MARGARET WILLE & ASSOCIATES LLLC
Margaret Wille #8522
Timothy Vandeveer #11005
P.O. Box 6398
Kamuela, Hawai‘i 96743
MW: (808) 854-6931
TV: (808) 388-0660
mw@mwlawhawaii.com
tim@mwlawhawaii.com

Attorneys for Plaintiffs
Friends of Ha‘ikū Stairs, Dr. Katrena Kennedy,
Randall Kennedy, Donald Kamalani Maiwa Pua III,
Bill Sager, Ernest Shih, and Richard Tuggle

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

FRIENDS OF HA‘IKŪ STAIRS, a 501(c)(3) nonprofit corporation; DR. KATRENA KENNEDY, an individual, RANDALL KENNEDY an individual, DONALD KAMALANI MAIWA PUA III an individual, BILL SAGER an individual, ERNEST SHIH an individual, AND RICHARD TUGGLE, an individual,

Plaintiffs,

v.

CITY AND COUNTY OF HONOLULU

Defendant.

Civil No.
(Environmental Court)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMPLAINT

Plaintiffs Friends of Haʻikū Stairs a 501(c)(3) non-profit corporation ("FHS"), and individual plaintiffs Donald Kamalani Maiwa Pua III, Dr. Katrena Kennedy, Randall Kennedy, Bill Sager, Ernest Shih, and Richard Tuggle (collectively, "Plaintiffs"), by and through their attorneys, Margaret Wille & Associates LLC, complain and allege against Defendant and County of Honolulu ("City" or "Defendant") as follows:

INTRODUCTION

1. This action seeks declaratory and injunctive relief against the Defendant for violations of the Hawaiʻi Environmental Policy Act ("HEPA"), Hawaiʻi Revised Statutes ("HRS") chapter 343, in failing to conduct an environmental impact statement ("EIS") for the planned action known as the "Haiku Valley Nature Preserve Removal of Haiku and Moanalua Saddle Stairs" ("Proposed Unlawful Action" or "Defendant's proposed action"). In the alternative, Plaintiffs seek declaratory and injunctive relief against Defendant for violating HEPA by failing to conduct a supplemental environmental impact statement ("SEIS") for the Proposed Unlawful Action.

2. The stated purpose of the City and County of Honolulu's Proposed Unlawful Action is the destruction of the Haʻikū Stairs, an iconic public landmark and historic monument on public land, consisting of a steel hiking trail structure of over 3,000 steps along Koʻolau mountain range on the island of Oʻahu. The action would involve the demolition and removal of the Stairs, situated on land classified Conservation and designated as federally protected critical habitat for multiple endangered species. Due to the actual and potential significant impacts on the environment should the destruction move forward, and for multiple reasons, HEPA mandates

that an environmental impact statement *shall* be required. *See e.g.,* HRS § 343-5 "Applicability and requirements" (a)(2).

3. Defendant is trying to rely on an inappropriate, outdated, and legally irrelevant Final Environmental Impact Statement ("FEIS") prepared in 2019 for a separate and distinct action that was completed by the Honolulu Board of Water Supply ("BWS") in July of 2020. To the extent there is an overlap of the 2019 FEIS that led to the 2020 final agency action and the current Proposed Unlawful Action, Defendant ignores HEPA statute, rules, and case law mandating that a new or supplemental EIS be prepared. (a Supplemental EIS is required when an essentially different action is under consideration due to a substantive change in the size, scope, intensity, use, location, timing, and/or other characteristics that may have a significant effect on the environment. *See* Hawai'i Administrative Rules § 11-200.1-30 "Supplemental Environmental impact statements".)

4. The result of the 2019 FEIS (under the previous, Mayor Caldwell administration) was the selection of the "Conveyance Alternative". The lands encompassing the Stairs were transferred from the BWS to the City and County Parks and Recreation Department to keep them open to the public in perpetuity, achieving BWS' objectives of eliminating the diversion of resources and potential liabilities. Defendant, through City officials, made numerous public proclamations of their support for this "Conveyance Alternative" before, during and after the FEIS was completed. City officials at the time acted on their intent to restore the Stairs and work to provide managed access for residents and visitors by issuing a solicitation to private vendors to manage the reopened Stairs in February 2020.

5. Plaintiffs relied on such promises to their detriment, including by not submitting comments on the "complete removal" action proposed in the 2019 FEIS and electing not to

contest the validity of the FEIS (despite numerous glaring deficiencies), believing the City decided to restore and provide managed access to the Stairs following the transfer of the property to the City Parks and Recreation Department. The City, now under the Mayor Blangiardi administration, has switched course entirely, in contravention to earlier publicly decided actions and legal requirements, denying Plaintiffs due process under the law.

6. On May 4, 2023, Defendant issued a Request for Competitive Sealed Proposal ("RFP")[1] for the Proposed Unlawful Action. On June 29, 2023, the Defendant, City & County of Honolulu, awarded the contract to perform services for the "Haiku Valley Nature Preserve Removal of Haiku and Moanalua Saddle Stairs" in the amount of $2,345,247.17 to The Nakoa Companies, Inc.[2] ("Nakoa"). By issuing the RFP and subsequently awarding a contract to Nakoa, City officials have signaled their intention to carry out the Proposed Unlawful Action. This decision, however, runs contrary to the requirements of HEPA, which provides that "acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of Proposed Unlawful Action". *See* HRS § 343–5(c).

7. Defendant's failure to conduct an EIS for Defendant's proposed action violates the letter and purpose of HEPA and its implementing regulations, as well as fundamental requirements of administrative procedure and due process. Defendants' violations in this case nullify HEPA's fundamental purpose: to "ensure that environmental concerns are given appropriate consideration in decision making" so that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process

[1] A copy of the Request for Proposal for the Stair Removal Action dated May 4, 2023 is attached hereto as **Exhibit 1**.
[2] A copy of the award letter for the contract to perform services for Haiku Valley Nature Preserve Removal of Haiku and Moanalua Saddle Stairs is attached hereto as **Exhibit 2**.

benefits all parties involved and society as a whole." *See* HRS § 343-1 "Findings and purpose". Public participation and the opportunity for input in the government's decision-making will be denied with respect to the Proposed Unlawful Action unless an appropriate EIS is carried out.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to HRS §§ 343-7(a), 603-21.5 "General", 603-21.9 "Powers", 604A-2 "Jurisdiction", HRS chapter 632 "Declaratory Judgments", and article XI, § 9 of the Hawai'i Constitution "Environmental rights".

9. Venue properly lies in this judicial circuit pursuant to HRS § 603-36 (5) "Actions and proceedings, where to be brought" because the claims for relief arose in this circuit and because it is the location where the Defendant is domiciled.

PARTIES

Plaintiffs

10. Plaintiff Friends of Haʻikū Stairs is a 501(c)(3) nonprofit organization dedicated to protecting and preserving the historic Haʻikū Stairs and the surrounding ʻāina for current and future generations. Its 15,000 active supporters are passionate about the Stairs and seek to steward them through managed access in order to safeguard the unique history, ecology, cultural integrity, and recreational opportunities of Haʻikū Valley.

11. Established in 1987, FHS has a long history of exercising stewardship over the Stairs. FHS was authorized by the City to access the Haʻikū Stairs decades ago; they retained authorization for access after the Stairs were closed to the general public. FHS led regular community volunteer work trips for decades to remove invasive species and trash and perform maintenance at no cost to the City. These volunteer work trips ended in 2015 when the Board of Water Supply denied FHS access. Decades of caring for the Stairs have provided FHS with

extensive knowledge of the Stair's structure and the surrounding ecology. Its members include former officials from the State of Hawai‘i Department of Land and Natural Resources ("DLNR"), the State of Hawai‘i Department of Transportation ("DOT"), the City and County of Honolulu Department of Planning and Permitting ("DPP"), the U.S. Navy, and U.S. Coast Guard, as well as engineers, scientists, and other experts.

12. FHS reinvigorated its mission to embrace community advocacy. FHS emerged as the leading voice rallying to save the Stairs for current and future generations.

13. FHS is governed by a board of directors with members from the surrounding community, local hiking groups, and conservation organizations. FHS officers and members live, work, and recreate in and around the Ha‘ikū Stairs. Several FHS members are past and present members of the Kāne‘ohe Neighborhood Board.

14. The recreational, educational, aesthetic, cultural, spiritual (religious), and subsistence interests of FHS officers and members are harmed by Defendant's failure to ensure full and proper disclosure of the proposed project's harmful environmental and cultural impacts and mitigation options and alternatives.

15. The rights of FHS's officers and supporters relevant to the project area are protected by the Hawai‘i State Constitution and state law. FHS's officers and supporters have rights to a clean and healthful environment under article XI, section 9 of the Constitution, which mandates enforcement of these rights through appropriate legal proceedings whenever any party, public or private, makes binding decisions under "laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources."

16. Individual Plaintiff Donald Kamalani Maiwa Pua III ("Kama") is a resident of Waipiʻo Valley on the island of Hawaiʻi. In 2015, his younger brother, Daylenn ("Moke") Pua tragically disappeared after an ill-fated Oʻahu hiking trip. The brother was widely reported to have "climbed the Haʻikū Stairs," contributing to a false public perception that the Stairs are dangerous. In fact, a subsequent investigation established that Moke Pua had embarked on the "back side route" up from Moanalua Valley. He got lost along the way and most likely fell to his death near the summit. Kama Pua wants to prevent future hikers from encountering the same tragic fate as his brother. He believes that reopening the Haʻikū Stairs would provide a far safer means for hikers to access the summit.

17. Individual Plaintiff Dr. Katrena Kennedy is a retired Radiologist who has been a resident of Heʻeia for over 30 years. She enjoys regularly hiking the trails of Hawaiʻi and elsewhere with family and friends. Dr. Kennedy is dismayed that the spectacular and historic Haʻikū Stairs in her own neighborhood have been legally inaccessible for so long and are now slated to be removed. She is also concerned that the unavailability of the Stairs has driven hiking traffic onto the far less safe Moanalua Trail.

18. Individual Plaintiff Randy Kennedy is a longstanding Heʻeia resident, avid hiker, boy scout leader, and board member of FHS. He previously served as the State Natural Area Program Manager for DNLR, coordinating the protection of endangered species state-wide. Mr. Kennedy is deeply concerned about the threat that the City's planned demolition of the Haʻikū Stairs poses to native habitat and rare plants and animals that surround the Stairs. He believes the Proposed Unlawful Action should undergo further vetting by experts as part of the required environmental review before being permitted to proceed. Mr. Kennedy has witnessed the City repeatedly ignore the overwhelming desire for Kāneʻohe and Oʻahu citizens to reopen the Stairs

under managed access. He is appalled that the City appears now to be ignoring State and Federal environmental protection laws.

19. Individual Plaintiff Bill Sager is a Kāneʻohe resident who has a longstanding connection to the Haʻikū Stairs. He first represented the State Division of Forestry & Wildlife in negotiations over the Haʻikū Stairs in the late 1990s when the Coast Guard Omega Station was closing. He later served as a member of the Kāneʻohe Neighborhood Board and heard public testimony on the Stairs in that capacity. Sager's son and daughter both climbed the Stairs several times as part of Castle High School Sierra Club hikes. Sager wants current Hawaiʻi residents to have a similar opportunity. He believes that the Stairs have a unique educational value as there is no other place in the world that one can climb from a tropical jungle through five native ecosystems to a pristine native forest such as exists at the summit of Na Pali.

20. Individual Plaintiff Ernest Shih is a board member of FHS, avid hiker, and Windward entrepreneur. As a business owner, Shih opposes the use of taxpayer money to destroy an iconic hiking trail and historic monument. He believes that, if managed responsibly, the Haʻikū Stairs would become a productive asset that would generate local jobs, community revenues and investment, as well as instill a lasting source of pride for Windward Oʻahu.

21. Individual Plaintiff Richard ("Mike") Tuggle is a longstanding resident of Haʻikū Valley. He lives near a popular trespassing entry point and has experienced first-hand the problems that inconsiderate hikers have caused to the community. Tuggle, along with many of his neighbors, believes that trespassing can be solved through managed access without the need to destroy the Haʻikū Stairs. In earlier years, Tuggle used to climb the Stairs for exercise, accessing them as often as three times per week. He wants future generations to be able to share in this unique island experience.

Defendants

22. Defendant and County of Honolulu ("City") is a municipal corporation duly organized and existing under the Constitution, the laws of the State of Hawai‘i, the Revised Charter of the City and County of Honolulu, and the Revised Ordinances of Honolulu ("ROH"). The City is the "proposing agency" and "accepting authority" for the Proposed Unlawful Action and as such, is the entity required to comply with HEPA prior to approval of the request and commencement of the Proposed Unlawful Action.

23. The Honolulu Department of Parks and Recreation ("DPR") is the City agency responsible for managing, maintaining, and operating all parks and recreational facilities of the City as well as developing and implementing programs for cultural and recreational activities. Its mission is to enhance the leisure lifestyle and quality of life for the people of O‘ahu through active and passive recreational opportunities. As the co-applicant (along with the Board of Water Supply) DPR prepared the 2019 FEIS and was the entity that received the Haiku Stairs for recreational use under the managed access plan approved by former City and County of Honolulu Mayor Kirk Caldwell's administration.

24. The Department of Design and Construction ("DDC") is the City's central agency responsible for the planning, design, and construction management of the City's Capital Improvement Program ("CIP"). The DDC is the agency that issued the RFP for the Proposed Unlawful Action.

LEGAL FRAMEWORK

The Constitution of the State of Hawai‘i

25. Under the Hawai‘i Constitution article XI “Conservation and Development of Resources”, section 1, Defendant has public trust duties to conserve and protect the state’s natural resources for the benefit of present and future generations.

26. Under the Hawai‘i Constitution article XI, section 9, 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 regulation as provided by law.”

HEPA Purpose and EIS Requirements

27. HEPA is the cornerstone of Hawai‘i’s statutory environmental protections. The stated purpose of HEPA, also known as HRS chapter 343 “Environmental Impact Statements”, is to “establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making.” *Id.* § 343-1 “Findings and purpose.”

28. In enacting HEPA, the legislature established an environmental review process to “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” finding that the environment is critical to humanity’s well-being because “human activities have broad and profound impacts upon the environment”. *See Id.*

29. In addition to informing and alerting decision makers as to environmental impacts from certain actions, the other main goal of HEPA is encouraging meaningful public participation in the process. “[T]he 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." *Id.*

30. Timing is key in the HEPA process. According to the Hawai‘i Administrative Rules, environmental review shall occur "at the earliest practicable time," before a proposed action may proceed to "assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed action prior to decision- making." HAR § 11-200.1-1(b) "Purpose."

31. The term "action" is defined in the HAR as "**any program or project to be initiated by an agency or applicant**." *See* HAR § 11-200.1-2 "Definitions" (emphasis added).

32. Whenever any person (termed an "applicant") proposes a covered action that requires agency approval, the approving agency "shall assess the significance of the potential impacts of the action to determine the level of environmental review necessary for the action." HRS § 343-2 "Definitions"; HAR § 11-200.1-14 "Determination of level of environmental review"(b). HEPA applies to nine categories of actions, including those that propose the "use of state . . . lands," or "any use within any land classified as a conservation district . . . under [HRS] chapter 205." HRS § 343-5(a)(1)(2).

33. HEPA requires the preparation of an EIS for any action that "***may*** have a significant effect on the environment." HRS § 343-5(c) (emphasis added). A "significant effect" is defined as "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long- term environmental goals as

established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State." *See* HRS § 343-2; *see also* HAR § 11- 200.1-2.

34. The agency must consider certain "significance criteria" outlined in HAR § 11-200.1-13 "Significance criteria". In determining whether an action may have a significant impact on the environment, "the agency shall consider every phase of a proposed action, the expected impacts, and the proposed mitigation measures." *Id*. at (b). "[A]n action shall be determined to have a significant effect on the environment if it may," among other factors:

(1) Irrevocably commit a natural, cultural, or historic resource;

(2) Curtail the range of beneficial uses of the environment;

(3) Conflict with the State's environmental policies or long-term environmental goals established by law;

(4) Have a substantial adverse effect on the economic welfare, social welfare, or cultural practices of the community and State;

(5) Have a substantial adverse effect on public health;

(6) Involve adverse secondary impacts, such as population changes or effects on public facilities;

(7) Involve a substantial degradation of environmental quality;

(8) Be individually limited but cumulatively have substantial adverse effect upon the environment or involves a commitment for larger actions;

(9) Have a substantial adverse effect on a rare, threatened, or endangered species, or its habitat;

(10) Have a substantial adverse effect on air or water quality or ambient noise levels;

> (11) Have a substantial adverse effect on or be likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, sea level rise exposure area, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters.
>
> (12) Have a substantial adverse effect on scenic vistas and viewplanes, during day or night, identified in county or state plans or studies; or

. . .

Id.

The criteria are expressly listed in the disjunctive. Thus, the existence of a single factor is sufficient to require preparation of an EIS. *See Id.*

35. An EIS is "an informational document . . . which discloses 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. Content requirements inform the substance of an EIS and are set forth in HAR §§ 11-200.1-24 "Content requirements; draft environmental impact statements" and 11-200.1-27 "Content requirements; final environmental impact statement".

36. An EIS generally must "fully declare the environmental implications of the proposed action and shall discuss all reasonably foreseeable consequences of the action," as well as "responsible opposing views, if any, on significant environmental issues raised by the proposal." *Id.* § 11-200.1-24(a). An EIS must discuss "significant . . . adverse impacts," including cumulative impacts and secondary impacts, as well as proposed mitigation measures

and alternatives considered. *Id.* §§ 11-200.1-24(d)(2), (3), (4). "Impacts" may include "ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative." *Id.*§ 11-200.1-2.

37. An EIS must also contain a "discussion of the alternative of no action as well as reasonable alternatives that could attain the objectives of the action," including "a rigorous exploration and objective evaluation of the environmental impacts of all such alternative actions," with particular attention to "alternatives that might enhance environmental quality or avoid, reduce, or minimize some or all of the adverse environmental effects, costs, and risks of the action." *Id.* § 11-200.1-24(h).

38. An EIS shall also include analysis of the probable impact of the proposed action on the environment, including "consideration of all consequences on the environment, including direct and indirect effects" and "[t]he interrelationships and cumulative environmental impacts of the proposed action and other related actions." *Id.* § 11-200.1-24(l) (emphasis added). The EIS shall address "all probable adverse environmental effects that cannot be avoided," including any adverse effects such as threats to public health or "other consequences adverse to environmental goals or guidelines" and shall clearly set forth "the rationale for proceeding with a proposed action, notwithstanding unavoidable effects." *Id.* § 11-200.1-24(o).

39. Acceptance of a required final EIS is a "condition precedent to approval of the request and commencement of the proposed action." HRS § 343-5(e).

40. If the approving agency determines that a proposed action "may have a significant effect, it shall issue an EISPN." HAR § 11-200.1-22(c) (emphasis added); HRS § 343-5(e)(3).

An EISPN is "a determination that an action may have a significant effect on the environment and, therefore, will require the preparation of an EIS." HAR § 11-200.1-2.

41. The agency shall file notice of the agency's determination with the office of planning and sustainable development, which, in turn, publishes the agency's determination for the public's information. HRS § 343-5(e). The notice "shall indicate," among other information, the "[r]easons supporting the determination." HAR § 11-200.1-22(e).

Past Determinations and Previous EISs

42. According to HAR § 11-200.1-11(d), "[a]gencies shall not, without careful examination and comparison, use past determinations and previous EISs to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted EISs. Further, when previous determinations and previous EISs are considered or incorporated by reference, they shall be substantially relevant to the action being considered".

Supplemental EISs

43. An EIS that is accepted with respect to a particular action is usually qualified by the size, scope, location, intensity, use, and timing of the action (among other characteristics). However, according to the HAR "Proposing agencies or applicants shall prepare for public review supplemental EISs **whenever the proposed action for which an EIS was accepted has been modified to the extent that new or different environmental impacts are anticipated**." HAR § 11-200.1-30(a-b) (emphasis added).

44. According to the HAR, supplemental EIS shall be warranted when the scope of an action has been substantially increased, **when the intensity of environmental impacts will be increased, when the mitigating measures originally planned will not be implemented, or**

where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with. HAR § 11-200.1-30(b) (emphasis added).

45. Though it may incorporate by reference unchanged material from the same (original EIS), the contents of the supplemental EIS shall be the same as required by the Administrative Rules for an EIS and shall also "**fully document the proposed changes from the original EIS, including changes in ambient conditions or available information that have a bearing on a proposed action or its impacts, the positive and negative aspects of these changes, and (shall) comply with the content requirements of [HAR] subchapter 10 as they relate to the changes**." HAR § 11-200.1-30(c) (emphasis added).

46. Finally, the HAR state that "[t]he requirements of the thirty-day consultation, public notice filing, distribution, the forty-five-day public review, comments and response, and acceptance procedures, shall be the same for the supplemental EIS as is prescribed (by this chapter) for an EIS." HAR § 11-200.1-30(d).

RELEVANT BACKGROUND FACTS

The Haʻikū Stairs

47. The Haʻikū Stairs are an architectural/engineering wonder that doubles as a world-class hike. The Stairs were built as part of a top-secret World War II radio project, a project that provided cutting-edge technology that helped win the war. Since then, the "Stairway to Heaven" (as the Stairs have since become known) has become an iconic fixture of Windward O'ahu treasured by generations of island residents, hikers, scouting troops, educators, and native Hawaiian gatherers. Up to 20,000 people per year climbed them legally and without incident in the 1970s and 80s. The Stairs' renown has also attracted visitors from around the world and continues to reverberate widely on social media today.

48. Built by the federal government on public land, the Stairs were repaired by the City & County of Honolulu in 2003 for the express purpose of public recreational use; they were transferred to the City Parks & Recreation Department in 2020, again for the purpose of public recreational use. In any other place, the Haʻikū Stairs would be a cherished resource, a crown jewel in the municipal park system. Instead, City and County now seek to demolish the Stairs, a decision that is both unexplained and unlawful.

49. In 2017, the then-landowner of the Haʻikū Stairs, the Honolulu Board of Water Supply, determined that the Stairs were a liability that did not align with the agency's mission. Recognizing that any solution involving demolition and removal of the Stairs would have a significant impact on the environment, the BWS conducted an environmental impact statement "in order to arrive at a long-term, viable solution for Haʻikū Stairs…to evaluate removal of Haʻikū Stairs, and evaluate potential alternatives that convey the land to another entity and wholly or partially keep Haʻikū Stairs."

50. In December 2019, BWS submitted its FEIS, in which stated that BWS and the City had discussed potential land transfer and takeover of Haʻikū Stairs by the City which could potentially achieve BWS' objectives of eliminating the diversion of resources and potential liabilities associated with Haʻikū Stairs, while also addressing trespass, community, and public safety concerns. FEIS at pg. 1-11. The FEIS included a "Conveyance Alternative" to the Proposed Unlawful Action (removal of the Stairs) which contemplated that "a willing agency from the City or the State would conduct a formal transfer of BWS Haʻikū Stairs lands" and also stating that "[t]he Conveyance Alternative assumes that the transferee or buyer will open Haʻikū Stairs for public use through a managed access scenario." FEIS at pg. 1-12.

51. In February 2020, the City issued an RFI soliciting private vendors to manage the reopened Stairs. On April 27, 2020, the BWS board voted unanimously to transfer the Stairs to the City. The vote selecting the Conveyance Alternative concluded the action contemplated by the 2019 FEIS.

52. On July 1, 2020, the City took possession of the Stairs. At the time, the City anticipated operating the Stairs as a paid attraction. The City continued to work to reopen the Stairs for the remainder of 2020, negotiating draft agreements with landowners and developing plans for managed access. In December, the City sought the City Council's approval to implement a managed access concession.

53. In January 2021, a new Mayor and City Council was inaugurated.

54. In September 2021, the City Council voted to remove the Haʻikū Stairs by non-binding Resolution 21-154.

55. On May 4, 2023, the City issued the RFP for the "Haiku Valley Nature Preserve Removal of Haiku and Moanalua Saddle Stairs." On June 29, a contract for removal services was awarded.

Final Action Taken Under the 2019 FEIS

56. The 2019 Board of Water Supply FEIS considered only three alternatives: no action, partial removal, and conveyance to a more appropriate agency that can move forward with managed access. Mayor Caldwell chose the latter and conveyed the land to the County Parks and Recreation agency. Now that the Conveyance Alternative was chosen and the land was transferred, the City and County of Honolulu has taken a final action contemplated under the FEIS, which renders that document effectively obsolete. The executive branch must arguably prepare a new EIS if it wishes to revisit any of the issues dealt with therein.

57. The City has failed to meet the condition precedent necessary for implementation of Defendant's proposed action because there is no final environmental impact statement that applies to what is currently being proposed. Though the 2019 FEIS does contemplate removal of the Stairs as one of three alternative "proposed actions", that study was done for the BWS, for their narrowly scoped goal: to "eliminate liability associated with Haiku Stairs and the on-going security costs that are passed on the water rate payers" as opposed to the current goals of the City Parks and Recreation Department. *See* FEIS at pg. 1-11. Importantly, removal/destruction was also not the course of action that the City initially pursued following its release.

58. In 2020, the BWS City took action under the 2019 FEIS by transferring the Stairs to the City Parks & Recreation Department (selecting "the Conveyance Alternative"). At that time, the FHS did not challenge the FEIS's validity because this course of action and the plans to reopen the Stairs under managed access would have minimal negative impact on the environment.

The Public Should Not Be Saddled with a Bait and Switch

59. The alternative/demolition course of action that the City has been eager to pursue since 2021 is a classic bait (Stairs restored) and switch (Stairs demolished) that denied Plaintiffs and the general public the right to participate in the process by denying them the right to challenge the current Proposed Unlawful Action when it was considered under the prior FEIS.

60. Had the City chosen differently and opted for removal in 2020, FHS and other supporters of the Stairs would have filed a legal challenge contesting the FEIS' validity. However, with the Caldwell Administration signaling its intent to preserve and reopen the Stairs, no such challenge was lodged. Having induced opponents FHS to refrain from challenging the FEIS's flawed removal analysis, the City is estopped from proceeding with

removal now, three years later, without providing further justification and explanation and allowing for robust public scrutiny via a new environmental review process.

61. For the City to reverse its position and rewrite history by denying the significance of its choice violates the overarching policy aims of the environmental review process, which is to ensure the public has an adequate opportunity for informed participation in environmentally sensitive decisions. It would also be perverse—and a waste of judicial resources—to require supporters of a chosen action to have to challenge the validity of an EIS that is being used to *support* that action based solely on the prospect that a future administration could reverse that decision later on—after the statutory deadlines for such challenges have elapsed—and choose a different action that was considered—and rejected—under the original EIS. Instead, the fundamental logic of the EIS process, along with basic principles of administrative law and due process, demands that a new EIS be completed once an initial final action has been chosen and concrete steps to implement it have been taken.

Substantive Changes in Key Characteristics of Original EIS

62. Since the prior 2019 BWS/City FEIS was completed, substantial changes have occurred in the following characteristics, any of which may have a significant effect on the environment, thus requiring the preparation of an SEIS pursuant to HAR § 11-200.1-30.

Change in Use

63. The most substantial change in the prior 2019 BWS/City FEIS is that the Stairs are now owned by the City Department of Parks and Recreation, the agency responsible for City parks across the island of O‘ahu. Whereas the BWS’ stated goal in 2019 was to demolish the Stairs to avoid liability with the *possibility* of transfer *if* an appropriate receiving entity could be found, that hypothetical transfer has now occurred (in 2020). The Stairs now belong to an

agency with a very different mission. Whereas the BWS emphasized in 2019 the incompatibility of maintaining a hiking trail for public recreational use with BWS's core mission of ensuring safe, affordable water supplies, public recreation lies at the core of the City Parks Department's kuleana. Indeed, City Parks already operates and maintains other island hiking trails, including the Koko Crater Stairs. Furthermore, whereas in 2019, the BWS speculated about possible interest from private concessionaires, after the transfer to the City took place, fourteen vendors stepped forward to express interest in response to 2020 RFI for managed access. Finally, whereas the 2019 EIS expressed doubt as to whether surrounding landowners would grant access to the Stairs for public recreational use, City Enterprise Services negotiated draft access agreements in 2020 with multiple landowners to secure access.

Timing

64. The Board of Water Supply's FEIS is dated January 2020. However, it was actually completed by BWS and submitted for the Mayor's acceptance on December 11, 2019. Much of the factual information including public testimony, interviews, and consultants' reports were compiled and completed in 2017 and 2018. Given that removal of the Stairs will not begin until 2024 at the earliest, the information in the BWS statement will therefore be more than five years out of date by the time the demolition work begins. The information and assessments contained therein have therefore grown stale, underscoring the need for supplemental review.

65. A more specific and salient timing issue concerns the FEIS's assessment of impacts on historic architectural features. The FEIS relied on a 2018 Intensive Level Survey (ILS) prepared by William Chapman. That Survey explained that while the Haʻikū Stairs were built by the Navy during World War II, they continued to be used and maintained after 1970 as part of the U.S. Coast Guard's Omega Station. The ILS noted that "the Omega story, however,

falls outside the normal fifty-year cutoff time for the Hawai‘i and National Registers." As such, the ILS explicitly disclaimed any assessments of the historical significance of Coast Guard-era architectural resources within the project area. The ILS further noted that "[t]he Omega Station will reach the 50-year historic property threshold in 2020." Given that the City now plans to undertake its removal work in this post-2020 era, an assessment of the historic significance of Coast Guard-era architectural features is now warranted. Absent such assessment, the 2018 ILS is incomplete, and the FEIS analysis based upon it is outdated.

66. The extent of Coast Guard-era architectural features in the project vicinity remains unknown. However, the onus falls on the City to affirmatively survey them. The Stairs and other ridgeline installations are known to have been used and maintained during the Coast Guard era. Moreover, the southern endpoints of the Omega Station antenna cables installed in 1972-75 were anchored near the Stairs summit. Accordingly, potential impacts from the City's planned removal activities on any remaining Coast Guard-specific features in the project vicinity must now be assessed and appropriate mitigation measures developed before any removal work can proceed.

The City's Removal RFP Fails to Honor Mitigation Commitments in the FEIS

67. Ripping a mile-long, 80-year-old staircase off from its perch atop a steep, windswept ridge exposed to torrential downpours is no simple task. The Stairs' modules are buried under layers of soil, debris, and vegetation that will require extensive digging as a predicate to removal. Such digging and the subsequent weathering impacts on the denuded hillside will trigger secondary erosion on what is already unstable terrain, prone to landslides. Complicating matters further, the surrounding habitat is conservation land, designated as critical habitat for over 21 federally protected endangered species, including several found nowhere else

on the planet. Fragile native ecosystems thus lie directly in harm's way. Recognizing such concerns, the FEIS took care to stipulate specific mitigation measures to reduce or offset the potential harmful impacts that removing the Stairs would otherwise engender.

68. The mitigation measures specified in the FEIS included a commitment to develop and implement a native species restoration plan. The plan would entail both removal of invasive species in the vicinity of the erstwhile Stairs and the restoration and replanting of native species. The FEIS repeatedly emphasizes this restoration plan as a "priority" should the Stairs removal proceed; it functions as a lynchpin of the FEIS's impact analysis, serving a three-fold purpose: (1) Removing invasive plants would prevent such alien species from making further inroads into the fragile ecosystem; (2) Replanting native plants would offset potential harmful impacts caused by removal work and/or subsequent secondary erosion; and (3) revegetating the denuded hillside exposed by removal of the Stairs' modules would prevent erosive soil runoff from harming the downstream watershed and potentially contaminating Kāneʻohe Bay.[3]

69. The City's 2023 Removal RFP notably omits any mention of native plant restoration.[4] Indeed, the RFP does not call for undertaking revegetation of any kind. It only calls for short-term erosion-control measures during the actual removal process. Yet, the RFP clearly calls for extensive digging and clearing of vegetation in order to detach and remove the

[3] The FEIS states that preventing erosive soil runoff from harming the downstream requires "permanent erosion and sediment control measures to lower potential impacts to surface and groundwater." It further stipulates such control measures "will include a native species restoration plan," raising the possibility that additional control measures may be required to mitigate erosive runoff.

[4] By contrast, the RFP notably does specify that a City biologist should consult during the removal project to establish buffer zones that would minimize potential impacts upon native plants due to digging and/or trampling by workmen. Such buffer zones represent a different mitigating measure that was also contemplated in the FEIS. However, an affirmative commitment to revegetate/restore native species is conspicuous by its absence.

Stairs modules and expose the anchor pillars to cut them down to grade. The RFP thus contemplates a strip-mining operation to extract the Stairs from the mountain while leaving the denuded ridgeline exposed.

70. As such, the City is planning to undertake removal of the Stairs without an essential safeguard that its own environmental impact statement identified as a key mitigating measure. The City's failure to honor the FEIS's commitment to revegetation and native plant restoration will trigger significant environmental impacts. Native ecosystems damaged by the removal work will no longer benefit from the offsetting mitigation that affirmative revegetation/replanting would afford. And without revegetation and/or other permanent erosion control safeguards, the denuded ridgeline will be left exposed, triggering secondary environmental harms.

71. Failure to revegetate threatens the environment on multiple dimensions: (1) the denuded hillside will provide a vector for invasive species to spread rapidly up the hillside, crowding out native species and putting at risk the relatively intact pockets of native ecosystems that remain at the top of the ridge; (2) erosion of the exposed ridge will directly harm native plants rooted in the surrounding soil; (3) erosion could also wash away root stock, seeds, and other remnants of endangered plants buried in the soil, eliminating the chance for these plants to one day regenerate should the invasive species be cleared and the habitat properly managed; (4) erosive soil runoff from the denuded hill will pour down the hillside in muddy torrents, polluting the downstream watershed and harming fragile and endangered species that live there. Such heightened environmental impacts significantly ratchet up the scope and intensity of the proposed removal project.

72. By omitting the native species restoration measures that the FEIS promised, the City's Proposed Unlawful Action thus materially departs from its original removal plans. The proposed removal of the Stairs currently contemplated therefore constitutes a materially different project—one that would be vastly more environmentally damaging.

Change in Traffic Patterns

73. Other significant changes since the 2019 FEIS involve a reduction in trespassing in Haʻikū Valley and a concomitant shift in hiking activity to the "back route" up from Moanalua. The result has been to shift many of the problems currently associated with illegal access to the Haʻikū Stairs to Moanalua, and, in the process, making these problems ever worse than before. Such developments call into question the rationale for removing the Stairs and underscore the comparative advantages of managed access.

A. Reduced Trespassing in Haʻikū Valley

74. In 2021, the year after the FEIS was completed, the Honolulu Police Department (HPD) stepped up enforcement of the trespassing violations in Haʻikū Valley. HPD officers staked out positions at the base of the Haʻikū Stairs and, in some cases, went up onto the Stairs themselves, issuing numerous citations for criminal trespassing. After 2-3 months of such stepped up enforcement, the word was out: trespassers were being issued $1000 fines. The deterrent effect was immediate and palpable. The volume of trespassing declined significantly: from "dozens" of trespassers daily at the start of the HPD campaign, the incidence of trespassing fell to a mere 1-2 per day. Residents in Haʻikū Valley report today that they experience far less disturbances from trespassing than five years ago. Given that the elimination of trespassing and disturbances of Haʻikū residents represents a central justification for removing the Stairs, this

dramatic reduction calls into question the enduring rationale for proceeding with the City's proposed demolition.

B. Increased Traffic on Moanalua Middle Ridge

75. Would-be climbers of the Haʻikū Stairs did not give up, however. Instead, they rerouted. Reports of trespassing citations and prosecutions led a shift in traffic to an alternative route to reach the Stairs summit, climbing up the "back way" from Moanalua. The ascent along Moanalua Middle Ridge became widely advertised on social media as the "legal way" to climb the Stairway to Heaven. The volume of traffic on this Moanalua trail rose exponentially, reaching as many as a hundred climbers daily on weekends. The shift in traffic to Moanalua helps to explain why the volume of trespassing in Haʻikū Valley has stayed low even today despite HPD's curtailment of its 2021 enforcement initiative. Given a legal alternative, most hikers choose to avoid trespassing. These facts, too, underscore the comparative advantages of managed access as a means to channel hiker interest constructively.

C. Increased HFD Rescue Calls & Danger to Hikers

76. In other respects, however, the shift in traffic to Moanalua has been a negative development. The Moanalua Middle Ridge trail is a much longer and more difficult route than the Stairs. It is also far more dangerous. The Stairs have handrails on both sides and regular, no-slip steps. It is impossible to get lost climbing them because there is only one way up and down. By contrast, the Moanalua trail follows uneven terrain along a heavily eroded ridgeline, with steep drop-offs on both sides. Lengthy sections feature steep exposed dirt faces with insecure footing that turns into slick mudslides when it rains (which is often). The trail is also poorly marked and involves some confusing forks that frequently leads hikers to choose the wrong path

and end up lost. The often foggy/rainy weather near the summit also leaves hikers disoriented and prevents them from reaching their intended destination.

77. Haʻikū Stairs is one of the safest hikes on the island, with zero deaths and no serious injuries in 80 years. Diverting traffic from the Stairs to Moanalua has dramatically ratcheted up the danger level, putting hiker's lives in jeopardy. At least one probable fatality has already occurred on the Moanalua route (Daylenn Pua, 2015).

78. Moanalua's challenging terrain has also led rescue calls to HFD to skyrocket. Many hikers are unprepared for the rigors of the Moanalua trail and either get lost or injured on the way up, or else reach the summit too terrified to come down. Some of them decide to risk the $1000 fines and descend the Haʻikū Stairs rather than risk their lives negotiating the steep, slippery descent down Moanalua. Others call for rescue, summoning HFD helicopter crews. In 2022, there were five reported rescues from Moanalua Middle Trail vs. only one on the Kāneʻohe side.[5] HPD data for the five years prior similarly shows a disproportionate share of rescues on the Moanalua side: with 48 rescues occurring there vs. 23 on the Kāneʻohe side. The FEIS notably failed to distinguish between Moanalua and Kāneʻohe rescues, lumping both into a combined set of statistics. However, the implications of this disaggregated data are clear: closing the Haʻikū Stairs has led hikers to shift to a more dangerous alternative route, leading to increased rescue calls, risks to hikers' lives, and mounting taxpayer expenses due to frequent rescue calls.

[5] The Kāneʻohe rescue involved a hiker injured at the *base* of the Haʻikū Stairs, an injury presumably incurred while trespassing in an effort to *reach* the Stairs, rather *on* the Stairs themselves. On-stairs injuries are, in fact, extremely rare. During the many years when access to Stairs was legal under Coast Guard, there were no rescues, even though up to 20,000 people per year climbed them.

79. Hikers are going to keep climbing Keahiakahoe (the Stairs summit) whatever the City does.[6] The mystique of the "Stairway to Heaven" exerts a powerful allure on social media. Further, public interest in exploring new hiking destinations, amplified by social media and stoked during pandemic lockdowns, has grown exponentially in recent years. Even if the city removes the actual Stairs, key elements of the structure will be left behind, including the landing platforms and summit installations. Moreover, the panoramic views at the summit are the real objective for most hikers. Removing the Stairs will not make these views any less enticing.

80. Removing the Haʻikū Stairs would make things worse, however, in other ways. It would deny hikers stuck at the summit and unable/unwilling to descend the Moanalua Middle Ridge the option of a safe path down. It would also deny HFD personnel a safe, alternative means to reach injured hikers in the Koʻolau summit region during inclement weather conditions when rescue helicopters are unable to fly safely, putting first responder lives at risk.[7] Safety was one of core reasons cited in the FEIS for removing the Stairs. Recent evidence from Moanalua suggests that closing access to the Stairs through stepped up enforcement has led to increased safety risks. Removing the Stairs would make matters worse and destroy what is by far the safest way to reach the summit. By contrast, the managed access alternative would allow hiker demand to be managed safely. As such, it shines brighter as a superior solution.

[6] Even if the Moanalua Middle Ridge route were closed, hikers would merely reroute to trails on adjacent ridges, all of which converge on the Stairs summit.

[7] Some daredevils will also continue to climb the ridge from Haʻikū Valley even after the Stairs are removed. Even if fewer hikers attempt this climb, they will do so at greater safety risk. Denied the safety of the Stairs' handrails and secure footing, such daredevils will have to negotiate steep ascents with dangerous drop-offs on unstable terrain. Thus, here too, removing the Stairs will undermine public safety rather than enhance it.

D. Disturbance of Moanalua Residents

81. The increased traffic up Moanalua Middle Ridge has also led to disturbances to Moanalua residents. A shortage of parking in Moanalua Valley Park has forced hikers to park in nearby residential streets. The all-day slog to the summit requires hikers to start early in the morning. The noises they make unloading their vehicles, triggering car alarms and barking dogs, has awakened residents. Littering is also a problem. Similar problems experienced by Haʻikū residents were cited in the FEIS as justifying removal. The Moanalua experience shows that such problems are not going away but have merely relocated.

E. Environmental Damage caused by Moanalua traffic

82. The rerouting of hikers from Haʻikū to Moanalua has also had devastating effects on the environment. Unlike Haʻikū Stairs, which provide an elevated metal platform for hikers to climb with minimal footprint on the surrounding environment, the Moanalua route offers no such separation. The steady trampling of hikers clambering up Moanalua Middle Ridge—with many wearing spiked shoes to negotiate the treacherous terrain—has spurred massive erosion. The ridge is crumbling under the assault, with rivers of mud washing away with every downpour. The root support of rare endemic plants has been undercut, and the fragile ecology of the native forest near the summit has been impaired. Environmental protection was also cited in the FEIS as justifying removal. Again, this recent evidence calls such assessments into question.[8]

[8] Similarly, the predictable stream of daredevils who continue to ascend the ridge from Haʻikū Valley will lead to heightened, rather than reduced environmental harms after removal. Forced to scramble up the steep, eroding ridgeline instead of walking atop a securely anchored elevated metal platform, such climbers will exert a far more damaging footprint, causing erosion, spreading invasives, and trampling endangered native plants.

F. Need to Weigh Tradeoffs Explicitly

83. In short, shifting traffic from Haʻikū to Moanalua has not eliminated the concerns that prompted calls to remove the Stairs. Instead, the problems have merely shifted to the leeward side of the Koʻolau Mountains. Moreover, in almost every case, they have grown worse. The shift to Moanalua has led to increased safety risks for hikers and first responders, it has increased the need for expensive HFD helicopter rescues at taxpayer expense, and it has proven devastating to the environment.

84. While the 2019 FEIS failed to reckon with these tradeoffs, developments since then have made such an appraisal imperative. Recent evidence suggests that reopening the Haʻikū Stairs under managed access would lure hikers back away from Moanalua, reducing safety risks and rescue calls and alleviating pressure on the Moanalua ecosystem. Supplemental environmental review is therefore warranted.

Impacts on Critical Habitat & Endangered Species

85. Supplemental environmental review is also warranted in light of an expanded set of environmental impacts that FEIS failed to consider. The FEIS focused its biological impact analysis narrowly on effects in the immediate vicinity of the Stairs caused by the uprooting of Stairs modules, clearing of vegetation, and trampling by workmen.

86. New information points to broader threats to the fragile ecosystem from removal that the FEIS failed to consider including: (1) gale-force winds generated by helicopter rotor downwash; (2) the noise from constant helicopter overflights and metal-on-metal sawing; (3) dust-clouds stirred up by digging, trampling, and helicopter overflights; and (4) landslides and erosive soil runoff. Given that the removal work is anticipated to last a year-and-a-half, with helicopters shuttling back and forth up to six hours per day, the cumulative effect of these factors

will compound over time. They will significantly disrupt the fragile ecology of both the upland native rainforest and downstream watershed. They will risk serious harm to the numerous endangered species that inhabit the surrounding federally designated critical habitat[9] (birds, bats, snails, damselflies, and plants) and the downstream watershed (shrimp, damselflies, and goby fish). Some of these, such as the flowering *trematolobellia singularis* and *achatinella* tree snails, are found nowhere else on earth. The damage to them could potentially prove irreversible. These risks need to be evaluated and appropriate mitigation measures devised. Importantly, the biological survey for the 2019 FEIS only surveyed up to a 10-foot margin on either side of the Stairs. However, the environmental impacts from removal described above extend over a far wider area. Accordingly, in light of these concerns, a new, expanded biological survey should be undertaken as part of the supplemental environmental review process.

Invasive Species Management

87. Another deficiency of the 2019 FEIS concerns its failures to consider the availability of safeguards to minimize the spread of invasive species by hikers as well as the potential for continuing spread of invasive species that have already been introduced to the area. The need to prevent the spread of invasive species is cited by the FEIS as a further rationale justifying removal. The FEIS focuses heavily on the role that hikers play as a vector for spreading invasives. Such a threat doubtless exists (as it does on all island hiking trails, including the Moanalua Middle Ridge route). However, it can be controlled relatively easily. In recent years, cleaning stations have been installed at trailheads for many popular island hikes

[9] The land on which the Stairs sit has been designated as federally protected critical habitat under the Endangered Species Act ("ESA"). The FEIS deflects such concerns by claiming that the Stairs themselves are not technically included as Critical Habitat. Yet, this ignores the impacts of removal on the *surrounding* habitat, which *is* protected.

allowing hikers to decontaminate their boots and thereby prevent the inadvertent transmission of invasive plants. The FEIS should be updated through supplemental review to take into account the potential efficacy of such simple, low-cost solutions.

88. The FEIS also ignored the threat that invasive species already established in the Stairs vicinity pose. Because invasive species grow faster than and out-compete native plants, once they are present, they continue to make inroads on native habitat and push aside endemics. The 2018 Biological Report in the FEIS commented specifically on the effects that such uncontrolled spread of invasive has engendered between 2009 and 2018 including: (1) a reduction in the abundance and diversity of native plants; (2) the specific disappearance of several critically endangered native plant specimens that used to grow near the staircase; and (3 their replacement by aggressive invasive plants whose inroads onto the unstable ridge terrain was triggering landslides and erosion. However, the FEIS ignores these threats in its analysis section and focuses solely on hiker spread.

89. The reality is that the two worst invasive species present in the area—Clidemia and Schefflera trees—predate use of the Stairs. Moreover, these species are predominantly spread by birds that eat their berries and defecate the seeds elsewhere on the mountain. Accordingly, removing the Stairs will do nothing to stop these aggressive pests from making further inroads at the expense of native plants. Moreover, as noted, the City's failure to honor its prior commitment to revegetate the ridge with native plants, as promised in the 2019 FEIS, will greatly accelerate the spread of invasives and open a pathway for them to spread rapidly up to the summit along the denuded, eroded ridgeline that will be left after the Stairs have been dug out and removed, thereby infiltrating the last pockets of relatively intact native forest.

90. It is also worth noting that Friends of Haʻikū Stairs used to lead regular volunteer work trips to remove invasive species from the vicinity of the Stairs as part of its historic stewardship of the Stairs. The Friends also took care to protect native plants and were about to begin outplanting of native species when access to the Stairs was cut-off by BWS. It is no coincidence that the spread of invasive species has dramatically increased since 2015 when access to the Stairs ended.

91. These new facts not addressed in the FEIS call into question the FEIS's conclusion that removal of the Stairs will reduce the spread of invasive species. In fact, the reverse is far more likely: invasives will spread faster than ever if removal proceeds, and native plants—including several critically endangered species—will bear the brunt of the harm. Moreover, once the Stairs are removed, biologists and volunteers will no longer have a means of accessing the area to stop the spread of invasives and monitor the health of native species.

92. Conversely, managed access would preserve the Stairs, allowing access to the area to remove invasive species and successfully restore native habitats. Friends of Haʻikū Stairs stands ready to resume its stewardship of the native habitat surrounding the Stairs at no cost to the City. Moreover, managed access would allow for supervision of hiker boot decontamination and other safeguards to prevent the introduction of new invasives to the area.

Federal Permitting

93. The 2019 FEIS also failed to address the additional environmental review that would be required under federal law should removal go forward. The FEIS acknowledges that the project falls within federally designated critical habitat. However, it denies a federal nexus due to a lack of federal funding or permitting requirements. Yet, the FEIS elsewhere explicitly acknowledges that a Federal Aviation Administration ("FAA") permit must be obtained for the

helicopter flights to remove the Stairs modules. In issuing the FAA permit, the impacts of helicopter overflights will need to be reviewed under the National Environmental Policy Act ("NEPA") and Section 4(f) of the National Transportation Act, both of which entail *additional review* beyond the requirements of state law. Additional review may also be required under the National Historic Preservation Act, and an incidental takings permit may be required from Fish & Wildlife. Supplemental review under HEPA should therefore be coordinated with these federal processes.

Cost & Economic Impacts

94. Further changes since the 2019 FEIS concern the cost of removal vs. managed access. The FEIS estimated the cost of removal at roughly $1 million. That estimate was always questionable given the City's own earlier estimate of $4-5 million reported in the 2014 Ikaika Anderson Task Force Final Report. As of June 2023, the City had secured a total of $2.8 million in removal funding. However, as noted, this total does not account for the costs of legally required safeguards and mitigation measures whose necessity the FEIS acknowledged such as native plant restoration and mitigation of long-term erosion risks. Mitigating harm to endangered species will bring additional costs. Accounting for these additional costs will bring the total cost of removal significantly higher.

95. Conversely, the 2019 FEIS estimated the costs of repairing the Stairs as a prelude to reopening them under managed access at roughly equivalent to the $1 million removal cost. However, Friends of Haʻikū Stairs have since offered to repair the Stairs at no cost to the City. FHS has decades of experience maintaining and repairing the Stairs modules and has both civil and structural engineers on their board who could oversee the repair work safely and competently. Moreover, in undertaking this work, FHS could draw on a vast and enthusiastic

network of volunteers who would jump at the change to work on the Stairway to Heaven. It is worth noting that the Kokonut Koalition has recently overseen repairs of the Koko Crater Stairs drawing similarly on volunteer labor and donated materials. That staircase was in far worse repair than the Haʻikū Stairs. Thus, in contrast to the FEIS's inflated estimate, the cost to taxpayers today for Haʻikū Stairs repairs would be zero.

96. These revised figures further underscore the comparative advantage of managed access over removal. Managed access would also potentially bring other economic benefits that the FEIS failed to adequately account for. It would provide local jobs and generate surplus revenues that could be reinvested in the community. Moreover, there has been renewed interest in combining the Stairs with other historic and culturally significant sites located in Haʻikū Valley. Under such joint stewardship, the combined property could qualify for designation as a National Historic Monument or other National Park Service designation, bringing in federal funding and resources. Removing the Stairs would preclude such benefits. Supplemental environmental review would allow economic considerations to be reevaluated in light of recent developments.

Rationales for Removal Now Obsolete or Attenuated

97. The 2019 FEIS emphasized the paramount concern of the Stairs' then-owner, BWS, over the incompatibility of continued stewardship of the Stairs with BWS's responsibilities for providing safe, dependable, and affordable drinking water and protecting water resources. The FEIS stated that its primary objectives in pursuing the Stairs removal were: (1) "[e]liminating liability" and (2) "supporting the BWS core mission." The second of these core objectives is no longer applicable since BWS no longer owns the land on which the Stairs are located. Instead, the Stairs now belong to the City Parks & Recreation Department, whose

mission—managing public recreation facilities—is far more compatible with continued stewardship of the Stairs.

98. As for the goal of eliminating liability, the baseline risks are already low. As the FEIS itself documented that there has never been a lawsuit arising from the Stairs in its entire 80-year history, and there has never been a serious accidental injury or death either. The Stairs have handrails on both sides and "no-slip" steps. It is impossible to get lost while traversing the Stairs because there is only one way up or down. Under the Coast Guard, the Stairs were open to the public for many years with minimal supervision; up to 20,000 people per year climbed them without any problems. Thus, removing the Stairs hardly seems imperative from a liability standpoint.

99. Moreover, removing the Stairs would not, in fact, eliminate the City's residual potential for liability. Instead, safety risks would increase, and with them, the City's liability exposure. As noted, hikers are still climbing to the Stairs summit via Moanalua and will continue to do so even if the Stairs are removed. The City's removal plans call for the former satellite installation at the summit to be left in place along with the landing stations and hoist house. These remnants will remain on City land and function as attractive nuisances that will lure hikers into danger, exposing the City to continued liability. Other daredevils will climb the denuded ridge up from Haʻikū Valley even after the Stairs are removed, negotiating the steep, insecure terrain with dangerous drop-offs. Even if fewer hikers climb this route, the risk they face will be exponentially higher. Thus, the City would likely face increased liability after removal.

100. Conversely, managed access would reduce the City's liability exposure to virtually zero. A managed access regime would screen hikers for fitness, provide safety

briefings, furnish adequate water supplies for hydration, monitor weather conditions, and supervise hikers to prevent risky behavior. Such commonsense safeguards would further reduce the already low risk of serious accidents that might prompt litigation.

101. As explained further *infra*, the prospect of a managed access solution has become significantly more attainable since completion of the 2019 FEIS—thus, this superior, liability reducing alternative is readily available. Moreover, the Friends of Haʻikū Stairs have specifically offered to indemnify the City for any liability claims in the managed access proposal. Such indemnities were also envisioned by the City when the Caldwell Administration issued its 2020 Request for Information, soliciting private vendors to manage the Stairs. With safer management plus legally binding indemnities, managed access would engender far less liability exposure than removal.

102. Accordingly, the two primary justifications that the FEIS gave for pursuing removal seem questionable, if not entirely inapposite. The new landowner's mission is no longer incompatible with recreational use of the Stairs. And liability risks can be better dealt with by implementing managed access to supervise hikers safely rather than leaving such traffic unmanaged.

103. As noted above, removal of the Stairs will also fail to achieve the other secondary objectives that the FEIS articulated: ensuring public safety, reducing rescue calls, and avoiding environmental harms such as erosion and the spread of invasive species. Removal will not only fail to curb these problems, but it will also make virtually all of them worse: removing the Stairs will increase the danger to hikers and first responders, lead to more rescues, more erosion, increased harm to native species, and greater spread of invasive species. Supplemental

environmental review would allow decision-makers to take stock of these facts and developments and reappraise the justification for removal accordingly.

Trespassing Can Be Dealt with By Means Other Than Removal

104. The only remaining rationale for removal is the need to eliminate trespassing and disturbances to residents in Haʻikū Valley. Yet, here too, the need for removal has been significantly weakened by recent developments. As noted, trespassing has already been reduced due to the 2021 HPD crackdown and subsequent rerouting of Stairs traffic to the Moanalua "back route." Canvassing by the Kāneʻohe Neighborhood Board confirms that the majority of Haʻikū residents are no longer being disturbed by trespassing in the Haʻikū Valley.

105. While trespassing remains an issue for a minority, more can be done to address the problem, and steps to this end are already underway. The Kāneʻohe Neighborhood Board has convened a community task force to work on the trespassing problem. Plans are being developed for community policing patrols. Cameras will be installed on homeowner properties that abut popular trespassing entry points to monitor access and provide evidence that will assist HPD enforcement. A private contractor has fixed holes in fences and posted signs to deter trespassers. These grass roots efforts show that trespassing can be dealt with through simple, low-cost measures. If the City were willing to cooperate, even more effective measures could be undertaken. In light of these developments, the case for undertaking a multimillion-dollar destruction of a cherished, historic resource seems questionable.

106. Conversely, the ability to control—and potentially eliminate—trespassing under managed access was effectively demonstrated by HPD's 2021 enforcement campaign. Posting HPD officers at the base of the Stairs enabled trespassers to be apprehended and cited with close to 100% effectiveness. While City resources did not allow such stepped up enforcement to be

continued indefinitely, under managed access, an equivalent level of enforcement could be sustained on a permanent basis, with the costs underwritten by access fees paid by hikers. Friends of Haʻikū Stairs have published a 2023 plan for a multilayered security system involving 24/7 surveillance that would end trespassing once and for all. Accordingly, supplemental environmental review is warranted to take stock of these recent developments.

Managed Access Has Become a Far More Viable Prospect

107. The 2019 FEIS considered managed access as its primary alternative to removal. It noted, however, significant uncertainties as to the viability of a managed access solution. Subsequent developments have dispelled almost all of the FEIS's caveats and rendered managed access a far more certain prospect than was previously assessed.

108. As a threshold issue, the FEIS contemplated managed access taking place only after the BWS first divested itself of the Stairs. It noted that this required that another government agency be willing to assume ownership of the property and expressed uncertainty whether such an agency could be found. However, following completion of the FEIS, the Caldwell Administration announced its intention to transfer the Stairs to the City Parks & Recreation Department. The BWS Board approved the transfer on April 27, 2020, and it became effective in July that year.

109. The FEIS also noted uncertainties as to the willingness of surrounding landowners to provide access to the Stairs. The Caldwell Administration made considerable progress on that front as well. It negotiated draft agreements with surrounding landowners to provide an access route that bypassed residential neighborhoods. Friends of Haʻikū Stairs has spoken with key landowners this year and confirmed their willingness to grant access.

110. It is also worth noting that all the land adjoining the Stairs is owned by the State of Hawai‘i. At the time the FEIS was completed, State leaders expressed equivocation about providing access. By contrast, current Governor Josh Green has come out publicly in favor of managed access. Thus, securing access to State land has become a more viable prospect for this reason as well.

111. The FEIS also expressed doubts as to whether a willing private concessionaire could be found to assume operational management of the Stairs. However, when the Caldwell Administration put out a Request for Interest in February, 2020, 14 different private vendors responded, ranging from major commercial operators such as Roberts Hawaii to local non-profits such as 808 Clean-up. Furthermore, whereas the FEIS noted that the mechanics of a managed access regime would still need to be worked out in detail, Friends of Ha‘ikū Stairs have since circulated a detailed 20-page conceptual plan that addresses a wide range of the nuts-and-bolts issues required to implement a managed access regime including capacity limits, safety, maintenance, budgetary issues, as well as safeguards to protect the environment and respect native Hawaiian protocols. Further updates elaborating on access, parking, and security measures were circulated by FHS in 2023.

112. Community support for managed access has also grown through grass-roots engagement with residents and other Valley stakeholders. Recent canvassing of Ha‘ikū residents has shown that a clear majority of residents favor managed access. The Kāne‘ohe Neighborhood Board community task force has spurred productive conversations around trespassing, and a series of town hall meetings to solicit community input on managed access are being planned.

113. Finally, whereas managed access at the time of the FEIS was seen as an unfamiliar, untested paradigm, since then, several successful managed access regimes have been

implemented at popular outdoor venues around the state. Managed access is working well at Hanaʻuma Bay, Diamond Head, and Haʻena. Haʻikū Stairs could build on these examples and emulate best practices. Recent statistics also confirm the benefits of managed access in improving public safety. Rescue calls by Diamond Head hikers have declined significantly since managed access was implemented there. These recent developments and facts underscore the viability of a managed access solution and put to rest the uncertainties and equivocation expressed in the 2019 FEIS. Supplemental environmental review is therefore warranted.

SEIS is warranted

114. In sum, an abundance of new facts and changed circumstances cast doubt on the continued validity of the BWS's 2019 FEIS. The historical survey relied on in the FEIS needs to be updated in light to take into account the Coast Guard era's entry into historic status. The City's own RFP has omitted essential mitigation measures that make its proposed removal an essentially different action. And the purported justifications for removal have been undermined by recent developments: the reduction in trespassing in Haʻikū Valley, the increased rescue calls arising from Moanalua, new concerns over environmental impacts from helicopters and the spread of invasive species, the escalating costs of removal, and the emergence of managed access as a viable alternative that would cost the City nothing and bring lasting benefits. Together, these developments suggest that the impacts of removal would be far more harmful than previously acknowledged and the benefits reduced. Moreover, the availability of a managed access alternative that would address all of the problems at far less cost and with far greater benefits demands renewed consideration. Accordingly, the City must prepare an Supplemental EIS before proceeding with its planned removal.

Conclusion

115. At the root of this controversy lies four decades of government failure. The City's curtailment of legal access to the Stairs has converted what was a safe, popular hike under the aegis of the Coast Guard into a dysfunctional debacle. Now government ineptitude has morphed into disregard for environmental law. By abrogating decisions made by the previous administration, the City seeks to evade the scrutiny that state and federal environmental law require to further a senseless demolition that will cause untold environmental damage, saddle taxpayers with million-dollar cost overruns, and fail to solve its intended goals. More than just a hiking trail, the Stairs are a treasured icon, situated in an otherwise inaccessible place of stunning beauty. It would be a travesty to destroy this priceless asset and the fragile native habitat surrounding it without exploring the alternatives. The City must conduct the required environmental review and ensure that its decisions are reached in a transparent manner that affords the public the opportunity to participate.

FIRST CLAIM FOR RELIEF

(Failure to Conduct an EIS in Violation of HEPA – HRS § 343-5)

116. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

117. Defendants' failure to conduct an EIS and issue an EISPN for the Defendant's proposed action violates HEPA's requirement of the preparation of an EIS as condition precedent to approval of the request and commencement of Defendant's proposed action. Based on the significance factors under the HEPA rules, Defendant's proposed action "may" have a significant impact on the environment and, thus, requires an EIS.

118. To avoid the requirement to prepare an EIS, Defendant improperly and unlawfully relied on the 2019 BWS/City FEIS, thus denying decision-makers and the public the right to informed decisions and participation in violation of the letter and purpose of HEPA and its implementing rules.

119. An actual controversy exists between Plaintiffs and Defendants concerning Defendants' violation of HEPA in failing to conduct an EIS for the Defendant's proposed action.

SECOND CLAIM FOR RELIEF

(Failure to Conduct a Supplemental EIS as Required by HAR § 11-200.1-30)

120. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

121. Defendant's proposed action constitutes an essentially different action from the action contemplated in the prior FEIS in 2019. Defendant's failure to recognize that the original 2019 EIS is no longer valid violates HEPA's requirement that a supplemental EIS be conducted.

122. To the extent there is an overlap between the prior EIS and the Defendant's proposed action, Defendant violated HEPA rules mandating that a supplemental EIS be prepared when a substantive change in the size, scope, intensity, use, location, timing, and/or other characteristics may have a significant effect on the environment. Defendant failed to fully document the proposed changes from the original EIS, including changes in mitigation, ambient conditions, alternatives, and other available information that have a material bearing on the Defendant's proposed action and its environmental impacts.

123. An actual controversy exists between Plaintiffs and Defendants concerning Defendants' violation of HEPA in failing to require an SEIS for the Defendant's Proposed Unlawful Action.

THIRD CLAIM FOR RELIEF

(Violation of Right to a Clean and Healthful Environment Under Hawai‘i Constitution, Article XI, Section 9)

124. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

125. Defendant City's failure to issue the required final environmental impact statement in order to meet the condition precedent necessary for implementation of its proposed action deprived Plaintiffs of due process and violated their constitutional right to a clean and healthful environment.

126. The right to a clean and healthful environment is both substantive and procedural and grants a legitimate entitlement to benefits defined by state law. Based on the violations contained in the other Counts of this Complaint, Plaintiffs are entitled to declaratory and injunctive relief that Defendants' actions have violated Plaintiffs' constitutional rights.

FOURTH CLAIM FOR RELIEF

(Estoppel)

127. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

128. Defendant asserts to Plaintiffs' disadvantage, its present right via the RFP and subsequent contractual award to pursue Defendant's proposed action that is inconsistent with its previous public position.

129. Plaintiffs reasonably relied to their detriment on Defendant's public proclamations that it intended to restore the Haiku Stairs and implement manage access and on its concrete actions taken in furtherance of its stated goal. Through its recent decision to completely abandon its publicly stated goal and actions and instead seek to demolish the Stairs

without a new EIS, Defendant prevented Plaintiffs from meaningful participation in the public process.

130. Had the City chosen differently and opted for removal in 2020, FHS and other Stair's supporters would have filed a legal challenge contesting the FEIS' validity. Instead, relying on the City's actions and representations, FHS elected not to contest the validity of the FEIS notwithstanding its numerous glaring deficiencies. The statutory period for challenges therefore elapsed, allowing the City to pull its "bait and switch" unhindered.

131. By attempting to move forward with Defendant's proposed action without basic legally required disclosures, candor, or transparent consideration and analysis of these issues, Defendant is denying FHS the opportunity to exercise its stewardship mission.

FIFTH CLAIM FOR RELIEF

(Violation of Rights Protected by the Fifth and Fourteenth Amendments (Due Process) to the United States Constitution and the Constitution of the State of Hawai'i)

132. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

133. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall…deprive any person of life, liberty, or property, without due process of law

134. Defendants have violated Plaintiffs' right to due process under the Fifth and the Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 5 of the Constitution of the State of Hawai'i by switching course in contravention to earlier publicly decided actions and legal requirements.

135. Defendant's failure to conduct an EIS for Defendant's proposed action violates the letter and purpose of HEPA and its implementing regulations and violates Plaintiffs' and the public's right to procedural due process under chapter 343.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:

(A) The Defendant's proposed action constitutes a separate and distinct action from that which was studied by applicants BWS and City as detailed in their FEIS submitted in December 2019;

(B) The 2019 FEIS prepared by applicants Board of Water Supply and City and County of Honolulu and accepted by Department of Planning and Permitting City and County of Honolulu, is inadequate for the Defendant's proposed action, the Removal of the Haiku Stairs;

(C) The Defendant's proposed action may have a significant impact on the environment;

(D) Defendants' actions have violated Plaintiffs' constitutional right to a clean and healthful environment;

(E) Defendant has violated and is currently violating HRS chapter 343 by failing to conduct an EIS for Defendant's proposed action;

(F) Defendant is breaching its public trust duties, including by violating management and conservation agreements with FHS, the entity authorized through previous agreement with the City to eliminate invasive species, and thus is allowing invasive species to spread;

(G) The existing Archaeological Impact Survey ("AIS") is incomplete and outdated;

(H) Defendant should therefore be estopped from proceeding with its RFP for the instant action without completing a new EIS and should not be permitted to act in a manner inconsistent with its former prior public position to the further injury of Plaintiffs;

(I) Defendant and Applicant City and County of Honolulu be required to prepare an EIS for the Defendant's proposed action and issue an EISPN. In the Alternative, Defendant shall be required to conduct a Supplemental Environmental Impact Statement.

2. Enjoin Defendant from demolishing or removing any part of the existing structure known as the Haʻikū Stairs until compliance with HEPA occurs;

3. Enjoin Defendant from requesting any permits related to demolition or removal of the Haʻikū Stairs, including, but not limited to permits from the State of Hawaiʻi Historic Preservation Division ("SHPD"), the State of Hawaiʻi Board of Land and Natural Resources ("BLNR"), the State of Hawaiʻi Office of Conservation and Coastal Lands ("OCCL"), or the City Department of Planning and Permitting ("DPP");

4. Enjoin Defendant from implementing contracts or payments related to demolition or removal;

5. Require Defendant to provide immediate interim access to Plaintiffs until compliance with HEPA occurs in order to maintain the integrity of the site and stop the spread of invasive species;

6. Require Defendant to comply with HAR Section 11-200.1-31(1) "National environmental policy act actions: applicability to chapter 343, HRS", that requires the City to notify the FAA of the potential environmental impacts so that the FAA may conduct appropriate review under applicable federal law;

7. Require the City to contact U.S. Fish & Wildlife and DNLR Division of Forestry in order to explore whether the Proposed Action would result in incidental takings of endangered species requiring a permit and habitat conservation plan.

8. Retain continuing jurisdiction to review Defendant's compliance with all judgments and orders entered herein;

9. Issue such additional judicial determinations and orders as may be necessary to effectuate the foregoing;

10. Award Plaintiffs the cost of the suit herein, including reasonable expert witness and attorneys' fees; and

11. Provide such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendant.

DATED: Honolulu, Hawai'i, August 8, 2023.

/s/ Timothy Vandeveer
MARGARET WILLE
TIMOTHY VANDEVEER

Attorneys for Plaintiffs
Friends of Ha'ikū Stairs, Dr. Katrena Kennedy, Randall Kennedy, Donald Kamalani Maiwa Pua III, Bill Sager, Ernest Shih, and Richard Tuggle