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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF H

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION(S) TO DISMISS, [CM/ECF No(s). 14, 15]; CERTIFICATE OF SERVICE

HEARING DATE:
February 14, 2020 at 10:30 a.m.

Judge Leslie E. Kobayashi

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PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION(S) TO DISMISS

I. INTRODUCTION

This memorandum is in opposition to Defendants 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 Planning of the City and County of Honolulu's (collectively, the "City" or "City Defendants") Motion to Dismiss ("City MD") all Claims in Plaintiffs' First Amended Complaint ("FAC"), and Defendants United States Department of the Interior ("DOI") and David Bernhardt, Secretary of the Interior's (collectively, the "Federal Defendants") Motion to Dismiss ("Federal MD") Plaintiffs' FAC for Lack of Jursidiction.

Plaintiffs respectfully submit that City and Federal Defendants' claims that Plaintiffs have no private right of action under federal statute is without merit since the Administrative Procedure Act ("APA") contains an express waiver of sovereign immunity for suits such as this one, seeking injunctive and declaratory relief based on wrongful action by an agency or its officers. City Defendants' claims that Plaintiffs fail to state a claim for which relief can be granted and that there is no supplemental jurisdiction over associated state claims are also without merit. Plaintiffs' FAC, while not the most concise, is not in violation of Federal

Rules of Civil Procedure (FRCP) Rule 8 and is instead drafted in a manner to provide full notice of the scope of the claims. However, if the Court finds that said claims are insufficient in substance or format, Plaintiffs ask that the Court allow Plaintiffs to amend the Complaint to more concisely and precisely set forth their claims. With respect to Defendants' argument that the City Defendants should be consolidated as one Defendant, Plaintiffs agree and seek to amend the Complaint accordingly.

II. RELEVANT FACTS

A. Federal Claims

Plaintiffs filed their First Amended Complaint on October 16, 2019, alleging claims arising from the planned development of the Waimānalo Bay Beach Park ("WBBP" or "Beach Park") by City Defendants in accordance with their Master Plan (hereinafter, "Proposed Development"). Although the actions of the City Defendants are a primary focus of the suit, Plaintiffs named Federal Defendants, because the Department of the Interior issued two Land and Water Conservation Fund Act ("LWCF") grants to the (then-owner of WBBP) State of Hawai‘i for developments at the Beach Park in 1971 and 1978. FAC ¶¶ 37-38. Grants under the LWCF Act require that the benefitting property be dedicated to outdoor recreation. Consequently, the National Parks Service ("NPS") retains an oversight role to ensure that significant changes in property use do not contravene

the condition that the property be dedicated to outdoor recreation and that projects do not significantly contravene the intent of the original project agreement. *See e.g.* 36 C.F.R. § 59.3 (explaining when NPS approval is required for requests regarding changes in a LWCF grant).

Plaintiffs bring two claims against the Department of Interior for violations of the LWCF Act. *See generally* FAC, ¶¶ 85, 92. Plaintiffs argue that the addition of non-water-oriented recreational activities, including ball fields and associated parking stalls, to a water-oriented beach park significantly contravenes the original LWCF grant purposes. *See generally* FAC, ¶¶ 5-11. Specifically, an Environmental Impact Statement ("EIS") drafted for the original grant project by the Division of State Parks, Outdoor Recreation and Historic Sites, Department of Land and Natural Resources ("DLNR"), in which the State of Hawai'i expressly noted that sports recreation activities including ball fields and "organized" (sport) recreation activities reduced the number of opportunities for beach and water-oriented recreation and were thus inappropriate for the Park. *See* FAC ¶¶ 49-50, 89. In this regard, Plaintiffs maintain that Federal Defendants had an obligation to protect the unique public resources at WBBP underlying the agreement and did not sufficiently ensure the proposed developments at the Park complied with the LWCF Act grant limitations. *See* FAC ¶ 85.

Plaintiffs contend that as well as a conversion in the land use in contravention of the original project agreement, the Proposed Development also represents a breach of the contract with the U.S. DOI to maintain water-oriented recreational use at the Waimānalo Bay Beach Park and that Defendant City breached the contract by failing to abide by the requirements of the subject grant in the original project agreement and failing to protect the specific recreational resource, namely beach and water-oriented recreational resources. FAC, ¶ 91. As third-party beneficiaries, Plaintiffs along with other members of the public who utilize the beach and water-oriented recreation at WBBP, are harmed by the City Defendants' failure to abide by the terms of the contract as well as the Federal Defendants' failure to enforce said contract. *See generally* FAC, ¶¶ 85, 92.

B. City Claims

Plaintiffs also point out that Defendant City did not follow the required Section 106 under the National Historic Preservation Act ("NHPA") process for proposed conversion of LWCF lands. In particular, Plaintiffs cite the lack of evidence that the City sought guidance from NPS regarding the consultation process or conducted reasonable or good faith consultation w/Native Hawaiian Organizations ("NHO"s) as required by Section 106. *See generally* FAC, ¶¶ 94-101. In addition, Plaintiffs point out that the City's Final Environmental

Assessment (FEA) failed to demonstrate the sufficient public consultation required by the Hawaii Administrative Rules and failed to consider reasonable alternatives to the proposed action in violation of the Hawaii Revised Statues. See generally FAC ¶ 104. The City and County of Honolulu also failed to address significant changes that occurred between the FEA's 2012 publication and the project's start in 2018, including significant population growth surrounding the site, vocal opposition to the project from the local community, and new CCH requirements to analyze climate change impacts on a project. *See generally* FAC ¶ 104. Finally, the City and County failed to adequately address substantial changes in the scope and size of the project that was assessed, when it downsized the project to completion of only one Phase of the Master Plan. *See generally* FAC, ¶ 104.

III. LEGAL STANDARD

A. 12(b)(1)

"The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss." *See MCI Communs. Servs. v. City of Eugene*, 359 F. App'x 692, 697 (9th Cir. 2009) (citations and internal quotation marks omitted). "[U]nlike a Rule 12(b)(6) motion, in a Rule 12(b)(1) motion, the district court is not confined by the facts contained in the four corners of the complaint—it may consider facts and need not assume the

truthfulness of the complaint." *See id.* (citations and internal quotation marks omitted).

B. 12(b)(6)

To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008). As the Court explained, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

IV. DISCUSSION

A. This Court Has Jurisdiction Under The Administrative Procedures Act

Plaintiffs agree that Congress provided no express public right of action under the LWCF Act, and thus no express waiver of sovereign immunity applies under that statute. However, the Administrative Procedures Act (APA) entitles a person to judicial relief who is "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute[.]" 5 U.S.C. § 702. The APA provides that sovereign immunity as a bar to

judicial review of federal administrative action otherwise subject to judicial review is waived, and in which case naming the United States, the agency, or the appropriate officer as a defendant is acceptable and appropriate. *See Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 64 (D.D.C. 2014), *aff'd sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015).

Specifically, courts have found that the APA provides waiver for non-monetary relief against a U.S. agency or officer acting in an official capacity. *Clark v. Library of Cong.,* 750 F.2d 89, 102 (D.C.Cir.1984) (noting that the APA "eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity."). Further, courts have held that a suit need not have been brought pursuant to the APA in order to receive the benefit of that statute's sovereign immunity waiver; and that "APA's waiver of sovereign immunity applies to any suit whether (brought pursuant to the) APA or not." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C.Cir.1996) (parenthetical added).

In the instant case, the federal administrative inaction that is alleged, namely the Secretary of the Department of the Interior's (through the NPS) failure to make a determination that the proposed land use is or is not a conversion of recreational use in contravention of the original project agreement, is otherwise subject to judicial review. *See Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d

Cir. 1985) (the U.S. Court of Appeals, Second Circuit) holding that "the district court wrongly decided that the easement lands presently are 'not intended for outdoor, public, or recreational use.' Rather, in light of the policies of the Department of the Interior and the purposes of the statute, we interpret section 6(f)(3) 'public outdoor recreation uses' broadly, to encompass uses not involving the public's actual physical presence on the property." *Id. at* 446, 449 (2d Cir. 1985).

To be sure, the instant action is not a suit that has been brought pursuant to the APA. But that fact is of no moment because "[t]here is nothing in the language of the second sentence of 5 U.S.C. § 702 that restricts its waiver to suits brought under the APA." *Z St., Inc. v. Koskinen*, 44 F. Supp. 3d 48, 64 (D.D.C. 2014), *aff'd sub nom. Z St. v. Koskinen*, 791 F.3d 24 (D.C. Cir. 2015) quoting *Trudeau v. FTC,* 456 F.3d 178, 186 (D.C. Cir. 2006); *see also id.* (noting that the APA "waives sovereign immunity for '[a]n action in a court of the United States seeking relief other than money damages,' not [solely] for an action brought under the APA"). The second sentence of § 702 of the APA also states:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted **or failed to act in an official capacity or under color of legal authority** shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C.A. § 702 (West) (**emphasis added)**

In the instant case, Plaintiffs argue that due to their failure to act, Federal Defendants have abrogated their oversight role in ensuring that significant changes in LWCF property management do not contravene the requirement that the property be dedicated to outdoor recreation, and thus have harmed the public. The APA is therefore a valid avenue in which Plaintiffs can seek remedy under the jurisdiction of the District Court.

B. Plaintiffs Are Third-Party Beneficiaries to the Contract Between State of Hawai‘i and Federal Government

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

The Proposed Development represents a significant contravention of the original project agreement and a conversion in the land use as well as a breach of the contract with the U.S. DOI to maintain public outdoor recreational use at the Waimānalo Bay Beach Park. Defendant City breached the contract with the United States Department of the Interior by failing to abide by the requirements of the original project agreement and failing to protect the beach and water-oriented

recreational resources.[1] Plaintiffs and other third-party beneficiaries, along with other members of the public who utilize the beach and water-oriented recreation at WBBP, are harmed by the City's failure to abide by the terms of the contract and failure to comply with restrictions imposed by the National Parks Service in the LWCF grant agreement, as well as by the U.S. DOI's failure to sufficiently oversee the grant and ensure compliance with restrictions.

Given that the intended beneficiaries are members of the public who desire to recreate in a nature oriented beach park and the associated forested area of the park ("Sherwood forest") – a private right of action can be implied. See e.g. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis,* 444 U.S. 11, 18, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979) ("But while the absence of anything in the legislative history that indicates an intention to confer any private right of action is hardly helpful to the respondent, it does not automatically undermine his position. This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. *Ibid.* Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.")

C. NHPA

[1] One could similarly look at this action in the context of Qui Tam, where public plaintiffs are suing on behalf of the government in order to protect a governmental interest.

Plaintiffs do not seek standalone relief under NHPA in the FAC, but instead point out that City misled the public regarding the status of the WBBP on the National Register of Historic Places. Plaintiffs also note that under Section 106 of the NHPA, LWCF proposals requiring NPS review and decision are "undertakings" and that if NPS had properly conducted the conversion analysis (as is required under the LWCF) pursuant to 36 CFR 59.3, a review under Section 106 of the NHPA also would have been required as part of the conversion process.

Though Plaintiffs agree that there is no private right of action under the NHPA, at this juncture it is unclear whether City Defendants used federal dollars in the planning or implementation of the Proposed Development at issue, and as such is also unclear whether claims would arise under NHPA, with a private right of action under the APA. As City Defendants note in their Motion to Dismiss, the NHPA is a "'directive[] to federal government actors.'" quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094 (9th Cir. 2005). See City MD at pg. 5. City Defendants also point out that "'this focus on regulating agencies provides little reason to infer a private right of action' and 'the Administrative Procedure Act — a longstanding means to challenge agency action—is an alternative means of ensuring that government officials comply with the dictates of federal statute.'" quoting *id.* at 1095.

D. Plaintiffs FAC Sufficiently States Claim for Relief and Does Not Violate FRCP Rule 8

At this juncture, the Complaint contains "sufficient factual matter", that, if accepted as true, "states a claim to relief that is plausible on its face." As explained in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007):

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.,* a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

In this case, the factual basis for Plaintiffs' claims are plain and simple. The City, as successor-owner to the subject parcel, inherited with WBBP the federal conservation easement that encumbered the land. City Defendants violated that easement when they acted on their Master Plan and attempted to construct non-water based recreational facilities in contravention of the original project agreement. Federal Defendants had an obligation to ensure that significant changes in property use did not constitute a conversion of the land in contravention of the original project agreement. The City and County of Honolulu also failed to demonstrate the sufficient public consultation or reasonable alternatives to the Proposed Development and failed to adequately address significant environmental changes that occurred between the FEA's 2012 publication and the project's start

in 2018, as well as recent changes in the scope and size of the project that was originally assessed.

Here, it is appropriate to also address the allegation by City Defendants that each allegation in the FAC is not "simple, concise, and direct" and Plaintiffs' Complaint is not "short and plain," and thus violative of Federal Rules of Civil Procedure ("FRCP") Rule 8(a)(2). *See* City MD at pg. 14. Plaintiffs acknowledge that they provide ample historical context for the parcel at issue in effort to include "sufficient factual matter" for all Defendants as well as the Court. However, Plaintiffs disagree that the FAC is overly long or that it violates Rule 8. To the extent the Court finds that it does, Plaintiffs humbly ask to amend the Complaint to make it more concise.

E. Supplemental Jurisdiction Over State Claims

On the one hand, City Defendants allege that the Complaint fails to state a claim for relief, and on the other, that Plaintiffs' state law claims clearly predominate in terms of the scope of the issues raised and the comprehensiveness of the remedies sought. These allegations are also without merit.

Though Plaintiffs do not cite to 28 U.S.C. § 1367 (supplemental jurisdiction), this Court has jurisdiction to exercise supplemental jurisdiction over any remaining state law claims. Courts declining to exercise supplemental jurisdiction, "must undertake a case-specific analysis to determine whether

declining supplemental jurisdiction 'comports with the underlying objective of most sensibly accommodat[ing] the values of economy, convenience, fairness and comity.' " *Gilliam v. Galvin*, No. CV 19-00127 JAO-RT, 2020 WL 252985, at *2 (D. Haw. Jan. 16, 2020) quoting *Bahrampour*, 356 F.3d at 978 (alteration in original) (citation omitted).

Plaintiffs' state law claims are not novel or complex and do not predominate over the claims over which the district court has original jurisdiction. To the contrary, the "original sin" in the entire history of the subject parcel stems from the federal LWCF Act grant dollars and promises that (then WBBP owner) the State of Hawai'i made to the federal government in relation to protecting recreational resources. Since the LWCF grant conditions created, in essence, a covenant that runs with the land, current parcel-owner City Defendants' Proposed Development represents a breach of the original project agreement. If the federal government had done its job consistent with the representations made in the original EIS, (which specifically found ball fields incompatible with water-oriented recreation), the corollary state claims would not have arisen because the ball fields would not have been allowed as part the current Master Plan.

F. 28 U.S.C. § 1331 and 28 U.S.C. § 1361

Similarly, Plaintiffs agree that there is no waiver of sovereign immunity under the federal question statute, 28 U.S.C. § 1331, nor under the mandamus

statute, 28 U.S.C. § 1361, but contend that the NPS had a duty under the LWCF to review and approve the proposed conversion of the parcel. Plaintiffs in a mandamus action may allege subject matter jurisdiction under both the mandamus statute, 28 U.S.C. § 1361, and the federal question statute, 28 U.S.C. § 1331.[2] In many cases involving agency delay, courts have accepted jurisdiction under 28 U.S.C. § 1331 and grant relief under the APA instead of the Mandamus Act. The court's subject matter jurisdiction is a separate issue from the court's authority to grant mandamus relief. *Ahmed v. DHS*, 328 F.3d 383, 386-87 (7th Cir. 2003). Subject matter jurisdiction is a threshold question that determines whether the court has the power to decide the case in the first place. *Id.* at 387. The failure to state a valid cause of action calls for a judgment on the merits and not for dismissal for lack of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Consequently, after a court has determined that the petitioner's "claim is plausible enough to engage the court's jurisdiction," the court turns to the question of whether it has authority to grant the particular relief. *Id.*

G. Plaintiffs Agree That Departments Within the City Are Not Separate Legal Entities and Should be Dismissed

Plaintiffs agree that the City Council of the City and County of Honolulu, Department of Planning and Permitting of the City and County of Honolulu, and

[2] To the extent that Plaintiffs did not explicitly seek to compel agency action as a cause of relief in the FAC, they seek to amend the Complaint.

Department of Design and Construction of the City and County of Honolulu should be dismissed as improper parties, as they are not separate legal entities from the City itself and to that end seeks to amend the Complaint in order to focus the claims on the City and County of Honolulu.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests that the Court deny Defendants' Motions to Dismiss. Plaintiffs' FAC may not be exemplary but is certainly sufficient to withstand a motion to dismiss at this juncture. However, to the extent the Court finds the counts to be inadequate, the appropriate remedy is to allow for amendment.

Dated: Honolulu, HI January 24, 2020.

/s/ Timothy Vandeveer
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