

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAI'I

In the Matter of KAHANA SUNSET) SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS) SM5 2023-000114
) SSAD 2023-00022
) EAE 2023-00032
SHORELINE SET BACK APPROVAL AND) SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))
EXEMPTION FOR LIMITED REPAIRS TO)
STABILIZE THE FOUNDATION FOR) APPELLANTS SURFRIDER
BUILDING "F," CONSISTING OF TWELVE) FOUNDATION, NA PAPA'I WAWAE
TOWNHOMES AT THE SHORELINE FO) 'ULA 'ULA, KA MALU O KAHĀLĀWAI,
THE KAHANA SUNSET AOA, AN 80-) KAI NISHIKI, and TIARE LAWRENCE'S.
UNIT CONDOMINIUM, LOCATED AT 4909) CONSOLIDATED NOTICE OF APPEAL
LOWER HONOAPIILANI ROAD,) FROM DIRECTOR'S DECISIONS;
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-) DECLARATION OF JILL WIRT;
003:015 (SMX2023-00155) (SM52023-) DECLARATION OF KAI NISHIKI;
000114) (SSAD2023-00022) (EAE2023-) DECLARATION OF TIARE LAWRENCE;
00032)) DECLARATION OF GLENN KAMAKA;
) EXHIBITS "01"- "47"; CERTIFICATE OF
and) SERVICE
)
)
APPROVAL FOR A SPECIAL)
MANAGEMENT AREA (SMA))
EMERGENCY PERMIT FOR REPAIRS TO)
THE CURRENT SINKHOLE UNDER)
BUILDING "A" AT THE KAHANA SUNSET))
AOAO, LOCATED AT 4909)
HONOAPIILANI ROAD, LAHAINA,)
ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-)
003:015 (SM3 2023-00006))

LAW OFFICE OF CHRISTINA LIZZI, LLLC

Christina Lizzi 10964
Post Office Box 1595
Makawao, Hawai'i 96768
christina@lizzi.law
808.633.3966

LAW OFFICE OF RYAN D. HURLEY

Ryan D. Hurley 9526
Post Office Box 19205
Honolulu, Hawai'i 96817
ryan@rdhlawhi.com
808.738.7610

LAW OFFICE OF BIANCA ISAKI

Bianca K. Isaki 9977
1720 Huna Street, 401B
Honolulu, Hawai'i 96837
bianca.isaki@gmail.com
808.927.5606

Attorneys for SURFRIDER FOUNDATION, NA PAPA'I WAWAE 'ULA'ULA, KA MALU O
KAHĀLĀWAI, KAI NISHIKI, and TIARE LAWRENCE.

TABLE OF CONTENTS

I.	Introduction	2
II.	Appellants	5
III.	Keonenui Bay and the Environmental and Cultural Impacts of Shoreline Hardening	7
IV.	Kahana Sunset’s Endless Cycle of “Repairs” and Refusal to Retreat	10
V.	The Director’s Issuance of an SMA Exemption Violates the Coastal Zone Management Act.	27
VI.	The Directors Issuance of the SMA Emergency Permit Violates the CZMA	39
VII.	The Director’s Issuance of a Shoreline Approval Violates the Coastal Zone Management Act	41
VIII.	The Director’s Issuance of an Environmental Assessment Exemption Violates Chapter 343, HRS	42
IX.	Appellants Have Standing to Appeal as a Matter of Right	44
	A. The Director’s Decisions Harm Appellants’ Rights to a Clean and Healthful Environment	45
	B. The Director’s Decisions Harm Appellants’ Interests in Native Hawaiian Traditional and Customary Practices	46
X.	Intervenor Status Should Be Freely Granted	48
	A. “Freely granted” is a Liberal Intervention Standard	49
	B. Appellants Do Not Hold Interests or Positions Substantially Similar to Existing Parties and Appellants’ Interests are not Represented by Existing Parties	49
	C. Intervention Will Not Render the Proceedings Inefficient or Unmanageable nor Unduly Delay Proceedings	50
	D. Intervention Will Aid in the Development of a Full Record and not Overly Broaden Issues	50
	E. A Hearing Will Protect Appellants’ Interest and Promote the Public Interest	52
XI.	Due Process Requires a Contested Case Hearing	53
XII.	Conclusion	54

APPELLANTS' NOTICE OF APPEAL FROM DIRECTOR'S DECISION

I. Introduction

On April 15, 1975, the Maui County Department of Planning Director Howard K. Nakamura approved Kahana Sunset's request to build a "concrete sea/retaining wall." The approval provided a warning:

Please be advised that the proposed retaining wall may not be a satisfactory and permanent solution to the existing situation. However, due to the immediate hazard created by the existing problem, we are approving the subject request. We recommend that an appropriate solution be found.

Declaration of Kai Nishiki ("Nishiki Decl.") ¶ 16, Exh. "02" (Nakamura to Saito, letter dated April 15, 1975). Nearly fifty years later, serial "repairs"¹ to Kahana Sunset's seawalls and the foundations immediately behind them are still not appropriate solutions.

Kahana Sunset's history of feet dragging on finding and implementing an "appropriate solution" has been facilitated by the Maui Planning Department's acquiescence of repeat repairs and emergency permits, without regard for the purpose of the Coastal Zone Management Act or the Hawai'i Environmental Policy Act.

For the past 13 years, Kahana Sunset has been tasked with developing a long-term strategic plan for managed retreat. It does not even have a draft yet.² Nishiki Decl. ¶ 18. In the interim, Kahana Sunset's poorly placed and failing buildings have affected beach processes, impeded meaningful public access, degraded nearshore waters, harmed traditional and customary Native Hawaiian practices, and contributed significantly to the loss of Keonenui Beach. The

¹ The use of the term "repairs" to describe the present and past developments at Building A and F is used to reflect the Department of Planning's terminology and in no way is an admission that such activities constitute "repairs" under either the Hawai'i Coastal Zone Management Act or the Hawai'i Environmental Policy Act.

² Eric "Rick" Roberts, President of the Kahana Sunset AOA, recently told Hawaii News Now that development of managed retreat plan would cost "\$65,000 to \$70,000" and that Kahana Sunset AOA would have to pay for it "out of their own pocket." Nishiki Decl. ¶ 17. Exh. 03. In cost comparison, the proposed Building F repairs are valued at \$1,800,000.00 and the Building A repairs are valued at \$155,000.00. Nishiki Decl. ¶ 19; Nishiki Decl. ¶ 15, Exh. 01 at 3 (Bldg F Exemption Letter). Units in Building A and F are still actively being listed for sale at prices of \$1,495,000 and \$995,000 respectively. Nishiki Decl. ¶¶ 20-21. Exh. 04, 05.

immediate and cumulative impacts of the proposed “repairs” mandate strict oversight, not exemptions.

Pursuant to § 12-202-26 and -28 of the Maui Planning Commission’s Special Management Area Rules (“SMA Rules”), § 12-203-18 and -30 of the Maui Planning Commission’s Shoreline Rules (“Shoreline Rules”)³ and § 12-201-39 of the Maui Planning Commission’s Rules of Practice and Procedure (“MPC”), articles I, § 5, XI, §§ 1, 9, and XII, § 7 of the Hawai‘i State Constitution, and Hawai‘i Revised Statutes (“HRS”) chapter 91, Appellants SURFRIDER FOUNDATION, NĀ PAPA‘I WAWAE ‘ULA‘ULA, KA MALU O KAHĀLĀWAI, KAI NISHIKI, AND TIARE LAWRENCE (collectively, “Appellants”) by and through their undersigned counsel, hereby appeal to the Maui Planning Commission (“Commission”) to challenge the Special Management Area Exemption (“SMA Exemption”) and Shoreline Setback Approval (“Setback Approval”) granted by Planning Department Director Kathleen Aoki (“Director”) on June 19, 2023 to Dawn Hegger-Nordblom for Kahana Sunset to conduct “limited repairs to stabilize the foundation for Bldg. F” at 4909 Lower Honoapiilani Rd., Lahaina 96761, Tax Map Key No. (2) -4-3-003:015-61206 (the “Building F Project”). Nishiki Decl. ¶ 15, Exh. 01.

Pursuant to § 12-202-26 and -28 of the SMA Rules and § 12-201-39 of the MPC, articles I, § 5, XI, §§ 1, 9, and XII, § 7 of the Hawai‘i State Constitution, and chapter 91, HRS Appellants, by and through their undersigned counsel, also hereby appeal to the Commission the Director’s decision to grant an SMA Emergency Permit to Dawn Hegger-Nordblom on behalf of Kahana Sunset “for repairs to the current sinkhole under building ‘A,’” which includes repair of the seawall fronting Building A (“Building A Project”). The approval was first granted July 13, 2023 and superseded by an approval letter dated July 18, 2023. Nishiki Decl. ¶¶ 22-23, Exhs. 06-07.

The Building F and Building A Project will be collectively referred to herein as the “Projects.”

³ Substantive amendments to both the SMA Rules and Shoreline Rules are pending before the Commission for approval and adoption. This notice is filed under the rules currently in effect but makes reference to definitions and requirements of the proposed amended rules as applicable for persuasive value. Relevant excerpts of the proposed amended rules are attached as Exhibits 09 and 10.

The SMA Exemption and Shoreline Approval for the Building F Project were noticed to the Commission at its July 11, 2023 meeting. Nishiki Decl. ¶ 24, Exh. 08 (agenda). This appeal is timely pursuant to the SMA Rules § 12-202-26 and Shoreline Rules § 12-203-18, because it is filed within ten days of the meeting at which the Commission received notification of the Director’s decision and neither the SMA rules, Shoreline Rules, nor the Commission required the Director’s decision to be served upon Appellants.⁴

The July 13, 2023 SMA exemption for the Building A Project is on the Commission’s July 25, 2023 agenda. Nishiki Decl. ¶ 27, Exh. 11. Thus, this appeal from that exemption is also timely as it has not yet been noticed to the Commission. SMA Rules § 12-202-26.

The concurrent direct, secondary, and cumulative impacts of these “repairs” to both Buildings A and F are not reflected in the SMA Exemption, Shoreline Approval, or SMA Emergency Permit. This is in violation of SMA Rules requirement to consider cumulative impacts. SMA Rules § 12-202-12(e)(2). It also violates chapter 343, HRS’s prohibition on segmentation and requirements for review of direct, secondary, and cumulative impacts, including reasonably foreseeable actions. Hawai’i Administrative Rules (“HAR”) §§11-200.1-10; -15.

This appeal should be granted because Appellant’s substantial rights are prejudiced by the Director’s decisions because the decisions are: (1) based on clearly erroneous findings of material fact or erroneous application of the law; and/ or (2) arbitrary or capricious in its application; and/ or (3) a clearly unwarranted abuse of discretion. SMA Rules § 12-202-32; Shoreline Rules § 12-203-24.

Appellants (1) have property interests affected by the Projects; (2) will be so directly and immediately affected by the SMA Emergency Permit, SMA Exemption, Shoreline Approval, and

⁴ SMA Rules § 12-202-26 provides in pertinent part:

Appeal of the director’s decision may be made to the commission by filing of a notice of appeal with the department not later than ten days after the receipt of the director’s written decision, or, where the director’s decision is not required by the commission or these rules to be served upon the appellant, not later than ten days after the meeting at which the commission received notification of the director’s decision.

Shoreline Rules § 12-203-18 has substantially similar language.

Environmental Assessment Exemption granted to the Projects that their interests are clearly distinguishable from the general public; (3) have substantial interests in the proceedings; (4) offer participation that will aid in the development of a full record on issues directly pertinent to the Director's decisions that will aid in decision making; (5) do not hold positions substantially the same as any existing parties to the proceedings; and (6) offer participation that would not make the proceedings inefficient and unmanageable. *See* MPC §§ 12-201-41, -43. Appellants' participation is the only means for protection of their interests, which include constitutional rights. *See id.* Appellants' participation is also in the public interest. *See id.*

II. Appellants

The Surfrider Foundation ("Surfrider") is a national, nonprofit 501(c)(3) organization, with approximately 350,000 members and supporters, whose mission is the protection and enjoyment of our ocean, waves and beaches, for all people, through a powerful activist network. Declaration of Jillian Wirt ("Wirt Decl.") ¶ 8. Surfrider's headquarters are located at 942 Calle Negocio, Suite 350, San Clemente, California 92673. *Id.* Surfrider has approximately 80 volunteer driven, grassroots chapters, and more than 100 school clubs, located throughout the U.S., carrying out its mission. *Id.* ¶ 13. Surfrider has four Chapters located in Hawai'i – the Kaula'i, Kona, Maui, and O'ahu Chapters – and eight school clubs in Hawai'i, including at the Carden Academy of Maui; Seabury Hall in Makawao, Maui; and the King Kekaulike High School in Makawao, Maui. *Id.* ¶ 14. Surfrider has approximately 560 current active members in Hawai'i, around 100 of which reside on Maui, and an additional 57 active school club members in Hawai'i. *Id.*

The Surfrider Foundation's volunteer-led Maui Chapter was chartered in 1995. *Id.* ¶ 15. The Chapter carries out campaigns and programs in furtherance of Surfrider's mission. *Id.* Surfrider's five primary initiatives include coastal preservation, protecting public beach access, clean water, ocean protection, and preventing marine plastic pollution. *Id.* ¶ 16. Jillian Wirt is one of Surfrider's Maui members who enjoys the waters off of Keonenui Bay recreationally and is an ocean advocate. *Id.* ¶¶ 7, 10. She received her master's degree in environmental science and management from the U.C. Santa Barbara. *Id.* ¶¶ 3-4. Her studies have taught her that while

shoreline armoring⁵ may have been a “best management option in the past,” its harmful impacts to public access, beaches, reefs, and people are now well known. *Id.* ¶ 6.

Ka Malu O Kahālāwai (“Ka Malu”), a domestic nonprofit corporation, is organized to protect the natural and cultural history and resources of Kahoma and surrounding ahupua‘a from mauka to makai. Declaration of Tiare Lawrence (“Lawrence Decl.”) ¶ 10. Ka Malu officers, directors and/ or supporters conduct traditional and customary practices of gathering, fishing, and hukilau at Keonenui Beach, and fishing, surfing, canoe paddling, and diving in waters including Keonenui Bay. *Id.* ¶ 11.

Tiare Lawrence is a public access advocate, coordinating member of Ka Malu, and kanaka maoli. Lawrence Decl. ¶¶ 2, 4, 8. She engages in traditional and customary practices of canoe paddling and surfing in waters off of Keonenui Bay as well as aloha ‘āina. *Id.* ¶ 12. Her generational ties are to Lāhainā. *Id.* ¶ 3. She is a graduate of Lahainaluna Highschool and attended Kapiolani Community College. *Id.* ¶ 5. She is a graduate of both the Ka Ipu Kukui Fellows Program and the Kuleana Academy. *Id.* ¶ 6. She is a mother of two children. *Id.* ¶ 7. Her children are her driving force in everything she does. *Id.*

Nā Papa‘i Wawae ‘Ula‘ula (“Nā Papa‘i”) is a domestic nonprofit, that advocates for preservation and enhancement of public beach access and preservation of public trust resources. Nishiki Decl. ¶ 6. Nā Papa‘i holds in-person and online community meetings with West Maui communities and administers a social media page on facebook.com for a group called “Access Denied!” that has over 5,200 members. *Id.* ¶ 7. Nā Papa‘i’s officers, directors, and supporters, who include Native Hawaiians, hold interests in preserving and expanding public beach access for public recreational use, Hawaiian cultural practices, subsistence, aesthetic enjoyment, and ecological protections for West Maui. *Id.* ¶ 8.

Kai Nishiki is a public access advocate and the executive director of Nā Papa‘i. *Id.* ¶¶ 4, 6. Through her decades of advocacy and participation in public decision making, she has gained an expertise in coastal planning process, including development of managed retreat plans. *Id.* ¶ 9. Nishiki chaired the Community Plan Advisory Committee (“CPAC”) for the West Maui Community Plan between July 2019 and May 2020. *Id.* ¶ 10. As part of that effort, she presided

⁵ The terms “shoreline hardening,” “coastal armoring” and “shoreline armoring” are used interchangeably throughout this document. These terms typically refer to the building of a barrier along the shoreline to prevent erosion of the backshore area.

over 35 CPAC meetings, attended 24 Maui Planning Commission and County Council meetings and attended pre-community engagement meetings beginning in 2016. Those efforts culminated in the Maui County Council adopting the West Maui Community Plan. *Id.* Development in the Special Management Area must conform with the West Maui Community Plan. *Id.* ¶ 11. She is the co-author of the managed retreat plan for the Pā‘ia Youth and Cultural Center, located in Pā‘ia, Maui. *Id.* ¶ 12. In 2018, she and Tiare Lawrence organized and hosted the Disappearing Shorelines & Managed Retreat conference, featuring keynote speakers Dr. Charles “Chip” Fletcher and Archie Kaleppa, as well as panels with scientists, policy makers, agency heads, developers, and community organization leaders. *Id.* ¶ 13. In 2017, she was awarded Sierra Club Maui Group’s “Mālama Kahakai” award, which recognized her work in protecting Maui’s coasts and defending public access to beaches. *Id.* ¶ 3. She has three children. *Id.* ¶ 14. Her advocacy to protect public access and the environment is motivated by a desire to ensure that her children and future generations will have an island on which they can thrive. *Id.*

III. Keonenui Bay and the Environmental and Cultural Impacts of Shoreline Hardening

Keonenui Bay has traditionally been a place of abundance and was once plentiful with fish. Declaration of Glenn Kamaka (“Kamaka Decl.”) ¶ 14. It was once a fishing village and is home to fringing reef ecosystem. Nishiki Decl ¶¶ 28-29, Exh. 12 (CIA), 13 (Wave Study). The sandy beach of Keonenui has been a staging area for Glenn Kamaka’s and other Native Hawaiian’s traditional and customary practice of hukilau (dropping net). Exh. 12 (CIA) at 17; Kamaka Decl. ¶ 14 Many fish such as ‘akule and papio used to be prevalent in the bay. Exh. 12 (CIA) at 17. It was also a breeding site for moi, culturally significant as a fish reserved only for the ali‘i. *Id.* There is still an active “fish house” (koa) fronting Kahana Sunset. *Id.* at 19.

Endangered species such as humpback whale, monk seal, green turtle and hawksbill turtle are known to frequent the waters offshore of Keonenui Bay. Nishiki Decl. ¶ 30; Exh. 14 (FEA) at 23. There have also been documented sightings of monk seals, green turtles, and hawksbill turtles at Keonenui Beach. Exh. 14 (FEA) at 24. The area is also known as a turtle haul out location, with numerous turtles found in the bay on most days. Nishiki Decl. ¶ 31, Exh. 15 (OCCL Letter within Schweitzer Shoreline Control FEA).

“Most of the shoreline at Keonenui Bay is either naturally hardened or artificially armored with vertical reinforced concrete stone masonry seawalls.” Exh. 14 (FEA) at 10. Due to

this armoring, “the natural wave action in the area is magnified and continues to erode the clay and ash substrate below the base of the unprotected natural walls of Keonenui Bay, threatening public safety and adding silt to the adjacent coastal waters.” *Id.* In 2012, the Office of Coastal and Conservation Lands (“OCCL”) noted that coastal armoring was “serving as a wave reflective surface. Reflective surfaces tend to have a negative impact on sandy beaches.” Exh. 15 (OCCL Letter within Schweitzer Shoreline Control FEA). In addressing shoreline hardening violations at Keonenui Beach, OCCL further explained the negative impacts of shoreline development and hardening:

Development on beaches and dunes has contributed to serious erosion of these areas, resulting in loss of recreational areas, habitat, and the storm protection that ‘healthy’ beaches and dunes provide. Beach narrowing and loss, and shoreline hardening (the construction of vertical seawalls or sloping stone revetments to protect coastal lands from marine erosion), also severely restrict public access to State Conservation land and the natural resources. In heavily armored sectors, sand impoundment mauka of walls can lead to reduction in sand supply and increasing regional erosion trends.

Unfortunately, many of Hawai‘i’s beaches have been degraded or lost from a combination of natural erosion and inappropriate coastal development including shoreline armoring, shallow beachfront lot subdivisions, and development too close to the shoreline.

Id. In 1998, the Coastal Erosion Management Plan (“COEMAP”) of DLNR produced “Shoreline Hardening Policy and Environmental Assessment Guidelines,” instructing decision makers that it is the general policy that “hardening of the shoreline should be considered the erosion management option of last resort, and its use should be avoided if other options are available.” Nishiki Decl. ¶ 32, Exh. 16 at 53.

Data from 2011 indicated that 85% of Maui’s shorelines are eroding over the long-term. Nishiki Decl. ¶ 17, Exh. 17 (Buika and Owens Slides). In all of the Hawaiian Islands, Maui’s beaches are experiencing the highest rates of erosion. Exh. 17. As of 2011, Maui had lost more than 10 percent of its beaches. *Id.* Human activities that impede sand supply and transport, including seawalls, are one of the three leading causes of coastal erosion. *Id.*, see also Exh. 15 (Schweitzer FEA). The Hawaii Coastal Hazard Mitigation Control Guidebook (2005) states that shoreline hardening (building of a rock or stone barrier along the shoreline to prevent erosion of the backshore area) has led to a loss of over 25% of O‘ahu’s beaches, and “miles of former beach

areas on Maui.”⁶ Nishiki Decl. ¶ 34, Exh. 18 at 6. In 2012, OCCL observed that in the area Building F, erosion of the shoreline was occurring at a rate of 1.15 feet per year. Exh. 15 (OCCL Letter within Schweitzer Shoreline Control FEA) Hardened shorelines prevent natural inland beach migration as well as the ability of sand to exchange with inland dune systems for replenishment. Exh. 18 (Coastal Hazards Guide) at 167. The Maui Planning Department has also recognized that part of the problem of shoreline erosion is reactive shoreline planning, which “protects threatened development at the expense of coastal ecosystems.” Exh. 17 (Buika and Owens Slides).

The existence of armoring at Kahana Sunset has also perpetuated armoring at neighboring properties. In 2013, a residential property immediately neighboring the Kahana Sunset’s Building F was fined by DLNR when the property’s unpermitted seawall and stairs began encroaching makai of the state certified shoreline, Exh. 15 (Schweitzer FEA). The residential property owners chose not to forgo armoring their property due to the “major concern” that removal of the structure would cause “exposure and potential damage due to flanking from the Kahana Sunset and Lusardi seawalls.” Exh. 15 (Schweitzer FEA). Armoring at Kahana Sunset, therefore, has the negative impact of perpetuating armoring at neighboring properties and forecloses the option to remove such structures.⁷

In 2016, a large plume of red clay and sediment was observed in Keonenui Bay. Tara Owens, a coastal processes and hazard specialist with the University of Hawaii Sea Grant, serving as a liaison to the County of Maui Planning Department, attributed the degraded water quality to “natural erosion of the beach, followed by exposure and erosion of the underlying land-based sediment layers (clay).” Nishiki Decl. ¶ 35, Exh. 19. Similar plumes are a logical consequence of further sand loss at Keonenui Beach caused by Buildings A and F.

Seawalls also lead to sinkholes:

As the tide goes in and out, water levels drop, and a vacuum is created causing the saturated soils to travel from the negative side of the seawall into the body of water. This leads to soil erosion, which can often be seen in the formation of small

⁶ Those alarming figures were based on data from 1998.

⁷ This effect is not limited to Kahana Sunset. “Data confirm the existence of a ‘hardening domino effect’ in which the first seawall triggers a succession of seawalls by adjacent property owners as the hardened shoreline initiates and accelerates erosion on adjacent, once stable beaches.” Nishiki Decl. ¶ 37, Exh. 21 (UH News Failure to Protect Beaches Article).

sinkholes immediately behind the seawall. The lack of supporting soils will ultimately lead to structural compromise of failure of the seawall.

Nishiki Decl. ¶ 36 , Exh. 20 (Avanti Website). These sinkholes then threaten the integrity of the seawalls and the properties the seawalls were intended to protect. Between 2007 and 2017, there were at least five instances of failed shore armorings along Keonenui Bay. Exh. 17 (Buika and Owens Slides).

Shoreline hardening also impedes public shoreline and beach access. Such hardening not only accelerates beach loss, but limits pathways to and along the shoreline. The “beach access” stairwell at Kahana Sunset, for example, is gated and dependent upon the Kahana Sunset AOAO timely unlocking the gate at designated hours. Nishiki Decl. ¶ 38. This frequently does not occur. *Id.* Fishermen and other beach users are not able to access the shoreline freely. *Id.* ¶ 39. The stairs are also located in an area that is typically inundated, requiring the public to walk up alongside the seawall through the surf to reach the last remnants of Keonenui’s sandy beach. *Id.* ¶ 40. No other public access is available despite the fact that the area once was a fishing village and popular hukilau staging grounds. *Id.* ¶ 41. Public access through any other point has been lost due to shoreline hardening and the Kahana Sunset’s private development. *Id.* ¶ 42.

In 2020, the State legislature passed Act 16, amending chapter 205A, HRS to, in most instances, prohibit new shoreline armoring or any significant expansion of shoreline armoring along sandy beaches due to the known consequences of such shoreline hardening. *Id.* ¶ 47.

IV. Kahana Sunset’s Endless Cycle of “Repairs” and Refusal to Retreat⁸

For nearly 50 years, the Director has facilitated Kahana Sunset’s endless cycle of repairs without retreat by serially issuing exemptions and emergency permits for the “protection” of Kahana Sunset’s Buildings A and F. These approvals have repeatedly been issued despite Kahana Sunset’s nonconformance with the West Maui Community Plan designation, which Kahana Sunset has unsuccessfully sought amendment of for the past decade. The 1968 zoning

⁸ This summary is not exhaustive. For brevity’s sake, Kahana Sunset’s long history of permitting , shoreline impacts, shoreline encroachment violations, and change in zoning applications cannot be fully represented in this notice of appeal. Such information would be provided in contested case hearings to establish the cumulative effects of the Project and the inappropriateness of the SMA Exemption, Shoreline Approval, SMA Emergency Permit and Environmental Assessment Exemption.

variance often relied upon by the Director in permitting is also suspect when taken in the context of its approval.

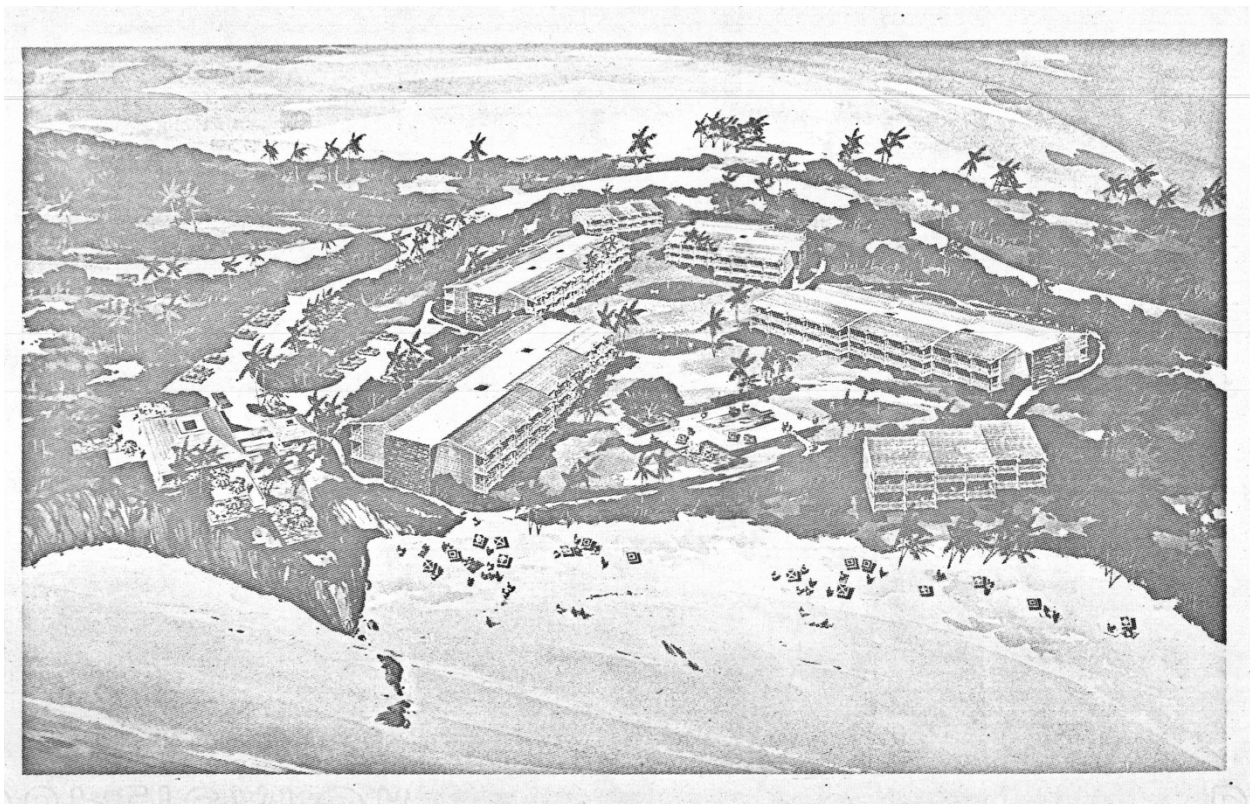


ABOVE: Recent Google Earth image with identification of Building A and F added .

In a 1968 letter, an attorney representing Yoshiharu Yabui and Kiyoshi Yabui, owners of the parcel that is now Kahana Sunset, wrote to the Commission, noting that his clients had applied for rezoning of the parcel from “residential to [Hotel]-1.” Nishiki Decl. ¶ 44, Exh. 22. That request was denied by the Commission as inappropriate for the area after substantial public opposition, including from the Planning Department. Nishiki Decl. ¶¶ 43- 44, Exhs. 22-23. The Yabui’s letter indicated they had given “considerable thought” since their request, and were now “seeking a variance of the said property” to permit construction of an “apartment based on the provisions of the proposed [Apartment]-1 zoning which has not yet been adopted.” *Id.* A few weeks later, the Board of Supervisors of the County of Maui approved the request and informed the Commission of its decision. Nishiki Decl. ¶ 45, Exh. 24. The Commission was thereafter

informed by the Board of Supervisors action.⁹ *Id.* The site remains in residential zoning today, despite Kahana Sunset’s use of the site as a nearly 100 percent transient vacation rental property. Nishiki Decl. ¶ 46

In 1971, Kahana Sunset Resort Condominium was built along Keonenui Bay between Haukoe Point and ‘Alaeloa Point at what is now 4909 Lower Honoapi‘ilani Road. Nishiki Decl. ¶ 48. The complex is made up of 79 units, spread across Buildings A – G. Nishiki Decl. ¶ 49. Building A was built a mere 15 feet from the shoreline atop a sea cliff some 25 feet above ocean level. Exh. 14 (FEA) at 8. Building F was constructed 50 feet from the shoreline. Exh. 14 (FEA) at 8.



ABOVE: Conceptual drawing for Kahana Sunset development in 1968.

Shoreline armoring was quickly needed to protect the walls of Kahana Sunset’s Building F from undermining. Exh. 25 (GA Report) at 2. On April 8, 1975, Kahana Sunset applied for a

⁹ The zoning for Kahana Sunset remains “apartment” today. Kahana Sunset also failed to request that the community plan be amended from the parcel’s designation as Multi-Family to Hotel during the most recent revision of the West Maui Community Plan, which had an extensive community input and engagement process. Nishiki Decl. ¶ 50. Instead, Kahana Sunset has attempted to receive that amendment outside of the community plan process before the Maui County Council and Commission. *Id.* ¶ 50.

shoreline setback approval to construct a “concrete sea/ retaining wall.” Exh. 02 (Nakamura to Saito, letter dated April 15, 1975). A week later, that request was granted by the Director of the Department of Planning “due to the immediate hazards caused by the situation.” *Id.* Even with such minimal review, the Director had the foresight to caution that the wall was unlikely a “satisfactory and permanent solution” and recommended that Kahana Sunset find an “appropriate solution.” *Id.*

In 1978, Kahana Sunset was issued a shoreline setback approval and conservation district use permit for “shoreline protection” and to “fill caves,” to protect Building A. Exh. 14 (FEA) at 9. The cliff face fronting Building A was gunited¹⁰, i.e., filled with concrete, “in an attempt to preclude erosion of its face by wave[s].” Exh. 25 (GT Report) at 3. Additionally, “three sea caves up to nine feet high and projecting as much as 20 feet into the cliff face were filled with concrete.” *Id.*

A shoreline certification was conducted at that time, which appears to be the most recent State Certified Shoreline certification on record for Kahana Sunset. Nishiki Dcl. ¶ 53, Exh. 26 (Reid Siarot, State Surveyor, email).

In 1996, an SMA exemption was granted for a more substantial repair of the Building F wall. Exh. 25 (GT Report) at 2; Exh. 14 (FEA) at 9.¹¹ These “repairs” consisted of placing stacked, concrete-filled fabric bags and then cementing them together with gunite. Exh. 25 (GT Report) at 2.

In 2000, low sea caves penetrating as much as seven feet inward from the cliff face beneath Building A were detected. At that time, the gunite facing appeared to remain intact. Exh. 25 (GT Report) at 3.

In 2002, an investigation revealed that sea caves extending inward up to 20 feet beyond the cliff face beneath Building A had formed and cracks were appearing in the gunite facing.

¹⁰ Gunite is a dry mixed form of sprayed concrete to which water is added when it is applied. It has substantially the same effect as concrete but differs in its form of application, which is through a high-pressured hose.

¹¹ There is a discrepancy between the permit listing and the Geoanalytical Report’s date of 1992. It is assumed here that the 1992 repairs noted in the Geoanalytical Report are those that were permitted in 1996, and that the 1992 reference was in error. There may, however, been two different repairs, one occurring in 1992 and one in 1996. The FEA refers to SSA 96/002, and SMA Exemption SM5 96/0005. Exh. 14 (FEA) at 9.

Exh. 25 at 3. It was concluded at that time that the conditions “posed a serious threat to the stability of Building A.” *Id.*

In 2003, further repairs were needed at Building F because the walls created from cemented-stacked-bags constructed in 1996 had failed; “one of the walls next to a staircase collapsed and sinkholes appeared behind the walls.” *Id.* at 2. The Director issued two SMA emergency permits¹² to backfill the voids beneath the walls with 8- to 12- inch diameter rock grouted with lightweight concrete. *Id.*; *see also* Exh. 14, (FEA) at 9.

In 2006, a Geoanalytical Investigation of the Kahana Sunset Condominium walls was conducted. Exh. 25 (GT Report). The purpose of the investigation was to “evaluate subsurface soil, ground water and other geologic conditions next to the walls and sea cliff, to prepare specific recommendations for use in rehabilitating and protecting the walls at Building "F" against future distress, and to offer recommendations for protection of Building "A" against the advance of sea cliff erosion and undermining.” Exh. 25 (GT Report) at 1. The report described Building A and F’s seawalls as adjoining “linear concrete lānai’s, spanning 25 and 57 feet respectively.” *Id.*

On December 23, 2009, the Department granted Kahana Sunset verbal permission for an emergency SMA permit to “complete temporary emergency protective measures and repairs to Building ‘F’ Foundation and Adjacent Seawall.” Nishiki Decl. ¶ 54 Exh. 27 (2009 Emerg. Permit).¹³ In the written authorization, dated December 29, 2009, the Department stated that it understood that “the foundation of Building ‘F’ is in danger of imminent collapse due to undermining of the foundation by ongoing coastal erosion.” *Id.* Two photographs were attached, “demonstrating a threat to public health and safety and potential physical harm to the foundation of Building F.” *Id.* One photograph is captioned: “unenforced seawall fronting collapsed lanai area Building F.” *Id.*

¹² SM3 2003/00001 & SM3 2003/0002.

¹³ SM3 2009/0005 (RFC 2009/0280)

Unreinforced seawall fronting collapsed lanai area of Building F



At that time, Building F had been evacuated and remained vacant due to safety concerns. *Id.* The solution authorized by the emergency temporary permit was to excavate and place boulders a minimum of 10 feet down within the collapsed lanai and fill them with grout. *Id.*

In February 2010, the Director granted another emergency permit for “protective measures and repairs” for Building A’s foundation and adjacent seawall. Nishiki Decl. ¶ 55, Exh. 28 (2010 Emerg. Permit).¹⁴ Like Building F, the foundation had again been undermined by wave action. *Id.* at 2-3.

In 2010, the Department requested Kahana Sunset “include a plan for long-term strategic retreat for structures that have been threatened by coastal erosion located along this highly eroding shoreline.”¹⁵ Nishiki Decl. ¶ 56, Exh. 29 (2010 Request for comments). The request was made by the same individuals involved in the SMA Exemptions and Shoreline Approval that this appeal challenges - Kathleen Ross Aoki, as Planning Director, and James Buika, as the Coastal Resources Planner. *Id.*

In 2011, a “Wave Climate Study for Kahana Sunset” was prepared. Exh. 13 (Wave Study) The Executive Summary of the report began: “Kahana Sunset Condominium Complex on

¹⁴ SM3 2010/0001.

¹⁵ The request was made in a comment on Kahana Sunset’s draft environmental assessment for the then proposed “shoreline erosion mitigation and bank stabilization” project, stabilization.

the northwest Maui coast experiences problems with chronic erosion of the beach and wave overwash of the existing sea wall foundations and other coastal fortifications along the coastline.” *Id.* Peak swell events, it explained, may “inundate approximately 60 feet inland reaching the existing seawalls and other infrastructure.” Exh. 13 (Wave Study) at 18. Further, moderate swells can cause inundation up to 42 feet inland with surge reaching and undermining the seawall. *Id.* at 19.

In January 2012, Kahana Sunset challenged State Land Surveyor Reid K. Siarot’s determination that portions of the shoreline were located “at the mauka face of the concrete seawall,” contrary to the private survey Kahana Sunset had contracted. Nishiki Decl. ¶ 57, Exh. 30.

In response, State Surveyor Siarot reinforced the State’s position:

The State determines shoreline based on evidence of “the upper reaches of the wash of the waves”. In front of Building F, the State found a significant amount of beach sand in the seawall drains indicating that the waves wash through the drains, at least to the mauka side of the CRM and concrete seawall. The State also found that a portions of the CRM seawall were undermined due to wave action at the toe of the structure.

Nishiki Decl. ¶ 58, Exh. 31. He indicated that the State had already conducted a site visit and “did not receive substantial evidence to dispute this shoreline determination.”¹⁶ *Id.*

In April 2012, Kahana Sunset received an SMA minor permit and shoreline approval for “complete controlled removal of an unstable soil overhang above a gainted cliff face and sea wall,” beneath Building A. Nishiki Decl. ¶ 59 Exh. 32¹⁷ (2012 Minor permit). This project was also exempted from chapter 343 environmental review. *Id.*

¹⁶ Siarot provided a similar stance in an email dated July 13, 2023 to Kai Nishiki:

Pursuant to Hawaii Administrative Rules 13-222-11 the shoreline certification is valid so long as the structure remains intact and unaltered if the shoreline is fixed by the approved structure and engineering drawings exist. If waves wash under and/over a seawall and we receive an application for shoreline certification, we would identify the shoreline at the upper reaches of the wash of the waves, either under or over the seawall, provided we see evidence of the wash over or under the wall.

Nishiki Decl. ¶ 62, Exh. 35 (email).

¹⁷ SMX 2009/0385, SM2 2012/0051, SSA 2012/0029, EAE 2012/0040.

In September 2013, Kahana Sunset received OCCL's approval for work in the conservation district to remove portions of a seawall, seawall buttress, and stairs that were undermined, some of which were also encroaching on state lands Nishiki Decl. ¶ 60, Exh. 33. As a condition of the approval, OCCL required: "To avoid encroachments upon the area, the applicant shall not use artificially accreted areas due to nourishment or hardening as indicators of the shoreline. To facilitate any future applications for shoreline certifications, the applicant should conduct a shoreline survey for state certification." *Id.* at ¶ 9.

In October 2013, after OCCL's approval was issued, the Department granted Kahana Sunset an SMA emergency permit "for removal of a shoreline encroachment and seawall repairs to a seawall that has been undermined. The undermined seawall is currently endangering the public and threatening further damage to the condominium structure, known as Building F." Nishiki Decl. ¶ 61, Exh. 34 (OCCL Approval).¹⁸

The emergency permit explained the "state of imminent danger posed and substantial harm that would occur to the habitable structure if the permit was not issued:"

A portion of the existing seawall fronting the Kahana Sunset is undermined due to long-term erosion and wave impact. The extent of the undermined area is approximately six feet (6') inward from the face of the existing seawall and runs for a length of approximately 100 feet (100'). The existing seawall is attached to the lanai of Building "F", and in this section has lost much of the sand substrate that was supporting it. Evidence of the emergency situation is that sand and earthen soil under the seawall and lanai continues to erode into the ocean. Because of the cavity created under the seawall, there exists extreme imminent danger of collapse resulting in bodily harm or death. Furthermore, as the foundation of the seawall and lanai is exposed, the foundation of Building "F" will be threatened as the ocean moves closer and will result in, sooner than later, very substantial damage to a habitable structure. Properties on both sides of the Kahana Sunset are also fronted by sea walls;

Id. at 2 (emphasis added).

In early 2014, Kahana Sunset published a final environmental assessment in support of applications for a SMA use permit, shoreline setback variance, community plan amendment ("CPA"), and change in zoning ("CIZ"). Exh. 14 at 1 (FEA). The SMA use permit and shoreline setback variance were for a proposed "replacement" seawall, drainage improvements, and beach access paths. Exh. 14 (FEA Figure 10) The plan also called for the removal of stairs fronting Building F. *Id.* The assessment also analyzed the impacts of changing the parcel's designation in

¹⁸ SM3 2013/0003

the West Maui Community plan from Single Family Home to Hotel as well as changing its zoning from R-3 Residential to H-M Hotel District. Exh. 14 at 1 (FEA Summary). On April 22, 2014, the Commission made a Finding of No Significant Impact determination. Exh. 14 (FEA FONSI Letter).

On July 22, 2014, the Commission voted to recommend that the Maui County Council approve Kahana Sunset's requested community plan amendment and change in zoning. The Commission also approved a shoreline setback variance and SMA use permit for the proposed "replacement" seawall, drainage improvements, beach access path and removal of stairs. Nishiki Decl. ¶ 63, Exh. 36 (2014 SMA Permit).¹⁹ As a condition of the variance, Kahana Sunset was required to "maintain[] and require[] safe lateral access to and along the shoreline for public use." Exh. 36 at 2. The approvals also required Kahana Sunset to "have the shoreline surveyed and certified by the State of Hawaii" and to submit evidence of such certification to the Director. *Id.* at 8.

In 2016, the Land Use Committee of the County Council met to consider a proposed bills to change the zoning of the Kahana Sunset parcel as recommended by the Commission but did not receive the necessary unilateral agreement from Kahana Sunset agreeing to conditions of zoning. Nishiki Decl. ¶ 64, Exh. 37 (2017 LUC letter).

In 2017, the Chair of the Land Use Committee of the County Council informed Kahana Sunset that the change in zoning and community plan amendment matter remained pending and requested information about the unilateral agreement. *Id.*

On July 13, 2017, the Director issued an SMA exemption for "repair of existing structure due to erosion and building undermining" of Building A. Nishiki Decl. ¶ 65, Exh. 38 (2017 Exemption)²⁰ The "repairs" consisted of: "permanently filling the existing cavity within the existing footprint of the existing 'A' building, and remedial additional work at grade, and in the lawn area to manage the eroded cavity. The cavity will be filled using concrete as described in the submitted plans." *Id.* at 1 (2017 Exemption). The Director also issued Kahana Sunset a shoreline approval and exemption from preparation of an environmental assessment as a "repair." *Id.* The project also received an emergency permit from OCCL. *Id.*

¹⁹ CPA 2012/0003, CIZ 2012/0007, SM1 2012/0003, SSV 2012/0002, EA 2012/0002.

²⁰ SMX 2017/0177, SM5 2017/0126, SSA 2017/0034, EAE 207/0043.

On July 12, 2018, the Director issued Kahana Sunset an exemption to “repair of existing foundation due to erosion and undermining” at Building A. Nishiki Decl. ¶ 66, Exh. 39. The scope of work authorized what “providing a secondary structural column system within the existing cavity within the existing footprint of the existing ‘A’ building and is limited to installing eight (8) 6”x6” foundation columns supports near the existing CMU foundation columns. The cavity, created by erosion, will not be filled as part of the submitted plans.” *Id.* The exemption letter noted that “protective sand bags have been placed at the shoreline to limit ocean waters to enter into the exposed foundational areas. The protective sandbag project has been reviewed and approved as an Emergency Permit” by OCCL, as “emergency mitigation and restoration work.” *Id.* The exemption noted that “Building A and other areas of the parcel will be subjected to predicted seal level rise” and encouraged Kahana Sunset to use the Hawaii Sea Level Rise Viewer to “understand what structures and buildings will be subjected to various levels of sea level rise.” *Id.*

The 2018 exemption required Kahana Sunset to prepare a managed retreat plan within six months:

That within 180 days of issuance of this permit, the Kahana Sunset AOA begin proactive planning regarding discussions for managed retreat from the shoreline by providing the Department with up-to-three location alternatives with relocated footprints for Buila A, more mauka (inland), away from the shoreline setback area, as defined on submitted figure S-2. The proposed relocation areas most likely will include part of the available parking lot area behind Building A. The applicant is encouraged to contact the Department within ninety (90) days of issuance of this permit. “Managed retreat” is defined herein as purposeful action that relocates structures and infrastructure aware from vulnerable coastal area. As you are aware, building A is in a vulnerable coastal area. For more information on vulnerability to sea level rise, the Department refers you to the Hawaii Sea Level Rise and Vulnerability Report.

Id. The Director also exempted the project from preparation of an environmental assessment on the basis that it was a “repair.” *Id.*

In March 2018, the Chair of the Land Use Committee of the County Council again wrote to Kahana Sunset, stating that he had received no response and inquiring whether Kahana Sunset was still pursuing a community plan amendment and change in zoning. Nishiki Decl. ¶ 67, Exh. 40.

Later in 2018, the community plan amendment and change in zoning came before the Land Use Committee again. At that time, a condition of zoning requiring “that any future units

shall first consist of replacement units as part of a shoreline managed retreat plan approved by the Department of Planning” was considered by the Committee but did not pass. Nishiki Decl. ¶ 68, Exh. 41 (Slide). Due to a minimum quorum present, Kahana Sunset’s matter was deferred. *Id.*

On March 4, 2020, the West Maui Community Plan Advisory Committee voted to keep the residential designation of the Kahana Sunset parcel. Nishiki Decl. ¶ 69, Exh. 42 (1/24/22 minutes) at 41.

On June 29, 2021, Kahana Sunset submitted an application for the Building F Project for which the June 19, 2023 SMA Exemption and Shoreline Approval, and Environmental Assessment Exemption were granted. Exh. 01 at 1. The plans included boring multiple seven inch in diameter micro piles through Building F’s lanai structure twenty-five feet down into the bedrock. The micro pile grid would be cemented together at the top. *Id.* at 2. This application is discussed in further detail below and is the subject of this notice of appeal.

On September 21, 2021, the Director authorized staging activities for the removal of sandbags fronting Building A, which was being required by OCCL.²¹ Exh. 01 at 2.

On the January 24, 2022, the Planning and Sustainable Land Use Committee of the Maui County Council once again considered Kahana Sunsets request for a community plan amendment and change in zoning. *See* Exh. 42 (minutes). Kahana Sunset sought the CPA and CIZ in part to facilitate the Planning Department’s approval for construction of a new sea wall along with repairs of the Building F’s lanai. *See id.*

Planning Department Planner Jim Buika described Kahana Sunset’s proposed seawall “repairs”:

Yes, the seawall basically...the repair for the seawall that is proposed is to drill...drill piles 25 feet deep down to bedrock. And as the piles come up, it would add a concrete wall basically from bedrock all the way up to the surface of 25 feet. So in essence, they would be building a brand new seawall upfront rather than like for like repair, which we usually authorize, you know, replacing rocks or mortar or minor repair. So this would be considered a new...a new seawall, which at this point is not allowed, and would require a variance from the Maui Planning Commission to achieve.

Id. at 36. A substantially similar method was also proposed to buttress the lanai behind the sea wall, is the same plan that was exempted by the Director on June 19, 2023. Nishiki Decl. ¶ 72,

²¹ SM2 2021/0077 and SSA 2020/0069

see also Exh. 01 (condition of SMA Exemption requiring compliance with plans submitted in 2017).

Planning Director Michele McLean also testified about the proposed seawall and Building F "repairs":

MS. MCLEAN: Yes. Thank you, Chair. We are and have been actively working with Kahana Sunset on Building F. They themselves have shuttered Building F, it's been closed up for more than a year and hasn't been occupied due to concerns of its structural soundness. They are interested in what's effectively replacing the seawall that Building F sits on, and we have made it clear to them that we do not support that, and in fact, don't think that State law, with the recent changes to HRS 205A, would allow that. It would effectively be a new seawall. **And we don't think it's responsible for Building F to be rebuilt or repaired.** The plans that they've put together to allow that would be just extensive work right in the shoreline environment, and not something that we would support. In terms of the entitlements though, we do support the entitlements because it recognizes the existing use. **And for them to properly maintain their buildings, to get an SMA major permit, we need to find consistency with the use and the zoning and community plan designation, and that would be difficult to do with the existing designations.** Now variance does come into play, and that's probably how we've been able to issue approvals in the past, **but it is better to have the appropriate designations . . .** (timer sounds). . . to make that clear, especially if they are going to talk about managed retreat and building entirely new buildings, they would need those designations for those buildings to be used the way that they're being used. Thank you, Chair.

Id. at 30 - 31.

Kahana Sunset was also questioned about its plans for managed retreat:

CHAIR PALTIN: . . . And to clarify, that there are no plans for managed retreat whether or not you get a change in zoning and a community plan amendment, you do not plan to retreat?

MR. CABEBE [KAHANA SUNSET]: Well, currently, there are no plans. You know, the AOA would like the option to do the...to plan a retreat when necessary and that, you know, having the change in zoning and the community plan amendment would assist them in helping them come up...you know, be able to have more options as far as, you know, doing their managed retreat. You know, should the buildings...Building A and Building F fail at some point.

....

COUNCILMEMBER LEE: Okay, how many units in Building F?

MR. CABEBE: There's 12.

COUNCILMEMBER LEE: Twelve, okay. And that's...and retreat is not a consideration, it's not an option?

MR. CABEBE: Not at this point.

....

COUNCILMEMBER RAWLINS-FERNANDEZ: Okay. Mahalo, Chair. The question is for Mr. Cabebe. And I know like several Members and the Chair has asked about the plan for managed retreat. And what I'm hearing from you and others is that managed retreat is like a Plan B, Plan C, you know, it's not the ideal. And so it sounds like to me that you're going to continue pushing this Plan A of re-enforcing the seawall and repairing Unit [sic] F and not continue to explore managed retreat unless you have to. Is that a fair assessment?

MR. CABEBE: Thank you, Councilmember Rawlins-Fernandez. Yes, you know, particularly the owners of, you know, the units in Building F, they would like to keep the building there obviously. But, you know, it's...everything is pointing more towards managed retreat now, you know, with the determination from the Planning Department that the wall is essentially a new wall. That was a determination that we...I think we just received like last week in a letter from the Planning Department. So, you know, going forward, you know, that was kind of Plan B which is true but, you know, there's something, you know, it may be Plan A now. So we would...you know, they would like the opportunity to be able to do that and, you know, come up with plans and a way to move these buildings if possible, you know, away from the shoreline.

See id.

The Committee ultimately filed the communication, in effect, preventing the application from moving to the full Council. *Id.* at 43-48. Council members indicated that Kahana Sunset should develop a new plan including a plan for managed retreat of Building F if it wanted to receive the Committee's approval for the change in zoning and community plan amendment in the future. *Id.*

On September 16, 2022, the Department received and accepted Kahana Sunset's compliance certificate demonstrating that it had removed the sandbags fronting building A "in order to authorize repairs for Building F." Exh. 01 at 2.

On November 28, 2022, the Department provided Kahana Sunset with a template to create a draft conceptual managed retreat plan. Exh. 01 at 2. As of June 19, 2023, the Department had not received a copy of Kahana Sunset's draft plan. *Id.*

On June 19, 2023, the Director informed Kahana Sunset by letter that the Department had received the June 9, 2021 application for Building F repairs, as well as their May 11, 2023 revised SMA application for the repairs. Exh. 01 at 1. The Director wrote that “the Department has observed the progressively deteriorating condition of Building F and its seawall and lanai since 2009 as well as the deteriorating condition of other shoreline properties in Keonenui Bay.” *Id.* The exemption authorized repairs to the foundation of Building F “which exhibits incipient signs of potential structural failure, causing concerns for the health and safety of occupants and beach goers.” The exemption noted that Building F had undergone numerous emergency repairs since 2009 and that the lanai behind the seawall had previously collapsed. *Id.*

The Building F repairs were described as:

installing a grid of approximately seven-inch-diameter micro piles extending from the slab-on-grade foundation, down approximately 25 feet through the existing substrate to bedrock. Several borings have been performed to understand the depth to the bedrock. The inserted micro piles will be tied together with a lateral concrete structural beam at the surface, designed to stabilize the support grid. There will be no expansion of the foundation area.

Id. at 1-2. The approval letter explained that the repairs were being authorized “to provide the Kahana Sunset Board of Directors additional time to perform necessary actions to complete its requested Change in Zoning and Community Plan Amendment and to submit a draft Managed Retreat Plan to the Department, as requested by the Maui County Council (Council) on January 24, 2022.” *Id.*

The exemption letter also referenced a January 14, 2022 “Guidance Letter”²² that defined a required “Step One.” That step consisted of removing the sand bags in front of Building A, which the Department permitted in 2021 and Kahana Sunset certified was completed in 2022. Exh. 01 at 1

“Step two”, the exemption letter explains, “represents stabilization of Building F by repairing its foundation that may be undermined, as evidenced by your Structural Engineering Report submitted as part of the subject SMA application.” Such stabilization is

²² The “Guidance Letter” does not appear to be available publicly. A Chapter 92 public records request made by Appellants counsel for documents pertaining to the June 19, 2023 exemption is still outstanding.

to “stabilize Building F foundation with the short-term future objective of removal of Building F that would lead to and result in relocation of the twelve, at-risk townhouse units.” *Id.* The exemption notes that “[t]he repairs are not intended to allow occupancy of Building F.” *Id.*

Steps three and four consist of: (3) “exploring demolition of Building F and relocation elsewhere on the property, with the support from the Department, as an initial Managed Retreat Strategy;” and (4) “Accept reality and put this pro-active shoreline plan to a test by envisioning a new common shoreline area and gaining owners’ support for a Managed Retreat Strategy.” *Id.* at 2.

The exemption further reiterated that the Department had supported Kahana Sunset’s various needs over the past 13 years. The Department noted that “seawall changes” that it approved “were a compromise to begin managed retreat as well as to cure violations for existing encroachments in the shoreline with the State of Hawaii.” *Id.* The Department reminded Kahana Sunset that it had supported Kahana Sunset’s request for community plan amendment and change in zoning before the Maui County Council. *Id.*

The exemption required that scope of work indicated in the plans titled “FOUNDATION STRENGTHENING FOR KAHANA SUNSET CONDOMINIUMS BUILDING F,” dated November 9, 2020, limited to repair of Building F, with the purpose to “maintain the structural integrity of the Building F foundation and to secure the foundation from any shifting or movement.” *Id.* at 3. The Building F Project is valued at \$1,800,000.00. *Id.* The exemption does not include “separate repairs and reconstruction” of Building F’s seawall, which would require an SMA Major Use Permit and Shoreline Setback Variance. *Id.* The exemption asserted that Kahana Sunset was concurrently taking steps to achieve consistency with the community plan and zoning. *Id.* at 3. The exemption letter states that “the action is consistent with the West Maui Community Plan” and that the “existing development designation standards are granted through a 1968 variance.” *Id.*

The Director determined the Building F Project “not a development” because it is “determined to be a repair, maintenance, or interior alterations to existing structures.” *Id.*

With respect to the Shoreline Approval, the Director found that the “shoreline is fixed in the vicinity of the subject repairs” and imposed various conditions, including that the repairs be made in accordance with plans by JPB Engineering dated November 9, 2020

(Nishiki Decl. ¶ 70, Exh. 43), that a state certified shoreline survey be obtained prior to initiating work, and that within 120 days of issuance of the permit, that a draft Managed Retreat Plan be forwarded to the Department. *Id.* at 5-6.

The Building F Project was also exempted from preparation of an environmental assessment as a “repair” to an existing structure “involving negligible or no expansion or change of use beyond that previously existing.” *Id.* at 7.

No archaeological monitoring was required for the Building F Project.

On July 11, 2023, the Commission was informed of the Director’s SMA Exemption and Shoreline Approval at its regularly scheduled meeting. Exh. 8 (July 11, 2023 Agenda). The exemption from preparation of an environmental assessment has not yet been noticed in the Environmental Notice. Nishiki Decl. ¶ 71.

On July 13, 2023, the Director issued an SMA Emergency Permit to Kahana Sunset for “emergency repairs to the current sinkhole” under Building A.²³ Nishiki Decl. ¶ 73, Exh. 06 at 1 (7/13/23 EP).²⁴ On July 18, 2023 the approval letter for the SMA Emergency Permit was superseded by a second approval letter. Exh. 07. The July 18, 2023 letter acknowledged that the Department received Kahana Sunset’s request for an emergency permit on April 13, 2023. *Id.*

The purpose of the request for the permit was to “expedite identified emergency repairs to the Building A’s seawall that has been undermined by waves, leading to a substantial sinkhole being the seawall. The sinkhole further exposes Building A’s structural foundation columns to potential undermining and continual damage.” *Id.* at 1. The letter confirmed that an SMA Emergency Permit was necessary because “the undermined seawall is currently endangering the public and threatening further damage to Building A’s condominium structure.” *Id.* at 2. It further noted that the area undermined by the seawall, the adjoining lawn, and outdoor lanai common area had been cordoned off by the AOA for safety. *Id.* at 2.

²³ Some files within MAPPS associated with this emergency permit are not available for viewing. An error message appears for some documents uploaded June 30, 2023 that says “File is not ready for download yet.”

²⁴ SM3 2023/0006

Kahana Sunset’s application describes the “emergency repairs” as “to stabilize/mitigate Building A’s sinkhole and to repair and maintain eleven (11) columns (on the first floor) to strengthen Building A’s south portion. Approximately, 100 cubic yards of [concrete low-strength material (CLSM)] will be utilized as well as the placement of sandbags in the sinkhole interior.” Nishiki Decl. ¶ 73 (MAPPS language). The application states, “There has been NO community meetings regarding the proposed project.” Nishiki Decl. ¶ 74 (emphasis in original) (MAPPS language).

The July 18th approval letter states that Building A’s seawall and support columns had been repaired and reinforced in 2018 but were now again being undermined and would continue to be undermined “if further damage to the existing seawall is allowed to continue.” *Id.* at 2. “Portions of Building A could move or collapse if not mitigated, endangering occupants and the safety of beachgoers.” *Id.*

With respect to the imminent danger and substantial harm posed if the permit were not issued, the letter explained that the base of seawall was undermined due to “wave impacts.” *Id.* The undermined area “is approximately 18-feet wide, 15-feet long, and 10-feet deep under the first-floor common area lanai” and the sinkhole also extends onto the common area lawn.” *Id.* Further, where the existing seawall is attached to the lanai, the lanai had lost much of the sand substrate that was supporting it. *Id.* “[S]and and earthen soil under the seawall and lanai continues to erode into the ocean,” evincing the emergency. *Id.* The letter emphasizes that “[b]ecause of the cavity created under the seawall and under the lanai, there exists extreme imminent danger of collapse resulting in bodily harm or death.” *Id.* The foundation of Building A would also remain threatened if the foundation of the seawall and lanai continued to be exposed to ocean wave incursion. *Id.* at 3.

The emergency permit authorized the following measures:

As per the submitted drawings and detailed, stepwise description dated April 13, 2023, by Sarah A. Marshall, Principal, and Donald E. Kimball, Senior Principal, and Licensed Structural Engineer, Building A columns will be repaired where deterioration has occurred in the first southernmost row. Option A only is authorized for the addition of low strength flowable fill material, as described, to fill the bottom half of the sink hole to stabilize the sinkhole. The material will provide support to the base of the column footings. To prevent the fill material from flowing under the seawall and into the ocean and to mitigate any potential flow of seawater, the approved plan is to deploy a row of sandbags made of coconut-fiber or other natural materials to be placed on the inside face of the existing seawall down at the void.

The sandbags will be filled with lime and sand that will harden over time when exposed to water. No work will occur makai of the seawall area in the ocean. No machinery will be placed below the high-water mark.

Id. No conditions requiring archaeological monitoring were imposed. The Building F Project is not discussed in the Emergency Permit and there is no indication that the impacts of the contemporaneously occurring projects on the same parcel were considered. *See* Exh. 07.

Despite the ongoing threats to Building A and Building F and the need for their demolition and retreat, units within the Building's continue to be listed for sale. Exhs. 04 - 05.

V. The Director's Issuance of an SMA Exemption Violates the Coastal Zone Management Act

The Director's decisions to issue an SMA Exemption for the Building F Project and an SMA Emergency Permit for the Building A Project as "repairs" violates the CZMA. The Projects are wholly inappropriate for the SMA. They present unmitigable significant and cumulative impacts, conflict with the community plan, and are contrary to the objectives of the CZMA. The Director's past decisions regarding SMA permitting of the endless cycle of "repairs" at Kahana Sunset are directly responsible for the "life threatening" situation present at Building A today, and the threats to Building F. This situation was only made possible by the Director's allowance of measures to continually "repair" structures that are known to cause sinkholes and be undermined by wave action. In 1975, Director Howard Nakamura had the good sense to inform Kahana Sunset that its construction of the first seawall was neither a "permanent" nor "appropriate" solution. Exh. 02 (Nakamura to Saito, letter dated April 15, 1975). In 2022, Director Michele McLean finally indicated a turn in the Department's approach, testifying, "we don't think it's responsible for Building F to be rebuilt or repaired. The plans that they've put together [to repair Building F] allow that would be just extensive work right in the shoreline environment, and not something that we would support." Exh. 42 (1/24/22 Minutes) at 30-31. The Building F Project exempted by Kathleen Aoki, however, are the same "repairs" to Building F that Director McLean was referring to as irresponsible. Nishiki Decl. ¶ 72.

The Projects will undoubtedly have a cumulative impact or significant environmental or ecological impact on the SMA. When considering the significance of environmental and ecological impacts, the Department is required to consider "the sum of those effects that

adversely affect the quality of the environment and the ecology, and shall evaluate the overall and cumulative adverse affects of the proposed action.” SMA Rules § 12-202-12(e)(1). The Director must consider “every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and short or long-term effects.” SMA Rules § 12-202-12(e)(2).

The SMA Rules currently do not define cumulative impact. The proposed amendments to the SMA Rules, however, include following definition: “‘Cumulative impact’ means the significant effect on the environment that results from the incremental impact of the proposed action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The Director’s SMA decisions regarding Kahana Sunset’s “repairs” have repeatedly neglected to consider the cumulative effect of the proposed action when combined with past and reasonably foreseeable impacts. HAR § 11-200.2. The Director’ decisions regarding the Building A Project and the Building F Project do not reference each other or consider the sum of the effects of the actions despite them being granted contemporaneously, on the same parcel, and for the same purposes. The Director was required to consider the Projects’ anticipated impacts together, including each phase of the Projects.

The Building F SMA Exemption letter references “four steps” previously laid out in a “Guidance Letter” that Kahana Sunset was required to undergo. Exh. 01. Step One was a prior action at Building A. *Id.* Step Two is the Building F Project. *Id.* Steps Three and Four are vague commitments to exploring managed retreat, including a draft “conceptual” plan, and future exploration of demolition of Building F. *Id.* The cumulative impacts of these “steps” are not considered in the SMA Exemption. Instead, the Director, like many before, segmented the Projects and the “steps” from each other, approving the Projects as “repairs” without considering “every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and short or long-term effects.” SMA Rules § 12-202-12(e)(2). This is a blatant violation of the CZMA that this appeal seeks to correct.

The Projects also are not “repairs,” but structurally alter existing structures and are not for the purposes of “fixing or replacing of any part of an existing structure for the purpose of its

maintenance.”²⁵ The Projects also increase the intensity of Kahana Sunset’s use of Buildings A and F because the Projects extend the lifespan of buildings that would otherwise soon require removal. The Projects also facilitate Kahana Sunset’s continued and increasing encroachment into the shoreline, which will be exacerbated by further shoreline erosion. They also expand the size of the Buildings downward and introduce new hardened areas by filling the sink hole with concrete material and creating a grouted micro pile grid at Building F.

The Projects may – and are very likely to – have a significant impact as defined by MPC § 12-202-12 (e)(2) because they:

- Involve an irrevocable commitment or destruction of any natural or cultural resources.
 - Kahana Sunset’s shoreline armoring forecloses the option of other Keonenui Bay properties from de-armoring. Unarmored, those properties would be subject to flanking caused by Kahana Sunset’s seawalls.
 - The Projects’ impacts include the narrowing and loss of Keonenui Beach due to the presence of Buildings A and F on the shoreline and their continual armoring to protect “habitable structures.”
 - The Projects’ impacts include the loss of Keonenui Beach and Bay as a natural resource for fishing and the practice of hukilau.
 - The Projects’ impacts include a loss of vertical and lateral public access to the shoreline.
 - The Projects’ impacts may include an irrevocable commitment and loss of reef ecosystem and fishery in Keonenui bay, which is both a natural and cultural resource, due to changes in wave action and water quality degradation from the introduction of clay sediments into the water. This also poses a loss to recreational use of the reef for snorkeling.
- Significantly curtails the range of beneficial uses of the environment.

²⁵ The SMA Rules and Shoreline Rules do not currently define “repairs.” The proposed amendments to the SMA Rules propose the following definition: “‘Repairs’ means the fixing or replacing of any part of an existing structure for the purpose of its maintenance, or renewal of surface treatments such as painting, carpeting, or exterior siding with substantially similar use of materials or location, but does not include expansion of use or intensity, reconstruction or renovation.”

- The Projects significantly curtail the beneficial use of Keonenui Beach for cultural practices as well as recreation.
- The Projects significantly curtail the beneficial use of Keonenui Bay as a fishing grounds.
- The Projects significantly delay the removal of Buildings A and F from the shoreline, which would allow the shoreline to heal to the extent possible and to provide its natural beneficial uses to the general public as well as Kahana Sunset's owners and patrons.
- The Projects significantly curtail and alter beneficial beach processes, including sand transport and natural replenishment.
- Conflicts with the county's or the state's long-term environmental policies or goals.
 - The Projects conflict with the site's designation in the West Maui Community Plan for single family homes, not the protection of transient vacation rentals.
 - The Projects conflict with the Hawai'i Environmental Policy Act due to segmentation and the Building F Project was wrongly exempted from preparing an environmental assessment.
 - The Project conflicts with DLNR's 1998 "Shoreline Hardening Policy and Environmental Assessment Guidelines." Exh. at 53
 - The Projects conflict with the policies and objectives of the CZMA, described in detail below.
- Substantially affects the economic or social welfare and activities of the community, county, or state.
 - The Projects represent a further commitment to a cycle of failing protective measures for Buildings A and F, leading to circumstances such as life-threatening sink holes, that then prompt approval of further filling of the sink holes and "repairs" to seawalls and foundations.
 - The Projects result in prolonged loss of public access to Keonenui Beach and Bay, including through the loss of vertical and lateral access from the access stairway.
 - The Projects further prolong the demolition of Buildings A and F and prolong the encroachment of Kahana Sunset's structure into the shoreline. Nishiki ¶ 75, Exh. 44 (Private Shoreline Survey). As State Surveyor Reid Siarot explained, "If waves

wash under and/over a seawall and we receive an application for shoreline certification, we would identify the shoreline at the upper reaches of the wash of the waves, either under or over the seawall, provided we see evidence of the wash over or under the wall.” Exh. 35. The Wave Report prepared for Kahana Sunset indicated that that was already happening. Exh. 13. It is also evinced by the consistent undermining of the seawalls. A state certified survey therefore would likely move the shoreline behind the seawalls, and formally recognizing the structures encroachment on public trust lands.

- Involves substantial secondary impacts, such as increased effects on drainage.
 - As discussed, the Projects impacts include beach loss, harm to the reef ecosystem, harm to traditional and customary practices, loss of recreational opportunities and uses of the area, and undermine the credibility of the Department’s efforts to engage in pro-active shoreline planning.
 - The Projects undermine the efforts of the Sustainable Planning and Land Use Committee of the Maui County Council to incentivize Kahana Sunset to develop and implement a managed retreat plan. The Projects extend the lifespan of Buildings A and F and involve substantial financial commitments, disincentivizing the demotion and relocation of the buildings in the near term..
- Cumulatively has a considerable effect upon the environment.
 - The Projects cumulatively, as described above, have a considerable effect upon the environment when the history of installation and perpetuation of the shoreline armoring at Kahana Sunset is accounted for, including the repetitive filling of sink holes and cavities in the cliff face below Building A.
 - These cumulative effects include, among others, beach loss and interruption of natural beach processes, water quality degradation, loss of beaches used by turtles and monk seals, loss of public access, the continuation of encroachments into the shoreline, the perpetuation of shoreline armoring at neighboring properties with the attendant negative effects of such armoring.
- Substantially affects a rare, threatened, or endangered species of animal or plant or its habitat.

- Endangered species such as humpback whale, monk seal, green turtle and hawksbill turtle are known to frequent the waters offshore of Keonenui Bay. Exh. 14 (FEA) at 23. There have also been documented sightings of monk seals, green turtles, and hawksbill turtles at Keonenui Beach. *Id.* at 24. The area is also known as a turtle haul out location, with numerous turtles found in the bay on most days. Exh. 15 (OCCL Letter in Schweitzer FEA). Loss of the beach accompanied by Kahana Sunset’s further encroachment into the shoreline will reduce areas for turtles to haul out and for monk seals to rest. Water quality degradation may also affect other rare or threatened marine animals and plants.
- Is inconsistent with the state plan, county’s general plan, appropriate community plans, zoning, and subdivision ordinances.
 - The Projects conflict with the site’s designation in the West Maui Community Plan for single family homes, not transient vacation rentals. .
 - The Projects rely upon a 1968 variance that was granted for the parcel to be used for an apartment complex. That variance initially contemplated allowing hotel use of the parcel, which was rejected by the Commission after strong public outcry, including from the Planning Department. *See generally* Exh. 23 (1968 variance documents including original change in zoning application and public testimony opposing it). Kahana Sunset has been able to operate a nearly one-hundred percent transient vacation rental resort by the Department’s construing the nonconforming use of the apartments for transient vacation rentals as an ongoing “apartment” use. This characterization of the variance flies in the face of the intent behind the 1968 change in zoning to “apartment” rather than “hotel.” *See id.*
- Detrimentially affects water quality.
 - Shoreline erosion has caused documented water quality impacts as the clay substrate beneath the sand at Keonenui Beach is exposed and washes into the bay. *See* Exh.19 (Lahaina News article)
- Affects an environmentally sensitive area.
 - The SMA and shoreline area are environmentally sensitive areas, which the CZMA is intended to protect.

- Substantially alters natural land forms.
 - The Projects will continue to alter the natural processes and land forms. Repairs to Building A have previously resulted in filling dozens of caves along the sea cliff below the building, as well as applying gunite across the entire face of the cliff. The Building A Project involves pouring additional concrete material into the ground. The Building F Project involves drilling micro piles 25 feet down into the bedrock beneath the lanai of Building F, thereby altering the land beneath the structure.
- Is inconsistent with the objectives and policies of chapter 205A, HRS.
 - HRS § 205A-2 sets forth 10 objectives of the CZMA and 10 corresponding policies. The Projects do not meet the following objectives and policies:
 - **Recreational Resources Objective:** The Projects diminish coastal recreational opportunities by contributing to the loss of Keonenui Beach and lateral public access along the shore. HRS § 205A-2(b)(1)(A).
 - **Recreational Resources Policies:**
 - The permit issuances do not require restoration of coastal resources that have significant recreational and ecosystem value, including the Keonenui coral reefs and Keonenui sand beach, when these resources will be unavoidably damaged by development. The Director has also not required any monetary compensation to the State for recreational purposes in lieu of restoration. HRS § 205A-2(c)(1)(B).
 - The Projects diminish public access to and along the shoreline of Keonenui Bay. HRS § 205A-2(c)(1)(C).
 - **Historic Resources Objective:** The Projects perpetuate the loss of Keonenui Beach and the abundance of fish at Keonenui Bay, which are both culturally significant resources for Hawaiian traditional and customary practices. HRS § 205A-2(b)(2)(A).
 - **Historic Resource Policies:**
 - The SMA Exemption and SMA Emergency Permit do not require Kahana Sunset to conduct any archaeological monitoring, even

though the environmental assessment prepared for construction of a new seawall in 2014 required an archeological monitoring plan. That plan recognized that “subsurface pre-Contact burials, remnant traditional cultural layers, historic refuse deposits, and buried architecture from both pre-Contact and historic periods may be extant” in the areas of Building A and F. Exh. 14 (FEA) at 28; HRS § 205A-2(c)(2)(A)-(C); *see also Public Access Shoreline Hawai‘i v. Hawai‘i Cnty. Planning Commission* (PASH), 79 Hawai‘i 425, 435, 903 P.2d 1246, 1256 (1995) (discussing obligation of counties to protect historic resources under the objectives and policies of the CZMA).

▪ **Scenic and Open Space Resource Policies:**

- The SMA Exemption and SMA Emergency Permit diminish the preservation and maintenance of shoreline open space, as they contribute to the continuing loss of such space. HRS § 205A-2(c)(3)(C).
- The SMA Exemption and SMA Emergency Permit encourage Building A and F -- developments that are not coastal dependent -- to remain on the shoreline by extending the useful life of the structures and lessening the urgency for Kahana Sunset to develop a plan for demolishing and relocating the buildings. HRS § 205A-2(c)(3)(D). Kahana Sunset has long dragged its feet on addressing the inevitable loss of the buildings to shoreline erosion and sea level rise. In 2010, the Planning Department instructed Kahana Sunset to “[i]nclude a plan for long-term strategic retreat for structures that have been threatened by coastal erosion located along this highly eroding shoreline” as part of the environmental assessment process for Kahana Sunset’s construction of a new seawall. Exh. 29. Thirteen years later, Kahana Sunset still has not produced a draft. As a condition to the Building F SMA

Exemption, Kahana Sunset is required to provide a “draft Managed Retreat Plan” to the Department by October 17, 2023. Exh. 01 at 6.

- **Coastal Ecosystems Objective:** The Projects pose a threat to the valuable coastal ecosystem at Keonenui Bay, including to its reefs and beaches. The Projects do not minimize adverse impacts on all coastal ecosystems in the area. HRS § 205A-2(b)(4)(A).
- **Coastal Ecosystems Policies:**
 - The issuance of the SMA Exemption and SMA Emergency Permit is not an exercise of an “overall conservation ethic” nor the practice of “stewardship in the protection, use and development of marine and coastal resources.” Rather, the Director’s decisions enable the continued harm to these resources from the armoring of Building A and F. HRS § 205A-2(c)(4)(A).
 - The issuance of the SMA Exemption and SMA Emergency Permit contribute to the loss of valuable ecosystems, including Keonenui’s reefs and beach. HRS § 205A-2(c)(4)(C).
 - The issuance of the SMA Exemption and SMA Emergency Permit contributes to the degradation of water quality from the exposure of red clay at Keonenui Beach as its sands are lost in large part due Building A and F. HRS § 205A-2(c)(4)(E).
- **Economic Uses Objective:**
 - The Projects propose improvements that, while supportive of the State’s tourism industry, are not in a suitable location and perpetuate land use in a dangerous and inappropriate shoreline area. HRS § 205A-2(b)(5)(A).
- **Economic Use Policies:**
 - The Projects do not concentrate coastal development in an appropriate area.
 - The issuance of the SMA Exemption and SMA Emergency Permit do not ensure that Projects and are “designed, and constructed to minimize exposure to coastal hazards and adverse social, visual,

and environmental impacts in the coastal zone management area.”
HRS § 205A-2(b)(5)(B). The Projects both will inevitably result in the development of additional sink holes, undermining of seawalls, and increased shoreline erosion.

- **Coastal Hazards Objective:** The Projects increase the exposure of Kahana Sunset’s buildings, owners, and patrons to coastal hazards that threaten life and property due to the known reoccurrence of sink holes after the buildings’ armoring is reinforced and then undermined by wave action. HRS § 205A-2(b)(6)(A).
- **Coastal Hazards Policies:**
 - The issuance of the SMA Exemption and SMA Emergency Permit do not control development in areas subject to coastal hazards. Rather, they are reactive measures. The language of the SMA Exemption evinces the Department’s deference to Kahana Sunset, and the Departments laissez-faire approach to repeatedly issuing SMA exemptions and emergency permits for sink hole and seawall “repairs” demonstrates that the Department is not “controlling” development at Kahana Sunset. HRS § 205A-2(c)(6)(B). The Department also has not enforced conditions on Kahana Sunset’s past permits, such as those requiring preparation of long term strategic managed retreat plans or for current state certified shoreline surveys to be provided. The Department also continues to allow development at Kahana Sunset when the overall land use at Kahana Sunset does not conform with the West Maui Community Plan, and Kahana Sunset failed to seek such amendment during the recent West Maui Community Plan update process.
- **Managing Development Objective:** The issuance of an SMA Exemption and SMA Emergency Permit is a reactive form of coastal planning that provides little opportunity for public participation in decision making other than through a notice of appeal after the Director’s decision has been made. HRS § 205A-2(b)(7)(A).

- **Managing Development Policies:**
 - The issuance of an SMA Exemption and SMA Emergency Permit violate the CZMA and therefore do not “use, implement, and enforce existing law effectively to the maximum extent possible in managing present and future coastal zone development.” HRS § 205A-2(c)(7)(A).
 - The issuance of an SMA Exemption and SMA Emergency Permit do not reference one another despite being contemporaneously issued, and do not seek to resolve overlapping or conflicting permit requirements between these and prior permits issued to Kahana Sunset. HRS § 205A-2(c)(7)(B).
- **Public Participation Objective:** As noted above, the serial issuance of SMA exemptions and emergency permits provides no opportunity for public participation in the decision-making process other than through a notice of appeal after the Director’s decision has been made. HRS § 205A-2(b)(8)(A).
- **Beach and Coastal Dune Protection Objective:** The Projects contribute to the loss of Keonenui Beach, which takes away the ability of the public to use Keonenui Beach, leads to the loss of the natural benefit of the coastal ecosystem, and removes the natural buffer the beach and nearshore areas once provided against coastal hazards. HRS § 205A-2(b)(9)(A).
- **Beach Protection Policies:**
 - The issuance of an SMA Exemption and SMA Emergency Permit allows new structures to be built within the shoreline setback that will increase interference with natural shoreline processes over the long run and eventually lead to the loss of the structural improvements themselves due to erosion and undermining. HRS § 205A-2(b)(9)(A). “Structure” is defined broadly as including “but is not limited to any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and

distribution line.” HRS § 205A-22. The Building F micro pile grid is a structure.

- The issuance of an SMA Exemption and SMA Emergency Permit enable construction of private shoreline hardening structures at Keonenui’s sandy beach, where shoreline hardening structures interfere with existing recreational activities. HRS § 205A-2(b)(9)(B). The Director’s decisions allow new hardening, as the Building F lanai is fortified with a micro pile grid twenty-five feet down into the bedrock, creating the functional equivalent of a secondary seawall behind the one that is failing.
- **Marine and Coastal Resources Objective:** The Projects do not promote the protection, use, and development of marine and coastal resources to assure the sustainability of those resources. HRS § 205A-2(b)(10)(A). Instead, the Projects threaten those resources.
- **Marine and Coastal Restoration Policies:**
 - The SMA Exemption and SMA Emergency Permit do not “ensure that the use and development of the marine and coastal resources are ecologically and environmentally sound and economically beneficial.” HRS § 205A-2(b)(10)(A). The Projects are not economically sound. Over the past fifty years, Kahana Sunset’s seawalls have perpetually been undermined and caused sink holes, requiring repeat economic investments for the reconstruction and fortification of seawalls and the filling of sinkholes. Kahana Sunset’s Board President recently complained that a managed retreat plan would cost between \$65,000 and \$70,000 and that the costs were coming out of the Kahana Sunset owner’s “own pockets.” **Exh. 03 (HNN Article)** This is a small sum compared to nearly \$2 million dollars Kahana Sunset will expend on the Projects alone. (Building A: \$155,000; Building F: \$1,800,000) Nishiki Decl. ¶ 19 (re: MAPPS valuation of Building A Project); Exh. 01 at 3 (valuation of Building F Project).

- The SMA Exemption and SMA Emergency Permit, issued separately for similar actions on the same parcel and without reference to one another, do not facilitate the coordination and management of coastal resources activities to improve effectiveness and efficiency even just within the limited purview of the Department. HRS § 205A-2(b)(10)(B).

Based on the foregoing, the issuance of the SMA Exemption and SMA Emergency Permit for the Projects is inconsistent with the policies and objectives of the CZMA.

An SMA exemption cannot be issued when there may be a cumulative or significant impact on the environment when the criteria of SMA Rules § 12-202-12(e)(2) are applied. Against those standards, the Building F Project is not eligible for an exemption. The Director's decision to issue the SMA Exemption was in violation of the CZMA.

VI. The Directors Issuance of the SMA Emergency Permit Violates the CZMA

HRS 205A-22 defines an SMA emergency permit as meaning:

an action by the authority authorizing development in cases of emergency requiring immediate action to prevent substantial physical harm to persons or property or to allow the reconstruction of structures damaged by natural hazards to their original form, provided that those structures were previously found to be in compliance with requirements of the National Flood Insurance Program.

HRS § 205A-22. "Emergency" is not defined by the SMA Rules or by chapter 205A, HRS. When a term is undefined, dictionaries may be referenced to determine the ordinary meaning of a word. *C. Brewer and Co. v. Hawaii Ins. Guar*, 123 Hawai'i 135, 139, 231 P.3d 60, 64 (App. 2010) ("When a term in a statute is undefined, we also look to dictionaries to determine the term's ordinary meaning.") Black's Law Dictionary defines "emergency" to mean "[a] sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm." Black's Law Dict. 10th Ed.

While serious, the development of sink holes and undermining of Building A's seawall are not unforeseen or sudden events.²⁶ The job sheet approved by the SMA Emergency Permit

²⁶ As described in the permitting history above, these types of events have happened regularly over the past 50 years and are a natural consequence of the location of Building A and its armoring.

for the Building A Project's structural repairs of the seawall is dated August 30, 2022. Exh. 45 (Kahana Sunset Bldg, A Structural Repairs); Exh. 7 (Emerg. Permit) at 2. The job sheet for filling the sinkhole is dated February 14, 2023. Exh. 46 (Kahana Sunset Bldg, A Sinkhole Repairs); Exh. 7 (Emerg. Permit) at 2.

This sinkhole at Building A was documented in K2NCREST's Field Report dated December 21, 2022 and included as part of the emergency permit application materials. Exh. 47 (K2NCrest Report). At that time, the sinkhole was already 9'-3" tall and 12' wide in the east/west orientation and 10' wide in the north/south orientation. *Id.* K2NCrest prepared a field report on the sink hole at Building A. *Id.* The field report noted: "[a]t the time of the site visit, the tide had returned sand into the sinkhole and had been placed adjacent to the seawall. Previous observations had been made where sand was not present, and water filled the sinkhole." *Id.* The field report also noted that there were voids beneath the seawall between 36" and 48" in size. *Id.* K2N recommended: "that the sand inside the void be removed adjacent to the back side of the seawall and a 2' wide row of sandbags be installed as far as possible along the length of the seawall. In addition to the sandbags, as in intermediary measure while repairs are designed and in process of being approved by the municipalities, K2N recommends that 100 psi controlled low-strength material (CLSM) be installed to fill the voids created by the sinkhole." *Id.* Five months later, Kahana Sunset applied for an "emergency" permit to fill the sink holes and "repair" the seawall.

Neither Kahana Sunset nor the Director have acted with expediency to address the sink hole and seawall situation at Building A. Kahana Sunset filed its request for an emergency permit to repair the seawall and sink holes at Building A on April 13, 2023, nine months from when the plans for "repairing" the seawall were prepared. Upon receipt of the application, the Director declined to give Kahana Sunset a verbal emergency permit. Exh. 7 (7/18/23 Emerg. Permit) at 2. Instead, the Director allowed four months to pass while the Department conducted various meetings with Kahana Sunset. *Id.* at 1. Not until July 13, 2023, did the Director issue the "emergency" permit asserting that the sink hole underneath the seawall and lanai created an "extreme imminent danger of collapse resulting in bodily harm or death." *Id.* at 2.

"Imminent danger" is not defined by the SMA Rules or chapter 205A, HRS. Black's Law Dictionary defines the term as "an immediate, real threat to one's safety. . . ." Black's Law Dict. (10th Ed.) The approval letter provides that the alleged danger to human life is being averted by

Kahana Sunset by cordoning off the area. Exh. 7 (7/18/23 Emerg. Permit) at 2. Kahana Sunset’s neglect in addressing the known sinkhole and undermining, and the slow pace of the Director’s decision to issue an “emergency” permit indicates that the harms the permit seeks to address are neither imminent nor unforeseen. Thus, the Director violated the CZMA when she issued the emergency permit contrary to SMA Rules § 12-202-16 and HRS § 205A-22.

Regardless of whether the sinkhole and seawall undermining are construed as an emergency, “a special management area permit may only be granted where the proposed development is ‘consistent with [CZMA] objectives and policies[.]’” *Kaleikini v. Yoshioka*, 128 Hawai‘i 53, 67, 283 P.3d 60, 92 (2012) (quoting PASH, 79 Hawai‘i at 435, 903 P.2d at 1256) (bracketed material in original). As analyzed in section IV *supra*, the Building A Project is not consistent with the CZMA objectives and policies. Therefore, the Director’s issuance of the SMA Emergency Permit was in violation of the CZMA.

VII. The Director’s Issuance of a Shoreline Approval Violates the Coastal Zone Management Act

On June 19, 2023, the Director issued a Shoreline Approval wrongly characterizing the Building F Project under Shoreline Rules § 12-203-12(a)(5) as permitted without a variance. The Shoreline Approval determined that the Building F Project was consistent with the following:

- A structure, excluding those defined as non-conforming, that received a written government approval and is the subject of repairs, provided that the repairs are
- (A) valued by a licensed engineer or architect at less than fifty percent of the current replacement cost of the structure,
- (B) the repairs do not enlarge or expand the structure nor intensity its use, and
- (C) the repairs are permitted by the building code, flood hazard regulations, and special management area law.

Exh. 01 at 4. As discussed *supra*, “repairs” are not currently defined in the SMA Rules or Shoreline Rules. Amendments to both sets of rules are currently being considered by the Commission. Each propose a modest definition of “repairs” as “the fixing or replacing of any part of an existing structure for the purpose of its maintenance, or renewal of surface treatments such as painting, carpeting, or exterior siding with substantially similar use of materials or location, but does not include expansion of use or intensity, reconstruction or renovation.”

On January 24, 2022, Jim Buika explained to the Sustainable Land Use Committee of the Maui County Council that Kahana Sunset’s then proposed seawall “repair” plan was “to drill

[micro] piles 25 feet deep down to bedrock. And as the piles come up, it would add a concrete wall basically from bedrock all the way up to the surface of 25 feet.” Exh. 42 (1/24/22 Minutes) at 36. He explained that “in essence, [Kahana Sunset] would be building a brand new seawall upfront rather than like for like repair, which we usually authorize, you know, replacing rocks or mortar or minor repair. So this would be considered a new...a new seawall, which at this point is not allowed, and would require a variance from the Maui Planning Commission to achieve.” *Id.*

The Building F Foundation scheme employs the same technique to “repair” the lanai and protect it from the sink hole forming beneath the existing seawall: drill thirteen seven-inch in diameter micro piles 25 feet down into the bedrock to create a grid of micro piles, grout each micro pile into place, and connect them with a slab of concrete at the surface. Exh. 43 (Building F Plans) at 1 (11(B) Grouting). In addition, a 2” by 4”-5’ concrete footing will be installed along the edge of the lanai for each micro pile. *Id.* at 3. The piles, depending on their location, will be able to bear loads of between 6,900 lbs to 18,700 lbs. *Id.*

The lanai is located immediately behind and is fronted by Building F’s undermined seawall. The lanai does not currently contain a grid of grouted micro piles extending 25 feet down into the bedrock and that need to be fixed. Thus, the Building F Project is, in essence, “building a brand new seawall. . . rather than like for like repair.” *See* Exh. 42 (1/24/22 Minutes) at 36 (Buika testimony). Because it is a new structure intended to fortify against the intrusion of water underneath the existing seawall that is undermining the foundation of the lanai, the project is a prohibited structure that requires a shoreline variance from the Commission. Furthermore, in 2020, the legislature passed Act 16, which prohibits new shoreline hardening structures along sandy beaches. The Building F Project is functionally a new, secondary seawall, buttressing the existing, undermined, and failing seawall. The Director thus violated the CZMA and the Shoreline Rules by issuing the Shoreline Approval for the Building F Project.

VIII. The Director’s Issuance of an Environmental Assessment Exemption Violates Chapter 343, HRS

Hawai‘i Administrative Rules (HAR) § 11-200.1-15(a) provides that “[s]ome actions, because they will individually and cumulatively probably have minimal or no significant effects, can be declared exempt from the preparation of an EA [environmental assessment].” The Director exempted the Building F Project from preparation of an EA by characterizing the project under the exemption category “[o]perations, repairs, or maintenance of existing

structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.” HAR § 11-200.1-15(b)(1).

An exemption may not be granted “when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.” HAR § 11-200.1-15(d). There is no indication in the Director’s exemption that the cumulative impacts of Project F were considered. Cumulative impacts under chapter 343, HRS, as under the CZMA, means the “impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” HAR § 11-200.1-2.

The long history of Kahana Sunset’s shoreline hardening and its impacts on the Keonenui Bay coastal ecosystem are not reflected in the exemption. There is no discussion of the numerous prior “repairs” of Building F’s lanai and seawall, nor of those planned to occur contemporaneously at Building A. The exemption also did not consider the cumulative impacts of Steps 1, 3, and 4, listed in the June 19, 2023 letter (the prior sandbag removal project at Building A and the exploration of demolishing and relocating Building F). Exh. 01.

The Director was prohibited from considering the Building Project F in a vacuum for purposes of environmental review. *See* HAR § 11-200.1-10. The Hawai‘i Environmental Policy Act requires that “a group of actions” be treated like a “single action” when (1) the component actions are phases or increments of a larger total program; (2) an individual action is a necessary precedent to a larger action; (3) an individual action represents a commitment to a larger action; or (4) the actions in question are essentially identical and a single EA or EIS will adequately address the impacts of each individual action and those of the group of actions as a whole.”

The Building F Project, as “step two” of the four steps, is a “necessary precedent to a larger action.” It also represents a “commitment to a larger action,” which are steps three and four. Future “repairs” due the creation of sink holes and undermining of the armoring are also foreseeable and will be necessary to protect Kahana Sunsets \$2 million investment in the Projects.

The Building F Project also falls squarely within the first category as a “phase or increment of a larger total program” of shoreline hardening and sink hole filling to maintain the integrity of Buildings A and F at Kahana Sunset. A “program” is defined to mean:

a series of one or more projects to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A program may include: a number of separate projects in a given geographic area which, if considered singly, may have minor impacts, but if considered together, - may have significant impacts; separate projects having generic or common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource management plans; implementation of multiple projects over a long time frame; or implementation of a single project over a large geographic area.

HAR § 11-200.1-2. The Projects are to be carried out concurrently. The Building F Project is just one of four phases. The Projects and those before them have been carried out for the similar purpose of protecting the integrity of Buildings A and F. The serial “repairs” and construction of new seawalls also represent the implementation of a single “building protection project” carried out over a long time frame.

Thus, the Director segmented and impermissibly exempted the Building F Project from preparation of an environmental assessment, thereby violating chapter 343, HRS.

IX. Appellants Have Standing to Appeal as a Matter of Right

Three categories of persons must be admitted as parties upon timely petition for intervention: (1) “all persons²⁷ who have a property interest in land subject to Commission action;” (2) all persons who lawfully reside on said land; and (3) all persons “who can demonstrate that they will be so directly and immediately affected by the matter before the Commission that their interest in the proceeding is clearly distinguishable from that of the general public.” MPC § 12-201-41(b). Appellants have standing as a matter of right based on their property interests in the land and the direct and immediate effects of the action on them that are distinguishable from those on the general public. Intervention must be granted pursuant to MPC § 12-201-41(b). Due process also mandates intervention and a contested case hearing.

²⁷ “Persons” includes community groups and associations. MPC § 12-201-05.

A. The Director’s Decisions Harm Appellants’ Rights to a Clean and Healthful Environment

Appellants’ officers, directors, members, and/ or supporters hold rights to a clean and healthful environment, as defined by the CZMA, chapter 205A, HRS, the SMA Rules and Shoreline Rules, and guaranteed by art. XI § 9 of the Hawai‘i State Constitution.²⁸ The SMA exemption and Shoreline Approval fall within the ambit of the CZMA.

The CZMA and Commission’s implementing rules are laws related to environmental quality. *See Protect & Preserve Kahoma Ahupua’a Ass’n v. Maui Planning Comm’n (Kahoma)*, 149 Hawai‘i 304, 306, 489 P.3d 408, 410 (2021). As such, Appellants’ rights are not a mere assertion of “unilateral expectations of aesthetic and environmental values, but a protectable property interest.” *Kahoma*, 149 Hawai‘i at 312, 489 P.3d at 416. This property interest entitles Appellants to intervention as of right. *See Kahoma*, 149 Hawai‘i at 312, n. 12, 489 P.3d at 416, n. 12 (right to clean and healthful environment defined by CZMA would entitle an organization to standing under MPC § 12-201-41(b)).

Appellants officers, directors, members, and/ or supporters also hold a right to a clean and healthful environment, as defined by chapter 343, HRS and guaranteed by Hawai‘i Constitution art. XI § 9. The Director improperly segmented and exempted the Project from preparation of an environmental assessment, despite the significant cumulative impact of the Project when considered with past and foreseeable actions in and around the Kahana Sunset area. This improper exemption harms Appellants’ right to a clean and healthful environment as defined by chapter 343, HRS.

As discussed in sections IV, V, VI, and VII above, the Director’s decisions violated the CZMA and chapter 343, HRS in multiple ways. These violations harm Appellants’ rights to a clean and healthful environment, as defined by those laws.

Appellants organizational interests are also harmed, as the Director’s decisions undermine Appellants’ organizations efforts to promote and protect public access, to protect and perpetuate traditional and customary Native Hawaiian practices in West Maui, to protect the

²⁸ Article XI, § 9 of the Hawai‘i State Constitution provides: “[e]ach 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.”

environment, and to protect the shoreline and coastal ecosystems from the harms of seawalls and other types of shoreline armoring. *See* Nishiki Decl. ¶ 8, Lawrence Decl. ¶ 10, Kamaka Decl. ¶ 6, Wirt Decl. ¶¶ 8, 16 17.

B. The Director’s Decisions Harm Appellants’ Interests in Native Hawaiian Traditional and Customary Practices

Article XII, section 7 of the Hawai‘i State Constitution guarantees: “[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua‘a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian island prior to 1778, subject to the right of the State to regulate such rights.” HRS § 1-1 affirms and protects the continuance of Hawaiian practices based on custom.

Ka Malu includes members who engage in traditional and customary practices in and around Keonenui Bay that will be harmed by the Projects, including fishing, diving, surfing, voyaging, hukilau, gathering, hukilau, as well as aloha ‘āina. Lawrence Decl. ¶¶ 11, 12, 22. Glenn Kamaka, a supporter of both Nā Papa‘i and Ka Malu, is 72 years old and grew up in a fishing family. Kamaka Decl. ¶¶ 4, 8, 10. Mr. Kamaka is seventy-five percent Native Hawaiian by blood. Kamaka Decl. ¶ 3. He learned fishing practices and how to care for the shoreline from the kūpuna.²⁹ Kamaka Decl. ¶ 10. Kahana Sunset used to be the place where he would go to drop net to bring all the fish in there. Kamaka Decl. ¶ 14. He recalls that Keonenui Beach used to be a big, sandy beach. It was never rocky, no matter the changes of the surf, season, or year. Sand was always there, it never moved. Kamaka Decl. ¶ 15. Mr. Kamaka observed that “[o]nce the seawalls went up, the sand disappeared from the backwash.” Kamaka Decl ¶ 16. Both the beach and the fish are nearly gone at Keonenui Bay. Kamaka Decl ¶ 17. Without beach and without the fish, Mr. Kamaka cannot engage in his traditional fishing practices, including hukilau. Kamaka Decl. ¶ 20. The continual “repairs” of the buildings and seawalls cause ongoing harm to the shoreline, fisheries, reef, and Mr. Kamaka’s traditional and customary practices that rely on those resources. Kamaka Decl. ¶ 21.

²⁹ Mr. Kamaka’s personal anguish of the ongoing harm caused by Kahana Sunset is expressed in his declaration: “I maintain a humble way of life and don’t push my issues on others. It pains me deeply, however, because I see all this. The kūpuna that have left are still in my heart and na‘au. To see the actions of Kahana Sunset, the harm to the shoreline, and harms to Keonenui Bay is devastating and it takes the life and spirit out of me.” Kamaka Decl. ¶ 12.

Appellants’ officers, directors, members and/or supporters who are Native Hawaiian have the right to engage in the reasonable exercise of traditional and customary practices. This right is a property interest that is harmed by the Director’s decisions and distinguishes the Projects’ impacts Appellants from those of the general public.

Courts have repeatedly recognized that a contested case hearing is necessary prior to impacts to traditional and customary practices from permitting. In *Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 136 Hawai‘i 376, 363 P.3d 224 (2015) (*Mauna Kea I*), the Hawai‘i Supreme Court held the exercise of traditional and customary Native Hawaiian practices was a property interest requiring a hearing based on due process. The *Mauna Kea I* court recognized that the petitioners “argued throughout this case that the project will have significant negative effects on their Native Hawaiian cultural practices on Mauna Kea.” *Id.* Quoting Article XII, section 7 of the Hawai‘i State Constitution, the court held that the asserted negative effects on their practices mandated a contested case hearing “as a matter of constitutional due process.” *Id.*

Subsequently, in *Flores v. Board of Land and Natural Resources*, the Hawai‘i Supreme Court considered whether the Board wrongly denied a petition for a contested case hearing in proceedings also related to the issuance of a permit for the same telescope facility on Mauna Kea. Relying on *Mauna Kea I*, the court expressly recognized that the petitioner’s right to the reasonable exercise of traditional and customary Native Hawaiian practices was a “constitutionally cognizable property interest.” 243 Hawai‘i at 126, 424 P.3d at 481. Ultimately, because the petitioner had fully participated in a contested case hearing regarding the issuance of the same conservation district use permit to the telescope facility, the court held that due process did not require a second contested case hearing to protect petitioner’s interest. *Id.*

In *‘Iao Ground Water Management Area High–Level Source Water Use Permit Applications* (‘*Iao*), 128 Hawai‘i 228, 241, 287 P.3d 129, 142 (2012), the Hawai‘i Supreme Court had jurisdiction pursuant to HRS § 91-14(a) to review the Commission on Water Resource Management’s (“CWRM”) determination of Interim Instream Flow Standards (“IIFS”) because that proceeding constituted a “contested case hearing.” A contested case hearing for purposes of jurisdiction is “a hearing that was (1) required by law and (2) determined the rights, duties, and privileges of specific parties.” *Kilakila*, 131 Hawai‘i at 200, 317 P.3d at 34 (quoting *Kaleikini v. Thielen*, 124 Hawai‘i at 16–17, 237 P.3d at 1082–83). Although neither statute nor rule required

a hearing, the court held that a hearing was required by due process because the determination of the IIFS affected the appellants' ability to engage in traditional and customary practices reliant on 'Iao stream water – i.e., their property interest. *Iao*, 128 Hawai'i at 239 - 241, 287 P.3d at 140 - 142

In his concurrence in *Kaleikini v. Thielen*, Justice Acoba explained the appellant was entitled to a contested case hearing because her “constitutionally protected right” to “exercise her Native Hawaiian customary and traditional practices — specifically, to ensure that the iwi receive proper care and respect” was affected by an agency decision permitting removal of iwi. *Kaleikini v. Thielen*, 124 Hawai'i at 30-31, 237 P.3d at 1097-98 (J, Acoba, concurring). Justice Acoba noted the court's holding in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995), that “those persons who are ‘descendants of native Hawaiians who inhabited the islands prior to 1778’ and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1 are entitled to protection regardless of their blood quantum.” *Id.* (citations omitted). He continued, “[i]n light of these constitutional provisions, native Hawaiians, whose customary practices demand that the iwi remain in place, have equal rights to a contested case hearing where these practices are adversely affected.” *Id.* at 31, 237 P.3d at 1098.

Like in *Mauna Kea I, Flores*, *'Iao*, and the *Kaleikini* concurrence, Appellants' traditional and customary Native Hawaiian practices are property interests threatened by the SMA Exemption and Shoreline Approval issued for the Project. Such development will have a significant impact on the environment, harming the Appellants' practices fishing, gathering, hukilau, surfing, diving, paddling and aloha 'āina. These harms to Appellant's substantive interests mandate intervention as of right.

X. Intervenor Status Should Be Freely Granted

In addition to meriting mandatory intervenor status, Appellants merit discretionary, permissive intervention. Pursuant to MPC Rule §12-201-4l(d), “leave to intervene shall be freely granted” unless the petitioners have substantially the same position or interest of a party already admitted to the proceedings, the admission of additional parties will render proceedings inefficient and unmanageable, or intervention will not aid in development of a full record and will overly broaden issues. *Id.* None of these exceptions to the general rule of freely granting

intervenor status exist and the Commission should allow the appeal to proceed to a contested case hearing.

A. “Freely granted” is a Liberal Intervention Standard

“The meaning of ‘freely granted’ is that “[a]ny person shall be permitted to intervene.” *Jack Weinstein, Revision of Procedure: Some Problems in Class Actions*, 9 Buff L. Rev. 433 (1959-1960). Authorities governing agency proceedings demonstrated a legislative policy to “encourage[] broad public participation, with intervention to be freely granted.” *Life of the Land, Inc. v. West Beach Dev. Corp.*, 63 Haw. 529,631,633, P.2d 588, 590 (1981). The Commission should follow the spirit of the law to freely grant intervention to Appellants.

B. Appellants Do Not Hold Interests or Positions Substantially Similar to Existing Parties and Appellants’ Interests are not Represented by Existing Parties

Neither the Applicant, as an already admitted party, and Planning Department Director and staff, to the degree that they would assist the Planning Commission, hold interests or positions similar to Appellants or could adequately represent Appellants’ interests. *See Hoopai v. Civil Service Comm'n*, I 06 Hawai‘i 205,217, 103 P.3d 365, 377 (2004) (“[Proposed intervenors] need only show that the Commission's representation of [its] interests may have been inadequate.”). A “lack of adequate representation” also exists where a prospective intervenor would make a “more vigorous presentation” of a side of an argument than the government defendant because the regulation - the validity of which is being challenged - would benefit members of the prospective intervenor group. *New York Public Interest Res. Grp. v. Regents of Univ. of New York*, 516 F.2d 350,352 (2d Cir. 1975).

Appellants cannot be denied permissive intervention on the basis of MPC § 12-201-41(d)(I). Appellants/ would make a more vigorous presentation of their interests and positions than Planning Department staff. The Director’s SMA Emergency Permit, SMA Exemption, Shoreline Approval, and exemption from preparation of an environmental assessment demonstrates that the Department is willing to issue such exemptions and approvals despite the unlawfulness of such issuance. This issuance harms Appellants property interests. The Department thus has not and cannot represent Appellants’ interests adequately in this matter.

C. Intervention Will Not Render the Proceedings Inefficient or Unmanageable nor Unduly Delay Proceedings

Mere inclusion of Appellants would not render proceedings unmanageable nor unduly delay the proceedings; “[a]dditional parties always take additional time which may result in delay, but this does not mean that intervention should be denied. The rule requires the court to consider whether intervention will ‘unduly delay’ the adjudication.” 7C Wright, Miller & Kane. Federal Prac. & Procedure, Civil 2d. 1913 at 381-82 (2d ed. 1986); See *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 265 F.2d 364, 367 n.1 (D.C. Cir. 1959) (“Efficient and expeditious hearing should be achieved not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence”). The SMA Rules and Shoreline Rules contemplate and allow for a contested case hearing stemming from a notice of appeal from the Director’s issuance of an SMA Emergency Permit, SMA Exemption, or Shoreline Approval. Allowing Appellants’ appeal to proceed to a contested case is expressly permitted by the rule and the proceedings on appeal will not cause “undue delay.”

Appellants are also represented jointly by counsel. This arrangement serves to increase the efficiency and management of the proceedings on appeal.

D. Intervention Will Aid in the Development of a Full Record and not Overly Broaden Issues

Appellants’ intervention would aid in development of a full record and not overly broaden issues considered by the Commission. Appellants have expertise in the impacts of shoreline armoring, see, e.g, Wirt Decl. ¶ 17, as well as local knowledge of Keonenui Bay and how to care for the shoreline that can only be gained from direct experience. Kamaka Decl. ¶¶ 10-11. The record relied upon by the Director in decision-making is devoid of information pertaining the exercise of traditional and customary Native Hawaiian practices that could be harmed by Projects. Appellants would be able to present information on their practices and how the Projects threaten the exercise of those practices. Kai Nishiki and Tiare Lawrence are also seasoned public access advocates with expertise in community engagement. They will be able to assist the Commission’s understanding of the public access impacts of the Projects as well as how, in alignment with the objectives and policies of the CZMA, the public may better participate in the decision making related to SMA Permitting for Kahana Sunset. Kai Nishiki has

co-authored a managed retreat plan for the Pā‘ia Youth and Cultural Center, and would be able to bring her expertise regarding the creation of such plans to the hearing. Kai Nishiki will also be able to address concerns with the Projects non-conformance with the West Maui Community Plan. Kai Nishiki chaired the West Maui Community Plan Action Committee.

At a hearing on appeal, Appellants’ presentation of witnesses and introduction of evidence will aid in the determination of the significant and/ or cumulative impacts of the Projects, the effects of the continued shore armoring on the environment as well as on traditional and customary Native Hawaiian practices and public access. None of those impacts are adequately represented in the Director’s decisions. That information is required to be considered pursuant to the objectives and policies of the CZMA, as well as in fulfillment of the County’s fiduciary obligations to protect public trust lands and waters, and the reasonable exercise of traditional and customary Native Hawaiian rights and practices.

Granting the appeal accords with the liberalized standing requirements for environmental and cultural matters. In cases where environmental and traditional and customary practitioners’ interests are at stake, Hawai‘i courts “have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.” *Citizen for the Protection of the North Kohala Coastline*, 91 Hawai‘i 94, 101, 979 P.2d 1120, 1127 (1999) (citations omitted). The court’s “basic position has been that standing requirements should not be barriers to justice.” *Life of the Land v. Land Use Comm’n*, 63 Haw. 166, 174, 623 P.2d 431, 441 (1981).

Including Appellants in the hearing benefits judicial economy because their inclusion may spare parties from re-litigation of the same issue. *See Alan Jenkins, Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 279-80 (1999) (disposition of issues in a single lawsuit may be achieved through liberal intervention and may avoid subsequent lawsuits). This is especially true where Kahana Sunset has serially received SMA exemptions and emergency permits for similar “repairs” to stop the undermining of its seawalls and to fill sinkholes caused by the seawalls’ presence. Issues pertaining to armoring of Kahana Sunset, the resort’s intrusion into public trust lands, and the need for demolition and managed retreat of the buildings A and F, are also likely to reoccur and be challenged. These matters all pertain to the Director’s decision and could be addressed on in the appeal.

E. A Hearing Will Protect Appellants' Interest and Promote the Public Interest

Appellants have no other means to protect their interests from the harms threatened by the SMA Emergency Permit, SMA Exemption, and Shoreline Approval, which have already been granted. “Procedural due process requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues.” *Application of Hawai'i Elect. Light Co.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984). There is no opportunity for public participation in the Director’s decision making on the matter other than through an appeal.

In 2021, the Hawai‘i Supreme has recently considered the rights of petitioners seeking intervention before the Commission. In *Protect & Preserve Kahoma Ahupua‘a Association v. Maui Planning Commission*, the Court held that the Commission reversibly erred when it denied intervention to a community organization despite the facts petitioners alleged demonstrating the approval in question would impact the petitioners’ rights to a clean and healthful environment. The *Kahoma* court noted that the petitioners’ property interest in their right to a clean and healthful environment would entitle petitioners to intervention as persons who “hold a property interest in land subject to commission action.” *Kahoma*, 149 Hawai‘i at 312, n.12, 489 P.3d at 416, n.12.

In this matter, Appellants’ rights to a clean and healthful environment as defined by the CZMA entitle them to a contested case hearing as persons who hold a property interest in the land” that is subject to the Director’s decision-making. *See id.*

The public interest is also served by holding proceedings on appeal. The appeal proceedings will vindicate constitutional rights and environmental protections embodied in the CZMA, the West Maui Community Plan, Act 16 (2020), and the public trust. The public at large is benefited by the protection of public trust resources and constitutional rights. The public will benefit by Appellants providing the Commission with information about harms to the environment and cultural practices from the Project and assisting the Commission in assessing the direct, secondary and cumulative impacts of the Project.

Appellants will advocate for protection of public access to the shoreline, for public trust lands, for protection of Keonenui Bay, nearshore waters, for sensible managed retreat, and for rational decision-making regarding a building that should be demolished rather than repaired repeatedly. Appellants aim is to ensure that Project does not receive approvals in violation of the

CZMA, the public trust, and constitutional rights to traditional and customary practices. At minimum, the proceedings will ensure that appropriate conditions are imposed on the Project's approvals. Appellants' appeal thus would also benefit the public.

XI. Due Process Requires a Contested Case Hearing

Due process also requires granting Appellants participation in a contested case hearing on appeal. Appellants' interests, discussed above, including their rights to a clean and healthful environment and in traditional and customary Native Hawaiian practices. These are property interests requiring a contested case hearing as due process.

To determine what procedures due process demands, courts consider: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *See Kahoma*, 149 Hawai'i at 313, 489 P.3d at 417 (citation omitted). "Procedural due process "requires that parties be given a meaningful opportunity to be heard. This implies the right to submit evidence and argument on the issues." *Application of Hawai'i Elect. Light Co.*, 67 Haw. 425, 430, 690 P.2d 274, 278 (1984).

Appellants' substantive interests in their right to a clean and healthful environment and traditional and customary Native Hawaiian practices are harmed by the Project, as discussed in section VIII above. The risk of an erroneous deprivation of Appellants' interests is high absent Appellants' participation in a contested case hearing on appeal because the SMA Emergency Permit, SMA Exemption, and Shoreline approval have already been granted without consideration or protection of Appellants' interests. The Department has already demonstrated a willingness to violate numerous laws and neglect constitutional obligations to facilitate the Projects. The harms from the Projects are likely to have long-term direct and cumulative impacts to Appellants' interests, the environment, and traditional and customary Native Hawaiian practices. There are no other avenues available to protect Appellants' substantive rights other than appeal as provided by SMA Rules and Shoreline Rules.

Finally, because the Commission/Department is already required to consider the type of information that Appellants will present, proceedings on appeal will assist in developing a full record and providing safeguards for Appellants' interests through a hearing will not be

burdensome on the Commission/Department. Indeed, the SMA Rules and Shoreline Rules expressly include a means to appeal the Director's decision as the safety measure to protect those aggrieved by decision of the Director. The Commission will not be burdened by providing the process its rules already contemplate. Thus, Appellants are also entitled to intervention in a contested case hearing as due process required by the Fifth Amendment to the United States Constitution, as well as Article I, section 5 of the Hawai'i State Constitution.

XII. Conclusion

For the foregoing reasons, Appellants respectfully request their appeal be granted and a contested case hearing be initiated immediately.

Appellants also request that the Commission confirm that the effect of the Directors' decisions are not final and have no executory force until the resolution of this appeal.

Dated: Lāhainā, Hawai'i

July 20, 2023



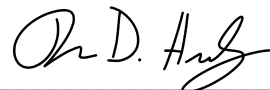
LAW OFFICE OF CHRISTINA LIZZI
Christina D. Lizzi, Esq.

Dated: Honolulu, Hawai'i

July 20, 2023



LAW OFFICE OF BIANCA K. ISAKI
Bianca K. Isaki, Esq.



LAW OFFICE OF RYAN D. HURLEY
Ryan D. Hurley, Esq.

Attorneys for
SURFRIDER FOUNDATION, NA PAPA'I WAWAE 'ULA 'ULA, KA MALU O
KAHĀLĀWAI, KAI NISHIKI, and TIARE LAWRENCE. .

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of KAHANA SUNSET) SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS) SM5 2023-000114
) SSAD 2023-00022
) EAE 2023-00032
SHORELINE SET BACK APPROVAL AND) SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))
EXEMPTION FOR LIMITED REPAIRS TO)
STABILIZE THE FOUNDATION FOR) DECLARATION OF JILLIAN A. WIRT
BUILDING “F,” CONSISTING OF TWELVE)
TOWNHOMES AT THE SHORELINE FO)
THE KAHANA SUNSET AOA, AN 80-)
UNIT CONDOMINIUM, LOCATED AT 4909)
LOWER HONOAPIILANI ROAD,)
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-)
003:015 (SMX2023-00155) (SM52023-)
000114) (SSAD2023-00022) (EAE2023-)
00032))
)
and)
)
APPROVAL FOR A SPECIAL)
MANAGEMENT AREA (SMA))
EMERGENCY PERMIT FOR REPAIRS TO)
THE CURRENT SINKHOLE UNDER)
BUILDING “A” AT THE KAHANA SUNSET)
AOAO, LOCATED AT 4909)
HONOAPIILANI ROAD, LAHAINA,)
ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-)
003:015 (SM3 2023-00006))

I, JILLIAN A. WIRT, do declare under perjury of law that the following is true and correct.

1. I make this declaration based upon my own personal knowledge, information, and belief.
2. I am a resident of the County of Maui.
3. I attended San Diego State University where I earned by B.S. in Environmental Science.
4. I earned a master’s degree in environmental science and management from the

U.C. Santa Barbara.

5. I am an advocate for our oceans, reefs, and shorelines.

6. My studies have taught me that while shoreline armoring may have been a “best management option in the past,” its harmful impacts to public access, beaches, reefs, and people are now well known.

7. I surf and snorkel in areas around Keonenui Bay.

8. The Surfrider Foundation (“Surfrider”) is a national, nonprofit 501(c)(3) organization, with approximately 350,000 members and supporters, whose mission is the protection and enjoyment of our ocean, waves and beaches, for all people, through a powerful activist network. Surfrider’s headquarters are located at 942 Calle Negocio, Suite 350, San Clemente, California 92673.

9. I have been involved with Surfrider since approximately 2016 when I started participating in Surfrider’s beach cleanups.

10. I am a member of Surfrider.

11. I currently serve as the secretary of Surfrider Maui Chapter’s Executive Committee.

12. Surfrider is an appellant in the above captioned proceedings.

13. Surfrider has approximately 80 volunteer driven, grassroots chapters, and more than 100 school clubs, located throughout the U.S., carrying out its mission.¹

14. Surfrider Foundation has four Chapters located in Hawai‘i – the Kaua‘i, Kona, Maui, and O‘ahu Chapters – and eight school clubs in Hawai‘i, including at the Carden Academy of Maui; Seabury Hall in Makawao, Maui; and the King Kekaulike High School in Makawao, Maui. Surfrider has approximately 560 current active members in Hawai‘i, around 100 of which reside on Maui, and an additional 57 active school club members in Hawai‘i.

15. The Surfrider Foundation’s volunteer-led Maui Chapter was chartered in 1995. The Chapter carries out campaigns and programs in furtherance of Surfrider’s mission. This includes holding regular beach cleanups;² advocating for local policies to reduce single-use plastics (Surfrider supported Maui County’s 2010 plastic bag ban, the first such local policy in Hawaii, as well as Maui County’s 2014 Tobacco Free Beaches and Parks legislation, and Maui

¹ See <https://www.surfrider.org/chapters>

² See <https://maui.surfrider.org/cleanups>

County’s 2017 polystyrene ban); and operating a community science water testing program, the Blue Water Task Force (BWTF).³ In 2022, trained BWTF volunteers sampled 21 sites and collected 199 samples, generating water quality information for recreational waters along Maui’s North Shore and in the East Maui community of Hāna. Each year the Maui chapter compiles an annual report of its findings on local water quality.⁴ The Maui Chapter also carries out Surfrider’s Ocean Friendly Restaurants Program in Maui, with approximately 10 restaurants participating. The program recognizes restaurants that commit to making sustainable choices for the ocean, including using only reusable foodware onsite, not selling beverages in plastic bottles, and not using plastic bags or straws.⁵ Chapter members also actively participates in the public process for various coastal issues and projects. As an example, in 2021 the Maui Chapter submitted testimony to the Maui Planning Commission on the proposed Kahana Bay Erosion Mitigation Project, advocating for managed retreat rather than the installation of harmful T-Shaped groins along Kahana Bay.⁶

16. Surfrider’s five primary initiatives include coastal preservation, protecting public beach access, clean water, ocean protection, and preventing marine plastic pollution. Surfrider carries out its initiatives through Campaigns⁷ and Programs⁸.

17. Surfrider’s Coast & Climate Initiative protects our shorelines. Surfrider proactively addresses threats like coastal development, sea walls and other types of shoreline armoring and beach dredge and fill projects to ensure the protection of our coast. Surfrider Foundation’s Beach Preservation Policy recognizes that beaches are unique coastal environments with ecological, recreational and economic value, and that beaches are a public resource and should be held in the public trust.⁹ Under the Policy, Surfrider advocates for actions to promote long term beach preservation for the benefit of the public, which includes establishing beach setbacks based on current and historical erosional trends and projected sea level rise. In areas

³ See <https://maui.surfrider.org/bwtf>

⁴ See <https://maui.surfrider.org/bwtf>; see e.g., <https://maui.surfrider.org/bwtfreport2022> and https://20811975.fs1.hubspotusercontent-na1.net/hubfs/20811975/Maui/BWTF/V2.%20Final%202022_Maui%20BWTF%20Report.pdf; and https://20811975.fs1.hubspotusercontent-na1.net/hubfs/20811975/Final.2021_Maui%20BWTF%20Report.pdf

⁵ See <https://maui.surfrider.org/ofr>

⁶ See e.g., <https://maui.surfrider.org/news/testimony-on-the-department-of-land-and-natural-resources-kahana-bay-erosion-mitigation-draft-environmental-impact-statement-deis>

⁷ See <https://www.surfrider.org/campaigns>

⁸ See <https://www.surfrider.org/programs>

⁹ See <https://www.surfrider.org/pages/beach-preservation-policy>

where erosion threatens existing coastal development, the Surfrider Foundation advocates for appropriate long-term solutions that maximize public benefit, which includes landward relocation of structures from dynamic shorelines.

18. Surfrider has successfully litigated to protect Hawai‘i shorelines from coastal development and encroachments into the shoreline setback zone. In September 2015, the Hawai‘i State Supreme Court ruled for Surfrider Foundation and co-plaintiffs, which had challenged a zoning variance for the Kyo-Ya Resort and Hotel that would have expanded the hotel 60 feet into the shoreline setback area on Waikiki.¹⁰ (*Surfrider Foundation v. Kyo-Ya Hotels & Resorts, LP*).¹¹

19. Surfrider has further engaged in several campaigns to protect Hawai‘i shorelines from proposed armoring. In 2016, Surfrider’s Maui Chapter joined other organizations and individuals, including co-appellant Tiare Lawrence, in opposing the Hawai‘i Department of Transportation’s proposal to install large boulders extending 40 feet into the water and stretching hundreds of feet along the shoreline at Olowalu in West Maui.¹² In 2012, Surfrider and coalition partners were successful in a decades long campaign to oppose an Army Corps of Engineers proposal to construct a breakwater at the Ma‘alaea Small Boat Harbor on West Maui.¹³ In 2020, the Surfrider O‘ahu Chapter opposed a proposed 1,500 foot shoreline barrier along a Marine Corps training facility at ‘Ewa Beach, adjacent to Pu‘uloa Beach Park.¹⁴ Surfrider has also supported state legislation like Senate Bill 1310 and Senate Bill 2519 that would limit the amount of time that emergency shoreline structures can remain in place.¹⁵ Surfrider also supported the successful passage of Senate Bill 474, which requires sea level rise disclosures in real estate transactions, which strengthens Hawai‘i’s ability to limit harmful shoreline hardening projects like seawalls,¹⁶ as well as HB 243 which strengthens interagency planning and assessment for mitigating sea level rise impacts.¹⁷ Surfrider has also campaigned to save

¹⁰ See <https://www.surfrider.org/campaigns/State%20Supreme%20Court%20Victory%20in%20the%20Kyo-Ya%20Case> and <https://www.surfrider.org/news/hawaii-supreme-court-sides-with-surfrider-to-protect-waikiki-beach-from-kyo>

¹¹ See <https://law.justia.com/cases/hawaii/supreme-court/2015/scap-14-0000379.html>

¹² See <https://www.surfrider.org/campaigns/Save%20Olowalu%3A%20Stop%20Hardening%20the%20Shoreline!>

¹³ See <https://www.surfrider.org/campaigns/Ma'alaea%20Saved!>

¹⁴ See <https://www.surfrider.org/campaigns/Protect%20'Ewa%20Beach>

¹⁵ See <https://www.surfrider.org/campaigns/Limit%20Emergency%20Shoreline%20Hardening%20Structures>

¹⁶ See <https://www.surfrider.org/campaigns/SB%20474%20-%20Sea%20Level%20Rise%20Disclosure>

¹⁷ See <https://www.surfrider.org/campaigns/HB%20243%20-%20Sea%20Level%20Rise%20Adaptation>

O‘ahu’s North Shore which is significantly impacted by chronic erosion¹⁸, and petitioned the Kaua‘i Planning Commission to invalidate permits to rebuild a coastal resort within the sea level rise inundation zone, that was destroyed by a hurricane in 1992.

20. In addition to stewardship of our ocean, waves, and beaches, Surfrider’s mission prioritizes the *enjoyment* of these public resources. Surfrider’s members recreate at the beach and in the water. Surfrider members are not just surfers, but beachgoers and water recreationalists of all types. Consequently, one of Surfrider’s core focuses is to ensure affordable, equitable public beach access through its Beach Access initiative. As part of this initiative, Surfrider has consistently fought to maintain and expand beach access for the public in the state of Hawai‘i, including in Maui.

21. In April 2023, for example, Surfrider secured a commitment from the County of Maui to open the gates at Ho‘okipa Beach Park at 5:30 am in perpetuity.¹⁹ The beach is known for its consistent waves, and is a local favorite, especially during the winter, but since the beginning of the COVID-19 pandemic it had remained closed until 7 am. By committing to opening the beach early, the County is ensuring that the beach is safely accessible for working surfers and other early-bird shoreline users. In February 2021, Surfrider celebrated as the Ko‘olina Resort complex in Oahu fully reopened its public parking lots and beach access to the Ko‘olina Lagoons.²⁰ Before that, the complex had been restricting access to public parking lots—a clear violation of their permits from the Department of Planning and Permitting. Surfrider has also supported SB 1034,²¹ which would protect the final 300 remaining parking stalls at the Ala Wai Boat Harbor Area in Waikīkī from privatization and thereby reduce the financial barriers to shoreline and ocean recreation.²² Additionally, in Maui County, Surfrider helped organize opposition to the renewal of Ruby & Sons’ 50-year lease of the parking lot at South Maui’s

¹⁸ See <https://www.surfrider.org/campaigns/Save%20the%20North%20Shore>

¹⁹ *Victory! County of Maui Opens Ho‘okipa Beach Gates Early* (Apr. 1, 2023), <https://www.surfrider.org/campaigns/Victory!%20County%20of%20Maui%20Opens%20Ho%CA%BBokipa%20Beach%20Gates%20Early>.

²⁰ *Restore Public Beach Access at Ko‘olina* (Feb. 1, 2021), <https://www.surfrider.org/campaigns/Restore%20Public%20Beach%20Access%20at%20Ko%CA%BBolina>.

²¹ SB 1034, Haw. Leg. 2023, https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1034_SD1_.htm.

²² *Protect Free Parking and Ocean Access at Ala Wai Boat Harbor* (last visited Jul. 18, 2023), <https://www.surfrider.org/campaigns/Protect%20free%20parking%20and%20ocean%20access%20at%20Ala%20Wai%20Boat%20Harbor>.

Keawakapu Beach.²³ The owners had been accused of harassing residents and fishermen and removing public parking signs, and residents are encouraging the Department of Land & Natural Resources to turn over the parking lot to the County to maintain the lot for free. As illustrated, Surfrider’s beach access initiative extends not only to maintaining beach access in the first place, but also to ensuring that such access is affordable and equitable for everyone.

22. In addition to coastal preservation and beach access work, Surfrider has engaged in other significant litigation to protect Hawai‘i’s coastal resources, including clean water. In 2012, Surfrider and co-plaintiffs filed a lawsuit to stop polluting discharges from the Lāhainā Wastewater Reclamation Facility in Maui, and eight years later, in 2020, were successful when the United States Supreme Court ruled in favor of Surfrider and its partners, holding that the Clean Water Act requires permits when there is a discharge from a point source directly into navigable waters or when there is the “functional equivalent” of a direct discharge. (*County of Maui, Hawaii v. Hawaii Wildlife Fund et al.*)²⁴

23. Surfrider supports robust application of the Clean Water Act, for example through submitting public comments on the definition of the “Waters of the U.S.” and scope of the Act,²⁵ and advocating for proper enforcement of the Act.²⁶ Surfrider was also instrumental in advocating for the BEACH Act, the 2000 amendment to the Clean Water Act that establishes a grant program for states and tribes to carry out water quality testing and public notification programs. Surfrider continues to advocate for annual funding for this program.²⁷

24. One of Surfrider’s premiere clean water programs is the Blue Water Task Force (BWTF), which is a citizen science water quality testing and notification program. The volunteer, chapter-run BWTF provides critical water quality information to protect public health at the beach. The BWTF has more than 50 labs around the U.S. which measure fecal indicator bacteria levels in recreational waters and compare them to water quality standards set to protect

²³ *Protect Public Parking at Keawakapu Beach* (last visited Jul. 18, 2023),

<https://www.surfrider.org/campaigns/Protect%20Public%20Parking%20at%20Keawakapu%20Beach>.

²⁴ See https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf; to learn more about Surfrider’s recent clean water litigation in Hawaii see <https://www.surfrider.org/news/hawaii-judge-does-not-allow-state-to-ignore-clean-water-act>, <https://hawaii.surfrider.org/kauaicleanwater/>, and <https://www.surfrider.org/news/surfrider-foundation-challenges-shrimp-farm-pollution-in-kauai>

²⁵ See, e.g., <https://www.surfrider.org/coastal-blog/entry/wotus-restored-somewhat>

²⁶ See, e.g., <https://www.surfrider.org/campaigns/Stop%20Shrimp%20Farm%20Water%20Pollution>

²⁷ See, e.g., <https://www.surfrider.org/campaigns/fund-the-beach-act-epa-clean-water-programs-fy2024#:~:text=Surfrider%20is%20asking%20Congress%20to,to%20below%20%2410%20million%20again>.

public health. Surfrider chapters use the program to raise awareness of local pollution problems and to bring together communities to implement solutions.²⁸ Surfrider has three BWTF labs in Hawaii, one of which is located on Maui and tests 15 sites around the island.²⁹

25. Surfriders' Maui chapter members hold a right to a clean and healthful environment, as defined by the chapter 205A, HRS and the to § 12-202-26 of the Maui Planning Commission's Special Management Area ("SMA") Rules ("SMA Rules") § 12-202-01 *et. seq.*, and the Maui Planning Commission's Shoreline Rules ("Shoreline Rules") § 12-203-01 *et. seq.*, and guaranteed by art. 9 § 11 of the Hawai'i State Constitution.

26. Surfrider's Maui chapter members also hold a right to a clean and healthful environment, as defined by the chapter 343, HRS and guaranteed by art. 9 § 11 of the Hawai'i State Constitution.

27. Surfrider's Hawai'i members are beneficiaries of public trust lands and waters held and managed by the State of Hawai'i on their behalf.

28. On June 19, 2023, the Director of the Maui County Department of Planning ("Director") issued (1) an SMA exemption, (2) a shoreline approval, and (3) an exemption from preparation of an environmental assessment to Kahana Sunset AOA ("Kahana Sunset") for purposes of alleged "repairs" to Building F.

29. On July 13, 2023 the Director issued an SMA emergency permit to Kahana Sunset for repairs to the seawall and to fill a sinkhole at Building A. That emergency permit was superseded by one granted on July 18, 2023.

30. It is common knowledge that Buildings A and F are subject to chronic erosion and waves washing below the existing seawalls and the buildings, causing sinkholes and making the buildings unsafe.

31. It is common knowledge that Building F has been effectively condemned for human habitation by Kahana Sunset's structural engineer because it is unsafe.

32. The SMA exemption, Shoreline Approval, and chapter 343 exemption will allow Kahana Sunset to essentially reinforce the existing, failing seawall in front of Building F by buttressing it from behind and creating a second layer of protection. Over a dozen seven-inch in diameter micro piles will be bored from the slab-on-grade foundation twenty-five feet into the

²⁸ See <https://bwtf.surfrider.org/>

²⁹ See <https://bwtf.surfrider.org/explore/51>

bedrock below the lanai. These micro piles will then form a structural grid tied together with a lateral concrete structural beam at the surface, designed to stabilize the support grid.

33. The SMA Emergency permit for Building A will “expedite repairs to Building A’s seawall that has been undermined by waves, leading to a substantial sinkhole behind the seawall, ” according to the language of the emergency permit dated July 13, 2023. The SMA emergency permit allows the seawalls columns to be repaired, for the sinkhole to be partially filled with concrete-like material, and for sandbags that will harden when exposed to water to be placed around the existing seawall.

34. The Director’s issuance of the SMA Emergency Permit, SMA Exemption, and Shoreline Approval, as well as exemption from preparation of an environmental assessment do not consider the cumulative significant impacts of the “repairs” authorized when considering the long history and multiplicity of permits issued to Kahana Sunset for similar “repairs” and shoreline armoring measures.

35. The Director’s issuance of the SMA Emergency Permit, SMA Exemption, and Shoreline Approval, as well as exemption from preparation of an environmental assessment implicate my and Surfrider Maui members’ rights to a clean and healthful environment.

36. The Director’s permit, exemptions and approvals are contrary to the environmental protections provided by chapter 205A, HRS and chapter 343, HRS, and their implementing regulations, which among other things, require consideration of cumulative impacts and must be in alignment with the objectives of the Coastal Zone Management Act. The Director’s action thus harms my and other Surfrider members’ rights to a clean and healthful environment.

37. The Director’s issuance of the SMA Emergency Permit, SMA Exemption, and Shoreline Approval, as well as exemption from preparation of an environmental assessment harm Surfrider’s ability to carry out its mission of protection and enjoyment of our ocean, waves and beaches, for all people.

38. The Director’s issuance of the SMA Emergency Permit, SMA Exemption, and Shoreline Approval, as well as exemption from preparation of an environmental assessment harm Surfrider’s efforts to protect shorelines from armoring and to ensure public access to beaches.

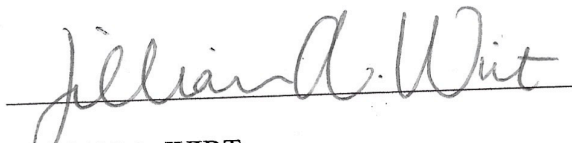
39. The Director’s issuance of the SMA Emergency Permit, SMA Exemption, and

Shoreline Approval, as well as exemption from preparation of an environmental assessment
harm Surfrider's members enjoyment of Keonenui Beach, its reefs, and nearshore waters.

DECLARANT FURTHER SAYETH NAUGHT.

Dated: Makawao, Maui, Hawai'i

July 18, 2023.

A handwritten signature in cursive script, reading "Jillian A. Wirt", is written over a horizontal line.

JILLIAN A. WIRT
DECLARANT

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAI'I

In the Matter of KAHANA SUNSET	)	SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS	)	SM5 2023-000114
	)	SSAD 2023-00022
	)	EAE 2023-00032
SHORELINE SET BACK APPROVAL AND	)	SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))	
EXEMPTION FOR LIMITED REPAIRS TO)	
STABILIZE THE FOUNDATION FOR	)	DECLARATION OF KAI NISHIKI
BUILDING "F," CONSISTING OF TWELVE)	
TOWNHOMES AT THE SHORELINE FO)	
THE KAHANA SUNSET AOA, AN 80-)	
UNIT CONDOMINIUM, LOCATED AT 4909)	
LOWER HONOAPIILANI ROAD,)	
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-)	
003:015 (SMX2023-00155) (SM52023-)	
000114) (SSAD2023-00022) (EAE2023-)	
00032))	
)	
and)	
)	
APPROVAL FOR A SPECIAL)	
MANAGEMENT AREA (SMA))	
EMERGENCY PERMIT FOR REPAIRS TO)	
THE CURRENT SINKHOLE UNDER)	
BUILDING "A" AT THE KAHANA SUNSET)	
AOAO, LOCATED AT 4909 HONOAPIILANI)	
ROAD, LAHAINA, ISLAND OF MAUI,)	
HAWAII; TMK: (2) 4-3-003:015 (SM3 2023-)	
00006))	

DECLARATION OF KAI NISHIKI

I, KAI NISHIKI, do declare under penalty of law that the following is true and correct.

1. I am competent to make the following statements and such statements are made to the best of my knowledge and experience.
2. I was born and raised on the island and county of Maui and continue to be a resident of Maui.

3. In 2017, I was one of the awardees of the Sierra Club Group’s “Mālama Kahakai” award, which recognized our work in protecting Maui’s coasts and defending public access to beaches.

4. I am a public access advocate.

5. I frequent Keonenui Beach and Bay recreationally and have personally advocated for public access to the shoreline in that area. .

6. I am the executive director of Nā Papa‘i Wawae ‘Ula‘ula (“Nā Papa‘i”), a domestic nonprofit association based in West Maui that advocates for preservation and enhancement of public beach access and preservation of public trust resources.

7. Nā Papa‘i holds in-person community meetings with West Maui communities and administers a social media page on Facebook.com for a group called “Access Denied!” a group that has over 5,200 members.

8. Nā Papa‘i’s officers, directors, and supporters, who include Native Hawaiians, hold interests in preserving and expanding public beach access for public recreational use, Hawaiian cultural practices, subsistence, aesthetic enjoyment, and ecological protections for West Maui.

9. Through decades of advocacy and participation in public decision making, I have gained an expertise in coastal planning process, including development of managed retreat plans.

10. I chaired the Community Plan Advisory Committee (“CPAC”) for the West Maui Community Plan between July 2019 and May 2020. As part of that effort, she presided over 35 CPAC meetings, attended 24 Maui Planning Commission and County Council and attended pre-community engagement meetings beginning in 2016, which culminated in the Maui County Council adopting the West Maui Community Plan.

11. Development in the Special Management Area must conform with the West Maui Community Plan.

12. I am the co-author of the managed retreat plan for the Paia Youth and Cultural Center, located in Pā‘ia, Maui.

13. In 2018, I and Tiare Lawrence organized and hosted the Disappearing Shorelines & Managed Retreat conference, featuring keynote speakers Dr. Charles “Chip” Fletcher and Archie Kaleppa, as well as panels with scientists, policy makers, agency heads, developers, and community organization leaders.

14. I have three children. My advocacy to protect public access and the environment is motivated by a desire to ensure that my children and future generations will have an island on which they can thrive.

15. Attached as Exhibit “01” is a true and correct copy of a June 19, 2023 authorization letter from Maui Planning Department Director Kathleen Aoki (“Director”) to Dawn Hegger-Nordblom for Kahana Sunset, regarding SHORELINE SETBACK APPROVAL (SSA) AND SPECIAL MANAGEMENT AREA (SMA) EXEMPTION FOR LIMITED REPAIRS TO STABILIZE THE FOUNDATION FOR BUILDING "F", CONSISTING OF TWELVE TOWNHOMES AT THE SHORELINE OF THE KAHANA SUNSET AOA, AN 80-UNIT CONDOMINIUM, LOCATED AT 4909 LOWER HONOAPIILANI ROAD, LAHAINA, MAUI, HAWAII; TMK: (2) 4-3-003:015 (SMX2023-00155) (SM52023-000114) (SSAD2023-00022) (EAE2023-00032).

16. Attached as Exhibit “02” is a true and correct copy of a letter from Planning Director Howard Nakamura to Norman Saito, Civil Engineer, approving construction of a seawall at Kahana Sunset.

17. Attached as Exhibit “03” is a true and correct copy of a Hawaii News Now article dated July 12, 2023, by Chelsea Davis, entitled “A popular beach fronting a resort is now gone. This Maui community is debating what to do next.”

18. I have been in regular contact with Dawn Hegger-Nordblom and our communications indicate that a draft managed retreat plan has not been prepared.

19. I viewed SM32023-00006 on MAPPS, which provided in the “more info” section that the valuation of the Building A proposed repairs is \$155,000.00. MAPPS does not provide a convenient method for saving a copy of the information it provides as a PDF.

20. Attached as Exhibit “04” is a true and correct copy of a current real estate listing of Kahana Sunset Unit F3 for a price of \$975,000.00 retrieved from the web address as provided on the exhibit.

21. Attached as Exhibit “05” is a true and correct copy of a current real estate listing of Kahana Sunset Unit A4 for a price of \$1,425,000.00 retrieved from the web address provided on the exhibit.

22. Attached as Exhibit “06” is a true and correct copy of the July 13, 2023 authorization letter from the Director to Dawn Hegger-Nordblom for Kahana Sunset, regarding

APPROVAL FOR A SPECIAL MANAGEMENT AREA (SMA) EMERGENCY PERMIT FOR REPAIRS TO THE CURRENT SINKHOLE UNDER BUILDING “A” AT THE KAHANA SUNSET AOA, LOCATED AT 4909 LOWER HONOAPIILANI ROAD, LAHAINA, ISLAND OF MAUI, HAWAII; TMK (2) 4-3-003:015 (SM32023-00006).

23. Attached as Exhibit “07” is a true and correct copy of the July 18, 2023 authorization letter from the Director to Dawn Hegger-Nordblom for Kahana Sunset, regarding APPROVAL FOR A SPECIAL MANAGEMENT AREA (SMA) EMERGENCY PERMIT FOR REPAIRS TO THE CURRENT SINKHOLE UNDER BUILDING “A” AT THE KAHANA SUNSET AOA, LOCATED AT 4909 LOWER HONOAPIILANI ROAD, LAHAINA, ISLAND OF MAUI, HAWAII; TMK (2) 4-3-003:015 (SM32023-00006).

24. Attached as Exhibit “08” is a true and correct copy of the Commission’s July 11, 2023 agenda, which was retrieved from the Commission’s website.

25. Attached as Exhibit “09” is a true and correct copy of excerpts of the proposed amendments to Title MC-12, Department of Planning, Subtitle 02, Maui Planning Commission, Chapter 202, Special Management Area Rules, “Final Ramseyer Version” provided with the Commission’s July 25, 2023 agenda.

26. Attached as Exhibit “10” is a true and correct copy excerpts of the proposed amendments to Title MC-12, Department of Planning, Subtitle 02, Maui Planning Commission, Chapter 203, Shoreline Rules, “Final Ramseyer Version” provided with the Commission’s July 25, 2023 agenda.

27. Attached as Exhibit “11” is a true and correct copy of the Commission’s July 11, 2023 agenda, which was retrieved from the Commission’s website.

28. Attached as Exhibit “12” is a true and correct copy of a 2012 Cultural Impact Assessment prepare for the Kahana Sunset Condominium by Jull Engledow (excerpts) and retrieved from the Environmental Review Program’s database of chapter 343, HRS environmental disclosure documents.

29. Attached as Exhibit “13” is a true and correct copy of an August 2011 Wave Climate Study for Kahana Sunset prepared for the Kahana Sunset AOA by Marc M. Siah & Associates, Inc. (excerpts) and retrieved from the Environmental Review Program’s database of chapter 343, HRS environmental disclosure documents.

30. Attached as Exhibit “14” is a true and correct copy of Kahana Sunset’s Final Environmental Assessment in Support of Applications for Special Management Area Use Permit, Shoreline Setback Variance, Community Plan Amendment & Change in Zoning, prepared by Chris Hart & Partners, Inc., dated January 2014 (Revised) (excerpts) and accompanying Determination of Finding of No Significant Impact by the Maui Planning Commission, which were retrieved from the Environmental Review Program’s database of chapter 343, HRS environmental disclosure documents.

31. Attached as Exhibit “15” is a true and correct copy of Final Environmental Assessment in Support of Conservation District Use Application for Schweitzer Shoreline Erosion Control prepared by Chris Hart & Partners, Inc., dated September 2013 (excerpts) and accompanying Determination of Finding of No Significant Impact by the Office of Conservation and Coastal Lands (“OCCL”) of the Department of Land and Natural Resources (“DLNR”), which were retrieved from the Environmental Review Program’s database of chapter 343, HRS environmental disclosure documents.

32. Attached as Exhibit “16” is a true and correct copy of the Coastal Erosion Management Plan (“COEMAP”) of DLNR’s “Shoreline Hardening Policy and Environmental Assessment Guidelines” (1998) from the Office of Environmental Quality Controls’ 2004 Guidebook for the Hawaii State Environmental Review Process, available at https://files.hawaii.gov/dbedt/erp/OEQC_Guidance/1998-Shoreline-Hardening-Policy-and-Environmental-Assessment-Guidelines.pdf.

33. Attached as Exhibit “17” is a true and correct copy of slides from a presentation by James Buika, Maui Planning Department and Tara Owens, Coastal Processes & Hazards Specialist, University of Hawaii Sea Grant on April 22, 2015, entitled “Managing Maui’s Dynamic Shorelines” (excerpts).

34. Attached as Exhibit “18” is a true and correct copy of the Hawaii Coastal Hazard Mitigation Control Guidebook (2005), author Dennis J. Hwang (excerpts), obtained by Tara Owens, Coastal Processes & Hazards Specialist, University of Hawaii Sea Grant via e-mail.

35. Attached as Exhibit “19” is a true and correct copy of a February 25, 2015 article in the Lahaina News, titled “West Side beaches and properties face erosion from large surf” and retrieved from <https://www.lahainanews.com/news/local-news/2016/02/25/west-side-beaches-and-properties-face-erosion-from-large-surf/>.

36. Attached as Exhibit “20” is a true and correct copy of a page from Avanti, an injection and grouting company, titled “Seawalls & Bulkheads” and retrieved from the website as listed on the exhibit.

37. Attached as Exhibit “21” is a true and correct copy of a University of Hawai‘i News article, research section, “Failure to protect beaches under slowly rising sea level,” dated December 10, 2018, retrieved from <https://www.hawaii.edu/news/2018/12/10/failure-to-protect-beaches-rising-sea-level/>.

38. The “beach access” stairwell at Kahana Sunset is gated and dependent upon the Kahana Sunset AOA timely unlocking the gate at designated hours. That often does not occur.

39. Fishermen and other beach users are not able to access the shoreline freely at Kahana Sunset.

40. Even when the gate is opened, the stairs are located in an area that is typically inundated, requiring one to walk along the seawall through the surf to reach the last remnants of Keonenui’s sandy beach.

41. No other public access is available in an area that once served as a fishing village and hukilau staging grounds.

42. That access was lost due to shoreline hardening.

43. Attached as Exhibit “22” is a true and correct copy of a letter from Meyer M. Ueoka to Joseph Medeiros, Chairman, Maui Planning Commission, dated February 6, 1968, and included with the Maui County Council’s Sustainable Planning and Land Use Committee’s January 24, 2022 meeting materials.

44. Attached as Exhibit “23” is a true and correct copy of various documents pertaining to the denial of a 1968 request for the zoning of the Kahana Sunset parcel to be changed from residential to hotel, which was intended to facilitate the development of Kahana Sunset. Among the items are the original application for the change in zoning, depicting the wide Keonenui Beach, and Buildings A and F set back from the shoreline. Included are numerous letters of protest for the change in zoning for hotel use of Kahana Sunset. This packet of materials was included with the Maui County Council’s Sustainable Planning and Land Use Committee’s January 24, 2022 meeting.

45. Attached as Exhibit “24” is a true and correct copy of a transmittal from the Maui County Board of Supervisors, dated March 6, 1968, to the Maui Planning Commission, which

was included with the Maui County Council's Sustainable Planning and Land Use Committee's January 24, 2022 meeting materials.

46. The Kahana Sunset parcel remains in residential zoning today, despite Kahana Sunset's use of the site as a nearly 100 percent transient vacation rental property.

47. In 2020, the State legislature passed Act 16, amending chapter 205A, HRS to disallow new shoreline armoring or any significant expansion of shoreline armoring along sandy beaches due to the known consequences of such structures.

48. In 1971, Kahana Sunset Resort Condominium was built along Keonenui Bay between Haukoe Point and 'Alaeloa Point at what is now 4909 Lower Honoapi'ilani Road.

49. The complex is made up of 79 units, spread across Buildings A – G.

50. The zoning for Kahana Sunset remains "apartment" today. Kahana Sunset also failed to request that the community plan be amended from the parcel's designation as Multi-Family to Hotel during the most recent revision of the West Maui Community Plan, which had an extensive community input and engagement process.

51. Instead, Kahana Sunset has attempted to receive that amendment outside of the community plan process before the Maui County Council and Commission.

52. Attached as Exhibit "25" is a true and correct copy of the March 13, 2006 Geoanalytical Report prepared for Kahana Sunset Condominium (excerpts) included with the 2014 FEA and retrieved from the Environmental Review Program's database of chapter 343, HRS environmental disclosure documents.

53. Attached as Exhibit "26" is a true and correct copy of correspondence I had with Reid Siarot, the State Surveyor, on July 19, 2023. Attached to his email was a 1978 State Certified Shoreline Survey for Kahana Sunset. I visited the link he provided in his email to the Dept. of Accounting and General Services website that maintains a listing of all State Certified Shoreline Surveys and could not find a more recent survey for Kahana Sunset.

54. Attached as Exhibit "27" is a true and correct copy of a written approval from Planning Director Jeffrey S. Hunt to the General Manager of the Kahana Sunset AOA regarding SPECIAL MANAGEMENT AREA (SMA) EMERGENCY PERMIT; VERBAL PERMISSION TO COMPLETE TEMPORARY EMERGENCY PROTECTIVE MEASURES AND REPAIRS TO BUILDING "F" FOUNDATION AND ADJACENT SEAWALL AT THE

KAHANA SUNSET, 4909 LOWER HONOAPIILANI HIGHWAY, LAHAINA, MAUI, HAWAII; TMK: 4-3-003:015 (SM3 2009/0005) (RFC 2009/0280).

55. Attached as Exhibit “28” is a true and correct copy of a written approval, dated February 4, 2010, from Planning Director Jeffrey S. Hunt to the General Manager of the Kahana Sunset AOA regarding SPECIAL MANAGEMENT AREA (SMA) EMERGENCY PERMIT VERBAL PERMISSION TO COMPLETE TEMPORARY EMERGENCY PROTECTIVE MEASURES AND REPAIRS TO BUILDING "A" FOUNDATION AND ADJACENT SEAWALL AT THE KAHANA SUNSET, 4909 LOWER HONOAPIILANI HIGHWAY, LAHAINA, MAUI, HAWAII; TMK: 4-3-003:015 (5M3 2010/0001).

56. Attached as Exhibit “29” is a true and correct copy of a letter written on behalf of Planning Director Kathleen Aoki dated November 3, 2010 to Chris Hart & Partners, Inc. regarding REQUEST FOR COMMENTS (RFC) ON EARLY CONSULTATION FOR ENVIRONMENTAL ASSESSMENT (EA) FOR PROPOSED SHORELINE EROSION MITIGATION AND BANK STABILIZATION AT THE KAHANA SUNSET CONDOMINIUM, ON PROPERTY SITUATED AT 4909 LOWER HONOAPIILANI ROAD, ALAELOA, LAHAINA, MAUI, HAWAII; TMK: (2) 4-3-003:015 (RFC 2010/0122).

57. Attached as Exhibit “30” is a true and correct copy of a letter from Isaac Davis Hall, dated January 20, 2012 to Reid K. Siarot, State Land Surveyor and included with the Maui County Council’s Sustainable Planning and Land Use Committee’s January 24, 2022 meeting materials.

58. Attached as Exhibit “31” is a true and correct copy of a letter from Reid Siarot, State Land Surveyor, to Isaac Davis Hall, dated April 17, 2012 and included with the Maui County Council’s Sustainable Planning and Land Use Committee’s January 24, 2022 meeting materials.

59. Attached as Exhibit “32” is a true and correct copy of a written approval dated April 26, 2012, from Planning Director William Spence to the General Manager of the Kahana Sunset AOA regarding SPECIAL MANAGEMENT AREA (SMA) MINOR PERMIT APPROVAL TO COMPLETE CONTROLLED REMOVAL OF AN UNSTABLE SOIL OVERHANG ABOVE A GUNITE-D CUFF FACE AND SEAWALL AT THE SHORELINE AT THE KAHANA SUNSET AOA, LOCATED AT 4909 LOWER HONOAPIILANI ROAD,

LAHAINA, MAUI, HAWAII; TMK: (2) 4-3-003:015 (SMX 2009/0385) (SM2 2012/0051) (SSA 2012/0029) (EAE 2012/0040)

60. Attached as Exhibit “33” is a true and correct copy of a written approval dated September 12, 2013 from OCCL Administrator Sam Lemmo to Kimmars Siah, AAA Structural Engineering Inspection and Evaluation Services, authorized by Kahana Sunset, Planning Director William Spence to the General Manager of the Kahana Sunset AOA regarding Notice of Site Plan Approval (MA-14-9) Removal of Encroaching Portions of Seawall at Kahana Sunset Condominium, 4909 Lower Honoapiilani Highway, Lahaina, Maui, Hawaii; TMK (2) 4-3-003:015.

61. Attached as Exhibit “34” is a true and correct copy of a written approval dated April 26, 2012, from Planning Director William Spence to the General Manager of the Kahana Sunset AOA regarding APPROVAL FOR A SPECIAL MANAGEMENT AREA (SMA) EMERGENCY PERMIT FOR THE KAHANA SUNSET AOA, LOCATED AT 4909 LOWER HONOAPIILANI ROAD, LAHAINA, ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-003:015 (5M3 2013/0003).

62. Attached as Exhibit “35” is a true and correct copy of correspondence I had with Reid Siarot, the State Surveyor, on July 19, 2023 regarding shoreline certifications at seawalls.

63. Attached as Exhibit “36” is a true and correct copy of a written approval dated August 18, 2014, from Planning Director William Spence to the General Manager of the Kahana Sunset AOA regarding APPROVAL OF THE SPECIAL MANAGEMENT AREA (SMA) USE PERMIT AND SHORELINE SETBACK VARIANCE (SSV) AND RECOMMENDATIONS FROM THE MAUI PLANNING COMMISSION TO THE MAUI COUNTY COUNCIL REGARDING COMMUNITY PLAN AMENDMENT AND CHANGE IN ZONING (CIZ) FOR THE KAHANA SUNSET AOA SHORELINE AND SITE IMPROVEMENTS, LOCATED AT 4909 LOWER HONOAPIILANI ROAD, LAHAINA, MAUI, HAWAII; TMK: (2) 4-3-003:015 (CPA 2012/0003) (CIZ 2012/0007).

64. Attached as Exhibit “37” is a true and correct copy of letter dated October 14, 2017, from Robert Carroll, Chair of the Maui County Council Land Use Committee to Chris Hart & Partners, Inc. regarding COMMUNITY PLAN AMENDMENT AND CHANGE IN ZONING FOR THE KAHANA SUNSET CONDOMINIUM AT 4909 LOWER HONOAPIILANI ROAD (LAHAINA).

65. Attached as Exhibit “38” is a true and correct copy of a written approval dated July 13, 2017, from Planning Director William Spence to the General Manager of the Kahana Sunset AOA regarding SPECIAL MANAGEMENT AREA (SMA) ASSESSMENT FOR REPAIR OF EXISTING STRUCTURE DUE TO EROSION AND BUILDING UNDERMINING AT THE "A" BUILDING FOUNDATION, LOCATED AT THE KAHANA SUNSET AOA, 4909 LOWER HONOAPIILANI ROAD, LAHAINA, ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-003:015 (SMX 2017/0177).

66. Attached as Exhibit “39” is a true and correct copy of a written approval of exemption dated July 12, 2018, from Planning Director Michele Chouteau McLean to the General Manager of the Kahana Sunset AOA regarding SPECIAL MANAGEMENT AREA (SMA) ASSESSMENT FOR REPAIR OF EXISTING FOUNDATION DUE TO EROSION AND BUILDING UNDERMINING AT THE "A" BUILDING FOUNDATION, LOCATED AT THE KAHANA SUNSET AOA, 4909 LOWER HONOAPIILANI ROAD, LAHAINA, ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-003:015 (SMX 2018/0156) (SM5 2018/0139).

67. Attached as Exhibit “40” is a true and correct copy of letter dated March 5, 2018, from Robert Carroll, Chair of the Maui County Council Land Use Committee to Chris Hart & Partners, Inc. regarding COMMUNITY PLAN AMENDMENT AND CHANGE IN ZONING FOR THE KAHANA SUNSET CONDOMINIUM AT 4909 LOWER HONOAPIILANI ROAD (LAHAINA).

68. Attached as Exhibit “41” is a true and correct copy of a slide from a presentation by Chris Hart on January 24, 2022 to the Maui County Council’s Sustainable Planning and Land Use Committee.

69. Attached as Exhibit “42” is a true and correct copy of the minutes of the Maui County Council’s Sustainable Planning and Land Use Committee’s January 24, 2022 meeting.

70. Attached as Exhibit “43” is a true and correct copy of the approved plans for the current Building F Project by JPB Engineering, dated November 9, 2020.

71. The exemption of the Building F Project from preparation of an environmental assessment has not yet been noticed in the Environmental Notice.

72. A substantially similar method of drilling micro piles into the bedrock as a seawall repair was also proposed to buttress the lanai behind the sea wall at Building F, which are the same plans for Building F’s lanai that were exempted by the Director on June 19, 2023.

73. On MAPPS, Kahana Sunset’s application describes the Building A “emergency repairs” as “to stabilize/mitigate Building A’s sinkhole and to repair and maintain eleven (11) columns (on the first floor) to strengthen Building A’s south portion. Approximately, 100 cubic yards of [concrete low-strength material (CLSM)] will be utilized as well as the placement of sandbags in the sinkhole interior.”

74. The application states, “There has been NO community meetings regarding the proposed project.”

75. Attached as Exhibit “44” is a true and correct copy of a privately conducted shoreline survey by Valencia Land Surveying based on a site visit conducted in 2011 and which bears no indication that the survey was certified by the State. This document was obtained from MAPPS.

76. Attached as Exhibit “45” is a true and correct copy of the “Civil & Site Work Plans” for the structural “repairs” referenced in condition 1 of the July 18, 2023 SMA Emergency permit as 4.13.23 KAHANA SUNSET BLG A STRUCTURAL REPAIRS_v1 (2).pdf and retrieved from MAPPS.

77. Attached as Exhibit “46” is a true and correct copy of the “Civil & Site Work Plans” for the sinkhole “repairs” referenced in condition 1 of the July 18, 2023 SMA Emergency permit as 4.13.23 KAHANA SUNSET BLG A SINKHOLE REPAIRS_v1 (2).pdf and retrieved from MAPPS.

78. Attached as Exhibit “47” is a true and correct copy of “Field Report: 1” prepared by K2NCREST for the Kahana Sunset Sinkhole, dated December 21, 2022. This document was retrieved from MAPPS as a supporting document for the Building A SMA Emergency Permit.

79. I and Nā Papa‘i’s leadership and supporters hold a right to a clean and healthful environment as defined by chapter 343, HRS and its implementing regulations, and guaranteed by article XI, section 9 of the Hawai‘i State Constitution.

80. Many of and Nā Papa‘i’s leadership and supporters hold a right to engage in traditional and customary Native Hawaiian practices guaranteed by article 12, section 7 of the Hawai‘i State Constitution. DOBOR and the Board are required to take steps to protect these practices.

81. Many of and Nā Papa‘i’s leadership and supporters trace their family history to the region of Kā‘anapali and have used its beaches and state waters surrounding the area for

generations for traditional and customary practices such as fishing, diving, surfing, voyaging, funerary practices, and gathering.

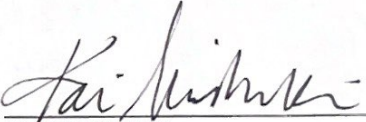
82. Nā Papa'i's ability to carry out its mission is harmed by Director's decisions.

83. This appeal would vindicate Nā Papa'i's interests and prevent injury to myself and the officers, directors, and supporters of Nā Papa'i, as well as to the environment and cultural resources of Hawai'i.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Kahakuloa, Maui, Maui

July 21, 2023


KAI NISHIKI
Declarant

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAI'I

In the Matter of KAHANA SUNSET	)	SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS	)	SM5 2023-000114
	)	SSAD 2023-00022
	)	EAE 2023-00032
SHORELINE SET BACK APPROVAL AND	)	SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))	
EXEMPTION FOR LIMITED REPAIRS TO)	
STABILIZE THE FOUNDATION FOR)	
BUILDING "F," CONSISTING OF TWELVE)	
TOWNHOMES AT THE SHORELINE FO	)	DECLARATION OF TIARE LAWRENCE
THE KAHANA SUNSET AOA, AN 80-)	
UNIT CONDOMINIUM, LOCATED AT 4909)	
LOWER HONOAPIILANI ROAD,)	
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-)	
003:015 (SMX2023-00155) (SM52023-)	
000114) (SSAD2023-00022) (EAE2023-)	
00032))	
)	
and)	
)	
APPROVAL FOR A SPECIAL)	
MANAGEMENT AREA (SMA))	
EMERGENCY PERMIT FOR REPAIRS TO)	
THE CURRENT SINKHOLE UNDER)	
BUILDING "A" AT THE KAHANA SUNSET)	
AOAO, LOCATED AT 4909 HONOAPIILANI)	
ROAD, LAHAINA, ISLAND OF MAUI,)	
HAWAII; TMK: (2) 4-3-003:015 (SM3 2023-)	
00006))	

DECLARATION OF TIARE LAWRENCE

I, TIARE LAWRENCE, do declare under penalty of law that the following is true and correct.

1. I am competent to make the following statements and such statements are made to the best of my knowledge and experience.
2. I am Native Hawaiian – a descendant of the people who inhabited the Hawaiian Islands prior to 1778.
3. I have generational ties to Lāhainā.

4. I am a public access advocate.
5. I am a graduate of Lahainaluna Highschool and attended Kapiolani Community College.
6. I am also a graduate of both the Ka Ipu Kukui Fellows Program and the Kuleana Academy.
7. I am a mother of two children, who are the driving force in everything I do.
8. I am a coordinating member of Ka Malu O Kahālāwai.
9. I am also a member of Nā Papa‘i Wawae ‘Ula‘ula.
10. Ka Malu O Kahālāwai, a domestic nonprofit corporation, is organized to protect the natural and cultural history and resources of Kahoma and surrounding ahupua‘a from mauka to makai.
11. Ka Malu officers, directors and/ or supporters conduct traditional and customary practices of gathering, fishing, and hukilau at Keonenui Beach, and fishing, surfing, canoe paddling, and diving in waters including Keonenui Bay.
12. I engage in traditional and customary practices of canoe paddling and surfing in waters off of Keonenui Bay as well as aloha ‘āina.
13. I and officers, directors, and supporters of Ka Malu O Kahālāwai have been harmed by Kahana Sunset’s shoreline hardening measures to protect Buildings A and F, both of which impeded access to and along the shore and a direct cause of shoreline erosion and sand loss at Keonenui Beach.
14. We will continue to be harmed by the projects proposed and approved by the Director of the Maui County Department of Planning (“Department”) for “repairs” to the Building A seawall and concrete filling of sinkholes that the seawalls caused. We will also be harmed by the construction of a micro pile grid embedded twenty-five feet down into the bedrock beneath Building F’s lanai and held together by a concrete slab.
15. The Building F project will create a de facto secondary seawall to buttress the failing seawall fronting Building F.
16. I and members of Ka Malu O Kahālāwai are harmed by the Director’s failure to impose archaeological monitoring conditions on the permits authorizing the projects. An archaeological monitoring plans prepared for a 2014 seawall construction project at Kahana Sunset identified that “subsurface pre-Contact burials, remnant traditional cultural layers,

historic refuse deposits, and buried architecture from both pre-Contact and historic periods may be extant” throughout the parcel. The Building A and Building F projects both involve excavation, ground disturbance, and boring that could harm ‘iwi and historic properties.

17. I and leadership and supporters of Ka Malu O Kahālāwai also hold a recreational and aesthetic interest in the maintenance of a healthy coastal and marine ecosystem at Keonenui Bay.

18. The projects will continue the trend of shoreline erosion from shoreline hardening and inhibit public access to and along the shoreline at Keonenui Bay.

19. I and Ka Malu O Kahālāwai’s leadership and supporters hold a right to a clean and healthful environment as defined by chapter 205A, HRS and the Maui Planning Commissions Special Management Area and Shoreline Rules, guaranteed by article XI, section 9 of the Hawai‘i State Constitution.

20. I and Ka Malu O Kahālāwai’s leadership and supporters hold a right to a clean and healthful environment as defined by chapter 343, HRS and its implementing regulations, and guaranteed by article XI, section 9 of the Hawai‘i State Constitution.

21. I and many of Ka Malu O Kahālāwai’s leadership and supporters hold a right to engage in traditional and customary Native Hawaiian practices guaranteed by article XII, section 7 of the Hawai‘i State Constitution. The Maui Planning Commission and the Director of the Maui County Department of Planning are required to take steps to protect these practices.

22. I and many of Ka Malu O Kahālāwai’s leadership and supporters trace their family history to West Maui and have used its beaches and state waters, including at and around Keonenui Bay, for generations for traditional and customary practices such as fishing, diving, surfing, voyaging, hukilau, and gathering.

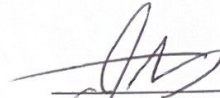
23. There is no indication on the authorizations issued to Kahana Sunset for the Building A and Building F permits that traditional and customary practices and impacts to cultural resources were considered in the permitting, let alone protected.

24. An appeal from the director’s decisions is the only method available to me and Ka Malu O Kahālāwai’s leadership and supporters to protect our substantive interests from injury.

DECLARANT FURTHER SAYETH NAUGHT

DATED: Makawao, Maui

July 20, 2023

A handwritten signature in black ink, appearing to read 'Tiare Lawrence', written over a horizontal line.

TIARE LAWRENCE
Petitioner-Declarant

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAII

In the Matter of KAHANA SUNSET) SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS) SM5 2023-000114
) SSAD 2023-00022
) EAE 2023-00032
SHORELINE SET BACK APPROVAL AND) SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))
EXEMPTION FOR LIMITED REPAIRS TO)
STABILIZE THE FOUNDATION FOR) DECLARATION OF GLENN KAMAKA
BUILDING “F,” CONSISTING OF TWELVE)
TOWNHOMES AT THE SHORELINE FO)
THE KAHANA SUNSET AOA, AN 80-)
UNIT CONDOMINIUM, LOCATED AT 4909)
LOWER HONOAPIILANI ROAD,)
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-)
003:015 (SMX2023-00155) (SM52023-)
000114) (SSAD2023-00022) (EAE2023-)
00032))
)
and)
)
APPROVAL FOR A SPECIAL)
MANAGEMENT AREA (SMA))
EMERGENCY PERMIT FOR REPAIRS TO)
THE CURRENT SINKHOLE UNDER)
BUILDING “A” AT THE KAHANA SUNSET)
AOAO, LOCATED AT 4909)
HONOAPIILANI ROAD, LAHAINA,)
ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-)
003:015 (SM3 2023-00006))

I, GLENN KAMAKA, do declare under perjury of law that the following is true and correct.

1. I make this declaration based upon my own personal knowledge, information, and belief.
2. I am a resident of the County of Maui.
3. I am seventy-five percent Native Hawaiian. My ancestors are those who lived in the Hawaiian Islands prior to 1778.
4. I am seventy-two years old.

5. I have lived in West Maui all my life and grew up in Oneoloa, Honokahua.
6. I am a supporter of Nā Papa‘i Wawae ‘Ula‘ula and Ka Malu O Kahālāwai’s missions to protect our public access to beaches, the environment, and to safeguard traditional and customary Native Hawaiian practices in West Maui.
7. This declaration is made on my own behalf, but to establish my connection to the area, I will share that my family and I are some of the original members of Door of Faith Church at ‘Alaeloa Point overlooking where Kahana Sunset now is. The church was established in the 1940s after the land was conveyed to my grandmother by Kahana fisherman George Ai Smith for the purpose of establishing the church. My family has now been in service to the church for generations.
8. I grew up in a fishing family.
9. We fished along the entire coast of West Maui.
10. Growing up in Oneloa, I learned from the kūpuna how to fish and to care for the shoreline.
11. There’s no other way to learn this; you can’t get it from schoolbooks.
12. I maintain a humble way of life and don’t push my issues on others. It pains me deeply, however, because I see all this. The kūpuna that have left are still in my heart and na‘au. To see the actions of Kahana Sunset, the harm to the shoreline, and harms to Keonenui Bay is devastating and it takes the life and spirit out of me.
13. Growing up, we relied upon the ocean and the land for our lives, so it was imperative for us to know how to care for the ocean and the land. It still is.
14. Kahana Sunset used to be the place where we would go to drop net to bring all the fish in there. That’s how well that area used to be.
15. Keonenui Beach used to be a big, sandy beach. It was never rocky, no matter the changes of the surf, season, or year. Sand was always there, it never moved.
16. Once the seawalls went up, the sand disappeared from the backwash.
17. Now, the beach is nearly gone and so are the fish.
18. I am not a rocket scientist, but I know what is going on with our island shore.
19. The buildings on the shore at Kahana Sunset need to be removed, not reinforced.
20. Without beach and without the fish, I cannot engage in my traditional fishing practices, including hukilau.

21. The continual “repairs” of the buildings and seawalls cause ongoing harm to the shoreline, fisheries, reef, and my traditional and customary practices that rely on them. .

22. Eventually, Mother Nature will take everything. I hope to help make people realize that you have to wake up, you can’t just live off the land and the ocean and not do your part. It needs help and it needs our help.

23. I am blessed to have learned from our kūpuna, to lead the life I have, and to be able to live with knowledge of our history.

24. The right decisions will be made if they come from the heart.

DECLARANT FURTHER SAYETH NAUGHT.

Dated: Lāhainā, Maui July 19, 2023.

A handwritten signature in cursive script that reads "Glenn Kamaka". The signature is written in dark ink and is positioned above the printed name and title.

GLENN KAMAKA

DECLARANT

BEFORE THE COUNTY OF MAUI PLANNING COMMISSION

STATE OF HAWAI'I

In the Matter of KAHANA SUNSET) SMX 2023-00155
BUILDING F AND BUILDING A REPAIRS) SM5 2023-000114
) SSAD 2023-00022
) EAE 2023-00032
SHORELINE SET BACK APPROVAL AND) SM3 2023-00006
SPECIAL MANAGEMENT AREA (SMA))
EXEMPTION FOR LIMITED REPAIRS TO)
STABILIZE THE FOUNDATION FOR)
BUILDING "F," CONSISTING OF TWELVE)
TOWNHOMES AT THE SHORELINE FO) CERTIFICATE OF SERVICE
THE KAHANA SUNSET AOA, AN 80-)
UNIT CONDOMINIUM, LOCATED AT 4909)
LOWER HONOAPIILANI ROAD,)
LAHAINA, MAUI, HAWAII; TMK (2) 4-3-)
003:015 (SMX2023-00155) (SM52023-)
000114) (SSAD2023-00022) (EAE2023-)
00032))
))
and)
))
APPROVAL FOR A SPECIAL)
MANAGEMENT AREA (SMA))
EMERGENCY PERMIT FOR REPAIRS TO)
THE CURRENT SINKHOLE UNDER)
BUILDING "A" AT THE KAHANA SUNSET)
AOAO, LOCATED AT 4909)
HONOAPIILANI ROAD, LAHAINA,)
ISLAND OF MAUI, HAWAII; TMK: (2) 4-3-)
003:015 (SM3 2023-00006))

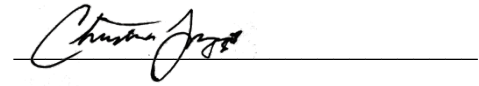
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date listed below, 15 hard copies were filed with the Maui County Planning Commission and that a file stamped copy of the appeal will be served contemporaneously on Dawn Hegger-Nordblom, the authorized representative of Kahana Sunset, at her last known address: Ke Kai Planing, PO Box 1175, Lāhainā, HI 96767.

Two checks each written in the amount of \$1,732.00 and made out to Maui County Director of Finance are also submitted with consolidated the notices of appeal.

Dated: Lāhainā, Hawai‘i

July 21, 2023

A handwritten signature in black ink, appearing to read "Christina Lizzi", is written over a horizontal line.

LAW OFFICE OF CHRISTINA LIZZI

Christina Lizzi, Esq.