

TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983  
PETER N. MARTIN (of counsel) 9705  
P.O. Box 798  
Makawao, Hawai'i 96768  
Tel No. 808-573-2428  
Fax No. 866-776-6645  
Email: tom@mauilandlaw.com

COUNTY OF MAUI  
DEPT OF PLANNING  
CURRENT DIV-RECEIVED

16 FEB -9 P12:27

Attorneys for Intervenors  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI KAI-  
NANI, PHASE ONE, INC.

BEFORE THE MAUI PLANNING COMMISSION

COUNTY OF MAUI  
STATE OF HAWAII

In the Matter of the Application of

Greg Walker, Victory Development Inc., a  
California Corporation,

To Obtain a Community Plan Amendment and  
Special Management Area Use Permit to  
Construct 39 Condominium Hotel Units in One  
Three-Story Building and One Four-Story  
Building, Including Parking, Pool, and Other  
Improvements, on 1.438 acres Located at Tax  
Map Key No. (2) 3-9-020: 032, 2505 South  
Kihei Road, Kihei, Maui, Hawai'i

PETITION TO INTERVENE; REQUEST  
FOR STAY OF CONTESTED CASE  
PROCEEDING; APPENDIX "A";  
CERTIFICATE OF SERVICE

**PETITION TO INTERVENE**

Pursuant to §12-201-39, *et seq.* of the Rules of Practice and Procedure of the Maui  
Planning Commission ("Commission Rules") Intervenors ASSOCIATION OF APARTMENT  
OWNERS OF KIHEI KAI-NANI, PHASE ONE, INC. ("Intervenors" or the "Association") by  
and through its attorneys, Tom Pierce, Attorney at Law, LLLC, petition to intervene in these  
proceedings.

## I. STATEMENT OF FACTS

The Association is a Hawai‘i non-profit corporation, and its membership consists of the condominium apartment owners of the 180 units, which are part of the Kihei Kai-Nani (“KKN”) condominium. The KKN condominium is located on a 5.192-acre property, at 2495 South Kihei Road, with master tax map key number (2) 3-9-020: 003. The KKN condominium was created in 1969, with construction of the condominium buildings occurring in the early 1970s. Many of the Association’s owner-members have been owners or residents for decades.

Applicant Victory Development, Inc., a California Corporation (“Victory”) has applied to the Maui Planning Commission (“Commission”) to obtain a community plan amendment and a special management area (“SMA”) use permit for the proposed Nani Loa Condominium Hotel (the “Proposed Hotel”). The Proposed Hotel would consist of 39 units, consisting of one three-story building and one four-story building, including ground level parking, swimming pool, shade pavilion, walkways, exercise room, barbecue areas, landscape plantings, and office. The Proposed Hotel is proposed to be located on 1.438 acres located at tax map key number (2) 3-9-020: 032, 2505 South Kihei Road, Kihei, Maui, Hawai‘i (the “Proposed Project Site”).

The KKN condominium lot is a narrow rectangular shape running *mauka-makai*. One side of the condominium lot abuts South Kihei Road, which road at this intersection immediately abuts a popular public beach, Kamaole Beach Park II. In this particular part of South Kihei Road, the shoreline and the State of Hawai‘i conservation boundary are in particularly close proximity to each other, upon information and belief, less than 150 feet.

The Proposed Project Site and the KKN condominium lot are located on the seaward, *makai*, southwestern slope of the volcanic mountain, Haleakala. The buildings and green spaces within the KKN condominium property are separated by a narrow parking lot, which also runs *mauka-makai*. Over forty years ago, when the KKN condominium was originally constructed,

the KKN parking lot was placed within an existing natural *mauka-makai* drainageway that funnels surface water runoff coming off the southwestern slope of Haleakala Mountain. The parking lot floods, sometimes severely, when there are significant rain events. Over the years, the flooding problem has gotten worse as the lands *mauka* of the KKN condominium property have been hardened through development, and all of the surface water has been further focused into the drainageway.

Victory proposes to locate the Hotel on the small 1.4 acre Proposed Project Site, which abuts and is immediately *mauka* of the KKN condominium lot. The Proposed Project Site is part of the *mauka-makai* drainageway. Victory proposes to harden, and to potentially further focus, the drainageway, so that it will go between its two hotel buildings, and then directly down into, and through the KKN parking lot, and then out to the shoreline. Victory also proposes to locate its utility infrastructure under the KKN parking lot. Victory also proposes to use the KKN parking lot as the ingress and egress between its hotel units and South Kihei road. Victory may also be proposing to use the KKN parking lot for ingress and egress during its construction of the Proposed Hotel. Victory is additionally proposing to amend the community plan designation for the Proposed Project Site from the “Multifamily” designation that it has had for many years to “H2 Hotel”.

Victory’s Proposed Hotel and related infrastructure will injure the owner-members of the Association, as well as harm and degrade portions of the coastal zone. The injuries include, but are not limited to, the following: increased traffic; increased flooding within the KKN condominium property, and into South Kihei Road; increased drainage into State of Hawai‘i conservation land, which includes a fragile nearshore coastal ecosystem, including coral; and loss of opportunities for dwellings for workers and residents of Kihei. These injuries will, among

other things, substantially harm public health and safety, substantially degrade portions of Maui's fragile coastal environment, and reduce opportunities for affordable residences for Kihei's significant residential working population.

In addition, Victory is continuing to pursue at this time the application for a SMA use permit and the application for a community plan amendment, even though the finding of no significant impact for the environmental assessment ("EA") upon which both applications are based has been challenged in the Circuit Court of the Second Circuit, State of Hawai'i in a civil case encaptioned *Assoc. of Apartment Owners of Kihei Kai-Nani, Phase One, Inc. v. County of Maui, et al.*, Civil No. 16-1-0001(3) (the "EA Action"). The complaint in the EA Action was filed on January 6, 2016. A copy of the Complaint is attached hereto as Appendix "A".

## **II. THE NATURE OF PETITIONER'S STATUTORY OR OTHER RIGHT TO INTERVENE**

Section 12-201-41(b) of the Commission Rules recognizes the right to intervene by adjacent property owners, such as the owner-members:

All persons who have a property interest in land subject to commission action, who lawfully reside on said land, or can demonstrate 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 shall be admitted as parties upon timely application for intervention.

Through the Statement of Facts, above, and the other sections set forth below, the Association has shown that the Association, and its owner-members, will be so directly and immediately affected by the Proposed Hotel, which is before the Commission, that their interest in the proceeding is clearly distinguishable from that of the general public.

**III. THE NATURE AND EXTENT OF PETITIONER'S INTEREST IN THE PROCEEDINGS AND, IF AN ABUTTING PROPERTY OWNER, THE TAX MAP KEY NUMBER OF THE ABUTTING PROPERTY**

**A. Tax Map Key Number of Abutting Property**

As explained in the Statement of Facts, the Association, and its owner-members, own, in fee simple, land that abuts the Proposed Project Site. The tax map key number for the condominium property is (2) 3-9-020: 003.

**B. The Association's Interest in the SMA Use Permit Application**

The SMA Use Permit is required by the Hawai'i Coastal Zone Management Act, Hawai'i Revised Statutes ("HRS") Chapter 205A (the "CZMA") and places obligations upon the Commission. HRS § 205-4 provides:

(a) In implementing the objectives of the coastal zone management program, the agencies shall give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development.

(b) The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority.

The Hawai'i Supreme Court has explained the importance of the CZMA, as well as clearly identifying why the Association and its owner-members have an interest in the SMA proceeding:

The CZMA is a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas. When the Hawai'i legislature enacted the CZMA, it specifically found that

special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided. The legislature therefore declared it to be the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawai'i. In order to carry out the CZMA's policies and objectives, the legislature authorized the counties

to establish SMAs. Development within an SMA is controlled by a permit system administered by the counties pursuant to HRS § 205A–28.

Accordingly, in order to preserve, protect, and, where possible, restore the natural resources of Hawai‘i’s coastal zone, the CZMA imposes special controls on the development of real property along the shoreline areas and delegated to the counties the responsibility of implementing the State’s policy embodied in the CZMA through the administration of SMA Use permits. HRS § 205A–21 (2001); *see also* HRS § 205A–27 (2001) (“The authority is designated the special management area authority and is authorized to carry out the objectives, policies and procedures of this part.”); HRS § 205A–28 (2001) (“No development shall be allowed in any county within the special management area without obtaining a permit in accordance with this part.”).

*Morgan v. Planning Dept., County of Kauai*, 104 Hawai‘i 173, 181-82, 86 P.3d 982, 990-91 (2004) (internal citations omitted).

As noted by the *Morgan* Court, the issues presented by the SMA use permit process, affect adjacent properties and their owners, who are also beneficiaries of having a clean and healthy coastal ecosystem in the coastal zone areas that will be affected by the proposed development. Therefore, the Association, and its owner-members, as adjoining landowners, have an interest in the SMA Use Permit proceedings relating to the Proposed Hotel, and a right to participate in a contested case proceeding. *See, e.g., Town v. Land Use Comm’n*, 55 Haw. 538, 543-44, 524 P.2d 84, 88 (1974) (“An interested party to a proceeding for a change in boundary, especially where he is an adjoining property owner, has an inherent interest in the decision no matter what that decision may be . . .”).

### **C. The Association’s Interest in the Proposed Community Plan Amendment**

The Association, and its owner-members also have an interest in Victory’s application to amend the 1998 Kihei–Makena Community Plan (“KM Community Plan”). As explained in *Leone v. County of Maui*, 128 Hawai‘i 183, 187, 284 P.3d 956, 960 (Ct. App. 2012), a request to amend a community plan is a request to amend a legislative act made by the Maui County

Council, after significant public input by members of the relevant community—in this case the Kihei-Makena community.

In *Leone*, the Intermediate Court of Appeals heard an appeal relating to the KM Community Plan. The court explained, that the landowners in question owned property “zoned ‘Hotel–Multifamily,’ permitting a variety of economically beneficial uses, including single-family residences. *However*, these parcels are among nine Palaua Beach lots that are designated “park” in the [KM] Community Plan.” 128 Hawai`i at 187, 284 P.3d at 960 (emphasis added). The *Leone* Court then explained, “The CZMA imposes stringent permit requirements for ‘developments’ within special management areas. HRS §§ 205A–28, 205A–26 (2001).” 128 Hawai`i at 187, 284 P.3d at 960 (bracketed material added). The *Leone* Court then quoted Rule 12–202–12(f)(5) of the Maui Planning Commission Special Management Area Rules (“SMA Rules”), which provides that a SMA use permit cannot be processed if “the proposed action is not consistent with the county general plan, *community plan*, and zoning, unless a general plan, community plan, or zoning application for an appropriate amendment is processed concurrently with the SMA permit application.” 128 Hawai`i at 188, 284 P.3d at 961 (emphasis added). Then the *Leone* Court, referring to an earlier SUP use permit case dealing with the KM Community Plan, explained the significance of the KM Community Plan:

[T]he [KM] Community Plan . . . in the County of Maui is a part of the general plan, and . . . contains a specific, relatively-detailed land use plan. The [Hawai`i] [S]upreme [C]ourt based its conclusion on its interpretation of the governing law, reflected in its holding that the Community Plan *was adopted after extensive public input and enacted into law by the Maui County Council* as an amendment to section 2.80.050 of the Maui County Code, “[i]t is part of the general plan of Maui County,” and, “[t]herefore, it has the force and effect of law and a proposed development which is inconsistent with the [Community Plan] may not be awarded an SMA permit without a plan amendment.” Accordingly, the supreme court has determined that *the [KM] Community Plan before us is a legislative enactment, with the full force and effect of law.*

128 Hawai'i at 194-95, 284 P.3d at 967-68 (emphasis added, ellipses denotes omitted material, some internal ellipses and quotes omitted).

In this case, there is an inconsistency between the H2 Hotel zoning for the Proposed Project Site and KM Community Plan's designation of Multifamily, which designation was given to the Proposed Project Site after extensive public input and then enacted into law by the Maui County Council. Therefore, the Association, and its owner-members, as abutting landowners, have a clear interest in Victory's proposal to amend the KM Community Plan to H2 Hotel, and a right to participate in a contested case proceeding. *See, e.g., Town, supra.*

#### **IV. OTHER INTERVENTION CRITERIA**

##### **A. The Effect of any Decision on the Proceeding on Petitioner's Interest**

As stated in the Statement of Facts, and as shall be further presented in the contested case proceeding, Victory's Proposed Hotel and related infrastructure will adversely affect and injure the owner-members of the Association, including portions of the coastal zone, which is to be evaluated by the Commission through the SMA use permit application. The injuries include, but are not limited to, the following: increased traffic; increased flooding within the KKN condominium property, and into South Kihei Road; increased drainage into State of Hawai'i conservation land, which includes a fragile nearshore coastal ecosystem, including coral; and loss of opportunities for dwellings for workers and residents of Kihei. These injuries will, among other things, substantially harm public health and safety, substantially degrade portions of Maui's fragile coastal environment, and reduce opportunities for affordable residences for Kihei's significant residential working population.

##### **B. Other Means Available Whereby Petitioner's Interest May Be Protected**

There are no other means available whereby the Association's, and the owner-members of the Association's interests may be protected.

**C. Extent Petitioner’s Interest May Be Represented By Existing Parties**

No other person, entity or government agency is sufficiently presenting the owners-members of the Association’s rights in this administrative proceeding.

**D. Extent Petitioner’s Interest in the Proceeding Differs from that of the Other Parties**

Victory has expressed its interest in developing the Proposed Project Site with the Proposed Hotel. Victory’s interests are not consistent with the Association’s, and its owner-members’ interests. While agencies of the County of Maui may participate in the contested case proceeding, none of them have an objective of only representing the owner-members of the Association, or their rights.

**E. Extent Petitioner’s Participation Can Assist in Development of a Complete Record**

The owner-members’ of the Association’s unique interest in the contested case is not currently being sufficiently presented to the Commission by the existing parties. Therefore, the Association can assist in development of a complete record.

**F. Extent Petitioner’s Participation Will Broaden the Issue(s) or Delay the Proceedings**

The Association’s intervention will be focused on the issues that require the Commission’s review and will not broaden the issues into areas outside the scope of the Commission’s purview. The owner-members of the Association, as adjoining landowners, are entitled to a contested case proceeding, and will otherwise not delay the proceedings. However, as noted further below, the Commission should not proceed with the contested case process until a final, unappealed EA has been presented to the Commission.

### **G. How The Petitioner’s Intervention Would Serve the Public Interest**

The owner-members of the Association have identified injuries, which if remedied, will also further public interests. These include public, health and safety concerns, traffic concerns, as well as coastal zone impact concerns.

### **V. REQUEST FOR STAY OF CONTESTED CASE PROCEEDING PENDING RESOLUTION OF THE EA ACTION**

As noted in the Statement of Facts, the Association has filed the EA Action. The EA Action challenges the Commission’s decision to issue a finding of no significant impact (“FONSI”) with respect to the impacts of the Proposed Hotel. The EA Action also challenges the sufficiency of the EA. The Commission should stay the contested case proceeding on the SMA use permit application and community plan amendment application pending resolution of the EA Action because the EA may need to be revised as a result of the EA Action, or an EIS may be required. This request is supported by the following analysis:

HRS § 343-1 of the Hawai`i Environmental Policy Act (“HEPA”) explains the purpose for requiring environmental review:

The legislature finds that the quality of humanity's environment is critical to humanity's well being, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and Counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

Here, Victory prepared the EA. However, the process does not end there. The Hawai`i Supreme Court has explained the necessary steps relating to the EA review process, including the right to challenge the EA’s substance or challenge the decision to issue a FONSI:

An EA, defined in HRS § 343–2, is an informational document prepared by either the agency proposing an action or a private applicant, which is used to evaluate the possible environmental effects of a proposed action. *Id.* It must give a detailed description of the proposed action or project and evaluate direct, indirect, and cumulative impacts, as well as consider alternatives to the proposed project and describe any measures proposed to minimize potential impacts. *Id.* Once completed, the public has thirty days to review and comment on a draft EA. After the draft EA is finalized and public comments responded to, the agency proposing or approving the action reviews the final EA to determine if any “significant” environmental impacts are anticipated. If the agency determines that there will be no significant environmental impact, it issues a finding of no significant impact (FONSI), allowing the project to proceed without further study, ***although a FONSI determination may be challenged.***

*Sierra Club v. Dep't of Transp.*, 115 Hawai`i 299, 307-08, 167 P.3d 292, 300-01 (2007), *as corrected* (Oct. 10, 2007) (emphasis added).

The EA review and deliberation process must be done at an “early stage”, or it will otherwise be of no assistance to decision makers, or will simply lead to a *post hoc* rationalization to support the action already taken. *Citizens for Protection of North Kohala Coastline v. County of Hawai'i*, 91 Hawai`i 94, 105, 979 P.2d 1120, 1131 (1999) (“*Citizens*”). It therefore follows that the Commission should not engage in decision making on the Proposed Hotel when the Proposed Hotel’s EA is subject to judicial challenge. The importance of staying the pending contested case until resolution of the EA Action may be seen from the analysis set forth in *Citizens* which explains why agencies should not make decisions until the EA process is complete:

Requiring early environmental assessment of the . . . project comports with HRS § 343-5(c)'s express mandate that environmental review be undertaken at the “***earliest practicable time.***” This result also finds support in the spirit and intent of HEPA to “establish a system of environmental review ***which will ensure that environmental concerns are given appropriate consideration*** in decision making along with economic and technical considerations ... ***[and] alert decision makers to significant environmental effects which may result from the implementation of certain actions.***” HRS § 343-1 (1993).

Consonant with these policies, both federal and state courts have recognized that environmental review must occur early enough ***to function practically as an input into the decision making process.*** In construing the National Environmental Policy Act (NEPA), for example, the United States Court of Appeals for the Ninth Circuit cautioned that “[a]n assessment must be “prepared early enough ***so that it can serve practically as***

*an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.*” It further stated that federal agencies are required to ““integrate the NEPA process with other planning at the *earliest possible time* to insure that planning and decisions reflect environmental values...’ ” According to the *J.R. Block* Court, “[t]he rationale behind this rule is that *inflexibility may occur if delay in preparing an EIS is allowed: ‘After major investment of both time and money, it is likely that more environmental harm will be tolerated.’*” . . . Rodgers, *Environmental Law* § 9.7, at 921 (2d. ed. 1994) (NEPA’s purpose is to require consideration of environmental factors “*before project momentum becomes irresistible*, before options are closed, and *before agency commitments are set in concrete.*”).

*Citizens*, 91 Hawai`i at 104-05, 979 P.2d at 1130-31 (some emphasis added, some in original; some internal citations and quotes omitted; ellipses denote omitted material).

Therefore, the appropriate course of action is to stay the contested case proceeding pending resolution of the EA Action.

## VI. CONCLUSION

For the foregoing reasons, the Association respectfully requests that the Commission grant the Association’s petition to intervene and stay the contested case proceeding pending resolution of the EA Action.

DATED: Makawao, Maui, Hawai‘i, February 9, 2016.



---

TOM PIERCE  
PETER N. MARTIN  
Tom Pierce, Attorney at Law, LLLC  
Attorney for Intervenors  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI  
KAI-NANI, PHASE ONE, INC.

FILED

2016 JAN -6 PM 12: 18

TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983  
PETER N. MARTIN (of counsel) 9705  
P.O. Box 798  
Makawao, Hawai'i 96768  
Tel No. 808-573-2428  
Fax No. 866-776-6645  
Email: tom@mauilandlaw.com

V. ISHIHARA, CLERK  
SECOND CIRCUIT COURT  
STATE OF HAWAII

Attorneys for Plaintiff:  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI KAI-  
NANI, PHASE ONE, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

ASSOCIATION OF APARTMENT OWNERS  
OF KIHEI KAI-NANI, PHASE ONE, INC.;

CIVIL NO. 16-1-0001(3)  
(Environmental Court)

Plaintiff,

vs.

COMPLAINT; SUMMONS

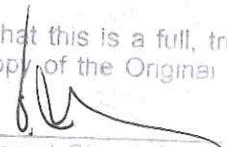
COUNTY OF MAUI; MAUI PLANNING  
COMMISSION; JOHN DOES 1-10, JANE  
DOES 1-10, AND DOE PARTNERSHIPS,  
CORPORATIONS, GOVERNMENTAL  
UNITS OR OTHER ENTITIES 1-10,

Defendants.

**COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF**

Plaintiff ASSOCIATION OF APARTMENT OWNERS OF KIHEI KAI-NANI, PHASE ONE, INC. ("Plaintiff" or the "Association") by and through its attorneys, Tom Pierce, Attorney at Law, LLLC, hereby alleges and avers as follows:

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

  
Clerk, Second Circuit Court

## INTRODUCTION

1. On December 8, 2015, the Office of Environmental Quality Control, State of Hawaii (“OEQC”), through the *Environmental Notice*, provided notice of the decision of Defendant MAUI PLANNING COMMISSION (“Planning Commission”) to issue a finding of no significant impact (“FONSI”) with respect to the *Final Environment Assessment in Support of Applications for Community Plan Amendment and Special Management Area Use Permit*, dated October 2015 (“Final EA”) prepared for the Nani Loa Condominium Hotel (“Hotel”) proposed by Victory Development Inc. (“Victory”).<sup>1</sup>

2. Pursuant to Hawai‘i Environmental Policy Act (“HEPA”), Hawai‘i Revised Statutes (“HRS”) Chapter 343, and the underlying rules in Hawai‘i Administrative Rules (“HAR”) Title 11, Plaintiff hereby challenges the FONSI because the potential for significant impacts on the environment from the proposed Hotel require the preparation of an environmental impact statement (“EIS”).

3. Plaintiffs further challenge the Final EA because it is inadequate in numerous respects, including but not limited to, failing to adequately analyze and disclose direct impacts of the Hotel as well as reasonable alternatives to the Hotel.

## JURISDICTION AND VENUE

4. This lawsuit is based on and this Court has jurisdiction over this matter pursuant to: HEPA, HRS Chapter 343; HRS §§ 603-21.5, 632-1, *et seq.* and article XI, § 9 of the Hawai‘i Constitution.

5. Venue properly lies in this judicial circuit pursuant to HRS § 603-36(5) because the claims for relief arose in this circuit and all the defendants are domiciled here.

---

<sup>1</sup> “Victory” includes Victory Development Inc. and the affiliated company Victory Development Nani Loa LLC, which owns Victory Development Inc.

6. Pursuant to HRS § 604A-2(a), the Environmental Court for the Circuit Court of the Second Circuit, State of Hawai‘i has exclusive original jurisdiction over this action arising from HRS Chapter 343.

### **PARTIES**

7. Plaintiff Association of Apartment Owners of Kihei Kai-Nani, Phase One, Inc. is a Hawai‘i non-profit corporation, and its membership consists of the apartment owners of the apartments within the Kihei Kai-Nani (“KKN”) condominium complex.

8. Defendant COUNTY OF MAUI (“County”) is a political corporation subject to suit pursuant to HRS § 46-1.5(22).

9. Defendant MAUI PLANNING COMMISSION (“Planning Commission”) is, pursuant to Maui County Charter Chapter 8, a part of the County Department of Planning, and consists of nine members appointed by the Mayor with the approval of the County Council, and which has the duties of advising the Mayor, the County Council, and the Director of the County Planning Department in matters concerning planning programs for the Island of Maui, and has such other powers and duties as may be provided by law, including a responsibility to assure that proper environmental analysis under HEPA has taken place in such cases where it is the “accepting authority”, as defined by HRS Chapter 343.

10. Based on the facts herein, the County and/or the Planning Commission are the “accepting authority” for the Final EA. *See* HRS § 343-5; HAR § 11-200-4.

11. Additional Defendants John Does 1-10, Jane Does 1-10, and Doe Partnerships, Corporations, Governmental Units or Other Entities 1-10 (collectively, “Doe Defendants”) are persons or entities who may be liable to Plaintiff or may have an interest in the matter or issues pending, whose identities and capacities are presently unknown to Plaintiff. Plaintiff has

reviewed the permits, records, state and federal statutes, and other documents, relevant to this action, but is unable at this time to ascertain whether or not all parties liable to Plaintiff are named herein. Plaintiff will identify such Doe Defendants when their names and capacities are ascertained. Plaintiff is informed and believes and thereupon alleges that some of these Doe Defendants are, and at all times relevant herein, were, in some manner presently unknown to Plaintiff, engaged in and/or responsible for the acts or omissions alleged herein, and/or were in some manner responsible to Plaintiff and the public for the acts or omissions, as alleged herein.

### STANDING

12. HRS § 343–7 grants a plaintiff standing to sue either on the basis of a traditional injury in fact or on the basis of a procedural injury. *Sierra Club v. Dep’t of Transp.*, 115 Hawai‘i 299, 321 167 P.3d 292, 320 (2007) (“*Superferry*”) (explaining that no special finding that a plaintiff is aggrieved is required in order for the plaintiff to have procedural standing to bring an action under HEPA). Specifically, the Hawai‘i Supreme Court explained:

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

*Id.* quoting *Sierra Club v. Hawai‘i Tourism Authority*, 100 Hawai‘i 242, 327, 59 P.3d 877, 901 (2002).

13. Members of the Association have provided written comment and/or testimony relating to the EA during one or more of the designated review periods, including with respect to

the issues challenged through this Complaint, and said comments and testimony are incorporated herein by reference.

14. The Association and its members have been harmed substantively and procedurally, and they are, and will continue to, suffer injury in fact, as a result of Defendants' acceptance of the Final EA and determination of a FONSI because they are, and will continue to be, directly and indirectly adversely affected by the proposed Hotel, as well as from the lack of informed decision making by government agencies and others relying on the Final EA and/or the FONSI.

15. These injuries and potential injuries include, but are not limited to, the following: increased traffic; increased flooding within the KKN condominium property, and into South Kihei Road; increased drainage into State of Hawai'i conservation land, which includes a fragile nearshore coastal ecosystem, including coral; and loss of opportunities for dwellings for residents of Kihei. These injuries will, among other things, substantially harm public health and safety and substantially degrade portions of Maui's fragile coastal environment.

16. The above described harms can potentially be avoided if an EIS were completed as required by HRS Chapter 343 because it would permit *appropriately informed* decision making, thereby leading to potentially different decisions and different outcomes as a result of the appropriate information having been provided to the decision makers.

17. This Complaint has been initiated within thirty days after the public was noticed of the acceptance of the Final EA and issuance of the FONSI by the OEQC in the *Environmental Notice*, on December 8, 2015, pursuant to HRS § 343-7(b).

18. HRS § 343-7(b), entitled "limitation of actions," provides in pertinent part as follows with respect to the determination of a FONSI:

... Any judicial proceeding, the subject of which is the determination that a statement is not required for a proposed action, shall be initiated within thirty days after the public has been informed of such determination pursuant to section 343-3.

19. Actual notice of a FONSI cannot be substituted for the public notice requirement in the *Environmental Notice*. See *Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai‘i 150, 231 P.3d 423 (2010) (Where there was no FONSI notice filed with the OEQC thirty day limitation prescribed by §343-7(b) was inapplicable; actual knowledge of FONSI cannot be substituted for the public notice requirement).

### **LEGAL FRAMEWORK**

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

In the “Findings and purpose” section, the legislature states its finding that “the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.” HRS § 343-1 (1993).

*Superferry*, 115 Hawai‘i at 327, 167 P.3d at 320 (2007).

21. HEPA establishes a framework for environmental review covering many categories of actions. HRS § 343-5(a). These include actions that “[p]ropose any amendments to existing county general plans where the amendment would result in designations other than agriculture, conservation, or preservation...” HRS § 343-5(a)(6).

22. Whenever any person or applicant requests approval of any covered action, the agency receiving the request must prepare an environment assessment (“EA”) at the earliest practicable time to determine whether an environmental impact statement (“EIS”) is required. HRS § 343-5(b); HAR § 11-200-11.2(a)(1). An EIS is a more extensive informational document

than an EA. An EIS must disclose, among other things, “the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” HRS § 343-2; HAR § 11-200-2.

23. For EAs for which a finding of no significant impact or negative declaration (“FONSI”) is anticipated, a draft EA is required to be made available for public review and comment for a period of thirty days. A FONSI means a determination based on an EA that the subject action will not have a significant effect and, therefore, will not require the preparation of an EIS. HRS § 343-2; HAR § 11-200-2.

24. A draft EA is submitted by a proposing agency or an approving agency for public review and comment when that agency anticipates a FONSI. HRS § 343-5(c); HAR § 11-200-2.

25. The agency is then required to respond in writing to comments received and prepare a final EA to determine whether an EIS is required.

26. An EA in support of a FONSI does not become final until the EA is submitted by a proposing agency or an approving agency to OEQC following the public review and comment period for the draft EA. HRS § 343-5(c); HAR § 11-200-2.

27. In determining whether a proposed action may have a “significant effect” on the environment and thus require an EIS, the agency is required to consider “every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.” HAR § 11-200-12(b); HAR 11-200-9. In most instances, an action shall be determined to have a significant effect on the environment if it will lead to any *one* or more of the following effects:

- Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;
- Curtails the range of beneficial uses of the environment;
- Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders;
- Substantially affects the economic or social welfare of the community or State;
- Substantially affects public health;
- Involves substantial secondary impacts, such as population changes or effects on public facilities;
- Involves a substantial degradation of environmental quality;
- Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
- Substantially affects a rare, threatened, or endangered species, or its habitat;
- Detrimentially affects air or water quality or ambient noise levels;
- Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;
- Substantially affects scenic vistas and viewplanes identified in county or state plans or studies; *or*,
- Requires substantial energy consumption.

HAR §11-200-12(c) (emphasis added).

### **FACTUAL BACKGROUND**

28. The KKN condominium was created in 1969. The condominium consists of 180 apartments separated into thirteen two- and three-story buildings located on an approximately five-acre property bearing tax map key number: (2) 3-9-020:003.

29. The KKN condominium lot is a narrow rectangular shape running *mauka-makai*. One side of the condominium lot abuts South Kihei Road, which road at this intersection immediately abuts a popular public beach, Kamaole Beach Park II. In this particular part of South Kihei Road, the shoreline and the State of Hawai‘i conservation boundary are in particularly close proximity to each other, upon information and belief, less than 150 feet.

30. The area at issue is located on the seaward, *makai*, southwestern slope of the volcanic mountain, Haleakala. The buildings and green spaces within the KKN condominium property are separated by a narrow parking lot, which runs *mauka-makai*. The center section of this parking lot also provides the only access to and from South Kihei Road for the KKN condominium apartment owners.

31. Over forty years ago, when the KKN condominium was originally constructed, the KKN parking lot was placed within an existing natural *mauka-makai* drainageway that funnels surface water runoff coming off the southwestern slope of Haleakala Mountain.

32. The parking lot floods, sometimes severely, when there are severe rain events.

33. Over the years, the flooding problem has gotten worse as the lands *mauka* of the KKN condominium property have been hardened through development.

34. Victory is proposing to develop the Hotel on a parcel of land of 1.438 acres identified as Lot 1-A of the Kamaole Homesteads in Kihei, Maui, Hawai‘i, bearing tax map key number (2) 3-9-020:032 (“Lot 1-A”).

35. Lot 1-A abuts the KKN condominium’s *mauka* boundary. As described in the Final EA, Victory proposes to gain access to the Hotel through the KKN condominium parking lot via an access easement that was granted in favor of Lot 1-A in 1972 (the “1972 Easement”).

36. As described in the Final EA, the proposed Hotel will consist of two buildings: one three-story building with eleven units and one four-story building with twenty-eight units. The two buildings will be separated by an open drainage area that will permit surface water to continue running downstream into the KKN condominium property. While some of the surface water may be caught by a drainage system proposed by Victory, the remainder will flow downhill through the KKN condominium property, and ultimately into the sea.

37. As part of the Hotel, Victory is proposing a Community Plan Amendment to the Kihei-Makena Community Plan (adopted by Ordinance No. 2641 on March 6, 1998) from (MF) Multi-Family to (H) Hotel. The proposed Community Plan Amendment triggered an EA under HRS Chapter 343-5(a), which is required when an applicant proposes an amendment to an existing community plan.

38. A draft EA for the Hotel, dated March 2009 (“2009 Draft EA”), was published on August 8, 2009 for public comment.

39. The 2009 Draft EA was reviewed by the Planning Commission on August 11, 2009.

40. Thereafter, the development of the Hotel was postponed due to the economic downturn. Efforts to develop the Hotel were resumed in 2014 or early 2015.

41. A draft EA for the Hotel, dated February 2015 (“2015 Draft EA”), was published on May 8, 2015 for public comment.

42. On June 9, 2015, the Planning Commission considered the 2015 Draft EA at a regular meeting. Members of the Association objected to the adequacy of the 2015 Draft EA at this meeting. The Planning Commission then requested revisions to the 2015 Draft EA.

43. On November 11, 2015, the Planning Commission considered a revised version of the 2015 Draft EA, and on the same day issued a FONSI.

44. Neither the Planning Commission nor Victory provided the Association or its members with written notice of the November 11, 2015 hearing.

45. The Final EA and the FONSI was noticed by the OEQC in the *Environmental Notice*, on December 8, 2015, pursuant to HAR §11-200-11.1.

**CLAIM FOR RELIEF  
(Violation of HEPA)**

46. Plaintiff realleges and incorporates herein by reference each and every allegation contained in the preceding paragraphs of this Complaint.

47. The Final EA violates HEPA by failing to conduct the full environmental impact analysis mandated by law, including but not limited to, analysis and/or disclosure of the matters set forth in subparts A, B, and C, below.

48. The acceptance or approval by Defendants, or either one of them, of the legally deficient Final EA violates HEPA's mandates and nullifies HEPA's purpose of informed decision making and public participation and therefore is legally invalid.

49. An actual controversy exists between Plaintiff and Defendants concerning the Final EA compliance with HEPA's requirements, and the validity of the acceptance of the Final EA and the determination of a FONSI by Defendants.

**A. Failure to Adequately Analyze and Disclose Direct Impacts of the Hotel**

50. The Final EA fails to comport with HEPA by failing to fully and accurately analyze and/or disclose direct impacts of the proposed Hotel.

**i. Potential Flooding and Drainage Issues**

51. The Final EA fails to adequately analyze or disclose actual flood prospects for the area in the vicinity of the Hotel.

52. The Final EA fails to adequately map the projected effect of surface water flooding through the Hotel or downstream of the Hotel.

53. The Final EA also fails to adequately analyze or disclose that:

- The drainage systems downstream of the Hotel are undersized and may result in backwater to some depth;
- The water levels downstream from the Hotel could reach depths that endanger public health and safety;
- A flood event may have substantial impact on the ability of emergency services to reach areas within the KKN condominium or the Hotel; and
- Climate change may have substantial impact on the frequency and magnitude of storm events in the project area.

**ii. Potential Traffic Issues**

54. The Final EA fails to adequately analyze or disclose actual potential traffic issues relating to the Hotel.

55. The increase in traffic from the proposed Hotel, especially at the entrance to the KKN condominium, will be significant and is not accurately reflected in the Traffic Impact Assessment Report, prepared by Rowell and Associates in December 2014 (“TIAR”) that is attached to the Final EA as Appendix “I”.

56. The Hotel, as currently proposed, will only be accessible through the 1972 Easement that goes through the existing parking lot for the KKN condominium.

57.

58. The TIAR is inadequate as it does not accurately reflect traffic during the most relevant time periods for Kihei, which would be the high tourist season. Instead, the TIAR is based on analysis of traffic during the lightest traffic times of the year, the “shoulder” months of April and September.

59. Additionally, the TIAR is inadequate as the horizon year is set for 2020. Traffic during the life of the Hotel (which will extend well beyond 2020) will likely be much worse than traffic in 2020.

60. The Final EA and the TIAR do not adequately address or disclose that the entrance to the KKN condominium on South Kihei Road is already congested and dangerous. There is no left turn lane into the KKN condominium.

61. The increase in traffic due to the Hotel will have a substantial and detrimental impact to the ability of emergency services to access both the Hotel and the KKN condominium.

62. The Final EA and the TIAR fail to address whether the Hotel and the KKN condominium, with the increased cars from the Hotel, can safely evacuate onto South Kihei Road during a tsunami evacuation.

**B. Failure to Prepare an EIS to Analyze Potentially Significant Impacts**

63. The Final EA fails to comport with HEPA because it erroneously concludes that the Hotel will have no “significant impact” and that therefore no EIS is necessary.

64. The proposed Hotel will have a significant impact on the environment. The proposed Hotel will have a “significant impact” because the effects of the Hotel meet one or more of the enumerated criteria under HAR §11-200-12(c). Among other things, the proposed Hotel will:

- Curtail the range of beneficial uses of the environment;
- Substantially affect the economic or social welfare of the Kihei-Makena community;
- Involve substantial secondary impacts, including affecting public facilities in the Kihei-Makena area;
- Involve a substantial degradation of environmental quality;
- Detrimentally affect air or water quality or ambient noise levels; and/or
- Affect or likely suffer damage by being located in an environmentally sensitive area, including in a nearshore coastal area and a flood plain.

**C. Failure to Adequately Consider Meaningful Alternatives to the Hotel**

65. Defendants failed to satisfy their HEPA duties by not adequately considering meaningful alternatives to the proposed Hotel.

66. In particular, the Final EA fails to adequately or sufficiently analyze Alternative 3 (Development as Multi-Family Project), which would be consistent with Lot 1-A's current land use designation and the existing Kihei-Makena Community Plan.

67. The Final EA arbitrarily concludes, without adequate support, that Alternative 3 is not preferred because there is "increased demand for hotel units" and that a designation of (H) Hotel rather than (MF) Multi-Family in the Kihei-Makena Community Plan "will allow for architectural design flexibility from height restrictions to facilitate the design of a more aesthetically pleasing and financially feasible project".

68. The above conclusory statements in the Final EA fail to sufficiently address the rationales behind the use of the (MF) Multi-Family designation in the Kihei-Makena Community Plan in 1998. The (MF) Multi-Family designation was included in the Kihei-Makena Community Plan after much consideration and input from the public.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court:

A. Assume jurisdiction over this action;

B. Enter a declaratory judgment that:

(i) The Final EA violates HEPA by failing to provide the adequate environmental impact analysis mandated by law;

(ii) The FONSI violates HEPA because there will be significant impacts from the Hotel, therefore requiring, pursuant to HEPA, the preparation of an EIS;

(iii) No part of the Hotel may legally proceed without first attaining full compliance with HEPA by curing the inadequacies in the Final EA, and thereafter, by the preparation of, and final acceptance of, an EIS;

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

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

DATED: Makawao, Maui, Hawai'i, January 5, 2016.

  
\_\_\_\_\_  
TOM PIERCE  
PETER N. MARTIN  
Tom Pierce, Attorney at Law, LLLC  
Attorney for Plaintiff  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI  
KAI-NANI, PHASE ONE, INC.

TOM PIERCE, ATTORNEY AT LAW, LLLC

TOM PIERCE 6983  
PETER N. MARTIN (of counsel) 9705  
P.O. Box 798  
Makawao, Hawai`i 96768  
Tel No. 808-573-2428  
Fax No. 866-776-6645  
Email: tom@mauilandlaw.com

Attorneys for Plaintiff:  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI KAI-  
NANI, PHASE ONE, INC.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

ASSOCIATION OF APARTMENT OWNERS  
OF KIHEI KAI-NANI, PHASE ONE, INC.;

Plaintiff,

vs.

COUNTY OF MAUI; MAUI PLANNING  
COMMISSION; JOHN DOES 1-10, JANE  
DOES 1-10, AND DOE PARTNERSHIPS,  
CORPORATIONS, GOVERNMENTAL  
UNITS OR OTHER ENTITIES 1-10,

Defendants.

CIVIL NO.  
(Environmental Court)

SUMMONS TO ANSWER CIVIL  
COMPLAINT

SUMMONS TO ANSWER CIVIL COMPLAINT

THE STATE OF HAWAII:  
To the above-named Defendants:

YOU ARE HEREBY SUMMONED and required to file with the court and serve upon plaintiffs' attorney, Tom Pierce, Attorney at Law, a Limited Liability Law Company, whose address is P.O. Box 798, Makawao, Hawai`i 96768, an answer to the complaint which is attached and herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service.

If you fail to make your answer within the twenty day time limit, judgment by default will be taken against you for the relief demanded in the complaint.

**If you fail to obey this summons this may result in an entry of default and default judgment.**

**Pursuant to Rule 4(b) of the Hawai'i Rules of Civil Procedure, this summons shall not be delivered between 10:00 p. m. and 6:00 a. m. on premises not open to the general public, unless a Judge of the Circuit Court permits, in writing on this Summons, personal delivery during these hours.**

DATE ISSUED: JAN -6 2016

/sgd/ V. ISHIHARA (seal)

\_\_\_\_\_  
CLERK OF THE ABOVE-ENTITLED COURT

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been duly served upon the following via hand delivery, on February 9, 2016.

Victory Development Inc.  
30 E. Lipoa Street Unit 4-109  
Kihei HI 96753

Patrick K. Wong  
Department of Corporation Counsel  
County of Maui  
200 South High Street  
Wailuku, Maui, Hawai'i 96793

DATED: Makawao, Maui, Hawai'i, February 9, 2016.



---

TOM PIERCE  
PETER N. MARTIN  
Tom Pierce, Attorney at Law, LLLC  
Attorney for Intervenors  
ASSOCIATION OF APARTMENT OWNERS OF KIHEI  
KAI-NANI, PHASE ONE, INC.