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Daryl Arita, Elder; Thomas Foster, Elder; David
Jenkins, Elder; and Robert Poulson, Elder

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HALE O KAULA CHURCH, DARYL ARITA,
Elder; THOMAS FOSTER, Elder; DAVID
JENKINS, Elder; and ROBERT POULSON, Elder;

Plaintiffs,

v.

THE MAUI PLANNING COMMISSION;
SAMUEL KALALAU III, JEREMY F. KOZUKI,
BERNICE LU, STAR MEDEIROS, SUSAN
MOIKEHA, HERMAN NASCIMENTO, RANDY
PILTZ, JOSEPH PONTANILLA, MONA
RICHARDSON, in their individual capacities and
in their official capacities as members of the Maui
Planning Commission; JOHN E. MIN, in his
individual capacity and in his official capacity as the
Director of the Maui Department of Planning; THE
COUNTY OF MAUI, HAWAII; JAMES APANA
JR., in his official capacity as Mayor of the County
of Maui; JUDITH NEUSTADTER FUQUA, in her
individual capacity and in her official capacity as
Hearing Officer for the Maui Planning Commission,

Defendants.

CIVIL NO. 01-00615 SPK KSC

**SECOND AMENDED COMPLAINT;
DEMAND FOR JURY TRIAL;
SUMMONS**

SECOND AMENDED COMPLAINT

Comes now the Plaintiffs Hale O Kaula Church (hereinafter “Church”), Daryl Arita, Thomas Foster, David Jenkins, and Robert Poulson, by and through their attorneys, and for their Complaint state as follows:

NATURE OF ACTION

1. This suit seeks relief from the clear and purposeful deprivation of the Plaintiffs’ rights to freedom of religion, freedom of speech, freedom of assembly, due process and equal protection of the laws by the Defendants. In this action, Plaintiffs allege that the land use and zoning laws and regulations of the State of Hawaii and of the County of Maui, both on their face and as they were applied by County officials against the Church and individual Plaintiffs, violate the United States and Hawaii Constitutions, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, and State and County statutes by depriving Plaintiffs of the ability to secure a place to assemble and meet for worship. The Plaintiffs allege that the County of Maui substantially burdens the religious exercise of, and wrongfully discriminates against, churches in general and Hale O Kaula and its members in particular through the Hawaii Revised Statutes and Maui County Code provisions preventing churches from locating in the State of Hawaii Agricultural District and the County of Maui Agricultural Zoning District, and in the application of those statutes against Hale O Kaula.

2. By denying Plaintiffs the ability to use their agricultural property as a place of worship, the County of Maui prevents Plaintiffs from practicing the Joseph Ministry, which is largely dependent on agricultural land use and is central to the Church’s religious vision and function. The Plaintiffs further allege that the County, through its officials, wrongfully failed to

grant a special use permit for the use of property located on Anuheia Place, Pukalani, Maui, Hawaii as a church.

3. The denial of the special use permit was the result of community opposition against Hale O Kaula and its members based on religious prejudice.

4. Plaintiffs seek injunctive, declaratory and compensatory relief under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (“RLUIPA”), 42 U.S.C. § 1983, H.R.S. ch. 205, and Maui County Code ch. 19.30A for their injuries suffered as a result of Defendants’ unlawful conduct. Plaintiffs also seek costs and attorneys fees.

JURISDICTION AND VENUE

5. This Court has jurisdiction over all federal claims in the Complaint as arising under the United States Constitution pursuant to 28 U.S.C. §§ 1331 and 1343 (a)(3) and (a)(4). This Court has pendant and supplemental jurisdiction over all state law claims under 28 U.S.C. § 1367(a).

6. Venue lies in this district pursuant to 28 U.S.C. § 1391. All Defendants and Plaintiffs are located in this district. All events giving rise to this action occurred in this District.

PARTIES

7. Plaintiff Hale O Kaula Church [the “Church”] is a nonprofit, Hawaii corporation. It has operated a church and held public worship services in the County of Maui, Hawaii since 1960. Hale O Kaula means “House of the Prophets.” It has approximately sixty members who live in and around Pukalani, County of Maui, Hawaii. The Church currently holds worship services in an inadequate facility in Haiku, County of Maui, Hawaii.

8. Plaintiff Daryl Arita is an elder of the Church.

9. Plaintiff Thomas Foster is an elder of the Church and the owner of Lot 25 on Anuheha Place.

10. Plaintiff David Jenkins is an elder of the Church and the owner of Lot 35 on Anuheha Place.

11. Plaintiff Robert Poulson is an elder of the Church and the owner of Lot 35 on Anuheha Place.

12. Defendant Maui Planning Commission is delegated the power to grant special land use permits under the Maui County Code and State land use special permits for properties of less than 15 acres.

13. Defendant Samuel Kalalau III is a member of the Maui Planning Commission.

14. Defendant Jeremy F. Kozuki is a member of the Maui Planning Commission.

15. Defendant Bernice Lu is a member of the Maui Planning Commission.

16. Defendant Star Medeiros is a member of the Maui Planning Commission.

17. Defendant Susan Moikeha is a member of the Maui Planning Commission.

18. Defendant Herman Nascimento is a member of the Maui Planning Commission.

19. Defendant Ransom Piltz is a member of the Maui Planning Commission.

20. Defendant Joseph Pontanilla is a member of the Maui Planning Commission.

21. Defendant Mona Claire H. Richardson is a member of the Maui Planning Commission.

22. Defendant John E. Min is the Director of the Maui Department of Planning.

23. Defendant County of Maui, Hawaii is a municipality created and existing by

virtue of the laws of the State of Hawaii and is empowered to act through its governing body, its officials, employees and official bodies. The County is empowered by the State of Hawaii to regulate and restrict the use of land and structures within the County's borders.

24. Defendant James Apana, Jr. is the Mayor of Maui, Hawaii, and is delegated with the authority to enforce the Maui County Code. He is sued in his official capacity only.

25. Defendant Judith Neustadter Fuqua is a hearing officer for the Maui Planning Commission.

STATEMENT OF FACTS

The Church

26. Hale O Kaula is a small, nondenominational congregation that has been holding religious services in Maui County since 1960.

27. There are roughly sixty people in the congregation, including approximately twenty children. This number has remained fairly constant over the last ten years.

28. The Church currently uses facilities in Haiku. The Haiku property is less than one-half acre in size and is inadequate to meet the current religious needs of the congregation, as the size and nature of the land severely limits agricultural and outdoor activities integral to Plaintiffs' religious beliefs.

29. Currently, at the Haiku Chapel, there are two services during the week: one on either Wednesday or Friday and one on Sunday morning. The midweek attendance averages about ten members, and Sunday mornings are attended by about forty members, counting children.

30. On Monday evenings, the Church holds an administrative meeting that is attended by about ten people.

31. Other meetings occur during the week at the Church.

32. Saturdays are frequently “work days” used for maintaining the existing structures, working on agricultural projects, and maintaining the landscaping. This is also the time for children’s and teens’ activities.

33. Service hours (including members’ arrival and departure) have been from about 8:00 a.m. to about 1:00 p.m. on Sundays, and from 7:00 p.m. to no later than 10:00 p.m. on weeknights.

34. Because of the limitations inherent in the Haiku property, the Church has been forced to hold some services and other religious activities at Pukalani Community Center. The Pukalani Community Center is owned by the County of Maui.

The Joseph Ministry

35. The Joseph Ministry is one of the core practices of the Church’s mission. The ministry requires the church to “provide sustenance from a life enriched environment that preserves God’s people alive and healthy.” Key functions to achieve this mission include: food management, production, storage and distribution; ecosystem management; soil restoration, gardening, greenhouse, orchard and permaculture management, which emphasize the enrichment of local ecosystems through the use of perennial agriculture; and holistic health and healing.

36. Directly related to its religious exercise, the Church plans to distribute some of the products of its agricultural activity to the broader community. Currently, Church members use the land to grow landscaping materials and edible sprouts from seed, and to produce organic vegetables.

37. The Church has invested approximately \$7,000 in this program at its Pukalani location, in addition to the cost of the property, the residence, and the agricultural building.

38. The Church experiments with different vegetables and organic farming methods. The vegetables will be distributed initially to the Church's members, and ultimately to stores and restaurants. This use will expand as the community gains more knowledge of organic farming methods.

39. Directly related to its religious exercise, the Church would use the property for outdoor recreation, primarily for the children and teenagers.

40. The Church's property provides an atmosphere for the children and teens to foster relationships with each other and with the adults, as well as space to run, play, and develop a relationship with the land in a manner that is simply impossible at the Church's current Haiku location, which contains no significant open space and directly abuts a busy thoroughfare.

The Property

41. Beginning in 1986, the Church attempted to lease or purchase property to expand its facilities in order to accommodate its congregation and to carry out its agricultural ministry. When this was not possible, the Church began looking for property that was more central to the members' residences in Makawao, Pukalani, and Kula areas and would allow them ample space for the agricultural and outdoor use required by Plaintiffs' religious beliefs.

42. In 1990, the Church purchased a parcel of agricultural land in an area that was central to all of their members, large enough for their needs, and would permit them to engage in the Joseph Ministry. The Church's property is identified as Maui Tax Map Key (TMK) 2-3-008:032, and is 5.85 acres in size [hereinafter "the Property"].

43. The Church's Property is located within the State Agricultural District, is identified as "Agriculture" on the Makawao-Pukalani-Kula Land Use Map, and is zoned Agriculture in accordance with Maui County Code (hereinafter "MCC"), Section 19.30A.

44. Many other churches exist in the Agricultural District, including Waipuna Chapel in Kula, Upcountry Christian Fellowship in Pukalani, Jesus is Alive in Pukalani, and Lahaina Christian Fellowship in Kahana.

45. This property is located near the end of Anuheha Place, a private road, in Pukalani, Maui. Anuheha Place is owned by the developers of the lots on Anuheha Place, Winston Watanabe and Arlene K. Ellis. The owners of Anuheha Place have consented to the Church's use of the road for access to the Church buildings.

46. Plaintiffs currently use the property as a residence, for agricultural purposes, as well as for outdoor recreation, including youth events and agricultural uses described above.

47. Members of the Church have engaged in, and continue to engage in many assembly uses at the Property.

48. Members of the Church and other individuals have held several workshops on agricultural issues on the Property, including on such topics as organic farming and its impact on the physical and spiritual aspects of their agricultural activity; soil nutrition including micronutrients, bacteria, nematodes; and composting. These assemblies have included in excess of 40 individuals and 20 automobiles.

49. As part of the community-based nature of the Church membership, groups of members assemble for agricultural purposes on the Property, including tilling, irrigation, mulching, planting, weeding, cleanup, and other activity. These assemblies have included in excess of 20 individuals.

50. Additionally, members of the Church and other individuals have held other events on the Property and on other lots on Anuheha Place, including birthday parties and potluck dinners. These assemblies have included in excess of 40 individuals and 20 automobiles.

51. Plaintiffs have hosted other assemblies in their homes on other lots on Anuhea Place, including most recently a prayer meeting for the September 11 disaster victims held on Plaintiff Thom Foster's property.

52. The surrounding land uses are as follows: North -- rapidly developing urban lands that are part of the Kulamalu Project; East -- rapidly developing urban lands that are part of the Kulamalu Project, Kaluapulani Gulch and agricultural lots; South -- Agricultural lots; and West -- one agricultural lot and rapidly developing urban lands that are part of the Kamehameha Schools campus.

53. Adjoining the Church's property to the north and east is the rapidly developing Kulamalu project. This development will have approximately 170,000 square feet of commercial uses on twenty acres, five acres of public/quasi-public space, a fifteen-acre active park, a five-acre Hawaiian cultural center, and about sixty units of multi-family residential buildings.

54. Adjoining the Church's property to the west is the over one hundred and seventy-acre Kamehameha School campus. The elementary school is currently in place and operating, and the middle school is under construction. This campus is planned to eventually accommodate 1,700 students, complete with ball fields, two gymnasias, and cafeterias.

55. Anuhea Place, located across Kula Highway from the Kula 200 development, is a twenty-foot wide private cul-de-sac roadway serving a fifteen-lot subdivision. All lots are between five and nine-and-a-half acres in size.

56. Kula 200 is a large, agricultural-zoned residential community built in 1980 with approximately 114 two-acre lots.

57. Six of the fifteen lots on Anuheia Place have homes on them, including the Church's Property and two other lots owned by Church members. All of the residential properties are fenced and gated. One has commercial riding stables and a lighted rodeo ring and associated structures; the remaining lots either lie fallow or are used for grazing purposes.

58. Other permitted uses of property on Anuheia Place frequently have much greater impact on the neighborhood and municipal services than a place of worship would have. Examples of such actual uses include transporting cattle and horses by large trailers and storage and distribution of construction materials and heavy equipment. Other permitted uses include "storage, wholesale and distribution, including barns; greenhouses; storage facilities for agricultural supplies, products and irrigation water; farmer's cooperatives." Residential uses are also permitted, including those activities that are a natural component of residential use, such as inviting groups of people for the purposes of entertaining, socializing and recreating. Inviting groups of people for the purpose of religious worship, however, is not permitted.

59. The Church's property has an existing residence, an agricultural building, and a generator building. These buildings are modest in scale and purposely designed to blend with the existing character of the area. All have an architecture that is low-impact on the environment, with the sizes and colors blending into the surrounding topography. All share an architectural design common in Hawaii.

60. The majority of the Property is open space with the existing structures located on the northernmost end. A catchment system fills a 30,000-gallon tank to serve the Church's needs and is supplemented by trucking in additional water as necessary. The Church has always declared to the County of Maui its willingness to install additional water storage to satisfy any additional fire protection requirements, and continues to do so.

61. The existing agricultural building is a 1,792 square-foot structure with a concrete floor. It is used for sprouting and starting seedlings. In sprouting, the transpiration and irrigation requirements are minimal. This building is also occasionally used for potlucks, birthday parties, and other get-togethers.

62. The Church proposes to use the agricultural building to hold church functions, including religious services. It has one bathroom, a small kitchen facility with a sink, and a 142-square foot room to be used for office functions. There is a garage door for equipment, and the flooring is painted concrete.

63. The second floor proposed for church functions is 2,500 square feet. This area will provide meeting space, an office, library, storage and handicapped accessible restrooms.

64. The Church has erected a shade house that is being used to produce landscaping plants for that industry, and to provide some income. This steel-hoop structure is covered by shade cloth and has a gravel floor. It measures eighty feet long and twenty feet wide, or 1,600 square feet.

65. There is a small fenced plot of approximately 6,000 square feet being used as a demonstration garden.

Community Opposition to Hale O Kaula

66. After the Church purchased the Pukalani property in 1990, the Church and its members have been subjected to a campaign of opposition and harassment by individuals living on Anuheha Place and the surrounding area.

67. On or about July 27, 1996, Carol Thuro, who is a resident of Pukalani, and Barbara Luke, who is the owner of vacant Lot 34 on Anuheha Place, began stopping all vehicles entering Anuheha Place beginning at about 7:00 am. Carol Thuro and Barbara Luke locked the

farm gate at the entry of the subdivision. People were forced to stop and were told that Carol Thuro and Luke were monitoring traffic on the street. Carol Thuro and Luke demanded that people sign a sheet and would interrogate them about their purpose in entering the street. Carol Thuro and Luke would then enter this information onto the sign up sheet. Carol Thuro and Luke refused to allow passage onto Anuheia Place without signing the sheet. Members of the Church subsequently called the police who talked with both parties and asked Jon Thuro, Carol Thuro and Luke to refrain from restricting passage down Anuheia Place.

68. On or about May 5, 2000, Carol Thuro wrote a letter to Defendants Maui Planning Commission, James Apana, Jr., John Min, and several other State and County officials and agencies opposing the Church's Application and describing Hale O Kaula as a "so-called church."

69. In November 1999, Jon Thuro followed invited guests onto the Church's Property. On that date, Church member Mike Murray entered the cul de sac to attend a birthday party on the Church's Property. Jon Thuro, who was exiting the cul de sac, turned around to follow Murray to the back of the Church property. After Murray exited his car, Jon Thuro exited his and said that, with all the cars going onto the property, the Church must be holding a worship service.

70. Between July 9 and August 12, 2000, Jon Thuro displayed a sticker on his mailbox on Anuheia Place saying, "Jesus Loves You. Everyone Else Knows You're an Asshole."

71. In December 2000, a sign was displayed on the gate at the top of Anuheia Road stating, "Are you sure the road you're on leads to my house? God."

72. In April 2000, Jon Thuro called the Maui County Planning Department, where William Spence, a Church member, is a staff planner and accused Spence of being corrupt and “slipping things through” the planning process.

73. On or about February 24, 2001, Jon Thuro ordered Church member Eddie Schiek to “Get the fuck out of here” on Anuheia Place fronting the Church’s Property.

74. On or about February 25, 2001, Frank Carvalho, Jr. a resident of Lot 24 on Anuheia Place, was excavating on Anuheia Place in front of Plaintiff Thom Foster’s home with a shovel and ranted at Thom Foster that “All of the owners of property on the cul de sac don’t want the Church there.” Frank Carvalho, Jr. also told Thom Foster on that date that the church “was buying up the street, and it would be OK if they were different people, not connected to the Church.”

75. On or about May 23, 2000, during the Planning Commission’s public hearing, Frank Carvalho, Jr. accused the Church of being a “cult” to Tim Hurley, a former reporter for the Maui News and a current reporter for the Honolulu Advertiser, and requested that reporter to investigate the Church.

76. On or about June 19, 2000, during a Pukalani Community Association meeting, Barbara Luke and Kathy Hall, both members of that Association and residents of Pukalani, called the Church “militant” and a “cult,” and accused the Church of practicing “mind control” on its members.

77. In 1995, the Church applied for a Land Use Commission Special Use Permit for a 8500 square-foot facility which was intended to address the long-term needs of the congregation. The Church originally intended to seek the permit to hold occasional outdoor religious services in a tent on the property. The (then) Planning Director of Maui County, Brian

Miskae, advised the Church to propose the largest long-term build-out scenario they could imagine, and thus avoid having to later apply to amend the permit if the need should arise. That request was denied after Jon Thuro, Frank Carvalho, Jr., and Barbara Luke complained to the Planning Commission about the proposed use.

The Current Special Use Application

78. Church filed the current special use application on December 20, 1999. The Church sought the Special Permit to conduct religious uses, in addition to the current permitted agricultural, outdoor recreational, and residential uses.

79. The Church sought approval to use the agricultural building to hold church functions, including religious services. The Church also planned to build a second story onto this structure. The upper story would have been used for services and primary office functions. This serves the purpose of separating the utility and church functions of the structure.

80. The Church intended—and still intends—to continue multiple land uses on the Property, including agricultural, outdoor recreational, social, and residential uses. More specifically, these uses would include extensive gardening of sprouts and herbs, the development of an orchard and a greenhouse, children’s activities, young adult programs, and housing for Church members. These activities are all related to Plaintiffs’ religious exercise, and the current zoning permits these uses.

81. In a settlement conference prior to the contested case hearing on the application, Maui Planning Commission Hearing Officer Judith Neustadter Fuqua expressed strong bias against the Church, stating that she “live[d] on a privately owned cul-de-sac roadway in the agricultural district and [she] would not want this church in [her] neighborhood,” that “if an application such as this was filed in [her] neighborhood, [she] would oppose it,” and that

“neighbors should be able to decide whether there should be a church in the neighborhood.” After observing this bias, the Church requested that she recuse herself from the matter. She refused to do so. The Church then moved the Planning Commission to remove her, but she intercepted, heard and denied the motion.

82. The Church had also filed a motion to continue the hearing on several bases, including the recent passage of RLUIPA. Defendant Neustadter Fuqua denied that motion as well, ruling that RLUIPA was inapplicable to the Church’s application.

83. In order to avoid waiving their right to object (under state law) to the Hearing Officer’s ruling on the Motion to Disqualify and the Motion to Continue, the Church therefore refused to subject themselves to her tainted jurisdiction, relying instead on the extensive stipulated evidence, and called no additional witnesses.

84. After ruling on the disqualification motion herself, on April 30, 2001, Defendant Neustadter Fuqua recommended denial of the Church’s application for a special use permit for religious use, finding that the religious use sought by the Church did not conform with the provisions of the Rules of the Land Use Commission of the State of Hawaii.

85. Defendant Neustadter Fuqua found the religious use of the property would adversely affect the properties of the surrounding landowners by creating high levels of traffic and noise in an agricultural area, and that the religious use of the property would cause problems in the municipality in terms of the provision of water, police, and fire protection. She stated that the basis for her decision was the testimony of the Jon Thuro, Frank Carvalho, and Barbara Luke. She ignored the stipulated evidence of county and state agencies and others that contradicted the testimony of these individuals.

86. The noise generated from religious services would be insignificant. There are no homes within 1,000 feet of the proposed location for such services. The size of the Church has remained stable over the years at approximately 60 total members.

87. Traffic generated by the proposed facility would be minimal. The stipulated evidence included a traffic study that determined that there would be no significant impact on traffic. After reviewing the proposal, the Maui County Police Department's only concern was that a County of Maui stop sign and stop line be installed at the entrance to the cul-de-sac. The stop sign has since been installed at that location, and the Church remains willing to pay for the installation of the stop sign.

88. The Director of Water Supply found that the Church's proposed use would not adversely affect water use on surrounding properties, as the Church's water will be supplied by a private water system.

89. The Department of Fire Control did not object to the Church's proposed use. The Department simply requested a hold-harmless agreement from the Church, and stated that it would review the Church's building permit application to determine how much additional water storage would be necessary to dedicate to fire protection.

90. The Church agreed to, and executed the hold-harmless agreement.

91. The Church stated it was, and continues to remain, willing to satisfy any additional requirements of the Fire Department, including installation of additional water storage.

92. The proposed religious uses create far lesser impacts than most of the agricultural uses that are permitted as of right on the Property. The proposed religious uses create far lesser impacts than the uses currently engaged in by the Plaintiffs on the Property.

93. On June 27, 2001, Defendant Maui Planning Commission adopted Defendant Neustadter Fuqua's recommendations and denied the Church's application for a special use permit.

94. At the June 27, 2001 hearing, the Church asked the Maui Planning Commission to acknowledge and apply federal law, particularly the First and Fourteenth Amendments to the United States Constitution and the Religious Land Use and Institutionalized Persons Act, in its decision-making. The Planning Commission explicitly refused to do so, on advice from the County Corporation Counsel attorney present at the Planning Commission meeting.

95. At the June 27, 2001 hearing, Defendant Commissioner Samuel Kalalau III stated "I also have a personal thing about this federal law, because as an indigenous person of this island, the federal law has taken away all my rights, and I believe that in this decision the law should be made under the state land use codes and the county land use codes." He voted in favor of accepting the hearing officer's findings.

96. At the June 27, 2001 hearing, Defendant Commissioner Randy Piltz stated: "And I understand that the new federal law is in effect now; but according to the facts that were presented, that was not clear to our hearings officer and therefore I concur with the motion" to accept the hearing officer's findings. RLUIPA was called to the attention of Defendant Neustadter Fuqua, who explicitly refused to consider the Act.

97. At the June 27, 2001 hearing, Defendant Commissioner Susan Moikeha stated "we are obligated to look at the state and county ordinances in regards to this Special Land Use Permit, and for that reason, you know, I turn to that as the first source. It's not to say that it diminishes what was brought forth by them under this federal law; but indeed, I don't think I

have the capability to understand it completely enough to say that it has application here.” She voted in favor of accepting the hearing officer’s findings.

98. At the June 27, 2001 hearing, Commissioner Herman Nascimento stated that his reasons for denial was concern for fire safety, even though the Fire Department had not yet determined any final fire protection requirements in the building permit process. The Fire Department does not review a building permit until after a special use permit would be granted. Nevertheless, three commissioners claimed “lack of fire protection” as the basis for denying the special use permit, even though the fire protection requirements had not been and could not be determined yet.

99. Also at the June 27, 2001 hearing, Plaintiffs expressed their willingness to proceed with another hearing on remand, so long as it was conducted by a different Hearing Officer. As the Corporation Counsel then made clear to the Commission, the Commission was free to order such a remand.

100. The Planning Commission subsequently issued a Decision and Order holding that the proposed use of the Property does not meet the criteria established for a Land Use Commission Special Use Permit. It did not remand the application for another hearing.

101. As a result of various decisions of the County of Maui, the Church is left with this result: it may assemble on the property and use it for a broad range of purposes, but it is prohibited from assembling for religious worship.

Allegations in Response to Certain Defendants’ Assertions of Immunity

102. Some important Planning Commission procedures are not even written down, including the process: for formulating and administering the list of potential hearings officers; for reducing the list to those “qualified” to participate in a particular case; regarding the

Commission's selection of one (or more) of the "qualified" hearings officers; regarding the form and extent of input from the parties into the process for selecting hearings officers; for determining the scope of the public notification of public hearings on special use permits; for withholding the recommendation of the Planning Department when a permit application is contested; for imposing "standard conditions" on certain permits granted, including mandated renewal periods; for renewing permits granted for a fixed period.

103. Some important Planning Commission procedures are written down but never followed. For example, in 1987, the County recognized the need for Planning Commission rules to administer special use permits, and adopted "Interim Guidelines" until rules could be adopted. Not only have the necessary rules never been adopted for the island of Maui, the Planning Commission has, as a matter of policy, consistently ignored those guidelines. The Molokai Planning Commission, by contrast, which is also in the County of Maui and similarly recognized the need for such rules, did issue them.

104. There are conflicting authorities or opinions among officials in the Planning Commission and Planning Department regarding the applicable procedures. This is common to the unwritten policies and procedures of the Commission, including those for the selection of hearings officers, the scope of notice for public hearings, whether, when, and which "standard conditions" will be included in a special use permit, and others.

105. There are no procedures specifically to address claims that a Planning Commissioner or Hearings Officer should be disqualified from a particular case for bias, prejudice, or any other compromise of their independence.

106. Neither the members of the Planning Commission nor Hearings Officers are required to be attorneys. No Planning Commissioner has ever been an attorney, so none has

taken even a basic course in constitutional law. Hearings Officers are typically attorneys, but no applicant for a Hearings Officer position is ever turned down for lack of qualifications for the job, whether to apply land-use law or constitutional law. There is no requirement that Planning Commissioners or Hearings Officers be selected without regard to their political beliefs.

107. Planning Commissioners and Hearings Officers act according to a policy under which they must categorically exclude federal constitutional considerations when deciding on special use permit applications. The Planning Commissioners were specifically reminded of this policy in this case by their counsel just before rendering their final decision on the special use permit. The Hearings Officer was similarly reminded of and followed this policy when she chose not to consider the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, in this case, even after the Plaintiffs called that law to her attention.

108. No policy or practice prohibits the Planning Commissioners or Hearings Officers, when deciding on a special use permit, from considering factors introduced into the record that lie beyond the applicable substantive legal standards. Application of law to fact is relatively unimportant in the Planning Commissioners' and Hearings Officers' decisionmaking process, as demonstrated by the lack of legal qualification for those positions, as well as the complete absence of lawyers from the Commission. Planning Commissioners and Hearings Officers commonly consider, both implicitly and explicitly, a range of extraneous factors in deciding on special use permits, such as the political, ideological and religious commitments of applicants, intervenors, and other neighbors; the family affiliations of those parties; and how the neighbors and intervenors happen to feel about the applicants.

109. Prior to Plaintiffs' 1999 Special Use Permit Application, Plaintiffs Dave Jenkins, Thom Foster, and Bob Paulson met with John Min personally to attempt to ascertain the

requirements for their application. (Also present was Aaron Shinmoto, Chief of the Zoning Administration & Enforcement Division of the Planning Department.) At that meeting, Defendant Min advised Plaintiffs that, in order to use the property for worship purposes, they must reapply for a Special Use Permit. Thus, Min made a determination to enforce those provisions of the Maui County Code that require a Special Use Permit for religious assembly purposes, but not for other assembly purposes such as a rodeo arena. Such differential treatment based on whether the assembly was religious is plainly unlawful under RLUIPA and the federal constitutional provisions that it enforces. Defendant Min completely refused to even acknowledge the applicability of these standards in the face of repeated warnings.

110. Defendant John Min is a final policymaker for the County Planning Department. Defendant Min failed to initiate the promulgation of various requisite rules relevant to Plaintiffs' Due Process claims, such as the procedures the Planning Commission must adopt to decide on special use permits under the "unusual and reasonable" standard. Min also failed to initiate new regulations for hearings officer selection, for reviewing claims of conflict of interest or bias of hearings officers, for direct appeal to the Planning Commission of interim decisions by a hearing officers, and others. Min has failed to promulgate standards for implementation of RLUIPA. His failure to perform these duties is knowing and intentional.

111 . It is clearly established law that local government officials, including those who formulate and implement land-use laws, are prohibited by the constitution from imposing substantial burdens on the exercise of religion, unless that burden satisfies strict scrutiny; passing rules that are based on religious hostility, or implementing rules that are based on religious hostility; from formulating or applying classifications that treat otherwise similar parties differently based on religion; from passing unreasonable rules or applying rules unreasonably.

112. The County Ordinance applied unconstitutionally in this case was passed in 1998 in large part because County attorneys discovered that Maui County had, until then, failed to zone its agricultural lands at all, having operated for years on the mistaken assumption that the state agricultural designation also served to zone the land as agricultural under county law.

113. In deciding on particular special use permits, the Planning Commissioners, the Planning Director, and the Hearings Officer are the relevant policymakers. State law left these county officials free to avoid burdens on religious exercise - and differential treatment of otherwise similar uses based on religion - by routinely granting special use permits to churches, but they chose otherwise. Nothing in state law required the Planning Commissioners, the Planning Director, and the Hearings Officer to deny special use permits to disfavored religious groups when such permits are readily granted to familiar churches.

Legal Violations

114. The denial of the Church's application places a substantial burden on Plaintiffs' ability to worship and practice the Joseph Ministry, an integral part of its religious exercise. That denial also discriminates against Plaintiffs based on their minority religious faith, discriminates against religious assemblies in general, and is also patently unreasonable. The Church's faith calls for a house of worship that is local to its membership and amenable to agricultural use and outdoor activities. A large part of the Church's youth program is creating outdoor activities and opportunities to build and work, play together with the congregation's children. Without adequate agricultural land, the Church is simply unable to engage in the Joseph Ministry.

115. The actions of the Hearing Officer and the Planning Commission in denying the Church a special use permit that would allow religious use of the Property were arbitrary, capricious and an abuse of discretion. From the decision to hear her own disqualification motion

to her refusal to consider stipulated evidence, the Hearing Officer clearly abused and acted in excess of her discretion and authority and violated state and municipal zoning and procedural laws. By adopting her recommendation, the Planning Commission did the same.

COUNT I

**Violation of the Religious Land Use and Institutionalized Persons Act of 2000
Discrimination on the Basis of Religion
(42 U.S.C. § 2000cc et seq.)**

116. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

117. Defendants have deprived and continue to deprive Plaintiffs of their right to be free from religious discrimination, as secured by the Religious Land Use and Institutionalized Persons Act, by imposing and implementing a land use regulation that discriminates against them on the basis of religion.

COUNT II

**Violation of the Religious Land Use and Institutionalized Persons Act of 2000
Equal Terms
(42 U.S.C. § 2000cc et seq.)**

118. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

119. Defendants have deprived and continue to deprive Plaintiffs of their right to be free from religious discrimination, as secured by the Religious Land Use and Institutionalized Persons Act, by treating them on less than equal terms as a nonreligious assembly or institution.

COUNT III

**Violation of the Religious Land Use and Institutionalized Persons Act of 2000
Substantial Burden on Religious Exercise
(42 U.S.C. § 2000cc et seq.)**

120. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

121. Defendants have deprived and continue to deprive Plaintiffs of their right to the free exercise of religion, as secured by the Religious Land Use and Institutionalized Persons Act, by imposing and implementing a land use regulation that places a substantial burden on Plaintiffs' religious exercise.

COUNT IV

**Violation of the Religious Land Use and Institutionalized Persons Act of 2000
Unreasonable Limitation
(42 U.S.C. § 2000cc et seq.)**

122. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

123. Defendants have deprived and continue to deprive Plaintiffs of their right to the free exercise of religion, as secured by the Religious Land Use and Institutionalized Persons Act, by imposing and implementing a land use regulation that unreasonably limits religious assemblies within a jurisdiction.

COUNT V

**Violation of the United States Constitution
Free Exercise of Religion: First and Fourteenth Amendments
(42 U.S.C. § 1983)**

124. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

125. Defendants have deprived and continue to deprive Plaintiffs of their free exercise of religion, as secured by the First Amendment to the United States Constitution and made applicable to the States by the Fourteenth Amendment, by discriminating against Plaintiffs because of their religious character and by substantially burdening their ability freely to exercise their religious faith.

COUNT VI

**Violation of the Hawaii Constitution
Free Exercise of Religion: Art. I, § 4**

126. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

127. Defendants have deprived and continue to deprive Plaintiffs of their right to freedom of religion, as secured by Article I, Section 3 of the Hawaii Constitution, by discriminating against Plaintiff's because of their religious character and by substantially burdening their ability freely to exercise their religious faith.

COUNT VII

**Violation of the United States Constitution
Freedom of Speech: First and Fourteenth Amendments
(42 U.S.C. § 1983)**

128. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

129. Defendants have deprived and continue to deprive Plaintiffs of their right to speak on matters of religion, as secured by the First Amendment to the United States Constitution and made applicable to the States by the Fourteenth Amendment, by discriminating against Plaintiffs based on the religious viewpoint of their expression, by inhibiting their right to freely express

their faith to their congregants and to the community, and by applying vague statutes, ordinances and regulations against them.

COUNT VIII

**Violation of the Hawaii Constitution
Freedom of Speech: Art. I, § 4**

130. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

131. Defendants have deprived and continue to deprive Plaintiffs of their right to speak on matters of religion, as secured by Article I, Section 4 of the Hawaii Constitution, by discriminating against Plaintiffs based on the religious viewpoint of their expression, by inhibiting their right to freely express their faith to their congregants and to the community, and by applying vague statutes, ordinances and regulations against them.

COUNT IX

**Violation of the United States Constitution
Freedom of Assembly: First and Fourteenth Amendments
(42 U.S.C. § 1983)**

132. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

133. Defendants have deprived and continue to deprive Plaintiffs of their right freely to assemble for the purposes of worship, as secured by the First Amendment to the United States Constitution and made applicable to the States by the Fourteenth Amendment, by prohibiting Plaintiffs from worshipping in a location where similar, but nonreligious, groups would be permitted to assemble.

COUNT X

**Violation of the Hawaii Constitution
Freedom of Assembly: Art. I, § 4**

134. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

135. Defendants have deprived and continue to deprive Plaintiffs of their right freely to assemble for the purpose of worship, as secured by Article I, Section 4 of the Hawaii Constitution, by prohibiting Plaintiffs from worshipping in a location where similar, but nonreligious, groups would be permitted to assemble.

COUNT XI

**Violation of the United States Constitution
Equal Protection: Fourteenth Amendment
(42 U.S.C. § 1983)**

136. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

137. Defendants have deprived and continue to deprive Plaintiffs of their right to equal protection of the laws, as secured by the Fourteenth Amendment to the United States Constitution, by discriminating against Plaintiffs in their application of the laws of the State of Hawaii and the Maui County Code.

COUNT XII

**Violation of the Hawaii Constitution
Equal Protection: Art. I, §§ 2 & 5**

138. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

139. Defendants have deprived and continue to deprive Plaintiffs of their right to equal protection of the laws, as secured by Article I, Sections 2 and 5 of the Hawaii Constitution, by discriminating against Plaintiffs in their application of the laws of the State of Hawaii and the Maui County Code.

COUNT XIII

**Violation of the United States Constitution
Due Process: The Fourteenth Amendment
(42 U.S.C. § 1983)**

140. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

141. Defendants have deprived and continue to deprive Plaintiffs of due process of law, as secured by the Fourteenth Amendment to the United States Constitution, by denying Plaintiffs use of their property based on an irrational and discriminatory motivation.

COUNT XIV

**Violation of the Hawaii Constitution
Due Process: Art. I, §§ 2 & 5**

142. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

143. Defendants have deprived and continue to deprive Plaintiffs of due process of law, as secured by Article I, Sections 2 and 5 of the Hawaii Constitution, by denying Plaintiffs use of their property based on an irrational and discriminatory motivation.

COUNT XV

**Violation of the Hawaii Administrative Procedures Act
(H.R.S. C. 91)**

144. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

145. The Decision of the Maui Planning Commission was in violation of constitutional and statutory provisions; in excess of statutory authority and jurisdiction of the agency; made upon unlawful procedure; affected by other errors of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and arbitrary, capricious and characterized by abuse of discretion and unwarranted exercise of discretion.

COUNT XVI

Violation of the Maui County Code ch. 19.30A

146. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

147. The Planning Commission failed to follow Title 19 Comprehensive Zoning Provisions of the Maui County Code, Section 19.510.070, by erroneously applying HAR 15-15-95, Rules of the State Land Use Commission.

COUNT XVII

**Conspiracy to Violate Civil Rights
(42 U.S.C. § 1985)**

148. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

149. Each of the Defendants Samuel Kalalau III, Jeremy F. Kozuki, Bernice Lu, Star Medeiros, Susan Moikeha, Herman Nascimento, Ransom Piltz, Joseph Pontanilla, Mona Claire H. Richardson, John E. Min, and Judith Neustadter Fuqua conspired with one or more of the other Defendants named in this paragraph and others for the purpose of depriving each of the Plaintiffs of the equal protection of the laws, or of equal privileges and immunities under the laws, and/or for the purpose of preventing or hindering the constituted authorities of Hawaii from giving or securing to Plaintiffs the equal protection of the laws. One or more of the Defendants

named in this paragraph engaged in one or more overt acts in furtherance of this conspiracy which caused injury to the person and property of each of the Plaintiffs and/or deprived each of the Plaintiffs from having and exercising the full rights or privileges of a citizen of the United States.

150. The acts of the Defendants named in the immediately preceding paragraph were done in knowing violation of plaintiffs' legal and constitutional rights, and have directly and proximately caused the Plaintiffs injury.

151. Plaintiff Hale O Kaula brings the allegations that comprise Count XVII on behalf of all of its members, including those not listed specifically as plaintiffs in this complaint.

COUNT XVIII

Failure to Prevent Conspiracy to Violate Civil Rights (42 U.S.C. § 1986)

152. Each of the preceding paragraphs is incorporated by reference as if set forth fully herein.

153. Defendants the County of Maui, the Maui Planning Commission, Samuel Kalalau III, Jeremy F. Kozuki, Bernice Lu, Star Medeiros, Susan Moikeha, Herman Nascimento, Ransom Piltz, Joseph Pontanilla, Mona Claire H. Richardson, John E. Min, and Judith Neustadter Fuqua had knowledge of the conspiracy to violate Plaintiffs' civil rights described in paragraphs 139-142, and knowledge that this conspiracy and the acts in furtherance of it were about to be committed. Each of the Defendants named in this paragraph had the power to prevent or aid in preventing the commission of that conspiracy and the overt acts in furtherance of that conspiracy, but neglected or refused to exercise that power.

154. The acts of the Defendants named in the immediately preceding paragraph were done in knowing violation of plaintiffs' legal and constitutional rights, and have directly and proximately caused the Plaintiffs injury.

155. Plaintiff Hale O Kaula brings the allegations that comprise Count XVIII on behalf of all of its members, including those not listed specifically as plaintiffs in this complaint.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court grant the following relief:

- (a) A preliminary and permanent injunction restraining Defendants, their officers, agents, employees, and attorneys from enforcing or endeavoring to enforce Hawaii Revised Statutes 205.6 and 205-4.5, § 15-15-95(b) of the Rules of the Land Use Commission of the State of Hawaii, and Maui County Code §§ 19.30A.060 and 19.510.070, to require Plaintiffs to seek a special use permit for the development and use of the property at Anuhea Place, Pukalani, Maui, Hawaii as a church;

- (b) A declaration that Hawaii Revised Statutes 205.6 and 205-4.5, § 15-15-95(b) of the Rules of the Land Use Commission of the State of Hawaii, and Maui County Code §§ 19.30A.060 and 19.510.070, and their application in such manner to exclude Plaintiffs is void, invalid and unconstitutional as violating the Free Exercise and Free Speech protections of the United States and Hawaii Constitutions, the right to Equal Protection and Due Process of law as protected by the United States and Hawaii Constitutions, and the Religious Land Use and Institutionalized Persons Act of 2000;

- (c) An award of compensatory damages against Defendants in favor of Plaintiffs as the Court deems just for the loss of Plaintiffs' free exercise of religion, freedom of speech, freedom of assembly, deprivation of Plaintiffs' right to equal protection and due process under the laws, and expenses incurred by Plaintiffs and caused by the Zoning Ordinance and Defendants' actions;
- (h) An award to Plaintiffs of full costs and attorney's fees arising out of this litigation; and
- (i) Such other and further relief as this Court may deem just and appropriate.

DEMAND FOR JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a trial by jury in this action of all issues so triable.

DATED: Honolulu, Hawaii, February 1, 2002.

CHARLES H. HURD
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HALE O KAULA CHURCH, DARYL ARITA,
Elder; THOMAS FOSTER, Elder; DAVID
JENKINS, Elder; and ROBERT POULSON, Elder;

Plaintiffs,

v.

THE MAUI PLANNING COMMISSION;
SAMUEL KALALAU III, JEREMY F. KOZUKI,
BERNICE LU, STAR MEDEIROS, SUSAN
MOIKEHA, HERMAN NASCIMENTO,
RANDY PILTZ, JOSEPH PONTANILLA,
MONA RICHARDSON, in their individual
capacities and in their official capacities as
members of the Maui Planning Commission;
JOHN E. MIN, in his individual capacity and in
his official capacity as the Director of the Maui
Department of Planning; THE COUNTY OF
MAUI, HAWAII; JAMES APANA JR., in his
official capacity as Mayor of the County of Maui;
JUDITH NEUSTADTER FUQUA, in her
individual capacity and in her official capacity as
Hearing Officer for the Maui Planning
Commission,

Defendants.

CIVIL NO. 01-00615 SPK KSC

SUMMONS

SUMMONS

To the above-named Defendants:

1. The Maui Planning Commission
2. Samuel Kalalau III, member
3. Jeremy F. Kozuki, member
4. Bernice Lu, member
5. Star Medeiros, member
6. Susan Moikeha, member
7. Herman Nascimento, member
8. Randy Piltz, member
9. Joseph Pontanilla, member
10. Mona Richardson, member
11. John E. Min, Director, Maui
Planning Department
12. The County of Maui, Hawaii
13. James Apana, Jr., Mayor of Maui
14. Judith Neustadter Fuqua, Hearing Officer

YOU ARE HEREBY SUMMONED and required to file with the Clerk of

this Court and serve upon:

Plaintiffs' Attorney: CHARLES H. HURD
 1500 City Financial Tower
 201 Merchant Street
 Honolulu, Hawaii 96813

an answer to the Second Amended Complaint which is herewith served upon you, within twenty (20) days after the service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

DATED: Honolulu, Hawaii _____.

CLERK OF THE COURT

DEPUTY CLERK OF THE COURT

RETURN OF SERVICE

I HEREBY CERTIFY that I served the documents listed herein by delivering a certified copy of each document to the person(s) at the time, date and place herein shown.

DOCUMENTS SERVED:

Complaint; Demand for Jury Trial; Summons

<u>NAME OF PERSON SERVED</u>	<u>TIME</u>	<u>DATE</u>	<u>PLACE</u>
1. _____			
2. _____			
3. _____			
4. _____			
5. _____			
6. _____			
7. _____			
8. _____			
9. _____			

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
_____	_____	_____

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and State of Service Fees is true and correct.

DATED: _____

Signature of Server
Deputy Sheriff/Police Officer

Address of Server

ACKNOWLEDGMENT OF SERVICE

Receipt of the document(s) listed on the reverse as item(s) 1 to ___ is hereby acknowledged.

Name	Time	Date
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Name	Time	Date
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CLERK OF THE COURT

DEPUTY CLERK OF THE COURT