laws that are otherwise cognizable under Art. XI, § 9.

266. The violations set forth in the allegations in the Counts above constitute an impairment of the public's right to a clean and healthy environment, and are therefore cognizable under Haw. Const. Art. XI, § 9, and are therefore violations of MLN's members' constitutional rights under Haw. Const. Art. XI, § 9. *See, e.g., Sierra Club v. Hawaii Tourism Auth. ex rel. Bd. of Directors*, 100 Hawai`i 242, 276-77, 59 P.3d 877, 911-12 (2002) (explaining HRS Chapter 343 is cognizable under Haw. Const. Art. XI, § 9).

267. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT VII—PUBLIC NUISANCE

268. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

269. Public nuisance encompasses any unreasonable interference with a right common to the general public. Public nuisance also is an offense against the public order and economy of the State and violates the public's right to life, health, and the use of property, while, at the same time it annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons.

270. Because DLNR seeks to construct the Sports Complex before the Wai`ale project is permitted and developed, DLNR intends to use existing streets and intersections within Maui Lani for ingress and egress to the Sports Complex that are used by the public.

271. The streets within Maui Lani were never designed to handle the additional traffic from the Sports Complex, and are already deemed to be overcapacity and operating at the lowest level of service used by traffic consultants.

272. The Sports Complex uses therefore constitute a public nuisance.

273. MLN requests relief against all named defendants herein consistent with the foregoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT VIII—VIOLATION OF DUE PROCESS

274. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

275. Citizens' due process rights are violated where the expedited special use process improperly avoids the more thorough change in zoning process:

> As courts have repeatedly recognized, unlimited use of the special permit to effectuate essentially what amounts to a . . . [rezoning] would ***undermine the protection*** from piecemeal changes to the zoning scheme ***guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.***

Waianae Coast, 64 Haw. at 272, 639 P.2d at 1102-03 (emphasis and bracketed material added).[39]

276. DLNR was required, at minimum, to seek from the County Council an amendment to the WK Community Plan for the Property, an amendment to the Maui Island Plan for the Property, and a change in zoning from the Agricultural District to Project District. As a matter of law, this change in zoning could only occur in conjunction with the remainder of the Wai'ale project being submitted for a change in zoning.

277. MLN's members were denied the opportunity to testify before the County Council during the required hearings, and have their concerns heard and addressed.

278. MLN's members, as property owners in proximity to the Property, have a property interest in the outcome of the County Council hearings on the county planning documents and the change in zoning, and therefore a property right to a meaningful hearing on the community plan amendments and the change in zoning.

279. Because of State and County Defendants' unlawful acts and omissions, MLN's members were denied their right to meaningful hearings before the County Council and that denial constitutes a violation of the MLN's members' due process rights guaranteed by Art. 1, § 5 of the Hawai'i Constitution.

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[39] While *Waianae Coast* related to a State district boundary amendment, the Court uses county zoning cases to explain its position inasmuch as Chapter 205 is a form of statewide zoning.

280. MLN requests relief against all named defendants herein consistent with the forgoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

COUNT IX—DECLARATORY AND OTHER RELIEF THAT NOTICE TO SURROUNDING NEIGHBORS WAS INADEQUATE

281. MLN repeats, realleges and incorporates by reference each and every allegation set forth above.

282. MCC § 19.510.070 (entitled "special use permits") provides *inter alia* that "[a]ll applications for a special use permit shall comply with the application procedures established in sections 19.510.010 and 19.510.020 of this code." MCC § 19.510.070(C).

283. MCC § 19.510.010 is entitled "general application procedures." MCC § 19.510.010(E), set forth immediately below, requires a developer to certify that it has properly noticed homeowners within a 500 foot radius of the subject property that the developer is seeking a special use permit (hereinafter referred to as "Application Notice"):

> At the time of the filing of the application, the applicant shall file a notice of application, which is in a form prescribed by the planning director, and an affidavit certifying that the notice of application was mailed to all owners and lessees of record located within a five-hundred-foot distance from the subject parcel. The notice of application shall include the following information: (1) The name, address and telephone number(s) of the owner and the owner's authorized agent, if applicable; (2) A brief description of the existing uses and uses proposed by the application; and (3) A location map and a description of the location of the proposed development which includes, but which is not limited to, the tax map key number and street address, if available, of the subject parcel.

284. MCC § 19.510.020 is entitled "applications which require a public hearing." MCC § 19.510.020(A)(4), set forth immediately below, requires a developer to certify that it has properly noticed homeowners within a 500 foot radius of the subject property that a public hearing will be held on the special use permit (hereinafter referred to as "Public Hearing Notice"):

> The applicant shall provide notice of the public hearing date on the application to the owners and lessees of record located within a five-hundred-foot distance from the parcel identified in the application by complying with the following procedures:
>
> (a) The applicant shall: (i) Mail a notice of the date of the public hearing of the application in a form prescribed by the director of planning by certified mail, return receipt requested, to each of the owners and lessees not less

than thirty calendar days prior to the date of the public hearing,(ii) Submit each of the return receipts for the certified mail to the planning director not less than ten business days prior to the date of the public hearing, and (iii) Publish the subject matter, in a form prescribed by the planning director, once a week for three consecutive weeks prior to the date of the public hearing in a newspaper which is printed and issued at least twice weekly in the County and which is generally circulated throughout the County,

(b) For purposes of this section, notice shall be considered validly given if the applicant has made a good faith effort to comply with subsection (A)(4)(a) of this section;

285. DLNR had an obligation to timely fulfill the Application Notice requirements and the Public Hearing Notice requirements.

286. MLN has been diligently requesting documents from State and County Defendants. MLN has also reviewed portions and or all of the special use application files submitted by DLNR to the County Defendants. The documents obtained thus far by MLN fail to include the documents evidencing compliance with the Application Notice requirements and the Public Hearing Notice requirements.

287. Upon information and belief, DLNR failed to fulfill the Application Notice requirements, including, among other reasons, failing to provide certified mail notice to all owners or lessees within a 500 foot radius of the Property.

288. Upon information and belief, DLNR failed to fulfill the Public Hearing Notice requirements, including, among other reasons, failing to provide certified mail notice to all owners or lessees within a 500 foot radius of the Property.

289. Upon information and belief, County Defendants (or one or more of them) failed to fulfill their obligation of assuring DLNR met the Application Notice requirements and the Public Hearing Notice requirements.

290. Upon information and belief, some of MLN's members were denied their legal right to be informed of the Application Notice and/or the Public Hearing Notice, and have been harmed as a direct result of the omissions and violations of the MCC by Defendants (or one or more of them).

291. Any breach of the Application Notice and/or Public Hearing notice requirements by Defendants (or one or more of them) constitutes a violation of MLN's members' due process rights under Art. 1, § 5 of the Hawai'i Constitution.

292. MLN requests relief against all named Defendants herein consistent with the foregoing allegations in this Count, including declaratory, injunctive and other relief consistent therewith, or as set forth in the Prayer for Relief, or as otherwise permitted by the Court.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court:

A. Assume jurisdiction over this action;

B. Enter declaratory judgments consistent with the foregoing, including but not limited to the following:

(i) The Sports Complex uses violate zoning for, among other reasons, a failure to obtain an amendment to the WK Community Plan, a failure to obtain an amendment to the Maui Island Plan, and a failure to obtain a change in zoning;

(ii) The special use permit issued by the Maui Planning Commission for the Sports Complex uses is void as a matter of law because, among other reasons, MCC Chapter 19.30A (Agricultural District) does not expressly permit the Sports Complex uses;

(iii) The special use ordinance, MCC § 19.30A.060(H), is unconstitutionally vague and ambiguous, because it gives unchecked, overbroad, and unbridled discretion to the Maui Planning Commission in the granting of special use permits in instances such as the current matter, and further fails to give sufficient notice to the public with respect to the intensity of the uses permitted on Agricultural District lands in violation of the due process clause, Art. 1, § 5 of the Hawai'i Constitution, and the ordinance is therefore illegal, null and void, including the special use permit rendered to DLNR for the Sports Complex uses;

(iv) The Property cannot meet the minimum lot size requirements for PK-3 Regional Park District (MCC § 19.615.040), which is a lot size of one hundred acres, and therefore the uses proposed by DLNR cannot proceed on the Property;

(v) DLNR's proposed action, the Sports Complex, violates HEPA because DLNR failed to prepare a supplemental EIS to the Wai'ale FEIS as required by HEPA and/or because the Sports Complex has been illegally segmented from a larger project, namely the Sports Development Initiative and/or the comprehensive regional parks scheme for Central Maui being pursued by State and/or County Defendants, and no part of DLNR's Sports Complex uses may legally proceed without first attaining full compliance with HEPA;

(vi) Because of the HEPA violations, DLNR's Sports Complex FEA is automatically rendered null and void and of no legal effect;

(vii) The foregoing violations of law are unconstitutional violations of MLN's members' environmental rights, which are protected under Article XI, § 9 of the Hawai'i Constitution;

(viii) The public streets within Maui Lani were never designed to handle the additional traffic from the Sports Complex, and are already deemed to be overcapacity and operating at the lowest level of service used by traffic consultants, and this additional traffic constitutes a public nuisance;

(ix) The County and/or State Defendants have violated MLN's members' due process rights, protected under Art. 1, § 5 of the Hawai'i Constitution, as a result of Defendants' unlawful acts and/or omissions, including the failure to apply for required land entitlements from the County Council, which would therefore provide for a full and meaningful hearing for MLN's members; and

(x) The Property cannot meet the minimum lot size requirements for PK-3 Regional Park District (MCC § 19.615.040), and therefore the uses proposed by DLNR cannot proceed on the Property;

B. For preliminary and permanent injunctive relief enjoining the Defendants, and their employees, agents, servants, and representatives, and any other persons acting in concert with them, under their authority, or with their approval, from approving or carrying out the Sports Complex uses, or any portion thereof, unless and until they have achieved full compliance with the laws set forth above;

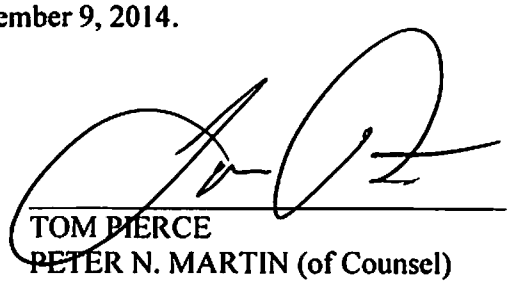
C. For the Court to retain continuing jurisdiction to review the Defendants' compliance with all judgments and orders entered herein;

D. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing;

E. For reasonable attorneys' fees and costs of suit incurred herein by MLN, as provided by law, including but not limited to, pursuant to HRS § 607-25 (actions based on failure to obtain government permit or approvals); and

F. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between MLN and Defendants.

DATED: Makawao, Hawai`i, September 9, 2014.



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July 12, 2014

William Aila
Chairperson
Board of Land and Natural Resources[1]
Department of Land and Natural Resources
State of Hawai'i
P.O. Box 621
Honolulu, Hawai'i 96809

VIA CERTIFIED U.S. MAIL AND U.S. MAIL AND VIA EMAIL:
william.j.aila@hawaii.gov

Re: Cease and Desist Demand – Proposed Central Maui Sports Complex

Dear Mr. Aila:

I represent Maui Lani Neighbors, Inc. ("**MLN**"), a Hawai'i nonprofit corporation. MLN is composed of homeowners who live in the Maui Lani project, which includes over 600 homes. MLN has the mission of supporting, promoting and advocating for sustainable and appropriate community planning, and legal state and county zoning consistent therewith, for the Central Maui region of the Island of Maui. MLN has been investigating a State of Hawai'i, Department of Land and Natural Resources ("**DLNR**") proposed project most recently referred to by DLNR as the *Central Maui Regional Sports Complex* ("**Sports Complex**"), and has determined that DLNR cannot legally proceed. ***MLN hereby demands that DLNR cease and desist from any further development activities related to the Sports Complex.***

DLNR proposes constructing the Sports Complex on a 65 acre parcel located in Central Maui. The Sports Complex will change the entire character of the proposed parcel, which is currently located in the Agricultural District, as zoned by the County of Maui ("**County**"). The Sports Complex will include: three soccer fields and nine baseball/softball fields, all fixed with lights for night time playing; acres of hardened surface area consisting of roads, 700 parking stalls, and related curbs and gutters; multiple restroom facilities; concession stands; and a very large retention basin that is intended to hold water generated not only from the Sports Complex

[1] The Board of Land and Natural Resources is identified in this letter for the purpose of providing notice to an approving government agency relating to environmental impact statement issues.

EXHIBIT "A"

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but also from the "Wai'ale" project described below. In short, the proposed 65 acre parcel will be permanently taken out of agricultural use. *See* **Exhibit 1.**[2]

Moreover, for likely the next seven years or more, the Sports Complex will be accessed directly through the Maui Lani neighborhood via Maui Lani Parkway, *see* **Exhibit 2,** a street that is already overcapacity despite only having been designed and built a few years ago. Users of the proposed Sports Complex would access Maui Lani Parkway either from the northwest (Wailuku side) or the east (via Kuihelani Highway). They would then have to travel to a four-way stop, and turn south on South Kamehameha Avenue, pass by another node of congestion, Pomaika'i School, and then enter the street providing access to the Sports Complex. The four-way stop significantly slows traffic during peak periods. MLN anticipates that when traffic is backed up, which is already common, drivers seeking to access the Sports Complex will make use of the smaller, internal residential roads, which permit a driver to bypass the four-way stop. *See* **Exhibit 2.**

Finally, DLNR's Sports Complex development includes a plan to build a 5.8 acre retention basin that the DLNR specifically explained would be constructed to handle surface water runoff from the adjacent Wai'ale project, described further below. Thus, this retention basin is being permitted by the County of Maui through an expedited review process before the Maui Planning Commission, even though the rest of the Wai'ale project to which the retention basin is related is slated for a thorough review process before the Maui County Council. ***See* Part I below for further description of the Sports Complex project.**

The Sports Complex is poorly conceived and was hurriedly vetted by DLNR. That alone is reason for DLNR to pause and consider other alternatives. However, DLNR must cease and desist development activities of any kind because of a considerable number of illegalities associated with the proposed development, including, but not limited to, the following.[3]

- ***Violation of zoning.*** On March 25, 2014, the Maui Planning Commission granted DLNR a Special Use Permit purporting to grant DLNR the right to construct the Sports Complex and retention basin on the Subject Property. The recreational uses specified for the Sports Complex, as well as the urban uses associated with the retention basin, are not uses that are qualified to be permitted under a special use permit. Instead, a change in zoning is necessary. The Maui Planning Commission lacked the authority to grant DLNR the special use permit. Therefore, the special use permit granted to DLNR is illegal, null and void. ***See* Part II(A), below.**
- ***Violation of Maui Island Plan.*** The uses specified for the Sports Complex and the retention basin are inconsistent with the *Community Park* designation in the Maui Island Plan, Directed Growth Plan. The *Community Park* designation is focused on passive recreational uses for the surrounding community members, not a regional park for

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[2] Site Map from Final Environmental Assessment titled "Central Maui Regional Park" (June 2013) ("Sports Complex FEA" or "FEA") (showing depiction of proposed improvements, with a portion of the Maui Lani project showing along the northern boundary).

[3] MLN identifies the following violations of law without waiving any right to bring any and all other claims before any agency or court as MLN deems applicable.

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nonresidents, as is intended through the Sports Complex (see discussion further below). Therefore an amendment to the Maui Island Plan, Directed Growth Plan would be necessary for any form of the project to proceed. Therefore, the special use permit granted to DLNR is illegal, null and void. ***See* Part II(B) and II(C), below.**

- ***Violation of Wailuku-Kahului Community Plan.*** The uses specified for the Sports Complex and the 5.8 acre retention basin are clearly inconsistent with the *Agriculture* designation in the Wailuku-Kahului Community Plan. Therefore, a community plan amendment is necessary. Therefore, the special use permit granted to DLNR is illegal, null and void. ***See* Part II(B) and II(D), below.**
- ***Failure to Prepare Supplemental EIS.*** Because the Subject Property was already part of the Wai`ale environmental impact statement ("**EIS**"), and because that EIS did not evaluate the impacts of the uses specified for the Sports Complex, a supplemental environmental impact statement is required, and, under the express EIS rules, the environmental assessment prepared by DLNR does not qualify as a supplemental EIS. The Maui Planning Commission did not have the required information before it to make its decision. Therefore, the special use permit granted to DLNR is illegal, null and void. ***See* Part II(E), below.**
- ***Violation of Land Use Commission's Decision and Order.*** During the State district boundary amendment process, the State of Hawai`i Land Use Commission specifically identified the southern portion of the South Wai`ale Land for *active* recreation, and clearly intended to limit the Subject Property to *passive* recreation uses. This limitation is a restrictive covenant running with the land and it limits the permitted uses of the Subject Property. Therefore, the special use permit granted to DLNR is illegal, null and void. ***See* Part II(F), below.**
- ***Violation of Subdivision Ordinance and State Enabling Statute.*** The County granted final consolidation-resubdivision approval and thereby exempted the resubdivision from consistency with the County general plan, the Maui Island Plan and the Wailuku-Kahului Community Plan. That exemption violates the State enabling statute, which requires consistency with county general plans, and the related plans. Further, the Public Works Director abused his discretion or exceeded his authority by failing to require that any park in the subdivision be for the benefit of the persons who will be living in the subdivision, as required by the State enabling statute. Therefore, the subdivision is illegal, null and void. ***See* Part II(G), below.**
- ***Subject Property Cannot Conform to PK-3 Regional Park District.*** Finally, even if DLNR were to go back through the entitlement process, including requesting a change in zoning, the 65 acre Subject Property may not be used for a regional park. That is because the County's *PK-3 Regional Park District* requires a minimum lot size of 100 acres. ***See* Part II(H), below.**

Based on the foregoing and the analysis below, MLN demands, pursuant to Hawai`i Revised Statutes ("HRS") § 607-25, that DLNR immediately ***cease and desist*** from any further action to develop the Sports Complex until DLNR has all legally necessary approvals to proceed. Please confirm in writing ***by not later than Friday, August 1, 2014***, that DLNR will cease and

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desist from any development activities relating to the Sports Complex until DLNR either relocates the proposed Complex to a better location, or until it revises the proposed uses for the Subject Property to make them consistent with a passive recreation community park.

I. OVERVIEW

A. Brief Background Summary

For over a decade, A&B[4] and other developers have been planning or developing much of the land in Central Maui. This started with Maui Lani, a 1,000 acre master planned community, which now consists of over 600 single family homes, a golf course, a school, and a significant commercial complex. While the Maui Lani project was being developed over the last decade, A&B was working through the planning phase for the development of the land immediately south of Maui Lani, the "Wai'ale" project, which is intended for 2,550 residential units, making it the largest housing project ever proposed for the Island of Maui. Wai'ale involves two contiguous land areas separated by Waiko Road (collectively the "**Wai'ale Land**"). *See* **Exhibit 3.**[5] The total acreage for the project is 545 acres. Of that total, a little over 422 acres of land is located immediately *north* of Waiko Road ("**North Wai'ale Land**") and a little over 122 acres of land is located immediately *south* of Waiko Road ("**South Wai'ale Land**"). *See* **Exhibits 3 and 4.**

The 65 acre property where the Sports Complex is proposed (which is believed to still be held by A&B at the time of this letter) is part of the North Wai'ale Land (hereinafter referred to as "**Subject Property**"), and was created through a consolidation and resubdivision of a number of parcels that was granted final approval by the County in October 2013.[6] Specifically, the 65-acre Subject Property consists of a narrow strip of land that abuts Maui Lani, making it the northernmost part of the Wai'ale Land. *See* **Exhibit 4.**[7] *See* also **Exhibit 1.** The Subject Property is bounded by Kuihelani Highway (to the east), the Maui Lani project (to the north), sand dunes and Hawaiian burials intended for a preservation area (to the west), and the residential component of the proposed Wai'ale development (to the south). *See* **Exhibit 5.**[8]

The County Directed Growth Plan, which is part of the Maui Island Plan (both discussed below), explained that there was a need for a *passive* recreation community park on the north side of Waiko Road that would help mitigate and buffer the impacts of the residential and

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[4] "A&B as used herein means A&B Properties, Inc., including its predecessors or parent or subsidiary entities, who may have owned the Wai'ale Project Land, and including its agents, representatives and employees.

[5] Showing annotated tax map from "Wai'ale EIS."

[6] A&B consolidated and resubdivided the parcels located on the north side of Waiko Road to create a five-lot subdivision, of which the 65-acre Subject Property is identified as Lot 12-A-3. Subdivision File Number: 3.2226, entitled the "Maui Lani Subdivision," granted final subdivision approval by the County of Maui Director of Public Works on 10/24/2013.

[7] Figure 2-1 from Wai'ale EIS (identifying Maui Lani north of the identified Wai'ale Land).

[8] **Exhibit 5** is Figure O-1 of the Wai'ale Final Environmental Impact Statement, prepared by A&B, and accepted as adequate by the State of Hawai'i Board of Land and Natural Resources ("BLNR") on November 4, 2011 ("FEIS" or "Wai'ale FEIS").

commercial uses planned for the Wai'ale Project. The Maui Island Plan, adopted in December 2012, prescribed a "community park" to be situated in the North Wai'ale Land. A "community park" is expressly defined by the MCC and has been given a specific zoning district with permitted uses that are generally passive in nature. *See* MCC 19.615.030.[9] Thus, if the Subject Property was, in fact, used for a *passive* community park, such as walking trails and open space, it would meet the mandates of the Maui Island Plan.

However, DLNR's Sports Complex, which was not proposed and evaluated until *after* the adoption of the Maui Island Plan, is entirely inconsistent with the goal of creating a low impact buffer area to be used by the surrounding community. Rather than act as a buffer to mitigate the density caused by A&B's two massive residential projects—Maui Lani and Wai'ale—the Sports Complex is instead expressly intended to do the exact opposite. It is being deliberately designed and built to encourage its use as a venue for nonresidents. The DLNR proposal thus offers no mitigation whatsoever to the existing and future homeowners.

The need for 600 parking stalls (with overflow parking for 100 more vehicles) speaks volumes about the intensity of the project. That means that DLNR anticipates there will be events at the park with up to 700 vehicles in attendance. Each of those vehicles will probably conservatively carry, on average, three people, meaning that up to 2,100 people may be using the 65 acre Subject Property at a time. This is not all. According to the official announcements from State of Hawai'i officials, the Subject Property also stands a high chance of being used intensively, and continuously as a training facility, or for extensive and noisy sports events, which would carry on into the evenings, and involve people potentially from all over the world.

These users will, by necessity, based on the design of the project, enter and exit the Subject Property by driving through the Maui Lani project via Maui Lani Parkway and South Kamehameha Avenue. Maui Lani's roads must handle all of the Sports Complex traffic from 2015 to 2022, as confirmed by DLNR's own traffic consultant. This consultant has also confirmed what the community already knows—that these two roadways are already "overcapacity."

The funding source for the Sports Complex leaves no doubt with respect to the above scenario. The Sports Complex is specifically funded by the State under Governor Abercrombie's "*Sports Development Initiative*," which was revealed to the public on October 15, 2013. According to the official press release, Governor Abercrombie appointed Lieutenant Governor Shan Tsutsui to "spearhead" the Initiative. The press release unambiguously explains that the

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[9] **PK-2 Community Park District.** The purpose and intent of the "PK-2 Community Park District" is to "provide park areas designed to meet the passive and active recreational needs of a community comprised of several neighborhoods." MCC § 19.615.030(A). The same section further explains, "This district shall be located adjacent to or in areas designated for residential use, shall be operated by a public or private non-profit organization, and shall not be operated for a commercial purpose. This district shall primarily be located in the state urban and rural districts." *Id.* The principal uses in the community park district are: campgrounds; community centers; fishing; open land recreation; picnicking; playgrounds; playing courts of community scale but not including tennis centers; playing fields for outdoor community uses; swimming pools; and, non-motorized trail activities. MCC § 19.615.030(B)(1). The minimum lot size for a community park is 25 acres. MCC § 19.615.030(C)(1).

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purpose of this Initiative is not to meet community needs, or to create quiet open space buffers and greenways between the Wai'ale Project and the Maui Lani project. Rather, the Initiative's goal is, in the words of Lieutenant Governor Tsutsui, "to diversify our visitor industry and generate more revenue for our state." [10]

The Lieutenant Governor went on to state during the videotaped press release that the Hawaiian Tourism Authority—not the community, or even the County—would have the primary discretion to determine who would be able to use the sports facilities created through this new initiative, which is primarily intended to create a new source of revenue for the State. The State's official press release, issued October 15, 2013, explained the goals of the initiative:

> This initiative will help to expand ***sports entertainment*** and participation opportunities in Hawaii, while also strengthening ***our visitor economy*** – particularly during the shoulder seasons when ***visitor*** arrivals are less robust," Gov. Abercrombie said. "With Shan at the helm, we hope to take advantage of each island's unique characteristics and ***bring athletic events*** that fit into their individual environments.
>
> While collaborating with the ***Hawaii Tourism Authority***, University of Hawaii System, Stadium Authority, and private sports organizations, the initiative will identify, promote and engage opportunities to establish Hawaii ***as a premier sports destination for professional, amateur and youth athletics***. The improvement of current facilities and development of world-class, state-of-the-art venues are also part of the initiative, intended to attract sporting events and athletic training opportunities not only on Oahu but throughout the state.

See State press release, link at Note 10 (emphasis added). [11]

The Governor presented this initiative to the legislature and was successful in having it swiftly funded as part of House Bill 1700 for the State Budget, which included appropriations for capital improvement projects slated for 2013/14 and 2014/15 fiscal years. [12] HB1700, which was approved by the legislature and signed into law in May of this year as Act 122, includes a capital

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[10] *See* http://governor.hawaii.gov/blog/lt-gov-tsutsui-to-lead-new-sports-development-initiative/.

[11] *Maui Now* published the following relevant quotes from Lt. Gov. Tsutsui:

> With our new facility, we will be able to host ***hundreds*** of off island families and ***provide a boost to our local businesses***," he stated at the time. . . .
>
> Once completed, the park could ***serve as a venue to host local, statewide, national, and international sporting events. It has the potential to be a revenue generator for Maui and the state***," said Tsutsui.

See http://mauinow.com/2013/10/11/breaking-4-7-m-released-for-central-maui-regional-park/ (emphasis added).

[12] *See* Governor's Testimony in support of HB1700 Relating to State Budget (3/5/2014) at 2. The Governor stated:

> [T]he Office is supportive of budget requests . . ., The Governor assigned the Office of the Lieutenant Governor with the Sports Development Initiative in October 2013 ***to grow the sports industry in Hawaii at the professional, amateur and youth levels throughout the State.*** This funding is requested to support that initiative . . . . .

improvement project item entitled "Central Maui Region Sports Complex, Maui," and further described as "design and construction for establishment of a regional park in the area of Central Maui; Ground and Site Improvements; Equipment and Appurtenances." The bill designated $4.7 million for fiscal year 2013/14 for design, construction, and another $5.0 million for fiscal year 2014/15 for construction.

Even before Act 122 was signed into law, and even before DLNR had obtained what it believed were the necessary approvals to proceed, DLNR had published a request for proposals and determined the successful bidder. The winning bid contractor was confirmed in or around May 2014. DLNR has announced to the public that it intends to break ground this summer.

Oddly, just days before the Governor and Lieutenant Governor made their Sports Development Initiative announcement, and identified the Subject Property as one of the recipients of Initiative funds, the County had consummated the purchase of 209 acres of land from A&B south of South Wai`ale for the specific purpose of a "Central Maui Regional Park." None of the politicians explained why there were suddenly *two* Central Maui regional parks, when the Maui Island Plan adopted by the County Council had only identified the need for *one*.

A final very concerning aspect of the Sports Complex proposal is the 5.8 acre storm water retention basin, which DLNR acknowledges is "***for the Wai'ale development to be developed by the Wai'ale developer***. *See* Sports Complex Final Environmental Assessment ("**FEA**") at 5 (emphasis added). Another section of the FEA further explains that the retention basin is a "key component" of the proposal:

> A large drainage detention basin (to be constructed by the Wai'ale developer) in the northeastern corner of the park ***is also a key component of this design***, which will allow for the retention of a larger amount of runoff, an estimated 176 acre-feet, ***from the Wai'ale master planned community***.

FEA at 7 (emphasis added). *See also* FEA at 9 (explaining the retention basin will be constructed "by the Wai`ale developer"); FEA at 32 ("[A] stormwater retention basin will store stormwater and help to mitigate sediment loads in runoff from the Wai'ale development to the south.). The Maui Planning Commission granted the special use permit even though the Planning Department advised the Commission of this strictly urban use of land being proposed for land zoned *Agriculture*.[13]

B. Brief Chronology of Events

The following table provides the chronological outline for this matter and the relationship between the various planning and entitlement steps that have been taken over the last decade.

2007 *Maui Island Plan Begins*	The County, community, and various landowners, including A&B, embark on five years of planning meetings that will result in the Maui Island Plan, and the Directed Growth Plan, which plans are to direct Maui's growth through 2030, including the

[13] See also *Maui Planning Department's Report to the Maui Planning Commission* (3/25/2014) at 2 ("The proposed regional park will be comprised of the following elements: . . . Retention basin (5.8 acres)"), and also at 16 ("The large drainage detention basin will replace the temporary retention basin ***and is also a key component of the park design***. The drainage detention basin with an estimated 176 acre-feet capacity, will allow for a larger amount of runoff from the park ***as well as the Waiale development***.") (Emphasis added).

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	Subject Property.
November 2011 *A&B's Wai'ale EIS*	A&B's EIS for Wai'ale is accepted. At the time this EIS is completed, the Maui Island Plan is still in *draft* form, and it has preliminarily shown a regional park to be located in the North Wai'ale Land. In light of the fact that the Maui Island Plan is not complete, A&B did not attempt to identify or evaluate the specific park uses for the Subject Property, or their impacts. The EIS also explains that any park use for the Subject Property will need a community plan amendment and a change of zoning. The EIS also specifically provides that, as requested by the State Department of Transportation, additional traffic impact studies will be necessary for any substantive changes to the Wai'ale project as identified in the EIS.
June 2012 *LUC Sets Location for Active Recreation*	The State Land Use Commission grants a district boundary amendment from *Agriculture* to *Urban* for Wai'ale, and specifically limits active recreation to a triangular section located at the southern part of the South Wai'ale Land.
December 2012 *Maui Island Plan Adopted*	The Maui Island Plan is adopted and includes the *final*, detailed boundaries in the Directed Growth Plan. The *preliminary* location for the regional park has shifted. The *final* Maui Island Plan establishes a large *regional* park for a 209 acre parcel located south of, and abutting, the South Wai'ale Land, and it establishes a smaller *community* park for the North Wai'ale Land. The Maui Island Plan also provided that yet greater specificity for the uses within the two parks would occur during the Wailuku-Kahului Community Plan Update and during A&B's entitlement process for Wai'ale.
June 2013 *DLNR's Sports Complex EA*	DLNR's environmental assessment for a proposed "Central Maui Regional Park" is accepted. The EA inaccurately claims the traffic, noise and visual impacts of the Sports Complex were evaluated in the Wai'ale EIS, and that the EIS found the impacts were insignificant. The EA fails to discuss the implications of the recent adoption of the Maui Island Plan. The EA does not substitute for a supplemental EIS, which is required by law.
September 2013 *County Purchases 209 acres for Regional Park*	The *Central Maui Regional Park and Facilities* that was identified in the Maui Island Plan on land immediately south of the South Wai'ale Land is purchased by the County on September 27, 2013. The 209-acre parcel was purchased from A&B for $5.2 million.[14] The land purchased by the County may be seen in **Exhibits 6 and 9.** The land is immediately south of the South Wai'ale Land, as is depicted in **Exhibit 7.** The County's purchase of this land for the *Central Maui Regional Park and Facilities* land is fully consistent with the Maui Island Plan. Importantly, this land is also of sufficient size to be rezoned to *PK-3Regional Park District* because it is greater than 100 acres in size. Whereas, the Subject Property cannot meet that zoning requirement, because it is only 65 acres in size.
October 2013 *Government Announcements*	*10/11/13:* Lt. Gov. Tsutsui makes a press release providing that $4.7 million in funding will be released for the construction of the "Central Maui Sports Complex," apparently to be located on the Subject Property, which was identified for a *community* park in the Maui Island Plan, not a regional park. *10/15/13:* Governor Abercrombie announces the Sports Development Initiative and appoints Lt. Gov. Tsutsui to lead the Initiative, which is intended to develop new sports venues that will encourage professional and amateur sports teams from the Asia Pacific region, and from around the world, to train and conduct events in Hawai'i

[14] http://mauinow.com/2013/10/15/first-pitch-tossed-at-future-central-maui-regional-park/

October 24, 2013 *Subdivision Approval*	The County grants final approval for a consolidation-resubdivision of the North Wai`ale Land, including carving out a 65-acre lot for the Subject Property. However, the subdivision fails to require consistency with the General Plan, the Maui Island Plan and the Wailuku-Kahului Community Plan; it also failed to require that any parks derived from the resubdivision process be used for the benefit of the surrounding community.
March 25, 2014 *SUP Approved*	On March 25, 2014, the Maui Planning Commission grants a special use permit for the Sports Complex. This permit is illegal, null and void because, by law, the Commission lacks the authority to grant a special use permit for (1) the active recreational uses of the Sports Complex, or (2) the retention basin, which is intended for the Wai`ale project.
April/May 2014 *New DLNR Impact Analyses*	After having its EA accepted and being granted a special use permit, DLNR *then* publishes three impact studies, never before provided to the public or to government agencies, relating to lighting, noise and traffic impacts anticipated from the Sports Complex. The lighting study is indecipherable because it fails to include a narrative summary. However, the noise and traffic studies both confirm significant impacts never before revealed.

II. ANALYSIS OF VIOLATIONS OF LAW

A. The Sports Complex and Retention Basin May Not Proceed Based on a Special Use Permit

On March 25, 2014, the Maui Planning Commission ("**MPC**") unlawfully granted a special use permit ("**SUP**") to DLNR for the purpose of permitting the Sports Complex and a large retention basin designed to hold runoff water from the Wai`ale project. Under the law, including the express provisions of the Maui County Code ("**MCC**"), a SUP to conduct certain uses on lands zoned *Agriculture* is permitted for *only* certain limited, expressly identified, uses. The Sports Complex and retention basin proposed by DLNR are not uses that may be permitted through the SUP process; instead, the law mandates that there be a change in zoning. Therefore, the County Planning Director acted *ultra vires* and exceeded his authority in determining that the MPC had the authority to issue a SUP for the uses proposed for the Sports Complex and retention basin. Similarly, the MPC acted *ultra vires* and exceeded its authority in granting the SUP for the Sports Complex and retention basin for which the law mandates that there be a change in zoning.

A SUP cannot be granted for a use that is neither permitted by law nor by zoning regulations. *See, e.g.*, 83 AM. JUR. 2D ZONING AND PLANNING XVIII (2014) § 814. Where a permit is issued by a governing body in violation of an ordinance, even under a mistake of fact, it is void as a matter of law. *Id.* § 822. Special exceptions are specific types of decisions clearly embraced by the principle that, in pertinent governmental land use decisions, the weight to be accorded a master plan or comprehensive plan recommendation depends upon the language of the statute, ordinance, or regulation establishing standards pursuant to which a decision is to be made. *Id.* § 823. As a general rule, when a zoning ordinance enumerates specifically the permitted uses within a particular zone, the ordinance establishes that the only uses permitted in the zone are those designated as uses permitted as of right and uses permitted by special exception, and any use other than those permitted and being carried on as of right or by special exception is prohibited. *Id.* § 829.

The Hawai'i Supreme Court (in a case very similar to the present case) has confirmed the above general limitations on SUPs, and, moreover, *specifically* held that the use of SUPs is *strictly limited to those instances where the use has been "expressly permitted by ordinance"*:

> The special use or exception evolved as a land use control device from a recognition of the hardship frequently visited upon landowners due to the inherent rigidity of the Euclidean zoning system, and of the inapplicability of variance or boundary amendment procedures to all land use problems. Unlike . . . a rezoning in its effect of reclassifying land, . . . a special permit allows the owner to put his land to ***a use expressly permitted by ordinance*** or statute on proof that certain facts and conditions exist, without altering the underlying zoning classification. . . .

Neighborhood Bd. No. 24 v. State Land Use Comm'n ("Waianae Coast"), 64 Haw. 265, 270-71, 639 P.2d 1097, 1101-02 (1982) (ellipses and emphasis added; internal citations omitted).[15]

As demonstrated below, the uses intended through the Sports Complex are *not expressly permitted by the MCC*, in violation of Hawai'i law.

i. The uses proposed by DLNR for the Sports Complex must occur on land zoned to PK-3 Regional Park District, while the retention basin must be zoned Project District

There is the significant fact that the MCC has an entire chapter establishing designations for four different kinds of park districts, including delineating specific criteria for community parks and regional parks. *See* MCC Chapter 19.615. The uses intended by the Sports Complex fall squarely within the criteria set forth in the *PK-3 Regional Park District* (with the exception of the fact that the Subject Property does not meet the 100-acre minimum lot size requirement, as discussed below). *See* **Exhibit 8** (providing *PK-2 Community Park District* and *PK-3 Regional Park District*, as well as other portions of the MCC).

Specifically, the purpose and intent of the *PK-3 Regional Park District* is to "***provide park areas designed for more intensive recreational and cultural facilities and uses than are permitted in the PK-1 neighborhood park district and the PK-2 community park district.***"

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[15] The *Waianae Coast* Court went on to explain that citizens' due process rights are violated where the expedited SUP process improperly avoids the more thorough change in zoning process:

> As courts have repeatedly recognized, unlimited use of the special permit to effectuate essentially what amounts to a . . . [rezoning] would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners ***by the more extensive procedural protections of boundary amendment statutes.***

Waianae Coast, 64 Haw. At 272, 639 P.2d at 1102-03 (ellipses, emphasis and bracketed material added). The Hawai'i Supreme Court has also warned government agencies to avoid illegal "spot zoning," which can easily occur through improper use of the SUP process:

> Spot zoning is an arbitrary zoning action by which a small area within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area ***and not in accord with comprehensive plan.***

Life of the Land, Inc. v. City Council of City & Cnty. of Honolulu, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980) (emphasis added; internal quotes omitted).

(Emphasis added). The principal uses for *PK-3* include: "***Athletic complexes for regional competitive activities***." MCC § 19.615.040(B)(1). A *PK-3* use may only be permitted in lands that have been designated as either rural or urban by the State Land Use Commission. MCC § 19.615.040(A). The permitted *accessory* uses include, relevant to here: comfort stations; "[l]imited commercial uses such as ticket sales, souvenir shop, snack bar or other eating facility which are designed and scaled to meet the needs of the members, guests or users of the park;" off-street parking and loading; and pavilions. MCC § 19.615.040(B)(2). Finally, before a *PK-3* zoning may be granted, the applicant must submit to the county a project master plan, and development plan, that must be reviewed at a public hearing. MCC § 19.615.040(D); MCC § 19.510.080.

It is a fundamental principal of statutory construction that when interpreting any section of an ordinance or statute, it must be read in the context of the entire ordinance or statute and construed in a manner consistent with its comprehensive purpose. *See, e.g., Aluminum Shake Roofing, Inc. v. Hirayasu,* 110 Hawai`i 248, 131 P.3d 1230 (2006). Reading the MCC comprehensively, it would be absurd to interpret the SUP criteria to permit something as intensive and expansive as the Sports Complex under the expedited SUP review process *where there is an entire zoning district that has been specifically created to deal with the types of impacts related to the Sports Complex uses*, and where that zoning district includes special requirements that must be followed in such cases to assure appropriate planning. *See* MCC § 19.615.040(D) (requiring the applicant of a regional park district to prepare and submit a project master plan and development plan pursuant to Article V of MCC § 19.615.040).

If the Planning Department had adhered to the established park district requirements, it would have to deny the proposed Sports Complex and its uses for the proposed 65-acre Subject Property because the development and related uses did not meet the minimum lot requirement of 100 acres. However, absurdly, under the Planning Department's apparent reasoning, it does not matter that the Sports Complex does not meet the *PK-3 Regional Park District* criteria, because, under the Planning Department's rubric, it can simply be granted under the SUP procedures. That reasoning is clearly flawed because it would otherwise render meaningless the existence of the *PK-3 Regional Park District*, which was obviously established by the County Council for a purpose. *See, e.g., Allstate Ins. Co. v. Schmidt,* 104 Haw. 261, 265, 88 P.3d 196, 200 (2004) ("When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language ***in the context of the entire statute and construe it in a manner consistent with its purpose.***") (Emphasis added).[16]

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[16] The fact that the County Council established a minimum lot size of 100 acres is significant. The decision was likely made to mitigate the impact to surrounding neighborhoods by assuring sufficient acreage, as well as to promote the efficient use of County park funds by constraining recreational uses to core locations. Alternatively, the appropriate applicant *could* have proposed a *community* park district, as was intended and required by the Maui Island Plan. This would have required *more passive recreation* opportunities and less active recreation opportunities, and this type of park would have met the 25-acre minimum lot requirements. However, the community park would be required to serve the surrounding community. Therefore, it could not have been funded under the State Sports Development Initiative, which is actually contrary to a *community* park purpose because its goal is to encourage use of the amenities by nonresidents.

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The attempt to grant approval for the retention basin under the SUP process is also inconsistent with review of the MCC as a whole, as well as with the factual background here. The Planning Department's report to the MPC, as well as DLNR's FEA, expressly stated that a 5.8 acre retention basin would be constructed on the Subject Property to receive increased surface water generated from new hardened surfaces in the *Wai`ale project*. These reports also stated that A&B would be responsible for the retention basin's construction. The retention basin is thus identified as an express clear part of the Wai`ale project, which is a master planned *urban* use. The Wai`ale project must still go through the community plan amendment process and a rezoning to *Project District* under MCC § 19.45 (entitled "*Project District Processing Regulations*"). The retention basin cannot be approved under the SUP procedures.

ii. The uses proposed for the Sports Complex and retention basin are not expressly permitted principal or accessory uses.

Even if one reads the *Agriculture District* zoning ordinance, MCC § 19.30A, *in isolation* (*i.e.*, not as part of the rest of the MCC), the same conclusion must be reached: The uses contemplated by the Sports Complex project are not expressly permitted in the County *Agriculture District*, which is the current zoning for the Subject Property. This can first be seen by evaluating whether the uses proposed in the Sports Complex are expressly permitted *principal* or *accessory* uses. *See* **Exhibit 8** (providing relevant sections of MCC § 19.30A). The answer is "no" as to both.

The uses intended for the Sports Complex and the retention basin are clearly not permitted as a "principal use" under MCC § 19.30A.050(A), which primarily relates to agricultural uses. *See* **Exhibit 8** (providing MCC § 19.30A.050(A)).

The uses intended for the Sports Complex are also clearly not permitted under the "accessory uses" because accessory uses must be "***incidental or subordinate to, or customarily used in conjunction with a permitted principal use.***" MCC § 19.30A.050(B) (emphasis added). *See* **Exhibit 8** (providing text of MCC § 19.30A.050(B)). The uses intended by the Sports Complex and the retention basin are clearly not intended to subordinate a principal agricultural use.

iii. The uses proposed for the Sports Complex and retention basin are not expressly permitted under the special uses.

The uses intended for the Sports Complex and retention basin are also not expressly permitted under the SUP section, MCC § 19.30A.060. That section covers a small assortment of uses that usually would take only a *small portion* of the surrounding agricultural land (*e.g.*, a telecommunications tower). *See* **Exhibit 8** (providing text of MCC § 19.30A.060).

With respect to the retention basin, DLNR expressly confirmed that it was sized to accept and handle surface water runoff from the Wai`ale project, and that it would, in fact, be constructed by A&B. *See* Part I, above (providing citations to documents). Therefore, absolutely no credible argument can be made that MCC § 19.30A.060 expressly permits a retention basin for a 2,500 unit master planned residential complex that has not yet obtained the necessary community plan amendments or a change in zoning. This alone causes the SUP granted by the Maui Planning Commission to fail.

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With respect to the proposed recreational uses for the Sports Complex, only Subsection H from MCC § 19.30A.060 could possibly be applicable. However, even Subsection H does not expressly permit the uses proposed by DLNR through the Sports Complex project. Subsection H provides in pertinent part:

> The following uses and structures shall be permitted in the agricultural district if a special use permit, pursuant to section 19.510.070 of this title, has been obtained . . . :
>
> > H. ***Open land recreation*** uses, structures or facilities which do not meet the criteria of subsection 19.30A.050.B.11, including commercial camping, gun or firing ranges, archery ranges, skeet shooting, paint ball, bungee jumping, skateboarding, roller blading, playing fields, accessory buildings and structures. . . . The following uses or structures shall be prohibited: airports, heliports, drive-in theaters, country clubs, drag strips, motor sports facilities, golf courses and golf driving ranges;

MCC § 19.30A.060 (emphasis added).

At first blush, one might mistakenly think that the uses intended by the Sports Complex are expressly permitted by Subsection H, above, because it mentions "open land recreation" and "playing fields." However, Subsection H, and the terms used therein, must be interpreted consistent with the MCC Zoning definitions. Three definitions are pertinent here.

First, "open land recreation" is a defined term under the MCC, and as shown below it is *specifically limited to activities carried out in conjunction with scenic interests*:

> "***Open land recreation***" means public or private recreational use or enjoyment, including, but not limited to, parks, picnic grounds, beaches, beach accesses, greenways and areas for hiking, fishing, hunting, camping, equestrian activities, ***and other scenic interests***, on a parcel or area of land or water which may be improved but which contains no buildings and which is set aside, designated, or reserved for such purposes.

MCC § 19.04.040 (emphasis added).

Second, the MCC provides separate definitions for "active recreation" and "passive recreation" definition, which must be read to give context to the entire ordinance. Through its definitions, the MCC clearly establishes that "passive recreation" activities occur on "open land recreation areas":

> "Passive recreation" means leisure time activities ***other than active recreation***, including walking, hiking and picnicking ***on open land recreation areas***." *Id.*

MCC § 19.04.040 (emphasis added).

It is significant that the scenic interests identified under the "open recreation area" definition are, by their nature, also *passive* recreational activities that would ordinarily be carried out in a natural setting. Thus, these natural setting, scenic interest, passive recreational uses, *can*

be seen as consistent with agricultural uses, thereby make it appropriate to grant them under the SUP process.[17]

Finally, In contrast, the Sports Complex uses are *not* scenic, do *not* occur in a natural setting, and do *not* involve passive recreation uses. Instead, the Sports Complex uses fall squarely under the "active recreation" definition:

> "Active recreation" means leisure time activities, ***usually of a more formal nature and performed with others, often requiring equipment and facilities***, and taking place ***at prescribed places, sites, or fields***."

MCC § 19.04.040 (emphasis added).

Moreover, the active recreational uses intended by the Sports Complex are proposed to be carried out in a distinctly *urban* environment. Notably, the Sports Complex uses require extensive hardening of the land from necessary structures and pavement, as well as significant grading and grubbing during the development process. Clearly these "active recreation" uses are antithetical to the intent and purpose of the *Agriculture*, considering the Sports Complex uses would erase any remaining hint of an agricultural nature to the Subject Property. Rather, the proposed Sports Complex development contains a distinct ***urban*** use that requires a change in zoning and is clearly not permitted under the limited permitted special use exceptions set forth in MCC § 19.040.060.

In summary, the SUP procedures cannot be used to permit the Sports Complex. The law clearly mandates that there be a change in zoning for such intensive uses. Moreover, because the Maui Planning Commission failed to adhere to the Maui Island Plan and the Wailuku-Kahului Community Plan, it breached its public trust obligations (discussed in the next section below). Therefore the SUP is illegal, null and void.

B. The Maui Island Plan and the Wailuku-Kahului Community Plan Have the Force and Effect of Law

In violation of the law, the Maui Planning Commission granted a use that conflicts with the specific directives of the Maui Island Plan, Directed Growth Plan, adopted by the County Council in 2012 ("**MI Plan**"), and that is inconsistent with the Wailuku-Kahului Community Plan, adopted by the County Council in 2002 ("**WKC Plan**").

Both of these planning documents went through years of planning involving the community, County, the affected landowners, and even the State. Moreover, both of these planning documents are, by State and County law, intended to be the bedrock for land use decision making in Hawai'i, and the failure of a government agency to abide by them constitutes a violation of State statute, County ordinance, and also constitutes an actionable breach of public trust.

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[17] DLNR may not argue that "parks" in Subsection H was intended to mean both active and passive parks. "The doctrine of ejusdem generis states that where general words follow specific words in a statute, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Peterson v. Hawaii Elec. Light Co.*, 85 Hawai'i 322, 328, 944 P.2d 1265, 1271 (1997).

At the State level, the State has established the Hawai'i State Planning Act, HRS Chapter 226, which provides for long range planning for the state. This statute requires the counties to establish general plans. HRS § 226-58. Further, the County's power to zone is expressly limited by the State's enabling statute, which provides in pertinent part that, "Zoning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county." HRS § 46-4. Recently, in the context of a special use permit, the Hawai'i Supreme Court held that County agencies, pursuant to HRS § 46-4, the enabling statute, and article XI, section 1 of the Hawai'i Constitution, have a trust obligation to the public to follow the General Plan and its subsidiary parts, and a failure to do so constitutes an actionable breach of public trust. *See Kauai Springs, Inc. v. Planning Comm'n of Cnty. of Kauai*, 130 Haw. 407, 425, 312 P.3d 283, 301 (Ct. App. 2013) *cert. granted,* SCWC-29440, (Haw. Sept. 4, 2013) and *aff'd,* 133 Haw. 141, 324 P.3d 951 (2014).[18]

At the County level, the Maui County Charter (2013) ("**Charter**") requires the County to prepare general and community plans through a specific process that includes state and public input, with final recommendations made by a citizen advisory committee that reports to the Maui Planning Commission, with that Commission making recommendations to the County Council. *Id.* § 8-8.5(1). Community Plans are an express part of the General Plan, and are required to include specific implementing directives. *Id.* § 8-8.5(5).[19] The Charter treats adoption of zoning laws the same as adoption of general plans and community plans—all three require adoption by ordinance affirmed by the County Council. *Id.* § 8-8.6.

MCC Chapter 2.80B establishes an hierarchy of planning efforts and related documents that all fall under the General Plan. These consist of "the Countywide Policy Plan," the Maui Island Plan," and the respective "Community Plans." MCC § 2.80B.030(A). *Cf.* MCC §

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[18] *Kauai Springs, Inc.*, explained in pertinent part, as follows:

> In sum, ***HRS § 46–4***, inter alia, confers authority upon each county to zone, to adopt a comprehensive general plan to guide the overall future development of the county, and to exercise the zoning power by ordinance. Relevant to the County's ***public trust duty*** in this case, the Kaua'i General Plan and the zoning ordinance for issuing a Use Permit and a Class IV Zoning Permit provide for the protection of water and watershed areas. Therefore, as in *Kelly*, the County's public trust duty under article XI, section 1 of the Hawai'i Constitution, "[c]oupled with the State's power to create and delegate duties and responsibilities to the various counties through the enactment of statutes," 111 Hawai'i at 225, 140 P.3d at 1005 (emphasis added), establishes that the County (through the Planning Commission) ***had a duty*** to conserve and protect water in considering whether to issue the Use Permit and the Class IV Zoning Permit to Kauai Springs.

(Emphasis added).

[19] Section 8-8.5(5) of the Charter provides:

> The community plans created and revised by the citizen advisory committees shall set forth, in detail, land uses within the community plan regions of the county. The objectives of each community plan shall be to implement the policies of the general plan. Each community plan shall include implementing actions that clearly identify priorities, timelines, estimated costs, and the county department accountable for the completion of the implementing actions.

2.80B.030(B) ("The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the charter."); Charter § 8-8.5(6) ("The community plans generated through the citizen advisory councils and accepted by the planning commission, council, and mayor are part of the general plan."). The relevant community plan with respect to the issues presented here is the WKC Plan.

The MI Plan includes Chapter 8, entitled the "Directed Growth Plan" which the MI Plan explains provides "the framework for future community plan and zoning changes and guides the development of the County's short-term and long-term capital improvement plan budgets." The MI Plan further emphasizes the Directed Growth Plan "is the backbone of the [MI Plan]," and directs growth in Maui through the adoption of urban and rural growth boundaries." MI Plan at 8-2.[20]

The MI Plan, the Directed Growth Plan or the WKC Plan are not simply guidance documents. Instead, MCC Chapter 2.80B establishes that its express purpose is "to provide [County] plans that clearly identify provisions that are meant to be policy guidelines ***and*** provisions that are intended to have the ***force and effect of law***." (Emphasis added). A Planning Director, Public Works Director or a Planning Commission may not ignore County planning documents. Instead, ***all*** administrative actions of government agencies are expressly required to "conform to the general plan." MCC § 2.80B.030(B). The Hawai`i Supreme Court confirmed this, as well, in *Kauai Springs, Inc.*, above, as well as in *Leone v. Cnty. of Maui*, 128 Hawai`i 183, 194, n.8, 284 P.3d 956, 967, n.8 (Ct. App. 2012), where the Court explained that zoning "must" assure consistency with general and community plans, and that the plans are "binding on all county officials."

C. The Maui Planning Commission Lacked the Authority to Permit a *Regional* Park Where the Directed Growth Plan Required a *Community* Park

The Directed Growth Plan includes a specific section relating to the Wai`ale project. MI Plan at 8-19 to 8-20. The section explains that "Wai`ale is the largest proposed town on the island, and the largest planned growth area proposed for the Wailuku-Kahului community plan region." MI Plan at 8-19. Because of its size, the MI Plan explains the importance of using greenbelts, open space and parks to prevent sprawl:

> To prevent sprawl and further urbanization of prime agricultural resource land, a hard edge must be maintained around Wai`ale Town. ***A network of greenbelts, open space, and parks will be utilized to contain urban development, maintain a clear distinction between existing*** communities and the new town, and to prevent urbanization of agricultural lands south of the site.

(Emphasis added).

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[20] The MI Plan (at 8-3) further explains:

> The Directed Growth Plan, which is grounded on the recommendations found throughout the MI Plan, establishes the location and general character of future development. The Directed Growth Plan will provide the framework for future community plan and zoning changes and guide the development of the County's short-term and long-term capital improvement plan budgets.

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The Directed Growth Plan contains a very detailed discussion of "planned protected areas" for Wailuku and Kahului, which areas "include some of the island's most treasured cultural, environmental, and recreational resources."[21] The Directed Growth Plan explains that one of its purposes is to "promote the protection and availability of "passive and active recreational amenities" by identifying five categories of planned protected areas, namely: "preservation areas, regional parks, greenways, greenbelts, and sensitive lands." MI Plan at 8-5. These planned protected areas are identified in the Directed Growth Plan's protected areas map, Figure 8-2 (attached here as **Exhibit 6**). MI Plan at 8-4. *See also* **Exhibit 9** (map excerpt from Exhibit WC-1 of MI Plan). Significant here, the Directed Growth Plan delineates in or around Wai`ale four planned protected areas in its Figure 8-2:

- A "*Regional Park and County Facilities*" area (shown in light green) south of Waiko Road on land south of, and abutting, the South Wai`ale Land;
- A "*Central Maui Community Park*" area (also shown in the same light green) within the North Wai`ale Land, with a portion of that park abutting Maui Lani and Kuihelani Highway.
- A "*greenway*" area (shown in speckled green) between the Central Maui Community Park and the Maui Lani development and Kuihelani Highway (this has been outlined in orange and identified with an arrow, as it is difficult to see); and,
- Two *preservation* areas (shown in dark green) along the most northwest portion of the North Wai`ale Land.

See **Exhibit 6.**

The Directed Growth Plan provides a matrix that, among other things, defines the basic "characteristics" of each of the five planned protected area categories. Importantly, the Directed Growth Plan tracks the definitions found in MCC Chapter 19 (pertinent definitions are provided in **Exhibit 8**). Specifically, the Directed Growth Plan adopts the exact same definition for "greenbelt" and "greenway" as set forth in MCC 2.80B.020. In addition, the *park* category is defined very similarly to "park" in the MCC: "Land areas devoted to passive (picnic facilities and gathering areas) and/or active (including, but not limited to, bike paths, hiking trails, ball fields, and tennis courts) uses that serve recreational needs." MI Plan at 8-5. Finally, the Directed Growth Plan describes the specific intended uses, *respectively,* for the (1) Central Maui

[21] The MI Plan (at 8-13) provides the following complete description of planned protected areas:

> Planned protected areas include some of the island's most treasured cultural, environmental, and recreational resources. These resources can come in the form of a coastal ridge, a burial ground, or an urban park. The planned protected area can be for the public's benefit and use, or to allow the natural habitat to exist in an unaltered state. The intent of the Protected Area is to provide one additional layer of protection to those areas that contain any number of irretrievable resources. The purpose and intent of each planned protected area is described after each planned growth area section.

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Community Park and (2) the Regional Park and County Facilities area, MI Plan at 8-20, 8-25,[22] as further summarized below.

First, the Directed Growth Plan notes that the regional and community parks for Central Maui are both "intended to maintain a significant amount of ***open space***," MI Plan at 8-25 (emphasis added), which, pursuant to the MCC, means a significant amount of the two areas must be "***essentially free of structures or impervious surfaces . . . .***" MCC § 19.04.040 (emphasis added). *See* **Exhibit 8** (providing this definition and others).

Second, the Directed Growth Plan clearly identifies the regional park to be located south of the South Wai`ale Land for *active* recreation, but does not do so for the *community* park proposed within the North Wai`ale Land:

> A ***community*** park is also planned for the Wai`ale area to provide a clear separation between the new community and Maui Lani. A ***regional*** park will be provided to the ***South of Wai`ale*** to provide a clear separation between the new community and Ma`alaea, ***and to allow for the placement of active and passive recreational opportunities***, County baseyards and like County facilities. Preservation areas will be established to protect Hawaiian Burials and intact sand dunes.

MI Plan at 8-20 (emphasis added).

Third, the Directed Growth Plan expressly provides that the ***southern*** "*Regional Park and County Facilities*" area "***should allow for the placement of sports fields*** with suitable topography for sports usage and may include an agricultural park and community gardens." (Emphasis added). MI Plan at 8-25. *See* also footnote 22 herein.

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[22] The Directed Growth Plan provided the following detailed description of the two respective parks, the Preservation area, and the County Facility Area:

> The Central Maui Regional Park, Community Park, Preservation, and County Facility Area is a planned open-space area within and adjacent to the Wai`ale mixed-use new town (*See* Figure 8-2). It is envisioned that the parks and preservation areas will be comprised of both passive and active park uses, including a network of pedestrian and bicycle pathways. ***The parks are intended to maintain a significant amount of open space*** and provide a ***distinct separation*** between the communities of Waikapū and Mā`alaea, Kahului, and Waikapū. ***The regional park's design should allow for the placement of sports fields with suitable topography for sports usage and may include an agricultural park and community gardens.*** The Protected Area will also include a preserve that will protect rich historical and cultural resources which are spread throughout the Central Maui Sand Dune system. ***The Central Maui community park will be established north of the Wai`ale planned growth area, proximate to a high concentration of existing and proposed residential and industrial uses, Pomaika`i Elementary School, and the primary employment center on the island.*** The Central Maui Regional Park may provide an area for the offices of the County Department of Parks and Recreation, a community center, County baseyards and like County facilities, and a location for the annual County Fair. The distinct boundaries of the park, specific location of the recreational uses, and the precise amenities will be further defined during the Wailuku – Kahului Community Plan update and the Wai`ale project review and approval process.

MI Plan at 8-25 (emphasis added).

Fourth, in contrast to the regional park, the Directed Growth Plan does not identify the *Central Maui Community Park* for active recreation but rather identifies its necessity as a *buffer*: "The Central Maui ***community*** park will be established north of the Wai`ale planned growth area, proximate to a high concentration of existing and proposed residential and industrial uses, Pomaika`i Elementary School, and the primary employment center on the island." MI Plan at 8-25 (emphasis added). *See* also footnote 22 herein.

Finally, the Directed Growth Plan explains that the final boundaries, and the specific uses for each of the parks, would be finalized during the community plan update process and during the project review for Wai`ale: "The distinct boundaries of the park, ***specific location of the recreational uses***, and the ***precise amenities*** will be further defined during the [WKC] Plan update and the Wai`ale project review and approval process." MI Plan at 8-25 (emphasis added). *See* also footnote 22 herein. Notably, the WKC Plan update process is not complete, and A&B has not even initiated a request for any of the entitlements it needs from the County.

Thus, the Maui Planning Commission was outside its authority in granting the SUP for a regional park for the Subject Property where the Directed Growth Plan specifically identified the Subject Property for a *community* park. The two uses are entirely different, as may be seen from MCC §§ 19.615.030 (*PK-2 Community Park District*) and 19.615.040 (*PK-3 Regional Park District*). Specifically, *PK-2* permits passive recreational activities as the principal use, while *PK-3* permits intensive active recreational activities as the principal use. *See* **Exhibit 8** (providing the text of these MCC sections, as well as the related definitions for "active recreation" and "passive recreation").

D. The Maui Planning Commission Lacked the Authority to Grant the Sports Complex on Land Designated in the Wailuku-Kahului Community Plan for Agriculture

Neither DLNR nor the County disputes the fact that the Subject Property is currently designated as *Agriculture* in the WKC Plan. While the Maui Island Plan was adopted in 2012, the WKC Plan is now over a decade old, and the update process for the WKC Plan is just getting underway. Therefore, there is a clear conflict between the MI Plan and the WKC Plan. Nevertheless, until it is amended, it remains the law. *See* Part II(B), above; *cf. Leone v. Cnty. of Maui*, 128 Hawai`i 183, 194, n.8, 284 P.3d 956, 967, n.8 (Ct. App. 2012) (explaining that zoning "must" assure consistency with general and community plans, and that the plans are "binding on all county officials").

Therefore, any person proposing a use inconsistent with the WKC Plan must first obtain a community plan amendment to assure consistency between a proposed use and the community plan designation. Here, the WKC Plan must be amended to *Park* so that a park may be placed on the Subject Property without violating the WKC Plan, which has the force and effect of law.

However, with respect to the 5.8 acres of land designated for the retention basin for the surface water runoff generated in large part from the Wai`ale development (*see* discussion in Part I(A), above), that land area needs a community plan amendment to *Urban*, as was contemplated by A&B during the Wai`ale EIS process (discussed in Part II(D), below).

In summary, a community plan amendment is certainly required before, or concurrent with, the appropriate changes in zoning. The SUP is therefore illegal, null and void based on

DLNR's failure to obtain appropriate community plan amendments, and by the Maui Planning Commission overstepping its authority.

E. A Supplemental Environmental Impact Statement Is Required

Notwithstanding the fact that DLNR obtained a finding of no significant impact ("**FONSI**") for the Sports Complex based on its environmental assessment, this does not remove DLNR's obligation to prepare an EIS. When an EIS has been triggered, as occurred with the Wai`ale Project, any change in the "size, scope, location, intensity, use, [or] timing of the action" triggers the need for a *supplemental* EIS. Hawai`i Administrative Rules ("**HAR**") § 11-200-6.

HAR § 11-200-6 is unequivocal. It provides that "[i]f there is any change in ***any*** of these characteristics which ***may*** have a significant effect, the original statement that was changed ***shall*** no longer be valid because an essentially different action would be under consideration and a supplemental statement ***shall*** be prepared and reviewed as provided by this chapter." *Id.* (emphasis added). This language (*i.e.*, "shall") is mandatory, and neither DLNR nor any other agency has the discretion to provide an exception to the rule. *Cf. Unite Here! Local 5 v. City & Cnty. of Honolulu,* 123 Hawai`i, 150, 174, 231 P.3d 423, 447 (2010) ("HAR § 11–200–2 defines 'supplemental statement' as 'an additional ***environmental impact statement*** prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things'.") (emphasis added).

Here, a supplemental EIS ("**SEIS**") is clearly required because the impacts of the Sports Complex, as proposed by DLNR, *were at no time assessed* in the Wai`ale EIS—even though DLNR's environmental assessment mistakenly states otherwise. In fact, the Wai`ale EIS made it clear that its intentions for the Subject Property were only preliminary at the time. The EIS made no effort to evaluate the impacts of a sports complex because that idea in its current form did not yet exist. Instead, the EIS specifically explained that the specifics of the park to be located on the Subject Property would be worked out during the WKC Plan process, as well as during A&B's application for rezoning to *Project District* for Wai`ale.

Furthermore, the environmental assessment prepared by DLNR for the Sports Complex cannot be considered a substitute for a SEIS because DLNR's Sports Complex proposal immediately triggered the need for an SEIS, and, at any rate, DLNR's environmental assessment did not provide the level of study and analysis required for a SEIS.

This is further explained below by first reviewing the Wai`ale EIS and then the Sports Complex environmental assessment.

i. The Wai`ale EIS Did Not Analyze any of the Impacts Now Being Proposed by DLNR through its Sports Complex Initiative

A&B prepared and submitted an environmental impact statement for the Wai`ale project. The accepting authority for the EIS was the State of Hawai`i Board of Land and Natural Resources ("**BLNR**"). BLNR accepted the Wai`ale Final Environmental Impact Statement ("**FEIS**" or "**Wai`ale FEIS**") on November 4, 2011. A careful review of the FEIS shows that while it does identify the Subject Property as a "regional park," it does not identify the actual intended uses of the Subject Property.

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In fact, the FEIS makes clear in a number of places that *further studies regarding the specific uses for the proposed park would be necessary.* The FEIS explains that the County Department of Parks and Recreation had expressed its concern that the Subject Property *was not large enough for a regional park.* Moreover, the FEIS explains that the Parks and Recreation Department had expressed its opinion that the *draft* MI Plan had not yet identified the best location for a regional park. The Parks Department suggested A&B *wait* on establishing the specific park uses for the Subject Property until the County Council completed its work on the MI Plan. Wai`ale FEIS at 132.[23] It is clear from the FEIS that A&B followed this suggestion. (*Importantly, subsequent to the A&B's completion of the FEIS, the delineation of the regional parks in the MI Plan changed considerably: The final MI Plan identified the 209 acres immediately south of the South Wai`ale Land for the regional park, while it designated the Subject Property for a community park.*)

The fact that there would be more government scrutiny regarding the regional park was also anticipated in another section where the FEIS explained that a district boundary amendment to *Urban* was necessary so that then the County Council could consider a change in zoning from *Agriculture* to *PK-3 Regional Park District*:

> Additionally, in order for these areas to be zoned and utilized for recreational park purposes, they must be situated within the Urban Growth Boundary (UGB) so that appropriate zoning can be eventually obtained through the County's zoning process (per [MCC §] 19.615.040 which states that regional parks must be situated either in the State Land Use "Urban" or "Rural" Districts)."

Wai`ale FEIS at 26.[24]

Notably, A&B expressly identifies the fact that its project will need to meet the directives in the Maui Island Plan. For example, the FEIS states "the objectives of Wai`ale are to: Create a new residential community ***consistent with the parameters and design concepts of the Draft Maui Island Plan***." FEIS at 206 (emphasis added).[25]

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[23] The Wai`ale FEIS provided as follows:

> During the Draft EIS public review period, the County Department of Parks and Recreation wrote that it: "...wishes to withhold comment until County Council has completed its review of the Maui Island General Plan 2030. The Department is not in agreement with the Regional Park area designated in the Central Maui Regional Park map in the Directed Growth Plan section of the Island Plan, as it does not provide adequate area needed to accommodate a Regional Park." Wai`ale includes lands reserved for active regional and neighborhood parks, greenways and open space. The provision of lands for park purposes will be undertaken in consultation with the County's Department of Parks and Recreation (DPR) to ensure that park and playground assessment requirements are appropriately addressed.

Wai`ale FEIS at 132.

[24] The reference to MCC § 19.615.040 is erroneous because that section requires a proposed regional park district to contain a minimum lot area of 100 acres. MCC § 19.615.040C)(1). *See* **Exhibit 8.** However, the Subject Property could be permitted as a *PK-2 Community Park District*, which has a minimum lot requirement of only 25 acres. MCC § 19.615.040(c)(1).

[25] *See also* Wai`ale FEIS at 7, 13-14.

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Other parts of the FEIS establish that the intensive uses DLNR is now proposing through the Sports Complex were not at all being proposed by A&B, as the examples below illustrate:

- The FEIS provides that the park will be for "open space," and for a "buffer." Wai`ale FEIS at 26, 123, 217.[26] As the MCC definitions provided above explain, "open space" uses are to be "***essentially free of structures or impervious surfaces***," and "buffer" uses are "deliberately left in a specific condition, typically to protect a natural resource, mitigate development impacts, or protect the character of a community." (Emphasis added) *See* **Exhibit 8** (providing definitions).
- The FEIS explains the Subject Property is intended to provide "a spatial separation," suggesting more of an open space buffer, rather than intensive uses. FEIS at 29.[27]
- The FEIS includes an analysis of noise impacts for the Subject Property. FEIS at 86-91. Notably, it evaluates the impact *surrounding* noises would have *on users of the park*, thus suggesting a quiet, passive park, environment.
- As a final example, a review of the FEIS, as well as the traffic impact analysis attached to it as Appendix J, shows that the FEIS did not make any assumptions for the increased traffic relating to the Subject Property now being proposed by DLNR. This is consistent with one of the caveats stated in the FEIS explaining that the State Department of Transportation specifically required a new traffic impact analysis report if there would be "***any*** substantive changes or refinements to the Wai`ale master plan." Wai`ale FEIS at 85.

Reading the Wai`ale FEIS in total, it is clear that the Subject Property was identified for park activities. However, the specific activities within the park were intended to be determined and evaluated at a later date in the planning and development entitlement process. Thus, none of the impacts from the uses now proposed by DLNR for the Sports Complex were evaluated in the FEIS.

ii. The Environmental Assessment Prepared for the Sports Complex Does Not Fulfill DLNR's Obligation to Prepare a Supplemental EIS

In December 2012, the County adopted the MI Plan. Six months thereafter, in June 2013, the BLNR accepted DLNR's finding of no significant impact ("**FONSI**") from the *Central Maui Regional Park Final Environmental Assessment* ("**Sports Complex FEA**" or "**FEA**").

While the FONSI was certainly wrong as a matter of law because of the significant impacts that are associated with the Sports Complex, as noted at the beginning of this Part II(E),

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[26] The FEIS (at 26) provides in pertinent part: "The Wai`ale master plan has sought to incorporate ***the open space buffer*** between Maui Lani and Wai`ale as articulated in the *Draft Maui Island Plan*. Within the Wai`ale master plan, areas designated for ***park space*** and planned cultural preserves Seek to provide that ***open space buffer***. . . ." (Emphasis added).

[27] The FEIS (at 29) provides in pertinent part as follows: "A regional park is proposed along the northern boundary of Wai`ale, providing ***a spatial separation*** between the neighborhoods of Wai`ale and Maui Lani. This park is intended to support regional and Wai`ale recreational activities and would be within walking distance or a bicycle ride from residential communities and schools."

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the FONSI determination is of no binding legal significance because HAR § 11-200-2 specifically requires an SEIS under the circumstances presented here. In addition, the FEA is replete with material omissions and misrepresentations, which are briefly discussed below. Had the appropriate SEIS been done, these issues would have likely been addressed and/or corrected. However, as things stand now, they are egregious inadequacies—even for the purposes of an environmental assessment. These inadequacies are as follows:

- The FEA fails entirely to make any attempt to address noise, light and traffic impacts. In fact, the FEA asserts that the traffic impacts that would be associated with the Sports Complex had already been evaluated in the Wai'ale EIS, and were determined to be insignificant. This is patently false.
- The FEA, prepared *after* the MI Plan has been adopted by the County, fails to mention the significant directives in the MI Plan and Directed Growth Plan. This by itself renders the entire FEA inadequate, considering:
    1. the MI Plan directly deals with the Subject Property;
    2. the MI Plan provides that the Subject Property shall be used for a *passive* recreation *community* park, not an *active* recreation *regional* park;
    3. the *final* designated location in the MI Plan for the regional park had changed subsequent to the publication of the Wai'ale EIS, which was based only on the *draft* MI Plan; and,
    4. the final MI Plan, approved by the County Council, has the force and effect of law with respect to the permitted uses on lands that have been specifically identified therein.[28]
- The FEA fails to explain or evaluate the *actual* use of the park, which is the use as recently enunciated in Governor Abercrombie's Sports Development Initiative. This Initiative clearly provides that the *principal* use of the Subject Property will be for professional and amateur sport teams flying in from potentially all parts of the world using the park in a uniquely intensive manner that must be specifically evaluated.[29] Any

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[28] The FEA's only reference to the Countywide Policy Plan is, itself, entirely misleading. To show consistency, the FEA relies on an out of date, 2011, study prepared for an unknown purpose:

> The County of Maui adopted a *Countywide Policy Plan* in March 2010. The Plan includes broad goals and more specific goals and objectives. Generally, the project supports the goals set forth in the Plan (PBR Hawai'i & Associates 2011).

FEA § 7.6, at 35.

[29] Specifically, the FEA only provided the following minimal description of the intended uses:

> The park will act as a partial northern boundary to the larger Wai'ale master planned community, as well as a southern boundary to the existing Maui Lani master planned community. Accessible by bicycle and walkable from residential areas, the park will act as a recreational area for the general public. ***The park will provide a venue for sports tournaments.***

FEA § 2.2, at 4-5 (emphasis added).

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community sports opportunities under the Initiative are intentionally secondary, or *accessory* in nature.[30]

- The FEA's "alternative action" fails to even discuss the most obvious alternative to the Sports Complex—that of a *community* park for *passive* recreation, as intended by the MI Plan. FEA § 3.3, at 6-7. Instead, the FEA suggests (in direct contradiction to the enunciated purpose of the Sports Development Initiative) that the Sports Complex, aka the "preferred alternative," will benefit the adjacent homeowners:

> The park will be used by nearby residents in the Wai'ale and Maui Lani communities. With Pomaika'i Elementary School nearby, as well as a potential 18-acre middle school including 6 acres of school fields which will be adjacent to the park, the park's sports fields will be available for use by students and the general public.

FEA § 3.3.2, at 7.

Compounding the above inadequacies is the fact that DLNR actually published noise, lighting and traffic studies *after* it obtained confirmation of its FONSI from BLNR and *after* it was granted the SUP from the Maui Planning Commission. Neither BLNR, nor the Maui Planning Commission, were given the opportunity to review these studies. These three recently provided studies are briefly discussed below in comparison to the relevant section in the Sports Complex FEA.

Noise. Section 4.8 of the FEA provides a one paragraph "assessment" of noise. The paragraph simply identifies the *baseline* ambient noise levels (based on a report that is not attached to the FEA and that was generated in 2011 for apparently a different purpose). Yet, *after* DLNR was successful in obtaining a FONSI, and was granted the SUP, it then published a noise impact assessment, dated April 22, 2014, for the proposed Sports Complex. The assessment clearly establishes that there will be significant noise impacts from the Sports Complex whenever there is more than one game being played on the field—a likely scenario considering the number of sports fields. With respect to Maui Lani homeowners attempting to enjoy their properties from outside their homes, the study explained: "These activities will be audible in the backyards of the adjacent residences ***and may be considered intrusive***. . . .[31] Even when the homeowners are inside, the study acknowledged impacts whenever there would be cheering or shouting—a very likely event: "Sporting event noises will likely only be audible inside the residences when there is a significant amount of cheering and shouting on the athletic fields." *See* footnote 31. Finally, while the assessment evaluates the impact on the Maui Lani neighborhood, it does not attempt to evaluate the impact on homeowners in residential units

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[30] While it is likely that the neighboring community will be granted some use of the Sports Complex, nowhere in the FEA does DLNR alert the community or the decision makers that the Sports Complex is really intended, under the State's Sports Development Initiative, to attract professional and amateur sports *visitors* for the purpose of creating a new income stream for the Hawai'i economy. Nor, are community members or decision makers alerted that the Hawai'i Tourism Authority will have the primary role of deciding who may use the recreational amenities, and when, and for how much time, and for what intensity.

[31] D.L. Adams Assoc., Central Maui Regional Park Noise Assessment (DLAA #14-22) (4/22/2014) at 2.

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planned for Wai'ale, even though these homeowners will be downwind from the prevailing trade winds, and thus, according to the study, would be more greatly impacted. *See* footnote 31.

Traffic. The number of errors and omissions (or outright false statements) made in the FEA with respect to traffic are troubling, as shown below:

- The FEA acknowledges that the Sports Complex "may increase the amount of vehicular and foot traffic to the park, especially during weekends and scheduled game events." FEA § 5.1, at 21. However, the FEA then suggests the impact on the Maui Lani homeowners would be "temporary." *Id.* The FEA fails to explain that "temporary" is a relative term, considering the Wai'ale EIS had already suggested that the route through Maui Lani (Maui Lani Parkway and Kamehameha Avenue, *see* Part I(A), above) would likely be used ***until 2022.***
- The FEA also states that the Wai'ale EIS had already determined there would be no impact from the Sports Complex.[32] As discussed earlier, this is patently false. The FEA makes this representation even though it is abundantly clear that the Wai'ale EIS did not attempt to evaluate the impact from a use that had not yet been specifically determined by A&B.
- Similar to the situation with noise impacts, DLNR did not publish a traffic impact analysis report until May 20, 2014 ("**2014 TIAR**"),[33] *after* it had obtained all the approvals it believed it needed. The 2014 TIAR reveals the Maui Lani Parkway and Kamehameha Avenue intersection are *already* operating at unacceptable Levels of Service, namely "***Level of Service F and overcapacity conditions***," even before including the significant increase in traffic from the proposed Sports Complex. 2014 TIAR § II(C), at 6.
- The 2014 TIAR goes on to explain that in the *next year* (2015), the Sports Complex would add to the overcapacity by "generat[ing] approximately 213 PM peak hour trips and 369 Saturday peak hour trips." 2014 TIAR § IV(A), at 16.
- Additionally , the 2014 TIAR confirms that "temporary" access through Maui Lani means probably at least until 2022, but that it could be *even longer*:

> At the time of this writing ***it is uncertain when the Waiale Development would be completed***, therefore, Year 2022 was selected as the build out

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[32] The FEA *mis*-states in pertinent part:

> Proficiency on the traffic network to mitigate the potential impacts of the Central Maui Regional Park ***has already been evaluated as part of the Wai'ale Environmental Impact Statement (2011) in which the proposed improvements to the park were included.*** An evaluation of traffic impacts during peak travel periods (AM and PM) did not show that the park would have a significant impact as most of the organized activity at the park would generally occur during off peak periods during the weekday and on weekends.

Sports Complex FEA § 5.1, at 21 (emphasis added).

[33] R.M. Towill Corp., *Traffic Impact Analysis Report Central Maui Regional Sports Complex* (May 20, 2014) ("2014 TIAR").

> year of that development to be consistent with the March 2011 Waiale Development TIAR. Furthermore, the Waiale Development is currently being revised and an update TIAR is planned as a result.

2014 TIAR, § IV(B), at 22 (emphasis added)

Lights. With respect to the impact of the evening lights, the FEA fails to even address potential impacts, even though sports fields lighting is an inherent nuisance that is always a significant issue for nearby communities. However, again, *after* obtaining the approvals it believed it needed, DLNR apparently attempted to evaluate lighting impacts. DLNR has published lighting drawings, dated April 17, 2014, prepared by Musco Lighting. However, the drawings do not include any decipherable analysis of the impacts for a layperson.

In summary, the FEA, which is inadequate even as an environmental assessment, certainly does not qualify as a SEIS. An SEIS is mandated by the law in light of DLNR proposing a new and substantially different use on land that was already the subject of an EIS, and for which the EIS did not evaluate the impacts now being proposed. In addition to the other legal obstacles described herein, it is clear that the Sports Complex may not lawfully proceed until DLNR prepares the SEIS, and the SEIS has been determined legally adequate.

F. The LUC Identified the Southern Portion of the South Wai'ale Land for Active Recreational Uses

Seven months after the Wai'ale FEIS, on June 21, 2012, the State Land Use Commission ("**LUC**"), pursuant to HRS Chapter 205, re-designated the 545-acre Wai'ale Land from *Agriculture* to *Urban* by granting a state district boundary amendment ("**DBA**"). This DBA was granted through Findings of Fact, Conclusions of Law, Decision and Order, filed by the LUC on June 21, 2012 ("**LUC D&O**").

The LUC granted the DBA for the Wai'ale Land subject to an express promise from A&B (which is recorded on title and which runs with the land, and which obligates A&B's successors and assigns) that the Wai'ale Land would be developed "in substantial compliance with the representations" made by A&B during the DBA process. LUC D&O at ¶ 21.[34] A&B's representations include those made through its application, exhibits, evidence presented at the DBA hearing, and including the representations A&B made in the Wai'ale FEIS.

Some of the key representations of A&B are set forth in the D&O as Findings of Fact ("**FOF**"). FOF ¶ 122 expressly identifies that the "southern portion of the Petition Area" (*i.e.*, a

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[34] *See* § 21 of LUC FOF/COL & Order. "Substantial" means actual compliance to necessary elements of the LUC FOF/COL & Order. *See, e.g., Sundquist Homes, Inc. v. County of Snohomish*, 276 F. Supp. 2d 1123, 1127 (W.D. Wash. 2003) *aff'd sub nom. Sundquist Homes Inc. v. Snohomish County*, 166 F. App'x 903 (9th Cir. 2006):

> Substantial compliance has been defined as actual compliance in respect to the ***substance essential to every reasonable objective of the statute.*** It means a court should determine whether the statute has been followed ***sufficiently so as to carry out the intent for which the statute was adopted.*** What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

(Emphasis added).

southern triangular section designated as park in the final MI Plan for the South Wai`ale Land) was to be used for "active recreational uses," "as opposed to passive recreational uses":

> The Project will include [1] a regional park that borders Kuihelani Highway and Road C [*i.e.*, the Subject Property], [2] a neighborhood park that borders Kuihelani Highway [this is a narrow strip fronting most of the highway], and [3] a cultural preserve in the northeastern portion of the Petition Area. [4] *The 300 feet closest to Kuihelani Highway on the southern portion of the Petition Area* [*i.e.*, the southern triangular part of the South Wai`ale Land] ***will be developed with active recreational land uses (e.g., ball fields or basketball courts) as opposed to passive recreational land uses (e.g., art garden).***

LUC D&O, FOF ¶ 122 (emphasis and bracketed material added).

This southern portion of the Petition Area, which is identified in FOF ¶ 122, was already identified as "park" by A&B in the Wai`ale EIS, and is shown with annotations in **Exhibit 7**. Identifying this southern, triangular, park-designated, section of the South Wai`ale Land for *active* recreational uses is consistent with the fact that A&B, the County and other government agencies had been discussing for decades the idea of a regional park *south* of Waiko Road.[35] This long term goal was consummated when the County purchased 209 acres from A&B in September 2013 for the express purpose of the County regional park. The approximate boundaries of the 209 acre parcel purchased by the County are annotated on **Exhibit 7**. This is consistent with the MI Plan, which shows the regional park south of Waiko Road. *See* **Exhibits 6 and 9**.

Importantly, FOF ¶ 122 expressly distinguishes between "passive recreational uses" and "active recreational uses" in its discussion of the four parks, and identifies for "active recreation" only the southern portion of the South Wai`ale Land. Reading FOF ¶ 122 with the above context confirms the Subject Property was to be limited to passive recreational uses.

This understanding is entirely consistent with the other facts that have been set forth above: (1) the fact that the County Parks and Recreation Department had expressed during the Wai`ale EIS process that it was concerned that the Subject Property was inappropriate for a regional park; (2) the fact that, thereafter, the final MI Plan designated the 209 acres purchased by the County for the regional park and designated the Subject Property for a community park; and (3) the fact that A&B had already identified in the Wai`ale EIS that there was a need for a *true* open space buffer between Maui Lani and Wai`ale, which identified point was further confirmed in the MI Plan.

Therefore, if DLNR were to proceed with its current Sports Complex proposal for the Subject Property, it would violate HRS Chapter 205, as well as the LUC D&O. The LUC D&O, like all LUC D&Os, was recorded as required by law, and the obligations therein run with the

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[35] *See, e.g., http://mauinow.com/2013/10/15/first-pitch-tossed-at-future-central-maui-regional-park/*: [Mayor] Arakawa says acquisition of the new park lands has been in the works for more than 20 years, when former A&B executive Mercer "Chubby" Vicens proposed the idea of selling A&B land in Waikapū to the county for a park complex."

land binding all future owners of the property, including the State of Hawai'i.[36] DLNR is bound by the LUC's decision. The Subject Property may not be used for active recreational uses.

G. The Exemptions for the Consolidation-Resubdivision Process Set Forth in the MCC Violate the State Enabling Statute, and the Public Works Director Otherwise Exceeded His Authority in Granting a Consolidation-Resubdivision of the North Wai'ale Land

On October 24, 2013, the County granted A&B final approval for A&B's consolidation-resubdivision request relating to the boundary adjustment of a number of parcels consisting of the North Wai'ale Land. This was done through Subdivision File Number: 3.2226, entitled the "Maui Lani Subdivision," which the County Director of Public Works approved on 10/24/2013, including the final subdivision map. The approved subdivision includes "Lot 12-A-3," which delineates the boundaries of the Subject Property.

Ordinarily, a large master planned project that still requires a project district, like Wai'ale, would not be able to proceed as to any of its intended development proposals until the project district approval was received, as well as all related approvals. Yet, here, A&B was permitted to carry out part of its master plan process—the creation of a park, as well as the creation of a retention basin, without there being any subdivision conditions being placed on the land. Apparently, it was the County's determination that the above could be permitted because of the exemptions set forth in MCC Chapter 18 relating to consolidations-resubdivisions.

However, as a matter of law, the consolidation-resubdivision exemptions of Chapter 18 violate the State enabling statute, HRS § 46-4, at least as to the statute's mandates with respect to the implementation of the directives in the County's general plan, and subsidiary planning documents (*i.e.*, the MI Plan, the Directed Growth Plan and the WKC Plan). As was already identified in Part II(B), above, "Zoning in all counties ***shall*** be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county." HRS § 46-4. Moreover, a Public Works Director may not ignore County planning documents. Instead, ***all*** administrative actions of government agencies are expressly required to "conform to the general plan." MCC § 2.80B.030(B). *Cf. Leone v. Cnty. of Maui* (holding directives in community plans are "binding on all county officials").

The County's subdivision ordinance specifically reflects the County's obligation to assure consistency with the general plan and delegates to the Public Works Director the obligation to assure consistency during the subdivision process:

> The director shall determine whether a proposed subdivision is consistent with the county general plan, community plans, State land use classification, and zoning after consultation with the planning director. If the subdivision does not involve a special management area permit, planned development, or project district, the director shall impose any conditions necessary to ensure consistency of land uses and shall require that

[36] *See* "Declaration of Conditions," and "Notice of Imposition of Conditions by the Land Use Commission," each filed in the State of Hawai'i Bureau of Conveyances on June 27, 2012, with respective Doc. Nos.: A-45610753 and A-4561052.

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> an applicant execute and record with the bureau of conveyances of the State of Hawaii or the land court of the State, as the case may be, a unilateral agreement incorporating such conditions, which shall be limited to a declaration of permissible uses.

MCC § 18.04.030(D).

Notwithstanding the above section, which appears to entail any and all subdivisions, MCC § 18.04.020(C) exempts consolidation-resubdivisions from the consistency requirement. However, there is no County discretion permitted with respect to general plans, and the related county planning documents, under the clear and unambiguous language in the State enabling statute. Therefore, MCC § 18.04.020(C) violates the State enabling statute, at least as to its exemption of consolidation-resubdivisions from the obligation to assure consistency with the general plan and subsidiary parts. Here, the failure of the Public Works Director to require consistency permitted A&B to subdivide the Subject Property so that it could be used for a regional park and an urban retention basin, even though, as discussed earlier, both of those uses are inconsistent with the WKC Plan's designation of *Agriculture,* and the MI Plan's designation of community park. Therefore the A&B consolidation-resubdivision for the North Wai'ale Land is illegal, null and void.

Further, irrespective of the above, the Public Works Director exceeded his authority and/or abused his discretion. While the consolidation-resubdivision ordinance permits an applicant to avoid a number of significant public health and safety benefits requirements that would otherwise be conditions of final subdivision approval for a standard subdivision, MCC § 18.04.020(C), these exemptions are not absolute. The Public Works Director has the discretion, and obligation, to impose requirements where a subdivision will have a significant or substantial impact upon public facilities or infrastructure. *See* MCC § 18.04.020(E). Here, the Director failed to require the Subject Property to be designated as a community park, as specifically designated in the MI Plan, and the Directed Growth Plan therein. The Director also in the process violated the State enabling statute's requirement that parks and playgrounds created from subdivisions be for the benefit of the residents in or around the park:

> [E]ach county shall adopt ordinances to require a subdivider, as a condition to approval of a subdivision to provide land in perpetuity or to dedicate land for park and playground purposes, ***for the use of purchasers or occupants of lots or units in subdivisions.***

HRS § 46-6(a) (emphasis added).[37]

Thus, the consolidation-resubdivision for the North Wai'ale Land is illegal, null and void, at least with respect to the ability of DLNR to use the Subject Property for the Sports Complex and the retention basin.

---

[37] Additionally, in light of the retention basin, which DLNR has confirmed runs in favor of A&B's Wai'ale project, it is difficult to imagine how A&B can convey a deed to DLNR reserving rights in the retention basin for a clearly urban use without violating MCC § 19.30A.040, which provides in pertinent part: "No deed, lease, agreement of sale, mortgage or other instrument of conveyance shall contain any covenant or clause which restricts, directly or indirectly, the operation of agricultural activities on lands within the agricultural district."

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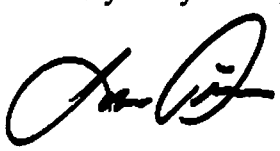
H. The Sports Complex Must Go Elsewhere Because Subject Property Cannot Meet the *PK-3 Regional Park District* Minimum Lot Requirements

DLNR cannot cure the problems discussed above in this letter by simply now going through the rezoning process. That is because the *PK-3 Regional Park District* requires a minimum lot size of 100 acres, and the Subject Property is only 65 acres in size. As discussed above in earlier sections, both during the Wai`ale EIS process, as well as the MI Plan process, agencies identified the fact that the Subject Property was too small for a regional park. Therefore, if DLNR still desires to implement the Sports Development Initiative in Central Maui, it must find an appropriate property on which to do it, where the property can be zoned *PK-3*. The appropriate property is the 209 acre parcel purchased by the County for a Central Maui Regional Park.

III. CONCLUSION

We sincerely hope that DLNR will appreciate the legal significance of the foregoing and confirm its intention to cease and desist from further development of the Sports Complex, as demanded herein.

Very Truly Yours,



Tom Pierce

cc: Tina Hoenig (President of Maui Lani Neighbors, Inc.)

BY EMAIL, U.S. MAIL AND CERTIFIED MAIL TO:

William Spence, Planning Director, County of Maui
David Goode, Public Works Director, County of Maui
Current Chair, State of Hawai`i Land Use Commission
Grant Chun, V.P., Maui, A&B Properties, Inc.

Figure 4 Site Map

EXHIBIT 1

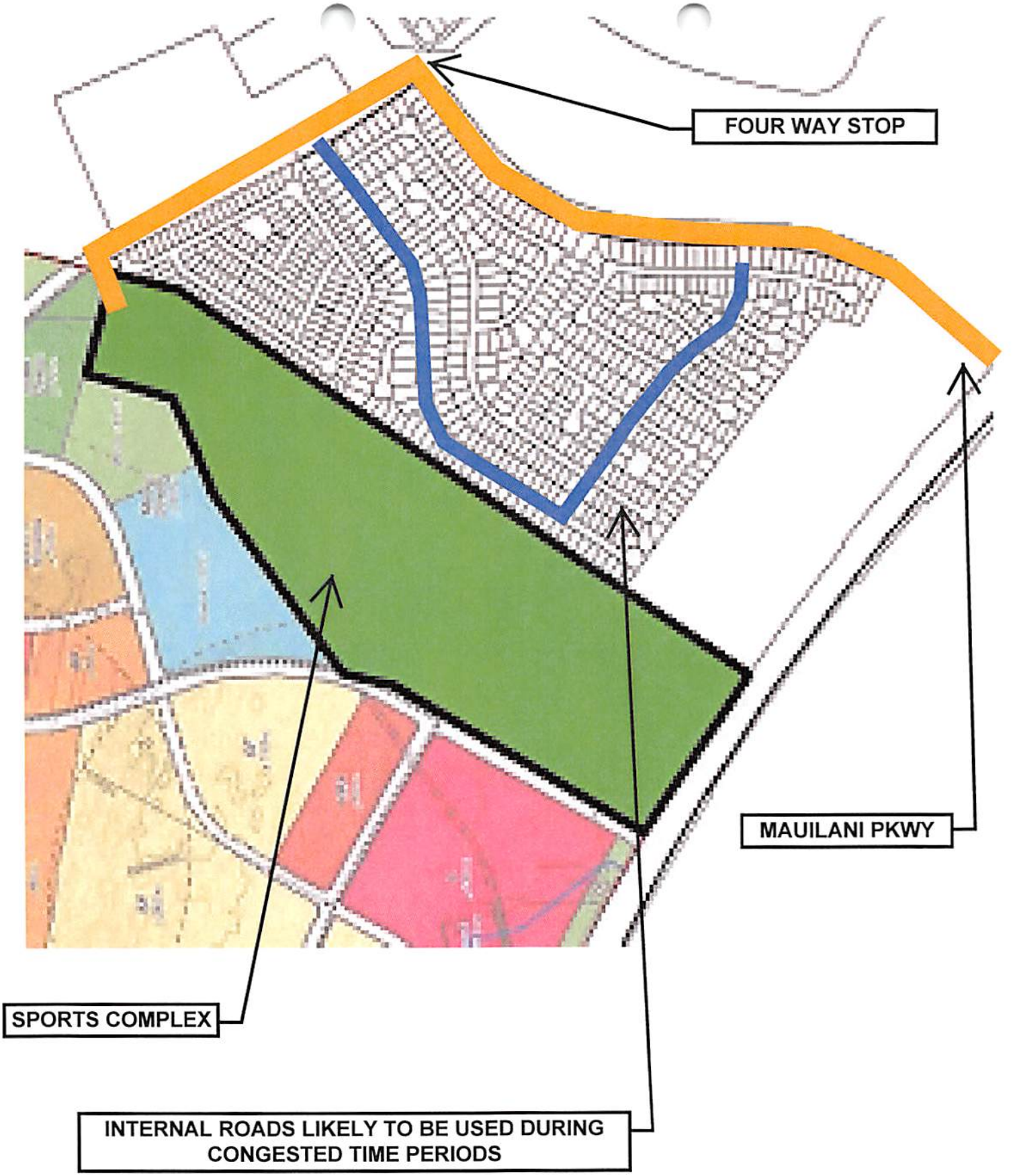
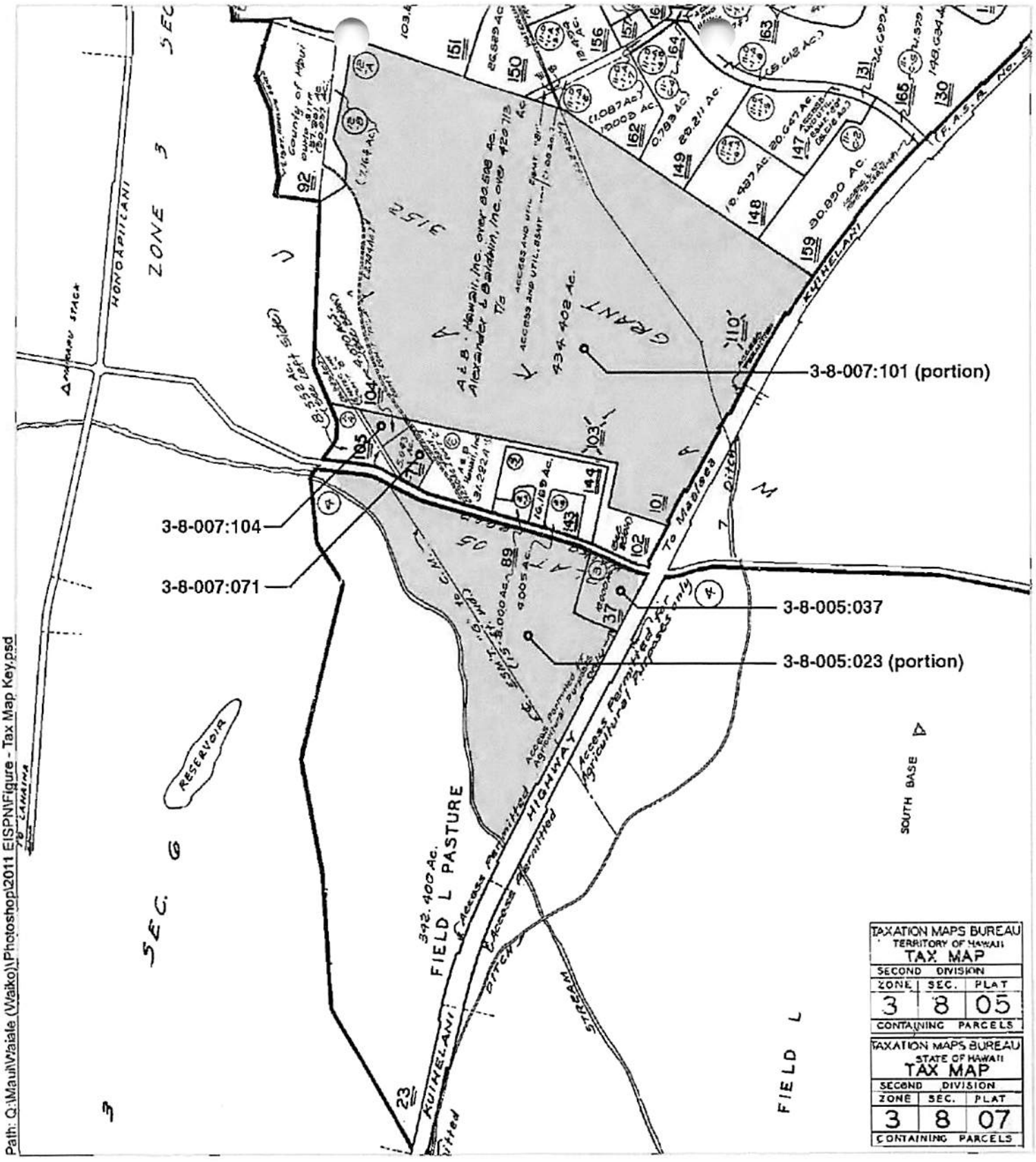

FOUR WAY STOP
MAUILANI PKWY
SPORTS COMPLEX
INTERNAL ROADS LIKELY TO BE USED DURING CONGESTED TIME PERIODS

EXHIBIT 2



LEGEND

Project Area

Figure 2-2
Tax Map Key
WAI'ALE
A&B PROPERTIES, INC. KAHULUI, MAUI

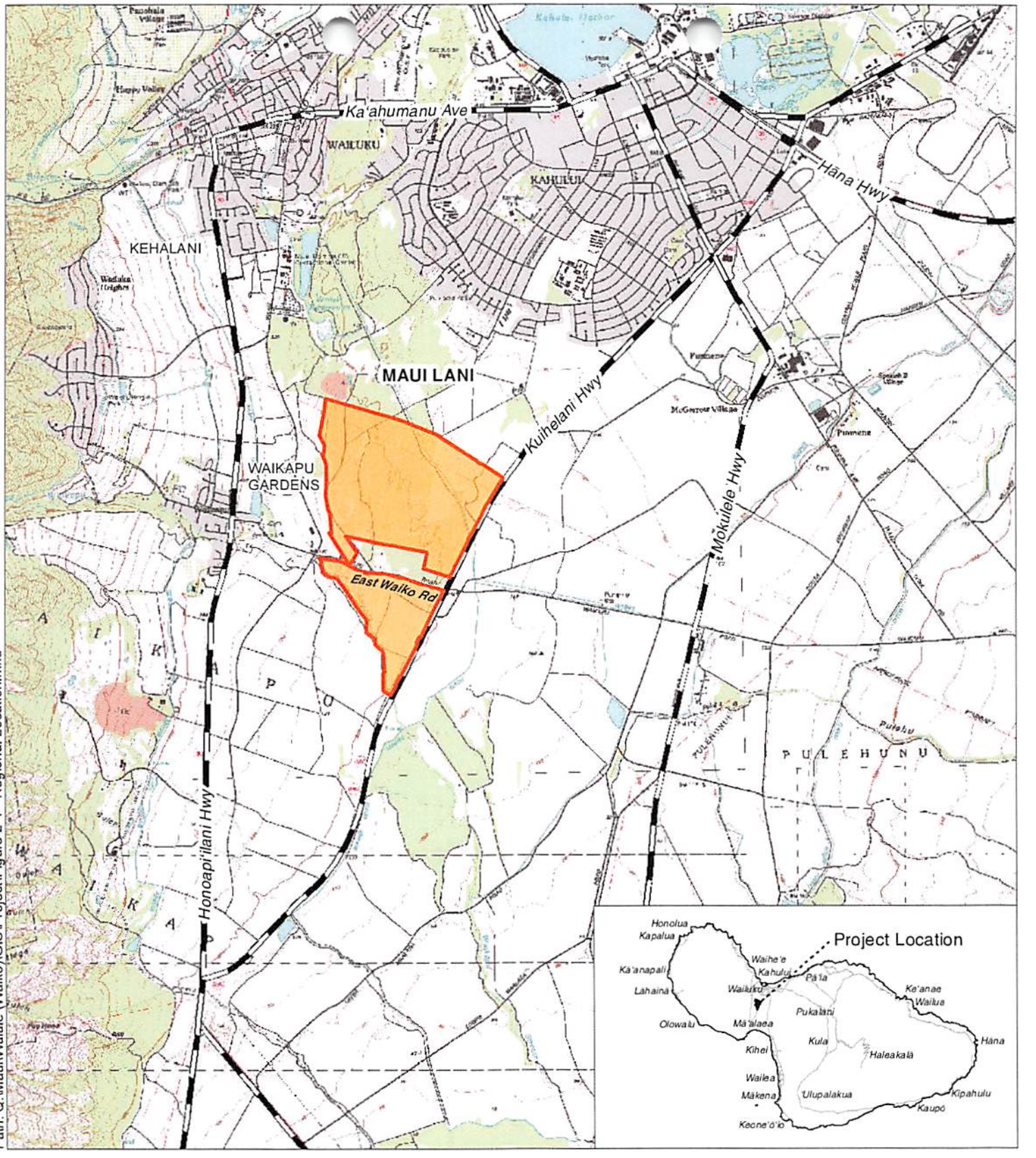
North

Linear Scale (feet)
0 750 1,500 3,000

PBR HAWAII & ASSOCIATES, INC.

Source: Tax Map Key: 3-8-05:xxx and 3-8-07:xxx
Disclaimer: This graphic has been prepared for general planning purposes only.

EXHIBIT 3



Path: Q:\Maui\Waiale (Waiko)\GIS\Project\Figure 2-1 - Regional Location.mxd

LEGEND

Project Area

Figure 2-1
Regional Location

W A I ' A L E

A&B PROPERTIES, INC. KAHULUI, MAUI

North

Lineal Scale (feet)

0 1,000 2,000 4,000 8,000

PBR HAWAII & ASSOCIATES, INC.

Source: U.S. Geological Survey (GIS)
Disclaimer: This graphic has been prepared for general planning purposes only.

EXHIBIT 4

EXHIBIT 5

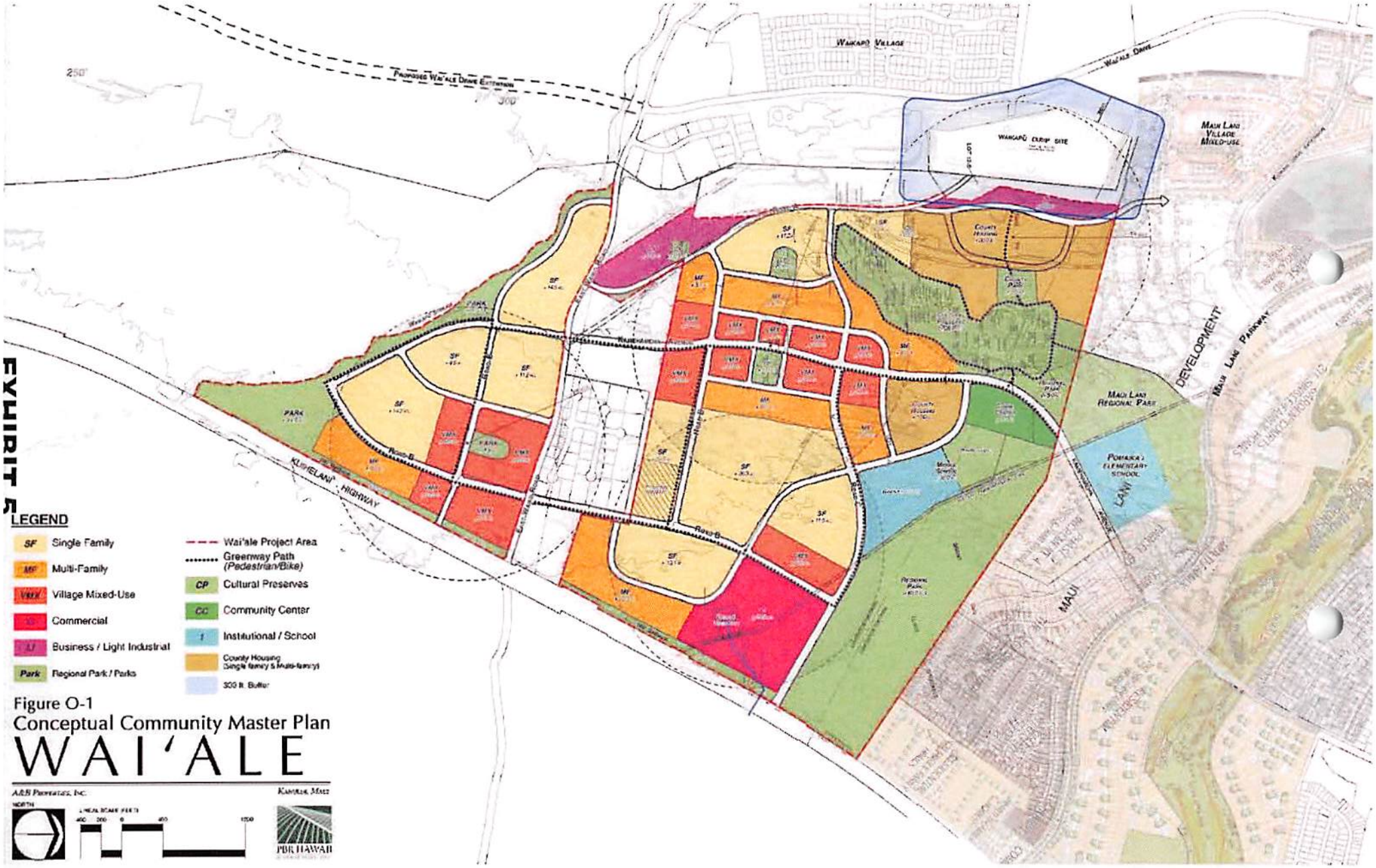


Figure O-1
Conceptual Community Master Plan
WAI'ALE

Wailuku – Kahului – Planned Protected Areas

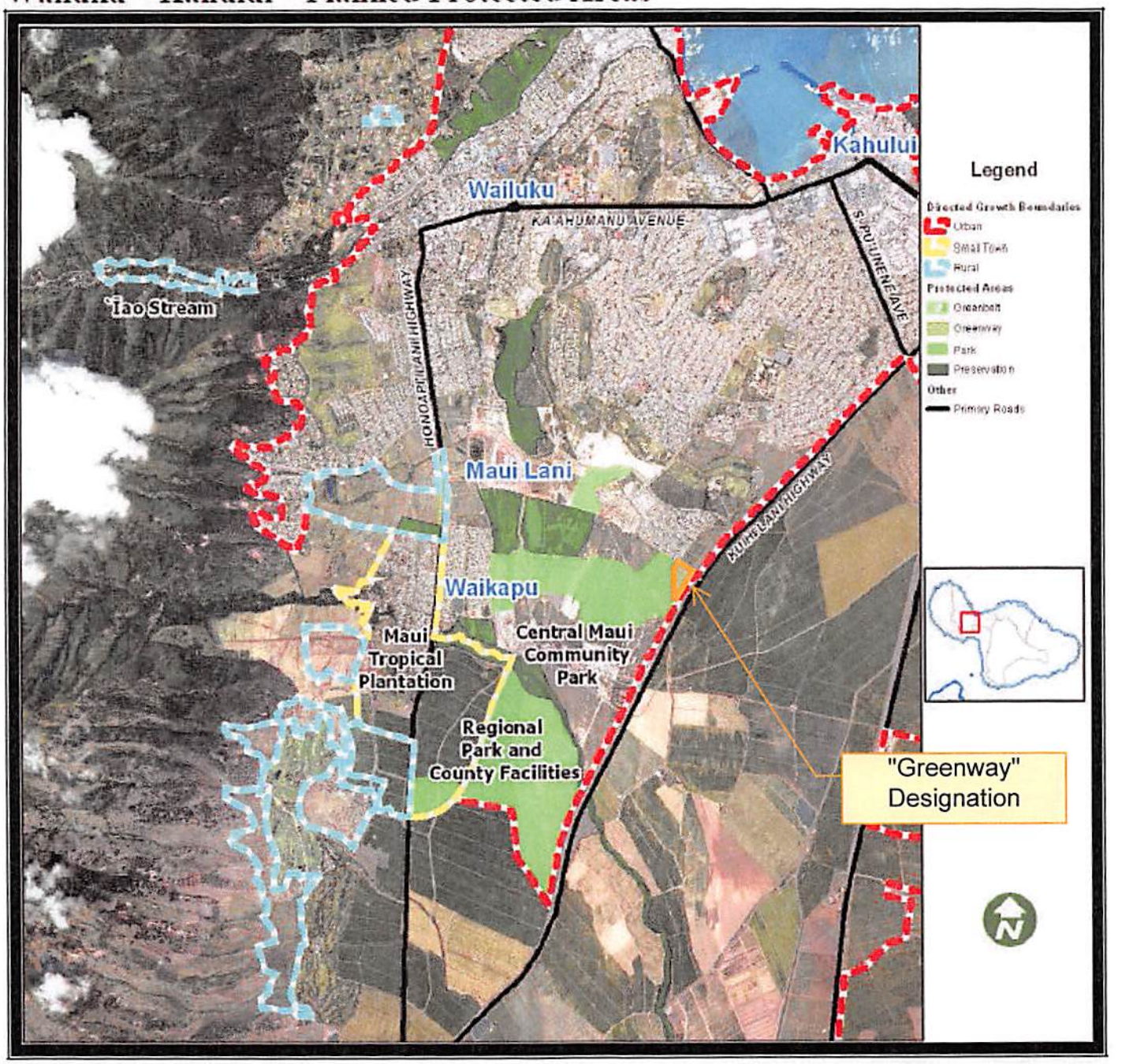
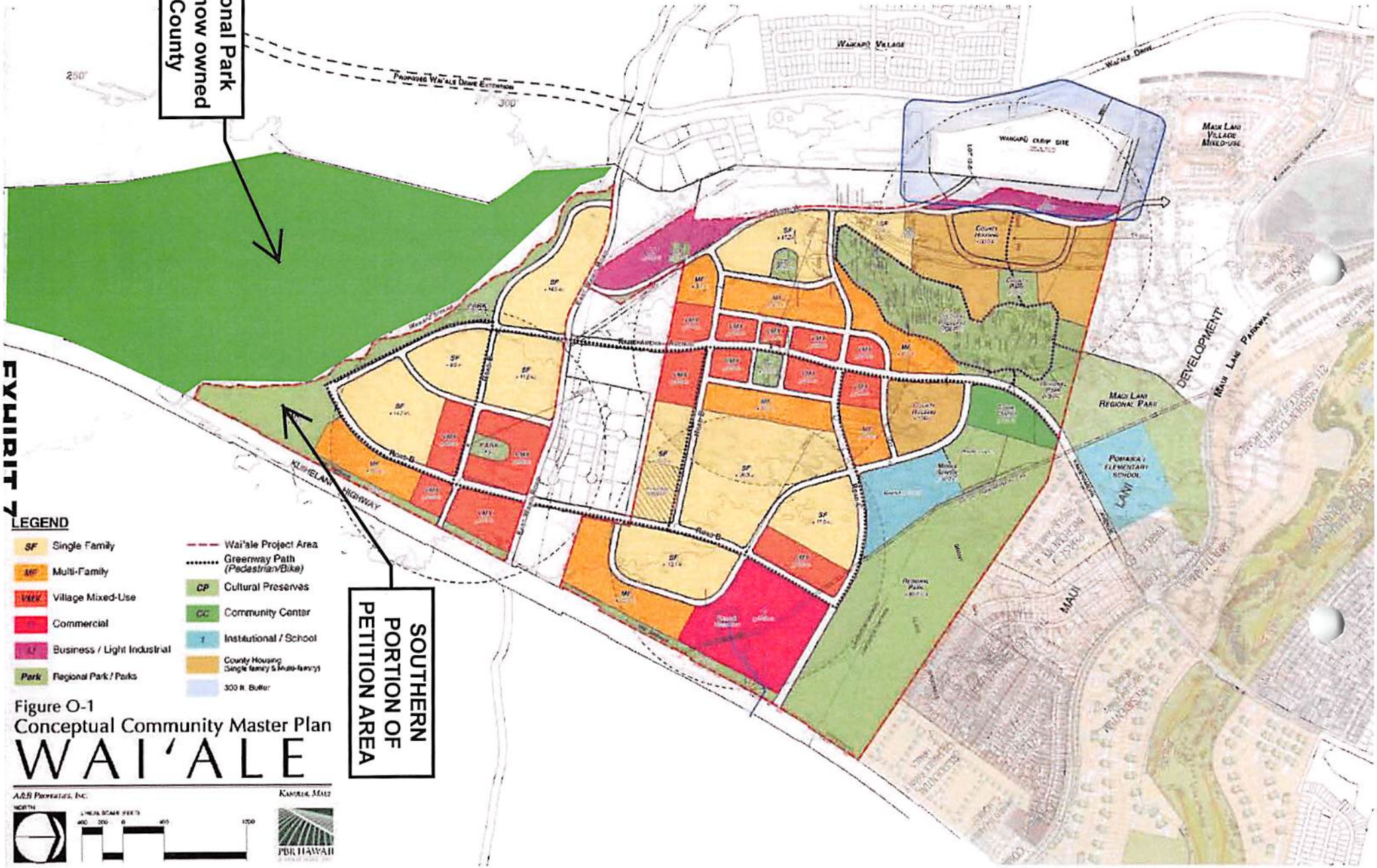


Figure 8-2: Central Maui Regional Park, Community Park, Preservation, and County Facility Area

EXHIBIT 6


Regional Park Land, now owned by County
SOUTHERN PORTION OF PETITION AREA
EXHIBIT 7
LEGEND
SF Single Family
MF Multi-Family
VMU Village Mixed-Use
C Commercial
LI Business / Light Industrial
Park Regional Park / Parks
Wai'ale Project Area
Greenway Path (Pedestrian/Bike)
CP Cultural Preserves
CC Community Center
I Institutional / School
County Housing (Single family & Multi-family)
300 ft. Buffer
Figure O-1
Conceptual Community Master Plan
WAI'ALE
A&B Properties, Inc.
Kahului, Maui
PBR HAWAII
Waiale Drive
Waiale Drive Extension
Waiko Road
Kuihelani Highway
Road A
Road B
Waikapu Village
Waikapu Camp Site
Maui Lani Village Mixed-Use
Maui Lani Parkway
Maui Lani Regional Park
Pomaikai Elementary School
Maui Lani Development
Maui

MAUI COUNTY CODE

Selected Sections

The County planning documents and environmental documents discussed in the attached letter are grounded in implementing, or relying on, the Maui County Code ("MCC"). Key definitions and rules from the MCC are provided below.

General Plan

MCC Chapter 2.80B, entitled "General Plan and Community Plans," relates to all of the County's planning documents. These include the Countywide Policy Plan, the Maui Island Plan (which includes the Directed Growth Plan), and the nine County community plans, including the relevant one here, the Wailuku-Kahului Community Plan. Below are three relevant definitions from MCC Chapter 2.80B.

> **"Buffer"** generally refers to the designated area around a land use or geographic feature, deliberately left in a specific condition, typically to protect a natural resource, ***mitigate development impacts, or protect the character of a community***."
>
> **"Greenbelts"** means ***an extensive area of largely undeveloped or sparsely occupied land*** established along natural corridors to protect environmental resources ***and to separate distinct communities***. Greenbelts may include accessory structures and ancillary uses consistent with the purpose and intent of the greenbelt area.
>
> **"Greenway"** means typically a long, narrow piece of land, often times used for recreation, pedestrian, and bicycle traffic. Greenways can include community gardens and can be used to link community amenities (e.g., parks, shoreline). Greenways may include accessory structures and ancillary uses consistent with the purpose and intent of the greenway area.

MCC 2.80B.020 (emphasis added).

Zoning Definitions

Another relevant set of definitions are those set forth near the beginning of MCC Chapter 19 (Zoning). The definitions found there are used to interpret all of the County's zoning laws. Relevant definitions are set forth below:

> **"Open space"** means a zoning lot or portion thereof ***essentially free of structures or impervious surfaces*** that serve the purpose of ***visual relief and buffering*** from building and structural mass.
>
> **"Park"** means a tract of land designated and intended to be used for active ***or passive*** recreation.
>
> **"Active recreation"** means leisure time activities, usually of a more formal nature and performed with others, ***often requiring equipment and facilities***, and taking place at prescribed places, sites, or fields.

EXHIBIT "8"

"**Passive recreation**" means leisure time activities other than active recreation, including walking, hiking and picnicking ***on open land recreation areas***.

Open land recreation" means public or private recreational use or enjoyment, including, but not limited to, parks, picnic grounds, beaches, beach accesses, greenways and areas for hiking, fishing, hunting, camping, equestrian activities, and other scenic interests, on a parcel or area of land or water which may be improved ***but which contains no buildings*** and which is set aside, designated, or reserved for such purposes.

MCC § 19.04.040 (emphasis added).

Agriculture District

19.30A.010 Purpose and intent.

A. Purpose. The purpose of the agricultural district is to:

1. Implement chapter 205, Hawai'i Revised Statutes, and the goals and policies of the Maui County general plan and community plans;
2. Promote agricultural development;
3. Preserve and protect agricultural resources; and
4. Support the agricultural character and components of the County's economy and lifestyle.

B. Intent. It is the intent of this chapter to:

1. Reduce the land use conflicts arising from encroachment of nonagricultural uses into agricultural areas;
2. Mitigate rising property values of farm lands to make agricultural use more economically feasible;
3. Discourage developing or subdividing lands within the agricultural district for residential uses, thereby preserving agricultural lands and allowing proper planning of land use and infrastructure development;
4. Discourage establishment of nonagricultural subdivisions;
5. Ensure that the rezoning of land from the agricultural district shall be open for public debate and in the overall public interest, as evidenced by conformance with the Maui County general plan and community plan land use designations and policies, State land use law, this chapter and good planning practices; and
6. Notify the public that lands within the agricultural district are used for agricultural purposes. Owners, residents, and other users of such property or neighboring properties may be subjected to inconvenience, discomfort, and the possibility of injury to property and health arising from normal and accepted agricultural practices and operations. Such normal and accepted agricultural practices and operations include but are not limited to noise, odors, dust, smoke, the operation of machinery of any kind, including aircraft, and the storage and disposal of manure. Owners, occupants, and users of such property or neighboring

properties shall be prepared to accept such inconveniences, discomfort, and possibility of injury from normal agricultural operations.

. . .

19.30A.050 Permitted uses.

The following uses and structures shall be permitted in the agricultural district provided they also comply with all other applicable laws:

A. Principal Uses.

1. Agriculture;
2. Agricultural land conservation;
3. Agricultural parks, pursuant to chapter 171, Hawai'i Revised Statutes;
4. Animal and livestock raising, including animal feed lots and sales yards;
5. Private agricultural parks as defined herein;
6. Minor utility facilities as defined in section 19.04.040, Maui County Code;
7. Retention, restoration, rehabilitation, or improvement of buildings, sites, or cultural landscapes of historical or archaeological significance; and
8. Solar energy facilities, as defined in section 19.04.040, Maui County Code, and subject to the restrictions of chapter 205, Hawaii Revised Statutes, that are less than fifteen acres, occupy no more than thirty-five percent of the lot, and are compatible with existing agricultural uses; except that land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class D or E need not be compatible with existing agricultural uses.

B. Accessory Uses. Uses that are incidental or subordinate to, or customarily used in conjunction with a permitted principal use, as follows:

1. Two farm dwellings per lot, one of which shall not exceed one thousand square feet of developable area;
2. One farm labor dwelling per five acres of lot area. On the island of Maui, the owner or lessee of the lot shall meet two of the following three criteria:
   a. Provide proof of at least $35,000 of gross sales of agricultural product(s) per year, for the preceding two consecutive years, for each farm labor dwelling on the lot, as shown by State general excise tax forms and federal form 1040 Schedule F filings;
   b. Provide certification by the department of water supply that agricultural water rates are being paid if the subject lot is served by the County water system; or
   c. Provide a farm plan that demonstrates the feasibility of commercial agricultural production.

   On the islands of Moloka'i and Lana'i, the owner or lessee of the lot shall meet both of the criteria provided by subsections 19.30A.050.B.2.a and 19.30A.050.B.2.b;

3. One agricultural products stand per lot, for the purpose of displaying and selling agricultural products grown and processed on the premises or grown in the County, provided that said stand shall not exceed three hundred square feet, shall be set back at least fifteen feet from roadways, shall have a wall area that is at least fifty percent open, and shall meet the off-street parking requirements for roadside stands provided by section 19.36.010 of this code, except that paved parking shall not be required; stands that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, Hawai'i Revised Statutes;

4. Farmer's markets, for the growers and producers of agricultural products to display and sell agricultural products grown and processed in the County; structures shall have a wall area that is at least fifty percent open; markets shall operate only during daylight hours and shall not operate on parcels less than ten acres; the director of public works may impose additional requirements if a building permit is required for any structures; markets that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, Hawai'i Revised Statutes;

5. Storage, wholesale and distribution, including barns; greenhouses; storage facilities for agricultural supplies, products and irrigation water; farmer's cooperatives; and similar structures that are customarily associated with one or more of the permitted principal uses or, for the purpose of this section, are associated with agriculture in the County;

6. Processing of agricultural products, the majority of which are grown in the County; this includes the burning of bagasse as part of an agricultural operation;

7. Energy systems, small-scale;

8. Small-scale animal-keeping;

9. Animal hospitals and animal board facilities; if conducted on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter;

10. Riding academies; if conducted on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter;

11. Open land recreation as follows: hiking; noncommercial camping; fishing; hunting; equestrian activities; rodeo arenas; arboretums; greenways; botanical gardens; guided tours that are accessory to principal uses, such as farm or plantation tours, petting zoos, and garden tours; hang gliding; paragliding; mountain biking; and accessory restroom facilities. If hiking, fishing, hunting, equestrian activities, rodeo arenas, hang gliding, paragliding, or mountain biking are conducted for commercial purposes on the island of Moloka'i, such uses shall have been approved by the Moloka'i planning commission as conforming to the intent of this chapter. Open land recreation uses or structures not specifically permitted by this subsection or by subsection 19.30A.060.H shall be prohibited; certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, Hawai'i Revised Statutes;

12. Except on Moloka'i, bed and breakfast homes permitted under chapter 19.64 of this code that are:

a. Operated in conjunction with a bona fide agricultural operation that produced $35,000 of gross sales of agricultural products for each of the preceding two years, as shown by State general excise tax forms and federal form 1040 schedule F filings; or

b. In compliance with all of the following criteria, provided that the bed and breakfast home is not subject to a condominium property regime pursuant to chapter 514A, Hawaii Revised Statutes:

i. The lot was created prior to November 1, 2008.

ii. The lot is comprised of five acres or less; and

iii. An approved farm plan has been fully implemented and is consistent with chapter 205, Hawaii Revised Statutes; or

c. Located in sites listed on the State of Hawaii Historic Register or the National Register of Historic Places.

13. Parks for public use, not including golf courses and not including commercial uses, except when under the supervision of a government agency in charge of parks and playgrounds; and

14. Other uses that primarily support a permitted principal use; however, such uses shall be approved by the appropriate planning commission as conforming to the intent of this chapter.

(Ord. No. 3824, § 2, 2011; Ord. No. 3611, § 3, 2008; Ord. 2749 § 3 (part), 1998)

19.30A.060 Special uses.

The following uses and structures shall be permitted in the agricultural district if a special use permit, pursuant to section 19.510.070 of this title, has been obtained; except that if a use described in this section also requires a special permit pursuant to chapter 205, Hawaii Revised Statutes, and if the land area of the subject parcel is fifteen acres or less, the state special permit shall fulfill the requirements of this section:

A. Additional farm dwellings beyond those permitted by subsection 19.30A.050.B.1;

B. Farm labor dwellings that do not meet the criteria of subsection 19.30A.050.B.2;

C. Agricultural products stands that do not meet the standards of subsection 19.30A.050.B.3;

D. Farmer's markets that do not meet the standards of subsection 19.30A.050.B.4;

E. Public and quasi-public institutions that are necessary for agricultural practices;

F. Major utility facilities as defined in section 19.04.040 of this title;

G. Telecommunications and broadcasting antenna;

H. Open land recreation uses, structures or facilities which do not meet the criteria of subsection 19.30A.050.B.11, including commercial camping, gun or firing ranges, archery ranges, skeet shooting, paint ball, bungee jumping, skateboarding, roller blading, playing fields, accessory buildings and structures. Certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, Hawaii Revised Statutes. The following uses or structures

shall be prohibited: airports, heliports, drive-in theaters, country clubs, drag strips, motor sports facilities, golf courses and golf driving ranges;

I. Cemeteries, crematories, and mausoleums;

J. Churches and religious institutions;

K. Mining and resource extraction;

L. Landfills;

M. Solar energy facilities that are greater than fifteen acres; and

N. Short-term rental homes, subject to the provisions of chapter 19.65 of this title; provided that, the applicant need not obtain a County special use permit pursuant to section 19.510.070 of this title; and provided further that, if the property containing the short-term rental home is located in the State agricultural district, the applicant shall obtain a State special use permit, pursuant to section 205-6, Hawaii Revised Statutes, in addition to the short-term rental home permit required by chapter 19.65 of this title.

(Ord. No. 3941, § 10, 2012; Ord. No. 3824, § 3, 2011; Ord. 2749 § 3 (part), 1998)

Park Districts

The MCC includes a Chapter 19.615 for "Park Districts." This Chapter includes distinctly separate rules for (1) neighborhood, (2) community, (3) regional, and (4) golf course park districts." The preamble to Chapter 19.615 explains:

> The general purpose and intent of the park district ordinances are to preserve and manage lands for passive or active recreational activities by a system of parks suited to the varying recreational needs of the county, to provide parks which are of differing sizes and uses, ***and to implement the general plan and community plans of the county and the land use laws of the state.***

MCC § 19.615.010 (emphasis added).

The "Community Park District" and "Regional Park District" are set forth below.

19.615.030 PK-2 community park district.

A. Purpose and Intent. The purpose and intent of the PK-2 community park district is to provide park areas designed to meet the passive and active recreational needs of a community comprised of several neighborhoods and to provide recreational activities and facilities which are more intensive uses than are permitted in the PK-1 neighborhood park district. This district shall be located adjacent to or in areas designated for residential use, shall be operated by a public or private non-profit organization, and shall not be operated for a commercial purpose. This district shall primarily be located in the state urban and rural districts.

B. Permitted Uses. The following uses shall be permitted within the PK-2 community park district:

1. Principal Uses.

a. Campgrounds; provided, that no camping unit shall be located less than one thousand feet away from a dwelling unit; and provided further, that the only camping units permitted on the campground shall be tents and recreational vehicles,

b. Community centers,

c. Fishing,

d. Open land recreation,

e. Picnicking,

f. Playgrounds,

g. Playing courts of community scale but not including tennis centers,

h. Playing fields for outdoor community uses,

i. Swimming pools, and

j. Trail activities; except those for motorbikes or automobiles.

2. Accessory Uses and Structures. Accessory uses and structures which include, but which are not limited to, the following:

a. Comfort stations,

b. Gymnasiums,

c. Historic buildings, structures or sites or areas of scenic interest,

d. Luaus, carnivals, bazaars and fairs which are special events and temporary in nature. For purposes of this section, "temporary" means no more than ten days in a one year period,

e. Maintenance and storage structures,

f. Off-street parking and loading,

g. Park furniture,

h. Pavilions,

i. Play and outdoor exercise equipment, and

j. Skating, including skateboard facilities.

C. Minimum Development Standards. Except as otherwise provided in this title, the following shall be the minimum development standards which shall apply for uses and facilities located on any zoning lot in this district:

1. Minimum lot area, twenty-five acres;

2. Minimum lot width, four hundred fifty feet;

3. Minimum yards, twenty feet, and

4. Maximum height, thirty-five feet; provided, that minor utility facilities, vent pipes, fans, chimneys, and energy-savings devices shall be permitted additional height if the item is mounted on the roof of a facility; except, that in no event shall this additional height exceed five feet above the governing height limit.

(Ord. 2031 § 5 (part), 1991)

19.615.040 PK-3 regional park district.

A. Purpose and Intent. The purpose and intent of the PK-3 regional park district is to provide park areas designed for more intensive recreational and cultural facilities and uses than are permitted in the PK-1 neighborhood park district and the PK-2 regional park district. This district permits a limited number of uses for a commercial purpose which are designed to be used by the users of the park. This district shall only be located in the state urban and rural districts.

B. Permitted Uses. The following uses shall be permitted within the PK-3 regional park district:

1. Principal Uses.

   a. Archery and gun ranges,

   b. Athletic complexes for regional competitive activities including arenas, stadiums and tennis centers,

   c. Automobile, go-carts and motorbike activities,

   d. Botanical gardens,

   e. Cultural and performing arts,

   f. Campgrounds; provided, that no camping unit shall be located less than one thousand feet away from a dwelling unit,

   g. Historic buildings, structures or sites or areas of scenic interest,

   h. Gymnasiums,

   i. Marinas,

   j. Open land recreation and other passive recreational activities,

   k. A private, for-profit park which is not owned or operated by a private or public nonprofit, eleemosynary, organization; provided, that only the uses identified as a principal, accessory, or special uses by the provisions of this chapter may be permitted in a private park,

   l. Playgrounds and playfields,

   m. Playing courts,

   n. Riding stables,

   o. Swimming pools,

   p. Skating, including skateboard facilities,

   q. Skeet and trap fields,

   r. Trail activities, and

   s. Zoos.

2. Accessory Uses and Structures. Accessory uses and structures which include, but which are not limited to, the following:

   a. One caretaker's dwelling unit,

   b. Comfort stations,

c. Limited commercial uses such as ticket sales, souvenir shop, snack bar or other eating facility which are designed and scaled to meet the needs of the members, guests or users of the park,

d. Luaus, carnivals, bazaars and fairs which are special events and temporary in nature. For purposes of this section, "temporary" means not more than ten days in a one-year period,

e. Maintenance and storage structures,

f. Off-street parking and loading,

g. Park furniture,

h. Pavilions, and

i. Play and outdoor exercise equipment.

C. Minimum Development Standards. Except as otherwise provided in this title, the following shall be the minimum development standards which shall apply for uses and facilities located on any zoning lot in this district:

1. Minimum lot area, one hundred acres;

2. Minimum yards, twenty feet; and

3. Maximum height, seventy-five feet; provided, that minor utility facilities, vent pipes, fans, chimneys, and energy-savings devices shall be permitted additional height if the item is mounted on the roof of a facility; except, that in no event shall this additional height exceed five feet above the governing height limit.

D. Project Master Plan and Development Plan Required. A project master plan and a development plan shall be required pursuant to article V of this title.

Maui Island Plan Protected Areas Diagram
(excerpt from Directed Growth Plan, Exhibit WC-1)

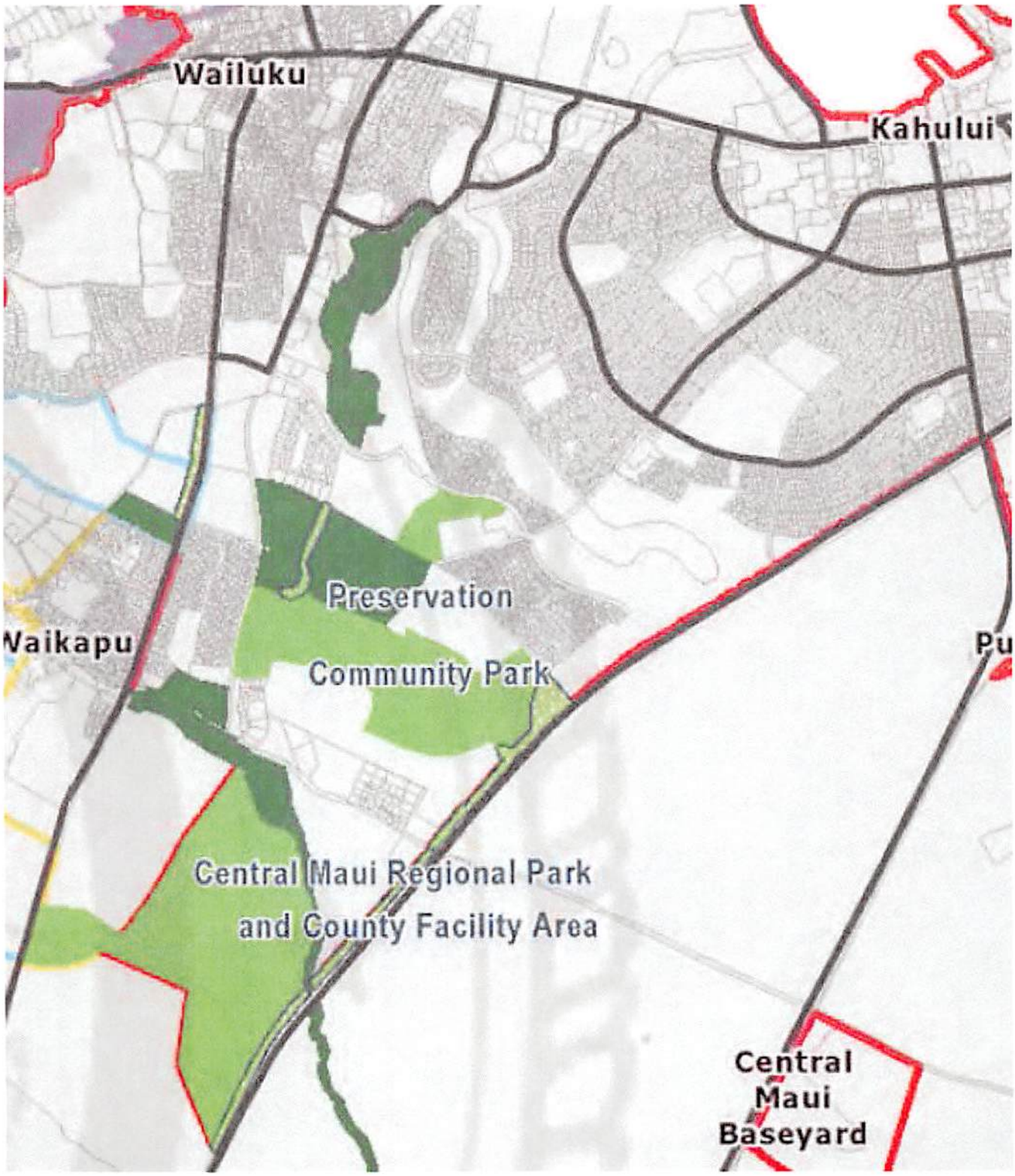


EXHIBIT "9"

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 1, 2014

Tom Pierce, Esq.
P.O. Box 798
Makawao, Hawaii 96768

Email: tom@mauilandlaw.com

Dear Mr. Pierce:

Re: Cease and Desist Demand - Proposed Central Maui Sports Complex

We received your July 12, 2014 letter regarding the Proposed Central Maui Sports Complex. As you know, the State of Hawaii is committed to construction of the sports complex to provide a much needed recreational opportunity for Maui. As noted by Mayor Arakawa, there is a shortage of sports fields on Maui with dozens of leagues competing for fields. This park will help alleviate some of that shortage.

This park has been in the planning since at least 2011, when the Board of Land and Natural Resources approved, in concept, the acquisition of private lands in Waikapu for the purpose of creating the park. We have obtained all necessary approvals and we believe we have complied with all legal requirements for the park as planned. We will not be relocating the sports complex.

We would like to reiterate the commitment made by Lieutenant Governor Shan Tsutsui at the groundbreaking ceremony yesterday that, although we are moving forward, we are committed to trying to address some of your clients' concerns. We want to be a good neighbor to your clients and to continue to work with them to refine the final park design.

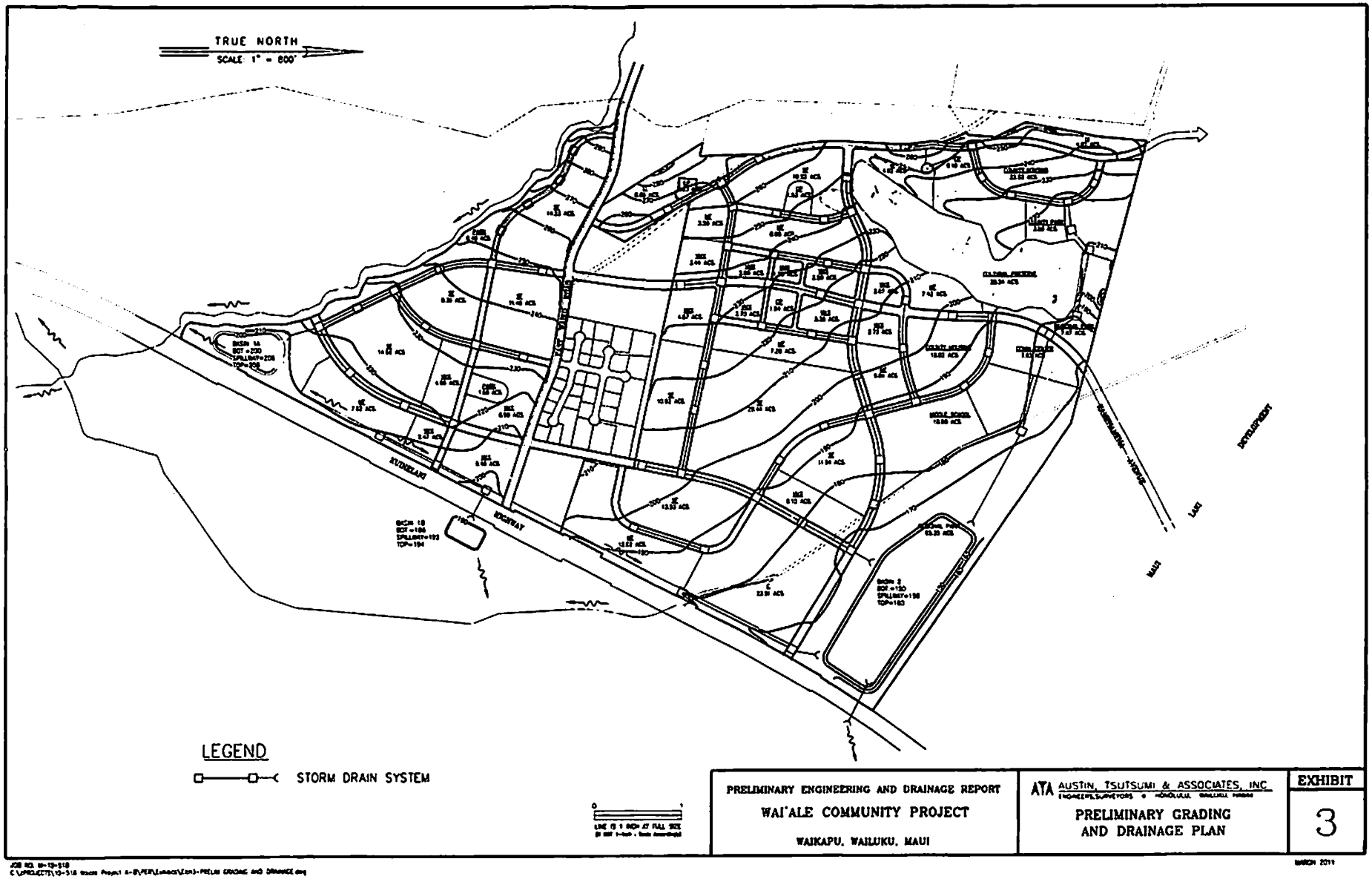
We welcome your clients to continue to work with us as we move forward in this project.

Sincerely,

William J. Aila, Jr.

c: William Spence, Planning Director, County of Maui
David Goode, Public Works Director, County of Maui
Grant Chun, V.P., Maui, A&B Properties, Inc.

EXHIBIT "B"



PRELIMINARY ENGINEERING AND DRAINAGE REPORT

WAI'ALE COMMUNITY PROJECT

WAIKAPU, WAILUKU, MAUI

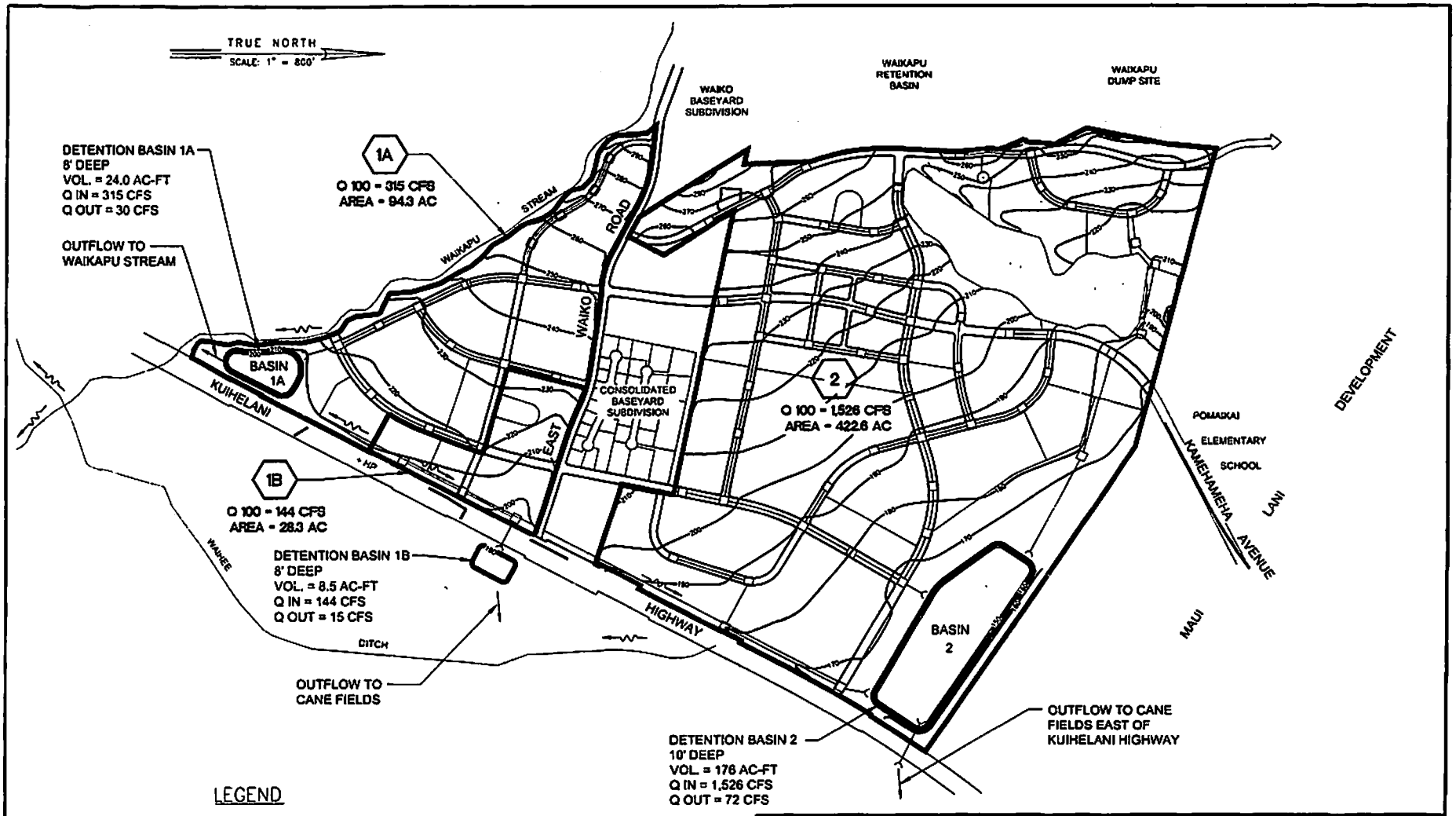
ATA AUSTIN, TSUTSUMI & ASSOCIATES, INC.
ENGINEERS/SURVEYORS • HONOLULU, HAWAII

PRELIMINARY GRADING AND DRAINAGE PLAN

EXHIBIT 3

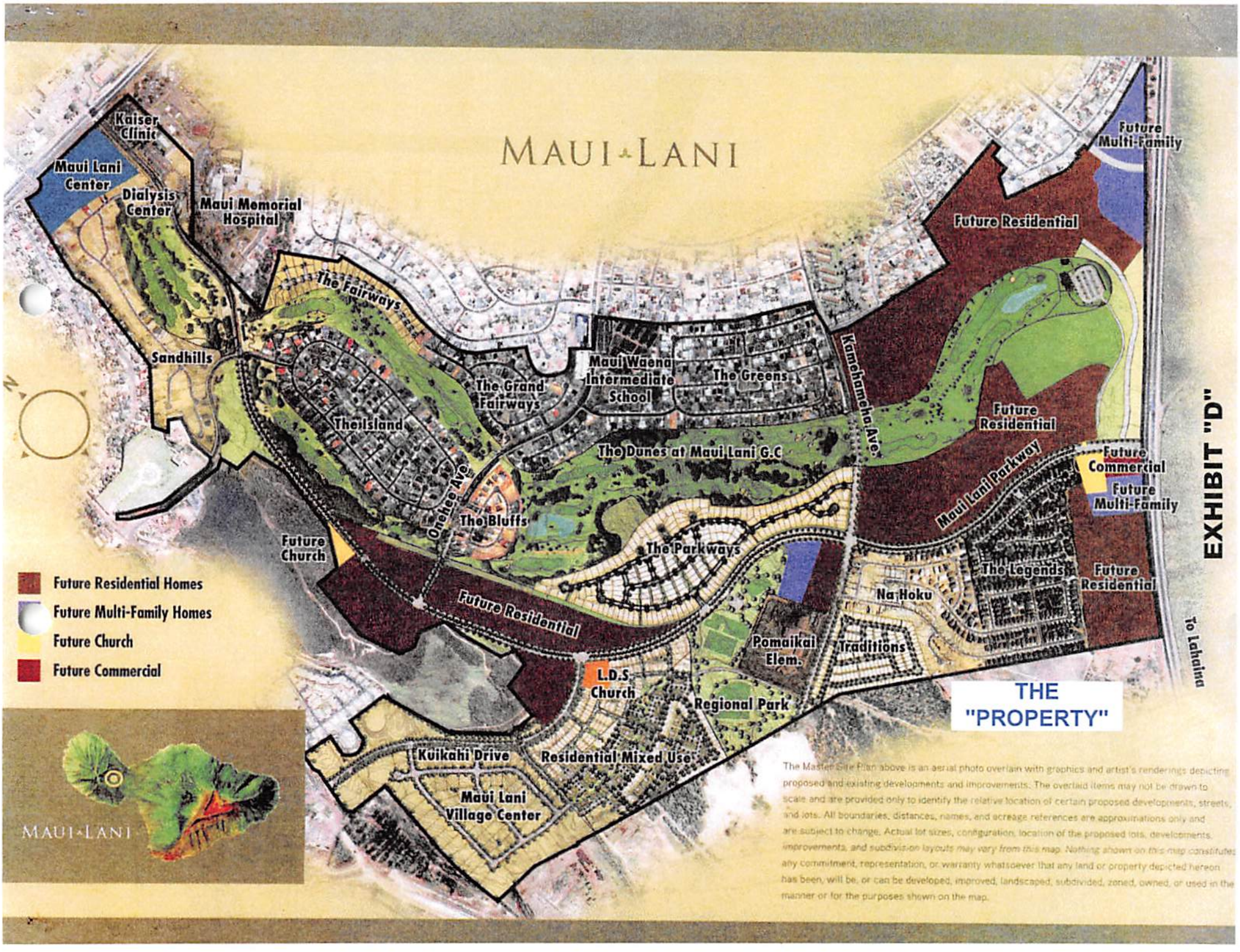
MARCH 2011

EXHIBIT "C"

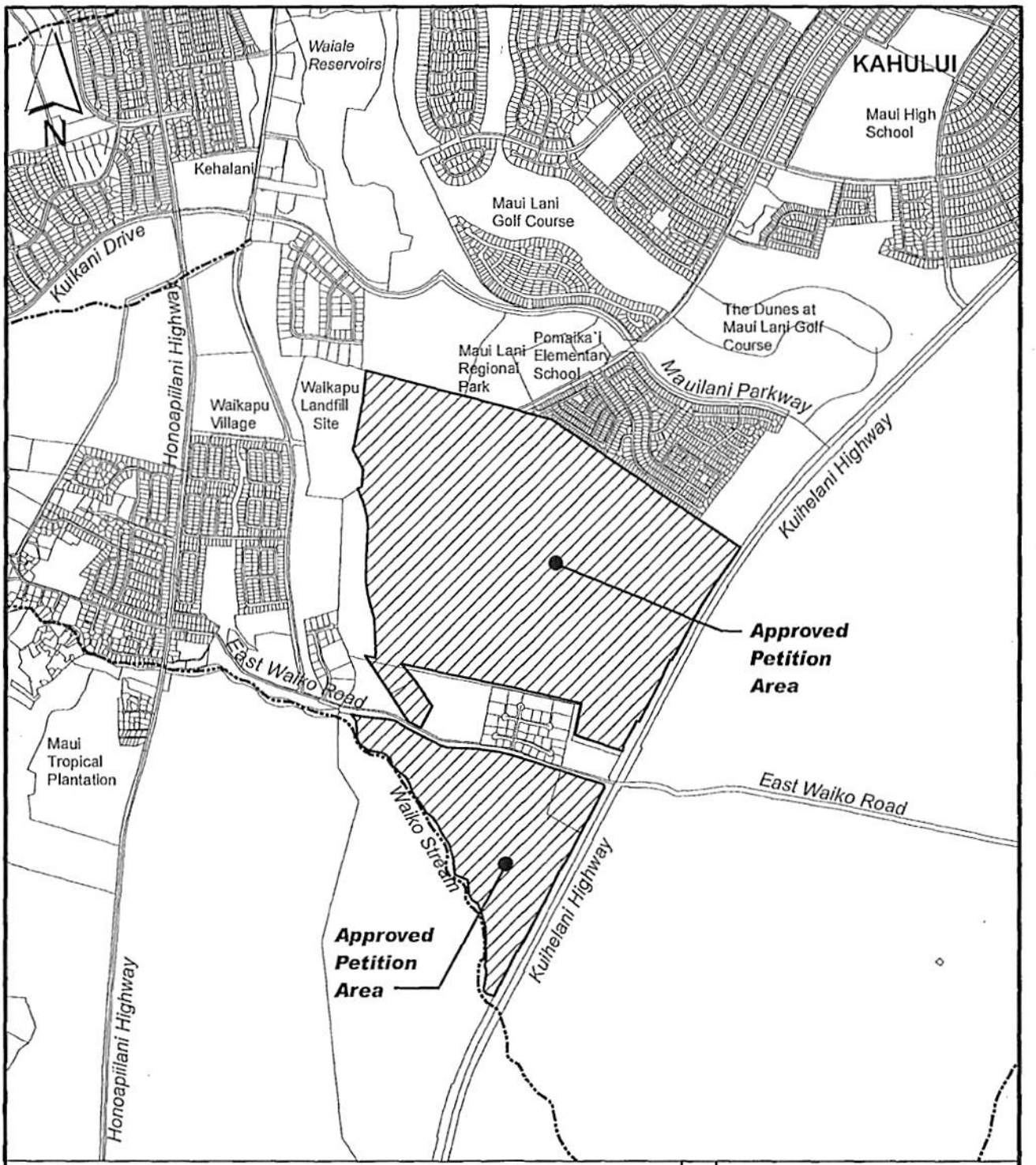


PRELIMINARY ENGINEERING AND DRAINAGE REPORT WAI'ALE COMMUNITY PROJECT WAIKAPU, WAILUKU, MAUI	AUSTIN, TSUTSUMI & ASSOCIATES, INC. DRAINAGE AREA MAP– PROPOSED CONDITIONS	EXHIBIT 10

MARCH 2011



The Master Site Plan above is an aerial photo overlain with graphics and artist's renderings depicting proposed and existing developments and improvements. The overlaid items may not be drawn to scale and are provided only to identify the relative location of certain proposed developments, streets, and lots. All boundaries, distances, names, and acreage references are approximations only and are subject to change. Actual lot sizes, configuration, location of the proposed lots, developments, improvements, and subdivision layouts may vary from this map. Nothing shown on this map constitutes any commitment, representation, or warranty whatsoever that any land or property depicted hereon has been, will be, or can be developed, improved, landscaped, subdivided, zoned, owned, or used in the manner or for the purposes shown on the map.



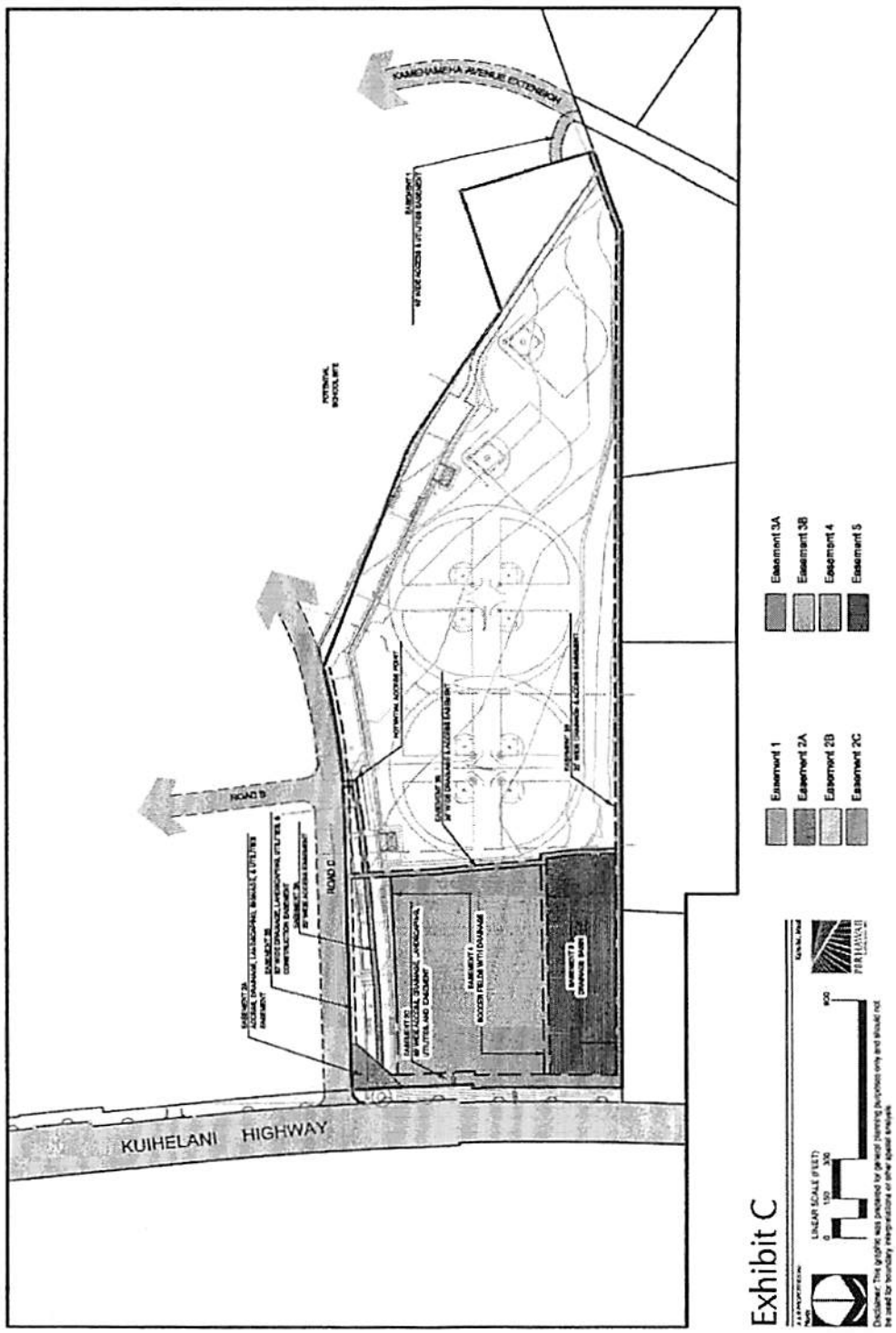
A10-789 A & B PROPERTIES, INC.
LOCATION MAP
Tax Map Keys: 3-8-05: Portion Of 23 And 37 And
3-8-07: 71, Portion Of 101, And 104
Wailuku And Waikapū, Island Of Maui,
State Of Hawai`i,
Scale 1: 24, 000

Exhibit "A"

C:\WBS\LuCZ\WBSLuC_07282012\Dockets\a10789landb.mxd

EXHIBIT "E"

EXHIBIT "B"



18 **EXHIBIT "F"**

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

MAUI LANI NEIGHBORS, INC., a Hawai`i Nonprofit Corporation;  Plaintiff,  vs.  STATE OF HAWAI`I; STATE OF HAWAI`I DEPARTMENT OF LAND AND NATURAL RESOURCES; STATE OF HAWAI`I BOARD OF LAND AND NATURAL RESOURCES; WILLIAM AILA, JR. in his official capacity as chair of the State of Hawai`i Board of Land and Natural Resources; COUNTY OF MAUI; COUNTY OF MAUI PLANNING COMMISSION; COUNTY OF MAUI DEPARTMENT OF PLANNING; WILLIAM SPENCE in his official capacity as County of Maui Planning Director; JOHN DOES 1-10, JANE DOES 1-10, AND DOE PARTNERSHIPS, CORPORATIONS, GOVERNMENTAL UNITS OR OTHER ENTITIES 1-10, Defendants.	CIVIL NO. 14-1-0501 (2) (Other Civil Action) DECLARATION OF HARLEY ICHIRO MANNER, Ph.D., IN SUPPORT OF FIRST AMENDED VERIFIED COMPLAINT

DECLARATION OF HARLEY ICHIRO MANNER, Ph.D., IN SUPPORT OF FIRST AMENDED VERIFIED COMPLAINT

I, Harley Ichiro Manner, Ph.D., state as follows:

1. I am over 18 years of age, have knowledge of the matters set forth in this Declaration, and, if called upon to testify, I could and would competently testify thereto.

2. Mary L. Spencer, Ph.D., and I reside at, and own, the home and property located at 12 Anamuli Street, Kahului, Hawai`i.

3. Our property is part of the "Na Hoku" development project, which is within the larger "Maui Lani" project.

4. I am a retired Professor Emeritus of Geography from the University of Guam.

5. I am also the vice president of Maui Lani Neighbors, Inc. ("MLN"), as well as a director on the board and a member. MLN is a Hawai`i nonprofit duly organized under the laws of the State of Hawai`i. MLN's corporate purpose includes supporting, promoting and advocating for sustainable and appropriate community planning, and legal state and county zoning consistent therewith, for the Central Maui region of the Island of Maui.

6. MLN's members consist of property owners within the Maui Lani master planned community, located in central Maui. At this time, MLN has over one hundred (100) members who represent over sixty (60) properties located within Maui Lani. MLN's membership is growing as additional Maui Lani homeowners enroll.

7. One of the primary goals of MLN is to assure citizens' concerns are rightfully heard during the community planning process as well as during the zoning process. This is a fundamental goal that promotes trust in the governmental system, and ensures that elected decision makers are able to make informed and balanced land use decisions that consider the best interest of all the citizens in Maui County.

8. I make this Declaration to verify facts set forth in the First Amended Verified Complaint ("Complaint"), to which this Declaration is attached. I adopt in this Declaration the defined terms set forth in the Complaint.

9. My ability to verify the facts in the Complaint is based in part on being a homeowner in Maui Lani, and having personal knowledge as a homeowner with respect to events that have been occurring in or around my neighborhood.

10. My ability to verify the facts in the Complaint is also based on being on the board of directors and the vice president of MLN, and having the responsibility to hear from other Maui Lani neighbors, as well as the responsibility to research and evaluate the issues and impacts related to the Sports Complex on in furtherance of MLN's nonprofit corporate purpose.

11. My ability to verify the facts in the Complaint is also based on my decades of education, knowledge and professional experience as an academic, with an emphasis in the field of geography. This academic and professional background includes being subject to, as well as conducting, peer review evaluation at the doctorate and professorial level. As a result of my background, I have the competence to read civic-oriented documents, chronology of events, and related matters, and confirm that certain stated facts related thereto are true and correct.

12. I have carefully reviewed the factual allegations in the Complaint, as further attested to herein.

13. I am generally knowledgeable of the facts surrounding the proposal by the State of Hawai`i Department of Land and Natural Resources ("DLNR") to construct the Central Maui Regional Sports Complex ("Sports Complex") on property immediately adjacent to Maui Lani's southern boundary ("Property") on the land that is being proposed for the "Wai`ale" residential project ("Wai`ale" project). Factual allegations ¶¶19-25, 37-57 in the Complaint are true and accurate statements regarding the Property and its relationship to Maui Lani and the Wai`ale project

14. I have also reviewed: (1) the Final Environmental Assessment titled "Central Maui Regional Park" (June 2013) ("FEA"); and (2) the Wai`ale Final Environmental Impact Statement, prepared by A&B Properties, Inc. ("A&B"), and accepted as adequate by the State of Hawai`i Board of Land and Natural Resources ("BNLR") on November 4, 2011 ("FEIS"), on

which some of the factual allegations of the Complaint are based. Factual allegations ¶¶ 70-79 are true and accurate statements regarding the FEIS. Factual allegations ¶¶96-110 are true and accurate statements regarding the FEA.

15. I have also reviewed the Maui Island Plan and the Wailuku-Kahului Community Plan, and I confirm that the summaries or reiterations set forth in the Complaint with respect to these two plans are true and accurate. Factual allegations ¶¶ 66-69, 89-92 are true and accurate statements regarding the Maui Island Plan.

16. I have also reviewed the Cease and Desist Letter dated July 12, 2014 ("C&D Letter"), which is attached as Exhibit "A" to the Complaint. The following exhibits, which are attached to the C&D Letter, are true and accurate copies and/or true and accurate depictions of what they purport to be:

- Exhibit 1, the Site Map from the FEA;
- Exhibit 2 is an accurate representation of the roads within Maui Lani likely to be used by users of the Sports Complex;
- Exhibit 3, an annotated tax map from the FEIS;
- Exhibit 4, Figure 2-1 from the FEIS;
- Exhibit 5, Figure O-1 from the FEIS;
- Exhibit 6, Figure 8-2 from the Maui Island Plan;
- Exhibit 7, an annotated Figure O-1 from the FEIS;
- Exhibit 8, selections from the Maui County Code; and
- Exhibit 9, Exhibit WC-1 from the Maui Island Plan.

17. The following exhibits, which are attached to the Complaint, are also true and correct copies and/or true and accurate depictions of what they purport to be:

- Exhibit "C", which consists of Exhibits 3 and 10 of the preliminary engineering report in the FEIS;
- Exhibit "D" accurately depicts the proposed layout development scheme for Maui Lani, including the general location of internal development projects, including Traditions, Legends and Na Hoku, and also showing the general location of the Property)
- Exhibit "E" (map provided during LUC proceedings showing "Approved Petition Area");

- Exhibit "F" map showing Easements 1, 2A, 2B, 2C, 3A, 3B, 4 and 5 granted in favor of the remainder of the Wai`ale Land, which map is attached to the Deed from A&B to DLNR of the Property and also to various grants of easement.

18. I am generally knowledgeable of the factual allegations in the Complaint regarding the subjects listed below. The factual allegations in the Complaint on these subjects contain true and accurate statements:

- The district boundary amendment that was approved by the Land Use Commission in 2012 (¶¶80-88 in the Complaint);
- The County of Maui's purchase of 209 acres from A&B for the express purpose of developing it as a regional park (¶¶93-95 in the Complaint);
- Governor Abercrombie's announcement of the "Sports Development Initiative" in October 2013 (¶¶103-110 in the Complaint);
- The final approval for a consolidation-resubdivision of Wai`ale land in Subdivision File Number 3.2226 (¶¶111-112 in the Complaint);
- DLNR's application to the Planning Commission for a special use permit, which was approved on March 25, 2014 (¶¶113-123 in the Complaint);
- DLNR's three impact reports regarding uses for the Sports Complex, which were first revealed after the FEA around April 2014 (¶¶124-126 in the Complaint); and
- The conveyance of the Property from A&B to DLNR, which occurred on or around June 26, 2014 (¶¶127-135 in the Complaint)

19. Between July 2014 and August 2014, MLN attempted to persuade the DLNR to stay construction of the Sports Complex. Factual allegations ¶¶ 136-139 in the Complaint are true and accurate statements of MLN's efforts.

I, Harley Ichiro Manner, Ph.D., declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: September 9, 2014.

HARLEY ICHIRO MANNER, Ph.D.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

MAUI LANI NEIGHBORS, INC., a Hawai'i Nonprofit Corporation, Plaintiff, vs. STATE OF HAWAI'I; STATE OF HAWAI'I DEPARTMENT OF LAND AND NATURAL RESOURCES; STATE OF HAWAI'I BOARD OF LAND AND NATURAL RESOURCES; WILLIAM AILA, JR. in his official capacity as chair of the State of Hawai'i Board of Land and Natural Resources; COUNTY OF MAUI; COUNTY OF MAUI PLANNING COMMISSION; COUNTY OF MAUI DEPARTMENT OF PLANNING; WILLIAM SPENCE in his official capacity as County of Maui Planning Director; JOHN DOES 1-10, JANE DOES 1-10, AND DOE PARTNERSHIPS, CORPORATIONS, GOVERNMENTAL UNITS OR OTHER ENTITIES 1-10, Defendants.	CIVIL NO. 14-1-0501 (2) (Other Civil Action) DECLARATION OF TOM PIERCE

Tom Pierce, Esq. states as follows:

1. I am over 18 years of age, am licensed to practice law in the State of Hawai'i, represent Maui Lani Neighbors, Inc., in the above captioned matter, have knowledge of the matters set forth in this declaration, and, if called upon to testify, I could and would competently testify thereto. (The abbreviations set forth in the First Amended Verified Complaint, filed September 9, 2014, are adopted herein.)

2. On July 12, 2014, the C&D Letter was served on the State of Hawai`i and the County of Maui, as well as others. A true and correct copy of the C&D Letter is attached to the First Amended Verified Complaint as Exhibit "A."

3. After serving the C&D Letter, I communicated with Deputy Attorneys General William Wynhoff, Amanda Weston and Linda Chow on a number of occasions, and asked that DLNR stipulate to stay construction of the Sports Complex pending resolution of the legal issues. These requests were rejected.

4. The letter attached to the First Amended Verified Complaint as Exhibit "B" is a true and correct copy of a letter, dated August 1, 2014, from BLNR Chairperson William Aila to me, which I received from the State of Hawai`i.

I, Tom Pierce, Esq., declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: Makawao, Maui, Hawai`i, September 9, 2014.

TOM PIERCE, ESQ.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been duly served upon the following via email and at the respective address by hand delivery on September 9, 2014:

Patrick K. Wong
Kristin Tarnstrom
Department of Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793

and upon the following via email and United States Mail, postage prepaid, on September 9, 2014:

William J. Wynhoff
Amanda J. Weston
Linda L. Chow
Department of the Attorney General
State of Hawaii
465 South King Street, Room 300
Honolulu, Hawaii 96813

DATED: Makawao, Maui, Hawai'i, September 9, 2014.

TOM PIERCE
PETER N. MARTIN (of Counsel)
Attorneys for Plaintiff
MAUI LANI NEIGHBORS, INC.