

Moana Kea Klausmeyer-Among  
Robert Palmer  
Jason Ellis  
c/o 84 - 445 Farrington Highway  
Waianae, Hawaii 96792  
(808) 221-5449

Plaintiffs Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

MOANA KEA KLAUSMEYER-AMONG  
ROBERT PALMER  
JASON ELLIS

Plaintiffs,

vs.

HONOLULU CITY COUNCIL, and  
CITY AND COUNTY OF HONOLULU  
DEPARTMENT OF PLANNING AND  
PERMITTING;

and

JOHN DOES 1-5, JANE DOES 1-5,  
DOE CORPORATIONS 1-5,  
DOE PARTNERSHIPS 1-5,  
DOE GOVERNMENT AGENCIES 1-5,  
AND DOE ENTITIES 1-5,

Defendants.

Civil No. \_\_\_\_\_  
( Other Civil )

VERIFIED COMPLAINT FOR  
INJUNCTIVE, EQUITABLE, AND  
OTHER RELIEF;  
EXHIBITS 1 - 26;

DECLARATION OF PLAINTIFF(S);

SUMMONS

VERIFIED COMPLAINT FOR INJUNCTIVE, EQUITABLE, AND OTHER RELIEF

Come now Plaintiff(s) Pro Se Moana Kea Klausmeyer-Among, Robert Palmer, and Jason

Ellis, pursuant to HRS Chapter 205A provisions, to file this Complaint for Judicial relief and to ask this Court for Injunctive, Equitable, and other applicable forms of relief pursuant to HRS 205A-6 Provisions, and other applicable rights to relief to file this Complaint/Appeal to seek INJUNCTIVE , Equitable, and other relief as this Court may deem just and proper; in asking this Court to overturn or otherwise revoke City Council Resolution 11-282, approved by Honolulu City Council on April 3rd, 2012 via 3 yes votes, 3 yes votes “with reservations”, and 2 “no” votes, and one Council member absent.

Plaintiffs and Defendants all reside or do business in the Judicial Circuit of the First Circuit, and Jurisdiction of this Court is proper pursuant to HRS Chapter 205A-6(c), which states:

“A court, in any action brought under this section, shall have jurisdiction to provide any relief as may be appropriate, including a temporary restraining order or preliminary injunction.”

This Complaint for relief is timely as HRS Chapter 205A-6(d) further states:

“Any action brought under this section shall be commenced within 60 days of the act which is the basis of the action.”

### Background

The Makaha Bridges No. 3 and 3A replacement project is a State of Hawaii, Department of Transportation ( DOT ) bridge(s) replacement project located within the coastal Special Management Area ( SMA ) of Makaha Beach. The DOT (applicant) applied to the City & County of Honolulu, Department of Planning and Permitting ( DPP) for permitting of the project in August 2011. The DPP

gave approval for the project, and forwarded their recommendation for final approval to the Honolulu City Council, required for SMA projects, on Oct. 4, 2011. **[Exhibit 1 ]** The SMA project was designated as Resolution 11-282 at City Council. The City Council approved Resolution 11-282 on April 3rd, 2012, with a divided vote, not unanimously. **[Exhibit 2. ]**

The Makaha Bridges 3 and 3A are two bridges situated along Farrington Highway both at Makaha beach area. Bridge 3 is on the Waianae end of Makaha beach, and Bridge 3A is about 100 yards away from Bridge 3 going towards Kaena Point direction. Kili Drive is a road that connects to Farrington Highway between the two bridges, and goes up to Makaha valley, ending at the Makaha towers condominiums. Bridge 3 at Farrington Highway crosses over the Makaha Stream, and Bridge 3A crosses over the West Makaha Stream. **[Exhibit 3 and 4]**

Plaintiff(s) are the owners of private properties with homes situated directly adjacent to the Makaha Stream, at Bridge 3, on the side of the stream closest to Waianae. The Klausmeyer home is situated on the makai side of Farrington Highway and right next to Bridge 3, and the Palmer/Ellis' home ( hereafter as Palmer home/property ),is situated on the mauka side of Farrington Highway right next to Bridge 3. Both homes have stream embankments on Makaha Stream. **[Exhibit 5 ]**

Of main concern and complaint of Plaintiffs in this Complaint for relief is concerned with the Bridge 3 design, and the proposed channel design and alterations of Makaha Stream that were submitted by applicant State DOT and approved by City DPP and City Council, and the effect of Kili Drive negatively affecting the purpose and function flood way of Makaha Valley for several decades and currently. These are not the only issues, but are central to this complaint.

Plaintiffs assert that both the DPP and Honolulu City Council failed to meet the requirements and standards of review and care mandated under Chapter 205A of Hawaii Revised Statutes, and that requirements of ROH Chapter 25 section 9.6 were violated or not addressed sufficiently by DPP and City Council in granting of the Makaha Bridges project SMA permit to applicant DOT. Plaintiffs further assert that DPP and City Council ignored or failed to adequately address or resolve significant problems about the project and its impacts on the environment and plaintiffs properties directly affected within the SMA area, brought to their attention by Plaintiffs and others at Public Hearings. DPP and City Council also ignored or failed to answer, resolve, or address many public concerns raised via much written testimony and evidence submitted into the record at such public hearings. The reasons for Plaintiffs asking this Court to overturn and otherwise revoke City Council's approval of Resolution 11-282 include but are not necessarily limited to the following:

#### COUNTS

1. Plaintiff(s) should not have their properties or any portions thereof subject to eminent domain or condemnation proceedings for a "bridge replacement" project.

Plaintiff's are in immediate danger of having forced condemnation or eminent domain actions instituted against them, as threatened by DOT. Plaintiffs are asking this Court to issue an ORDER for an immediate INJUNCTION against any such proceedings against Plaintiffs until this Court decides this case.

The approved design of this project will result in residential zoned property of Plaintiffs being condemned, while property across the Makaha Stream, zoned "AEF" as FEMA Flood Way, and all of

which is vacant land, to be protected, to detriment of Plaintiffs residential zoned properties, which are zoned “AE” flood fringe, and should be protected. [Exhibit 16 ]

Plaintiffs note to the Court that neither the SMA permit application submitted to DPP, or the recommendation, Findings of Fact, and Order forwarded by DPP to City Council, nor the City Council Resolution 11-282 approval as written with several conditions listed, contains any specific mention of or authority granted to DOT for condemnation or eminent domain proceedings against any of the adjacent property home owners ( Plaintiffs ) at Makaha Stream

Plaintiffs have nevertheless been threatened with condemnation or eminent domain of portions their private property, in writing by DOT, after the City Council Approval, after refusing to sell voluntarily their property to DOT and objecting to the project design and negative impacts on their properties.

Meanwhile DOT and their consultant R.M. Towill Corporation, have stated there are “no negative or adverse impacts to any adjacent properties” from the project. Plaintiffs entirely disagree with such statements made by applicants, in that the forced taking of private property would be an entirely “adverse impact” on the adjacent property owners.

DOT has stated they will condemn portions of the Klausmeyer-Among property, TMK (1) 8-4-008 - 020 and Palmer and Ellis’s property TMK (1) 8- 4- 018 - 014 and **Plaintiffs request this Court to issue an Order for an immediate Injunction against any such proceedings while this case is pending.**

Plaintiffs do not see in the SMA 38/39 application submitted by DOT any request for condemnation, and in the DPP and City Council findings of fact or order, any specific order or

authorization granting or specifying condemnation of either the Klausmeyer-Among parcel or the Palmer parcel.

However, in an abundance of caution, Plaintiffs hereby enter an appeal to this Court if any such order or authority was granted to DOT by City Council, and if such authority exists in the SMA permit ( also called SMP ) granted by City Council.

2. An Environmental Impact Statements ( EIS ) was required by State law, but applicants performed a much less stringent Environmental Assessment ( EA ).

An EIS for this major project encompassing the entire Makaha Beach SMA area, which includes was mandated by State Law and regulations. When this was brought to the attention of City Council, via petition of Plaintiffs and many others, the petition was ignored and not addressed by City Council. **[Exhibit 25 ]** City Council did not bother to discuss, refute, or even address the EIS petition filed by residents at City Council proceedings, except for Leeward District Councilman Mr. Tom Berg, who urged the City Council to demand an EIS be required for Resolution 11-282 to pass.

Pursuant to HAR Chapter 11-200-12, Significance criteria, there are 13 criteria or “triggers” of proposed coastal development projects that “shall” require an EIS be conducted by applicant for the SMA permit process. This major Makaha Bridges SMA project triggered at least 7 and up to 9 of these 13 criteria, and DPP and City Council did not abide by the State law in allowing this Resolution 11-282 SMA project to proceed without an Environmental Impact Statement to be conducted. Not only is the environmental impact significant at the Makaha beach area within the SMA boundaries, but this project if implemented will affect the whole Makaha Valley flood plain, future land uses and zoning changes,

and have a very great long term CUMULATIVE impact, that is required by law to be evaluated in approving such projects. The DPP and City Council should have never allowed this project or applicant to proceed with a self certified EA, when an EIS was required, and this was brought to the attention of City Council before they voted, yet they ignored constituents and district Councilman Tom Berg's petition and plea for an EIS to be conducted for this large scale project, which will tear up the entire Makaha Beach area, and re-arrange half the entire Makaha Valley flood way!

3. Large change of project design and scope, was ordered in March 2010, at a cost of over \$600,000,00 to do additional studies, change the design, and additional survey's and hydraulic and hydrological studies ( not including construction cost at all ), almost a year AFTER the required Public review period had expired following the Draft EA published in May 2009.

Plaintiffs and other constituents, and Leeward District Councilman Tom Berg, at public hearing, called upon City Council to order the SMA project applicants to publish an updated Draft EA with the new studies and design allowing for another Public review period, since the project had changed so much the original Draft EA did not satisfy the public review requirements, and there was no public review after the vast changes were made to the project. Tom Berg and constituents introduced evidence of the "change order" before City Council, but this denial of due process to area constituents was ignored by City Council entirely.

4. DPP failed to hold a hearing on the accompanying Shoreline Setback Variance associated with the Makaha Bridges SMA in the Waianae District as required by ROH Chapter 25 provisions.

When Plaintiffs Palmer and Ellis notified DPP in writing that they were prejudiced by not

being able to attend the downtown scheduled public hearing, and requested a hearing in the district of the project as per Chapter 25 ROH mandates [Exhibit 7 ], DPP ignored their request, issued the Shoreline Variance permit to DOT, and in writing told constituents including Palmer and Ellis they had a right to file a contested case hearing, at a filing cost of \$400, and failed and refused to abide by ROH Chapter 25 requirements. DPP also ignored a letter from the Waianae Neighborhood Board requesting the hearing to be held in the District of the project, which was also ignored by DPP. Such a response is in violation of due process against Plaintiffs, and others affected, and they herein request this Court to revoke the Shoreline Variance permit issued by DPP and order the hearing be held as required.

The above section of Chapter 205A mandates that in evaluating any development in the SMA areas, the DPP and City Council must apply and enforce the **existing laws and conditions**, such as a standing in effect Land Court Order, current Tsunami zoning, current FEMA Flood Way and other current parameters. The Chapter does not allow for an applicant to rely upon, nor the DPP or City Council to grant approval of a development based the “proposed flood boundaries” or the “proposed re-alignment” of Makaha Stream, or the “proposed channel design”, and other “changes” that are not allowed under CURRENT existing laws and conditions.

5. Kili Drive is an illegal berm, was never completed, has been an illegal road for more than 40 years, and is a de facto built up berm, dividing the FEMA AEF zoned Flood Way in Makaha Valley, and was connected to Farrington Highway without proper drainage

The DPP failed to disclose a conflict of interest as approving agency regarding the fact that Kili Drive should never have been allowed to connect to Farrington Highway, violated the Detailed



Land Use Map of C&C, and was never properly completed or constructed. **[Exhibit 26 ]** On the original construction plans, most of the approving signatures are missing, including the signature of Robert Way, then Planning Department Director, and also missing is the Highways Division signature. Of six required signatures, only two are shown **[Exhibit 8 ]**

The DPP approval of the submitted design of the project benefits DPP as well as applicant DOT, both of which were negligent in allowing Kili Drive to connect to Farrington Highway in the first place, and was connected without proper drainage improvements at the intersection, which are the cause of up to 6-10 feet of fine silt being deposited over the years on the Kaena Point side of Makaha Stream mauka of Bridge 3. **[Exhibit 9** pic. of HRT parcel and **Exhibit 15]**

The proposed Bridge No. 3 channel design seeks to reinforce this illegally attained grade obtained by the 40+ years of Kili Drive acting as a berm across the Flood Way. The several feet thick of silt has been deposited on the C&C parcel and the HRT Kili Drive LLC parcel, across from Palmer/Ellis' on the opposite embankment area and all the way to Kili Drive. During several decades and many flooding events, flood waters have been blocked from flowing freely through the flood plain, and allowing excess flood water to access bridge 3A, by Kili Drive which formed a dead end bermed in area along with Farrington Highway, for silt deposits. Kili Drive cuts across a FEMA designated AEF zoned Flood Way, and from 1970 to 1995, was higher in elevation ( about 14 feet road surface level at the intersection with Farrington, and rising thereafter going inland ) than the Base Flood Elevation of the AE zoned and permitted homes in the same 100 year flood hazard zone. When Kili Drive was built the owners filled the natural grade to a much higher grade to build

Kili Drive, which then served as a berm preventing free flowage of water across the flood plain [EXHIBIT 10 microfiche Kaena Road showing filled in original grade ] Subsequent floods and siltation caused by Kili Drive berm, has resulted in a grade of 12' or more feet heigh on the Kaena side of Makaha Stream across from the residential side (Palmer /Ellis side), and Palmers and other homes having a permitted grade of 10 feet, on the Waianae side of Makaha Stream. The DOT project plans include installing rock embankments or rip rap, using only 10 FEET high on the residential /Waianae side of Makaha Stream and 12 FEET high illegal grade on Kaena Point side, mauka of the new Bridge 3.

With Rip rap of 12 FEET high on the Kaena ( Flood Way zoned ) embankment, and only 10 FEET high on the Palmer/Ellis residential embankment, and as can be seen quite clearly and starkly in [ EXHIBIT 11 ], the rip rap will be curved inward, then if flood waters were to become more than 10 feet deep in the Makaha Stream channel, and up to 12 feet deep, the flood water MUST go into the Palmer property before it can access and exit under Bridge 3!!

This design seeks to protect AEF Flood Way property ( on Kaena side ) at a higher elevation than AE residential zoned properties !! This poses a Health and Safety threat to homes and residents including Palmer and Klausmeyer-Among.

Neither DPP nor City Council should have legally approved or permitted any design that poses a direct health and safety threat to permitted dwellings, while protecting an AEF zoned Flood Way embankment from erosion. The DOT project engineer Henry Kennedy, when questioned whether flood waters would indeed be directed onto Palmers and other properties by the design, merely stated:

“ its unfortunate those houses were built there”.

6. The DPP intentionally misrepresented a material fact in response to Leeward District Councilman Tom Berg’s questioning about the permit history of Kili Drive: Intentional misrepresentation of critical material facts made by DPP to Tom Berg and City Council members:

Before the City Council voted on the resolution 11-282, Leeward District City Councilman Tom Berg questioned the DPP Deputy Director at the public hearing as to whether Kili Drive was properly permitted from its connection to Farrington Highway all the way up to the Makaha Towers Condominiums. The DPP Deputy Director said he would have to check the DPP records and get back to Tom Berg. Two days later, after hearing nothing from DPP, Mr. Berg followed up with a written request . [Exhibit 12 ] In a written response from DPP Director sent from David Tanoue, DPP Director, to Tom Berg and City Council [Exhibit 13 ], the DPP Director misrepresented the material fact that Kili Drive, was all prim and proper, when in fact Kaena Road, or Kili Drive, under either name, was never supposed to connect to Farrington Highway, was in violation of the Land Use Policy, and was NEVER completed properly, or with proper drainage or improvements. [EXHIBITS 14a, 14b, 14c, 14d, 14e, 14f, 14g ]

The importance of this intentional misrepresentation to Tom Berg and City Council members and Chairman by DPP cannot be understated, and the importance of HIDING the Kaena Road/Kili Drive conundrum history from the City Council, and PLAINTIFFS, cannot be understated, and the effect of Kili Drive on the entire goal and project design submitted by applicants cannot be understated. The DOT, DPP, HRT Kili Drive LLC, and the City and County of Honolulu ( owner of the parcel

across from Palmer ), ALL benefit from the project design, greatly by utilizing the illegal higher grade which has silted in over the past decades, and to the detriment of Plaintiffs properties. Even applicants own EA study references nothing but silt deposited in the area mauka of Bridge 3 across from Palmer which is bermed in by Kili Drive, noting silt up to 7 feet deep on the surface, without even a pebble in there, all deposited from previous floods, because blocked from free flowage by Kili Drive across the flood way. [Exhibit 15 ] Having Kili Drive for all these past 40 years cutting the Makaha Valley flood way in half is analogous to allowing an elevated road to traverse across the entire Kaiwanui Marsh in Kailua, cutting the flood way in half, which would never have been allowed to fester for 40 years without correction!

In addition, the DPP “Kaena Road” construction plans show a drainage culvert pipe as being in place passing underneath Kili Drive from the Waianae side to the Kaena Point side of Kili Drive a few feet mauka of the connection of Kili Drive to Farrington Highway, with elevation of the pipe at the base of the pipe of 10 FEET in elevation. [Exhibit 10b ]. However, Plaintiffs, who have resided at their current addresses for decades, and are extremely familiar with the intersection of Kili Drive and Farrington Highway, see no such drainage pipe in place, as was supposed to be placed there. The significance of this missing pipe is enormous in this lawsuit. If the pipe was there as originally engineered, then water could at least flow through that pipe adjacent to Farrington Highway, at an elevation of 10 FEET above sea level, and the ditch that was originally there would have been preserved, at a level of 10 FEET, with flowing water through it and thus the surrounding area silt and would not have built up to the current situation of 14 FEET grade level at the edge of Kili Drive, and

12 FEET high at the Kaena Point side embankment of the Makaha Stream. All this area has built up over the many years due to no drainage pipe underneath Kili Drive at this intersection as originally designed in the construction plans. If indeed such pipe was ever installed, it has been buried under at least 4 FEET of silt for decades, and never functional for its drainage purpose, which is negligence of the C&C owner of said parcel, or HRT Kili Drive LLC, one of which would have been responsible to maintain the pipe to keep it functional. If the pipe is not there, it proves Plaintiff's assertion that "Kaena Road" was never constructed nor completed properly and lacked proper drainage requirements.

In a further bizarre twist, the questionable "access road" shown on the applicants "Makaha Stream Channel Plan" sure enough actually has TWO connections, one to Kili Drive and one to Farrington Highway, which is a very odd design, and nearly unexplainable, except that it exactly serves DPP's and DOT's and C&C's ulterior undisclosed purpose to finally after 40 years "legalize" the illegal connection of Farrington Highway to Kili Drive, via DOT purchasing the first 40 feet of Kili Drive in their project proposal plans, and then by boxing in the Kili Drive culvert drain pipe if it even exists, so as to make the lack of drainage for 40 years a moot issue, being surrounded on all sides by 14 + feet high asphalt!! This lack of proper drainage for 40+ years at this intersection, and the conflict of interest of DPP as approving agency with an undisclosed conflict of interest and ulterior motives with applicant DOT are germane to this Court complaint, and of great significance in the damages to Plaintiffs from this 40+ years lack of proper drainage resulting in an illegally higher grade on C&C and HRT Kili Drive LLC parcels.

The DPP and DOT are hiding this fact from Tom Berg and the rest of City Council, and this drainage

pipe that SHOULD BE THERE, but is not there or hasn't functioned in 40 years, is the direct cause of the illegal higher elevation of the embankment area across from Palmer , and the area between the Makaha Stream and Kili Drive across from Palmers and other residences, extending several hundred feet upstream of Bridge 3. This is the exact area where DOT proposes to reinforce the illegal higher grade to the detriment of Plaintiffs properties across the Makaha Stream, who are lower in elevation. DPP, DOT, RM Towill, and HRT Kili Drive LLC, all knew or should have known, and Plaintiffs allege DPP knew or had a duty to know, that the lack of drainage and lack of a drainage pipe depicted on the construction plans, would result in flooding to Plaintiffs properties over the years, which it has, by elevating the flood way via silt buildup, to a higher elevation than permitted residences on the Waianae side of Makaha Stream mauka of Bridge 3. When Councilman Tom Berg asked DPP a direct question, whose purpose was clear, to gain a clear understanding of the history and permitting of Kili Drive, the DPP Director, after nearly two weeks, wrote a reply which is nothing short of intentional deceit of Tom Berg and City Council. Plaintiffs found the attached records in DPP's own public records files, so DPP chose to deceive Tom Berg, the District Councilman for the area in which this SMA project is planned, and completely and purposefully misinform him and City Council regarding Kili Drive.

7. City Council did not follow own procedures re: Zoning Committee adopted minutes:

The adopted minutes from the October 10, 2011 meeting of the Zoning and Planning committee at City Council had instructed the applicant DOT to submit to FHWA plans for the Bridge 3

channel design WITHOUT the objected rip rap to see if DOT could get federal approval for a design without the rip rap embankments. [Exhibit 17, City Council Zoning Committee Minutes of Oct. 10, 2011 ]

On Feb. 9, 2012 DOT (applicant) and RM Towill ( the DOT consultant) did not show up at the scheduled hearing, and did not notify the committee prior or during the hearing of any reason for their absence. Further, they had NOT submitted any plans to FHWA as the committee had instructed them to do. The Zoning and Planning committee allowed the February 9, 2012 hearing to go forward, without applicants or their consultant present, and never discussed or referenced the fact that the minutes and instructions of the Zoning Committee were never followed, as if they never existed. Plaintiffs assert this was a denial of due process in that they relied upon the committee instructions and adopted minutes as binding upon applicants.

8. The Makaha Stream favors the North West direction of the lower reaches of Makaha Valley.  
This project seeks to force the Makaha Stream to the directly opposite side of the lower valley, to the South East side of Makaha Valley, directly against its natural flow direction:

In the applicant’s own EA study conducted for this project, it is stated that the Makaha stream favors the North West direction in the lower reaches of the Makaha Valley. [Exhibit 18 ]

The project design of the channel mauka of Bridge 3, with the added curved inward and higher rip rap reinforced rock embankment on the kaena Point side of the Makaha Stream across from Palmer houses, as shown on applicant’s submitted “proposed flood boundary” map drainage report, will serve

to restrict and direct the Makaha Stream against the South East /Waianae side of Makaha valley and up against permitted homes, not just at Bridge 3, but farther up at Nukea Street and Manuku Street where applicant's own submitted maps show the 100 year flood plain will be pushed toward the residential zoned properties and away from the current flood way, and in the South East side of the valley, directly opposite of the NATURAL FLOW direction as stated in applicants own EA study. Furthermore, and miraculously, the infamous Kili Drive emerges as not even within the flood way anymore, after 40 years of illegally blocking the flood way! HRT Kili Drive LLC, who owns dozens of acres of AEF Flood Way zoned land off of Kili Drive will then be free to seek re-zoning to residential or other higher uses, to the detriment of Plaintiff's properties. see **[Exhibits 19 and 20 ]**

There will be a drastic and permanent reduction in available flood way, which a drastic change in a natural resource, not discussed or accounted for by DPP or City Council, as a long term effect of the project. Future flood waters must go somewhere, most likely, as Henry Kennedy admitted, through the Plaintiffs homes and properties.

The design on its face is obviously designed to protect HRT Kili Drive LLC's embankment, which is zoned AEF Flood Way. The rip rap on the Kaena Point side is curved toward the center of the Makaha Stream and will greatly skew the stream toward the AE zoned residences on the Waianae side of the stream. Mr. Ikaika Anderson, during City Council Zoning and Planning Committee hearing, asked the DOT and RM Towill engineers, if with all the new concrete bridges being constructed all across the State, whether they could point to a similar curved inward rip rap design for any other bridge? They could not produce a single example. The reason is that there doesn't exist anywhere such



an asinine design, to build a 15 Million dollar longer span concrete bridge and then block off half of the channel approaching the bridge with rock rip rap! Plaintiffs hope this Court will ask the same question, whether such a channel design as seen mauka of proposed Bridge 3 exists anywhere, in ANY State, because Plaintiffs don't believe such a design would ever be put forth by any Bridge designer. The whole purpose of this obviously strange design is to protect HRT Kili Drive LLC embankment and skew the Makaha Stream toward the residences, which is dead wrong wrong wrong, and violates the 1951 Land Court Order, which Plaintiffs hereby invoke.

9. The entire project design and alteration of Makaha Stream go directly against the Land Court Order No. 10157, filed March 7, 1951:

The land Court Order of March 7, 1951, established a covenant on the Deeds pertinent to this Complaint for

“ an easement for the free flowage of water through the natural stream beds as noted and shown on said map be noted on said certificate of title **in favor of all interested** in said free flowage of water through said natural stream beds.”  
( emphasis added). [ **Exhibit 21** ]

This covenant appears on the C&C parcel, and the HRT Kili Drive LLC parcel, across from Plaintiffs properties on the other side of Makaha Stream [**Exhibits 22** City & County parcel TCT and **Exhibit 23** HRT Kili Drive LLC parcel Deed]

DOT proposes to purchase portions of the above properties currently owned by C & C of Honolulu, and HRT Kili Drive LLC, and to then alter the Makaha Stream channel on that land, which

Plaintiffs oppose, and Plaintiffs hereby invoke and rely upon this Land Court Order, that any alteration of the Makaha Stream channel will be a violation of said land Court Order.

City Council, prior to voting to approve the project, received testimony and was provided a copy of Land Court Order No. 10157, filed March 7, 1951; and City Council was advised that Plaintiffs and other property home owners along the Makaha Stream opposed any Makaha Stream alteration or realignment and the adding of un-natural rock rip-rap reinforced embankments along the Makaha Stream channel, including the curved inward design, which artificially blocks the natural flowage of Makaha Stream [ **Exhibit 11a, 11b** ], the rock rip-rap reinforced embankment and “access road” with two (2) entrances, connecting to Farrington Hwy and Kili Drive ].

A) Bridges 3 and 3A are the “mouths” of the outflow of flood waters for the whole Makaha valley, originating from “pueo falls” deep in the back of Makaha valley. The Makaha Stream(s) flow down and through the Makaha valley flood plain, and then exit to the ocean under Makaha bridges 3 and 3A.

B) Makaha Stream carries the vast majority of the Makaha Valley drainage to Bridge 3, at Plaintiffs properties, since the West Makaha Stream was diverted into Makaha Stream in the upper valley years ago.

C) The Makaha Stream, when flowing and after exiting under and through Bridge 3, makes a 90 degree right turn immediately after passing under Bridge 3, heading toward Kaena Point direction, and along and parallel to Farrington Highway, and then meets bridge 3A, and the water actually runs back inland under Bridge 3A, an area which is several feet lower than on the other side of Kili Drive, caused by Kili Drive blocking sediment and silt from reaching or depositing in that area for decades.

D) The proposed Makaha Stream curved rip-rap and accompanying questionable design access road, will artificially alter and reinforce the Kaena Point side embankment of the Makaha Stream with the result that Makaha Stream will be forever forced against the South East side of Makaha Valley, opposite of its natural flow direction to the North West. **[Exhibit 18 ]**

E) The “Orange” CURRENT flood boundary and the “Blue” proposed flood boundary maps of consultant RM Towill Corporation, sums up the result of this added rip rap curved inward alteration. In fact, as shown by the applicant’s consultant’s “proposed flood boundary maps”, the curved rip rap actually skews the flow, direction, and stream bed of Makaha Stream to the South East side of Makaha Valley, essentially all the way up Makaha Valley. The rip rap design, and its resultant change of the natural flow of Makaha Stream of Bridge 3 directly violates the Land Court Order, which Plaintiffs hereby invoke their rights thereunder.

The March 7, 1951, Land Court Order is still listed as a covenant and encumbrance on Kili Drive itself, City & County lands adjacent to Makaha Stream, HRT Kili Drive LLC parcel(s) adjacent to Makaha Stream and encompassing Kili Drive, and these are the parcels that DOT intends to install the channel altering rip rap. [ **Exhibits 22 and 23** , C&C property TCT, and HRT Kili Drive LLC Deed, showing 1951 LCO covenant ]

Further, Plaintiffs assert that the “natural stream beds” noted on the applicable Land Court Order, include all designated flood way areas, which are part of the natural flow and vis a vis part of the stream bed during high run-off events. Makaha Stream being normally a dry stream, the flood way associated with Makaha Stream is a critical adjunct area necessary to handle what are often flash

flooding events in the Makaha valley.

10. The Hawaii Supreme Court Decision No. 2956, issued on January 26, 1956, in David Orth Klausmeyer and Marie Blackwell Klausmeyer vs. Makaha Valley Farms Ltd; Makaha Beach Co. Ltd; Waianae Village Properties Ltd; and Capital Investments Ltd; established that one may not engage in activities or actions on one's property that could adversely over time lead to the failure or undermining of another owners adjacent or nearby property.

Plaintiff Moana Kea Klausmeyer-Among's parents purchased the property currently owned by Ms. Klausmeyer-Among, in 1947, and built the house still standing on the property. Her parents in the early 1950's, had cause to file a Court action against developers who were mining the sand commercially off Makaha Beach. In a landmark decision of the Hawaii Supreme Court in 1956 [ **Exhibit 24** ], the Court ruled that such an endeavor may undermine the property of another by reducing the support of the embankment or land itself by the removal of adjacent sand or other support. This is the same notion that a neighbor may not excavate deeply near another neighbors home or building such that it may cause the adjacent owners ground to fail or be more subject to natural calamities, than if such excavation was not present, and the ground was solid. This Hawaii Supreme Court decision is a landmark decision often referenced in other proceedings. In the instant matter, Plaintiff assert this decision should protect them from the adverse results that implementation of DOT's Bridge 3 design and channel changes would bring about, exactly encroaching and weakening the ground underneath Plaintiff(s) structures and property, by bringing the embankment closer to their homes, and bringing water saturated soil and sand closer to their structures, when the natural flow of Makaha Stream is

AWAY from both Plaintiffs properties. DOT has plans to excavate the Palmer embankment significantly up within about 10 feet of his home, removing a stable extended much wider embankment that has been solid for decades, which will become flood way. This design also leaves the embankment of an adjacent neighbor to the mauka side the of Palmer property, extending exposed and without support, once

DOT excavates Palmers embankment as shown on the design plans. The property owner to the mauka rear of Palmer embankment will lose that embankment to flooding, lacking the previous support of the Palmer extended embankment, and thus the Supreme Court Decision of 1956 will have been violated against additional owners of real property, besides Plaintiffs. Those property owners asked DOT at public hearings whether their property would have any portion of their property or embankment, currently both being entirely in the AE flood fringe zone, re-designated as AEF Flood Way for any portion of their property. The DOT has refused to answer the question.

11. City Council failed to address repeated misrepresentations in testimony of applicants and their consultants at public hearings, and misrepresentations in maps/design drawings submitted by applicants:

Constituents in the project area brought to the attention of City Council that the applicants maps and drawings depicting the project design showed many misrepresentations of the Makaha Stream center, as shown on maps submitted to DPP and to City Council. The DPP and City Council ignored these misrepresentations of project drawings, and did not question applicants whatsoever as to

the drawings submitted..

Director of DPP testified Oct. 4, 2011 the Makaha bridges project was “not designed to address any flooding issues” but in fact applicants seek to submit a drainage report and new flood maps that eliminate half the flood plain in Makaha Valley, and change the land zoning all the way up the valley, greatly benefitting HRT Kili Drive LLC and other large landowners to the detriment and loss of land to Plaintiffs.

12. Council and DPP failed to apply EXISTING laws as required by HRS 205A-2(c)(7)(A), in approving the project resolution:

The existing laws and policies in effect are to be enforced and applied to SMA projects. The existing law is the Land Court Order No, 10157, of March 7, 1951, and the Supreme Court decision of 1956, and the current EIS requirements, and current DPP public review policies and procedures for holding hearings in the proper district where the development is to take place.

The current FEMA Flood Zones , current Tsunami zones and other CURRENT laws have been ignored by DPP and City Council in approving this SMA project. The current illegal condition and existence of Kili Drive has been intentionally mis-represented. For example, when a constituent owning a property along makaha Stream adjacent to Palmer testified before City Council that the Council did not have jurisdiction to over rule the Land Court Order of 1951, and did not have authority to approve the applicants intended alteration of Makaha Stream’s natural flow with completely un-natural rip rap rock embankments in the channel, and that the constituent was invoking the applicable Land Court Order in

favor of no rip rap, the City Council ignored him and passed the Resolution 11-282 project as designed, as if there was no such testimony made.

13. Failure of DPP to disclose CONFLICT of INTEREST to City Council or public

The DPP failed to reveal a conflict of interest with respect to the history of Kili Drive. There has been 40 years of negligence by DPP, and the City and County of Honolulu, as owner of the parcel wherein Kili Drive connects to Farrington Highway. DPP failed to reveal to City Council a bias and conflict of interest in evaluating applicants project and design, in that DPP and DOT both benefit greatly by the proposed design, while Plaintiffs are threatened with condemnation and flooding. The City and County of Honolulu, as owner of the parcel that allowed the improper connection of Kili Drive to Farrington Highway, and failed to ensure proper drainage and engineering of said connection, also have a conflict of interest, or bias to favor DOT and DPP in this matter, to detriment of Plaintiffs, that was not disclosed to constituents or Plaintiffs by City Council at the public hearings on this project.. The City Council has a conflict of interest in not disclosing the City and County negligence regarding Kili Drive, which was brought up repeatedly in the hearings. With such conflict of interest and bias toward solving their own conundrum of issues involving Kili Drive, DPP should not be allowed legally to be the approving agency for this SMA project.

14. Applicant DOT has throughout the entire public review process and upon specific requests

made, refused to release Hydraulic, Hydrological, Survey, and Drainage and Flood studies and data, thus Plaintiffs and others have been unable to ascertain the true nature of the project impacts to their properties and the area.

The DPP, and City Council failed to require applicants to release such directly relevant and pertinent studies and data, even though plaintiffs and other constituents continuously requested access to the data. When City Council questioned the applicant whether they were willing to release such studies, the DOT replied it is DOT policy not to release such data and studies until AFTER the project is completed. Plaintiffs assert this is a denial of fair and due process, and this denial of information in and of itself necessitates the filing of this Court action.

repeated testimony before DPP and City Council by applicants “we are simply replacing two old wooden bridges”

15. HRS Chapter 205A-2(a)9c)(6)(C) section violated in issuance of SMA permit by DPP and City Council.

The fact that the project design will protect currently zoned AEF Flood Way vacant property to a mean level of 12 feet, which will remain dry and uneroded and not inundated during flood waters rising above 10 feet mean elevation, but lower than 12 feet mean elevation. This curved rip rap design at 12 feet high, will result in the extra two feet deep of flowing water having to flow over and through the currently zoned AE residential properties, including Palmer property, in order to exit to the Bridge. This “sloshing” of flood waters caused by the bottleneck the curved inward rip rap forms mauka of



Bridge 3, is undeniable, and will occur from this submitted channel design, and this obviously ADVERSE result to the residential properties is not directly related to a “No Rise Certification” which will be highly touted by applicants. This certainly violates the above Chapter 205A-2(a)(c)(6)(A) requirement that approving bodies must:

“Ensure that developments comply with requirements of the Federal Flood Insurance Program”

The negative effect on Palmers property will be dirty and disease causing flood waters, and resultant left over mud and stagnant sludge, left over after a 10-12 foot flow event, while the AEF Flood Way opposite embankment remained high and dry and had no inundation.

Whereupon Plaintiffs ask of this Court to issue an Order for an immediate INJUNCTION barring applicants from proceeding in any manner to initiate condemnation or bring eminent domain proceedings against Plaintiffs, and to order a cease and desist order against applicants continuing to process any adjunct permits, in any other venues, until this Court decides this case, and decides whether the SMA permit granted by DPP /City Council will be ordered as revoked due to the violations and Plaintiffs rights here filed with this Court.

Further, Plaintiffs ask the Court to Order for applicants to release all data and studies in their entirety, including preliminary, final, changed or initial studies, during the 9 years design of this Makaha Bridges project.

Plaintiffs also request an order for entire Kili Drive to be removed out of the current FEMA designated Flood Way, or at minimum the portion of Kili Drive which connects to Farrington Highway

which is not privately owned by HRT Kili Drive LLC, and uses an easement over and across the C&C owned parcel to connect to Farrington Highway.

Plaintiffs also request an Order to be issued for the C&C and HRT Kili Drive LLC to immediately remove the excess silt built up on their parcels on the Kaena Point side of Makaha Stream over the decades, such that the AEF Flood Way will be lower than the AE residential zone across Makaha Stream, as should be the normal situation.

This is because the original grade before Kili Drive was constructed, was filled and raised considerably in elevation during its construction, and has acted as an illegal berm across the Makaha valley flood way illegally for decades, and has after decades of being a berm, formed a wide silted in berm, which alters the natural direction of flow of the Makaha Stream, which favors to flow to the North West direction, and towards the Bridge3A, but has been continuously forced to flow under Bridge 3, against its natural flow direction, in violation of the 1951 Land Court Order.

AND, upon a hearing hereof, plaintiff's further pray that this Court order the REVOCATION of Resolution 11-282 the Makaha Bridges replacement project approved by City Council, and a permanent injunction against the implementation of any future Makaha Bridges replacement project design that changes the natural direction or flow of, or otherwise alters the channel of the Makaha Stream or the West Makaha Stream. And Plaintiffs pray for such other and further relief to which they may be entitled pursuant to Rule 54 of the Hawaii Rules of Civil Procedure.

DATED: Honolulu, Hawaii \_\_\_\_\_.

---

MOANA KEA KLAUSMEYER-AMONG  
Plaintiff Pro Se

---

ROBERT PALMER  
Plaintiff Pro Se

---

JASON ELLIS  
Plaintiff Pro Se