GET-11 (1)

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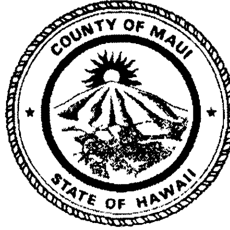

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DEPARTMENT OF THE CORPORATION COUNSEL
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January 25, 2019

MEMO TO: Michael J. Molina, Chair
Governance, Ethics, and Transparency Committee

F R O M: Caleb P. Rowe, Deputy Corporation Counsel

SUBJECT: Litigation Matters (GET-1)
Settlement of Claims and Lawsuits: AUTHORIZING SETTLEMENT OF DAVID J. CHEVALIER AND PATRICIA A. CHEVALIER V. COUNTY OF MAUI, ET AL.,
CIVIL NO. 18-1-0353(3)

Our Department respectfully requests the opportunity to present information to the Government, Ethics, and Transparency Committee and to discuss settlement options with regard to the above-referenced lawsuit.

Copies of the Resolution authorizing settlement and the Complaint for Declaratory, Injunctive and Other Relief, are attached.

Because the settlement is the product of confidential mediation, it is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities and liabilities of the County, the Council, and the Committee.

We request that a representative from Department of Water Supply be in attendance during discussion of this matter. Should you have any questions or concerns, please do not hesitate to contact me. Thank you for your anticipated assistance in this matter.

CPR:chs

Enclosures
cc: Jeffrey T. Pearson, Director, Department of Water Supply

Resolution

AUTHORIZING SETTLEMENT OF DAVID J. CHEVALIER AND
PATRICIA A. CHEVALIER V. COUNTY OF MAUI, ET AL.,
CIVIL NO. 18-1-0353(3)

WHEREAS, Plaintiffs David J. Chevalier and Patricia A. Chevalier filed a lawsuit in the Circuit Court of the Second Circuit, State of Hawaii, on August 29, 2018, Civil No. 18-1-0353(3), against the County of Maui, seeking declaratory and injunctive relief related to the administration of the Upcountry water meter priority list, the subdivision approval process, and the issuance of various permits; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Government, Ethics, and Transparency Committee; and

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a

negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

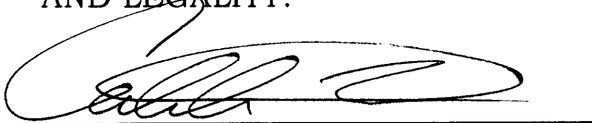
1. That it hereby approves settlement of this case under the terms set forth in an executive meeting before the Government, Ethics, and Transparency Committee; and

2. That it hereby authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

3. That it hereby authorizes the Director of Finance to satisfy said settlement of this case, under such terms and conditions as may be imposed, and agreed to, by the Corporation Counsel; and

4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Director of Water Supply, and the Corporation Counsel.

APPROVED AS TO FORM
AND LEGALITY:



CALEB P. ROWE
Deputy Corporation Counsel
County of Maui
LIT 5894

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V. ISHIHARA, CLERK
SECOND CIRCUIT COURT

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Attorneys for Plaintiffs:
David J. Chevalier and Patricia A. Chevalier

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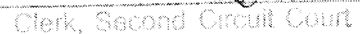
IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAI`I

DAVID J. CHEVALIER AND PATRICIA A. CHEVALIER; Plaintiffs, vs. COUNTY OF MAUI; COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY OF COUNTY OF MAUI; RODERICK F.H. FONG; FONG CONSTRUCTION CO., LTD.; FONG FAMILY REAL ESTATE COMPANY L.P.; FONG CONSTRUCTION DEVELOPMENT PARTNERS LLC; HENRY F.S. FONG; AILEEN LUM FONG; THERESA F. LOCK; FRANCENE F. KIHARA; DEBORAH Y.K. FONG; VINCE G. BAGOYO, JR.; JENNIFER K. BAGOYO; AMERICAN SAVINGS BANK F.S.B.; BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI`I; JOHN DOES 1-10, JANE DOES 1-10, AND DOE PARTNERSHIPS, CORPORATIONS, GOVERNMENTAL UNITS OR OTHER ENTITIES 1-10, Defendants.	CIVIL NO. 18-1-0353(3) Environmental Court COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF; JURY DEMAND; SUMMONS

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



Clerk, Second Circuit Court

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COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs DAVID J. CHEVALIER AND PATRICIA A. CHEVALIER ("Plaintiffs") by and through their attorneys, Tom Pierce, Attorney at Law, LLLC, and Damon Key Leong Kupchak Hastert, hereby allege and aver as follows.

INTRODUCTION

1. Maui County Council passed laws to assure fair treatment of landowners awaiting water meters on the Upcountry Priority List (defined herein). These laws were intended to provide Upcountry Maui landowners with an orderly and fair mechanism for allocating the limited number of water meters that are made available by DWS to properties located within the Upcountry Water System (defined herein).

2. Notwithstanding Maui County Council's laws, which included specified time limits for water meter reservations, the County of Maui Department of Water Supply ("**DWS**") has routinely permitted certain preferred landowners to hoard Upcountry water meters, sometimes for decades, even though these landowners failed to timely meet their obligations to complete necessary infrastructure to accept the reserved water meters.

3. In so doing, DWS has ignored the express mandates established by the County Council, abused its limited discretion, breached its public trust obligations, and acted arbitrarily, capriciously, and in clear violation of law. These unlawful practices have, and are continuing, to harm landowners on the Upcountry Priority List, including Plaintiffs.

4. This Complaint also seeks relief against the developers and landowners named herein as defendants who, with the assistance of a former director of DWS, now acting as a private consultant, were granted significant financial concessions, entitlements, and repeated water meter reservation extensions based on numerous false and misleading representations made to Maui County. Notably, the developers illegally obtained a thirteen-lot "family subdivision" under the auspices of it being for the purpose of estate planning for the family, even while privately creating sophisticated development agreements and executing land contracts with non-family third parties, among them, the former DWS director.

JURISDICTION AND VENUE

5. This Court has general jurisdiction under Hawai`i Revised Statutes ("**HRS**") §603-21.5, HRS § 632-1 (Declaratory Judgments), *et seq.*, and HRS § 91-7 (Declaratory Judgment on Validity of Rules).

6. This Court has jurisdiction over this matter pursuant to HRS § 604A-2, which grants the Environmental Courts in the State of Hawai`i with exclusive, original jurisdiction over all proceedings, including judicial review of administrative proceedings and proceedings for declaratory judgment on the validity of agency rules authorized under chapter 91, arising under numerous environmental laws, including the following, which are pertinent to this action: HRS Chapter 174C (State Water Code); HRS Chapter 180C (Soil erosion and Sediment Control); HRS Chapter 6E (Historic Preservation); and Article XI, § 9 of the Hawai'i Constitution, which grants each person the right to a clean and healthful environment, including control of pollution and conservation.

7. Venue properly lies in this judicial circuit pursuant to HRS § 603-36(5) because the claims for relief arose in this circuit.

PROPERTY AT ISSUE

8. The property at issue in this action is a thirteen lot subdivision, entitled the *Keokea Kai Subdivision*, which is the consolidation of Lots 34-B-1, 34-D and a portion of Lot 36 of the Waiohuli Keokea Homesteads subdivision into one lot, and resubdivision of said consolidation into Lot numbers 34-B-1-A, 34-B-1-B, 34-B-1-C, 34-B-1-D, 34-B-1-E, 34-B-1-F, 34-D-1, 36-B, 36-C, 36-D, 36-E, 36-F, 36-G and 36-H, being portions of Grant 10140 to Robert M. Ling and Grant 10257 to Maggie Fong, located at Waiohuli-Keokea, Kula, Maui, Hawai`i (the "**Subdivision**").

PARTIES

9. Plaintiffs are residents of the County of Maui, State of Hawai`i, whose interest in this case is set forth in the facts below.

10. Defendant COUNTY OF MAUI ("**County**") is a political corporation subject to suit in its own capacity and on behalf of its departments and their directors, pursuant to HRS § 46-1.5(22).

11. Defendant Department of Water Supply, County of Maui ("**DWS**") is a department of the County of Maui and is charged with managing and operating all water systems owned by the County of Maui, among other duties, as set forth in Chapter 11 of the Maui County Charter.

12. DWS and the County are collectively referred to herein as the "**County Defendants**").

13. Upon information and belief, the defendants identified in the allegations below, numbered 14 to 19 of this Complaint, collectively referred to herein as the "**Developers**", have an interest in this action because, upon information and belief, they have an interest in one or more of the lots within the Subdivision, as set forth in the allegations below.

14. Upon information and belief, Defendant HENRY F.S. FONG is a resident of the County of Maui, State of Hawai`i, and owns the following three lots within the Subdivision: Lot 34-B-1-B, bearing TMK (2) 2-2-4:103; Lot 36-C, bearing TMK (2) 2-2-4:109; Lot 36-E, bearing TMK (2) 2-2-4:110.

15. Upon information and belief, Defendant AILEEN LUM FONG is a resident of the County of Maui, State of Hawai`i, and owns the following lot within the Subdivision: Lot 34-B-1-A, bearing TMK (2) 2-2-4:094.

16. Upon information and belief, Defendant THERESA F. LOCK is a resident of the City and County of Honolulu, State of Hawai`i, and owns the following two lots within the Subdivision: Lot 36-B, bearing TMK (2) 2-2-4:108; Lot 34-B-1-E, bearing TMK (2) 2-2-4:106.

17. Upon information and belief, Defendant FRANCENE F. KIHARA is a resident of the County of Maui, State of Hawai`i, and owns the following three lots within the Subdivision: Lot 36-G, bearing TMK (2) 2-2-4:112; Lot 36-D, bearing TMK (2) 2-2-4:014; and, Lot 34-B-1-D, bearing TMK (2) 2-2-4:105.

18. Upon information and belief, Defendant DEBORAH Y.K. FONG is a resident of the County of Maui, State of Hawai`i, and owns the following two lots within the Subdivision: Lot 34-B-1-F, bearing TMK (2) 2-2-4:107; and Lot 36-H, bearing TMK (2) 2-2-4:113.

19. Upon information and belief, Defendant RODERICK F.H. FONG is a resident of the County of Maui, State of Hawai`i, and owns the following two lots within the Subdivision: Lot 34-B-1-C, bearing TMK (2) 2-2-4:104; Lot 36-F, bearing TMK (2) 2-2-4:111.

20. Defendant Roderick Fong is also sued in his capacity as a licensed contractor, with license number CT-15172, issued by the Hawai`i Department of Commerce & Consumer Affairs ("**DCCA**"). Unless otherwise specified herein Roderick Fong shall be referred to herein as "**Fong**".

21. Defendant FONG CONSTRUCTION CO., LTD. ("**Fong Construction**") is a Hawai`i Corporation and operates under contractor license number CT-1017, issued by the DCCA. Upon information and belief, the officers of Fong Construction are the Developers, namely the following defendants: Roderick F.H. Fong; Henry F.S. Fong, Francene F. Kihara; Aileen L. Fong; Deborah Y.K. Fong; and Theresa F. Lock. Upon information and belief, Fong Construction has a pecuniary business interest in the Subdivision.

22. At all relevant times herein, Fong acted as a representative of, and on behalf of, the Developers, either acting individually, or as a representative of Fong Construction.

23. Defendant FONG FAMILY REAL ESTATE COMPANY L.P. ("**Fong Real Estate**") is a Hawai`i limited partnership whose general partner is Defendant Aileen L. Fong. Upon information and belief, Fong Real Estate has a pecuniary business interest in the Subdivision.

24. Defendant FONG CONSTRUCTION DEVELOPMENT PARTNERS LLC ("**Fong Development Partners**") is a Hawai`i limited liability company, which was organized by Fong, Nathan K.G. Kwee, and Jennifer K. Bagoyo, as trustee of the Vince G. Bagoyo revocable living trust, and whose current members are Fong, S & F Land Co., Inc., and Gerardo V. Calvillo, Jr. Upon information and belief, Fong Development Partners has a pecuniary business interest in the Subdivision.

25. Defendant VINCE G. BAGOYO, JR. and JENNIFER K. BAGOYO (collectively "**Bagoyo Defendants**") are named herein because they may claim an interest in the Subdivision by virtue of a loan to Fong and Aileen Fong, secured by a mortgage recorded on May 23, 2016, in the State of Hawai`i Bureau of Conveyances ("**Bureau**"), as Document Number A-59871063 (the "**Bagoyo Mortgage**"), which recites that the Bagoyo Defendants have entered into a contract of sale for purchase of Lot 34-B-1-A of the Subdivision, which Lot is owned by Defendant Aileen Lum Fong, and which grants the Bagoyo Defendants as lenders certain property rights in Lots 34-B-1-A, owned by Defendant Aileen Lum Fong 34-B-1-C, and Lots 34-B-1-C and 36-F, owned by Defendant Fong.

26. Defendant AMERICAN SAVINGS BANK, F.S.B. is named herein because it may claim an interest in the Subdivision by virtue of a Mortgage, Security Agreement and Financing Statement (Fixture Filing), filed in the Bureau on October 14, 2015, as Document No. A-57650161, which mortgage is secured by the land identified as Roadway Lot 34-D and Lot 34-B-1 of the Waiohului-Keokea Homesteads, which Lot now consists of the following subdivided lots within the Subdivision: 34-B-1-A; 34-B-1-B; 34-B-1-C; 34-B-1-D; 34-B-1-E; 34-B-1-F.

27. Defendant BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I is named herein because of its enforcement powers and obligations set forth in Hawai'i Revised Statutes § 6E-10.5, including the power to impose penalties against persons violating any part of HRS Chapter 6E.

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

PLAINTIFFS' INTEREST IN THIS ACTION

29. Plaintiffs own and reside at property located in Waiohuli-Keokea, Kula, Hawai'i, that abuts the Keokea Kai Subdivision, including the following properties bearing TMKs: (2) 2-2-004:044, 013, 042, 023, 099.

30. Plaintiffs own a water meter issued by DWS that services the property on which they reside, and at all times relevant herein Plaintiffs have been customers of DWS and users of the water provided through the Upcountry Water System.

31. Plaintiffs purchased a property bearing TMK (2) 2-2-4:099, which had pre-existing entitlements to a water meter. In or around 2009, DWS offered a water meter to Plaintiffs. Plaintiffs thereafter sought to accept the water meter. However, in 2011, the director of

DWS (hereinafter "Director") informed Plaintiffs that the time in which they had the opportunity to accept the water meter had expired, and they were not entitled to an extension of time. Plaintiffs appealed the Director's decision to the County of Maui Board of Water Supply ("**BWS**"). BWS affirmed the Director's decision to deny Plaintiffs the water meter.

32. Plaintiffs are currently on the Upcountry Priority List for a water meter for TMK: (2) 2-2-4:099, which property abuts the Subdivision. DWS identifies TMK: (2) 2-2-4:099 on the November 30, 2017 version of the Upcountry Priority List with Priority No. 1287, Priority Date 5/24/2012, and Reference No. WR 2361. Plaintiffs are ready and able to immediately accept a water meter for TMK: (2) 2-2-4:099.

FACTUAL ALLEGATIONS

I. THE UPCOUNTRY WATER SHORTAGE AND MORATORIUM

33. The Upcountry Water District includes the Makawao, Lower Kula and Upper Kula public water systems and provides drinking water to residents of Haiku, Haliimaile, Makawao, Pukalani, Kula, Ulupalakua and Kanaio.

34. In 1993, DWS determined the Upcountry Water District had insufficient water supply for domestic and irrigation purposes. As a result, DWS issued a moratorium on issuance of water meters to properties within the Upcountry Water District (the "**Moratorium**").

35. In 1994, DWS created a list (the "**Upcountry Priority List**" or "**List**") to prioritize the order in which properties would receive water meters once the Moratorium ended.

36. In 2013, DWS closed the Upcountry Priority List to new applicants. At that time, approximately 1,887 properties within the Upcountry Water District were requesting meters.

37. In 2014, DWS lifted the Moratorium that was issued in 1993 and began offering a very limited number of meters to properties on the Upcountry Priority List.

38. Since 2014, issuance of water meters for the Upcountry Water District by DWS has been paltry. As of November 30, 2017, when DWS last updated the Upcountry Priority List, 1,728 properties remained on the Upcountry Priority List.

39. DWS staff have recently acknowledged at Council hearings that at the current rate of processing of approximately sixty applications per year it could take as much as twenty years to get through the Upcountry Priority List.

40. Even though DWS may be able to process sixty applications per year, this does not mean that sixty properties per year will obtain water meters. Instead, a property owner who is

not ready to accept, due to the need to make water improvements, may request from DWS up to two one-year extensions, plus, upon a showing of sufficient good cause, two six-month extensions, *i.e.,* extension for a total of up to three years.

41. However, DWS has granted extensions of time to certain property owners, including the Developers, that go well beyond the permitted three-year time period.

42. In those cases where DWS has permitted an extension of time to a property owner, DWS is directly affecting the limited available water sources that could otherwise go to applicants within the Upcountry Water District who are ready to accept water service upon being offered a water meter, including Plaintiffs.

II. THE DEVELOPERS HAVE REQUESTED, AND OBTAINED, THIRTEEN YEARS OF WATER RESERVATION EXTENSIONS

A. The Developers Have Obtained or Reserved More than Thirteen Water Meters

43. As set forth in the allegations below, the Developers have requested, and received, numerous waivers from DWS, as summarized below, in direct contravention with the express legal time limits.

44. Although the Developers are still attempting to obtain eleven additional water meters, as shown below, the Developers have separately already obtained additional water meters for certain lots they own involving the same or adjacent properties. Oddly, the Developers were successful in having at least one of these additional meters installed during the Moratorium and without adhering to the Upcountry Priority List.

45. The Developers needed thirteen water meters for their thirteen lots. Only one water meter was originally benefitting the Subdivision. This meter is not being challenged in this action.

46. With respect to the water meters in contention through this Complaint, they relate to eleven meters made through two separate reservation applications, as set forth in the allegations below, as well as one additional water meter that was granted by DWS for the Subdivision based on "unusual circumstances".

B. The Developers Were on Notice of the Three-Year Reservation Limitation

47. In order to receive the water meter reservations, the Developers were required to enter into a binding agreement with DWS entitled the "Reservation of Available Service Capacity".

48. On behalf of all of the Developers, Fong executed the Reservation of Available Service Capacity, and thereby agreed to the conditions set forth therein, including the following pertinent ones.

49. The Reservation of Available Service Capacity included conditions on the design and improvement of the water system for the proposed development:

> Construct water system improvements for the subdivision. . . . In general the requirements will be (but not limited to):
>
> > a. Provide fire protection in accordance with the standards. Construct 6-inch waterlines and standpipes at the required spacing along roadways adjacent and within the subdivision. Pressure reducing valve stations will be required.
> >
> > b. Provide water service to each lot in accordance with the standards. Relocate and upgrade the existing water service lateral to current standards.
> >
> > c. Deliver to the department perpetual easements required for the water system improvements.
>
> All improvements shall conform to the department's standards. . . .

50. The Reservation of Available Service Capacity also included time limitations:

> Concerning reservations please be advised that the duration of any such reservation ***shall not exceed two years plus two six-month extensions, each for good cause shown and approved by the department if water service is available.*** . . .

(Emphasis added).

51. The Reservation of Available Service Capacity included specific understandings and acknowledgments by the Developers, which reiterated the three-year time limit:

> The Applicant hereby requests a reservation of service capacity at the stated location. The Applicant is not able to accept water service at this time.
>
> The Applicant understands and agrees that the reservation ***will expire two years from the Date of Reservation, unless the Board reviews and grants a request for a six-month extension.*** The Applicant agrees to submit a letter to the Board by registered mail requesting any time extension and showing good cause for the time extension 45 days before the date of expiration of the initial two-year term. ***The Board may grant two six-month extensions for good cause.***
>
> If, after the expiration of the reservation, including any extension, the Applicant is unable to accept water service, the fee paid shall be forfeited by the Applicant and retained by the Board, and shall not constitute a credit toward any future water system development fee.

The Applicant understands and agrees that acceptance of water service will mean that;

1. All water related improvements are completed, inspected and accepted.

2. All improvement warranties, easement documents and other required documents are submitted arid approved.

3. As-Built drawings are submitted to the department.

(Emphasis added).

52. Notwithstanding the maximum three-year time limitations set forth above, the Developers have requested, and received from DWS, over *thirteen* years of extensions, as further alleged below.

C. The Developers Failed to Meet DWS Requirements During the Three-Year Time Period for Eight (8) Water Meters

53. The first DWS approval for water meter reservations was made in 2004 for a total of eight meters with DWS Reservation Nos: 04-073a, 04-073b, 04-073c, 04-073d, 04-073e, 04-073f, 04-073g, and 04-073h.

54. The Developers' reservation for eight water meters was formally accepted by DWS on October 18, 2004.

55. The two-year expiration for these eight meters occurred on October 18, 2006.

56. Thereafter, DWS–after an apparent sufficient showing of "good cause"–granted two six-month extensions on the following dates: (a) October 4, 2006 (six-month extension to April 18, 2007); and (b) April 24, 2007 (six-month extension to October 18, 2007).

57. The Developers reached the end of their total of three years of extensions for the 2004 reservation for eight water meters on ***October 18, 2007.***

D. The Developers Failed to Meet DWS Requirements During the Three-Year Limitation for Three (3) Additional Water Meters

58. The second DWS approval for water meter reservations was made in 2005 for an additional three meters with DWS Reservation Nos: 05-494, 05-495, and 05-496.

59. The Developers' reservation for three additional water meters was formally accepted by DWS on September 9, 2005.

60. The two-year expiration for these three meters occurred on September 2, 2007.

61. Thereafter, DWS–after an apparent sufficient showing of "good cause"–granted the two permitted six-month extensions on the following dates: (a) on October 24, 2007 (six-month extension to March 2, 2008); and (b) on May 8, 2008 (six-month extension to September 2, 2008).

62. The Developers reached the end of their total of three years of extensions for the 2005 reservation of an additional three water meters on ***September 2, 2008***.

E. The Repeated and Continuing Illegal Extensions of Reservations by DWS

63. Notwithstanding the conclusion of the two-year grace period, plus the two purportedly "good cause" six-month extensions, DWS thereafter has, in direct contravention with the law, continued issuing repeated extensions to the Developers for both the 2004 and 2005 reservations, as set forth in the following allegations.

64. On November 11, 2007, DWS granted an "additional extension" to February 18, 2009.

65. On February 3, 2009, DWS granted an "additional extension" to March 31, 2010.

66. On March 29, 2010, DWS granted a "final extension" to December 31, 2010.

67. On November 24, 2010, DWS granted another "final extension" to December 31, 2011.

68. On January 1, 2012, DWS granted another "final extension" to December 31, 2012.

69. On November 26, 2012, DWS granted another "final extension" to December 31, 2013.

70. On December 5, 2013, DWS granted another "final extension" to December 31, 2014.

71. When the Developers requested an extension beyond December 31, 2014, an internal DWS memo was sent to the Director on December 18, 2014, wherein a DWS employee recommended the extension "[e]ven though the applicant ***exhausted all potential time extensions***". (Emphasis added).

72. On December 19, 2014, DWS granted another "final extension" to December 31, 2015.

73. In or about December 2015, DWS granted another "final extension" to December 31, 2016.

74. Thereafter, neither Fong nor any of the Developers requested an extension of time before December 31, 2016.

75. Approximately six months after the expiration of the last "final extension", which expired on December 31, 2016, Fong, by letter to DWS dated June 13, 2017, requested yet another time extension to December 31, 2018.

76. By letter to Fong dated September 18, 2017, the Director explained in pertinent part, as follows:

> Please be aware that according to department records, the water meter reservations have ***expired on December 31, 2016, and is therefore no longer a valid reservation***. Further, the initial date of Reservations 04-073a through 04-073h was October 18, 2004, and ***the two maximum allowable 6-month extensions, as outlined in the Maui County Code, were already issued***. Similarly, the initial date of Reservations 05-494 through 05-496 was September 2, 2005, and the ***two maximum allowable 6-month extensions, as outlined in the Maui County Code, were already issued.***

(Emphasis added).

77. Notwithstanding the foregoing, determination, the Director purported to have the power to resurrect the "no longer valid" reservations and to grant the Developers yet another "final" two-year extension to "December 31, 2018".

III. DWS' ILLEGAL GRANT OF TWELFTH WATER METER FOR "ORIGINAL PARCEL 94"

78. In addition to granting the Developers over thirteen years of extensions with respect to eleven water meter reservations, DWS granted an additional twelfth water meter to the Developers for the Subdivision.

79. By letter to DWS, dated June 10, 1998, Fong requested three meters for a "just completed subdivision" he referred to as the Keokea-Waiohuli Subdivision, which was the subdivision of Lot 34, originally identified as TMK Number: (2) 2-2-04:16.

80. Thereafter, Fong paid for, and received from DWS, two meters for two of the lots, (1) Lot 34-A-1 assigned TMK: (2) 2-2-04:16 (2.47 acres); and Lot 34-C-1 assigned TMK: (2) 2-2-04:95 (4.082 acres). These two lots were then sold to third parties.

81. The remaining lot was 34-B-1, which consisted of 13.56 acres, and originally bore TMK: (2) 2-2-04:***94*** (hereinafter "**Original Parcel 94**").

82. Original Parcel 94 was subsequently further subdivided into five of the lots that are part of the Subdivision, identified as Lots 34-B-1-A, 34-B-1-B, 34-B-1-C, and 34-B-1-D.

83. By letter to DWS, dated February 7, 2005, Fong argued the Developers were entitled to a meter for Original Parcel 94:

84. Upon information and belief, DWS notified the Developers that their request was denied.

85. Upon information and belief, the Developers failed to timely appeal DWS' denial of the request for a water meter for Original Parcel 94, and therefore DWS' denial became final.

86. Upon information and belief, the Developers, on or about August 2, 2005, requested that Original Parcel 94 be placed on the Upcountry Priority List for one additional meter, in addition to the other eleven meters that were already requested for the Subdivision.

87. By letter to DWS, dated December 15, 2009, Fong renewed his argument that the Developers were entitled to an additional water meter for Original Parcel 94.

88. Upon information and belief, DWS wrote Fong a letter, dated August 19, 2010, wherein DWS denied Fong's request, explaining:

> The "Water Meter Issuance Rule for the Upcountry Water System", enacted in October 2002, allowed for properties such as yours to obtain water service up until December of that year. One of the purposes of this new rule was to bring forth any properties and owners that may have had previous reliance in obtaining water service and to resolve their claims. ***The new rule provided a "last chance" to make application for a meter without being subject to the priority list. Unfortunately, we have no documentation of such an application, or fee receipt for the third meter prior to December 2002.*** As a result, we regret to inform you that your request for a meter has been denied. ***The parcel remains on the Upcountry priority list based on the request received August 2, 2005.*** Your request for water service will be considered when meters become available for the Upcountry area, and the approval of your request will be subject to the Department's rules and regulations in effect at that time.

89. Upon information and belief, Fong did not timely appeal DWS' <u>second</u> denial of this water meter request, made August 19, 2010, and DWS' <u>second</u> denial became final.

90. Notwithstanding the multiple failures to appeal DWS' prior decisions, by letter dated November 21, 2012, Fong again renewed his argument that the Developers were entitled to a water meter for Original Parcel 94. Fong addressed the letter to the Director; however, he additionally sent a separate copy to then DWS Deputy Director, Paul Meyer.

91. By letter dated January 7, 2013, then Deputy Director Paul Meyer, granted Fong's request for the additional water meter for Original Parcel 94, based solely on the following analysis: "circumstances . . . allow us to distinguish your case."

92. By letter dated April 25, 2013, Fong asked DSA for the right to amend the subdivision plat to add a thirteenth lot based on the additional water meter. Fong explained his request was being made because "[f]inally a meter was installed [for Original Parcel 94] a few months ago". He further explained that "we now have a total of 13 water meters for this proposed subdivision instead of 12". Fong then requested subdivision of a 4.38 acre lot into two lots and asserted that "[w]e do not believe that this change will have any affect on the other agencies and departments that have already reviewed and approved this family subdivision".

93. On May 8, 2013, DSA informed Fong that a thirteenth lot for the Subdivision would be permitted "[d]ue to the unusual situation where it appears the addition will be limited to a change from a single service water lateral to a double . . . ."

IV. THE DEVELOPERS' MISLEADING PRESENTATION OF A "FAMILY" SUBDIVISION TO THE COUNTY

A. The Family Subdivision Exception

94. In 2009, the Developers submitted to the County Public Works Department an application for the subdivision that would eventually become the Subdivision.

95. With limited exception, before the County will grant final subdivision approval, a developer must incur the significant cost of completing improvements to the property, such as, depending on the development involved the following types of improvements: potable water system infrastructure, road creation or widening, sidewalks, gutters, retention basins, and traffic signals.

96. The Developers were successful in obtaining final subdivision approval without incurring these costs by representing to the County that their proposed subdivision was excepted from the standard code requirements because it was a "family" subdivision as provided by MCC § 18.20.280.

97. The purpose of MCC § 18.20.280 "is to authorize owners of property to transfer interests in their property to family members without immediate compliance with the requirements for subdivision improvements."

98. MCC § 18.20.280(B), entitled "Family Subdivisions", includes the following limitations on the use of the provision:

> 3. The purpose of the transfer shall not be to provide housing or other uses.
>
> 4. No building permit or additional water service shall be requested by the applicants, transferees, subsequent grantees or vendees, assignees, lienors, or other persons claiming interest in the subject property without full compliance with all subdivision requirements then in effect and all rules of the reviewing agencies; compliance with the subdivision requirements and the rules of the reviewing agencies shall mean compliance relative to the parcel of land prior to subdivision and not to the parcels created pursuant to the deferral granted by this section. The director shall not issue a building permit, and the director of water supply shall not approve of water service, for the subject property or any subdivided parcel thereof unless the requirements set forth in this chapter are fully completed.

99. On July 27, 2009, County Development Services Administration ("**DSA**") granted preliminary subdivision approval for Subdivision File No. 2.3099, a thirteen-lot subdivision relating to the consolidation and resubdivision of TMKs: (2) 2-2-004:014, 094, and 096, owned by the Developers.

100. One of the enumerated conditions in the preliminary approval letter was compliance with DWS rules and conditions requiring water system improvements before final approval of a subdivision.

101. However, the Developers requested deferral from the water system improvement requirements under MCC § 14.05.180. The purpose of MCC § 14.05.180, entitled "Deferral", "is to authorize owners of real property to transfer interest in their property to family members without immediate compliance with the requirements pertaining to subdivisions."

102. MCC § 14.05.180(B), includes the following specific limitations on use of the deferral of water improvements:

> 2. The purpose of the transfer shall not be to provide housing or other uses which would necessitate additional water service.
>
> 3. The department shall not approve any application for a building permit or additional water service unless the requirements for the subdivision water system are complied with. The standards and requirements for the subdivision water system shall be the standards and requirements of the department in effect at the time of the department's approval of said application for building permit or additional water service. The subdivision water system shall include all deferred improvements and is not limited to improvements needed for an individual subdivided parcel created pursuant to the deferral granted by this section.

103. On November 27, 2013, DSA requested comments from various government agencies, including DWS, regarding the proposed subdivision.

104. On December 10, 2013, DWS responded that it did not recommend approval of the subdivision and provided an explanation, including the following pertinent parts from paragraphs numbered "2" and "3":

> 2. The new water meters required for the subdivision are not available at this time. Approval of water new meters for the subject subdivision is based upon placement on the priority list and [MCC] Chapter 14.13[,] the Water Meter Issuance Provisions for the Upcountry Water System . . . .
>
> 3. We are deferring action on the subject subdivision based on the Water Availability Rule ([MCC] Chapter 14.12). The department's existing source capacity cannot provide a long-term supply of water [] for the subdivision.

105. Upon information and belief, DWS later retracted its "no recommendation" comments to DSA and recommended approval of the subdivision based on the representation by the Developers that the lots were not intended for development and sale to third parties.

106. The Developers formally represented their adherence to the family subdivision code requirements through an "Agreement Authorizing Subdivision Water System Deferral of Requirements, dated July 2, 2015.

107. Through a final plat signed on November 30, 2015, the County Director of Public Works granted final subdivision approval to the Developers for the Subdivision, which was designated with Subdivision File Number: 2.3099, relating to TMKs: (2) 2-2-04: 014, 094, and 096.

108. The final plat specifically provides that the subdivision "is based upon Section 18.20.280 (Family Subdivisions) of the Maui County Code."

B. The Developers' Consistent Commercial Plans for the Subdivision

109. Although the Developers were successful in obtaining final subdivision approval based on representations to the County that their subdivision met the family subdivision exceptions, thereby permitting them to defer costly improvements, their activities –both before and during the time they were availing themselves of the family subdivision exceptions – were patently commercial in nature, and included sophisticated business entity creation, as well as agreements with numerous third parties involved in commercial real estate ventures.

110. As previously alleged above, in 1993 DWS issued the Moratorium, and in 1994 initiated the Upcountry Priority List. The Developer's commercial-oriented activities began soon thereafter, been continuous thereafter, as shown through the following allegations.

C. The 1994 Amendments to Fong Construction to Assure Business Participation and Pecuniary Gain by all of the Developers

111. As confirmed by the DCCA, on December 31, 1994, each of the Developers was appointed to be a director of Defendant Fong Construction. Additionally, family members were appointed as officers of the corporation, with Fong appointed to be president, Henry Fong appointed to be vice president, Francene Kihara appointed to be secretary, and Aileen Fong appointed to be treasurer.

112. Upon information and belief, the changes to the board of directors and officers were made for commercial purposes in furtherance of pecuniary gain from the lots now identified as the Subdivision.

D. The Developers' 1995 Initial Proposal for Thirty-Two Lots for Commercial Purposes

113. By letter dated May 9, 1995, Fong asked DWS to be placed on the Priority List for the benefit of the properties that would subsequently become the Subdivision. Fong informed DWS that "[w]e would like to turn in preliminary subdivision drawings this year . . . ." In this letter, Fong contemplated developing as many as thirty-two lots, and needing up to thirty meters from DWS in addition to two previously obtained meters, depending on the Developers' ability to rezone portions of the land to the County rural zoning district.

E. Increase in Common Stock of Fong Construction

114. On December 31, 2000, Defendant Fong Construction reported to the DCCA that it had established 200,000 common shares of stock with 121,000 paid shares of stock.

115. Upon information and belief, the revision of the stock quantities related to commercial capital investments made for commercial purposes in furtherance of pecuniary gain from the lots now identified as the Subdivision.

F. The 2004 Creation of Defendant Fong Real Estate for Business Purposes and Pecuniary Gain Related to the Subdivision

116. On June 30, 2004, Aileen L. Fong executed a certificate of limited partnership for Fong Real Estate and filed it with the DCCA. The certificate identifies Aileen Fong Ltd., a Hawaii corporation, as the general partner. The DCCA identifies Aileen L. Fong as the president of Aileen Fong Ltd., which was incorporated on July 1, 2005. The limited partner is identified as Aileen L. Fong, Trustee of the Aileen L. Fong Trust, under the Declaration of Trust, dated October 28, 1992, as amended and restated.

117. Upon information and belief, Defendant Fong Real Estate has a pecuniary business interest in the Subdivision and was established for such purpose.

G. The 2007 Creation of Defendant Fong Development Partners for Business Purposes and Pecuniary Gain Related to the Subdivision

118. On August 28, 2007, Defendant Fong Development Partners filed its articles of organization with the DCCA, listing three organizers: (a) Fong; (b) Nathan K.G. Kwee; and, (c) Jennifer K. Bagoyo, as trustee of the Vince G. Bagoyo revocable living trust.

119. Nathan Kwee is a Hawai`i licensed real estate agent and the principal broker of Realty 1st Inc., which operates real estate sales from Wailuku, Maui, Hawai`i.

120. Subsequent to the creation of Fong Development Partners, Nathan Kwee publicly marketed lots for sale within Subdivision through the Multiple Listing Service ("**MLS**") while the Developers represented to the County that their actions and intent were consistent with the family subdivision requirements set forth in the Maui County Code.

121. For example, upon information and belief, Lot 36-B of the Subdivision was listed for $650,000 through MLS listing number 374484, and Lot 34-B-1-F was listed for $595,000 through MLS listing number 363032.

122. The remaining organizer of Defendant Fong Development Partners was Jennifer K. Bagoyo in her capacity as trustee of the Vince G. Bagoyo revocable living trust. Vince Bagoyo is a consultant to developers in the County of Maui, including past and currently acting as land and planning consultant to the Developers with respect to the Subdivision. Vince Bagoyo currently conducts business under the business name V. Bagoyo Development Consulting Group, and, upon information and belief, did so in 2007 when his trust was named in the

organizing documents for Defendant Fong Development Partners. Prior to his consulting firm, Vince Bagoyo had a long history as a county employee dating back to 1974, including being the former director of DWS from 1984 to 1990. Mr. Bagoyo was also elected to, and served on, the County Council from 1990 through 1993. Mr. Bagoyo served as vice president of Castle & Cooke on Lanai from 1993 to 2003.

123. Upon information and belief, Defendant Fong Real Partners has a pecuniary business interest in the Subdivision and was established for such purpose.

H. The 2014 Ownership Changes to Fong Development Partners for Business Purposes and Pecuniary Gain Related to the Subdivision

124. Upon information and belief, Fong Development Partners' current members are Fong, S & F Land Co., Inc., and Gerardo V. Calvillo, Jr.

125. Upon information and belief, Gerardo Calvillo became a member of Defendant Fong Development Partners on July 1, 2014. Upon information and belief, Mr. Calvillo is a licensed engineer and the vice president and director of Wood Rodgers, Inc., a large, California-based development consulting company that offers a full range of consulting services including civil engineering, land planning, surveying, landscape architecture, geotechnical, environmental, water resources, transportation and structural engineering.

126. Upon information and belief, S & F Land Co., Inc. became a member of Fong Development Partners on July 1, 2016, is a land development company, and its president is Earl Stoner, Jr.

127. Upon information and belief, Defendant Fong Real Estate continued to have a pecuniary business interest in the Subdivision after the changes in the members and directors.

I. The Developer's Negotiations and Agreements with Prospective Purchasers

128. Upon information and belief, as early as 2013, while they were still pursuing subdivision approval as a "family subdivision", Fong and/or other persons among the Developers entered into letters of intent with third-parties who were not family members of the Developers to sell certain lots within the proposed subdivision.

129. Upon information and belief, as early as 2013, Fong entered into a contract to build a house on one of the lots within the proposed subdivision. The contract was with a third-party who was not a family member of the Developers.

130. Upon information and belief, as early as 2014, Fong and/or other persons among the Developers entered into binding land contracts with third-parties who were not family members of the Developers to sell certain lots within the proposed subdivision.

131. Upon information and belief, the Developers and Vince Bagoyo agreed that all or a portion of his compensation would be through conveyance of one of the lots within the Subdivision, once the lots could be conveyed to third parties.

J. The $150,000 Loan by the Bogoyo Defendants and the Contract to Purchase Lot 34-B-1-A

132. As previously alleged herein, in 2016, Fong and Aileen Fong entered into the Bagoyo Mortgage with the Bagoyo Defendants.

133. The Bagoyo Mortgage provides that Fong and Aileen Fong signed a promissory note, and that the loan amount, plus interest, would be applied to the purchase price of Lot 34-B-1-A of the Subdivision, which is owned by Aileen Fong.

V. THE DEVELOPERS' VIOLATION OF ENVIRONMENTAL AND ARCHAEOLOGICAL LAWS DURING SUBDIVISION IMPROVEMENTS

A. Violation of County Grading Laws

134. By letter dated December 5, 2013, the County Development Services Administration ("**DSA**") approved the construction plans for the Subdivision.

135. DSA's approval was conditional: "The approval of construction plans is valid for a period of one year unless construction has commenced and is continuous."

136. Thereafter, Fong Construction initiated construction work but periodically ceased construction work for months at a time.

137. By letter dated March 2, 2018, Plaintiffs wrote DSA requesting verification of the status and legality of the Developers' construction activities.

138. By letter dated March 13, 2018, DSA ordered Fong to stop work immediately. The letter noted that a County highway permit issued in 2016 and a grading permit issued in

2015 had both expired in 2017. DSA required resubmittal and approval of the subdivision construction plans prior to issuance of new permits.

139. DSA also identified unpermitted work conducted by Fong: "Based upon a recent site inspection, it appears that work occurred beyond the previous grading limits." DSA requested that all activities be made part of the new construction plans.

B. The Developers' Flagrant Violation of State and Federal Clean Water Laws

140. The grading permit previously requested by Developers and approved by DSA in 2015 called for massive grading and grubbing of more than five acres of land, including the excavation of 23,825 cubic yards.

141. The Property is on the slopes of Haleakala and has two major gulches located within it that flow through numerous downstream properties. The gulches can run like rivers during high rain events. The owners and developers of the Property have been engaged in extensive grading and grubbing for more than two years. When there have been significant rain events during this prolonged grading and grubbing work, massive amounts of mud and debris have exited the Property. The sediment first encounters a public road that provides access to Plaintiffs' property, then a property owned by the State of Hawai'i. Thereafter, it flows through numerous privately-owned lands downstream of the Property.

142. The developers have long been aware that Federal and State soil specialists were concerned that their Property had a risk of harming downstream properties. In 2008, during the subdivision application process, the Natural Resources Conservation Service wrote the Chair of the Olinda-Kula Soil and Water Conservation District ("**SWCD**") and made a number of recommendations, including the following: "We highly recommend this project should be constructed in phases to reduce and decrease the impact of runoff after construction. As soon grading and construction of each single phase is complete, the area should be stabilized and vegetated."

143. In 2010, the SWCD Chair wrote DSA and again warned of construction activities due to the significant drainages on the Property: "The area has two major drainage gulches through the property. These gulches should not be graded or grubbed during construction. The

drainages not only play an important part within the parcel, but for parcels above and below the subject parcel as well."

144. Grading and grubbing activities involving more than one acre of land require a National Pollutant Discharge Elimination System ("**NPDES**") permit from the State of Hawai`i Department of Health ("**DOH**").

145. By letter to DOH, dated April 19, 2018, Plaintiffs requested DOH investigate the grading activities that have been occurring within the Subdivision, and enforce, as necessary.

146. By letter from DOH, dated April 25, 2018, DOH confirmed that the Developers had failed to obtain a NPDES permit.

C. The Developers' Misleading Representations to State Historic Preservation Division

147. The timeline of events shows that the Developers' made intentional misrepresentations to the State Historic Preservation Division ("**SHPD**"), which thereby had the consequence of causing the DSA to omit necessary conditions on the project at the time of final subdivision approval that were necessary to protect a known archaeologically sensitive area.

148. As early as 2009, the Developers had already engaged consultants and engineers to prepare all necessary reports for the commercial development of the Subdivision, and was providing the same to DSA.

149. In 2009, the Developers submitted to DSA a soils investigation report, dated July 23, 2009, prepared by Island Geotechnical Engineering, Inc.

150. In 2009, the Developers submitted to DSA a drainage report, dated September 30, 2010, prepared by Silversword Engineering.

151. By letter dated July 13, 2009, the State Historic Preservation Division ("**SHPD**") wrote DSA responding to a County request for agency comments with respect to the Developers' proposed subdivision. SHPD explained that the archaeological inventory survey ("**AIS**") submitted by the Developers could not be accepted by SHPD and required revisions. Therefore, SHPD could not recommend approval of the Subdivision.

152. Thereafter, the Developers' archaeologist submitted additional reports to SHPD.

153. By letter dated December 5, 2013, DSA approved the Developers' construction plans for the commercial development of the Subdivision.

154. By letter dated December 10, 2013, SHPD again wrote DSA regarding the Subdivision. SHPD explained that an AIS had subsequently been reviewed and accepted by SHPD. SHPD further explained that the AIS documented nine new sites, most of which related to pre-contact habitations. SHPD explained that, as a result, archaeological monitoring should be required because "the likelihood of subsurface historic properties is high." SHPD then went on to specifically require an archaeological monitoring plan "prior to any ground-altering activities on parcels in this subdivision."

155. By letter dated June 5, 2014, SHPD wrote DSA and revised its December 2013 letter. As SHPD explained therein, the Developers, notwithstanding the fact they had been making preparations since 2009 to break ground within the Subdivision and conduct extensive grading, and notwithstanding the fact that had already obtained approval of their construction plans for the Subdivision, represented to SHPD "that no construction is planned at this time" and that subdivision approval would only be a "paper action".

156. Based specifically on the Developers' representations, SHPD concluded in its June 5, 2014 letter to DSA that at that time, "no historic properties will be affected by the proposed subdivision."

157. As a result of SHPD's finding, archaeological monitoring was not made a condition of the final subdivision approval.

158. However, SHPD's June 5, 2014, letter expressly informed the Developers and DSA that when construction commenced, archaeological monitoring would be recommended during "any ground-altering activities" with respect to "***all parcels*** in this new subdivision at ***any time any ground-altering activities occur***". (Emphasis added).

159. Less than six months later, on November 18, 2015, the Developers, through Fong, applied for a grading permit for over five acres of land within the Subdivision, involving excavation of ***23,825 cubic yards***.

160. On November 23, 2015, the County Department of Public Works granted the grading permit without further consultation with SHPD.

161. Thereafter, the Developers commenced grading activities, which have continued for years.

162. Upon information and belief, the Developers never had an archaeologist present to monitor any of the grading activities.

163. Upon information and belief, the Developers never completed a data recovery plan that was required by law before commencing grading activities.

164. Upon information and belief, the Developers' grading activities have harmed or destroyed cultural and historic sites.

CLAIMS FOR RELIEF

GENERAL ALLEGATIONS RELATING TO ALL CLAIMS FOR DECLARATORY RELIEF

165. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

166. Declaratory relief under HRS Chapter 632 shall be granted where there is an actual controversy or a challenge or denial of a legal right in which a party has a concrete interest. HRS § 632-1. Declaratory relief is appropriate where the court is satisfied that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. *Id.*

167. In this case, there is an actual controversy in regard to the construction and legal effect of certain County laws and rules.

168. Granting declaratory relief, as requested in the counts below, will terminate the uncertainty and controversy giving rise to this proceeding.

169. Plaintiffs have a concrete interest in this Court granting the requests for declaratory judgment set forth in the Counts below, including directly and proximately suffering harm as a result of Defendants' illegal actions.

170. With respect to all requests for declaratory relief set forth in this Complaint, any request made against a County employee or agency shall be deemed to be a request also made against the County generally.

COUNT I—THE 1994 UPCOUNTRY PRIORITY LIST IS INVALID, NULL AND VOID

171. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

172. The Hawai`i Administrative Procedures Act ("**HAPA**") in HRS Chapter 91 defines a rule as an "agency statement of general or particular applicability and future effect that

implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. . . ." HRS § 91-1 (emphasis added).

173. HAPA specifically mandates each government agency to "[a]dopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency." HRS § 91-2.

174. Prior to enactment of an agency rule, HAPA establishes specific public hearing requirements of an agency to assure public participation in the rulemaking process. *See* HRS § 91-3, *et seq.*

175. HAPA provides that "[n]o agency rule, order, or opinion shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been published or made available for public inspection as herein required . . . ." HRS § 91-2.

176. In 1994, DWS began maintaining a list referred to as the "**Upcountry Priority List**" or "**List**".

177. DWS did not prepare any rules regarding the Upcountry List, including provisions relating to such issues as: what properties or persons were entitled to be on the list; what requirements must an applicant fulfill to receive a water meter; how long could an applicant remain on the list without fulfilling the requirements.

178. The Upcountry List constitutes a rule within the meaning of HAPA.

179. DWS failed to conduct the necessary rulemaking process and hearings prior to creating the Upcountry List in 1994.

180. Plaintiffs are entitled to a declaratory ruling that the Upcountry List created in 1994, and thereafter maintained up through the enactment of the BWS Rule in 2002, is invalid, and therefore null and void. Therefore, the Developers have no entitlements to water meters or water reservations as a result of the Upcountry Priority List created by DWS in 1994.

COUNT II—THE BWS RULE IS INVALID, NULL AND VOID

181. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

182. In 2002, BWS proposed the *Water Meter Issuance Rule for the Upcountry Water System* (the "**BWS Rule**").

183. The authority of BWS to adopt rules in 2002 was expressly limited by the Maui County Charter, as set forth in the 1999 edition of the Maui County Charter of 1983, as amended (the "**1999 Charter**"). 1999 Charter § 8-11.4(3).

184. Section 8-11.8 of the 1999 Charter provided that any rule adopted by BWS pursuant to § 8-11.4(3) "***shall*** require ***action*** by ***both*** the mayor and council." (Emphasis added).

185. On July 9, 2002, BWS adopted the BWS Rule and thereafter transmitted it to the Mayor.

186. The Mayor failed to approve or disapprove the BWS Rule.

187. Thereafter, the BWS Rule was transmitted to the Council.

188. On September 24, 2002, the Council adopted Resolution No. 02-131. The Resolution provided that BWS "ha[d] requested approval of a proposed rule entitled *Water Meter Issuance rule for Upcountry Water System* . . . ."

189. Resolution No. 02-131 further provided that the Council had been transmitted to the Council "as a result of ***inaction*** by the Mayor". (Emphasis added).

190. The Council resolved to "approve" the rule notwithstanding the Mayor's inaction.

191. Pursuant to the express terms of Section 8-11.8 of the 1999 Charter, approval of the BWS Rule required "action" by both the Mayor and the Council.

192. As a matter of law, the *inaction* by the Mayor cannot be deemed an "action to approve" an administrative agency rule.

193. Moreover, Resolution No. 02-131 does not act as an independent form of legislation: "Every legislative act of the [C]ouncil shall be by ***ordinance***", unless otherwise expressly provided in the Charter." 1999 Charter § 4-1 (emphasis added); *ibid.* Charter (2017) § 4-1 (same).

194. The validity of the 2002 BWS Rule was brought into question by the Council itself when it adopted Ordinance No. 3225 in 2004: "Under the Revised Charter of the County of

Maui (1983), as amended [*i.e.,* the 1999 Charter], the decision to extend the BWS Rule should be accomplished by ***ordinance***." Ord. 3225 § 1 (emphasis added).

195. Section 2 of Ordinance 3225 provided that the BWS Rule would be extended beyond its sunset provision, but only "***to the extent the [BWS R]ule conforms to the [1999] Charter.***" (Emphasis added).

196. Plaintiffs are entitled to a declaratory ruling that the BWS Rule, codified at Title 16, Chapter 106 of the Maui County Administrative Rules, ("MCAR") § 16-106-02, did not conform to the 1999 Charter and is invalid, null and void, notwithstanding the Council's action through Resolution No. 02-131 and Ordinance 3225. Therefore, the Developers have no entitlements to water meters or water reservations as a result of the BWS Rule, including any provisions therein purporting to cure the invalidity of the 1994 Upcountry Priority List, as it existed prior to 2002.

COUNT III—CHAPTER 14.07 OF THE WATER CODE ESTABLISHES ABSOLUTE TIME LIMITS FOR RESERVATIONS AND EXTENSIONS

197. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

198. In 2011, the Council, through Ordinance 3851, amended MCC Chapter § 14.07 to include a section 19.07.090 entitled *Payment of Water System Development Fee.*

199. Where the applicant is ready for water service, MCC § 19.07.090 authorizes the DWS Director to approve the application, "provided water source capacity is available at that time".

200. Where the applicant is *not* ready for water service, MCC § 19.070.090 permits the DWS Director to reserve an allocation of water service source capacity available at that time, subject to specific time limits: "***The duration of any such reservation shall not exceed two years plus two six-month extensions, each for good cause shown and approved by the director, provided water service source capacity is available.***" MCC § 19.070.090(B) (emphasis added) (the "**Three-Year Time Limit**").

201. MCC § 14.07.090 further provides that if an applicant, "within two years, or longer with extension(s)" is unable to accept installation of water service, the application and the

reservation "***shall** expire*" and the deposit paid by the applicant "***shall** be forfeited.*" MCC § 14.07.090 (emphasis added).

202. Where a statute uses the word "shall," the provision generally will be construed as mandatory. *See e.g., Malahoff v. Saito*, 111 Hawai'i 168, 191, 140 P.3d 401, 424 (2006). Where the language of the statute is plain and unambiguous, the court's only duty is to give effect to the statute's plain and obvious meaning. *See e.g., Mathewson v. Aloha Airlines, Inc.*, 82 Hawai'i 57, 71, 919 P.2d 969, 983 (1996) (citations omitted). Departure from the plain and unambiguous language of a statute cannot be justified without a clear showing that the legislature intended some other meaning would be given the language or that a literal interpretation would produce absurd or unjust results that are clearly inconsistent with the purposes and policies of the statute. *Id.* (citations omitted).

203. Plaintiffs are entitled to a declaratory ruling that the provisions set forth in MCC § 19.070.090, the Three-Year Time Limit, are mandatory and absolute, including the maximum of three years of extensions for reservations of an allocation of water service source capacity. To the extent the Developers had any entitlements as a result of being on the Upcountry Priority List, and/or the BWS Rule, such entitlements ended after two years, plus two six month extensions, if given for good cause shown.

COUNT IV—CHAPTER 14.13 OF THE WATER CODE DOES NOT AUTHORIZE THE DIRECTOR TO WAIVE OR MODIFY PROVISIONS IN OTHER CHAPTERS OF THE WATER CODE, INCLUDING CHAPTER 14.07

204. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

205. On July 8, 2009, the Council passed Ordinance 3667, which established Chapter 14.13 of the County Water Code, entitled the *Water Meter Issuance Provisions for the Upcountry Water System.*

206. MCC § 14.13.040(B), provides that "Premises on the priority list that are unable to fulfill departmental requirements for water service or who refuse water service shall be removed from the priority list."

207. MCC § 14.13.060(C) provides that "If an applicant from the priority list is unable to accept water service immediately, the department may issue a reservation for water service up

to the requested allocation available at the time the request is made, in accordance with terms and conditions set forth in [MCC] section 14.07.090 of this code."

208. MCC § 14.13.080 provides that the Director may, after meeting three factual findings, waive or modify the provisions of ***only*** MCC Chapter 14.13. *See* MCC § 14.13.080 ("The director may waive or modify the provisions of ***this chapter***...") (emphasis added).

209. If the Council had wanted to grant the Director the power to waive or modify the provisions of the Three-Year Time Limit (MCC § 14.07.090), it could have expressly done so when it passed the Three-Year Time Limit two years later in 2011 through Ordinance 3851. *See* Count III.

210. Plaintiffs are entitled to a declaratory ruling that MCC § 14.13.080 does not grant the Director the power to waive or modify the provisions of a different chapter of the County Water Code, including MCC Chapter 14.07, and including MCC § 14.07.090, the Three-Year Time Limit. Therefore, any purported extensions by the Director beyond the three-year absolute limitation set forth in MCC § 14.07.090 are invalid, null and void, including those extensions given to the Developers by the Director.

COUNT V—TO THE EXTENT CHAPTER 14.13 OF THE WATER CODE AUTHORIZES THE DIRECTOR TO WAIVE OR MODIFY ANY OF THE WATER CODE CHAPTERS, IT IS AN UNCONSTITUTIONAL DELEGATION OF POWER

211. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

212. At the time of the Council's passage of Ordinance 3667 in 2009 (and as it continues to be in the current Charter), the County Charter provided that the Council "shall be the legislative body of the [C]ounty." County Charter § 3-6 (2003 ed.). Moreover, the County Charter did not at that time, or now, grant any express rulemaking rights to either the BWS or the DWS.

213. It is a fundamental legal principle that unless expressly authorized by a state statute or by a charter, a municipal governing body may not delegate its legislative powers to an agency. *See, e.g., Andy's Ice Cream v. Salisbury,* 724 A.2d 717 (Md. App., 1999) ("Municipal corporations have only the powers conferred upon them by the Legislature, and these are to be strictly construed. To doubt such power in a given case is to deny its existence.") (internal quotes

omitted). The exercise of legislative discretion by a municipal corporation cannot be delegated to a municipal officer or agency. *See, e.g., Whitmire v. City of Eureka,* 105 Cal.Rptr. 185 (Cal. App. 1972) (quoting *Kugler v. Yocum,* 445 P.2d 303 (Cal. 1968) (explaining the purpose behind the nondelegation doctrine is that "truly fundamental issues" should be resolved by the legislative body, and that any grant of authority must be accompanied by "safeguards adequate to prevent its abuse"). Hawai`i has adopted the nondelegation doctrine. *See Kauai Elec. Division of Citizens Utilities Co., Application of,* 60 Haw. 166, 590 P.2d 524 (1978) (citing *State v. Willburn*, 49 Haw. 651, 426 P.2d 626 (1967)).

214. MCC § 14.13.080 (the "**Waiver Provision**") provides in its entirety as follows:

> The director may ***waive or modify the provisions of this Chapter*** when not contrary to the public's health, safety or welfare, and when the director finds:
>
> 1. Strict application of the provisions of this chapter would cause an absurd, unfair, or unreasonably harsh result;
> 2. The director finds the circumstance or condition is unique or exceptional, and the director would grant the same request if made by every similarly situated applicant; and
> 3. The resulting action of the director will be without detriment to existing users.

MCC § 14.13.080 (emphasis added).

215. Plaintiffs are entitled to a declaratory ruling that the Waiver Provision is an impermissible and unconstitutional delegation of the Council's power because it permits the Director to waive or modify the provisions set forth in Chapter 14.13 of the County Water Code, *i.e.,* to act as a legislator and repeal or amend Chapter 14.13, thereby exercising the Council's exclusive legislative discretion.

216. Plaintiffs are, in the alternative, entitled to a declaratory ruling that the Waiver Provision lacks adequate definitions, limits and safeguards to assure a proper and balanced exercise of discretion, and is therefore overbroad, vague and/or ambiguous, in the delegation of duties.

217. Plaintiffs are additionally entitled to a declaratory ruling that any actions taken by the Director or the Department in reliance on the Waiver Provision, including granting extensions of the Three-Year Time Limit to the Developers, are invalid, null and void.

<u>COUNT VI</u>—TO THE EXTENT THE WAIVER PROVISION (MCC § 14.13.080) IS A PERMISSIBLE DELEGATION OF POWER, IT CANNOT BE APPLIED UNTIL THE DEPARTMENT CONDUCTS RULEMAKING PURSUANT TO HAPA

218. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

219. As set forth more fully above in Count I, HAPA specifically mandates each government agency to "[a]dopt rules of practice, setting forth the nature and requirements of all formal and informal procedures available, and including a description of all forms and instructions used by the agency." HRS § 91-2.

220. In the same year as the Council's passage of the Waiver Provision through Ordinance 3667 in 2009, the Council amended the County Water Code to expressly identify the Director's obligation to conduct rulemaking pursuant to HAPA in order to properly implement the County Water Code: "The [D]irector may promulgate administrative rules pursuant to [HAPA] ***to implement*** the provisions of [the County Water Code]. MCC § 14.01.030 (as amended by Ordinance No. 3670, § 1 2009; emphasis added).

221. The decision-making criteria set forth in the Waiver Provision (*see* Count V) are not self-executing because they lack adequate definitions, limits and safeguards to assure a proper and balanced exercise of discretion.

222. The Director, including the Department and BWS to the extent relevant, failed to establish rules pursuant to HAPA to implement the Waiver Provision.

223. Plaintiffs are entitled to a declaratory ruling that, to the extent the Waiver Provision (MCC § 14.13.080) constitutes a proper delegation of power, the Waiver Provision is nonetheless not self-executing, and requires implementing agency rules established pursuant to HAPA before any part of MCC Chapter 14.13 may be waived or modified by the Director.

224. Plaintiffs are entitled to a declaratory ruling that until implementing rules have been properly promulgated pursuant to HAPA, any action by the Director purporting to exercise discretion pursuant to the Waiver Provision, including granting extensions of the Three-Year Time Limit to the Developers, is invalid, null and void.

COUNT VII—THE DIRECTOR'S EXERCISE OF THE WAIVER PROVISION (MCC § 14.13.080) WAS ARBITRARY, CAPRICIOUS, AND CHARACTERIZED BY ABUSE OF DISCRETION AND CLEARLY UNWARRANTED EXERCISE OF DISCRETION

225. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

226. No rule requires the Director to notify the public or adjacent owners of a Director's decision to exercise discretion under the Waiver Provision, including decisions to grant extensions of time beyond the Three-Year Time Limit.

227. Neither the Director, nor the Department, nor Fong, nor any of the Developers ever informed Plaintiffs that time extensions were being granted to the Developers with respect to their water reservations.

228. On November 28, 2017, Plaintiffs conducted a document review at DWS pursuant to the Hawai`i Uniform Information Practices Act. As a result of that document review, Plaintiffs learned for the first time that the Director had been granting extensions to the Three-Year Time Limit, including that the Director had granted another extension of time through a letter to Fong, dated September 18, 2017.

229. Plaintiffs have no obligation to seek to exhaust administrative relief where, such as here, none exists, or where an attempt to seek administrative relief would be futile. *Kellberg v. Yuen,* 131 Hawai'i 513, 319 P.3d 432 at 452 (Hawaii, 2014) (citing and quoting *Pele Defense Fund v. Puna Geothermal Venture,* 9 Haw.App. 143, 151, 827 P.2d 1149, 1154 (1992) ("Where the administrative machinery is not provided, the power of the court is not ousted by a claim of failure to exhaust administrative remedies.")). "The purpose of the exhaustion requirement is to redirect grievances for their proper resolution, not to preclude them altogether." *Id.*

230. To the extent the Waiver Provision (MCC § 14.13.080) is valid, and the Director is entitled to exercise his authority to exercise discretion without establishing implementing rules pursuant to HAPA, Plaintiffs are entitled to a declaratory ruling that the Director's decisions to grant the Developers repeated requests for extensions of time beyond the Three-Year Time Limit was arbitrary and capricious, and characterized by an abuse of discretion and clearly unwarranted exercise of discretion.

231. Plaintiffs are entitled to a declaratory ruling any grant of extension made by the Director or the Department beyond the Three-Year Time Limit was, or is, invalid, null and void.

<u>COUNT VIII</u>—THE DIRECTOR LACKED THE AUTHORITY TO REINSTATE A WATER RESERVATION THAT HAD EXPIRED

232. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

233. In his September 18, 2017 letter to Fong, the Director explained that the Developers' water meter reservations "expired on December 31, 2016".

234. Notwithstanding the expiration of the reservations, the Director thereafter went on resurrect the expired water meter reservations by granting an additional two-year "extension of time that was retroactive December 31, 2016.

235. Plaintiffs are entitled to a declaratory ruling that neither the Waiver Provision, nor any other part of the Code, grants the Director the authority and discretion to reinstate water meter reservations that had conclusively expired on December 31, 2016.

<u>COUNT IX</u>—DWS LACKED THE AUTHORITY TO GRANT A WATER METER TO ORIGINAL PARCEL 94

236. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

237. As set forth in the factual allegations above, the DWS Deputy Director, on January 7, 2013 wrote to Fong and stated that pursuant to "distinguishing circumstances", the Department was granting the Developers an additional water meter for Original Parcel 94.

238. The Deputy Director's action granting a water meter to Original Parcel 94 was in direct contravention of MCC Chapter 14.13, which provides that DWS "shall not issue a water meter to any applicant who is not on the priority list until all applicants who are on said priority list have either accepted water service or have been removed from the priority list pursuant to this chapter." MCC § 14.13.060(A).

239. Plaintiffs are entitled to a declaratory ruling that the Chapter 8-11 of the County Charter does not authorize the Deputy Director, acting alone to make such a decision, and the decision was *ultra vires*, and therefore invalid, null and void.

240. Plaintiffs are additionally entitled to a declaratory ruling that neither the County Charter, nor the MCC, nor the Rules of the Department of Water Supply grant DWS or any of its employees the power to grant the additional water meter for Original Parcel 94, based on the facts and circumstances relating to the water meter request made by the Developers and Fong for Original Parcel 94.

COUNT X—ALL OF THE DEVELOPERS' WATER METER RESERVATIONS ARE EXPIRED, AND NULL AND VOID

241. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

242. "No subdivision shall be approved, unless prior to submittal of subdivision construction plans . . . the [DWS D]irector shall provide written verification of a long-term, reliable supply of water." MCC § 14.12.040 (Ord. 3602 (2007)).

243. When evaluating whether or not a proposed subdivision should be recommended for approval, the Director must provide comments considering a multitude environmental, planning and water source factors, including evaluation of "[t]he adverse impacts to the water needs of residents currently on a County 'wait list' for water meters". MCC § 14.12.050 (Ord. 3602 (2007)).

244. A written verification of a long-term, reliable supply of water "shall expire, and be deemed null and void" where water meters covered under a County water meter reservation have not been installed "in accordance with the terms, conditions, and provisions, and time limitations of the meter reservation policies of the department," except where the Director extends the written verification for "good cause". MCC § 14.12.060.

245. The Subdivision does not constitute a "family subdivision" under MCC § 18.20.280, and therefore it is not excepted from the provisions of MCC Chapter 14.12.

246. The Director failed to extend the Developers' water meter reservations for good cause, and irrespectively, no good cause existed, or exists for extending the Developers' water meter reservations.

247. Plaintiffs are entitled to a declaratory ruling that the Developers' water meter reservations, and any written verification of a long-term, reliable supply of water associated with the Subdivision, are expired, and null and void.

COUNT XI—THE DIRECTOR'S AND/OR DWS' ACTIONS CONSTITUTE A BREACH OF THEIR FIDUCIARY OBLIGATIONS TO PROTECT A PUBLIC TRUST ASSET

248. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

249. The purpose of the County Water Code is to comply with, conform to, and complement the State Water Code, HRS Chapter 174C and the County's constitutional duties under the Hawaii public trust doctrine, and to provide a just and fair distribution of water to the people of the County of Maui and to measure a proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and private uses, in conformity with the requirements of law. MCC § 14.01.020.

250. The County Water Code also confirms that "water is a natural and cultural resource that must be protected, preserved, and managed as a public trust" MCC § 14.12.010; *same* MCC § 14.06A.010 ("Pursuant to Article XI, Section 1 of the Hawaii State Constitution, the County finds that water is a public trust resource.").

251. Every governmental entity and agency in Hawaii is a trustee for the public, and is impressed with a duty under the public trust doctrine to make and review decisions about water with "clarity" and "additional rigor." The State and its political subdivisions must "take the public trust into account in the planning and allocation of water resources, and ... protect public trust uses whenever feasible."

252. Plaintiffs are entitled to a declaratory ruling that the Director and DWS breached their fiduciary duties under the law and under the public trust to the public, including to Plaintiffs.

COUNT XII—THE FINAL SUBDIVISION APPROVAL IS NULL AND VOID AS A RESULT OF THE DEVELOPERS' MISLEADING REPRESENTATIONS

253. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

254. At all times relevant herein, the Developers continuously sought commercial pecuniary gain from their efforts to subdivide their property.

255. Commercial subdivisions are required to complete all necessary improvements before being granted final subdivision approval.

256. The Developers made repeated misleading representations to County agencies that they were merely subdividing their interests to permit passage of title to family members, and that the subdivision process was a "paper subdivision", and therefore they were entitled to deferral of the standard subdivision improvements.

257. As a direct and proximate result of the Developers' misleading representations, the Developers obtained subdivision approval including a final subdivision plat.

258. Plaintiffs are entitled to a declaratory ruling that because final subdivision approval was granted based on the false or misleading representations of the Developers, said final subdivision approval is null and void.

COUNT XIII—VIOLATION OF FEDERAL DUE PROCESS AND EQUAL PROTECTION CLAUSES AND FEDERAL CIVIL RIGHTS STATUTE

259. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth above.

260. Plaintiffs are "persons" and have a property right recognized by the U.S. Constitution and its amendments with respect to their earlier and current efforts to obtain water meters for real property they own located within the Upcountry Water District.

261. Plaintiffs are entitled to a declaratory ruling that the arbitrary and capricious acts and omissions of County Defendants with respect to their administration of the Upcountry Priority List, including their repeated extensions of water meter reservations to the Developers, and the denial and delay of water meters sought by Plaintiffs, violates Plaintiffs' due process and equal protection rights protected by the U.S. Constitution and its amendments.

262. The County and its agencies are "persons" as that term is defined in 42 U.S.C. § 1983.

263. The County and its agencies have established a custom, policy, pattern and practice of enforcing their regulations in the above-described manner, under color of state law, and have deprived Plaintiffs of the use of their civil rights in violation of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

<u>COUNT XIV</u>—CLAIMS FOR INJUNCTIVE AND OTHER RELIEF UNDER HRS CHAPTER 6E

264. As set forth in the Declaration of intent of HRS Chapter 6E, "[t]he Constitution of the State of Hawai`i recognizes the value of conserving and developing the historic and cultural property within the State for the public good. The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage."

265. In furtherance of historic property, HRS § 6E-11 and 6E-11.5 grants the State of Hawai`i the authority to investigate, enforce, and impose significant civil and criminal penalties against persons who violate the mandates of HRS Chapter 6E, by, among other things, excavating, injuring, destroying, or altering any historic property or burial site during the course of land development or land alteration activities.

266. In addition to the State's enforcement powers, Chapter 6E grants standing to "any person" to maintain an action in this Environmental Court for restraining orders or injunctive relief against any person upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration. *See* HRS § 6E-13.

267. As set forth in the previous factual allegations, the Developers failed to inform SHPD of their planned and imminent grading activities and instead misleadingly assured SHPD that the granting subdivision approval would not result in grading activities.

268. As set forth in the previous factual allegations, the Developers, in violation of HRS Chapter 6E and the administrative rules promulgated thereunder, failed to prepare a data recovery plan prior to commencing grading activities,

269. As set forth in the previous factual allegations, the Developers, in violation of HRS Chapter 6E and the administrative rules promulgated thereunder, failed have an archaeological monitor present during their extensive grading activities, which have taken place over the course of several years.

270. The Developers have harmed cultural and historic sites within the Subdivision through their grading activities, which are continuing.

271. Upon information and belief, the Developers destroyed or permanently modified cultural or historic sites within the Subdivision without proper documentation of those sites.

272. Plaintiffs are members of the public who benefit from the protection and proper documentation of cultural and historic sites and are, and will continue to be irreparably harmed by the Developers' illegal actions.

273. Pursuant to HRS § 6E-13, Plaintiffs are entitled to a temporary restraining order against the Developers, and permanent mandatory injunctive relief against the Developers.

COUNT XV—CLAIMS FOR INJUNCTIVE AND OTHER RELIEF UNDER MCC CHAPTER 20.08

274. The purpose of MCC Chapter 20.08 is "to provide minimum standards to safeguard life and limb, protect property, and promote public welfare, and to preserve and enhance the natural environment, including but not limited to water quality, by regulating and controlling grubbing and grading operations within the County. The public health, safety and welfare requires that environmental considerations contribute to the determination of these standards insofar as they relate to protecting against erosion and sediment production."

275. MCC Chapter 20.08 includes numerous specific requirements of a developer to protect the environment and the public that must be conducted prior to grading activities as well as during the grading activities.

276. MCC Chapter 20.08 specifically provides that it is unlawful for any person to do any act forbidden, or to fail to perform any act required, by the provisions of this chapter. MCC § 20.08.300.

277. The Developers have, and are continuing, to violate MCC Chapter 20.08, and their failure to meet the requirements of Chapter 20.08 has already result in significant harm to the environment and the public.

278. The County has issued a stop work order relating to violations of MCC Chapter 20.08. However, the Developers have repeatedly violated the stop work order.

279. The County has failed to seek injunctive relief from this Court.

280. As set forth in the previous factual allegations, Plaintiffs are adjacent to the Subdivision and have, and will continue to suffer irreparable harm from the Developers' violation of MCC Chapter 20.08.

281. Plaintiffs are entitled to a temporary restraining order against the Developers, and permanent mandatory injunctive relief against the Developers.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court:

A. Assume jurisdiction over this action;

B. Issue declaratory judgments and/or orders declaring and adjudging the violations of laws aforementioned;

C. Issue a permanent injunction against the appropriate Defendants named herein from violating the aforementioned laws and enjoining the illegal conduct previously specified;

D. Reimburse Plaintiffs for their attorneys' fees and costs of suit pursuant to state and federal law, including but not limited to Haw. Rev. Stat Sections 607-25, and other relevant provisions of state and federal law;

E. Award Plaintiffs appropriate damages as specified in the Complaint in an amount to be determined at trial;

F. Award Plaintiffs' attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and,

G. Grant such other and further appropriate relief to Plaintiffs for the protection of the public and the public trust that this Court deems proper and just;

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI`I

DAVID J. CHEVALIER AND PATRICIA A. CHEVALIER; Plaintiffs, vs. COUNTY OF MAUI; COUNTY OF MAUI DEPARTMENT OF WATER SUPPLY OF COUNTY OF MAUI; RODERICK F.H. FONG; FONG CONSTRUCTION CO., LTD.; FONG FAMILY REAL ESTATE COMPANY L.P.; FONG CONSTRUCTION DEVELOPMENT PARTNERS LLC; HENRY F.S. FONG; AILEEN LUM FONG; THERESA F. LOCK; FRANCENE F. KIHARA; DEBORAH Y.K. FONG; VINCE G. BAGOYO, JR.; JENNIFER K. BAGOYO; AMERICAN SAVINGS BANK F.S.B.; BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI`I; JOHN DOES 1-10, JANE DOES 1-10, AND DOE PARTNERSHIPS, CORPORATIONS, GOVERN-MENTAL UNITS OR OTHER ENTITIES 1-10, Defendants.	CIVIL NO. Environmental Court SUMMONS TO ANSWER COMPLAINT

SUMMONS

THE STATE OF HAWAII:

To the above-named Defendants:

YOU ARE HEREBY SUMMONED and required to serve a written answer to the attached Complaint within 20 days after service of this Summons upon you, exclusive of the date of service.

Your written answer must be filed with the Chief Clerk of this Circuit at the following location or address:

Hoapili Hale
2145 Main Street, Suite 106
Wailuku, Hawai`i 96793-1679

A copy of your answer should also be served upon the Plaintiff's attorney at the address shown on the Complaint.

If you fail to file your written answer within the 20-day time limit, further action may be taken in this case, including judgment for the relief demanded in the Complaint, without further notice to you.

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE PUBLIC, UNLESS A JUDGE OF THE DISTRICT OR CIRCUIT COURT PERMITS, IN WRITING ON THE SUMMONS, PERSONAL DELIVERY DURING THESE HOURS.

FAILURE TO OBEY THE SUMMONS MAY RESULT IN AN ENTRY OF A DEFAULT AND DEFAULT JUDGMENT AGAINST THE PERSON SUMMONED.

DATED: Wailuku, Maui, Hawaii, AUG 29 2018,

/sgd/ V. ISHIHARA (seal)

CLERK OF THE ABOVE-ENTITLED COURT