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NO. CAAP-23-0000437

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

PROTECT WAIEHU AHUPUA'A, INC., a non-profit corporation,
Plaintiff-Appellant,

v.

DEPARTMENT OF HOUSING AND HUMAN CONCERNS of the COUNTY OF MAUI;
COUNTY OF MAUI; GENOVA CONSTRUCTION AND DEVELOPMENT,
a foreign stock corporation, Defendants-Appellees,
and DOES 1-27, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 2CCV-22-0000193)

MEMORANDUM OPINION

(By: Leonard, Presiding Judge, Wadsworth and McCullen, JJ.)

Plaintiff-Appellant **Protect Waiehu** Ahupua'a, Inc.,
appeals from the Circuit Court of the Second Circuit's June 22,
2023 final judgment in favor of Defendants-Appellees Genova
Construction and Development (**Genova**), the County of Maui (**the
County**), and the Department of Housing and Human Concerns of the
County of Maui (**DHHC**), which was based on the circuit court's
June 16, 2023 order granting Genova's motions for summary

judgment on all counts, granting DHHC and the County's cross-motion for summary judgment, and denying Protect Waiehu's motion for summary judgment.¹

Protect Waiehu's Amended Complaint for Declaratory and Injunctive Relief (**Amended Complaint**)² alleged Genova violated the Hawai'i Environmental Policy Act (**HEPA**), Hawai'i Revised Statutes (**HRS**) chapter 343, and HEPA's implementing rules, Hawai'i Administrative Rules (**HAR**) § 11-200.1, by compiling an inadequate draft environmental assessment (**draft EA** or **DEA**) and final environmental assessment (**final EA** or **FEA**). Likewise, Protect Waiehu alleged DHHC violated HEPA and HAR § 11-200.1, as well as provisions in the Hawai'i Constitution, by accepting Genova's inadequate draft EA and issuing an anticipated finding of no significant impact (**AFNSI**), and by accepting Genova's inadequate final EA and issuing a finding of no significant impact (**FONSI**).

We vacate in part and affirm in part. An environmental assessment (**EA**) "serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect." HAR § 11-200.1-2. We hold that the final

¹ The Honorable Peter T. Cahill presided.

² Protect Waiehu filed its complaint on August 7, 2022, but subsequently amended it to reflect a change in its corporate status.

EA in this case did not "provide sufficient evidence and analysis" and could not support a FONSI.

I. BACKGROUND

A. Factual Background

At the center of this case is a now vacant, 238-acre parcel of land, formerly used for sugar cane agriculture and macadamia nut production, located in the 'ili of Waiehu in the ahupua'a of Wailuku on Maui (**the Parcel**).³

Throughout the past twenty years, various developers have submitted project proposals to construct residential subdivisions on the Parcel.

In 2005, for example, Hale Mua Properties LLC submitted, and the State of Hawai'i Land Use Commission (**LUC**) accepted, an FEA (**the 2005 Hale Mua FEA**) for the "Proposed Hale Mua Affordable Housing Subdivision" (**the Hale Mua Project**). The 2005 Hale Mua FEA included an Archaeological Inventory Study and the State Historic Preservation Division's concurrence with that study. The LUC issued a FONSI, which allowed the Hale Mua Project to proceed without conducting further environmental review, but it ultimately did not move forward.

Fifteen years later, Genova proposed to develop the Waiehu Residential Community (**the Project** or **Genova's Project**)

³ The Tax Map Key (**TMK**) number for the Parcel is 2-3-3-002:031.

on the Parcel, "a 100% affordable 752-unit residential community along with associated infrastructure, roadways, amenities such as park space, walking trails, and landscaping," as well as retail space.

Genova prepared a draft EA for the Project in December 2021.⁴ DHHC transmitted Genova's DEA to the State of Hawai'i, Office of Planning and Sustainable Development's Environmental Review Program for publication in the December 23, 2021 edition of The Environmental Notice.

The thirty-day comment period commenced on December 23, 2021, with comments due by January 24, 2022.

We must briefly mention that, regarding an unrelated development on a neighboring parcel, the Environmental Review Program published on June 8, 2022, an FEA and DHHC's FONSI for the proposed Hale Mahaolu Ke Kahua Affordable Housing Community (**Hale Mahaolu**).⁵

⁴ Only excerpts of the DEA appear in the record; the entire DEA is incorporated by reference in various filings and is accessible online. Chris Hart & Partners, Inc., Waiehu Residential Community Draft Environmental Assessment (Dec. 16, 2021), https://files.hawaii.gov/dbedt/erp/Doc_Library/2021-12-23-MA-DEA-Waiehu-Residential-Community.pdf [<https://perma.cc/3G88-DRUQ>].

⁵ The record contains excerpts of the 2022 Hale Mahaolu FEA's front matter. The full FEA is accessible online. Munekiyo Hiraga, Hale Mahaolu Ke Kahua Affordable Housing Community Final Environmental Assessment (June 8, 2022), https://files.hawaii.gov/dbedt/erp/Doc_Library/2022-06-08-MA-FEA-Hale-Mahaolu-Ke-Kahua-Affordable-Housing-Community.pdf [<https://perma.cc/N9UN-EXHY>]

On July 8, 2022, the Environmental Review Program published Genova's final EA and DHHC's FONSI in The Environmental Notice for Genova's Project.

B. Procedural Background

1. Protect Waiehu's Amended Complaint

Protect Waiehu filed its seven-count Amended Complaint on September 8, 2022, alleging that both the DEA and FEA did not comport with HEPA, HAR § 11-200.1, or the relevant constitutional provisions. As presented, the seven counts were:

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|------------------|---|
| Count I | "Violation of Chapter 343, HRS – Improper Assessment of Environmental Impacts" (or Impacts Not Assessed) |
| Count II | "Violation of Chapter 343, Failure to Prepare Statement for Action That May Have Significant Impacts" (or Possible Significant Impacts) |
| Count III | "Violation of Chapter 343, HRS – Scope of Action Improperly Defined (or Segmentation)" |
| Count IV | "Violation of Chapter 343, HRS Environmental Assessment Preparation Procedures" (or Contents of EA) |
| Count V | "Violation of Constitutional Duties" (or Public Trust) |
| Count VI | "Violation of Constitutional Duties Under Article XII, Section 7 of the [Hawai'i] State Constitution" (or Traditional & Customary Rights) |
| Count VII | "Injunction" |

In its prayer for relief, Protect Waiehu sought a declaratory judgment invalidating the FEA and FONSI and an injunction preventing Genova and DHHC from moving forward with the Project until they fully complied with HEPA, HAR § 11-200.1, and the Hawai'i Constitution.

2. Motions for Summary Judgment

On January 4, 2023, Protect Waiehu moved for summary judgment on all seven counts.

On January 6, 2023, Genova filed two motions for summary judgment. Genova first moved for summary judgment on Counts I (Impacts Not Assessed), II (Possible Significant Impacts), V (Public Trust) and VI (Traditional & Customary Rights). Genova next moved for summary judgment on Counts III (Segmentation) and IV (Contents of EA). Genova did not move for summary judgment on Count VII (Injunction). DHHC and the County filed a joinder to Genova's summary judgment motions.

DHHC and the County cross-moved for summary judgment on all seven counts and opposed Protect Waiehu's summary judgment motion.

The circuit court held a hearing with oral argument on the motions for summary judgment.

On June 16, 2023, the circuit court entered its order granting Genova, DHHC, and the County's motions for summary

judgment and denying Protect Waiehu's motion for summary judgment.

On June 22, 2023, the circuit court entered final judgment against Protect Waiehu and in favor of Genova, DHHC, and the County and dismissed with prejudice any unaddressed claims. Protect Waiehu timely appealed.

3. Genova Conveys the Parcel to the Department of Hawaiian Homelands (DHHL)

Sometime during the course of the litigation, Genova cancelled the Project and entered discussions with DHHL regarding the Parcel's disposition. DHHL proposed to site its Waiehu Mauka Homestead Project (**the DHHL Project**), an "updated configuration of" Genova's Project, on the Parcel.

On July 27, 2023, five days after Protect Waiehu appealed, DHHC informed the Environmental Review Program of its determination that DHHL was not required to complete an EA for the DHHL Project. DHHC explained that, pursuant to HAR § 11-200.1-11 (eff. 2019),⁶ the DHHL Project (1) was substantially

⁶ HAR § 11-200.1-11, which sets forth guidelines for when a proposed action may proceed without additional environmental review where, as here, a substantially similar action previously received a FONSI, provides in relevant part:

§11-200.1-11 Use of prior exemptions, findings of no significant impact, or accepted environmental impact statements [(EIS)] to satisfy chapter 343, HRS, for proposed actions. (a) When an agency is considering whether a prior exemption, FONSI, or an accepted EIS satisfies chapter 343, HRS, for a proposed action, the agency may determine that additional environmental review is not required because:

(continued . . .)

similar to Genova's Project for which a final EA was submitted and accepted; (2) was "anticipated to have fewer direct, indirect, and cumulative impacts than" Genova's Project; and (3) "fit[] within the range of alternatives analyzed in the Final EA because the [DHHL Project] is on the same site as [Genova's Project] analyzed in the Final EA and has a smaller footprint of development."

The Environmental Review Program published DHHC's exemption determination in the August 8, 2023 edition of The Environmental Notice.

On December 26, 2023, Genova conveyed the Parcel to DHHL and recorded the deed with the State of Hawai'i, Bureau of Conveyances on December 29, 2023.

II. DISCUSSION

On appeal, Protect Waiehu raises numerous points of error (**POE**), contending the circuit court erred when it entered

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- (1) The proposed action was a component of, or is substantially similar to, an action that received an exemption, FONSI, or an accepted EIS (for example, a project that was analyzed in a program EIS);
- (2) The proposed action is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in a prior exemption, final EA, or accepted EIS; and
- (3) In the case of a final EA or an accepted EIS, the proposed action was analyzed within the range of alternatives.

summary judgment against Protect Waiehu and in favor of Genova, DHHC, and the County on each of the seven counts in Protect Waiehu's Amended Complaint.⁷ Genova moved to dismiss this appeal as moot. We first address Genova's mootness argument.

⁷ Protect Waiehu's seven POE, excerpted below, contend the circuit court erred by:

- (1) "Applying the incorrect standards of review, including an arbitrary and capricious standard to DHHC's FONSI determination, clear error review to the procedural violations, and deferring to DHHC's FONSI determination along with applying a clear error and arbitrary and capricious standard to [Protect Waiehu]'s segmentation claims";
- (2) Denying Protect Waiehu's motion for summary judgment and granting Genova, DHHC, and the County's motions for summary judgment "despite [Genova, DHHC, and the County's] violations of HEPA procedures, including failing to consider the appropriate factors in making the FONSI determination";
- (3) Denying Protect Waiehu's motion for summary judgment and granting Genova, DHHC, and the County's motions for summary judgment "despite segmentation of the Project in violation of HAR § 11-200.1-10";
- (4) Denying Protect Waiehu's motion for summary judgment and granting Genova, DHHC, and the County's motions for summary judgment "where the FONSI determination was not supported by substantial evidence";
- (5) Denying Protect Waiehu's motion for summary judgment and granting Genova, DHHC, and the County's motions for summary judgment "where the record demonstrated at least one significant impact was likely, rendering the FONSI determination clearly erroneous and requiring preparation of an EIS";
- (6) Finding the record did not contain sufficient evidence to determine DHHC breached its public trust duties; and
- (7) Denying Protect Waiehu injunctive relief.

We do not reach POE 6 relating to Count V (Public Trust) of the Amended Complaint. See Kia'i Wai v. Dep't of Water, 151 Hawai'i 442, 466 n.48, 517 P.3d 725, 749 n.48 (2022) (quoting State v. Lo, 66 Haw. 653, 657, 675 P.2d 754, 757 (1983) ("If a case can be decided on either of two grounds, one

(continued . . .)

A. Appeal Is Not Moot

Genova moved to dismiss this appeal as moot because the "Project has been cancelled, the property underlying the Project has been sold to a third party, DHHL, and DHHL intends to use the property for a different project." Under these circumstances, Genova contends DHHC, the County, Protect Waiehu, and itself "no longer have an 'adverse interest'; 'there is no effective relief that can be granted to" Protect Waiehu; and none of the mootness exceptions apply.

"Under the mootness doctrine, this court will generally refrain from deciding a case that has 'lost its character as a present, live controversy,' and in which 'the reviewing court can no longer grant effective relief.'"

Carmichael v. Bd. of Land & Nat. Res., 150 Hawai'i 547, 560, 506 P.3d 211, 224 (2022) (quoting In re Marn Fam., 141 Hawai'i 1, 7, 403 P.3d 621, 627 (2016)).

However, DHHC's approval of the FEA and issuance of the FONSI remain in effect for other proposals to rely on. See HAR § 11-200.1-11; Nat'l Parks & Conservation Ass'n v. U.S.

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involving a constitutional question, the other a question of statutory construction or general law, this court will decide only the latter.").

And none of the POE address Count VI (Traditional & Customary Rights), so any challenge to the dismissal of that count is waived. See Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded.").

Dep't of Transp., 222 F.3d 677, 679 n.1 (9th Cir. 2000) ("The [agency's] approval of the project, however, remains in effect. Because the extension could still go forward based on the Environmental Impact Statement at issue in this case, National Parks' challenge continues to present a live controversy."); Kia'i Wai v. Dep't of Water, 151 Hawai'i 442, 458 n.31, 517 P.3d 725, 741 n.31 (2022) ("Hawai'i courts consider case law on HEPA's federal counterpart, the National Environmental Policy Act ("NEPA").").

HEPA's administrative rules allow an approving agency (here, DHHC) to approve a proposed action (here, the DHHL Project) without requiring further environmental review where it has previously issued a FONSI for another project (here, Genova's Project), and the proposed action is "substantially similar to" and "is anticipated to have direct, indirect, and cumulative effects similar to those" of that other project, provided "the proposed action was analyzed within the range of alternatives." HAR § 11-200.1-11(a). Once the approving agency determines that a prior FONSI satisfies HEPA's requirements for a proposed action and its determination is published in The Environmental Notice, the proposed action may proceed. HAR § 11-200.1-11(b).

Less than one month after Protect Waiehu appealed, the Environmental Review Program published DHHC's determination in

the August 8, 2023 edition of The Environmental Notice. There, DHHC determined that DHHL need not conduct additional environmental review for the DHHL Project because it "is substantially similar to [Genova's Project], whose Final EA received a FONSI in 2022;" its effects "are anticipated to be fewer than those analyzed in the 2022 EA;" and "the proposed project fits within the range of alternatives analyzed in the 2022 EA." DHHC explained that the DHHL Project would develop "343 single family lots and 55 half-acre rural lots along with associated infrastructure, roadways, and amenities" on the same 238-acre parcel as Genova's Project.

Because Genova's FEA and DHHC's FONSI may be relied upon, and because DHHL indicated it would do so, this appeal is not moot. See HAR § 11-200.1-11(a); Nat'l Parks & Conservation Ass'n, 222 F.3d at 679 n.1.

B. Regarding Summary Judgment, the Circuit Court Erred in Part

Protect Waiehu challenges the denial of its motion for summary judgment and the granting of Genova and DHHC and the County's motions for summary judgment, which resulted in the dismissal of the seven counts raised in its Amended Complaint. In its opening brief, Protect Waiehu raises seven points of error (POE 1-7) and provides eight arguments (Arguments A-H) but does not expressly identify the dismissed count to which each POE and Argument refers. And Protect Waiehu's POE do not always

directly correlate with the Arguments made. For example, the challenge to the dismissal of Count I appears to be addressed in POE 4 and Argument C, and we say "appears" because Protect Waiehu does not expressly state so.

We generally note that poorly organized briefs unnecessarily burden already-strained judicial resources. And where there is non-compliance with the appellate rules, a point may be disregarded and an argument may be deemed waived, or alternatively, a party may be sanctioned, a brief may be struck, or a case may be dismissed. Hawai'i Rules of Appellate Procedure (**HRAP**) Rules 28(b), 30, and 51. Attorneys are deemed aware of, and are required to comply with, the appellate rules. HRAP Rule 1(d).

That said, we attempt to address Protect Waiehu's challenge to the dismissal of the Amended Complaint to the extent we can discern. And we address Protect Waiehu's arguments only to the extent necessary to resolve this appeal.

We review the grant or denial of summary judgment de novo. Villaver v. Sylva, 145 Hawai'i 29, 34, 445 P.3d 701, 706 (2019).

The party moving for summary judgment must carry its burden of showing the "absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a

matter of law." Umberger v. Dep't of Land & Nat. Res., 140 Hawai'i 500, 528, 403 P.3d 277, 305 (2017) (quoting French v. Hawaii Pizza Hut, 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004)).

"This burden has two components" that the movant must meet. Ralston v. Yim, 129 Hawai'i 46, 56-57, 292 P.3d 1276, 1286-87 (2013) (quoting French, 105 Hawai'i at 470, 99 P.3d at 1054). First, the movant must meet its "burden of production – to show there is not a genuine issue of material fact as to the essential elements of the claim and that it is entitled to judgment as a matter of law." Frankel v. Bd. of Land & Nat. Res., 155 Hawai'i 358, 378, 564 P.3d 1157, 1177 (App. 2025) (citing Ralston, 129 Hawai'i at 56, 292 P.3d at 1286), cert. denied, No. SCWC-20-0000603, 2025 WL 1713026 (June 19, 2025). Second, the movant must meet its "burden of persuasion – to convince the court that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Id. (citing Ralston, 129 Hawai'i at 57, 292 P.3d at 1287).

"If the plaintiff, who has the burden of proof at trial, is the movant, 'the plaintiff must establish, as a matter of law, each element of its claim for relief by the proper evidentiary standard applicable to that claim.'" Id. (quoting Ocwen Fed. Bank, FSB v. Russell, 99 Hawai'i 173, 182-83, 53 P.3d 312, 321-22 (App. 2002)). If the plaintiff "movant satisfies

this burden, the burden then shifts to the nonmoving party defendant to 'demonstrate the existence of a triable, material factual issue on the plaintiff's claims' or adduce 'evidence of material facts which demonstrate the existence of affirmative defenses that would defeat the plaintiff's claim.' Id. (quoting Ocwen Fed. Bank, FSB, 99 Hawai'i at 183, 53 P.3d at 322).

A defendant movant "may satisfy [its] initial burden of production by either (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the [non-movant] will be unable to carry [its] burden of proof at trial." Ralston, 129 Hawai'i at 60, 292 P.3d at 1290.

"When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence and determine all questions presented." Frankel, 155 Hawai'i at 367, 564 P.3d at 1166 (quoting Ke Kauhulu O Mānā v. Bd. of Land & Nat. Res., 154 Hawai'i 158, 547 P.3d 1188, No. CAAP-18-0000057, 2024 WL 1886115, at *7 (App. Apr. 30, 2024) (mem. op.), vacated on other ground by 156 Hawai'i 356, 575 P.3d 13 (2025)).

1. Count I (Impacts Not Assessed)

In Count I, Protect Waiehu claimed violation of HRS chapter 343. Protect Waiehu claimed that Genova's "FEA did not properly assess primary, secondary, and cumulative impacts of

the Project," and "DHHC's acceptance of the insufficient FEA and issuance of a FONSI for the Project violated Chapter 343, HRS and the Hawai'i State Constitution." All parties moved for summary judgment on Count I.

On appeal, in POE 4 and Argument C, Protect Waiehu alleges the FEA did not adequately assess the Project's impacts on population, public facilities, agriculture, water resources, or offsite components.

Under HAR § 11-200.1-21(6) (eff. 2019), a final EA must identify and analyze the proposed action's impacts.⁸

⁸ HAR § 11-200.1-21 provides in full:

§11-200.1-21 Contents of a final environmental assessment. A final EA shall contain, but not be limited to, the following information:

- (1) Identification of applicant or proposing agency;
- (2) For applicant actions, identification of the approving agency;
- (3) Identification of agencies, citizen groups, and individuals consulted in preparing the EA;
- (4) General description of the action's technical, economic, social, cultural, historical, and environmental characteristics;
- (5) Summary description of the affected environment, including suitable and adequate regional, location, and site maps such as Flood Insurance Rate Maps, Floodway Boundary Maps, United States Geological Survey topographic maps, or state sea level rise exposure area maps;
- (6) Identification and analysis of impacts and alternatives considered;

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"Impacts," synonymous with "effects,"⁹ include ecological, aesthetic, historic, cultural, economic, social, or health effects, "whether primary,^[10] secondary,^[11] or cumulative,^[12] whether immediate or delayed." HAR § 11-200.1-2 (eff. 2019).

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- (7) Proposed mitigation measures;
- (8) The agency determination and the findings and reasons supporting the determination;
- (9) List of all required permits and approvals (state, federal, and county) and, for applicants, identification of which approval necessitates chapter 343, HRS, environmental review; and
- (10) Written comments, if any, and responses to the comments received, if any, pursuant to the early consultation provisions of section 11-200.1-18(a), and statutorily prescribed public review periods in accordance with section 11-200.1-20.

(Emphases added and formatting altered.)

⁹ HAR § 11-200.1-2 defines "effects" or "impacts" as follows:

"Effects" or "impacts" as used in this chapter are synonymous. Effects 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, whether immediate or delayed. Effects may also include those effects resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

¹⁰ "Primary" or "direct" impacts are "effects that are caused by the action and occur at the same time and place." HAR § 11-200.1-2.

¹¹ "Secondary" or "indirect" impacts are effects "caused by the action and [are] later in time or farther removed in distance, but [are] still reasonably foreseeable." HAR § 11-200.1-2.

¹² "Cumulative" impacts are effects "on the environment that result[] from the incremental impact of the action when added to other past, present, (continued . . .)

Although Protect Waiehu challenges the FEA's impacts analysis as to "population, public facilities, and agriculture," its argument on appeal focuses on population.

Changes in "population density or growth rate" may produce secondary, "growth-inducing effect[s] and other effects." HAR § 11-200.1-2.

Here, the FEA stated the Project was situated within the Waihe'e-Waiehu Census Designated Place with an April 2020 population of 9,234 residents.¹³ It otherwise neglected to analyze the Project's impact on population or attendant "growth-inducing effect[s] and other effects" that may follow changes in population density and growth rate. In turn, the FEA did not explicitly address how population changes would impact the already over-capacity intermediate and high schools servicing the Project area.

Thus, Protect Waiehu met its burden of showing it was entitled to a judgment as a matter of law on Count I.

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and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions." HAR § 11-200.1-2. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." HAR § 11-200.1-2.

¹³ The FEA further noted the Project was subject to the Maui County Code's (MCC) Residential Workforce Housing Policy and, thus, would exclusively serve existing, full-time Maui residents. However, MCC chapter 2.96 requires only that twenty-five percent (25%) of the total number of units developed be designated for residential workforce housing, meaning the remaining seventy-five percent of units need not be set aside for existing residents. MCC § 2.96.040(A) (2006).

Accordingly, the burden shifted to Genova, DHHC, and the County to "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." See Umberger, 140 Hawai'i at 528, 403 P.3d at 305 (quoting French, 105 Hawai'i at 470, 99 P.3d at 1054).

Neither Genova nor DHHC and the County pointed to which parts of the FEA or its appendices analyzed population density or growth rate in the area surrounding and including the Project. Instead, the portions of the FEA that Genova pointed to addressed population changes on a countywide scale.

Because Protect Waiehu demonstrated, as a matter of law, that the final EA did not contain a sufficient impacts analysis regarding at least one reasonably foreseeable secondary impact, the final EA could not support DHHC's FONSI. Thus, the circuit court erred by granting Genova, DHHC, and the County's motions for summary judgment and denying Protect Waiehu's motion for summary judgment on Count I. We do not address Protect Waiehu's remaining arguments as to this count.

2. Count II (Possible Significant Impacts)

In Count II, Protect Waiehu claimed the "Project may have significant impacts on the environment, as defined by HAR § 11-200.1-2 and HAR § 11-200.1-13 [(eff. 2019)], requiring preparation of an [environmental impact statement (**EIS**)]." Protect Waiehu moved for summary judgment on Count II, alleging

that the Project's likely significant impacts required an EIS, citing to HAR § 11-200.1-13(b). Genova, DHHC, and the County likewise moved for summary judgment.

On appeal, in POE 5 and perhaps Arguments E and F, Protect Waiehu argues "the environmental court should have invalidated the FEA-FONSI and required preparation of an EIS on the basis that the Project is likely to have at least one significant impact." (Footnote omitted.) In particular, Protect Waiehu points to Genova having sought "an exemption from compliance with the Maui Countywide Policy Plan"; the Project being an "[im]permissible use in the State Agricultural District"; the removal of "158-acres of highly-rated soil [being] an irrevocable commitment of a natural resource"; the Project having "adverse secondary impacts" on population and public facilities and "significant cumulative and/or secondary impacts on drinking water"; and the FONSI determination being unsupported by substantial evidence.

To issue a FONSI, an approving agency must (1) require the applicant to prepare an FEA, (2) review public and agency comments, and (3) apply HAR § 11-200.1-13's significance criteria. HAR § 11-200.1-22(a) (eff. 2019). "In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of the proposed action, the expected impacts, and the proposed

mitigation measures." HAR § 11-200.1-13(b). "[T]he phrase 'may have a significant effect' as used in HEPA means 'whether the proposed action will "likely" have a significant effect on the environment.'" Unite Here! Loc. 5 v. City & County of Honolulu, 123 Hawai'i 150, 178, 231 P.3d 423, 451 (2010) (citing Kepo'o v. Kane, 106 Hawai'i 270, 289, 103 P.3d 939, 958 (2005)).

To recap, effects and impacts are synonymous. HAR § 11-200.1-2. Impacts include "effects on natural resources . . . whether primary, secondary, or cumulative, whether immediate or delayed." Id. A cumulative impact is an

impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Id. (emphasis added).

"'Environment' means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, health, air, water, minerals, flora, fauna, ambient noise, and objects of historic, cultural, or aesthetic significance." Id.

"Plaintiffs need not show that significant effects will in fact occur but instead need only raise substantial questions whether a project may have a significant effect." See

Unite Here! Loc. 5, 123 Hawai'i at 178, 231 P.3d at 451 (citation modified). A "significant effect" is:

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.

HRS § 343-2 (2022); see also HAR § 11-200.1-2.

In Kia'i Wai, the supreme court held that the FEA did not properly analyze cumulative impacts because it only considered cumulative impacts within the project site and "not cumulative impacts on water resources." 151 Hawai'i at 461, 517 P.3d at 744. The supreme court looked to a Ninth Circuit case, Center for Environmental Law & Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011), for guidance in analyzing cumulative impacts in a water diversion case. Kia'i Wai, 151 Hawai'i at 461-62, 517 P.3d at 744-45.

There, as here, the applicant sought to draw water from a source that "was already subject to numerous withdrawals at the time." Kia'i Wai, 151 Hawai'i at 461, 517 P.3d at 744 (citing Ctr. for Env't L. & Pol'y, 655 F.3d at 1003). The Ninth Circuit held the EA "properly analyzed cumulative impacts because it examined 'both the existing condition of the area and what the effects of the project would be.'" Id. (quoting Ctr. for Env't L. & Pol'y, 655 F.3d at 1008).

Applying that guidance in Kia'i Wai, the supreme court determined that HEPA's cumulative impact rules required the FEA to "discuss additional water withdrawals facilitated by the relief line in relation to existing and anticipated withdrawals." Id. at 462, 517 P.3d at 745. While the impacts of diverting water from a source with no existing or anticipated diversions may be minimal, "the same incremental withdrawal leads to a dry streambed" if diversions already exist. Id.

Here, the evidence Protect Waiehu appended to its motion for summary judgment demonstrated it was entitled to judgment as a matter of law because the FEA did not adequately consider the Project's water withdrawals in conjunction with the anticipated withdrawals of other proposed projects in the area, such as Hale Mahaolu. See id. at 461-62, 517 P.3d at 744-45.

Rather, the FEA stated, "It is anticipated that the proposed action will generate demand that will cause a less than significant impact on the Maui County water system." The FEA then indicated that mitigation of the Project's impact on water resources would include construction of a new 1-million-gallon water storage tank that would "be filled primarily from the [Maui County Department of Water Supply's (**DWS**)] Central Maui Water Transmission System, or alternatively from the DWS' Waiehu wells" and that "[e]ach of the residential areas comprising the

proposed Waiehu Community [would], in turn, draw water for domestic use and fire protection."

The FEA also stated that the Project's anticipated water consumption would "be between 367,000 and 490,000 gallons of potable water per day"; the Project would "have to depend on the Maui County DWS for potable water"; and there was an "[in]sufficient quantity of water at the outset to build out the entire development," resulting in a phased build-out instead:

While there are strategies that [the County] has identified to develop new source capacity or free existing capacity for the other uses, such strategies will take time to pursue - so, there may not be a sufficient quantity of water at the outset to build out the entire development. Consequently, development of the proposed project has to be phased and the build-out has to be timed to reflect the availability of water source capacity.

Moreover, the FEA stated that several other projects were planned for the area over the next decade, "some of which [were] in close proximity of the proposed project." And the Project, "together with other area projects, [would] increase the demand for drinking water."

The FEA contained no information as to the anticipated amounts of water the other planned projects would draw. The FEA nonetheless concluded, "With the recent increase in water allocation from the [Īao] Aquifer to the County of Maui, significant cumulative and/or secondary impacts are not anticipated to threaten the long-term sustainability of the County's water resources."

DHHC and the County's cross-motion for summary judgment and opposition to Protect Waiehu's motion for summary judgment did not present any evidence regarding the anticipated water demands of the other proposed projects in the area. See Umberger, 140 Hawai'i at 528, 403 P.3d at 305 (shifting burden to nonmoving party to demonstrate specific facts presenting a genuine, trial-worthy issue). Rather, DHHC argued it could not "fairly be said to be liable" under Counts I (Impacts Not Assessed), II (Possible Significant Impacts), and III (Segmentation), because it – as the approving agency and not the applicant – was not "responsible for defining the scope of the project or the content of the disclosures made in the EA document." (Formatting altered.)

Genova, in its opposition, countered that "DHHC properly concluded the Project would likely not have a significant impact on the environment" in part because the Project would not "involve significant secondary impacts such as population changes or impacts on groundwater." (Formatting altered.) For support, Genova referenced the section of its opposition regarding Count I (Impacts Not Assessed). There, Genova asserted that "the FEA examined the anticipated total water demand for the Project, including drinking water, water for fire protection, and irrigation water for the Project's landscaped areas."

But neither DHHC nor Genova point to where in the FEA or the record the other projects' potential water use is shown. Although Genova appended excerpts of Hale Mahaolu's 2022 FEA, those excerpts do not describe that project's anticipated water uses.

Given the importance of water, its limited availability, and a lack of information regarding anticipated competing water needs, the final EA did not adequately address the Project's cumulative impacts on water resources. See Kia'i Wai, 151 Hawai'i at 462, 517 P.3d at 745. Without an adequate cumulative impacts analysis as to at least one reasonably foreseeable future action, the final EA could not support DHHC's FONSI. See HAR §§ 11-200.1-2, -21.

Thus, the circuit court erred by granting Genova, DHHC, and the County's motions for summary judgment and denying Protect Waiehu's motion for summary judgment on Count II. We do not address Protect Waiehu's remaining arguments as to this count.

3. Count III (Segmentation)

In Count III, Protect Waiehu asserted the "Project is a component or phase of a larger total program," the "FEA failed to assess a component or phase of a larger total program," and the "FEA did not assess or disclose the environmental impacts of other components of the larger total program."

Protect Waiehu moved for summary judgment on Count III, alleging the FEA improperly segmented the Project "[b]y omitting any disclosure and analysis of the environmental impacts of" the Project's "new pressurized force main" sewer line. In particular, Protect Waiehu appeared to contend the FEA did not sufficiently analyze the environmental impacts of two proposed offsite routes for the Project's sewer line.

In its opposition to Genova's second motion for summary judgment, Protect Waiehu argued for the first time that the FEA improperly segmented from its analysis the construction of a 1-million-gallon water storage tank on a 1.5-acre lot west of the Project area.¹⁴ In support of its segmentation argument, Protect Waiehu contended the water storage tank's construction qualified as an action under HEPA because its integration with the existing County water system would "utilize State or County lands" and require a discretionary grading and grubbing permit from the County. Protect Waiehu further contended that the water storage tank possessed no independent utility, as it "would not reasonably be built absent the Project." As such, Protect Waiehu argued the FEA should have, but did not, "assess [the proposed water storage tank's] direct, secondary, or

¹⁴ The Preliminary Engineering Report indicated the 1.5-acre lot would "be purchased and dedicated to Maui County DWS to accommodate [the] new tank." (Formatting altered.) At the time of the summary judgment hearing, Genova did not own – nor had it entered into a contract to purchase – the 1.5-acre lot. Protect Waiehu identified Wahi Hoomalu LP as the owner of the 1.5-acre lot.

cumulative impacts as part of the Project" because the FEA's "scope of review [was limited] to the 238 acres of the Parcel."

During the summary judgment hearings, Genova argued the FEA clearly identified the existence and location of the water storage tank, "DHHC knew that this 1.5 acres was also part of this project[,] and "the hard look that was done on the project site [was] sufficient for DHHC to say well, if there's an additional 1.5 acres, you know, your biologist doesn't need to go walk that 1.5 acres."

In reaching its decision, the circuit court stated that it based its ruling "upon all of the material that's been submitted, [its] review of everything, and mainly, frankly, the oral arguments that [it] heard."

On appeal, in POE 3 and Argument D, Protect Waiehu argues "the FEA does not assess the direct, secondary, and cumulative impacts of [the] Project's Offsite Components." The "offsite components" appear to include the "[c]onstruction of the sewer/force main line under State highways"; "[i]nstallation of waterlines to connect the Project to the Central Maui Water Transmission System"; and interconnection of the "1-million-gallon capacity water tank . . . with the County's existing storage tanks, requiring work on the County's parcel as depicted" in the Preliminary Engineering Report. Regarding the Hale Mahaolu development to be built nearby, Protect Waiehu

argues HEPA requires that that project and Genova's Project be considered together.

"[A]gencies making exemption determinations must consider [HAR § 11-200.1-10 (eff. 2019)¹⁵] as a preliminary step in defining the action at issue." Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 337, 167 P.3d 292, 330 (2007). HAR § 11-200.1-10 explains when component or individual programs or projects shall be considered "a single action" for the purposes of environmental review:

§11-200.1-10 Multiple or phased actions. A group of actions shall be treated as a single action when:

- (1) The component actions are phases or increments of a larger total program;
- (2) An individual action is a necessary precedent to a larger action;
- (3) An individual action represents a commitment to a larger action; or
- (4) The actions in question are essentially identical and a single EA or EIS will adequately address the impacts of each individual action and those of the group of actions as a whole.

(Formatting altered.) An "action" is "any program or project to be initiated by an agency or applicant." HAR § 11-200.1-2.

"To determine whether projects are improperly segmented under [HAR § 11-200.1-10]," courts should apply the

¹⁵ Sierra Club cites to HAR § 11-200-7, the previous version of HAR § 11-200.1-10, which was non-substantively amended in 2019. See Save Kaiwa Ridge v. Dep't of Land & Nat. Res., 156 Hawai'i 300, 574 P.3d 320, No. CAAP-22-0000261, 2025 WL 2436060, at *5 n.4 (App. Aug. 25, 2025) (SDO).

"'double' or 'multiple' independent utility test" and "consider whether each of the projects--not just one of the projects--would occur independently." Kia'i Wai, 151 Hawai'i at 447, 464, 517 P.3d at 730, 747.

If not, then the projects – all of which must also qualify as an "action" as defined by HEPA – shall be treated as a single action under HAR § 11-200.1-10, and the FEA must review their environmental impacts together. See id. at 464-65, 517 P.3d at 747-48. Courts should apply the segmentation rules "using common sense to further informed decision-making," as "too broad a reading of the segmentation rules would require boundless HEPA review." See id. at 465, 517 P.3d at 748.

In Kahana Sunset Owners Association v. County of Maui, for example, a proposed development did not trigger HEPA's environmental review requirements, but the drainage line for the development did, as it was to be installed beneath state or county lands and did not fall within a HEPA exemption. 86 Hawai'i 66, 71-72, 947 P.2d 378, 383-84 (1997). Applying the precursors to HAR §§ 11-200.1-10(1) and 200.1-10(2) then in effect, the Hawai'i Supreme Court determined the "proposed drainage system [was] part of the larger project and [was] a 'necessary precedent' for the development." Id. at 74, 947 P.2d at 386. It further determined that the "drainage system ha[d] no independent utility" and "would not [have been] constructed

except as part of the larger development. Isolating only that particular component of the development for environmental assessment would [therefore] be improper segmentation of the project." Id. at 74, 947 P.2d at 386. Thus, "even though only the drainage line triggered HEPA," the supreme court held that "the EA had to consider the entire development as part of the same action." Kia'i Wai, 151 Hawai'i at 462, 517 P.3d at 745 (summarizing holding in Kahana Sunset Owners Association, 86 Hawai'i at 74, 947 P.2d at 386).

Since Kahana Sunset Owners Association, the supreme court has clarified that "for actions to have been improperly segmented, the actions must fall within the formal definition of an 'action' under HEPA." Kia'i Wai, 151 Hawai'i at 465, 517 P.3d at 748.

a. Offsite Components

Protect Waiehu takes issue with the Project's "offsite components" – the 1-million-gallon water storage tank, water lines, and sewer lines.

It appears from the record that the proposed integration of Genova's 1-million-gallon water storage tank with the County's existing water storage tanks qualifies as an "action" under HEPA because connecting the tanks would require

use of County land.¹⁶ See HRS § 343-5(a)(1) (2022) (requiring environmental assessments for actions proposing the use of state or county lands). Maps in the Preliminary Engineering Report, for example, depict Genova's plan to install new waterlines across a portion of the County's parcel, connecting the County's existing water storage tanks to Genova's proposed 1-million-gallon water storage tank on the adjacent 1.5-acre lot. And the FEA itself explained that the "new 1.0 [million-gallon] tank [would] be configured in order to be filled primarily from the DWS' Central Maui Water Transmission System, or alternately from the DWS' Waiehu wells for added reliability and [would] be dedicated to DWS upon completion."

As to independent utility, Genova specifically acknowledged that the proposed water storage tank had none. Genova argued "the water tank is a million gallons[,] which is enough to service the project, but not enough to service other developments in other communities. It's being built for this project." Stated differently, Genova acknowledged the water storage tank would not be constructed absent the Project and did not possess independent utility beyond the Project. Genova also failed to present any evidence that the construction of the

¹⁶ The existing water tanks are located on TMK No. 2-3-3-002:028, which is owned by the County. See <https://qpublic.schneidercorp.com/Application.aspx?AppID=1029&LayerID=21689&PageTypeID=4&PageID=9251&KeyValue=330020280000> [<https://perma.cc/V2FA-XBR3>].

water storage tank was exempt from HEPA review. See HAR § 11-200.1-15 (eff. 2019) (setting forth general types of actions that may be declared exempt from the preparation of an EA given their probable minimal effects, including "[c]onstruction and location of single, new, small facilities or structures" for "[w]ater, sewage, electrical, gas, telephone, and other essential public utility services").

Accordingly, HAR § 11-200.1-10 required the FEA to consider the 1-million-gallon water tank as part of the Project. See Kia'i Wai, 151 Hawai'i at 464-65, 517 P.3d at 747-48. And it did. Specifically, the FEA determined that "DWS' existing water source, storage, and distribution systems [did] not have sufficient capacity to serve the project demand without significant improvements." Those significant improvements included the construction of the proposed 1-million-gallon water storage tank. Thus, to the extent that Protect Waiehu claims the water tank was improperly segmented from the FEA, this claim fails.

However, the gravamen of Protect Waiehu's segmentation argument appears to be that the FEA insufficiently identified, analyzed, and disclosed the impacts of the water tank construction. The same may be said of Protect Waiehu's arguments regarding the water and sewer lines. Illustratively, Protect Waiehu's opening brief asserts, "The FEA does not assess

the Offsite Components' impacts, which as actions, require HEPA compliance," and directs this court to the section of its brief containing its arguments as to Count I (Impacts Not Assessed).

To the extent Protect Waiehu's argument regarding Count III (Segmentation) reiterates and collapses into its argument in Count I (Impacts Not Assessed), we have already determined that the circuit court erred by denying Protect Waiehu's motion for summary judgment, and we decline to address it further.

We further note that this court is "not obligated to search the record to crystallize the parties' arguments," nor are we obligated to "sift through the voluminous record to verify an appellant's inadequately documented contentions."

Onaka v. Onaka, 112 Hawai'i 374, 387, 146 P.3d 89, 102 (2006) (quoting first Kienker v. Bauer, 110 Hawai'i 97, 104 n.12, 129 P.3d 1125, 1132 n.12 (2006); then Lanai Co. v. Land Use Comm'n, 105 Hawai'i 296, 309 n.31, 97 P.3d 372, 385 n.31 (2004)).

b. Hale Mahaolu

Relying on HAR § 11-200.1-10(1), Protect Waiehu appears to argue that the Project and Hale Mahaolu are component actions of "DHHC's policy to develop affordable housing in a particular area" and, thus, "should have been assessed together."

HAR § 11-200.1-10(1) provides that "[a] group of actions shall be treated as a single action when . . . [t]he component actions are phases or increments of a larger total program[.]" A program is defined as:

a series of one [or] more projects to be carried out concurrently or in phases within a general timeline, that may include multiple sites or geographic areas, and is undertaken for a broad goal or purpose. A program may include: a number of separate projects in a given geographic area which, if considered singly, may have minor impacts, but if considered together, may have significant impacts; separate projects having generic or common impacts; an entire plan having wide application or restricting the range of future alternative policies or actions, including new significant changes to existing land use plans, development plans, zoning regulations, or agency comprehensive resource management plans; implementation of multiple projects over a long time frame; or implementation of a single project over a large geographic area.

HAR § 11-200.1-2 (emphases added).

Here, the Project and Hale Mahaolu both purport to address Maui's affordable housing shortage.¹⁷ However, Protect Waiehu does not point to any facts in evidence establishing that DHHC, in furtherance of its affordable housing policy, developed a larger total program within the meaning of HEPA, of which the Project and the neighboring Hale Mahaolu development were part. Nor does Protect Waiehu point to any caselaw showing that these projects constituted component actions of a larger total program initiated by DHHC. Instead, Protect Waiehu merely identifies

¹⁷ According to the FEA, the purpose of the Project is to "help satisfy the need for affordable housing in central Maui." (Emphasis omitted.) Likewise, Hale Mahaolu was proposed "[i]n response to the current and projected shortage of affordable housing in Maui County."

similarities between the Project and the Hale Mahaolu development.

Accordingly, Protect Waiehu did not carry its summary judgment burden as to Count III, and the circuit court did not err by entering judgment in Genova, DHHC, and the County's favor as to this count.

c. Summary Judgment Analysis

We pause to briefly address Protect Waiehu's contentions as to the circuit court's "standard of review." Protect Waiehu contends in POE 1 and Argument A that the circuit court reached its ruling on Count III (Segmentation) by applying "clear error and arbitrary and capricious standards" of review instead of "a de novo review under a right/wrong standard" and by "wrongly deferr[ing] to DHHC's 'policy decision'" that "this affordable housing should go in the northerly direction."

The circuit court was asked to rule on the parties' motions for summary judgment. We discussed the analysis for ruling on a motion for summary judgment above at pages 12-15. While the circuit court's discussion during arguments may have included terms like "clear error" or "arbitrariness" and "capriciousness," the written order ruling on the motions for summary judgment is straightforward and simply indicates the denial and grant of these motions. Nevertheless, given our analysis above, any error by the circuit court does not alter

our determination that Protect Waiehu did not satisfy its summary judgment burden as to Count III.

4. Count IV (Contents of EA)

In Count IV, Protect Waiehu claimed, among other things, that Genova's FEA did "not respond to substantive comments received regarding the Project's DEA and to conduct consultations in good faith," and Genova "did not provide sufficient responses to substantive comments on the DEA."

Protect Waiehu moved for summary judgment, alleging "DHHC violated significant impact determination notice requirements," and "the FEA failed to comply with consultation and public comment requirements." (Formatting altered.)

On appeal, in POE 2 and Argument B, Protect Waiehu argues that the "multiple procedural violations rendered the FEA meaningless." (Formatting altered.) In particular, Protect Waiehu points to multiple comments not being addressed, citizen groups not being consulted, DHHC improperly delegating its duties to Genova, and Genova improperly incorporating the 2005 Hale Mua FEA's Archaeological Inventory Study and the concurrence from the State Historic Preservation Division.

Protect Waiehu's claims regarding Genova's inadequate responses to certain public comments are dispositive, and we do not reach its remaining arguments.

HAR § 11-200.1-20 (eff. 2019) applies "only if . . . an approving agency anticipates a FONSI determination for a proposed action and . . . the applicant has completed the draft EA requirements of sections 11-200.1-18 and 11-200-19 [sic]." HAR § 11-200.1-20(a). When preparing a draft EA, applicants must conduct early consultation, and the draft EA must include "[w]ritten comments, if any, and responses to the comments received, if any, and made pursuant to the early consultation provisions of subsection (a)[.]" Id. § 11-200.1-18(a), (d) (10) (eff. 2019).

Genova's responses to the comments it received during early consultation were thus required to comply with HAR § 11-200.1-20(f), which governs public review and response requirements for draft EAs.

Under HAR § 11-200.1-20(f), applicants must endeavor to "address specific environmental concerns identified by the commenter, providing a response that is commensurate with the substantive content of those comments" received.¹⁸ As mentioned

¹⁸ HAR § 11-200.1-20(f) provides in full:

In responding to substantive written comments, proposing agencies and applicants shall endeavor to resolve conflicts or inconsistencies in information and address specific environmental concerns identified by the commenter, providing a response that is commensurate with the substantive content of those comments. The response shall describe the disposition of significant environmental issues raised (for example, the response may point to revisions to the proposed action to mitigate anticipated

(continued . . .)

earlier, "'Environment' means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action[.]"

HAR § 11-200.1-2.

Here, Genova's responses to the early consultation comments it received from the Maui County Police Department (**MPD**), the Maui County Department of Transportation (**MDOT**), and the Hawai'i Department of Education (**HIDOE**) were not "commensurate with the substantive content of those comments."

For example, Genova's response to MPD was insufficient because it did not acknowledge or address the recommendations that "the [P]roject meet[] the minimal standards set forth by county codes and state laws," or that the Project should deploy "flag men" and "proper signage" to direct traffic as needed.

The MPD commented in full:

This is in response to your letter dated November 6, 2020 requesting comments for the proposed Waiehu Residential Community Project located at Kahekili Highway and Waiehu Beach Road.

(. . . continued)

impacts or objections raised in the comment, or may refute all or part of the comment). In particular, the issues raised when the proposing agency's or applicant's position is at variance with recommendations and objections raised in the comments shall be addressed in detail, giving reasons why specific comments and suggestions were not accepted, and factors of overriding importance warranting an override of the suggestions. The response shall indicate changes that have been made to the text of the draft EA.

(Emphases added.)

In review of the submitted documents, we would like to recommend the project meets the minimal standards set forth by county codes and state laws. If the roads will be temporarily closed due to alternating traffic, we ask the project manager utilize flag men to conduct traffic control, as well as post proper signage along the routes during construction.

Thank you for giving us the opportunity to comment on this project.

(Formatting altered.)

Instead, Genova's response characterized MPD's letter as not providing any comments at all. Genova responded in full:

Thank you for your comment letter of November 16, 2020, indicating that the department does not have any comments on the proposed project at this time.

(Formatting altered.)

Similarly, Genova's response to MDOT failed to address comments regarding ensuring public transit safety. MDOT commented in full:

We appreciate the opportunity to provide early consultation comments on the Proposed Waiehu Residential Community Project.

[MDOT] provides public transit services within the vicinity of the proposed residential community project. In order for public transit to be considered for expansion in new developments, there are certain criteria that makes transit works such as through streets whether it's major collector roads or within the subdivisions. Providing interconnecting sidewalks within and between the subdivisions and ample lighting in the evenings is also necessary for walkable communities and for the safety of potential residents and public transit riders.

(Formatting altered.)

Genova again mischaracterized the letter as not providing any comments at all. Genova responded in full:

Thank you for your letter dated November 17, 2020, regarding the subject application. The applicant acknowledges that your department has no comments or

recommendations to offer at this time. Thank you for taking the time to have a follow up meeting with project team in May 2021.

(Formatting altered.)

Finally, although Genova responded to most every part of the HIDOE's comment, it did not acknowledge that the intermediate school and high school serving the Project area were "over capacity" and would remain so for the next five years:

The HIDOE schools servicing the proposed Project are Waihe'e Elementary, 'Īao Middle, and Baldwin High. Waihe'e Elementary has capacity and will continue to have capacity during the next five years. Both 'Īao Middle and Baldwin High are over capacity. This over capacity is expected to remain over the next five years.

The Project is located within the Central Maui School Impact District with fee amounts of \$2,371 for multi-family residential units and \$5,373 for single family residential units. The Project developer is encouraged to meet with the HIDOE as early as possible to discuss executing an[] Educational Contribution Agreement.

The combined application should identify whether the Project will include accessory dwelling units.^[19]

(Formatting altered.)

Instead, Genova indicated it would meet with HIDOE to execute an Educational Contribution Agreement and related information about the types of units the Project would include.

Thank you for your comment letter of December 4, 2020. The Applicant acknowledges that the project is in the Central Maui School Impact District and will continue to coordinate with [HI]DOE staff to discuss executing an Educational Contribution Agreement. The forthcoming Draft EA will include a unit type breakdown and discussion of the impact fees. No accessory dwelling units are proposed as part of this project.

¹⁹ Modern orthography added.

(Formatting altered.)

Because Protect Waiehu demonstrated, as a matter of law, that the final EA did not contain commensurate responses to at least three comments it received, the final EA could not support DHHC's FONSI. See HAR § 11-200.1-20(f). Thus, the circuit court erred by granting Genova, DHHC, and the County's motions for summary judgment and denying Protect Waiehu's motion for summary judgment on Count IV. We do not address Protect Waiehu's remaining arguments as to this count.

III. CONCLUSION

Based on the foregoing, we vacate the circuit court's June 22, 2023 final judgment, which was based on the circuit court's June 16, 2023 order, as to Counts I (Impacts Not Assessed), II (Possible Significant Impacts), IV (Contents of EA), Counts V (Public Trust), and VII (Injunction). We affirm on Counts III (Segmentation) and VI (Traditional & Customary Rights).

We remand this case for further proceedings consistent with this memorandum opinion. Furthermore, we instruct the circuit court to enter judgment in favor of Protect Waiehu and against Genova, DHHC, and the County as to Counts I (Impacts

Analysis), II (Significance Criteria), and IV (Contents of EA).²⁰

Genova's motion to dismiss this appeal is denied.

DATED: Honolulu, Hawai'i, September 21, 2026.

On the briefs: /s/ Katherine G. Leonard
Presiding Judge

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Associate Judge

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Human Concerns of the County
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²⁰ Vacating as to Counts V (Public Trust) and VII (Injunction), which incorporate by reference the allegations contained in the preceding counts, comports with the supreme court's decision in Kia'i Wai.

In Kia'i Wai, the supreme court vacated the order granting summary judgment on the constitutional claims presented in Counts VIII and IX, even though it did not reach the arguments raised as to those claims. Rec. on Appeal Vol. 1 of 2 at 23, 25, Kia'i Wai, 151 Hawai'i at 465-66 n.48, 517 P.3d at 749-50 n.48 (CAAP-20-0000487), Dkt. No. 19 (asserting violations of Haw. Const. art. XI, § 1 and Haw. Const. art. XII, § 7 in Counts VIII and IX respectively); Rec. on Appeal Vol. 2 of 2 at 189-90, Kia'i Wai, 151 Hawai'i at 465-66 n.48, 517 P.3d at 749-50 n.48 (CAAP-20-0000487), Dkt. No. 21 (granting summary judgment as to Counts V, VI, VIII, and IX); Marn v. McCully Assocs., CAAP-22-0000081, 2022 WL 4128616, at *1 n.1 (App. Sep. 12, 2022) (order) (quoting State v. Akana, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985) ("The most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records.")).

The supreme court also remanded the case for determination of whether injunctive relief, requested in Count X of the complaint, was warranted, presumably in light of its decision. Rec. on Appeal Vol. 1 of 2 at 26, Kia'i Wai, 151 Hawai'i at 467, 517 P.3d at 750 (CAAP-20-0000487), Dkt. No. 19. Here, however, we vacate Count VII (Injunction) without instructions, as Genova sold the Parcel to DHHL and DHHL is not a party to this litigation.