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WAIPIO OHANA CORPORATION
dba WAIPIO VALLEY SHUTTLE

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

WAIPIO OHANA CORPORATION
dba WAIPIO VALLEY SHUTTLE,

Plaintiff,

vs.

MITCHELL D. ROTH, in his capacity as Mayor
of the County of Hawai'i; IKAIKA
RODENHURST, in his capacity as Director,
County of Hawai'i, Department of Public Works;
COUNTY OF HAWAI'I, and DOES 1-10,

Defendants.

CIVIL NO.

COMPLAINT: SUMMONS

COMPLAINT

The Plaintiff, WAIPIO OHANA CORPORATION dba WAIPIO VALLEY SHUTTLE
and GARY MATSUO ("Plaintiff"), by and through counsel William Dean of Ohana Law Firm,
hereby complains and avers as follows:

PARTIES

1. Plaintiff WAIPIO OHANA CORPORATION dba WAIPIO VALLEY SHUTTLE
is a Hawaii corporation, whose principal place of business is 115 Puhili ST, Hilo, Hawaii 96720.

2. Defendant MITCHELL D. ROTH ("Mayor Roth) is the duly elected Mayor of the COUNTY OF HAWAI'I and sued herein in his official capacity.

3. Defendant IKAIKA RODENHURST is the appointed Director, County of Hawai'i, Department of Public Works, and sued herein in his official capacity.

4. Defendant COUNTY OF HAWAI'I is a municipal corporation and political subdivision of the State of Hawai'i whose powers and limitations are set forth in HRS chapter 46 including its capacity to be sued.

5. At times in this Complaint, some or all of Defendant MITCHELL D. ROTH, Defendant IKAIKA RODENHURST and Defendant COUNTY OF HAWAI'I are collectively referred to herein as "County Defendants".

6. Each named Defendant has participated in the wrongful acts or omissions alleged herein and each named Defendant has acted as the agent and servant of the other named Defendants.

7. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendant DOES 1-10 ("DOE Defendants") are unknown to Plaintiff, who therefore sue said DOE Defendants by such fictitious names and will ask leave of Court to amend this complaint to substitute the true names and capacities when same are ascertained.

8. Plaintiff's counsel performed due and diligent search to ascertain the names and identities of DOE Defendants, including interview of known witnesses and examination of all pertinent reports, documents, and records retrievable by Plaintiff.

9. Each named Defendant and DOE Defendants, inclusive, have participated in the unlawful acts alleged herein. Accordingly, each named Defendant and DOE Defendants, inclusive, is responsible for violation of Plaintiff's respective rights asserted herein through their own acts and omissions or through the acts and omissions of their agents.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Circuit Court under the common law and the applicable provisions of Hawaii Revised Statutes (“HRS”) including HRS §§ 603-21.5, 603-21.7, 603-21.9, and 632-1 conferring jurisdiction over the Plaintiff’s respective claims because the matters at issue occurred within this Circuit and the claims arose here.

11. Venue is proper under HRS § 603-36 because the claims herein arose in this judicial district and all Defendants have their respective principal places of business here.

FACTUAL BACKGROUND

12. Historically, the Hawai‘i Supreme Court has committed to preserve public access to the ocean by vesting rights in waterways and beaches in the State when reasonably possible. Longstanding public use of Hawai‘i’s beaches has ripened into a customary right and public policy favors extending to public use and ownership as much of Hawai‘i’s shoreline as is reasonably possible. These rights enjoyed by Plaintiff and the rights guaranteed by Article 1, sections 2, 5 and 8 and 11 of the Hawai‘i Constitution are fundamental. Moreover, Article 11, section 1 requires County Defendants to promote use of Hawai‘i’s natural resources for the people. Article 11, section 6 guarantees that all natural fisheries in the sea waters of the State remain free to the public. Article 11, section 9 guarantees all persons the right to a clean and healthful environment.

13. Waipi‘o Valley Road is owned by the County of Hawai‘i and a necessary and integral component of public access to Waipi‘o beach and the adjacent ocean. The sacred Waipi‘o Valley was the boyhood home of King Kamehameha I, and an important center for political and religious life in Hawai‘i. The beach at Waipi‘o features some of Hawai‘i’s best surfing waves,

unrestricted flow of freshwater via the Waipi‘o river, and incomparable dramatic landscapes favored by centuries of Hawai‘ian royalty.

14. Before Western contact, native Hawai‘ians used Waipi‘o beach and the adjacent ocean for fishing, surfing, gathering, swimming, spiritual practices, recreation, and enjoyment of life.

15. Since Western contact, residents of what is now the County of Hawai‘i have used Waipi‘o beach and the adjacent ocean for fishing, surfing, gathering, swimming, spiritual practices, recreation, and enjoyment of life up until the present time.

16. Article 1, Section 2 of the Hawai‘i Constitution guarantees all persons certain inherent and inalienable rights, including enjoyment of life, liberty, and the pursuit of happiness.

17. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." This, "Takings Clause" is made applicable to the states through the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017).

18. Similarly, Article 1, Section 20 of the Hawai‘i Constitution provides, "[p]rivate property shall not be taken or damaged for public use without just compensation."

19. The Company also enjoys the right to travel along Waipi‘o Valley Road under HRS § 7-1 which guarantees that the people shall have "the right of way" and "roads shall be free to all."

20. Under the common law, the Company also has the right to use County of Hawai‘i roads.

21. For more than 25 years Plaintiff, Waipio Ohana Corporation, has owned and operated the Waipio Valley Shuttle (the "Company"). The Company is the original guided tour company in the Waipi‘o Valley and prior to the Defendant’s illegal actions detailed herein, it had

operated almost uninterrupted as a business since the late 1960s¹.

22. The Company is currently licensed by all required state governing bodies including the State of Hawaii Public Utilities Commission and the County of Hawaii and is the only fully licensed tour company currently operating in the Waipi'o valley.

23. Unlike what seems to be a growing trend in the state of Hawai'i, Waipi'o is not owned by one mainland multi-billionaire, or by or a small group of wealthy people. It is a sacred historical site that truly belongs to all of the residents of the state of Hawai'i. In a sense therefore, the Company acts as a connection point between the people of Hawai'i, and this treasured site.

24. The Waipi'o Valley once housed the kings of ancient Hawai'i and served as a retreat for Hawaiian royalty. It is for that reason that the valley was bestowed with the nickname "The Valley of the Kings". Waipi'o valley is where Kamehameha the Great received custody of Kukailimoku, the war god of the kings of Hawaii. At Waipi'o, Kamehameha engaged in the first naval battle in Hawaiian history and began his conquest and his reign over the islands lasting until his death in 1819.

25. The Company's staff of six employees, which includes several Native Hawaiians, provide carefully choreographed and managed public access to Waipio's verdant valleys, meandering rivers, magnificent waterfalls, wild horses, and beaches. In doing so the Company and its employees act as stewards of the land, reducing automobile traffic in the valley and ensuring that the sanctity of the natural environment is protected.

26. As online reviewers of the Company have stated, "There's something so enjoyable and rewarding about experiencing a tour led by a local or a native"; "Not only is Hawaii [our

¹ County Defendant Department of Public Works closed public access to Waipi'o during the approach of Hurricane Douglas in July 2020 and twice for holidays during coronavirus restrictions.

guide's] home, but it is evident when he speaks of home he speaks with pride"; "[Our guide] was amazing! With his ties to the valley, he had so much knowledge. Such wonderful history to be shared"; "This is, in my opinion, the best way to see and learn about the valley. And frankly, the most respectful too."

27. Up until February 25, 2022, Plaintiff's operated the Company with unrestricted access over the Hawaii County-owned Waipi'o Valley Road.

28. On February 25, 2022, Mayor Roth interrupted the Plaintiff's ability to operate their business, violated the Plaintiff's access to the ocean and beach, a clean and healthful environment at Waipi'o and the Plaintiff's employees' and clients' enjoyment of life and pursuit of happiness generally.

29. In claimed reliance on a biased Preliminary Geotechnical Engineering Evaluation prepared by the engineering firm Hart Crowser for Defendant County of Hawai'i, Department of Public Works and similarly flawed recommendations from the same Defendant County of Hawai'i, Department of Public Works, Mayor Roth exaggerated and misstated the conclusions of such Evaluation and declared an emergency when none existed.

30. Specifically, Mayor Roth issued a Traffic Emergency Zone Declaration dated February 25, 2022 ("Declaration") and Waipi'o Valley Road Emergency Rule No. 1 ("Emergency Rule").

31. There appear to be no records of incidents of injury or death to persons from rock fall, landslide, or roadway failure along Waipi'o Valley Road at any time during the last 50 years.

32. Nevertheless, Mayor Roth's Declaration claims that "upon scientific information and expertise available, Waipi'o Valley Road is in imminent threat of slope and roadway failure threatening the health, safety, and welfare of the people" and "due to the possibility of imminent

emergency or disaster", closure to some groups but not all groups are necessary. Emphasis added.

33. Email communications with Defendant County of Hawai'i, Department of Public Works clearly show that the perceived threat to persons on which the Declaration is based rests on the flawed Preliminary Geotechnical Engineering Evaluation's erroneous conclusions that pedestrians on Waipi'o Valley Road have a greater than 1/18,000 chance of dying from rock fall events per single trip over the Road and vehicle occupants have a risk of 1/170,000 chance of dying from rock fall events per single trip over the Road.

34. In its Preliminary Geotechnical Engineering Evaluation, Hart Crowser made clear mathematical errors in its use of wrong equations to calculate risk to pedestrians and vehicle occupants from potential rock fall.

35. Weeks before this Complaint was filed, the mathematical errors and erroneous risk conclusions made by Hart Crowser were made known to Hart Crowser and Defendant County of Hawai'i, Department of Public Works.

36. To date, Defendant County of Hawai'i, Department of Public Works has failed and refused to require Hart Crowser to correct its mathematical errors and erroneous risk conclusions.

37. Written correspondence from Defendant County of Hawai'i, Department of Public Works and Hart Crowser show that the degree of threat to persons on which Mayor Roth's Declaration and Emergency Rule is based rests on Hart Crowser's miscalculated risk of harm to pedestrians and vehicle occupants from potential rock fall.

38. When properly employed by Civil Engineer Panos Prevedouros, Ph. D.², the methodology misapplied by engineers Hart Crowser in their Preliminary Geotechnical Engineering Evaluation yields a far less actual risk to pedestrians, approximately 1/5,000,000. Similarly, the

² Dr. Prevedouros is the retired chair of the Department of Engineering, University of Hawai'i.

properly calculated risk to vehicle occupants is approximately 1/17,000,000.³ Both of these actual risks are nearly 100 times less than calculated by Hart Crowser and are well within the acceptable risk for existing slopes using the Australian Geomechanics Society ("AGS") risk evaluation methodology applied in the Hart Crowser Preliminary Geotechnical Engineering Evaluation at pp. 10-11.

39. Even with its mathematical errors and exaggerated risk conclusions, the Hart Crowser Evaluation did not recommend closure of Waipi'o Valley Road, except for times associated with heavy rain events. Moreover, nowhere in the Hart Crowser report does the word "imminent" appear. The Hart Crowser Preliminary Geotechnical Engineering Evaluation provides no support for closing Waipi'o Valley Road to Plaintiff.

40. No credible scientific information and available expertise nor other rational basis exists to support Mayor Roth's Declaration and Emergency Rule that Waipi'o Valley Road is "in **imminent** threat of slope and roadway failure threatening the health, safety, and welfare of the people" and "due to the possibility of **imminent** emergency or disaster", closure to some groups but not all groups are necessary. [Emphasis added]

41. The effects of the Declaration and Emergency Rule interrupted and violated Plaintiff's rights of access to the Waipi'o Valley, including Plaintiff's enjoyment of life and pursuit of happiness in favor of other groups whose rights of access to Waipi'o Valley remained unaffected.

42. In issuing the Declaration and Emergency Rule, Mayor Roth acted beyond the scope of to his lawful authority. Specifically, Mayor Roth claimed to rely on HRS §264-1.5, but HRS §264-1.5 provides no authority for his actions and does not allow for closure of Waipi'o Valley Road. HRS §264-1.5 does not grant the mayor rule-making authority to discriminate between

³ Hart Crowser assumes one in three vehicles struck by rocks will result in death.

residents and non-residents of Waipio Valley, as well as taro farmers and tour operators. Even if HRS § 264-1.5 had provided him authority, Mayor Roth failed to follow the requirements of the statute.

43. The purpose of HRS § 264-1.5 is to provide access to an area that is threatened by a temporary closure or lack of adequate access to a road, not to close the only road to an area with no alternate access to a select group of favored constituents.

44. By issuing his Declaration and Emergency Rule, Mayor Roth sought to designate the Waipi‘o Valley to be a traffic emergency zone and close the road. The Declaration and Emergency Rule, however, did not comply with the statutory requirement of HRS §264-1.5 to fix a place and time, not later than twenty-four hours after the designation, for a hearing to be held before the county director of transportation.

45. The terms of the Declaration and Emergency Rule allow use of Waipi‘o Valley Road by some groups with no safeguards at all, while arbitrarily denying other groups use of the Road.

46. The terms of the Declaration and Emergency Rule failed to make reasonable accommodations to provide for continued use of Waipi‘o Valley Road by the Plaintiff and others to access the ocean and beach at Waipi‘o in exercise of their rights guaranteed by the Hawai‘i State constitution and the public trust doctrine.

47. The Declaration and Emergency Rule are unlawful, unnecessary and continue to cause division among long time users of Waipi‘o Valley Road and the Hamakua community.

COUNT 1

Violation of the Takings Clause of the Hawai‘i Constitution

48. Plaintiff hereby incorporates by reference the preceding paragraphs 1 through 42 as though fully set forth herein.

49. Mayor Roth has seized without compensation the Plaintiff's property, by completely eliminating the ability of the Company to operate on Waipi'o Valley Road, in effect forcing its closure, through his issuance of the February 25, 2022 the under the Declaration and Emergency Rule.

50. The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." This, "Takings Clause is made applicable to the states through the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942, 198 L.Ed.2d 497 (2017).

51. Similarly, Article 1, Section 20 of the Hawai'i Constitution provides, "[p]rivate property shall not be taken or damaged for public use without just compensation."

52. The Takings Clause's requirements apply as equally to government takings of personal property, e.g., an automobile, or in this case a business, as it does to real property. "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, 576 U.S. 350, 135 S. Ct. 2419, 2426 (2015).

53. The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original)).

54. The Takings Clause bars government actors "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

55. Mayor Roth has placed the cost of the Declaration and Emergency Rule squarely upon the shoulders of private business owners who operate in the Waipi‘o Valley and the Hamakua community more broadly, including the Plaintiff, and has failed to justly compensate the Plaintiff for these takings undertaken ostensibly for their benefit to the public.

56. Without extending constitutionally required just compensation to Plaintiff, the Declaration and Emergency Rule jeopardized the sustainability of Plaintiff’s businesses and the rights of the Plaintiff’s rights with respect to property ownership.

57. Mayor Roth acted under color of state law, and the Declaration and Emergency Rule were issued to serve a well-recognized public purpose by a duly elected government official and his designees.

58. The Declaration and Emergency Rule adversely impacted the Plaintiff’s use of this personal property, i.e., the Company, to such an extent that, at least temporarily, the Orders entirely diminished the economic benefit of the Company.

59. The U.S. Supreme Court “recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such ‘regulatory takings’ may be compensable under the Fifth Amendment.” *Lingle*, 544 U.S. at 537.

60. “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922).

61. Mayor Roth’s arbitrary and capricious restrictions on the Plaintiff’s use of Waipi‘o Valley Road went “too far” and must “be recognized as a taking.” *See id.*

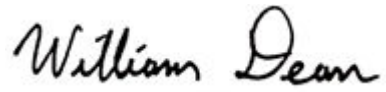
62. Otherwise, without just compensation guaranteed by the Takings Clause, Plaintiff will be privately saddled with the cost of paying for government action undertaken for the common good.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks the Court to grant the following relief:

- A. For general and compensatory damages in an amount to be determined at trial;
- B. Award Plaintiff its reasonable attorneys' fees, costs, and expenses under applicable state law; and
- C. Any other such further relief to which Plaintiff may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

DATED: Hilo, Hawai'i, February 13, 2022



WILLIAM DEAN
Attorney for Plaintiff
WAIPIO OHANA CORPORATION
dba WAIPIO VALLEY SHUTTLE

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
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WAIPIO OHANA CORPORATION
dba WAIPIO VALLEY SHUTTLE,

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MITCHELL D. ROTH, in his capacity as Mayor
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County of Hawai'i, Department of Public Works;
COUNTY OF HAWAI'I, and DOES 1-10,

Defendants.

CIVIL NO.

SUMMONS

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY NOTIFIED THAT Linda Nguyen, Plaintiff, has commenced an action in CIVIL NO. _____ in the Circuit Court of the Third Circuit, State of Hawaii, against you in the above- entitled Court wherein it requests general and special damages, punitive damages, Plaintiff's attorney fees and court costs against you, together with such other relief as the Court deems just.

YOU ARE HEREBY SUMMONED to appear before the Honorable _____, Judge of the above-entitled Court, at 777 Kilauea Avenue, Hilo, Hawaii, on _____, at _____ and required to file with the court and serve upon William Dean 9086 Ohana Law Firm. Email documents, including Answer to the Complaint and Counterclaims to: william@ohanalawfirm.com (808)430-0704, 614 Kilauea Ave., Ste. 102-39, Hilo, HI 96720, Fax (888)490-0933 Attorney for Plaintiff whose address is stated above, an Answer to the Complaint which is herewith served upon you, within 20 days of Service of the Complaint and this Summons.

If you fail to do so, judgment by default may be taken against you for the relief demanded in the Complaint.

DATED: Hilo, Hawaii, _____.

CLERK OF THE ABOVE-ENTITLED COURT