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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

SAVE OUR SHERWOODS, a non-profit organization, MOANA KEA AMONG, MAUREEN HARNISCH, ARCHIBALD KAOLULO, MITCH WERTH

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, Secretary of the Interior, CITY AND COUNTY OF HONOLULU, CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU, DEPARTMENT OF PLANNING AND PERMITTING OF THE CITY AND COUNTY OF HONOLULU; DEPARTMENT OF DESIGN AND CONSTRUCTION OF THE CITY AND COUNTY OF HONOLULU; DOES 1-10,

Defendants.

Civil Case No.: 1:19-cv-519
(Declaratory and Injunctive Relief)

COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF; INDEX TO EXHIBITS AND EXHIBITS 1-5; DEMAND FOR JURY TRIAL; NOTICE OF SERVICE [Per FRCP Rule 4]

Plaintiffs Save Our Sherwoods, Moana Kea Among, Maureen Harnisch, Archie Kaolulo, and Mitch Werth (**"Plaintiffs"** or **"the Plaintiffs"**), complain and allege against Defendants as follows:

INTRODUCTION

1. On April 23, 2019, despite a flawed planning process, inadequate community engagement, and overwhelming public opposition, Defendant City and County of Honolulu Department of Design and Construction **("Department of Design and Construction"**) began construction on a massive sports complex, including four multi-purpose ball fields, 470 paved parking stalls, and a 2,500 square-foot concrete pad for a play structure on the 75-acre parcel known as Waimānalo Bay Beach Park (the **"Beach Park"**, or "**WBBP"**), (also known as **"Sherwoods"** or **"Sherwood Forest"**) as Phase 1 of its Master Plan (the **"Proposed Development"** or **"Plan"**). The approval was granted by Defendant City Council of the City and County of Honolulu (**"City Council"**) and based on the flawed recommendation of Defendant Honolulu Department of Planning and Permitting of the City and County of Honolulu (**"DPP")** (collectively – along with Department of Design and Construction, the **"City"**). The Proposed Development also includes additional camp sites, additional group camping/gathering areas, walking trails, picnic areas, and comfort stations to be constructed at the Park at a projected cost to taxpayers of approximately 32 million dollars.

2. Currently, Waimānalo Bay Beach Park is a family-style county beach park in the center of Waimānalo. The beach in Waimānalo is nearly 5.5 miles long and the longest stretch of sandy shoreline on O‘ahu. With its heavily forested shoreline and dedicated open space, the Beach Park is also one of the few remaining examples of a shaded beach and coastal forest on the island. The Beach Park is currently and has been a water-oriented recreation site for over 45 years.

3. Waimānalo Bay Beach Park (WBBP) is listed on the National Register of Historic places and includes numerous documented historic sites and burials containing human remains.

4. 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, another open/multi-use field, and a Community Center.

5. Though heavily used by the public, the existing parks located in the area surrounding Waimānalo Bay Beach park, including Waimānalo Beach Park and Waimānalo District Park/Azevedo Field, have been in a state of neglect and disrepair for a number of years.

6. In June 1971, the State of Hawai‘i (then-owner of WBBP) applied for and was granted funding as part of the Land and Water Conservation Fund

(**"LWCF"**) administered by the National Park Service (**"NPS"**) of the United States Department of the Interior (**"DOI"**) for Waimānalo Bay Beach Park.[1]

7. Pursuant to federal statutory authority and regulatory guidelines, State LWCF projects are governed by grant agreements that impose substantive land use restrictions on LWCF-funded parks. In the project agreement for the grant application, the State of Hawai'i agreed to be restricted to developing "water-oriented recreation facilities in a beach park".

8. In 1977, an Environmental Impact Statement (**"EIS"**) was drafted for the grant project for Waimānalo Beach State Recreation Area (as it was then-known) by the Division of State Parks, Outdoor Recreation and Historic Sites, Department of Land and Natural Resources (**"DLNR"**), the State of Hawai'i expressly noted that sports recreation activities such as court games including "open-level" ball fields and "organized" (sport) recreation activities detracted from and were not appropriate for "water-oriented recreation" and thus undesirable at Waimānalo Bay Beach Park.[2]

[1] U.S. Dept. of the Interior National Park Service Land and Water Conservation Fund Project Agreement Number 15-00053 is attached as Exhibit #1.
[2] Environmental Impact Statement for Project Number 15-00053 dated June 2, 1977 is attached as Exhibit #2.

9. The United States, in consideration of the promises made by the State of Hawai‘i in the project agreement, general plan, and EIS, promised to provide to the State $239,200 in federal grant money for the project.

10. In 1978, the beach park improvements were developed at WBBP utilizing the federal grant money from the Land and Water Conservation Fund. The State's improvements include many of the water-oriented recreation features that are present in the park today including: perimeter fencing, picnicking and camping facilities, comfort stations, and landscaping.[3]

11. The recording of the LWCF agreement and land use obligations in public records, (and the U.S. government's reliance on such agreement), constitutes a conservation easement that burdens the parcel in question. The federal government thus has contractual rights against the state, and a property right in the ultimate project sponsors' LWCF funded property.

12. The current development proposal in the City's Master Plan, including a massive sports complex, four "open level" ball fields for organized recreation contravenes the original project agreement for the restricted use parcel.

[3] A caretaker's house, that was built as part of the original project agreement, was destroyed by fire in 2016.

13. The proposed 470 additional parking stalls far exceeds what is needed for a water-oriented beach park and constitutes a conversion in the land use to other than public outdoor recreational use.

14. The City did not seek authorization and the NPS did not authorize a substantive change in eligible use in contravention of the original project agreement or a conversion in the park's intended recreational activities. The current Master Plan also represents a breach of the original express agreement between the State of Hawai‘i and the United States Department of the Interior.

15. WBBP is listed on the National Register of Historic Places. Defendant City has not fulfilled federal requirements regarding fulfillment of Section 106 of the National Historic Preservation act, specifically regarding consultation with Native Hawaiian Organizations (NHOs) as part of their request for conversion of the Park's recreational use.

16. Defendant City and County of Honolulu has also 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.

17. In 2009, an Environmental Assessment (**"EA"**) was drafted by PBR Hawai‘i for its client, Defendant City and County of Honolulu Department of Design. This EA did not adequately consider alternatives to the Proposed

Development, including repairing existing District Parks in the immediate vicinity of Waimānalo Bay Beach Park and preserving the unique integrity of WBBP.

18. Besides insufficient and conclusory data, the EA also contains numerous fallacies. Foremost among them was the false claim by the City and County of Honolulu that Waimanalo Bay Beach Park is not listed on the National Register of Historic Places.

19. The false information in the 2009 EA pervades the record in betrayal of the public trust and undermines the validity of subsequent land use approvals.

20. The 2009 EA also notably failed to properly assess the cumulative impacts from the Proposed Development, including but not limited to, traffic, congestion, and climate change.

21. The proposed WBBP development plan will result in an increase in visitors, traffic, and congestion to the Waimānalo Bay Beach Park area – that was not sufficiently addressed by the 2009 EA.

22. The decade-old development plan (accepted in final form in 2012) does not account for the numerous and substantial changes to the environment and context of the community surrounding the Proposed Development.

23. In 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 was not mandated for this particular project, the impacts of global climate change and sea-level rise will have disproportionately greater negative impacts O‘ahu and specifically on places such as WBBP, which are located in the coastal zone. Given the drastic rise in temperature in Hawai‘i and impacts on nearshore reef systems over the past several years alone, an expanded and comprehensive study based on the substantial changes in the environment surrounding WBBP is necessary to determine the impacts of this project on the coastal community.

24. This specific proposed development is subject to additional development restrictions because the 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).

25. The SMA or this proposed development plan, like the EA, is also inadequate and based upon on bad information.

26. 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.

27. The affected local residents, including Plaintiffs, as well as civic minded members of the Waimānalo community and surrounding communities, have been left out of the critical stages of the required planning process for such a park conversion.

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

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

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

31. To date, the City, its City Council and its DPP, have not adequately enforced the federal, state and local laws, including the statutory mandate requiring authorization from the National Park Service for substantive change in eligible use in contravention of the original project agreement or conversion of recreational land, SMA permitting and monitoring requirements, HRS Chapter 205A, and ROH Chapter 25, and Hawai‘i Administrative Rules against the Department of Design and Construction to ensure present and future compliance.

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

33. This action seeks declaratory and 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 sense of place.

34. Ultimately, Plaintiffs seek to stop the conversion of a culturally and environmentally sensitive community beach park into a massive sports complex that contravenes legal commitments to the federal departments that funded the park and that would likewise contravene state and local laws.

THE PARTIES

35. Plaintiff Save Our Sherwoods is an incorporated 501(c)(3) non-profit organization, dedicated to protecting and preserving the historical, cultural, and natural resources of Waimānalo and neighboring communities across the state of Hawai‘i. In particular, SOS 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. SOS is also specifically concerned about the desecration and disrespect of the historic and cultural resources and known archaeological sites throughout the WBBP, including numerous iwi kupuna. Many SOS members are Native Hawaiian cultural practitioners and consider the park land to be sacred ground, specifically the Jaucus sand deposits which hold numerous burials. SOS members also utilize the beach park and the public amenities connected to water recreation that are provided at the park. SOS members feel that the Proposed Development is simply a pretext for increased commercial development in the area and feel that instead of urbanization and multi-million-dollar sports complexes, 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.

36. Plaintiff Moana Kea Among has been active in efforts to keep Waimanalo an active agriculture community and preserve the rural atmosphere for future generations. 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 horse 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. In particular, Moana Kea utilizes the beach at Waimānalo Bay Beach Park and is concerned that this increase in traffic will also frustrate and diminish her recreational activities.

37. Plaintiff Maureen Harnisch is a 26-year O‘ahu resident and has personally utilized Waimānalo Bay Beach Park as a primary recreation site along with her family for over two decades. Harnisch has been involved in the Waimānalo community for many years and spent over a decade working on environmental projects in the area. She has a particular interest in being able to utilize the beach park and is concerned that a sports field will interfere with her

family's on-going beach recreation by disrupting low-key nature-based ocean recreation activities and opportunities that epitomize the community's sense of place and community values. Harnisch is also a long-time environmental activist 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.

38. Plaintiff Archibald Kaolulo is a 38-year resident of Waimānalo. 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, Kaolulo headed the Waimānalo Beach Lots Association and worked to help convert cesspools to more environmentally sound septic systems. Kaolulu 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, Kaolulo has a particular concern in protecting Waimānalo Bay Beach Park,

the open space, adjoining shoreline, nearby residential neighborhoods, and coastal and environmental resources.

39. Plaintiff Mitch Werth is a 45-year resident of Waimanalo and has lived adjacent to the Waimānalo Bay Beach Park during that time. Werth began the practice of law in 1974 as a Deputy Public Defender for the State of Hawaii for the island of Oahu until entering private practice in 1978. After becoming a Board Member for the Waimanalo Teen Project in 1975, and after incorporating it as a non-profit organization to serve the youth of Waimanalo to enhance their educational & vocational law abiding participation within the community, 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 protect the Waimānalo Beach Lots residential zoning classification from being converted to commercial. 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 and as a neighbor living adjacent to the Waimānalo Bay Beach Park, Werth has concerns about proposed changes to the infrastructure with particular concern in protecting Waimānalo Bay Beach Park, the open space, adjoining shoreline, nearby residential neighborhoods, and coastal and environmental resources.

40. Defendant United States Department of The Interior is an agency of the United States government and bears responsibility, in whole or in part, for the acts complained of in this Complaint, including ensuring compliance with Federal-State agreements relating to the Land and Water Conservation Fund.

41. Defendant David Bernhardt is the Secretary of the Interior and is sued in his official capacity. Mr. Bernhardt oversees the Land and Water Conservation Fund and is responsible for making determinations regarding the authorization of conversion of LWCF lands pursuant to 54 U.S.C.A. § 200305(f)(3).

42. Defendant City and County of Honolulu is a municipal corporation duly organized and existing under the Constitution, laws of the State of Hawai'i, the Revised Charter of the City and County of Honolulu, and the Revised Ordinances of Honolulu.

43. Defendants 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 (as noted above, together, Defendants City and County of Honolulu, Honolulu City Council, DPP and Department of Design and Construction are collectively referred to as the "City"). 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).

44. 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. 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

45. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States) and 28 U.S.C. § 1361 (action to compel officer or agency to perform duty owed to Plaintiffs). This action arises under The Land and Water Conservation Fund 54 U.S.C.A. § 200305. This Court may grant declaratory relief, injunctive relief, and other relief pursuant to the above laws.

46. Venue is proper in the United States District Court for the District of Hawaii pursuant to 28 U.S.C. § 1391(e) because this is the judicial district in which all Plaintiffs reside, where the actions disputed are occurring, and this action seeks relief against federal agencies and officials acting in their official capacities.

FACTUAL BACKGROUND

47. Waimānalo Bay Beach Park is comprised of land ceded to the Territory of Hawai‘i, then taken for United States military purposes in 1917. In 1972, the U.S. military transferred the land back to State of Hawai‘i, Department of Land and Natural Resources.

48. In 1972, the Park was placed on the National Register of Historic Places as part of the Bellows Field Archaeological Area. The Area is listed as a “funerary” in the Register, due to the discovery of numerous burials, and human remains.[4]

49. Waimānalo Bay Beach Park was formerly owned and managed by the State of Hawai‘i, Department of Land and Natural Resources, Division of State Parks and known as Waimanalo State Recreation Area. Prior to state ownership, the Park it was part of the adjacent Air Force facility, known at the time as “Bellows Field”. In 1972, after the land was transferred from the military to the State, a general plan was developed. The 1972 plan encompassed both the subject 75-acre site as well as lands that are still under management by the U.S. Air Force.

[4] National Register of Historic Places Nomination Form for Bellows Field Archaeological Area is attached as Exhibit #3, including redacted portions of the form noting burial sites, which was previously made public by the City and County of Honolulu on August 12, 2019.

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

51. In a subsequent Environmental Impact Statement (**“EIS”**) conducted for the State of Hawai‘i Department of Land and Natural Resources (**“DLNR”**) in April 1977, the State of Hawai‘i noted, (and the Department of the Interior accepted (pertaining to court and field sports) “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)

52. Following the approval of the Final Environmental Impact Statement (FEIS) in June 1977, the State of Hawai‘i amended the original project agreement with the Department of the Interior (based on the recommendations in the FEIS),

deleting from the scope of the project 30 campsites, 12 acres of site improvements, 12 acres of landscaping, 1 maintenance/storage/administration building, 0.75 miles of road, an 80 space parking area, and 2 park signs and reducing in scope the number of group picnic sites from 4 to 2, and number of comfort stations from 3 to 2[5].

53. 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."[6] Improvements for the project included an additional comfort station, sewer system, and related support facilities.

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

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

56. In 2009, a draft Environmental Assessment (EA) process was initiated.

[5] U.S. Dept. of the Interior Bureau of Outdoor Recreation Project Amendment No. 15-00053.4 is attached as Exhibit #4.
[6] U.S. Dept. of the Interior National Park Service Land and Water Conservation Fund Project Agreement Number 15-00123 is attached as Exhibit #5.

57. Pre-consultation with the U.S. Army began in 2010. On June 14, 2010, DLNR acknowledged that the area is in a flood zone.

58. 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" and recommends (among other provisions), pre-construction briefing and on-site monitoring.

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

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

61. An application for a Special Management Area Permit was accepted on January 31, 2013. The public hearing for the SMA was held on March 1, 2013. The SMA was approved on April 9, 2013.

62. 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 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.

63. 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.

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

65. On April 23, 2019 bulldozers arrived at the park and local resident Jody Green alerted neighbors and news media.

66. Community organization Na Kua‘āina o Waimānalo held the first community meeting concerning the initiation of the project at the Waimanalo Public School library on April 26, 2019. Approximately 800 signatures were collected on a petition to stop the project.

67. A grading permit was issued in April of 2019. The permit did not acknowledge or grant authorization for trenching.

68. On April 29-30th, 2019 trees were knocked down on site with no archaeologist present. This violation eventually prompting SHPD to send Division of Conservation and Resource Enforcement (DOCARE) officers to temporarily shut down work on the project. 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. This violation eventually prompting SHPD to send Division of Conservation and Resource Enforcement (DOCARE) officers to temporarily shut down work on the project.

69. 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.

70. On May 29, 2019, the Honolulu City Council held 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".

71. 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.

72. On June 10, 2019 – The Waimānalo Neighborhood Board voted 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".

73. 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.

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

COUNT I – Against Department of the Interior and Secretary of the Interior (Conversion in Violation of 54 U.S.C.A. § 200305)

75. Plaintiffs re-allege all prior paragraphs.

76. The Land and Water Conservation Fund (LWCF) provides funding for federal and state projects to acquire and develop parks for public outdoor recreation. The National Park Service (NPS) is responsible for overseeing the state grants program. LWCF grants may serve a broad range of purposes, but all projects are governed by individual agreements between the state and NPS that establish the purpose and scope of each specific project. These agreements restrict the use of LWCF-funded parks.[7]

77. LWCF grants constitute legally enforceable contracts. An LWCF grant provides the project sponsor with funding for its desired project and enables the United States to protect a natural resource in perpetuity. When the state accepts LWCF funds, the state is bound to protect the specific recreational resource supported by the grant, even if it passes the grant on to a local sponsor.

[7] The legal authorization of the LWCF expired on September 30, 2018 and was permanently reauthorized on March 12, 2019. The new citation for the Land and Water Conservation Fund (54 U.S.C.A. § 200305) is noted here, though some regulations and program manuals still cite the relevant portion pertaining to conversion as 16 U.S.C. 4601 Section 6(f)(3).

78. In June 1971, the State of Hawai‘i entered into a project agreement with the U.S. Department of the Interior for assistance from the Land and Water Conservation Fund, which was to be used to develop “water-oriented recreation facilities in a beach park”. The proposed development included, “site improvements, comfort stations, maintenance/storage administration buildings, group shelters, camp-ground, electrical system, water system, sprinkler system, sewage system, outdoor shower, parking, roadway, picnic tables, outdoor grills, fencing, landscaping, and signs.”

79. The State applied for and eventually received $239,200 dollars in LWCF funds as part of the proposed project. The United States, as represented by the Department of the Interior, and the state of Hawai‘i mutually agreed to perform this agreement under the Land and Water Conservation Fund Act of 1965, and “with the terms, promises, conditions, plans, specifications, estimates, procedures, project proposals, maps and assurances attached”. The State of Hawai‘i promised, in consideration of the promises made by the United States, to execute the project in accordance with the terms of the agreement.

80. In a subsequent Environmental Impact Statement (**“EIS”**) conducted for the State of Hawai‘i Department of Land and Natural Resources (**“DLNR”**) in April 1977 for the Master Plan project utilizing LWCF grant money, the State of Hawai‘i explained the following: “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)

81. Following the approval of the EIS in June 1977, the State of Hawai‘i amended the original project agreement with the Department of the Interior, deleting from the scope of the project 30 campsites, 12 acres of site improvements, 12 acres of landscaping, 1 maintenance/storage/administration building, 0.75 miles of road, an 80 space parking area, and 2 park signs and reducing in scope the number of group picnic sites from 4 to 2, and number of comfort stations from 3 to 2.

82. In 1978, the Park improvements were expanded utilizing federal grant money from the Land and Water Conservation Fund. The State's improvements included many of the water and beach-oriented recreation features explained in the project agreement and the EIS that are still present in the park today, including:

picnicking and camping facilities, comfort stations, showers, perimeter fencing, and landscaping.

83. In 1986, the State of Hawai‘i applied for and received an additional LWCF grant 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."

84. Pursuant to 54 U.S.C.A. § 200305 (f)(3) "Conversion to other than public outdoor recreation use":

> No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation use. The Secretary shall approve a conversion only if the Secretary finds it to be in accordance with the then-existing comprehensive statewide outdoor recreation plan and only on such conditions as the Secretary considers necessary to ensure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location. Wetland areas and interests therein as identified in the wetlands provisions of the comprehensive plan and proposed to be acquired as suitable replacement property within the same State that is otherwise acceptable to the Secretary, acting through the Director, shall be deemed to be of reasonably equivalent usefulness with the property proposed for conversion.

85. Because the LWCF supports protecting a broad range of recreational resources, courts must look to the content of the specific grant agreement governing an illegally converted park.

86. According to 36 C.F.R. § 59.3 "Land and Water Conservation Fund Program of Assistance to States; Post-Completion Compliance Responsibilities":

> Section 6(f)(3) of the L&WCF Act is the cornerstone of Federal compliance efforts to ensure that the Federal investments in L&WCF assistance are being maintained in public outdoor recreation use. This section of the Act assures that once an area has been funded with L&WCF assistance, it is continually maintained in public recreation use unless NPS approves substitution property of reasonably equivalent usefulness and location and of at least equal fair market value.

…

> To assure that facility changes do not significantly contravene the original project agreement, NPS shall be notified by the State of all proposed changes in advance of their occurrence. A primary NPS consideration in the review of requests for changes in use will be the consistency of the proposal with the Statewide Comprehensive Outdoor Recreation Plan and/or equivalent recreation plans. Changes to other than public outdoor recreation use require NPS approval and the substitution of replacement land in accordance with section 6(f)(3) of the L&WCF Act and paragraphs (a) through (c) of this section.

87. According to the National Park Service Land and Water Conservation Fund State Assistance Program Manual Volume 69, Chapter 8 (Effective October 2, 2008):

> When it is discovered that a Section 6(f)(3) (now known as a Section (f)(3)) area has been converted without NPS approval, a conversion proposal must be submitted and reviewed by NPS for retroactive action. The NPS shall notify the State it is in violation of the grant contract, program regulations, and law, and an immediate resolution of the unapproved conversion must be expedited. If it is discovered that an unauthorized conversion is in progress, the State must notify the project sponsor to cease immediately until the conversion process

> pursuant to 36 CFR 59.3 has been satisfactorily completed. Resolution of the conversion will require State and NPS review of the conversion proposal, including the provision of suitable replacement property.[8]

88. The sports complex included in Phase 1 of the Waimānalo Bay Beach Park Master Plan represents a significant contravention of the project agreement, the 1972 Waimanalo Beach Park general plan, and the 1977 Environmental Impact Statement prepared along with the general plan in reliance on the LWCF grant funds.

89. Sports fields and concrete playgrounds are not "water-oriented recreation". As the 1977 EIS noted in advance of the 1978 utilization of LWCF funding, sport fields will attract participants and spectators who come to an area primarily for sports recreation and reduce the number of opportunities for beach and water recreation activities.

90. Further, the proposed 470 paved parking stalls to be developed as part of the Master Plan also constitutes a conversion in contravention of the original project agreement. According to LWCF Program Manual, if a grantee proposes to convert only a portion of an LWCF-funded park, NPS requires an evaluation of the conversion's impact on the park as a whole.

[8] https://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf (last visited on 9/21/19)

91. Pursuant to 54 U.S.C.A. § 200305, 36 C.F.R. § 59.3 and the requirements of the LWCF State Assistance Program Manual, the City and County of Honolulu has an obligation to notify NPS of the contravention of the original project agreement and seek authorization to ensure that the facilities change does not constitute a conversion. The City and County of Honolulu also has an obligation to notify NPS of the proposed park conversion, submit a substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location, and seek approval from the Secretary of the Department of the Interior.

92. The LWCF grant agreement also requires a coercive remedy to effectively protect the unique public resources at WBBP underlying the agreement. Based on the purpose and language of the LWCF grant agreement between the State of Hawai‘i and the United States, NPS is allowed to sue to enjoin unauthorized conversions and ensure restoration of parks converted without authorization or adequate substitution.

COUNT II – Against City and County of Honolulu
(Permitting in Violation of National Historic Preservation Act, Hawai‘i Environmental Policy Act, and Hawai‘i Administrative Rules)

93. Plaintiffs re-allege all prior paragraphs.

94. As noted above, Section 106 process must be applied to the Section (f)(3) protected area to be converted as well as the acquisition and development of

the replacement parkland. Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on such undertakings.

95. Waimānalo Bay Beach Park is a historic property listed in the National Register of Historic Places. Under Section 106, LWCF proposals requiring NPS review and decision are undertakings. The Section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties.

96. States are responsible for making reasonable and good faith efforts to identify Indian tribes and Native Hawaiian Organizations (NHOs) that shall be consulted in the Section 106 process. Consultation should commence early in the planning process in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties. States should seek assistance from the SHPO, THPOs, Native Hawaiian

organizations, tribes, other federal landholders, and any party it deems appropriate to determine if the proposal has the potential to affect Native Hawaiian resources. Under the LWCF, States are also instructed to seek further guidance from their NPS LWCF regional office in cases where the consultation process is complex, and assistance is needed to further define these responsibilities and roles.

97. Defendant City and County of Honolulu did not follow the required Section 106 process for proposed conversion of LWCF lands. In particular, there has been no reasonable or good faith consultation w/ NHOs as required by Section 106. There is no evidence that the City and County sought guidance from NPS regarding the consultation process.

98. Defendant City and County of Honolulu has also 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. 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.

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.

99. In the EA, the consultant, on behalf of Defendant City recommends an Archaeological Inventory Survey (**"AIS"**), yet to date no AIS has been provided to SHPD.

100. According to 36 C.F.R. § 60.15(b):

> Properties listed in the National Register prior to December 13, 1980, may only be removed from the National Register on the grounds established in paragraph (a) (1) of this section.

36 C.F.R. § 60.15 paragraph (a) (1) states:

> Grounds for removing properties from the National Register are as follows:
> (1) The property has ceased to meet the criteria for listing in the National Register because the qualities which caused it to be originally listed have been lost or destroyed, or such qualities were lost subsequent to nomination and prior to listing;

101. None of the qualities which caused the Bellows Field Archaeological Area to be placed on the National Register of Historic Places in 1972 have been lost or destroyed. To the contrary, the City's proposed development at Waimānalo Bay Beach Park poses the most immediate threat to the numerous archaeological sites and iwi kūpuna that are present at the site.

COUNT III – Against City & County of Honolulu Department of Planning (The FEA Violates HAR § 11-200.1-18 and HRS § 343.4)

102. Plaintiffs re-allege all prior paragraphs.

103. 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 Planning and reviewed and submitted by the City and County of Honolulu Department of Design and Planning 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." Based on the above-mentioned unauthorized conversion of the parcel in contravention of the original plan and intent for the area, the plan is clearly *not in compliance* with Federal land use controls.

104. The FEA also is also deficient in the following areas:

A. DPP did not conduct sufficient public consultation in violation of HAR § 11-200.1-18.

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 earlies 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 <u>those citizen groups and individuals that the proposing agency or approving agency reasonably believes may be affected</u>. (emphasis added)

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 FEA, in a community with a population at the time of over 5,400, meaning that the contractor consulted with approximately 0.01 percent of Waimanalo's residents.

Beyond its failure to adequately engage the local community regarding the project, the contractor did not to 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 B. 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.

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

The DPP did not consider reasonable alternatives to the project, specifically the repair and upgrade of existing ball 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 (7th Cir. 2003).

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 additional ball fields. This is a necessary alternative from the environmental, historical / cultural, and fiscal perspective, as there are already ball fields nearby and the proposed WBBP ball fields constitute a significant portion of the over $32 million price tag.

The contractor cannot say it did not have notice of this issue: a frequent theme of the public comments received was why build more ball fields when there are already four ball fields within less-than two miles of Waimānalo Bay Beach Park? While there was a general consensus that the ballfield at Waimānalo District Park suffered from poor drainage and was in need of maintenance and repair, why was this alternative not even mentioned in the FEA? The money saved by not razing trees and building ball fields at WBBP could potentially be spent on

upgrades to existing facilities. The FEA also uses the argument that the new ball fields at WBBP would relieve pressure on existing facilities, an argument that public comments contradicts in that the existing facilities were not heavily used due to their poor condition.

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 ball fields, ball fields that are unnecessary due to similar facilities already existing nearby.

The DPP's failure to consider reasonable alternatives such as eliminating the ball fields from the project due to the existing ball field facilities nearby is in violation of HRS § 344-4, especially given the negative impact clear cutting trees has on the habitat of the endangered Hawaiian hoary bat, and represents a failure to take a "hard look" at the impacts of a project required by an environmental assessment.

C. DPP did not draft a supplemental EA despite "significant new circumstances" since the original EA was published in 2012.

While the HAR only addresses supplemental environmental review in terms of an EIS, the same criteria should apply to an Environmental Assessment. HAR 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! Local 5 v. City and County of Honolulu*, 123 Hawai'i 150, 178, 231 P.3d 423, 451 (Supreme Court of Hawai'i, 2010).

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

- Over 32,000 people have signed a petition 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 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 32,000 people oppose the project should mean something to a project that is supposed to benefit those who actively oppose it.

- 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 associated with 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.
- 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.

Based on the above significant changes and information relevant to the project, a supplemental Environmental Assessment should be completed. The supplemental EA should also address the other shortcomings of the 2012 FEA addressed in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief:

A. An order declaring that: (1) The development and conversion of WBBP into the proposed sports complex is contrary to the commitment made to the United States; (2) The City failed to exercise its Public Trust responsibilities to protect cultural and environmental public trust resources; and (3) The Secretary of the Interior failed to exercise his duties, including under 54 U.S.C.A. § 200305;

B. An order ensuring that the Secretary of the Interior acknowledges its oversight obligation and undertakes the oversight required to prevent development and conversion that is inconsistent with the Project Agreement Number 15-00053 between the State of Hawai‘i and the United States in order to ensure the proper recreational use of WBBP.

C. An order declaring that the City failed to exercise its responsibilities to protect historic and culturally significant places under the National Historic Preservation Act and State of Hawai‘i historic preservation law.

D. An order declaring the City failed to exercise its responsibilities under HAR § 11-200.1-18 and HRS § 343.4.

E. Temporary, Preliminary, and Permanent Injunctive Relief against the City: (1) for unauthorized conversion of outdoor recreational space in violation of LWCF Grant Project Agreement , (2) voiding the SMA Major Permit and EA, (2) enjoining all current and future development in Waimānalo Bay Beach Park that is not consistent with the controlling restrictions for the nature-based beach park, (3) mitigating past and current impacts on the adversely affected public trust resources at Waimānalo Bay Beach Park, (4) requiring immediate compliance with all federal and state laws based on Counts I – III above;

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.

Dated: Honolulu, HI 96816 September 26, 2019.

/s/ Timothy Vandeveer
Timothy Vandeveer
Margaret (Dunham) Wille

Attorneys for Plaintiffs