LAW OFFICE OF LANCE D. COLLINS
Lance D. Collins (8246)
Post Office Box 179336
Honolulu, HI 96817
Telephone: (808) 243-9292

LAWYERS FOR EQUAL JUSTICE
M Victor Geminiani (4354)
119 Merchant Street, Ste. 605A
Honolulu, HI 96813
Telephone: (808) 587-7605

HOGAN LOVELLS US LLP
Andrew C. Lillie *(pro hac vice)*
Andrew M. Nussbaum *(pro hac vice)*
1601 Wewatta Street, Ste. 900
Denver, CO 80202
Telephone: (303) 899-7300

Joseph L. Lambert *(pro hac vice)*
Two North Cascade Avenue, Ste. 1300
Colorado Springs, CO 80903
Telephone: (719) 448-5900

Attorneys for Plaintiffs
MICHAEL TUTTLE, CHI PILIALOHA GUYER,
JOSEPH VU, and SHAZADA RAYLEEN YAP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP, Plaintiffs, vs. FRONT STREET AFFORDABLE HOUSING PARTNERS, a domestic limited partnership, 3900 LLC, a foreign limited liability company and HAWAII HOUSING FINANCE & DEVELOPMENT CORPORATION, Defendants.	Civil No. 18-cv-00218-JAO-KJM **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF**

Plaintiffs Michael Tuttle, Chi Pilialoha Guyer, Joseph Vu, and Shazada Rayleen Yap (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby move for summary judgment on their First, Second, and Third Claims for Relief in their Amended Complaint (ECF No. 5). There are no genuine issues of disputed material fact regarding these claims and Plaintiffs are entitled to a summary judgment in their favor as a matter of law on these three claims.

Plaintiffs bring this Motion under Fed. R. Civ. P. 56 and LR 56.1. This Motion is based on the Memorandum in Support of Plaintiffs' Motion, the Joint Statement of Stipulated Facts (ECF 42), Plaintiffs' Concise Statement of Material Facts in Support of Their Motion for Summary Judgment on Their First, Second,

and Third Claims for Relief, including the Declarations attached thereto, and such other evidence as may be adduced at the hearing on this Motion.

Dated: October 19, 2018

Respectfully submitted,

/s/ Lance D. Collins
LAW OFFICE OF LANCE D. COLLINS
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

/s/ M. Victor Geminiani
LAWYERS FOR EQUAL JUSTICE
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

/s/ Joseph L. Lambert
HOGAN LOVELLS US LLP
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP, Plaintiffs, vs. FRONT STREET AFFORDABLE HOUSING PARTNERS, a domestic limited partnership, 3900 LLC, a foreign limited liability company and HAWAII HOUSING FINANCE & DEVELOPMENT CORPORATION, Defendants.	Civil No. 18-cv-00218-JAO-KJM **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THEIR FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF**

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INTRODUCTION

Maui is in an affordable housing crisis. Homelessness has skyrocketed in the county, while rents have increased far beyond inflation over the last several years. The Front Street Apartments located in Lahaina, Maui ("Project" or "Front Street") is one of the few affordable housing complexes left in Maui. This suit is about whether Front Street will stay affordable as its owner and the State promised it would.

At its core, this case turns on the application of well-settled principles of Hawai'i law to an unambiguous restrictive covenant that runs with the land at issue—Front Street. The owner of the Project, Defendant Front Street Affordable Housing Partners ("FSA"), operates Front Street as low-income housing under the federal Low-Income Housing Tax Credit ("LIHTC") program, and has done so for the past sixteen years. No one disputes that the Project is subject to applicable federal law concerning the LIHTC program, including 26 U.S.C. § 42 and regulations promulgated thereunder. The parties' instant dispute instead centers on the extent to which FSA obligated itself (and its successors) through a restrictive covenant running with the land to operate the Project as low-income housing *beyond* the minimum requirements under federal law, and whether Plaintiffs—as current or prospective tenants of Front Street—have standing to enforce that covenant.

When it obtained approval to operate Front Street as low-income housing in 2002, FSA promised it would do so for no less than 51 years (through at least December 31, 2051)—which was considerably longer than the 30-year minimum time-requirements imposed by federal law. FSA did so by entering into and recording a "Declaration of Restrictive Covenants for Low-Income Housing Credits" ("Declaration"). The Declaration makes clear that:

- FSA and its successors would rent Front Street at reduced rates to individuals whose income qualifies them for the LIHTC program for no less than 51 years, terminable before then if—and only if—Front Street is acquired by foreclosure or a deed in lieu of foreclosure (neither of which has occurred).
- The Declaration's low-income use restrictions are covenants running with the land or, alternatively, equitable servitudes.
- And, the benefits of the Declaration and its associated covenants run to—and are enforceable by—past, present, and prospective tenants of the Project.

Plaintiffs are present and prospective tenants of Front Street who seek to ensure that FSA honors its promise to keep the Project affordable for the full 51-year period set forth in the Declaration, up to and including December 31, 2051.

In short, if the Declaration says what it means and means what it says, Plaintiffs should be entitled to judgment in their favor as a matter of law on their

First, Second, and Third Claims for Relief in their Amended Complaint. Plaintiffs believe the only dispute, then, concerns Defendants' unilateral attempt to "release" the Declaration without Plaintiffs' (or any other tenant beneficiary's) consent.

In 2016, Defendant Hawai'i Housing Finance & Development Corporation ("HHFDC")—the state agency designated to administer the LIHTC program in Hawai'i—executed a "Release of Declaration of Restrictive Covenants for Low-Income Housing Credits" ("Release"), which purported to release FSA and the fee owner of the Project (Defendant 3900 LLC's predecessor-in-interest) from their low-income commitments under the Declaration so that FSA could begin renting units at the Project at Maui's unaffordable full market rates. The problem is that Defendants did not seek or obtain the consent of Plaintiffs (or any other tenant beneficiary of the Declaration) before doing so. That is fatal to the Release: the law is clear that a restrictive covenant—like the Declaration—is terminable by release only if the consent of each and every beneficiary of the covenant—here, Plaintiffs—is sought and obtained. This conclusion is grounded in bedrock principles of Hawai'i law and the nearly identical decision of *Nordbye v. BRCP/GM Ellington*, 266 P.3d 92 (Or. Ct. App. 2011). In *Nordbye*, the court struck down an owner's attempt to avoid a practically indistinguishable restrictive covenant by unilaterally "releasing" that project's low-income housing restrictions without obtaining the consent of the project's tenants.

Plaintiffs thus move for summary judgment under Fed. R. Civ. P. 56 and LR 56.1 on their First, Second, and Third Claims for Relief in their Amended Complaint (ECF No. 5). They respectfully request that this Court enter an order (a) declaring that the Declaration remains in full force and effect through December 31, 2051, and that the Release is null and void and of no force or effect, and (b) enjoining any further violation by Defendants of the Declaration's low-income use restrictions.[1]

BACKGROUND

1. The LIHTC program

The LIHTC program, codified at 26 U.S.C. § 42, incentivizes private parties to develop low-income rental housing in exchange for substantial tax credits. *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 188 F. Supp. 2d 1148, 1152 (D.S.D. 2002), *aff'd,* 342 F.3d 871 (8th Cir. 2003). Under the LIHTC program, the federal government allocates tax credits to states, and state housing agencies distribute the credits to private investors. *See generally* 26 C.F.R. § 1.42-1T. State housing

[1] Plaintiffs do not move for summary judgment on their Fourth and Fifth Claims for Relief at this time. Those claims challenge HHFDC's failure to promulgate rules and use reasonable efforts concerning the LIHTC program's "qualified-contract" process (discussed below). If the Court declares the Declaration to be in full force and effect and the Release to be null and void, Plaintiffs' Fourth and Fifth Claims will be rendered moot because those claims presume that FSA is not bound by the Declaration and is able to utilize the qualified-contract process to jettison the Project's low-income housing restrictions before December 31, 2051.

agencies such as HHFDC also are responsible for ensuring compliance with the program. *See* 26 U.S.C. § 42(m). In exchange for receiving tax credits under the program, a tax-credit recipient must commit to maintain the project as low-income housing for 30 years. *Id.* § 42(h)(6). The 30-year commitment is divided into two parts: an initial 15-year "compliance period" and a 15-year "extended use period." *Id.*

For purposes of this litigation, the LIHTC program imposes two key occupancy restrictions on participating housing projects. First, the tax-credit recipient agrees that it will rent a specified number of units in a qualifying project to low-income tenants. *Id.* § 42(g). Second, the recipient and the state housing agency must record the recipient's low-income commitment as a restrictive covenant, "which allows individuals who meet the income limitation applicable to the building . . . (whether prospective, present, or former occupants of the building) the right to enforce in any State court the requirement and prohibitions" in the Declaration. *Id.* § 42(h)(6)(B)(ii).

2. The Project and the relevant players

Front Street is an affordable housing Project located in Lahaina, Maui, Hawai'i. FSA owns and operates Front Street. JSSF ¶ 3. FSA leases the fee estate on which Front Street is located from Defendant 3900 LLC ("3900"), which is the successor-in-interest to 3900 Corp., the former fee owner. *Id.* ¶¶ 3–4. HHFDC is

the state agency responsible for administering the LIHTC program in Hawai'i. *Id.* ¶ 2; Haw. Rev. Stat. §§ 201H-2, 201H-16. HHFDC is the successor-in-interest to Housing and Community Development Corporation of Hawai'i ("HCDCH"), which formerly administered the LIHTC program in Hawai'i. JSSF ¶ 2.

3. The Declaration

In 2002, FSA, 3900's predecessor, 3900 Corp., and HHFDC's predecessor, HCDCH, entered into the Declaration as required by 26 U.S.C. § 42(h)(6). JSSF ¶ 8, **Ex. B** at 1. The Declaration memorializes FSA's promise to maintain 141 apartment units available to low-income residents of Maui in exchange for substantial tax credits under the LIHTC program through at least December 31, 2051. *Id.* at 1–2; *see also* Joint Statement of Stipulated Facts ("JSSF") ¶ 21, **Ex. J** at 1(noting that the FSA's "Affordability Commitment Expires on December 31, 2051"). The Declaration was recorded with the Hawai'i Bureau of Conveyances on August 9, 2002, at reception no. 20002.144948. *Id.* at 1.

Pertinent to this case, the Declaration contains three key provisions: (1) a low-income covenant running with the Project; (2) a 51-year term—21 years beyond what is required by statute; and (3) an enforcement provision allowing enforcement by past, present, and prospective tenants of the Project.

First, the Declaration by its terms created a covenant running with the land. Pursuant to § 3(g) of the Declaration, "[d]uring the term of th[e Declaration], all

units subject to the [LIHTC program] shall be leased and rented or made available to members of the general public who qualify as Low-Income Tenants . . . under the applicable election specified in Section 42(g) of the [Internal Revenue] Code." FSA agreed that this commitment "shall be and [is a] covenant[] running with the Project, encumbering the Project for the term of th[e Declaration], binding upon [FSA]'s successors in title and all subsequent owners and operators of the project." JSSF ¶ 8, **Ex. B** § 2(b). The Declaration also makes clear that FSA:

> hereby agrees that any and all requirements of the laws of the State of Hawaii to be satisfied in order for the provisions of this [Declaration] to constitute restrictions and covenants running with the Project shall be deemed to be satisfied in full, and that any requirements of privileges of estate are intended to be satisfied, or in the alternate, that an equitable servitude has been created to insure that these restrictions run with the Project.

Id. Thus, by its terms the Declaration is a restrictive covenant running with the Project or, alternatively, an equitable servitude under Hawai'i law.[2]

Second, in § 5 of the Declaration, FSA agreed to maintain its low-income commitment for a 51-year term:

> [T]his [Declaration] and the Section 42 Occupancy Restrictions specified herein shall commence with the first day in the Project period of which any building which is part of the Project is placed in service and shall end on the date which is thirty-six . . . years after the close of the initial 15-year compliance period, for a total or fifty-one . . . years ("Extended Use Period").

[2] § 7(e) of the Declaration states that Hawai'i law governs its interpretation and enforcement. JSSF ¶ 8, **Ex. B** § 7(e).

Id. § 5(a). By the Declaration's plain terms, there are only two circumstances in which this 51-year term may be cut short—(1) "acquisition of the Project by foreclosure," and (2) "instrument in lieu of foreclosure." *Id.* § 5(b). Neither circumstance has occurred here. JSSF ¶ 9.

Third, §§ 2(b) and 6(b) of the Declaration make all prospective, present, and future occupants third-party beneficiaries of the Declaration, and empowers them to enforce those covenants, including the Declaration's low-income commitment:

> In consideration for receiving low-income housing credits for this Project, [FSA] hereby agrees and consents that, for any breach of the provisions hereof, [HCDCH] ***and any individual who meets the income limitation applicable under Section 42 ("The Beneficiaries") (whether prospective, present or former occupant)*** shall be entitled, in addition to all other remedies provided by law or in equity, to enforce specific performance by [FSA] of [FSA]'s obligations under this [Declaration].

JSSF ¶ 8, **Ex. B** § 6(b) (emphasis added); *see also id.* § 2(b)(iii) ("[FSA] intends, declares and covenants . . . that this [Declaration] and the covenants and restrictions set forth in this [Declaration] . . . shall bind [FSA] (and the benefits shall inure to [HCDCH] and any past, present or prospective tenant of the Project).").

The Declaration thus (1) runs with the land (2) for 51 years and (3) benefits third-party past, present, and prospective tenants of the Project, who are empowered to enforce the Declaration's covenants during the Declaration's term.

4. FSA's qualified-contract request and the purported Release of the Declaration

Though the LIHTC program requires a 30-year low-income commitment from recipients of program tax credits, a recipient may apply to be released from its low-income commitment after a 15-year "compliance period" through a so-called "qualified contract." 26 U.S.C. § 42(h)(6)(E)(i)(II). A qualified contract is "a bona fide contract to acquire (within a reasonable period after the contract is entered into) the non-low-income portion of the building for fair market value and the low-income portion of the building for an amount not less than" a statutorily determined sum. *Id.* § 42(h)(6)(F). Under the qualified-contract process, a LIHTC participant requests a qualified contract, and the state agency responsible for administering the LIHTC program—HHFDC in Hawai'i—then offers a low-income rental property for sale to the general public. 26 C.F.R. § 1.42-18(d)(2). If the state agency is unable to find a buyer at the qualified-contract price within one year after receipt of the project owner's request, the use restrictions may terminate. 26 U.S.C. § 42(h)(6)(E)(i)(II), § 42(h)(6)(I).

Significantly, however, the qualified-contract process does not apply—and a project owner may not opt-out of its low-income commitment through a qualified-contract—"if more stringent requirements are provided in the [declaration] or in State law." *Id.* § 42(h)(6)(E)(i). That is precisely the situation here: the

Declaration does not permit FSA to avoid the Declaration's covenants through a qualified-contract. Rather, as noted above, the Declaration prescribes only two circumstances in which the Declaration's 51-year term may be cut short—(1) "acquisition of the Project by foreclosure," and (2) "instrument in lieu of foreclosure," neither of which has occurred here. JSSF ¶ 9.

In 2015, FSA submitted a qualified-contract request to HHFDC. JSSF ¶ 13. HHFDC was unable to find a bona fide purchaser within the one-year qualified-contract period. JSSF ¶ 19, **Ex. G** at 2.[3] So, on December 16, 2016, HHFDC unilaterally executed the Release that purported to release FSA and 3900 from their low-income commitments under the Declaration effective August 4, 2016. *Id.* at 2. HHFDC did so despite the Declaration imposing more stringent requirements than the default LIHTC program requirements, including an extended use period that extends 21-years beyond what is required by the LIHTC program.

5. Plaintiffs' interest in the dispute and standing to enforce the Declaration

Plaintiffs Tuttle, Guyer, and Vu meet the low-income qualifications for residing in the Project. Concise Statement of Material Facts ("CSMF") ¶ 3.

[3] Plaintiffs' Fourth and Fifth Claims for Relief address HHFDC's failure during the qualified-contract process to (1) use reasonable efforts to offer the Project for sale to the general public as it was required to do (assuming the Declaration was validly terminated, which it was not), *see* 26 C.F.R. § 1.42-18(d)(2); and (2) adopt administrative rules pertaining to the method of offering a qualified contract, Haw. Rev. Stat. § 91-3. Plaintiffs will pursue these claims to the extent they are unsuccessful in enforcing the Declaration against the Defendants via this Motion.

Plaintiffs Tuttle, Guyer, and Vu are present tenants of the Project. *Id.* ¶ 2. Plaintiff Yap is a prospective tenant of the Project. FSA, HHFDC, and 3900 did not obtain the consent of, or otherwise consult with, Plaintiffs Tuttle, Guyer, and Vu before HHFDC unilaterally signed the Release. *Id.* ¶ 4.

If FSA is permitted to violate the use-restriction covenants in the Declaration, Plaintiffs Tuttle, Guyer, and Vu's rents will increase to market levels and they will no longer be able to live in the Project. *Id.* ¶ 5. And Plaintiff Yap will be deprived of one of the few low-income housing options in Maui.

ARGUMENT

Although the LIHTC program generally is a creature of federal law, this case turns on the application of Hawai'i state law to the Declaration—an unambiguous covenant running with the land. The Declaration created a real covenant in gross running with the land or, alternatively, an equitable servitude, the benefit of which inures to Plaintiffs and other current and prospective tenants of the Project. As such, Defendants' failure to obtain the consent of Plaintiffs before terminating FSA's commitments and promises under the Declaration renders that purported termination—the Release—void as a matter of law and of no force or effect.

Indeed, the only court to have addressed the standing of low-income tenants to enforce a restrictive covenant in gross recorded under the LIHTC program held, in *Nordbye v. BRCP/GM Ellington*, 266 P.3d 92, 224–25 (Or. Ct. App. 2011), that

termination of such a covenant requires the consent of tenants of a low-income housing project. Here, Defendants failed to obtain Plaintiffs' consent to terminate the Declaration. Accordingly, the Release is null, void, and of no force or effect as a matter of law.

1. The Declaration created a real covenant in gross running with the land.

a. The Declaration created a real covenant in gross enforceable by Plaintiffs.

The Declaration created a real covenant in gross, whose benefit runs to third parties: past, present, and prospective tenants of Front Street, including Plaintiffs. Unlike a covenant appurtenant, whose benefit is tied to ownership of the real property at issue, the benefit of a real covenant in gross "is not tied to ownership or occupancy of a particular unit or parcel of land." Restatement (Third) of (Servitudes) § 1.5 (2000) ("Restatement").[4] That is, a covenant is in gross "if created in a person who held no property that benefited from the servitude." *Id.* § 4.5. Covenants in gross are valid under Hawai'i law. *See, e.g.*, *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. P'ship*, 862 P.2d 1048, 1059 (Haw. 1993).[5]

[4] The Supreme Court of Hawai'i follows the Restatement Third's approach to covenants and servitudes. *See Neighborhood Ass'n v. Hawai'i*, 403 P.3d 214, 237 (Haw. 2017) (relying on Restatement (Third) of (Servitudes) (2000)); *see also Polumbo v. Gomes*, NO. CAAP-13-0003145, 2018 WL 1082986 at 5–7 (Haw. Ct. App. Feb. 28, 2018) (same).

[5] *See also Lalakea v. Hawaiian Irrigation Co.*, 36 Haw. 692, 706 (Haw. 1944) (recognizing that the property interest in question is an "easement in gross").

Here, the Declaration created a covenant in gross whose benefit runs to the Plaintiffs. The Declaration says that the benefit of the restrictive covenants "shall inure to . . . any past, present or prospective tenant of the Project"—a group that includes Plaintiffs. JSSF ¶ 8, **Ex. B** § 2(b)(iii). And indeed, in § 6(b) "[FSA] . . . agree[d] . . . that, for any breach of the provisions [of the Declaration], . . . any individual who meets the income limitation applicable under Section 42 ("The Beneficiaries") (whether prospective, present or former occupant) shall be entitled, in addition to all other remedies provided by law or in equity, to enforce specific performance by [FSA] of [FSA]'s obligations under this [Declaration]." *Id.* § 6(b) (emphasis omitted). This language reflects the prototypical covenant-in-gross relationship. The Declaration places a burden on FSA, as owner of the Project (including FSA's successors)—the low-income use restrictions. And third-party tenants, like Plaintiffs, receive the benefit of those low-income use restrictions.

The rule of contract interpretation pertaining to third-party beneficiaries provides a helpful analogy. A contract empowers a third-party beneficiary to enforce a contract if "an intent to make the obligation inure to the benefit of such person . . . clearly appear[s] in the contract." *Jou v. Dai-Tokyo Royal State Ins. Co.*, 172 P.3d 471, 480 (Haw. 2007) (citation omitted). Here, the Declaration uses that precise language—the benefit of the Declaration's covenant "inure[s]" to past,

present, and prospective tenants. This language expresses a clear intent to create a covenant in gross enforceable by Plaintiffs. *See* Restatement § 2.6 cmt. e ("[T]he parties to a transaction creating a servitude may freely create benefits in third parties . . . . If their intent is expressed, and other requirements for creating a servitude have been met, the benefits in third parties will be given effect.").

Accordingly, the Declaration created a covenant in gross whose benefit runs to the Plaintiffs.

b. The burden of the Declaration's low-income covenant runs with the land.

To run with the land, (1) a covenant must "touch and concern" the property, (2) the "covenanting parties must intend [the covenant] to run with the land," and, if the property has been transferred, "(3) there must be privity of estate." *Waikiki Malia Hotel*, 862 P.2d at 1057. The first two elements are satisfied here. And because there has been no transfer of the Project, the last element is not applicable.

First, the low-income use restrictions touch and concern the Project. To touch and concern the land, the covenant must "relate[] to the use of the land and the ownership interest in it," and "it must extend to the land so that the condition required to be performed affects the quality or value of the land." *Id.* Here, the Declaration's low-income use restrictions clearly affect the use of the land: the Declaration delimits to whom FSA may rent apartments. And the Declaration's

use restrictions also affect the value of the land: by limiting the amount of rent FSA can recoup from renting the apartments. If it were otherwise, FSA would not now be attempting to escape its low-income commitments under the Declaration.

Second, by the Declaration's plain language, the covenanting parties—FSA, HHFDC, and 3900—clearly intended for the Declaration's covenants to run with the Project:

> the Fee Owner [3900] and the Owner [FSA] . . . intend, declare, and covenant that the regulatory and restrictive covenants set forth herein governing the use, occupancy and transfer of the Project ***shall be and are covenants running with the Project*** for the term stated herein and binding upon all subsequent owners of the Project for such term, and are not merely personal covenants of the Owner.

JSSF ¶ 8, **Ex. B** at 2 (emphasis added). The Declaration provides that the covenant "shall run with the Project"; this shows that the parties intended the covenant to run with the land. But the Declaration must also specify an intended beneficiary. *Waikiki Malia Hotel*, 862 P.2d at 1057. The Declaration does that. As explained, the Declaration specifies that "past, present or prospective tenant[s]" of the Project are the intended beneficiaries of the Declaration's covenants. *Id.* § 2(b)(iii).

Third, there is no question of privity of estate here because the Project has not been sold or otherwise transferred. If the Project is sold or transferred in the future, however, the low-income use restrictions would bind any future owner. This is because the touch-and-concern and intention elements are satisfied here. And FSA and 3900 encumbered the Project with these use-restrictions for the full

51-year term of the Declaration. So, any future owner of the Project would take from FSA and/or 3900 subject to the use restrictions in the Declaration. *See Lee v. Puamana Cmty. Ass'n*, 128 P.3d 874, 881 (Haw. 2006) ("[W]e have long held that where a deed makes a specific reference to a restrictive covenant, the grantee is on notice that his interest is subject to the terms of that restrictive covenant.").[6]

c. The Declaration has not been effectively terminated or released.

By its terms, the Declaration may be cut short in only two circumstances, neither of which has occurred here. *First,* the Declaration may terminate upon "acquisition of the Project by foreclosure." JSSF ¶ 8, **Ex. B** § 5(b). *Second,* the Declaration may terminate upon "acquisition of the Project by . . . instrument in lieu of foreclosure."[7] *Id.* Because neither event has occurred, the Declaration

[6] Alternatively, even if the Declaration did not create a covenant in gross running with the land (and it did), the Declaration created an equitable servitude enforceable by Plaintiffs. In Section 2(b)(iii) of the Declaration, FSA represented that the Declaration created covenants running with the land, "or in the alternate, that an equitable servitude has been created to insure that these restrictions run with the Project." JSSF ¶ 8, **Ex. B** § 2(b)(iii). Hawaii courts have long recognized that, where a declaration expressly creates restrictive covenants enforceable as equitable servitudes, those servitudes will be enforceable by the intended beneficiary. *Lee*, 128 P.3d at 881; *see also Brescia v. N. Shore Ohana*, 168 P.3d 929, 948 (Haw. 2007) ("[W]here a deed makes a specific reference to a restrictive covenant, the grantee is on notice that his interest is subject to the terms of that restrictive covenant."). Therefore, at a minimum, this Court should enforce those use restrictions as equitable servitudes.

[7] This is colloquially known as a "deed in lieu," *i.e.* "A deed by which a borrower conveys fee-simple title to a lender in satisfaction of a mortgage debt and as a substitute for foreclosure." Deed, Black's Law Dictionary (10th ed. 2014).

remains in full force and effect, notwithstanding Defendants' improper attempt to release it.

Of course, a covenant may be terminated by a *proper* release executed by the beneficiaries of the covenant. *See* Restatement § 7.3 ("A release by the beneficiary of a servitude modifies or extinguishes the beneficiary's interest in the servitude to the extent specified in the instrument of release."); *see also id.* § 7.1. But that rule has no application here because Defendants failed to seek or obtain the consent of Plaintiffs (and every other beneficiary of the Declaration) before the Release was executed in December 2016. Indeed, the Release was executed by only one party to the covenants in the Declaration—HHFDC. JSSF ¶ 19, **Ex. G** at 1. The Release was not executed by FSA, 3900, Plaintiffs, or any other past, present, or prospective tenant of the Project, and certainly not agreed to by Plaintiffs. Moreover, the Release violates § 3(o) of the Declaration, pursuant to which FSA

> Warrant[ed] that it . . . will not execute any other agreement with provisions contradictory to, or in opposition to, the provisions hereof, and that in any event, the requirements of this [Declaration] are paramount to and controlling as to the rights and obligations herein set forth and supersede any other requirements in conflict herewith.

JSSF ¶ 8, **Ex. B** § 3(o). This provision memorializes the familiar principle of contract law that "[d]ischarge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and

promisee is ineffective if a term of the promise creating the duty so provides." Restatement (Second) of Contracts § 311(1) (1981).

Consequently, the Release is void and of no force or effect.

d. The Release violates the low-income covenants in the Declaration.

The Release directly violates the covenants in the Declaration. It purports to terminate the restrictive covenants in the Declaration to allow FSA to sell or otherwise operate the Project unencumbered by its 51-year low-income use commitment. JSSF ¶ 19, **Ex. G** at 2. But the Release is invalid for the reasons expressed above. So the Release and any attempt to effectuate the Release is a violation of the Declaration that this Court must enjoin.

* * *

In sum, the Declaration is a real covenant in gross that remains in full force and effect, despite Defendants' invalid attempt to release it. The Declaration requires FSA, among other things, to comply with the low-income requirements of the LIHTC program. This covenant is enforceable by Plaintiffs as intended third-party beneficiaries. Because no valid termination of the Declaration's covenants has occurred, Defendants' attempt to abscond the restrictive covenants in the Declaration is void. This Court should declare the Release invalid and enjoin any further attempt by Defendants to circumvent the covenants in the Declaration.

2. *Nordbye v. BRCP/GM Ellington* is spot-on.

Nordbye is indistinguishable from this action. There, a former tenant of a housing complex financed by the LIHTC program brought an action for an injunction and declaratory relief against the housing complex. *Id.* at 94, 97. Just like the Declaration here, a "Declaration of Land Use Restrictive Covenants for Low–Income Housing Tax Credits," into which the owner of the LIHTC housing complex in *Nordbye* entered, created low-income restrictive covenants virtually identical to those at issue here:

> The Owner intends, declares and covenants, . . . that this Declaration and the covenants and restrictions set forth in this Declaration . . . shall be and are covenants running with the Project land, . . . and . . . shall bind the Owner (and the benefits shall inure to . . . any past, present or prospective tenant of the Project) . . . .

Id. at 95–96. The *Nordbye* declaration also allowed prospective, present, or former occupants of the housing complex to enforce the covenants in the declaration—just like the Declaration here does. *Id.* at 96 (stating that "any individual who meets the income limitation applicable under section 42 (whether prospective, present or former occupant) shall be entitled, for any breach of the provisions hereof . . . To enforce specific performance by the owner of its obligations under this declaration." (emphasis omitted)).

During its first decade of operation, the housing complex in *Nordbye* experienced LIHTC-compliance issues, which caused the original owner to convey

the property to a new owner. *Id.* Yet the new owner did not bring the housing complex into compliance with the LIHTC restrictions, so the Oregon state housing agency tasked with administering the LIHTC program decided unilaterally to remove the complex from the program. *Id.* The Oregon housing agency then executed a release agreement nearly identical to the Release executed by HHFDC here, which purported to lift all restrictive covenants in the declaration. *Id.* at 97.

Plaintiff, a former tenant of a housing complex, filed suit, arguing that the release was a violation of the covenants in the declaration and that the declaration created a covenant in gross, which she had the right to enforce. *Id.* at 100. The court agreed. The court first held that the terms of the declaration created a covenant running with the land and that "plaintiff is an intended third-party beneficiary of the use restrictions" who "is independently entitled to enforce those use restrictions." *Id.* The court then explained that, although the Oregon housing agency executed a release of the declaration of restrictive covenants, the release ran afoul of black-letter property law: "a grantor and grantee cannot terminate a restrictive covenant without the consent of the intended beneficiary." *Id.*

The housing complex responded that the declaration did not create a covenant running with the land and, thus, the housing complex was not bound by the declaration. *Id.* at 101. Although the court disagreed—the declaration's terms expressly created "covenants running with the land"—it held in the alternative that

the housing complex "would nevertheless be subject to enforcement of the use restrictions as an equitable servitude." *Id.* at 102.

Nordbye is on all fours here and should dictate the outcome of this case. Like the housing complex and state agency in *Nordbye*, the Defendants here executed and recorded the Declaration, which created covenants running with the land enforceable by prospective, present, or former occupants of the Project pursuant to the Declaration's plain terms. *Id.* at 96; JSSF ¶ 8, **Ex. B** § 6(b). Although HHFDC here, like the state agency in *Nordbye*, purported to release the restrictive covenants in the Declaration, Plaintiffs here, just like the tenant in *Nordbye*, have an unfettered right under the Declaration to enforce the Declaration's restrictive covenants. Thus, like the release in *Nordbye*, the Release here was not effective because Defendants failed to obtain the consent of Plaintiffs.

In short, *Nordbye* is dispositive of all the issues here and should, as a result, control the outcome of this case.

CONCLUSION

This case really is as simple as it appears and presents a straightforward application of black-letter Hawai'i property law. In sum, the Declaration created covenants running with the land enforceable by past, present, and prospective tenants of Front Street, including Plaintiffs. Defendants attempted improperly to abrogate those covenants by executing the Release, all so that FSA could rid the

Project of its low-income housing restrictions and maximize profits. But Defendants failed to obtain the consent of the intended beneficiaries of the covenants—Plaintiffs—before doing so. This failure is fatal to the Release.

Hence, this Court should enter an order declaring that the Declaration remains in full force and effect through December 31, 2051, and that the Release is null and void and of no force or effect, and enjoining any further violation by Defendants of the Declaration's low-income use restrictions.

Dated: October 19, 2018

Respectfully submitted,

/s/ Lance D. Collins
LAW OFFICE OF LANCE D. COLLINS
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

/s/ M. Victor Geminiani
LAWYERS FOR EQUAL JUSTICE
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

/s/ Joseph L. Lambert
HOGAN LOVELLS US LLP
Attorney for Plaintiffs MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MICHAEL TUTTLE, CHI PILIALOHA GUYER, JOSEPH VU, and SHAZADA RAYLEEN YAP, Plaintiffs, vs. FRONT STREET AFFORDABLE HOUSING PARTNERS, a domestic limited partnership, 3900 LLC, a foreign limited liability company and HAWAII HOUSING FINANCE & DEVELOPMENT CORPORATION, Defendants.	Civil No. 18-cv-00218-JAO-KJM **CERTIFICATE OF SERVICE**

I certify that on October 19, 2018, I filed **Plaintiffs' Motion for Summary Judgment on Their First, Second, and Third Claims for Relief** with the Clerk of Court for the United States District Court for the District of Hawai'i using the CM/ECF system, which will serve the document on all counsel of record.

/s/ Stephanie Rummery
Stephanie Rummery