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STATE OF HAWAI‘I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

STATE OF HAWAI‘I,

Plaintiff/Counterclaim Defendant,

vs.

JAMES O’SHEA AND DENISE O’SHEA as Trustees of the James and Denise O’Shea Trust, JAMES O’SHEA, individually and DENISE O’SHEA, individually, JOHN AND JANE DOES 1-10,

Defendants/Counterclaimants.

JAMES O’SHEA and DENISE O’SHEA as Trustees of the James and Denise O’Shea Trust, JAMES O’SHEA, individually and DENISE O’SHEA, individually,

Third-Party Plaintiffs/ Counterclaim Defendants,

Civil No. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)(Environmental Court)

STATE OF HAWAI‘I’S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE STATE’S PRAYER FOR A MANDATORY INJUNCTION, OR IN THE ALTERNATIVE, FOR DECLARATORY JUDGMENT

MEMORANDUM IN SUPPORT OF MOTION

DECLARATION OF LAUREN K. CHUN
DECLARATION OF REID SIAROT
DECLARATION OF SAMUEL LEMMO
DECLARATION OF JOCELYN J. GERVACIO GODOY
DECLARATION OF GIOVONNI PARKS

EXHIBITS “1” – “15”

APPENDICES “A” – “B”

NOTICE OF HEARING

vs. RUPERT T. OBERLOHR, individually; RUPERT T. OBERLOHR, as Trustee of the Rupert Oberlohr Trust; DOE DEFENDANTS 1-100, Third-Party Defendants/ Counterclaimants.	CERTIFICATE OF SERVICE Hearing: DATE: April 9, 2021 TIME: 1:30 P.M. JUDGE: Jeffrey P. Crabtree Trial Date: None

STATE OF HAWAI'I'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH RESPECT TO THE STATE'S PRAYER FOR A MANDATORY INJUNCTION OR IN THE ALTERNATIVE, FOR DECLARATORY JUDGMENT

Plaintiff/Counterclaim Defendant State of Hawai'i ("State"), by and through its counsel, hereby moves for partial summary judgment in its favor as to Counts I – III of its Second Amended Complaint, and for a mandatory injunction to enter ordering Defendants/ Counterclaimants/ Third-Party Plaintiffs James O'Shea and Denise O'Shea as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually and Denise O'Shea, individually, to remove the new seawall located at 59-171 D Ke Nui Road, Haleiwa, Hawai'i, 96712.

In the alternative, the State prays for a declaratory judgment finding that the new seawall constitutes a trespass and encroachment on State land.

This motion is made pursuant to Rules 7(b) and 56(a) of the Hawaii Rules of Civil Procedure, and is supported by the attached memorandum in support of motion, declarations, and exhibits, and the records and files herein.

DATED: Honolulu, Hawai'i, March 8, 2021.

/s/ Lauren K. Chun
William J. Wynhoff
Linda L.W. Chow
Lauren K. Chun
Deputy Attorneys General
Attorneys for Plaintiff/Counterclaim Defendant
State of Hawai'i

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I. INTRODUCTION

Defendants knowingly, intentionally, and illegally built an encroaching structure on their neighbor's property – without the neighbor's permission and without any of the necessary government permits. Clear Hawai‘i case law provides a road map to resolution in the neighbor's favor.

This straightforward scenario is made more egregious (but not more difficult) because the neighbor is the State of Hawai‘i ("State") and the encroachment constitutes the invasion and appropriation of public trust property at one of the most iconic and precious stretches of public beach in the State – Sunset Beach on the North Shore of O‘ahu. Defendants are homeowners who, following the collapse of an old and no longer effective seawall, erected a brand new, thirteen-foot wall of stone and concrete on the public beach. Defendants did so despite being warned that they were invading State land without authorization.

The sole issue of material fact in this case is whether the illegal seawall is, or is not, constructed on public property. There is no genuine dispute as to this one material fact. At the very least, the State is entitled to a declaratory judgment finding that the wall is a trespass and encroachment on State land.

Allowing the wall to remain on State land constitutes a continuing harm, damages the coastline, and is contrary to public policy. For the reasons set forth herein, the State is entitled to a mandatory injunction ordering the defendants to remove the wall.

II. FACTUAL BACKGROUND

Defendants/ Counterclaimants/ Third-Party Plaintiffs James O'Shea and Denise O'Shea as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually and Denise

O'Shea, individually ("defendants") own the property located at 59-171 D Ke Nui Road, Haleiwa, Hawai'i, 96712 (TMK (1) 5-9-2-025) (the "property"). Dkt. 23, 9/7/2018 Second Amended Complaint for Injunctive Relief ("Comp.") at ¶6; Dkt. 26, 9/17/2018 Defendants' Answer to Second Amended Complaint for Injunctive Relief ("Ans.") at ¶2. Their property abuts and is immediately *mauka*[1] of the boundary between State land and private property which runs along the shoreline. Comp. at ¶12, Ans. at ¶4. Specifically, the property sits immediately *mauka* of Sunset Beach.[2]

A seawall formerly stood *makai*[3] of the O'Sheas' property (the "old seawall"). In other words, the old seawall was admittedly on state land. Dkt. 26, 9/17/2018 Counterclaim ("Counterclaim") at ¶10.[4] This old seawall collapsed on or about September 3, 2017. Comp. at ¶13, Ans. at ¶5. After the collapse, the defendants began building a new seawall without applying for or obtaining any State or County permits. Comp. at ¶21, Ans. at ¶10.

The defendants admit that the new seawall is a new structure "separate and apart" from the old seawall. Exh. 1 at 007. They claim, however, that the wall was built "entirely within the

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1 "*Mauka*" means "inland." *Diamond v. Dobbin*, 132 Hawai'i 9, 13 n.8, 319 P.3d 1017, 1021 n.8 (2014) [*Diamond II*].

2 The sandy beach itself, Sunset Beach Park, is dedicated to the City and County of Honolulu per Executive Order 02598 of 1971. *See* Exh. 3 at S00057-70. The land set aside to the County includes the dry land between the highwater mark and the privately owned Pupukea-Pamalu Beach Lots. *Id*. at S00060-62, 70. However, as discussed *supra*, all land below the highwater mark is owned in fee simple by the State. As shown herein, there is no dry land between the shoreline and the property, and thus, all of the land seaward of the property is State, not County, land.

3 "*Makai*" means "on the seaside, toward the sea, in the direction of the sea." *Diamond II* at 14 n.12, 319 P.3d at 1022 n.12.

4 Defendants contend that the old seawall was not only built on State land, but was built by the State. Counterclaim at ¶10. The State denies that it built the old seawall. Dkt. 27, 9/26/2018 State's Answer to Counterclaim at ¶1.

boundary lines" of their property. *Id.* The only support for this contention is outdated shoreline certifications from 1988. *Id.* (citing defendants' documents produced as OS000091-92 and OS000084-85); Exh. 2 (OS000084-85 and OS000091-92). By law, such certifications are long expired and were not valid after 1989. *See* Hawaii Revised Statutes ("HRS") § 205A-42(a).

It is well-settled law in Hawai‘i that land *makai* of the highest wash of the waves is state-owned land held in public trust for the people of the State. *Hawaii Cty. v. Sotomura*, 55 Haw. 176, 183-184, 517 P.2d 57, 63 (1973). Photos taken during the construction of the new seawall clearly show that construction was occurring on areas that would otherwise have been wet sand.

On September 5, 2017, approximately two days after the old seawall collapsed, workers could be seen piling sand in front of the collapsed wall. Photographs show that the wash of the waves, as evidenced by the undisturbed sand, would have extended at least to the base of where the wall once stood:

See Exh. 4.

See Exh. 4.

On September 8, 2017, workers were seen placing boulders *makai* of the shoreline, as evidenced by the wet beach:

See Exh. 5

On September 8, 2017, the Office of Conservation and Coastal Lands ("OCCL") of the State of Hawai'i Department of Land and Natural Resources ("DLNR") delivered a letter to the defendants notifying them that they may be in violation of Hawaii Administrative Rule ("HAR") Title 13, Chapter 5, for unauthorized land use in the conservation district.[5] Exh. 8 at S00608; Declaration of Samuel Lemmo ("Lemmo Dec.") at ¶14.

Photographs from September 14, 2017 show ongoing construction, with boulders blocking the waves from moving further inland, as evidenced by the photos below, showing that waves had moved further *mauka* in the areas that were not blocked by boulders.

See Exh. 6.

[5] As discussed further, *infra*, the conservation district includes all lands *makai* of the shoreline.

See Exh. 6.

See also Exh. 7 (September 16, 2017 photos also showing construction on an area that would otherwise have been wet sand, as evidenced by the undisturbed sand extending *mauka* in the areas not covered by construction debris).

On September 22, 2017, the State filed a motion for a temporary restraining order ("TRO") to enjoin the defendants from continuing to build the seawall. *See* Dkt. 4, 9/22/2017 Motion for TRO. This court immediately granted the motion and enjoined the defendants from continuing to construct the seawall through October 2, 2017. *See* Dkt. 5, 9/22/2017 Order Granting Plaintiff's Motion for TRO.

On October 13, 2017, at a sunshine meeting of the Board of Land and Natural Resources ("Board"), OCCL recommended that the Board impose fines against the defendants for continued unauthorized land use. Exh. 8 at S00597. The defendants' counsel appeared at the Board meeting and requested a contested case, which remains pending. Exh. 9 at S00591; Lemmo Dec. at ¶20.

In addition to proceeding without a permit from the State, defendants also flouted City and County of Honolulu ("County") permit requirements. The County issued a notice of violation on October 6, 2017, ordering the defendants to restore the area within thirty days. Exh. 10. Defendants simply ignored the notice.[6] Despite clear notice from the County and the State that the construction of the wall was illegal, and while this lawsuit remained pending, the defendants completed the construction of the roughly thirteen foot high new seawall.

The new seawall was completed in or around October 2017. Lemmo Dec. at ¶21. It sits on State land, i.e., land that is *makai* of the highest wash of the waves. Video taken of the completed seawall on October 8, 2019 shows waves crashing into its base, leaving no dry beach exposed at all. *See* Exh. 14. Video taken on November 10, 2020 shows the same. *See* Exh. 15. If the wall was not there, the shoreline would migrate even further *mauka*, extending the State's and the public's interest in the beach. There can be no genuine issue of material fact that the border between the State's land and the defendants' land must *at the very least* be located further *mauka* than the face of the seawall.

III. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

A claimant is entitled to move for summary judgment upon any claim and to obtain declaratory relief under Hawaii Rule of Civil Procedure 56(a).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

[6] Despite receiving the October 6, 2017 notice of violation, on September 26, 2019, the defendants managed to obtain a building permit (Building Permit Number 838995) for the purported purpose of "repair to ***existing*** 13'-0" height sea wall at rear of property." Exh. 11 (emphasis added). Within a few days, the County discovered its error. On October 9, 2019, the County issued another notice of violation to the defendants after an inspector discovered that incorrect information was submitted to obtain the permit. Exh. 12 at 1. The permit was officially revoked on the same date. Exh. 13 at 1.

> fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Bremer v. Weeks, 104 Hawai‘i 43, 51, 85 P.3d 150, 158 (2004).

"The function of a motion for summary judgment is to determine whether an issue set forth in the pleadings is in fact in dispute and, if not, to eliminate any portion of the case *for which trial is not required*." *Hawaii Prince Hotel Waikiki Corp. v. City & Cty. of Honolulu*, 89 Hawai‘i 381, 393, 974 P.2d 21, 33 (1999) (internal quotation marks and citations omitted).

There is no reason to litigate what has already been captured in photos and on video. This court should summarily hold that the unpermitted seawall is on State property.

IV. ARGUMENT

A. The Property Line Between State and Private Property is Located *Mauka* of the New Seawall.

1. In Hawai‘i, the State owns all land *makai* of the upper reaches of the wash of the waves.

This motion presents a straightforward question of law: Can an illegally erected seawall which stops the landward movement of the waves constitute the legal boundary line between private property and property held in public trust by the State? Hawai‘i law dictates that the answer is a firm "no."

In Hawai‘i, as in every other coastal state,[7] the land *makai* ("seaward" in other states) of the shoreline is owned by the State and held in public trust for the people of the State. *Sotomura*, 55 Haw. at 183–84, 517 P.2d at 63 ("Land below the high water mark, like flowing water, is a

[7] "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found . . . ." *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 435, 13 S. Ct. 110, 111 (1892).

natural resource owned by the state 'subject to, but in some sense in trust for, the enjoyment of certain public rights.'") (quoting *Bishop v. Mahiko*, 35 Haw. 608, 647 (Haw. Terr. 1940)). While many other states define the shoreline boundary as the mean high water mark, and some as the mean low water mark,[8] Hawai'i uniquely recognizes the shoreline as the "upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves[.]" *Application of Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968). "The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves." *Application of Sanborn*, 57 Haw. 585, 588, 562 P.2d 771, 773 (1977).

By its very nature, the boundary between private property and public land is not fixed, but may change due to the dynamic nature of the shoreline. In Hawai'i, this principle was enunciated in *Sotomura*, where the court held that even when the boundaries of a parcel were previously determined by the Land Court, "***the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.***" 55 Haw. at 180, 517 P.2d at 61 (emphasis added).

The *Sotomura* court thus held that title to land lost to erosion passes to the State. *Id.* at

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[8] *See* Margaret E. Peloso & Margaret R. Caldwell, Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate, 30 Stan. Envtl. L.J. 51, 57–58 (2011):

> In nearly all cases, the relevant lines for defining the limits of private title and public access are the mean high water and mean low water marks, which are the averages of high and low tides over 18.6 years. The first and largest category of states are those states that recognize that private title ends and state title begins at the mean high water mark. Second, are those states that recognize private title to the mean low water mark but find a public trust easement over the foreshore. Finally, Texas and New Jersey have recognized that the public trust extends all the way to the first line of vegetation, covering the whole dry sand beach.

(Footnotes omitted).

183, 517 P.2d at 62-63. Its decision was based on common law principles:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . (W)hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

Sotomura, 55 Haw. at 183, 517 P.2d at 62–63. The *Sotomura* court found further support in the public trust doctrine:

> [Title to land below the high water mark] is a title held in trust for the people of the state . . . . ***The control of the state for the purposes of the trust can never be lost***, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *King v. Oahu Railway & Land Co.*, 11 Haw. at 723-24.

Id. at 184, 517 P.2d at 63 (emphasis added).

There is no dispute that land *makai* of the shoreline, i.e. the upper reaches of the waves, belongs to the State.

2. <u>The new seawall is an illegal structure.</u>

The State's position is that the new seawall was built on State property. Defendants contend that it was built entirely within their property boundaries. We will show below that defendants are wrong as a matter of law. In either case, the new seawall is an illegal structure.

Land use on either side of the shoreline is restricted by the Coastal Zone Management Act ("CZMA"), HRS Chapter 205A. The definition of "shoreline" in the CZMA is the same as the definition of the shoreline under *Ashford*, *Sotomura*, and *Sanborn*:

> "Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

HRS § 205A-1.

Any land *makai* of the shoreline is part of the State land use district known as the "conservation district."[9] HAR § 15-15-20(6). The Board and the DLNR have the power to regulate lands in the conservation district. HRS § 183C-3. The rules adopted by the Board state that no land uses may be undertaken in the conservation district except as permitted by the Board or DLNR. HAR § 13-5-30(b). "Land use" includes:

> (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;
> . . . . or
> (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

HAR § 13-5-2; *see also* HRS § 183C-2.

Defendants admittedly did not apply for or receive a conservation district use permit. Comp. at ¶21; Ans. at ¶10. If the new seawall was constructed *makai* of the shoreline, as defined in HRS § 205A-1, it was illegal.

But even if the new seawall was *mauka* of the shoreline it is still illegal. First, it would require a building permit from the County, as mandated by Revised Ordinances of Honolulu ("ROH") Sec. 18-3.1(a)(1). *See* App'x A. Not only did defendants fail to obtain any building permit related to the new seawall until September 26, 2019, but that permit, which was obtained for mere *repair*, was revoked less than two weeks later. Exh. 13; Declaration of Jocelyn J. Gervacio Godoy ("Godoy Dec.") at ¶10.

Second, even if the new seawall was built entirely within the boundary lines of the property, as the defendants claim, it is still in violation of Hawai'i statutes, specifically, the

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[9] The boundaries of the conservation district are determined by the Land Use Commission ("LUC"). HRS § 205-2. According to the LUC Rules (HAR § 15-15-20(6)), the conservation district includes all land having an elevation below the shoreline as defined by HRS § 205A-1.

CZMA. HRS § 205A-44(b) (2017)[10] prohibits all structures within the "shoreline setback area" without a variance, subject to a few limited exceptions. A "structure" includes "any portion of any building, . . . wall, or revetment." HRS § 205A-41 (2017). Generally, the shoreline setback area includes all of the land area between the shoreline and the "shoreline setback line." *Id*. The "shoreline setback line" is determined by the respective counties. HRS § 205A-43 (2017). In the City and County of Honolulu, the shoreline setback line is generally 40 feet inland from the certified shoreline. ROH Sec. 23-1.4(a). *See* App'x. B.

An *entire* structure is deemed to exist within the shoreline area when that structure fixes or significantly affects the shoreline and the structure has not received all required permits:

> [I]f the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this part extends seaward of the shoreline, then the term "shoreline area" shall include the entire structure.

HRS § 205A-41 (2017); *see also* HRS § 205A-43.6(b) (2017) ("Where the shoreline is affected by an artificial structure that has not been authorized with government agency permits required by law, if any part of the structure is on private property, then for purposes of enforcement of this part, the structure shall be construed to be entirely within the shoreline area.")

The new seawall is obviously a structure and, as shown above, the wash of the waves is fixed or significantly affected by the seawall. Thus, the "shoreline area" includes the *entire* seawall.

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[10] The versions of HRS §§ 205A-41, -43 and -44 cited herein are the versions found in the 2017 replacement volumes of the HRS. These sections were in effect at the time of the defendants' 2017 construction of the seawall, and were not revised until September 15, 2020.

The new seawall was thus illegal *unless* the defendants obtained a variance from the County.[11] HRS § 205A-43.6(a). Yet, the defendants have never applied for, let alone acquired, a shoreline setback variance for the new seawall. *See* Exh. 10; Godoy Dec. at ¶¶5-6.

Thus, even if originally built within the boundaries of the defendants' property, the new seawall is unquestionably an illegal structure which exists entirely within the shoreline area in violation of HRS § 205A-44(b).

3. An illegal, artificial structure cannot be used to fix the shoreline boundary *makai* of the true upper wash of the waves.

No Hawai'i case has yet answered the question of where the legal boundary is located when the wash of the waves is affected by an artificial seawall. For the purposes of this motion, it is not necessary for the court to determine whether the shoreline may necessarily extend beyond *all* seawalls in the State. The question here is much narrower – whether *this* seawall, which was constructed without the State's permission and without a shoreline setback variance or a valid building permit – should constitute the legal barrier between public property and private property.

The Hawai'i supreme court has already rejected the use of artificial enhancements to move the shoreline further *makai* than the "true" upper wash of the waves. In *Diamond v. State*, 112 Hawai'i 161, 175, 145 P.3d 704, 718 (2006) [*Diamond I*] the supreme court held, unequivocally, that an artificially planted vegetation line could not establish the location of the shoreline for the purposes of the CZMA when there was evidence that the "upper wash of the waves" was further *mauka* than the vegetation line. *Id.* at 176, 145 P.3d at 719.

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[11] A variance is not required when a non-conforming structure is repaired or altered in a way that does not increase its nonconformity. ROH Sec. 23-1.6(a). That exception does not apply here, where the new seawall was admittedly a new structure "separate and apart" from the old seawall. Exh. 1 at 007.

In *Diamond I*, the owner of ocean-front property planted spider lilies and naupaka along his property line. 112 Hawai‘i at 164, 145 P.3d 707. The Board certified[12] the shoreline of the owner's property at the vegetation line, *even though* there was evidence that waves sometimes washed up *mauka* of the vegetation line. *Id.* at 167-69, 145 P.3d at 710-12. On appeal, the supreme court determined that *Sotomura* merely supported using the most *mauka* line, not that the vegetation line always controlled. *Id.* at 112 Hawai‘i at 175, 145 P.3d at 718.

Moreover, the court agreed that an "artificial vegetation line" created by human-planted and irrigated salt-tolerant plants could not be relied upon to certify the shoreline. *Id.* Doing so would contradict the public policy set forth in both the CZMA and *Sotomura*. *Id.* at 175-76, 145 P.3d at 718-19. As *Sotomura* articulates: "Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. At 182, 517 P.2d at 61-62. The court in *Diamond I* explicitly "reject[ed] attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties." 112 Hawai‘i at 176, 145 P.3d at 719.

The *Diamond I* court's decision was bolstered in *Diamond v. Dobbin, 132 Hawai‘i 9, 319 P.3d 1017 (2014)* [*Diamond II*]. In another appeal of a shoreline certification, the supreme court held that the Board should have considered whether a hedge line of salt tolerant plants was hindering the debris line from being located further *mauka*. *Id.* at 33, 319 P.3d at 1041.

> It would be contrary to *Diamond* [*I*], the policy articulated in *Sotomura,* and the legislative purpose behind HRS chapter 205A, as noted *supra,* to locate the shoreline where salt-tolerant plants had been grown ***and had prevented a debris line from forming*** that was indicative of the ***true*** "highest wash of the waves."

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[12] The CZMA directs the Board to adopt a procedure for determining the "shoreline." HRS § 205A-42(a). These shoreline determinations are used to determine the shoreline setbacks, which are enforced by the planning departments of the respective counties. HRS § 205A-43.

Id. (emphasis added).

The public policy in favor of extending the State's jurisdiction as far *mauka* as reasonably possible, as discussed in *Diamond I*, is codified in the CZMA. The policies of the CZMA, which are binding all State agencies,[13] specifically include: "(A) Locat[ing] new structures ***inland*** from the shoreline setback" and "(B) ***Prohibit[ing]*** construction of private shoreline hardening structures, ***including seawalls*** and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities." HRS § 205A-2(c)(9) (emphases added).[14]

It is impossible to reconcile the use of an illegal seawall to artificially fix the shoreline with the clear holdings of *Diamond I* and *Diamond II* and the public policy recognized by the supreme court and codified in the CZMA. "*Diamond I* bar[s] the use of artificially induced plants as an indication of the shoreline, because the use of such a false vegetation line in making a shoreline determination would allow landowners to effectively erect an artificial 'barrier' extending their land further makai." *Diamond II*, 132 Hawai'i at 32, 319 P.3d at 1040. Unquestionably, the seawall in this case is an artificial barrier which prevents the shoreline from moving further *mauka* than it would be without the wall. Accepting the seawall as the shoreline in this instance is manifestly contrary to public policy, even more so than certifying the shoreline at a seemingly legal, yet human-induced, vegetation line.

In short, the only genuine issue of material fact in this case is whether the new seawall

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[13] HRS § 205A-4(b) states that: "The objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all agencies, within the scope of their authority."

[14] In fact, pursuant to the CZMA's implementing rules, a shoreline cannot be certified ***at all*** "where an unauthorized improvement encroaches upon state land or where an unauthorized improvement interferes with the natural shoreline processes." HAR § 13-222-19.

intrudes onto State land. For the foregoing reasons, there is no doubt that it does.

B. All Counts of the Complaint must be Resolved in the State's Favor

1. Count I – HRS § 669-1 Quiet Title/Declaratory Judgment

HRS § 669-1(a) allows an action to be brought by "any person against another person who claims, or who may claim adversely to the plaintiff, an estate or interest in real property, for the purpose of determining the adverse claim."

As a matter of law, the dividing line between the ocean and the defendants' property is where the upper wash of the waves would be if not for the illegal seawall. *Cf. Diamond I*, 112 Hawai'i at 176, 145 P.3d at 719 (the Board's finding that the shoreline was anything other than the highest wash of the waves during high season was wrong as a matter of law); *see also State v. Trudeau*, 139 Wis. 2d 91, 109, 408 N.W.2d 337, 345 (1987) (holding that the erection of an artificial barrier did not remove land from the public trust: "As long as lake water would naturally flow to and from the site in the absence of an artificial barrier, it is a part of Lake Superior.").

For the purposes of this motion, it is unnecessary for the court to determine the exact metes and bounds of the defendants' parcel. It is sufficient to hold that the shoreline, the legal boundary between State and private land, is necessarily located *mauka* of the new seawall.

2. Count II – Trespass and Count III - Encroachment

The Hawai'i Intermediate Court of Appeals ("ICA") has recognized the elements of "trespass" as articulated in the Restatement (Second) of Torts § 158 (1965):

> One is subject to liability to another for trespass, irrespective of whether [they] thereby cause[ ] harm to any legally protected interest of the other, if [they] intentionally
> (a) enter[ ] land in the possession of the other, or cause[ ] a thing or a third person to do so, or
> (b) remain[ ] on the land, or

> (c) fail[ ] to remove from the land a thing which [they are] under a duty to remove.

Spittler v. Charbonneau, 145 Haw. 204, 210, 449 P.3d 1202, 1208 (Haw. App. 2019). "A continuing encroachment by an adjoiner upon the land of another by erecting and maintaining a building thereon without right is, at common law, not only a trespass or continuing trespass but also a nuisance." 1 Am. Jur. 2d Adjoining Landowners § 112 (2020) (footnotes omitted).

Under the same definition of trespass as the ICA, the Ninth Circuit Court of Appeals held that seawalls which permanently fix the landward, ambulatory movement of the tides, constituted a trespass onto tidelands that were owned by the United States in trust for the Lummi Tribe.[15] *United States v. Milner*, 583 F.3d 1174, 1191 (9th Cir. 2009). In *Milner*, shoreline property owners erected various shoreline defense structures, but over time, due to erosion, some of these structures sat seaward of the mean high water line ("MHW"), the upper boundary of the tidelands under federal law. 583 F.3d at 1181. The court rejected the argument that "once the MHW line intersects the face of their defense structures, the boundary becomes fixed and remains so unless the tide line overtops the structures or recedes." *Id.* at 1188. Rather, the ambulatory nature of the shoreline was an ***inherent*** attribute of the properties at issue. *Id.* at 1189. The fact that the homeowners sought to protect their properties from erosion was not a defense to trespass against the tidelands that would have accrued to the Lummi. *Id.* at 1189-90. The homeowners could not artificially fix the location of the shoreline to the detriment of the

[15] In *Milner*, the United States, rather than the State of Washington, held the tidelands at issue in trust for the Lummi Tribe pursuant to a treaty between the U.S. and various Indian tribes. 583 F.3d 1174, 1186.

Lummi. *Id.*[16]

As with the structures in *Milner*, the new seawall in this case encroaches onto the property of the State. The face of the seawall intersects with the upper wash of the waves and prevents *mauka* movement of the waves, which establish the shoreline. As in *Milner*, the fact that the purpose of the seawall is to guard against erosion is no defense to trespass, since erosion and the seaward migration of the shoreline is an inherent attribute of the defendants' beachfront property. "Given that the [State] holds title to the [land *makai* of the shoreline] and that the [defendants] cannot permanently fix the [shoreline] boundary, it quickly follows that the [defendants] are liable for trespass." *Id.* at 1191.

Further, although the structures in *Milner* were apparently legal when built,[17] here, the defendants proceeded in flagrant disregard for the State's orders to stop. That defendants entered and remained on State land without right, committing a trespass, is a foregone conclusion.

C. Removal of the New Seawall is the Appropriate Remedy.

1. The nature of the defendants' encroachment necessitates an injunction for removal.

It is black letter law that "[i]n the absence of an easement or agreement, no person has any right to erect buildings or other structures on one's own land so that any part, however small, will extend beyond one's boundaries . . . and thus encroach on the adjoining premises." 1 Am. Jur. 2d Adjoining Landowners § 112; *cf. Dudoit v. Clifton*, 114 Hawai'i 175, 178, 158 P.3d 293,

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[16] Hawai'i law does allow private facilities or improvements that artificially fix the location of the shoreline, but only in certain circumstances and only with a variance. HRS § 205A-46(a)(9).

[17] To be clear, the State does not ask the court to adopt a rule that all seawalls, even those which received State and County permission, become illegal when they intersect with the upper wash of the waves or thereby become State property. As clarified, this case requires only a holding that an *illegal* seawall constitutes a trespass and does not divest the State of property that would otherwise accrue to it because of erosion.

296 (Haw. App. 2006) (upholding trial court's finding that a wall was not an encroachment when the plaintiff's predecessor in interest consented to it). Ejectment is a proper remedy for an encroachment. 1 Am. Jur. 2d Adjoining Landowners § 117 (2020); *see also Honolulu Mem'l Park, Inc. v. City & Cty. of Honolulu*, 50 Haw. 189, 193, 436 P.2d 207, 210-11 (1967) (holding that plaintiff was entitled to the ejectment of the city's sewer line).

Encroachments, by their nature, constitute a continuing and irreparable harm if not removed. Thus, "an injunction will ordinarily issue . . . to compel the removal of encroaching structures or property. Injunctive relief is available in encroachment actions, although it is extraordinary relief, due to the peculiar nature of the right invaded, and the subject matter affected—namely, land." 1 Am. Jur. 2d Adjoining Landowners § 120 (footnotes omitted).

The Hawai‘i supreme court has already held that ejectment is the proper remedy for private seawalls that encroach onto public land *makai* of the shoreline. In *Territory v. Kerr*, 16 Haw. 363, 369 (Haw. Terr. 1905), the court held that the defendant's seawall, which was built *makai* of the high water line, was a "purpresture" or an encroachment upon public property. As such, the defendant could be ordered to remove the wall. *Id.* at 376. To allow the illegal seawall to remain would not only cause irreparable harm, but would amount to the permanent appropriation of public property:

> I[t] is not so much the extent of this obstruction or the irreparable injury to the public which it now causes, that requires its removal, as the fact that as far as any obstruction can do so it prevents public use of the shore for passage over it, and that ***if allowed to go on to completion it would appropriate public territory to private use for no purpose conducive to public interests***. Walls and buildings extending seaward beyond high water mark block the right of way and furnish no compensatory advantages to the public for purposes of navigation or fishery.

Id. (emphasis added).

Not only does the seawall constitute a purpresture, it is well-established that shoreline

hardening structures contribute to beach loss. As Justice Nakayama wrote in her dissent in the *Gold Coast* case:

> It is widely accepted that seawalls "exacerbate coastal erosion and beach loss." Lance D. Collins, Segmentation and Seawalls: Environmental Review of Hawaii's Coastal Highways in the Era of the Anthropocene, 20 Haw. Bar J. 89, 90 (2016); see also Dep't of Land and Nat. Res., Hawaii Coastal Erosion Management Plan (COEMAP) 4 ("***Studies conducted at the University of Hawaii show that hardening the shoreline of Oahu where there is chronic coastal erosion causes beach narrowing and beach loss.... Beach narrowing and loss, and shoreline hardening, also severely restrict public access to state conservation lands and natural resources.***"); Sophie Cocke, Walls No Match for Waves, Honolulu Star-Advertiser, Feb. 24, 2016, at A10 ("***Scientists say that Hawaii's legacy of allowing property owners to build too close to the shoreline and later erect seawalls to protect their properties has led to the loss of many of Hawaii's beaches.***").

Gold Coast Neighborhood Ass'n v. State, 140 Hawai'i 437, 482, 403 P.3d 214, 259 (2017) (Nakayama, J., dissenting) (emphasis added).

Further, because the wall narrows the beach, it blocks the public's right of transit along the shorelines[18] and in the "beach transit corridor," i.e. the area seaward of the shoreline,[19] in violation of HRS § 115-9(a): "A person commits the offense of obstructing access to public property if the person, by action or by having installed a physical impediment, intentionally prevents a member of the public from traversing: . . . [a] public transit corridor; or [a] beach transit corridor."

Thus, even though an injunction for removal is already the ordinary remedy for an encroachment, the need for such a remedy is exacerbated by the circumstances in this case. Should defendants and other homeowners be allowed to retain their seawalls, as the *Kerr* court

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[18] "The right of access to Hawaii's shorelines includes the right of transit along the shorelines." HRS § 115-4.

[19] "The right of transit shall exist seaward of the shoreline and this area shall be defined as the beach transit corridor." HRS § 115-5(a).

observed: "The entire shore could thus be appropriated by coterminous owners." 16 Haw. at 369. The court should not tolerate the permanent appropriation of public property. Nothing short of an injunction will prevent the harm the seawall will cause to the beach itself. No amount of damages can replace the loss of one of Hawaii's most iconic coastlines.

2. An injunction should issue without regard to the relative hardship to the defendants.

In a case such as ours where a landowner ignores warnings not to encroach upon their neighbor's land but does so anyway, "an injunction will generally be issued requiring that landowner to remove the encroachment, ***without regard for the relative conveniences or hardships which may result from ordering its removal.***" 1 Am. Jur. 2d Adjoining Landowners § 125 (2020) (emphasis added). *See also*, *Nellie Gail Ranch Owners Assn. v. McMullin*, 4 Cal. App. 5th 982, 1003, 209 Cal. Rptr. 3d 658, 675 (2016) (the court may only exercise its discretion ***not*** to grant an injunction to enjoin an encroachment if the encroachment is not willful or negligent); *Papanikolas Bros. Enterprises v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1259 (Utah 1975) ("When the encroachment is deliberate and constitutes a wilful and intentional taking of another's land, equity may require its restoration, without regard for the relative inconveniences or hardships which may result from its removal.") (footnotes omitted); *Green v. Normandy Park*, 137 Wash. App. 665, 698, 151 P.3d 1038, 1055 (2007) ("In considering whether to grant an injunction requiring the removal of an erected building or structure, . . . [t]he benefit of the doctrine of balancing the equities, however, is reserved for the innocent party who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights.")

Hawai'i courts are no different. They do not allow a defendant who knowingly or recklessly violates the property rights of another to argue that the balance of equities should

weigh in their favor. *Sandstrom v. Larsen*, 59 Haw. 491, 500, 483 P.2d 971, 978 (1978); *see also*, *Royal Kunia Cmty. Ass'n ex rel. Bd. of Directors v. Nemoto*, 119 Hawai‘i 437, 451, 198 P.3d 700, 714 (Haw. App. 2008).

In *Sandstrom*, even though defendants received notice that building a second story on their home would violate a restrictive covenant, and even though their neighbors brought a lawsuit against them, defendants still went ahead and completed the construction of their second story during the pendency of the lawsuit. *Id.* at 492-93, 499-500, 483 P.2d at 974-75, 978. The court held that "[w]e are convinced that where a property owner deliberately and intentionally violates a valid express restriction running with the land [o]r intentionally takes a chance, the appropriate remedy is a mandatory injunction to eradicate the violation." *Id.* at 500, 583 P.2d at 978 (internal quotation marks omitted). "Therefore, mandatory injunctive relief was available to [neighbors] without the necessity of consideration by the court below of the relative hardship between the parties." *Id.*

Here, as in *Sandstrom*, the defendants were undeniably on notice that the seawall would encroach on public lands: 1) defendants received OCCL's September 8, 2017 letter demanding that they cease construction of the new seawall; 2) on October 13, 2017, the defendants requested a contested case on the OCCL's recommendation that the Board impose a fine; 3) this lawsuit was initiated on September 22, 2017; 4) on the same date, this court issued a temporary restraining order enjoining the construction of the seawall; and 5) the County issued a notice of violation and revoked the defendants' building permit on October 9, 2019. Yet despite multiple notices and the pendency of this lawsuit, the defendants disregarded the property rights of the State, "took a chance," and completed the wall. Landowners such as the defendants cannot simply erect immense, expensive structures on public land and then complain of the hardships

they would suffer in removing their encroachments. The only appropriate remedy here is an injunction ordering that the wall be removed from State land.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court enter summary judgment in the State's favor as to Counts I – III of its Second Amended Complaint, and grant a mandatory injunction ordering the removal of the new seawall.

In the alternative, the State prays for a declaratory judgment finding that the new seawall constitutes a trespass and encroachment on State land.

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