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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.: 19-00519 LEK-WRP
(Declaratory and Injunctive Relief)

**MEMORANDUM IN SUPPORT
OF MOTION**

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MEMORANDUM IN SUPPORT OF MOTION

Introduction

Plaintiffs are a non-profit environmental organization and individual residents of the City and County of Honolulu and have brought the above-referenced lawsuit to stop the illegal construction project at Waimānalo Bay Beach Park (“**WBBP**”), known by its Hawaiian name Hunananiho (also known as “**Sherwoods**” or “**Sherwood Forest**”), until authorization for conversion of recreational space and proposed park use in contradiction of the original project agreement is obtained, federal and state requirements for historic preservation have been met, and environmental impacts have been properly assessed.

On April 23, 2019, bulldozers arrived at the park to begin construction on “Phase 1” of the WBBP Master Plan for Defendant City and County of Honolulu Department of Design and Construction (collectively, along with City and County of Honolulu, City Council of the City and County of Honolulu, and Department of Planning and Permitting of the City and County of Honolulu, “**Defendant City**”).

“Phase 1” of Defendant City’s proposed development project at WBBP is within a 3.88-acre portion of the 74.76-acre park. According to Defendant City, 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.

Though the project plan called for the halting of “tree and shrub clearing of woody plants over 15 feet tall” to “avoid impacts to young Hawaiian hoary bats during the bat breeding and pupping season that lasts from June 1st through September 15”, nearly four acres of mature trees had already been clear cut for the construction of the multi-purpose field (almost the entire footprint of Phase 1) by the beginning of June. The project was postponed several times (for reasons unknown to the public) and construction continued piecemeal through the summer. Earthmoving equipment was slated to start subsurface work on September 23, 2019 but was halted again after overwhelming community opposition. On September 28, 2019 an archaeological object was discovered on the Phase 1 site and reported to the State Historic Preservation Division (“**SHPD**”) halting work until a mitigation plan could be completed.

Though the project is broken into different phases of construction, both the Final Environmental Assessment (FEA) and Special Management Area (SMA)

Permits considered the entire Master Plan as proposed and the project in totality. Future phases of the project include additional sports fields and facilities, an increase in the number of camp sites, two group camping/gathering areas, walking trails, picnic areas with new comfort stations, and some 459 additional parking stalls. The total cost to taxpayers is currently estimated at 32 million dollars.

Facts

As described in the First Amended Complaint (“FAC”) ¶ 5, in June 1971 the State of Hawai‘i applied and was granted funding for Waimānalo Bay Beach Park (“WBBP”) from the Land and Water Conservation Fund (“LWCF”), administered by the National Park Service (“NPS”) of the United States Department of the Interior (“DOI”), which funding dictated certain restrictions – including that the project be utilized for recreational purposes in compliance with the original project agreement.

In 1972, the Park was also 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 items of archaeological significance, including human remains (FAC ¶ 47).

In 1977, an Environmental Impact Statement (“EIS”) was drafted for the LWCF grant project for Waimānalo Beach State Recreation Area (as it was then-known) by the State of Hawai‘i which 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 (FAC ¶ 49). The United States, in reliance on 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 (FAC ¶ 8).

In 1978, beach park improvements were developed at WBBP utilizing the federal grant money from the LWCF. (FAC ¶ 9). 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.

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 (FAC ¶ 51).

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 (FAC ¶ 52). In 2007, the City and County of Honolulu Department of Design and Construction initiated the Waimānalo Bay Beach Park Master Plan (FAC ¶ 53). In 2009, a draft

Environmental Assessment (EA) process was initiated (FAC ¶ 54). The 30-day comment period for the EA ended on April 23, 2012 (FAC ¶ 55). On, June 25, 2012, the Master Plan was completed and the Final Environmental Assessment (FEA) was presented to Office of Environmental Quality Control (FAC ¶ 56). Because the WBBP is in the coastal zone, a Special Management Area (SMA) Permit was required for the project. 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 (FAC ¶ 57).

Argument

“A plaintiff seeking a preliminary injunction must establish that (they) (are) likely to succeed on the merits, that (they) (are) likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in (their) favor, and that an injunction is in the public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). As the court noted in *All. for the Wild Rockies v. Cottrell*, “...‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” 632 F.3d 1127, 1135 (9th Cir. 2011)

In the instant case, Plaintiffs have raised “serious questions going to the merits” as to Defendant City’s failure to seek or receive approval from the NPS for conversion of recreational space and proposed park use in contradiction of the original project agreement. Plaintiffs argue that Defendant City’s failure to seek approval for conversion entitles Plaintiffs to injunctive relief as a statutory right.

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.¹ (emphasis added)

Plaintiffs have, at a minimum, raised serious questions going to the merits of Defendant City’s failure to seek or obtain approval for proposed (allowable) park use in contradiction of the original project agreement, failure to comply with

¹ National Park Service Land and Water Conservation Fund State Assistance Program Manual Volume 69, Chapter 8 (Effective October 2, 2008) - <https://www.nps.gov/ncrc/programs/lwcf/manual/lwcf.pdf> (last visited on 9/21/19)

federal and state requirements for historic preservation and failure to properly assess the environmental impacts of the WBBP Master Plan. Plaintiffs have also shown an existing and ongoing threat of irreparable harm to the WBBP parcel and that an injunction is in the public interest.

I. PLAINTIFFS HAVE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. Defendants actions or inactions were violative of LWCF

Defendant City's current development proposal for WBBP, including a multi-purpose sports complex, "open level" ball fields for organized recreation, and a concrete "play structure", contravenes the original project agreement for the restricted use parcel. The proposed 470 additional paved parking stalls (approximately 11 is which stalls are dedicated for multi-purpose sports complex and organized recreation in contravention of original project agreement) constitute a conversion in the land use to other than public outdoor recreational use.

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.

The City did not seek 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.

B. National and State Historic Preservation

As described in Complaint, WBBP is listed on the National Register of Historic Places. Both the FEA and the SMA permit rely on Defendant City's false claim the property is not on the Historic Register. Defendant City has not petitioned the federal government for removal of the property from the Register per the process outlined in 36 C.F.R. § 60.15, that requires applicants to cite how qualities which caused the property to be originally listed (for WBBP, archaeological sites and iwi kūpuna) have been lost or destroyed. To the contrary, the City's proposed development at WBBP poses the most immediate threat of destruction to the numerous archaeological sites and iwi kūpuna that are present at the site.

Though Defendant City maintains that even if WBBP were listed on the Historic Register it would irrelevant to their project, as no federal funds are to be

used in the proposed development (that would otherwise trigger federal requirements under Section 106 of the National Historic Preservation Act (“NHPA”)), Defendant City would be required to fulfilled federal requirements regarding Section 106 of NHPA as part of a request for conversion of the Park’s recreational use, specifically regarding required consultation with Native Hawaiian Organizations (“NHO”s).

Under Hawai‘i Administrative Rules (“HAR”), Defendant City is also required to consult with “ethnic organizations or members of the ethnic group for whom some of the historic properties may have significance” and for “native Hawaiian properties”, the Office of Hawaiian Affairs (“OHA”). Though Defendant City’s FEA includes an entry about To Plaintiffs’ knowledge, Defendant City has not submitted documentation of consultation with ethnic organizations and OHA to the State Historic Preservation Office as required by Hawai‘i Administrative Rules.

In the FEA the consultant, on behalf of Defendant City, recommends an Archaeological Inventory Assessment (“AIS”) prior to completion of detailed park design for areas proposed for ground disturbance, noting that the most extensive areas of earth moving will be required to create level sports fields near Kalaniana‘ole Highway. Though these areas were extensively bulldozed by the U.S. military in the late 1970’s, they have been tested by archaeologists, and

Defendant City acknowledges there is the possibility of discovering sub-surface intact cultural deposits.

C. The FEA is inaccurate and insufficient

As noted above, the FEA contains numerous inaccuracies and omissions, including the false claim the WBBP is not on the National Register of Historic Places.

The FEA also failed to meet basic requirements of the HAR pertaining to Environmental Assessment. According to the FEA, the extent of the required public “consultation” amounted to approximately 0.01 percent of Waimanalo’s residents. The failure of project planners to adequately consult the community was evidenced by the outpouring of public and political opposition that came with increased awareness outside the limited channels of engagement utilized by Defendant City. 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 Waimānalo Recreational Park. The FEA does not address this particular comment, nor does it consider this alternative.

The consultant for Defendant City 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.” Among the first actions taken by Defendant City in April 2019 was to clear cut approximately four acres of the parcel for the multi-purpose recreation field as part of Phase 1 of construction, including large stands of trees and ironwoods.

The DPP did not consider reasonable alternatives to the project as required by Hawai‘i Revised Statutes (“**HRS**”) Chapter 344, specifically the repair and upgrade of existing ball fields in the nearby area. 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.

A frequent theme of the public comments received in opposition to the proposed Master Plan pertained to Defendant City’s plan to build more sports fields instead of repairing and maintaining the existing ball fields in the community, four of which are located within less-than two miles of Waimānalo Bay Beach Park. This alternative was 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 states that the proposed organized sports fields at WBBP would relieve pressure on existing facilities, an argument that is contradicted by public comment which points out that existing facilities are not heavily used due to their poor condition.

The FEA 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 existing nearby. It is also important to note that there is no budget for maintenance for the proposed sports facilities at WBBP.

The DPP's failure to consider reasonable alternatives such as eliminating the proposed multi-purpose sports fields for organized recreation from the project due to the existing field facilities nearby is in violation of HRS § 344-4, especially given the negative impact that clear cutting trees has on the habitat and concrete

paving has on flood mitigation. This omission represents a failure to take a “hard look” at the impacts of a project required by an environmental assessment.

The FEA is also insufficient and should have been supplemented due to “significant new circumstances” since the original EA was published in 2012, including increased tourism, traffic (the studies for which were conducted in 2007), population growth, and public and political opposition to the WBBP Master Plan. The FEA also fails to take into account impacts from climate change that are reflected in current City land use policy. The FEA also failed to properly assess cumulative impacts on the environment from development in and around the area, including along the two-lane Kalaniana‘ole Highway that fronts WBBP.

D. The SMA Permit is invalid

As noted above, the SMA permit application contains numerous inaccuracies and omissions, including the false claim the WBBP is not on the National Register of Historic Places.

According to Defendant City, “approval of this (WBBP Master Plan Improvements) Special Management Area Permit does not constitute compliance with other Land Use Ordinance (LUO) or governmental requirements. They are subject to separate review and approval. The Applicant shall be responsible for ensuring that the final plans for the project approved under this permit comply with all applicable LUO and other governmental

agencies' provisions and requirements". The SMA permit is therefore not valid since the Applicant did not ensure that the final plans complied with other governmental agencies provisions and requirements, namely that required authorization from the National Park Service of the U.S. Department of the Interior regarding conversion of recreational space to something other than recreational use and proposed use in "significant contravention in the original project agreement" was not obtained.

Further, the SMA does not employ current models of sea level rise as they apply to coastal areas of the proposed WBBP Master Plan project. Current models of the impacts of climate change and sea-level rise show that many of the proposed campsite improvements described in the SMA permit will likely be under water due to the disproportionately greater negative impacts from climate change on O'ahu and specifically on parcels in the coastal zone such as WBBP.

II. PLAINTIFFS WILL SUFFER IRREPERABLE INJURY WITHOUT THE INJUNCTION

A. Water-oriented recreational activities

Future construction will injure Plaintiffs by permanently converting a portion of the parcel into non-recreational use by pouring concrete for parking stalls and a playground "pad" – permanently destroying habitat for endangered and threatened species and taking away the open space that the community treasures.

The sports complex proposed for construction as part of Phase 1 will also frustrate the “water-based recreation” purposes of WBBP by attracting participants and spectators to the area primarily for the purpose of “organized recreational activities” and consequently reduce the number of opportunities for beach and water recreation activities. Since the primary recreation resource of WBBP is the beach, constructing recreation interests which compete rather than supplement this recreational resource will cause irreparable harm to the Plaintiffs in this case.

B. Cultural and historic resources

Future construction is also likely to further disturb and destroy sub-surface archaeological sites in the WBBP parcel, which is located on the National Register of Historic Places as part of the Bellows Field Archaeological Area. City Defendants have submitted an archaeological mitigation plan to the State Historic Preservation Division (SHPD) but given the recent discovery of an archaeological item on the “Phase 1” project site since the filing of the Complaint, that plan is obviously insufficient, and the project is currently awaiting a SHPD mitigation plan reassessment.

Though City Defendant has stated a desire to proceed with construction once a new mitigation plan is in place, Plaintiffs argue that work should not proceed until an updated Archaeological Inventory Survey for the entire project, as recommended in the FEA. Though not acknowledged in the Master Plan or EA,

archaeologists have since admitted that the planned trenching and pipe construction for Phase 1 are likely to disturb iwi kūpuna (human burials) located in the Jaucus sand deposits nearer to the ocean. There are also currently no permits for trenching on the parcel. The likelihood of finding numerous and significant cultural and historic items, including iwi kūpuna, makes such harm inevitable.

C. Environmental degradation and flooding

The clear-cutting of large portions of the 3.88-acre portion of the 74.76-acre WBBP will have negative and irreparable effects on the habitat of endangered and threatened species such as ground nesting birds and the Hawaiian Hoary bat. As the forest and permeable dunes act as a natural buffer for the shoreline and ocean, the paving of the parcel will also have negative and irreparable impacts on marine life due to the increased likelihood of flooding and runoff in the area, carrying harmful pesticides, herbicides and other pollutants into the ocean.

D. Totality of the project

Because Defendant City failed to properly consider alternatives for sports fields and facilities, such as repairing existing nearby facilities, the project will be a major waste of taxpayer money.

Defendant City has publicly made the promise that it will only pursue “Phase 1” of the proposed development and seems to argue that the inaccurate and insufficient FEA and SMA permit only apply to the original scope of the project

(and the multiple phases it encompassed) and not to Phase 1 as recently excised from the original WBBP Master Plan. However, the project must be considered in its totality and future phases of the project as originally contemplated must be taken into consideration when assessing the likelihood of irreparable injury.

III. THE INJUNCTION WILL NOT SUBSTANTIALLY INJURE OTHERS

A preliminary injunction will not harm Defendant City – the project went almost seven years from completion and acceptance of the FEA to initiation of work. Any costs associated with potential construction delays are outweighed by the potential permanent damage to cultural resources, the fragile coastal ecosystem, and water-based recreation activities for the community.

The Defendant City has argued that they lose \$300,000 by stopping the project, however, the City could use the \$300,000 to repair existing facilities at other nearby parks for immediate use in fulfillment of their stated goals of providing viable sports fields near Kalaniana'ole Highway, while also responding to the community's overwhelming desire for preserving the character of the WBBP. The \$300,000 also pales in comparison to the \$32,000,000 projected cost for constructing a park that no one wants.

IV. THE INJUNCTION FURTHERS THE PUBLIC INTEREST

Injunctive relief is clearly in the public interest as it preserves the water-based recreational activities in the park and avoids irreparable environmental and cultural injury that would otherwise occur.

Plaintiff Save Our Sherwoods (“SOS”) is a non-profit community organization dedicated (according to their mission statement) 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 kūpuna.

Individual Plaintiffs Among, Harnisch, Kaolulo, and Werth also seek to preserve their water-based recreational opportunities in WBBP by stopping the conversion of the 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. These plaintiffs also seek to stop adverse impacts to infrastructure and traffic for residents of the neighboring community and all of O‘ahu.

Conclusion

All of the required elements for a temporary restraining order and a preliminary injunctive relief are met. Plaintiffs respectfully request that the Court expeditiously grant the requested injunctive relief.

DATED: Honolulu, HI 96816, October 16, 2019.

/s/ Timothy Vandever
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