

Sharks Cove on O`ahu's North Shore is a global treasure, a fragile coastal ecosystem and part of the Pupukea Marine Live Conservation District (MLCD).

Sharks Cove is now threatened by a 3-acre, \$18 million dollar 34,500 square foot commercial tourist-oriented development across from this marine protected area.

Despite three years of community opposition, a history of over \$200,000 in assessed fines, continuing violations of the law, and the failure to demonstrate compliance with the high standards of the state and county laws that protect Hawai`i's precious coastal resources developer Hanapohaku was granted a fast-track approval by the Honolulu City Council and Department of Planning and Permitting approval to build across from Sharks Cove.

Hawaii's Thousand Friends (HTF) became a plaintiff in a lawsuit, filed in February 2019, against the development to protect the heavily visited critical beach, ocean and tide pool from the mauka development of numerous 1 and 2-story retail and office buildings, a 126-space parking lot, anticipated 926 new daily vehicle trips (337,990 trips per year) to Kamehameha Highway, and increased pollution of nearby "Class AA" marine waters of Sharks Cove.

In 2018 of the 6 million tourists who visited O`ahu, an estimated 51% visited the North Shore, over 3 million tourists a year. The proposed development will result in an 11% increase in tourists, and congestion, to Sharks Cove area.

Hawaii Revised Statute (HRS) Chapter 205A Coastal Zone Management requires that a development within Special Management Area must be consistent with the General Plan. Sharks Cove is within the SMA.

In its recommendation to approve the SMA Major Permit, DPP failed to ensure compliance with the intent and letter of the NSSCP by accepting the developer's promises. The developer displaced a dentist and realtor, who served the community in preference to retail stores and food trucks that cater to tourists.

Under ROH (Revised Statutes of Honolulu) §25-5.5 the City Council has 60 days to review and evaluate the impacts from the proposed development and recommendations by DPP for an SMA Major Permit Application, a period that can be extended.

On 10/23/18 the Council received DPP's recommendations and granted the SMA Major Permit within a 3+ week span on 11/14/18.

Why HTF is suing the City and County of Honolulu

Count 1 Against the City

(Failure to exercise public trust responsibilities to protect fresh and marine water resources the park, and the MLCD in violation of the Hawai`i Constitution Article X1-Section 1, Article X1-Section 7 and Common Law Public Trust Doctrine

Article X1 Conservation, Control and Development of Resources

Section 1 - For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources,

including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State

All public natural resources are held in trust by the State for the benefit of the people.

Section 7 Water Resources – The State has an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people.

Public Trust Doctrine

The ancient laws of the Roman Emperor Justinian held that the sea, the shores of the sea, the air and running water was common to everyone. The seashore, later defined as waters affected by the ebb and flow of the tides could not be appropriated for private use and was open to all. This principle became the law in England as well.

The public trust applies to both waters influenced by the tides and waters that are navigable in fact. The public trust also applies to the natural resources (mineral or animal) contained in the soil and water over those public trust lands.

History of Hawaii's Public Trust Doctrine

Long before Hawai'i became a territory and state, the Hawaiian Kingdom - as with the English monarchs - held land in trust for the common good. In granting land ownership interests during the Great Mahele, (XXX) the Hawaiian Kingdom expressly reserved its sovereign prerogatives to encourage and even to enforce the use and enjoyment of lands for the common good. By maintaining this sovereign right, a public trust was imposed upon all the waters of the kingdom. The public interest in the waters of the kingdom necessitated retention of authority and the associated duty to maintain the purity and flow of Hawaii's water for future generations.

The Public Trust Doctrine Today

Today, the Public Trust Doctrine is a judicially created body of law that protects Hawaii's natural resources. It sets limits and attempts to draw boundaries. The Public Trust Doctrine remains perhaps the most powerful, useful body of principles in our legal system related to the management of natural resources.

Count 11 against all defendants

(Right to a Clean and Healthful Environment in violation of Hawai'i Constitution, Article X1 Section 9 Environmental Rights)

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law.

Count III – Against City

(Failure to follow the North Shore Sustainable Communities Plan in Violation of HRS Chapter 205A and ROH Chapter 25)

The O`ahu General Plan was adopted in 2002 and sets forth the City's broad policies for long-range development with the 8 Development/Sustainable Communities Plans serving as detailed schemes for implementing and accomplishing the development objectives and policies of the General Plan.

The North Shore Sustainable Communities Plan (NSSCP), adopted in 2011 by ordinance has the force and effect of law, details the goals for the region to remain country, with wide open space, vistas and rural communities and be an essential haven and respite for urban Honolulu.

The Hawaii Supreme Court ruled that in 1998 that "the county general plan does have the force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan."

The Court also held that a community plan "adopted after extensive public input and enacted into law" is part of the General Plan.

The General Plan and its implementing community/regional development plans supersede zoning rules.

The City's approval of the SMA Major Permit failed to properly evaluate the impact of the Proposed Development on the SMA resources in light of the objectives, policies and guidelines of HRS Chapter 205A.

Count IV – Against DPP

(Improper issuance of after-the-fact SMA Minor Permit, and failing to enforce the Minor Permit Conditions, in violation of HRS Chapter 205A & ROH Chapter 25)

HRS §205A-2 requires all agencies of the State to consider the objectives, policies, and guidelines of the Coastal Zone Management Act, HRS 205A, and the rules and regulations issued thereunder and to enforce them with respect to any development within or affecting the SMA.

HRS §205A-2 requires that all agencies give full consideration to the "ecological, cultural, historic, esthetic, recreational, scenic, and open space values" before and/or when taking or allowing actions that impact resources within the SMS.

DPP failed to properly independently consider or assess the effects and impacts of the development on the SMA, coastal resources and MLCD:

- Underground seepage, drainage and incursion of sewage into the MLCD from proposed leach field
- Creating significant additional traffic congestion on Kamehameha Highway
- Adversely affecting public access to and use of Pupukea Beach Park

- Creating pedestrian and other safety issues crossing Kamehameha to Pupukea Beach Park and Sharks Cove
- Creating drainage and non-point source pollution from food trucks, parking area, overflowing dumpsters, haphazard handling of waste and garbage resulting in silt and runoff into MLCD
- Failure to assure or require the Developer to be in compliance with all State/County laws, rules and regulations prior to issuing a SMA Minor Permit
- Failure to ensure storm water mitigation
- Failure to monitor the Developer’s operations for compliance

Count V – Against DPP

(Unlawful enforcement fine policy and practice in violation of Constitution, Article 1, Section 5, Article X1 Section 9, Public Trust Doctrine, HRS 205A and ROH Chapter 25)

Article 1 Section 5 Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

This constitutional provision seeks to protect individuals from arbitrary governmental deprivation of property and liberty rights.

Count VI – Against the City

(Approving the SMA Major Permit without ensuring compliance with food safety code in violation of ROH 25 (Special Management area), HRS§ 321-11(18) (Health) and Hawai`i Administrative Rules (HAR) Title 11 Chapter 50 (DOH Solid Waste Management Control))

The City either knew or should have known that the food trucks currently on the parcels do not comply with several provisions of HRS §321-11(18) and HAR Title 11 Chapter 50- Food Safety Code.

The City should have required transparent and full proof of compliance and future monitoring as part of the SMA process.

Count VII – Against City

(Improper acceptance of inadequate EIS in violation of ROH Chapter 25 & HAR Title 11, Chapter 200)

For SMA Major Permits, ROH Chapter 25 requires applicants to submit an environmental review document that follows the “rules and regulations implementing HRS 343 (Environmental Impact Statements)

The FEIS didn’t “fully declare the environmental implications of the proposed action and ...discuss all relevant and feasible consequences of the action. In order that the public can be fully informed and that the agency can make a sound decision based upon the full

range of responsible opinion on environmental effects, a statement should include responsible opposing views, if any, on significant environmental issues raised by the proposal.” HAR §11-200-16 Draft EIS Content Requirements)

FEIS did not properly evaluate the “secondary or indirect” “impacts or effects” related to the Proposed Development, defined in HAR §11-200-2 as: “effects which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” HAR §11-200-17(i)

The FEIS did not evaluate the “cumulative impact” related to the Proposed Development, defined in HAR §11-200-2 as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The FEIS did not properly adequately describe and analyze realistic alternatives to the Proposed Development required in HAR §11-200-17(f) which, requires “the draft EIS shall describe in a separate and distinct section alternatives which could attain the objectives of the action, regardless of cost, in sufficient detail to explain why they were rejected. The section shall include a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions.”

The FEIS did not properly disclose the “irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. Identification of unavoidable impacts and the extent to which the action makes use of non-renewable resources during the phases of the action, or irreversibly curtails the range of potential uses of the environment shall also be included.” HAR §200-17(k).

**Count VIII – Against DPP and the City Council
(Failing to provide fair and impartial review at the administrative level in violation
of Hawai`i Constitution Article 1 Section 5, Due Process)**

When deciding whether to issue an SMA Major Permit, the City Council is acting in a quasi-judicial capacity.

DPP and the City Council deprived the Plaintiffs of due process by fast-tracking the permitting and approval of the Proposed Development at the behest of the Developer because of political opportunism.

**Count IX – Against DPP and City Council
(Improperly recommending issuance and improperly issuing the SMA Major in
Violation of HRS Chapter 205A and HOH Chapter 25)**

DPP and the City Council have committed the same above-alleged failures and violations of the CZJA in processing, recommending and issuing the SMA Major Permit to the developer for its proposed development. The burden was on the City and Applicant to find no adverse impact. Plaintiffs have the burden to show only that the proposed development may have an impact.

**Count X – Against City and Developer
(Water Pollution in Violation of HRS, Chapter 205A, ROH Chapter 25, HRS Chapter 342D (Water Pollution), HAR title 11-54 and HAR Title 11-55)**

The developer's current and future activities on the site are causing and will continue to cause water pollution of the MLCD through contaminated subsurface groundwater flows and through storm water runoff, in violation of the State Water Pollution Act, HAR 342D, HAR§11-54 (Water Quality Standards, and HAR §11-55 (Water Pollution control). The City failed to consider these issues in issuing the Minor and Major SMA Permits in violation of Chapter 204A and ROH Chapter 25.

**Count XI – Against Hanapohaku
(Public Nuisance)**

Developer Hanapohaku has engaged in unlawful acts or omissions that have endangered the lives, safety, health, property, or comfort of the public, by, for example operating and/or leasing space to food trucks that violate health and safety laws, by undertaking unpermitted development, and by creating adverse impacts on the MLCD, Park, public resources, and surrounding roadways.