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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

FRIENDS OF SHERWOOD FOREST,  
MOANA KEA AMONG, MAUREEN  
HARNISCH, ARCHIBALD KAOLULO,  
AND MITCH WERTH

Plaintiffs,

vs.

CITY AND COUNTY OF HONOLULU,  
DOES 1-10,

Defendants.

Civil Case No.:  
(Injunctive Relief)

**COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF; DEMAND  
FOR JURY TRIAL; SUMMONS**

Plaintiffs Friends of Sherwood Forest, Moana Kea Among, Maureen Harnisch, Archibald Kaolulo, and Mitch Werth (“**Plaintiffs**” or “**the Plaintiffs**”), complain and allege against Defendants as follows:

### **INTRODUCTION**

1. Waimānalo Bay Beach Park (“**WBBP**”), known by its Hawaiian name Hunananiho (also known as “**Sherwood Forest**”) is a family-style county beach park in the center of Waimānalo. Fronting WBBP is Waimānalo Beach, the longest stretch of sandy shoreline on O‘ahu. With its heavily forested coastal vegetation and dedicated open space, WBBP is one of the few remaining shaded beaches on the island. As a culturally significant gathering place and environmentally sensitive ocean recreation site for over 45 years, WBBP is woven into the fabric of the Waimānalo community and largely defines its sense of place.

2. WBBP is also in close proximity to several parks with sports recreation features that are maintained by the City and County of Honolulu. Waimānalo Beach Park, located 1.4 miles from WBBP, has 3 ball fields. Waimānalo District Park/Azevedo Field, located 1.8 miles from WBBP, has 1 ball field, an “open/multi-use” field, and a Community Center which includes facilities for indoor sports.

3. Though heavily used by the public, the parks located in the surrounding area including Waimānalo Beach Park and Waimānalo District Park/Azevedo Field, that are supposed to be maintained by the City and County of Honolulu, have been in a state of neglect and disrepair for a number of years.

4. In 2009, an Environmental Assessment (“**EA**”) was drafted by PBR Hawai‘i & Associates, Inc (“**PBR**” or “**Planner**”) for proposed development in WBBP called the Waimānalo Bay Beach Park Master Plan (the “**Proposed Development**” or “**Plan**”) for its client, the City and

County of Honolulu Department of Design and Construction (**“Department of Design and Construction”**). The EA, submitted in final form to the Office of Environmental Quality Control (**“OEQC”**) in 2012, did not adequately consider alternatives to the Proposed Development, including a “no action alternative” or repairing existing District Parks in the immediate vicinity of Waimānalo Bay Beach Park and preserving the unique integrity of WBBP.

5. Besides insufficient and conclusory data, the 2012 Final Environmental Analysis (**“FEA”**) also contains numerous errors and omissions. Among them was the omission that a portion of the proposed development in Phase 1 is within the Area of Special Flood Hazard (Zone AE) and that the City is required to establish a floodway and conduct a flood encroachment survey pursuant to Honolulu Revised Ordinances and federal law. Another was the fallacious claim by the City and County of Honolulu that Waimanalo Bay Beach Park is not listed on the National Register of Historic Places.

6. The extensive inaccuracies in the 2012 FEA betray the public trust and compromised the validity of subsequent land use approvals.

7. The decade-old development plan does not take into account the numerous and substantial changes to the environment, increased pressures on infrastructure, the presence of previously unknown cultural assets, and accurate community sense of place with respect to this nature-oriented beach park surrounding the Proposed Development.

8. The 2012 FEA also notably failed to properly assess the cumulative impacts from the Proposed Development, including but not limited to tourism, traffic, water usage, and the effects of climate change.

9. On April 23, 2019, despite a flawed planning process, nominal community engagement, and overwhelming public opposition, the Department of Design and Construction

began construction on its Master Plan which includes a massive sports complex, four multi-purpose ball fields, 470 paved parking stalls, and a 2,500 square-foot concrete pad for a playground structure on the 75-acre parcel comprising Waimānalo Bay Beach Park. Approval for the Proposed Development was granted by City Council of the City and County of Honolulu (“**City Council**”) based upon the flawed recommendation of the Department of Planning and Permitting of the City and County of Honolulu (“**DPP**”) (collectively, along with Department of Design and Construction, the “**City**” or “**Defendant City**”). The Proposed Development also includes plans to construct camp sites, group camping and gathering areas, walking trails, picnic areas, and comfort stations at the Beach Park at a projected cost to taxpayers of approximately 32 million dollars.

10. The Proposed Development is subject to development restrictions because the Beach Park is located within the Special Management Area (“**SMA**”) pursuant to the municipal law enacted in 1978 under the authority of the State Coastal Zone Management Act (“**CZMA**”), Hawai‘i Revised Statutes (“**HRS**”) Chapter 205A. The SMA policy is “to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. Special controls on development within an area along the shoreline are necessary to avoid permanent loss of valuable resources and foreclosure of management options, and to ensure that adequate public access is provided to public owned or used beaches, recreation areas, and natural reserves, by dedication or other means.” ROH § 25-1.2. All projects within the SMA require an SMA permit prior to development. See ROH Chapter 25; *see also, e.g., Hawai‘i’s Thousand Friends v. City & County of Honolulu*, 75 Haw. 237, 246, 858 P.2d 726, 731 (1993).

11. The SMA for the Proposed Development, like the EA, is also inadequate and based upon on incorrect information. For example, the SMA falsely characterizes the proposed

project as enhancing coastal recreational facilities and scenic and open space in Waimānalo, when in fact it does the opposite.

12. Since the time that Defendant City started construction in 2019, officials from the City and County of Honolulu have made numerous public announcements regarding various significant and substantial changes planned for the project that were not studied as part of the 2012 FEA. Further, the City now apparently contends that *none of the phases of the project that were studied as part of the WBBP Master Plan will proceed*. However, the City has made clear that it will proceed with development in “some form”. These changes are in violation of the SMA Permit, as the ambiguous, ever-changing development proposals now being offered by Defendant City were not even contemplated in the FEA or subsequent permits. To the contrary, the proposed phases of development that were studied in the FEA and are now apparently cancelled included specific, detailed plans for mitigation measures regarding environmental impacts that were contingent and/or dependent upon other phases originally proposed and studied.

13. The 2012 FEA section pertaining to “Natural Hazards” (Section 4.3) omits that a portion of the proposed development in Phase 1, the only portion of the WBBP that the City currently claims to pursue, is within the Area of Special Flood Hazard (Zone AE). Defendant City has not established a floodway or conducted a flood encroachment survey at WBBP in violation of ROH Chapter 21 Sec. 21A-1.7(F) and 44 CFR 60.3(d)(3). Without establishing a floodway and conducting a flood encroachment survey, it is impossible to establish conclusively that the development will not have adverse flooding impacts on the surrounding neighborhoods.

14. Plaintiffs also have a deep concern about the irreversible adverse impacts of the Proposed Development on the Waimānalo community's sense of place and rich cultural history, as well as the environmental health of the Waimānalo Bay Beach Park area.

15. The Plaintiffs' concerns are underscored by the inadequate process carried out by the City in its assessment of the WBBP development proposal, especially given the City's history of lack of public engagement, input, accountability, and maintenance of existing facilities.

16. The affected local residents, including the Plaintiffs, as well as civic-minded members of the Waimānalo community and surrounding communities, were left out of the critical stages of the required planning process for the WBBP conversion.

17. Plaintiffs file this action as a last resort to protect beach and water-oriented recreational opportunities, the public trust, open-space, neighboring residential communities, and the natural, cultural, and historic resources of Waimānalo Bay Beach Park.

18. To date, the City, its City Council, and its DPP have not adequately enforced the federal, state and local laws, including SMA permitting and monitoring requirements, HRS Chapter 205A, ROH Chapters 21 and 25, and Hawai'i Administrative Rules against the Department of Design and Construction to ensure present and future compliance.

19. To date, the City has not adequately enforced the state and local laws, including the required archaeological monitoring of subsurface activity.

20. This action seeks injunctive relief, attorneys' fees and costs, and civil penalties to redress violations of Constitutional, federal, state, and local laws that were enacted *inter alia* to protect environmentally-oriented parks such as WBBP and the affected community's sense of place.

21. Plaintiffs feel that the Proposed Development is simply a pretext for increased commercial development in the area and believe that the City and County of Honolulu should focus on alternatives that suit the rural atmosphere of Waimānalo, such as preserving open space and repairing existing nearby sports fields instead of urbanization and multi-million-dollar sports complexes.

22. Ultimately, Plaintiffs seek to stop the destruction of a culturally and environmentally sensitive community beach park by making their City government follow the law.

### **THE PARTIES**

23. Friends of Sherwood Forest (“Friends”) is a collective of volunteers from all walks of life who share the belief that Sherwood Forest in Waimānalo, Hawai‘i is one of the most beautiful places in the world. Their mission is to honor and defend not only the great natural beauty of WBBP, but also its environmental importance and historical significance. Friends’ members care deeply about preserving Sherwood Forest and are dedicated to protecting it from destruction and development, for the sake of their community and for future generations. In particular, Friends is dedicated to protecting and preserving open space in Waimānalo, as well as the sensitive and fragile marine environment and shoreline with a focus on saving Waimānalo Bay Beach Park from degradation and destruction in perpetuity.

24. Plaintiff Moana Kea Among has been active in efforts to keep Waimanalo an active agriculture community and preserve the rural atmosphere for future generations. Ms. Among is the Na Ala Hele Hawai‘i State Trail Systems Equine Representative and actively stewards the Waimānalo Ditch Trail - the only Designated Equine Trail in the State of Hawai‘i. She spends most of her time in Waimānalo with fellow members of the equestrian community

and has an interest in “keeping the country, country” – preserving the Waimānalo Bay area’s community sense of place. Ms. Among frequently transports horses to and from the Waimānalo community and is concerned that increased traffic caused by the Proposed Development on the already heavily trafficked two-lane Kalaniana‘ole Highway will create a dangerous situation for residents and visitors alike. Kea utilizes the beach at Waimānalo Bay Beach Park and is concerned that the Proposed Development will frustrate and diminish her opportunities for water-oriented recreational activities.

25. Plaintiff Maureen Harnisch has been a resident of the City and County of Honolulu for over 26 years. Along with her family, she has personally utilized Waimānalo Bay Beach Park as a primary recreation site for over two decades. Ms. Harnisch has been involved in the Waimānalo community for many years and spent over a decade working on environmental projects in the area. She appreciates the nature-based focus of WBBP and recognizes that a sports field will interfere with her family’s on-going beach recreation by disrupting ocean and nature-based recreation activities and opportunities that epitomize the community’s sense of place and community values. Maureen is also a long- time environmentalist and has tremendous concerns about the coastline, forest, and water quality, and is concerned that litter, noise, and traffic will destroy one of the last shady beaches and coastal forests on the island. As a community activist and frequent user of Windward O‘ahu ocean resources, Harnisch also has a particular concern in protecting Waimānalo Bay Beach Park, the open spaces and coastal environmental resources, as well as the endangered birds and endangered hoary bats for the benefit of all residents of urban Oahu.

26. Plaintiff Archibald Kaolulo is a 38-year resident of Waimānalo. Mr. Kaolulo began to practice law in 1976 as a Deputy Prosecuting attorney for the City and County of



Honolulu until entering the civil practice of the law. From 2003 to 2004, Mr. Kaolulo headed the Waimānalo Beach Lots Association and worked to help convert cesspools to more environmentally sound septic systems. He lives adjacent to the Waimānalo Bay Beach Park and has concerns about proposed changes to the infrastructure and impacts to local residents. As a long-time resident and neighbor who utilizes Waimānalo Bay Beach Park along with his family, Mr. Kaolulo has a particular concern in protecting Waimānalo Bay Beach Park, the open space, adjoining shoreline, nearby residential neighborhoods, and coastal and environmental resources.

27. Plaintiff Mitch Werth is a 45-year resident of Waimanalo and has lived adjacent to the Waimānalo Bay Beach Park during that time. Mr. Werth began the practice of law in 1974 as a Deputy Public Defender for the State of Hawai‘i on Oahu until entering private practice in 1978, emphasizing his entire legal career representing abused and neglected children and juvenile rights. After becoming a Board Member for the Waimanalo Teen Project in 1975, Werth served as President of the Teen Project for 13 years from 1977 through 1990 in which time the Teen Project provided services for up to 700 youth annually. In 1980-81, he worked to keep the Waimānalo Beach Lots residential zoning classification from being converted to commercial in order to preserve the sense of the local community. From 2010–2017, Werth served as administrative appeals hearing officer for the State of Hawai‘i. As a long-time member and resident of the Waimānalo community who utilizes Waimānalo Bay Beach Park for water-based recreation, and as a neighbor living adjacent to WBBP, Werth has concerns about proposed changes to the infrastructure with particular concern in protecting the open space, adjoining shoreline, nearby residential neighborhoods, and environmental and cultural resources.

28. Defendant City and County of Honolulu is a municipal corporation duly

organized and existing under the Constitution of State of Hawai‘i, the laws of the State of Hawai‘i, the Revised Charter of the City and County of Honolulu, and the Revised Ordinances of Honolulu. The Honolulu City Council, DPP, and Department of Design and Construction are “agencies” of the City and County of Honolulu for the purposes of HRS § 205A-6. The director of the DPP has the responsibility to administer and enforce the City's Special Management Area permit system. See ROH § 25-2.1(a).

29. Does 1-10 are persons or entities sued herein under fictitious names because their true names and/or responsibilities are presently unknown to Plaintiffs, except that they are connected in some manner with the named Defendants and/or are responsible for all or a portion of the conduct alleged herein. Plaintiffs are unable at this time to ascertain the identity of the Doe Defendants.

30. Plaintiffs have made diligent and good faith efforts to ascertain the identity, actions, and liability of said unidentified Defendants, including but not limited to, a review and search of documents and information presently available to them. Plaintiffs will identify said Defendants if and when they are discovered.

### **JURISDICTION AND VENUE**

31. This Court has jurisdiction under HRS §§ 603-21.5 and -23, and HRS § 632-1, HRS § 205A-6(c) and -33 (SMA jurisdiction, injunctive relief).

32. Venue is proper in this Court under HRS § 603-36(5).

### **RELATED CASE**

33. A related case, Civil No.: 19-00519 was filed in United States District Court for the District of Hawai‘i on September 26, 2019. The case was voluntarily dismissed without

prejudice by Plaintiffs on April 13, 2020 pursuant to Federal Rules of Civil Procedure (“**FRCP**”) Rule 41, without requiring permission from the Court or stipulation by the opposing parties.

### **FACTUAL BACKGROUND**

34. Waimānalo Bay Beach Park is comprised of land ceded to the Territory of Hawai‘i, then taken for United States military purposes in 1917. The Beach Park was part of the adjacent Air Force facility, known at the time as “Bellows Field”.

35. In 1971, the U.S. military transferred the land that now comprises WBBP back to State of Hawai‘i, Department of Land and Natural Resources (“**DLNR**”). During the years Waimānalo Bay Beach Park was owned and managed by the State of Hawai‘i DLNR (Division of State Parks), it was known as Waimānalo State Recreation Area.

36. In 1971, the State of Hawai‘i entered into a project agreement with the U.S. Department of the Interior for grant assistance from the Land and Water Conservation Fund, which was to be used to develop “water-oriented recreation facilities in a beach park” at WBBP.

37. In 1972, WBBP was placed on the National Register of Historic Places as part of the Bellows Field Archaeological Area, being the first human settlement on O‘ahu dating to approximately 600 years ago. The Area is listed as a “funerary” in the Register, due to the discovery of numerous burials and human remains.

38. In 1972, a general plan for the area was developed. The 1972 plan encompassed both the subject 75-acre WBBP site as well as lands that are still under management by the U.S. Air Force.

39. In April 1977 an Environmental Impact Statement (“**EIS**”) was conducted for the DLNR, in which the State of Hawai‘i explained (and the Department of the Interior accepted) the following rationale in their promise for the intended use of the LWCF grant funds: “organized

recreational activities including court games; baseball, softball, etc. are generally a function of local playgrounds and a responsibility of the County Parks and Recreation Dept. Open-level areas can be available for such activities at the project site, but *only on an informal basis*.

Organized rec activities tend to attract participants and spectators who come to an area primarily for this purpose, consequently, this recreation activity will reduce the number of opportunities for beach and water recreation activities. *Since the primary recreation resource is the beach, recreation interests which compete rather than supplement this rec resource are undesirable.*" (emphasis added)

40. Following the approval of the Final Environmental Impact Statement (FEIS) in June 1977, the State of Hawai‘i amended the original project agreement.

41. In 1986, the State of Hawai‘i requested and received additional LWCF grant funds in the amount of \$75,184.60 as part of a “long-range program to bring Waimānalo Bay State Park into a maximum utility in accordance with a general plan.” Improvements for the project included an additional comfort station, sewer system, and related support facilities for beach and water-oriented recreation activities.

42. In 1992, the Beach Park was transferred from the State of Hawai‘i to the City and County of Honolulu and renamed Waimānalo Bay Beach Park.

43. In 2007, the City and County of Honolulu Design and Construction initiated the Waimānalo Bay Beach Park Master Plan.

44. In 2009, a draft Environmental Assessment (EA) process was initiated. Pre-consultation with the U.S. Army began in 2010. On June 14, 2010, DLNR acknowledged that the area is in a flood zone.

45. The 30-day comment period for the draft EA ended on April 23, 2012.

46. On, June 25, 2012, the Master Plan was completed and the Final Environmental Assessment (FEA) was presented to Office of Environmental Quality Control.

47. On January 31, 2013, an application for a Special Management Area Permit was accepted by Defendant City DPP. The public hearing for the SMA was held on March 1, 2013. The SMA was approved by Defendant Honolulu City Council on April 9, 2013.

48. According to the SMA Permit, the WBBP Master Plan proposes the use of pervious materials for parking areas, landscaped bioswales, and use of treated, recycled water (designated “R1”) from the Waimanalo Wastewater Treatment Plant for landscape irrigation to mitigate against the impacts to water resource usage. However, there is no R1 recycled water in Waimānalo or anywhere on the Windward side of O‘ahu.

49. According to the Clean Water Branch of the Department of Health and the Honolulu Board of Water Supply, there are no plans in the works for an upgrade to the sewage treatment plant to become an R1 facility. R2 water exists in Waimānalo, but it is disposed of into injection wells and not available for use.

50. According to the Ko‘olaupoko Watershed Management Plan, Waimānalo has a water shortage. The WBBP Master Plan predicts water usage to be at over 157,500 gallons of water per day.

51. On October 22, 2018, DLNR State Historic Preservation Division (“**SHPD**”) sent a letter to Defendant City and County of Honolulu Department of Design and Construction concerning comments to the Draft Archaeological Monitoring Plan. The letter describes the proposed project as “construction of a multi-purpose field and geotechnical borings for the installation of a stormwater disposal system and new waterline. The project is within a 3.88-acre portion of the 74.76-acre City and County of Honolulu-owned parcel identified as Waimanalo Bay Beach Park. The scope of work involves construction of a new 205 ft. by 340 ft. multi-

purpose recreational field, an 11-stall asphalt concrete parking lot, 2,500 sq. ft. of accessible concrete walkways, a 2,500-sq. ft. concrete pad for a ‘play structure’, and 1,430 linear feet of 4-inch diameter potable water line piping. The project will also include grubbing, grading, grassing. In addition, the project will involve eight (8) geotechnical borings to determine subsurface soil conditions crucial to completing drainage design. Four borings will extend down to a maximum of 10 ft. below current ground surface and the other four will extend to a maximum of 5 ft. below current ground surface.” In addition, SHPD also recommended pre-construction briefing and on-site archaeological monitoring as well as other provisions.

52. On April 23, 2019, bulldozers arrived at the park and local resident Jody Green alerted neighbors and the news media. Contrary to responses given in the Environmental Assessment by Defendant City’s Project Manager to community questions regarding the trees of Sherwood Forest, that “no ironwoods are proposed for removal to accommodate proposed park elements,” one of the project’s first actions was to clear cut four acres of ironwoods for the “multi-purpose” sports field, playground complex, and parking lot.



Figure 1. Sherwood Forest at WBBP before and after Phase 1 construction began in April 2019.

53. On April 26, 2019, community organization Na Kua‘āina o Waimānalo held the

first community meeting concerning the initiation of construction for the Proposed Development at the Waimanalo Public School library. Approximately 800 signatures, almost unanimous among all attendees, were collected on a petition to stop the project.

54. On April 2019, a grading permit for Phase 1 of construction was issued. The permit did not acknowledge or authorize trenching at the site. The permit did not include a flood variance.

55. On April 29-30, 2019, trees were knocked down on site with no archaeologist present. On May 14, 17, 20, and 26, 2019, community members documented the absence of an archaeologist while subsurface work commenced on the project, in clear violation of Hawai'i Administrative Rules. These violations eventually prompting SHPD to send Division of Conservation and Resource Enforcement (DOCARE) officers to temporarily halt construction while they assessed compliance with the Archaeological Monitoring Plan.

56. On May 28, 2019, in response to overwhelming public opposition to the project, Honolulu City Councilmember Kymberly Pine sent a letter to Mayor Kirk Caldwell asking him to stop the project.

57. On May 29, 2019, the Honolulu City Council held a special meeting of the City Department of Parks and Recreation. The meeting attracted a standing-room only crowd. In her summary at the end of the meeting, Councilwoman Heidi Tsuneyoshi stated "obviously, this community just didn't know (about the scope of the project) or they would have spoken up at the time."

58. On May 29, 2019, in response to overwhelming public opposition to the project, Honolulu City Councilmember Heidi Tsuneyoshi sent a letter to Mayor Kirk Caldwell, asking him to stop the project.

59. On June 10, 2019, the Waimānalo Neighborhood Board overwhelmingly voted

(11-1) in favor of a resolution urging Mayor Kirk Caldwell, City Council Chair Ikaika Anderson, and The City Council of the City and County of Honolulu to “Stop Further Destruction Of Sherwoods Forest (a.k.a. The Waimānalo Bay Beach Park) Phase I Construction Project Immediately And Any Future Construction Until The Waimānalo Community Determines Its Needs And Priorities”.

60. On June 17, 2019, in response to overwhelming public opposition to the project, Honolulu City Councilmember Tommy Waters sent a letter to Mayor Kirk Caldwell, asking him to stop the project.

61. On June 20, 2019, Defendant City began trenching on site without a permit.

62. On August 12, 2019, City and County of Honolulu Mayor Kirk Caldwell announced that the Proposed Development *was substantially changing in scope* as part of a “huge compromise” with the community. As part of the new “compromise”, the Mayor’s office announced that the City and County of Honolulu planned to “cut back” on the Master Plan and only go forward with construction of Phase 1 of the plan, including a multi-field sports complex, an 11-stall parking lot, a playground, and “planting trees”.

63. In a letter dated September 25, 2019, Defendant City admitted that it was wrong in saying the Waimānalo Bay Beach Park was not on the National Register of Historic Places. In the letter that City officials addressed to “stakeholders”, the Mayor’s office stated that (the Beach Park’s designation on the National Register of Historic Places) “doesn’t mean that no work can be done there. It means care needs to be taken with respect to the historic items.”

64. On September 26, 2019, an object of archaeological interest was found on the Phase 1 construction site and reported to the State Historic Preservation Division.

65. On Tuesday, October 1, 2019, Mayor Kirk Caldwell halted the project at Waimānalo Bay Beach Park while officials “wait for further information from the State Historic



Preservation Division and the Oahu Island Burial Council.”

66. On January 14, 2019 Mayor Caldwell announced that the City was planning to “abandon the master plan for its construction project at Sherwood Forest”. However, according to a City Council resolution drafted by the Mayor’s Office and presented to the Waimānalo Neighborhood Board by City and County of Honolulu Managing Director Roy Amemiya, work would continue on Phase 1 of the plan “in some form”.

67. At 4:30 p.m. on Monday, March 23, 2020, Mayor Kirk Caldwell issued a stay-at-home order in response to the COVID-19 virus. At 12:01 a.m. on Wednesday March 25, 2020, the Governor issued a stay-at-home order for the entire State of Hawai‘i. Both orders (and subsequent orders) require Hawai‘i residents to quarantine by staying at home and only leaving their home or place of residence for “essential activities” or to engage in “essential businesses and operations”. Both orders also require the public to comply with the social distancing requirements to “the fullest extent possible”. Neither order lists freedom of speech, assembly, or the press as “essential activities” or “essential businesses and operations.”

68. On April 3, 2020 a grading permit for Phase 1 of construction was issued for “Construction of a Multi-purpose field” at Waimānalo Bay Beach Park. The permit did not acknowledge or authorize trenching at the site. The permit did not include a flood variance.

69. On April 6, 2020, bulldozers arrived at the WBBP to continue construction on “Phase 1” of the WBBP Master Plan for Defendant City.

70. At an April 6, 2020 press conference, City and County of Honolulu Mayor Kirk Caldwell stated that “we’re not proceeding with Phase 1...Phase 1 *is no longer in existence...*”. However, he made it clear that the City would be proceeding with a “grassy field” and “cultural and historical park”.

71. On April 7, 2020, one day after construction crews had resumed construction at

Waimānalo Bay Beach Park, Mayor Caldwell announced that he was stopping construction at WBBP “indefinitely” due to the discovery of iwi kūpuna (a 3-inch upper arm bone fragment) within the project area. However, the Mayor made conflicting statements regarding both the reason for the shutdown and how long it might last, stating that the project was put on hold due to the discovery and (in another instance) due to “health and safety concerns” for the community, and also that the project would only be paused “while we consult with the appropriate entities.” Whether or not Phase 1 (or any variation thereof) or some new idea for development would proceed once construction resumes also remains unclear.

**COUNT I - The City Failed to Adequately Address Substantial Changes in the Scope and Size of the Project in Violation of HRS § 205A-6 and HAR § 11-200-13**

72. Plaintiffs re-allege all prior paragraphs.

73. This action is not barred by any statute of limitation because the process violation of failing to adequately address substantial changes in the project is not constrained by any notice requirements or timelines. See *Unite Here! Local 5 v. City and County of Honolulu*, 123 Hawai‘i 150, 231 P.3d 423 (Supreme Court of Hawai‘i, 2010) (where the 30-day limitation for a supplemental statement action was not triggered when the agency failed to file notice of no supplemental statement).

74. Similar to the requirement for a supplemental statement under HAR § 11- 200-26, when a project is implemented and incorporates or relies on a previous environmental assessment, the work on the ground must be “substantially similar.” HAR § 11-200-13. Under the requirements for substantial similarity for an EIS supplemental statement, a change in “size, scope, intensity, use, location, or timing, among other things,” may constitute a substantial change. See HAR § 11-200.1-30.

75. Additionally, supplemental statements “shall be warranted when the scope of an

action has been substantially increased, when the intensity of environmental impacts will be increased, when the mitigating measures originally planned are not to be implemented, or where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with.” HAR § 11-200-27.

76. A phased project, as was originally proposed and assessed at WBBP, is generally treated as a single action for purposes of HEPA. HAR § 11-200-7. Whether Defendant City wants to pursue the project Phase 1 as part of the Waimānalo Bay Beach Park Master Plan, or as separate actions where each phase requires a separate EA, the current construction at the park requires an updated or new assessment because the EA from 2012 is not substantially similar to the current amended project and does not adequately address the intensity of the environmental impacts.

77. Phase 1 (or the proposed development formerly known as Phase 1 and now referenced as “non-existent” by Mayor Caldwell) is not substantially similar to the Master Plan EA because:

- The latest proposed use of the park for a “grassy field” and “cultural and historical park” was not contemplated in the original proposal;
- The entire design and layout of Phase 1 does not follow the Master Plan;
- Phase 1 was started without completing the full AIS as recommended in the EA to mitigate significant cultural impacts;
- The irrigation water source has been changed constituting an irrevocable commitment of natural resources that would have triggered an EIS in the original proposal;
- The EA failed to address several non-exempt issues such as herbicide use for brush clearing;
- New climate models, Total Maximum Daily Load (TMDL) data, tourism projections, and City ordinances will have significant effects on the environment if Phase 1 construction and/or the full Master Plan is implemented.

78. Agencies must consider direct, indirect, primary, secondary, and cumulative effects of thirteen significance factors, HAR § 11-200-9, in assessing a project:

- a. Involves an irrevocable commitment to loss or destruction of any natural or cultural resource;
- b. Curtails the range of beneficial uses of the environment;
- c. Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344, HRS, and any revisions thereof and amendments thereto, court decisions, or executive orders;
- d. Substantially affects the economic or social welfare of the community or State;
- e. Substantially affects public health;
- f. Involves substantial secondary impacts, such as population changes or effects on public facilities;
- g. Involves a substantial degradation of environmental quality;
- h. Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
- i. Substantially affects a rare, threatened, or endangered species, or its habitat;
- j. Detrimentially affects air or water quality or ambient noise levels;
- k. Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone, beach, erosion-prone area, geologically hazardous land, estuary, fresh water, or coastal waters;
- l. Substantially affects scenic vistas and view planes identified in county or state plans or studies; or,
- m. Requires substantial energy consumption.

79. Several environmental impacts were not addressed in the Master Plan EA or have been altered by the current proposed Phase 1 construction. The gaps in the Waimanalo Bay Beach Master Plan EA as altered by Phase 1 changes include:

- The EA did not address any impacts of potable water use for irrigation in a water

scarce system, nor the direct impacts on the streams, water tables, and the bay. In the Master Plan, R-1 reuse water would use water that was already treated for a prior primary use but would not require additional withdrawals. The current plan draws new water from the system in competition with other primary uses. The new plan calls for 157,000+ gallons of new water every day. Reuse water was a mitigation tactic to avoid irrevocable commitments of natural resources that would trigger an EIS.

- The EA did not use updated climate models that show several new and existing facilities would be impacted by sea level rise and at risk of suffering significant damage.
- The EA did not run any hydrological models to show whether irrigation infiltration and water table effects would influence beach erosion or how quickly chemicals from the substantial parking lots and fields would migrate to the bay and affect marine life, including endangered species.
- The EA did not address herbicide use on the fields for clearing and maintenance and the effect on the coastal resources of groundwater dispersal through irrigation infiltration, nor effects on endangered species present in the park.
- The EA and Master Plan failed to remedy the faulty and leaky bathroom drainage system and impacts of increased burden on such facilities from increased traffic and use.
- Failure to address the bathroom facilities also avoids the discussion of the TMDL enterococcus counts in Waimanalo Bay that are already intermittently beyond EPA limitations and most directly affected by nearby Waimanalo Stream. The increased use of the faulty bathrooms will contribute to sustaining increased levels of enterococcus in the Bay system and put public health at risk.

80. The EA also did not account for current Honolulu City Council Resolutions attempting to ban all commercial use of Windward beach parks *except for Waimanalo Bay Beach Park*. These restrictions would substantially increase the use and burden on WBBP and its facilities. The impact, especially when considered alongside the proposed development in the Master Plan, violates the stated main objective of the Master Plan to “maintain the security and rural character of the park.”

81. Current trends in tourism are substantially higher than in 2012. Increased tourism to the park will impact the community socially and economically. The current road system of Waimanalo is inadequate for current traffic and tourism. The EA merely called for widening the entry to the park to mitigate traffic. However, increased use of the park will

significantly affect the roads, traffic, public facilities, and the park environment creating a need for extremely large investments in infrastructure to support the use.

82. Perhaps the most obvious inadequacy is in the impact to cultural and community resources. The community engagement in the first EA followed a faulty process only inviting selected individuals and organizations to participate at locations with limited access. It is no wonder the City has little knowledge of the actual cultural impacts of this project and no wonder that several inadvertent archeological discoveries have halted construction at the site.

83. Although the Master Plan somehow managed to escape the rigor of a full EIS, the changes in the current proposed Phase 1 and new impacts associated with the project require not only a reassessment, but very likely trigger the significance factors for an EIS.

84. Adequacy of a determination is a question of law. In the instant case, there were not only significant changes in the project, but the FONSI determination is no longer legally or scientifically adequate. The purpose of EA and EIS “process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.” HRS Chapter 343-1. Here, there is next to no environmental consciousness for the community and decision makers to rely on because the HEPA process has been repeatedly violated to push this project forward.

85. Because the current project is not substantially similar to that proposed in the EA, the City cannot rely on the previous EA to adequately support the project. Defendant City must comply with HEPA and fully examine the impacts of this project under its current conditions before proceeding.

## **COUNT II – The original EA is Insufficient and Invalid**

86. The Finding of No Significant Impact (FONSI) for the Final Environmental Assessment (FEA) is predicated on a fallacy. The Environmental Assessment prepared by consultant PBR Hawai‘i for the City and County of Honolulu Department of Design and Construction and reviewed and submitted by the City and County of Honolulu Department of Design and Construction is inadequate and misleading from the very beginning. In the second sentence of the plan summary of the Master Plan, the consultant notes that the plan is “compliant with land use controls of the City, State and Federal government.” However, as detailed below, the EA is, in multiple places, glaringly and significantly NOT in compliance with appropriate land use controls.

### **A. In violation of HAR § 11-200.1-18.**

87. Black’s Law Dictionary defines “consultation” as “1. The act of asking the advice or opinion of someone. 2. A meeting in which parties consult or confer.” In conducting an Environmental Assessment, the burden is on the entity drafting the assessment to ensure that all appropriate parties are consulted with. See the Hawai‘i Administrative Rules (“HAR”) § 11-200.1-18 “Preparation and contents of a draft environmental assessment”, subsection (a) which states”:

A proposing agency shall conduct, or an approving agency shall require an applicant to conduct, early consultation seeking, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county’s general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals that the proposing agency or approving agency reasonably believes may be affected. (emphasis added)

88. The FEA cites the fact that three Community Action Group (“CAG”) meetings were held. While the initial CAG consisted of invited members, additional people volunteered to

participate in the group for the second and third meetings. A total of approximately 50 community members participated in the three CAG meetings. One open public meeting was held. That meeting had 21 attendees, mostly members of the CAG. The contractor also provided several informational briefings to the Waimanalo Neighborhood Board, whose meetings are held on a military base. That is the extent of the public “consultation” according to the FEA. At the time of assessment, the Waimānalo community had a population of over 5,400, meaning that the contractor consulted with approximately 0.01 percent of Waimanalo’s residents.

89. Beyond its failure to adequately engage the local community regarding the project, the contractor did not respond to written comments as required by HAR § 11-200.1-18, subsection (d)(10), which requires “[w]ritten comments, if any, and responses to the comments received...”. The contractor received a written comment in November 2010 stating that no athletic fields should be built without a cost-benefit analysis that considered improvement of existing fields at Waimanalo Recreational Park. The FEA does not address this particular comment, nor did even consider this alternative (see C. below). PBR also made false statements in responding to comments. Responding to a written comment regarding the trees of Sherwood Forest, the Project Manager wrote that “[p]ark elements have been designed to preserve large stands of trees and no ironwoods are proposed for removal to accommodate proposed park elements.” The project’s first actions in April 2019 were to clear cut four acres of ironwoods for the baseball field. Destruction of large stands of ironwood trees resumed in April 2020.

90. Either the contractor severely underestimated the number of groups and individuals that would be affected by the project, or it just assumed that speaking to less than 100 people in a community of 5,400 was sufficient. In either case, the DPP, through its contractor



PBR, failed to comply with the public consultation requirements of HAR § 11-200.1-18.

**B. Defendant City and County of Honolulu has not submitted documentation of consultation with the community and the Office of Hawaiian Affairs to the State Historic Preservation Office as required by Hawai‘i Administrative Rules**

91. According to Haw. Code R. 13-275-6(c):

Prior to submission of significance evaluations for properties other than architectural properties, the agency shall consult with ethnic organizations or members of the ethnic group for whom some of the historic properties may have significance under criterion “e” to seek their views on the significance evaluations. For native Hawaiian properties which may have significance under criterion “e” the Office of Hawaiian Affairs also shall be consulted.

Criterion “e” pertains to properties that:

Have an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events or oral accounts--these associations being important to the group's history and cultural identity.

92. Hawai‘i Administrative Rules governing historic properties requires a description of the consultation process used, a list of the individuals and organizations contacted, and a summary of the views and concerns expressed when historic properties deemed significant are involved. Consultation with OHA is required. Additional requirements include a table of the significant historic properties identified, indicating which form of mitigation is proposed for each property with justification for the proposed mitigation. SHPD must receive and review documentation of the consultation process and the ways in which the City and County has taken into consideration the views and concerns held by consulting parties.

93. As demonstrated by the absence of any documentation in the FEA, Defendant City has not complied with the above requirements.

**C. DPP did not consider reasonable alternatives in violation of HRS § 344-4.**

94. The DPP did not consider reasonable alternatives to the project, specifically the repair and upgrade of existing sports fields in the nearby area. In analyzing its proposed actions and alternatives, a state agency is required to consider *inter alia* the following guidelines pursuant to HRS Chapter 344 “State Environmental Policy”, section 344-4 “Guidelines”:

- Encourage management practices which conserve and protect watersheds and water sources, forest, and open space areas;
- Establish and maintain natural area preserves, wildlife preserves, forest reserves, marine preserves, and unique ecological preserves;
- Protect endangered species of indigenous plants and animals;
- Protect the shorelines of the State from encroachment of artificial improvements, structures, and activities;
- Promote open space in view of its natural beauty not only as a natural resource but as an ennobling, living environment for its people;
- Provide for expanding citizen participation in the decision-making process.

Courts have also weighed in on this issue, noting that “The inquiry into consideration of reasonable alternatives is ‘independent of the question of environmental impact statements, and operative even if the agency finds no significant environmental impact.’” *Highway J Citizens Group v. Mineta*, 349 F.3d 938, 960 (7<sup>th</sup> Cir. 2003).

95. An environmental assessment that sufficiently considered the guidelines listed above in analyzing this proposed action would have considered the alternative of upgrading WBBP without building sports fields. This is a necessary alternative from an environmental, historical/cultural, and fiscal perspective, as there are already sports fields nearby and the proposed WBBP sports complex constitutes a significant portion of the \$32 million-plus price tag.

96. The contractor cannot say it did not have notice of this issue: a frequent theme of

the public comments received involved residents questioning why the City would build more sports fields when there are already three sports fields within less-than one mile and one sports field less than two miles from Waimānalo Bay Beach Park? There was a general consensus that the sports field at Waimānalo District Park suffered from lack of irrigation and was in need of maintenance and repair, but that reason alone does not explain why this alternative was not even mentioned in the FEA. The money saved by not razing trees and building ball fields at WBBP could more economically be spent on upgrades to existing facilities. This alternative would also have the added benefit of fulfilling the HRS Chapter 344-4 Policy Guidelines (mentioned above) including: protecting the watershed, coastal forest, open space, and endangered and indigenous plants and animals from the encroachment of artificial improvements, structures and activities.

97. The FEA also sets forth the argument that the new sports fields at WBBP would relieve pressure on existing facilities, an argument that public comments contradict by pointing out that existing nearby facilities were not heavily utilized due to the lack of maintenance resulting in poor condition of the fields.

98. The FEA itself lists the WBBP project objectives as:

- Improve existing park services including repair of comfort stations and supporting infrastructure.
- Add park services including camping and picnicking.
- To minimize operational and maintenance costs, utilize Low Impact Development (LID) and green building techniques for new improvements.
- Maintain the security and rural character of the Park.

All of these objectives could be met without building sports fields; fields that are unnecessary due to similar facilities already existing nearby.

99. The DPP's failure to consider reasonable alternatives such as eliminating the sports fields from the project due to existing nearby facilities is in violation of HRS Chapter 344-

4, especially given the negative impact that encroachment of artificial improvements, structures, and activities would have on the other policy goals, and represents a failure to take a “hard look” at the impacts of a project required by an environmental assessment.

**D. DPP did not draft a supplemental EA despite “significant new circumstances” since the original EA was published in 2012**

100. While the HAR only addresses supplemental environmental review in terms of an EIS, the same criteria should apply to an Environmental Assessment. HAR § 423 11-200.1-30 requires that a supplemental EIS be completed if a project has changed substantively in “size, scope, intensity, use, location, or time, among other things.” NEPA requires a supplemental EIS when “There are significant new circumstances or information relevant to the environmental effects that have bearing on the proposed action or its impacts.” Hawai‘i courts have ruled that changes in traffic and the presence of threatened or endangered species required a supplemental EIS be completed. See *Unite Here!* 123 H. 150, 178, 231 P.3d 423, 451 (2010).

101. In the case of the proposed project at WBBP, there are significant new circumstances and information relevant to impacts of the project, including but not limited to:

- The most recent change to Phase 1 of the project, as described by City and County of Honolulu Mayor Kirk Caldwell in his press conference of April 6, 2020, includes a “grassy field” and “cultural and historical park”, something not even described or contemplated in the original Environmental Assessment. In fact, in the April 6, 2020 press conference, Mayor Caldwell stated that “we’re not proceeding with Phase 1...Phase 1 *is no longer in existence*...”.
- From the Mayor’s remarks, one can only deduce that the City and County of Honolulu are not planning to proceed with any of the phases described and assessed in the

Waimānalo Master Plan Final Environmental Assessment, *but instead are proposing construction of an entirely new project altogether.* Though the details of this project are continually shifting and changing, the Mayor has stated that he believes (whatever project is eventually constructed) “can be valuable to the future of the Waimanalo community.”

- In 2010, Waimanalo’s population was approximately 5,400 people. By some estimates, the population in 2017 was as high as almost 6,600 people, an increase of over twenty percent (20%). Until the impacts of this significant population growth on traffic, as well as other causes of a substantial increase in traffic (such as increased tourism as well as residents of other communities using Waimānalo as a “short cut” to circumvent and avoid Honolulu traffic by utilizing the H3 highway), park use, and the cost benefit of repairing existing facilities are analyzed, an accurate and up- to-date environmental assessment for this project does not exist.
- Over 40,000 people have signed petitions against the project and the Honolulu City Council and the Waimanalo Neighborhood Board have come out in opposition to the project. This indicates that DPP and its contractor utterly failed in its duty to consult and engage with the public and that many of the .01 percent of the Waimānalo population who once supported the project have now changed their mind. While public opinion is not the final arbiter of government projects, the fact that the FEA only indicates that approximately 100 members of the public were ‘consulted’ and now over 40,000 people oppose the project should mean something to a project that is supposed to benefit those who actively oppose it.
- In July 2018, the City & County of Honolulu began requiring county agencies to consider the impacts of global climate change on any proposed projects, using the

State's 2017 *Sea Level Rise Vulnerability and Adaptation Report* as a guide. While this new analysis requirement is not mandated for this particular project, having some idea of what impacts the inevitable global climate change will have on WBBP and the surrounding area would certainly be useful in determining future impacts of this project, as well as conducting the necessary cost benefit analysis of repairing and upgrading other similar facilities nearby. The 2017 report indicates only minimal direct impacts on WBBP due to sea level rise and storm flooding, however it shows significant impact to Kalaniana'ole Highway both just north and just south of WBBP, which could result in major changes to people's ability to access and use the park. This information also further supports the more robust analysis of potential alternatives that HRS § 343.7 requires but that the FEA ignores.

102. Based on the above significant changes and information relevant to the project, a supplemental Environmental Assessment should be completed in order to address the shortcomings of the 2012 FEA as addressed in this Complaint, and to determine whether a full Environmental Impact Statement (EIS) is required.

**Count III – In violation of ROH Chapter 21 Sec. A-1.7 and 44 CFR 60.3(d), the City failed to identify a floodway or conduct a flood encroachment survey**

103. The WBBP Master Plan section pertaining to "Natural Hazards" (including the floodplain) omits that a portion of the proposed development in Phase 1 is within the Area of Special Flood Hazard (Zone AE). There is no floodway designated in the construction area in Phase 1. The emergency egress road proposed in the Master Plan is also entirely within Zone AE and crosses *Inoaole Stream*, which is already designated as a floodway (Zone AO).

104. According to 44 CFR 60.3(d)(3), for construction within Zones AE and AO the developer must ensure that the proposed encroachment would not result in any increase in flood

levels within the community during the occurrence of the base flood discharge. This regulation pertains not only to structures, but *any* development activity that triggers an encroachment study including: fill, new construction, substantial improvements and “other development”. Projects, such as filling, grading or construction of a new building, must be reviewed to determine whether they will obstruct flood flows and cause an increase in flood heights upstream or adjacent to the project site.

105. The Federal Emergency Management Agency (“**FEMA**”) encourages communities to adopt more restrictive requirements for these areas, and the City and County of Honolulu has done so in Chapter 21 of the Revised Ordinances of Honolulu. One of the more restrictive requirements adopted by the City is mandatory encroachment modeling, to determine the floodway *before* development.

106. According to the Revised Ordinances of Honolulu (“**ROH**”), Chapter 21A “FLOOD HAZARD AREAS”, Article 1. General Provisions, Sec. 21A-1.7(f) “Floodway area”:

“The floodway identified on the flood maps and located within areas of special flood hazard is the watercourse reserved to discharge the base flood. Since the floodway is an extremely hazardous area due to the velocity of floodwaters which could carry debris, and erosion potential, the following provisions shall apply:

- (f) Within an area designated AE *without a floodway on the flood maps*, until a floodway is designated, no new construction, substantial improvement, or other development (including fill) shall be permitted unless it is demonstrated that the cumulative effect of the proposed development, when combined with all other existing and anticipated development, will not increase the water surface elevation of the base flood more than one foot at any point.” (emphasis added)

According to FEMA, the objective of this requirement and the floodplain management ordinance is “to ensure that the floodway is reserved to do its natural job: carrying floodwater.

*The preferred approach is to avoid all development there.*<sup>1</sup>

107. Once (the) community adopts its floodway, (it) must fulfill the requirements of 44 CFR 60.3(d). The key concern is that each project proposed in the floodway must receive an encroachment review, i.e., an analysis to determine if the project will increase flood heights. Under National Flood Insurance Program (“NFIP”) minimum requirements, it is assumed that there will be no cumulative effects since the permissible rise for any single encroachment is zero. The City and County may conduct the encroachment review, or may require the developer (in this case the same entity) to conduct it.

108. On March 16, 2020, City and County of Honolulu Floodplain Manager Mario Siu-Li (Department of Planning and Permitting) confirmed that the City *has not* conducted a flood encroachment survey at WBBP. Thus, the City has not demonstrated that the cumulative effect of the proposed development will not increase the water surface elevation of the base flood more than one foot at any point as required by ROH Chapter 21 Sec. 21A-1.7(F) and 44 CFR 60.3(d)(3).

109. There is no flood hazard, flood determination, or floodway variance in the April 3, 2020 grading permit for the “proposed construction of a multi-purpose field” at Waimānalo Bay Beach Park.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for the following relief:

A. Temporary, Preliminary, and Permanent Injunctive Relief against the City;

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<sup>1</sup> NFIP Floodplain Management Requirements, located at FEMA website: [https://www.fema.gov/pdf/floodplain/nfip\\_sg\\_unit\\_5.pdf](https://www.fema.gov/pdf/floodplain/nfip_sg_unit_5.pdf), last visited on April 26, 2020.



- B. For an order requiring immediate compliance with all state laws based on Counts I –III above;
- C. For an order voiding the SMA Major Permit and EA and requiring a Supplemental Impact Statement for the newly-proposed development at Waimānalo Bay Beach Park;
- D. For an order requiring a flood encroachment survey at WBBP;
- E. For an order mitigating past and current impacts on the adversely affected public trust resources at Waimānalo Bay Beach Park,
- F. For an order awarding damages as determined appropriate at trial and Plaintiffs’ attorneys’ fees and costs incurred;
- G. For such other and further relief as this court deems just and proper.

#### **DEMAND FOR JURY TRIAL**

Pursuant to Rule 38 of the Hawai‘i Rules of Civil Procedure, Plaintiffs demand a trial by jury in this action of all issues so triable.

DATED: Honolulu, HI 96816, April 27, 2020.

MARGARET WILLE & ASSOCIATES LLC

/s/ *Timothy Vandever*  
Timothy Vandever  
Margaret (Dunham) Wille  
  
Attorneys for Plaintiffs