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December 14, 2020

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Division of Boating and Ocean Recreation
4 Sand Island Access Road
Honolulu, Hawai'i 96819

Clare E. Connors, Esq.
Department of the Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

Re: Ma'alaea Small Boat Harbor, Ma'alaea, Maui, Hawai'i

Dear Ms. Case, Mr. Underwood and Ms. Connors:

I am the attorney for Lois Bruce in her capacity as the Trustee of the unrecorded Bruce Trust dated May 16, 1974 (hereinafter "Ms. Bruce"). Ms. Bruce is the owner of land at 250 Hauoli Street in Ma'alaea, Maui, Hawaii described as TMK (2) 3-8-014-005 with an area of 1.251 acres. The Kana'i a Nalu condominium project is partially located on this parcel. The remainder of the Kana'i a Nalu condominium project is located on the adjacent parcel TMK (2) 3-8-014-004 which is owned by Maalaea Beach LLC. The Kana'i a Nalu condominium project AOA has a lease from the State of Hawaii for a seawall located on the remains of the beach fronting the project. Over the years, the shoreline portion of the land on which the Kanai a Nalu condominium project is located has been heavily impacted and eroded.

Ms. Bruce is personally familiar with TMK (2) 3-8-014-005 as it used to belong to her father and was the site of the Bruce family home before the Ma'alaea Small Boat Harbor was constructed in the 1950s. Ms. Bruce was concerned about the shoreline erosion fronting TMK (2) 3-8-014-005 which was diminishing her land. As such, Ms. Bruce retained Hany Elwany, Ph.D. of Coastal Environments, Inc. of La Jolla, California to do a study of the shoreline fronting the Kana'i a Nalu condominium project and adjacent properties to determine if the rate of shoreline

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erosion was natural or unnatural. Dr. Elwany completed his study and I am attaching his report with this letter.

Dr Elwany found and made an extensive review of the existing studies of Ma'alaea Bay including, but not limited to, a 2012 study by Sea Engineering, Inc.; a 2011 study by Moffat & Nichol; and a 2014 study by Chris Hart & Partners, Inc. The following are some of the findings made by Dr. Elwany in his November 2020 report:

The beaches at Maui are currently erosional beaches, but the presence of the [Ma'alaea Small Boat] harbor in the middle of a littoral cell impedes longshore sand supply to beaches east of the harbor and accelerates beach erosion. A study carried out by Sea Engineering, Inc. (2012) states that Ma'alaea Harbor's breakwater cuts off transport from the area further upstream to the east; and consequently, this area [to the east of the harbor] is starved for sediment delivery from that portion of the littoral cell.

A study by Moffat & Nichol (M&N, 2011), funded by the U.S. Army Corps of Engineers (USACE) to determine a regional management plan for Maui's western beach, recognized that "the Kihei region has been affected by the construction of the Ma'alaea Harbor." Other studies e.g. Chris Hart et al. (2014) have acknowledged the same; in their study, they stated that Harbor breakwaters cut off sediment transport from farther upstream to the west, resulting in this area being starved for sediment delivery from that portion of the littoral cell. The Chris Hart et al. (2014) study also acknowledged that the sandy beach within the harbor was created as a result of accretion after the construction of the eastern breakwater [in 1958].

The earlier studies are in agreement that the Ma'alaea Small Boat Harbor has an effect on the natural erosion currently experienced by beaches on Maui. However, Dr. Elwany's company focused its study on the size of the impact that Ma'alaea Small Boat Harbor is having on oceanfront properties near the harbor. The analysis used two different datasets to reach its conclusion: a modeled wave dataset from the Pacific Islands Ocean Observing System (PacIOOS), and two bathymetry datasets for the years 2013 and 1999, obtained with Lidar surveys performed by the National Oceanic and Atmospheric Administration (NOAA).

The presence of the Ma'alaea Harbor's east breakwater enhances water trapping by waves and reef flats, which continue movements until they encounter a natural channel in the reef, where the current then flow[s] backwards out to sea as a cross-shore or rip current. This is the mechanism

that moves nearshore sand to the offshore.

Dr. Elwany's study found that there were unnaturally accelerated and exacerbated accretions and erosions to surrounding shorelines and submerged lands as a result of the Ma'alaea Small Boat Harbor. The study found that the shoreline fronting the Kana'i a Nalu condominium project and adjacent properties was losing an additional 480 cubic meters of sediment every year over the rate that would happen if the harbor had not been constructed. This represents an additional reduction of longshore sediment at the site by 16% to 28% with an average of 22%. In short, the Ma'alaea Small Boat Harbor is, by its existence, damaging and disturbing the real property in its vicinity including the property owned by Ms. Bruce and other nearby lands. Over the years, the shore line fronting the oceanfront lands to the east of the harbor has eroded at an approximately 22% greater rate than natural and this has been going on since the middle of the twentieth century.

Attempts by the landowners to the east of the harbor to stop or slow the retreat of their seaward boundaries has met fierce government resistance and huge expenses for the studies required to fund applications for Special Management Area Permits and Conservation District Use Permits. The encroaching shoreline, under Hawaii law, transfers ownership of former dry land that is now within the "high wash of the waves" to the State of Hawaii.

The County of Maui, which is in charge of Special Management Area Permits, is currently promoting the idea that the various buildings on these oceanfront lands, including massive condominium projects like the Kanai a Nalu, be physically moved inland on the ever-narrowing lots bounded by Hauoli Street and all the while the erosion is being exacerbated by a recreational harbor built, owned and operated by the State of Hawaii. Since the initial construction of the recreational harbor in some sixty-plus years ago, at least 22% of the shoreline loss has been the result of the flawed design of the recreational harbor. In short, the Ma'alaea Small Boat Harbor falls under the legal definition of a "nuisance" and the State of Hawaii needs to take responsibility for the damage caused by the harbor. Furthermore, the unnatural erosion, caused by the state-owned recreational harbor, that is transferring ownership of formerly private land to the State of Hawaii, is a taking without just compensation in violation of the state and federal constitutions.

A nuisance has been variously defined to mean "that which unlawfully annoys or does damage to another, anything that works hurt, inconvenience, or damage, anything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or physical occupation uncomfortable, and anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." 58 Am. Jur.

2d Nuisances at 555 (1971).

Littleton v. State, 66 Haw. 55, 67, 656 P.2d 1336, 1344-45 (1982)

At Common law courts of equity were without authority or jurisdiction to enjoin criminal acts solely on the basis of their criminality. [citations omitted] Equity courts, even now, will not exercise their powers for the purpose of enforcing criminal laws by restraining criminal acts. [citation omitted] However, the common law has always provided a remedy for a nuisance, either by way of an action for damages or an equitable action to restrain the continuance of the wrong or both [citation omitted] and where equity would otherwise have jurisdiction to enjoin certain conduct, the fact that the legislature has made such conduct a crime does not affect that jurisdiction. The historical basis of equity jurisdiction to grant injunctions is the protection of property rights. [citation omitted] Since the inception of that principal, however, equity jurisdiction has expanded to allow issuance of an injunction where there are other appropriate circumstances besides injury to a specific property right. [citation omitted] In such situations equity acts, as it does in relation to nuisances, not to enforce criminal law, but to protect from irreparable harm.

The Hawaii Supreme Court has also held that "[i]f the actual or threatened tortious acts complained of interfere with property or *rights of a pecuniary nature*, equity will intervene."

Marsland v. Pang, 5 Haw. App. 463, 476, 701 P.2d 175, 186-87 (1985) *citing* Auto Rental Co. v. Lee, 35 Haw. 77, 93 (1939)

Nuisances are classified as to the scope of their injurious effect into public nuisances and private nuisances, or sometimes as both private and public. The latter are sometimes called mixed nuisances. A nuisance is common or public where it effects the rights enjoyed by citizens as a part of the public, that is, the rights to which every citizen is entitled. A private nuisance is one that affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public. Mixed nuisances are those which are public and which at the same time cause special damages to private individuals. Public nuisances are indictable while private nuisances are actionable merely.

Territory v. Fujiwara, 33 Haw. 429-430 (1935)

A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregates, or where members of the public are likely to come within range of its influence; for, if the act or use of property be in

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a remote and unfrequented locality, it will not, unless malum in se, be a public nuisance. (citation omitted) If the nuisance affects a place where the public has a legal right to go, and where the members thereof frequently congregate, or where they are likely to come within its influence, it is a public nuisance. [*City of Burlington v. Stockwell*, 5 Kan. App. 569, 573, 47 P. 988, 989-90 (1897).]

Littleton v. State, 66 Haw. 55, 67, 656 P.2d 1336, 1344-45 (1982)

In this case, the harbor could be classified as a public nuisance as to the beach and as a private nuisance as to the oceanfront landowners' real estate. In short a "mixed nuisance." As the Department of Land and Natural Resources has both the ownership and the control of the recreational harbor, it also has an undisputed legal duty to maintain the harbor in a safe condition and in a way that the harbor is not a public or a private nuisance. See, Levy v. Kimball, 50 Haw. 497, 499-500 (1968).

In the case of Aana v. Pioneer Hi-Bred Intern., Inc. 965 F.Supp.2d 1157 (D. Haw. 2013), the United States District Court for the District of Hawaii discussed a Plaintiff's various causes of action which included a nuisance cause of action. The District Court Judge noted that, in general, a nuisance cause of action must be brought within two years after the cause of action accrued. **HRS § 657-7 states: "[a]ctions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13."**(emphasis added).

Pursuant to Hawaii's "discovery rule," a cause of action does not "accrue," and the statute of limitations in § 657-7 does not begin to run, until the plaintiff knew or should have known of the defendant's negligence. Hays v. City & County of Honolulu, 81 Hawai'i 391, 393, 917 P.2d 718, 720 (1996). As such, a claim accrues "the moment plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter." Yamaguchi v. Queen's Med. Ctr., 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982) (citation omitted); see also Hays, 81 Hawai'i at 396, 917 P.2d at 723 ("[Haw. Rev. Stat.] § 657-7.3's two-year limitation commences to run when plaintiff discovers, or through the use of reasonable diligence should have discovered, (1) the damage; (2) the violation of the duty; and (3) the causal connection between the violation of the duty and the damage." (quoting Jacoby v. Kaiser Found. Hosp., 1 Haw. App. 519, 525, 622 P.2d 613, 617 (1981))).

Aana, 965 F.Supp.2d at 1179

The District Court Judge in the Aana case continued:

Hawai'i recognizes a continuing tort doctrine under which "a continuing wrong may, in effect, toll the statute of limitations with respect to tortious conduct that is

ongoing." Garner v. State Dep't of Educ., 122 Hawai'i 150, 168, 223 P.3d 215, 233 (Ct. App. 2009) (citing Anderson v. State, 88 Hawai'i 241, 248-50, 965 P.2d 783, 790-92 (App. 1998); Wong Nin v. City and County of Honolulu, 33 Haw. 379, 386 (1935)). Where the Defendant could have taken curative action at all times, the damage "cannot be deemed to be a permanent nuisance" and thus is "a continuing injury against which the statute of limitations" does not run. Anderson, 88 Hawai'i at 249, 965 P.2d at 791 (citation and internal quotation marks omitted)

Under the continuing tort doctrine, "a continuous tortious act should not be subject to a limitations period until the act ceases." Id. at 250, 965 P.2d at 792. "[W]hile the statute of limitations is 'tolled' by a continuing tortious act, recovery may be had only for damages accruing within the statutory period before the action, but *not* for damages accrued prior to that period." Garner, 122 Hawai'i at 168, 223 P.3d at 233 (emphasis in original) (citing Anderson v. State, 88 Hawai'i 241, 250, 965 P.2d 783, 792 (App. 1998) (citing Wong Nin v. City and County of Honolulu, 33 Haw. 379, 386 (1935))). The practical effect is that "the date that the tort 'first accrues' moves forward into the future as long as the tortious conduct continues." Id.

Aana, 965 F.Supp.2d at 1181-82

Based on the definition of nuisance adopted by the Hawaii Supreme Court and the Intermediate Court of Appeals, the construction and maintenance of the harbor would be a mixed (public and private) nuisance and as Dr. Elwany's study shows that the Harbor and its breakwall is responsible for accelerating and exacerbating the normal rate of beach erosion to the detriment of the property interests of nearby oceanfront landowners, the mixed nuisance is a continuing nuisance. There are viable engineering options available to the State of Hawaii to mitigate the nuisance caused by the recreational harbor as well as transferring the accreted sand within and adjacent to the harbor to the areas where the shoreline was eroded as a result of the harbor.

As mentioned at the beginning of this letter, Dr. Elwany's November 2020 study was the first to show the actual damage caused to the oceanfront lands east of the harbor and the cause of action to stop the effects of the recreational harbor therefore accrued in November of 2020. It is also clear that the recreational harbor is a continuing mixed nuisance and the State of Hawaii's liability will continue until it solves the problem caused by the faulty design of the recreational harbor.

Under HRS § 662-2, "The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

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HRS § 662-2 is called the State Tort Liability Act and was modeled after the Federal Tort Claims Act so that case law interpreting the FTCA can be used to interpret the State act. Taylor-Rice v. State, 105 Haw. 104, 108, 94 P.3d 659, 663 (2004). Under Hawai'i case law, the State Tort Liability Act is to be liberally construed to effectuate its purpose. Breed v. Shaner, 57 Haw. 656, 665, 562 P.2d 436, 441 (1977). While there are no published Hawaii cases dealing with state-owned harbors being designed so that they adversely effect adjacent properties, it is clear that the State's duty to maintain its harbors so as not to be a continuing nuisance is the same as the State's duty to maintain its highways.

In reviewing the correctness of the circuit court's order we begin with the State's general duty to keep its highways in reasonably safe condition. Levy v. Kimball, supra; Ikene v. Maruo, 54 Haw. 548, 511 P.2d 1087 (1973); Struzik v. City and County, 50 Haw. 241, 437 P.2d 880 (1968). This includes the duty to design the highway to be safe for travel by people exercising ordinary care. Ikene v. Maruo, supra at 550, 511 P.2d at 1089; Rogers v. State, 51 Haw. 293, 459 P.2d 378 (1969); see Mullins v. Wayne County, 16 Mich. App. 365, 168 N.W.2d 246 (1969). Where the design of the highway is defective or becomes inadequate the State must either warn the users of the highway of the danger or correct it. Rogers v. State, supra; Levy v. Kimball, supra; Cabral v. City and County, 32 Haw. 872 (1933); see Hargis v. Dearborn Heights, supra.

Breed, 57 Haw. at 665, 562 P.2d at 441.

Based on Hawaii statutory and case law, the State of Hawaii has waived any sovereign immunity with regard to claims for damages to nearby lands resulting from the faulty design of its recreational harbor.

Ms. Bruce is also entitled to restorative action and/or compensatory action under Article I of the Hawaii State Constitution "Bill of Rights" at Section 20. This provision states: "Private property shall not be taken or damaged for public use without just compensation." The recreational Harbor was constructed in the 1950s and the State of Hawaii is the current owner of the harbor. Due to the faulty design and construction of the harbor, there are unnatural accretions of sand and sediment in some areas (including the interior of the harbor) while other shorefront properties to the east have been starved of the natural sediment and sand that would ordinarily have replenished the beaches. There was no formal condemnation by the State of Hawaii of the impacted land or any payment of any nature and, as such, the doctrine of inverse condemnation applies and gives Ms. Bruce and all other similar and adjacent property owners the right to recover just compensation for the taken property.

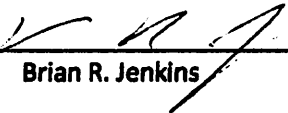
The purpose of this letter is to seek immediate and cooperative action from the State of Hawaii as the shoreline erosion is an on-going and horrendous problem that is impacting the homes of hundreds of residents in Ma'alaea. There are nine condominium projects besides the Kana'i a Nalu with a number of local residents and retirees living in the apartments. The horrific

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costs of the studies required by applications for Special Management Area Permits and Conservation District Use permits in addition to legal fees that have been borne by the oceanfront landowners for decades are generally converted into assessments levied on the individual apartment owners by the condominium associations. The other impact is the difficulty in selling apartments impacted by the accelerated erosion. Many hundreds of people have been unknowingly impacted by the faulty design of the recreational harbor and this needs to stop and stop now. As such, Ms. Bruce seeks a meeting with State officials and other impacted landowners to attempt to arrive at a quick and productive solution to the on-going damage caused by the recreational harbor. Please contact the undersigned as soon as possible to discuss.

Sincerely,

Enc.



Brian R. Jenkins

Ms. Bruce (w/enc.)