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THE CITY AND COUNTY OF HONOLULU and
WAYNE YOSHIOKA, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULUTRAFFIC.COM; CLIFF SLATER; BENJAMIN J. CAYETANO; WALTER HEEN; HAWAII'S THOUSAND FRIENDS; THE SMALL BUSINESS HAWAII ENTREPRENEURIAL EDUCATION FOUNDATION; RANDALL W. ROTH; and DR. MICHAEL UECHI, Plaintiffs, vs. FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; RAY LAHOOD, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services, Defendants, and FAITH ACTION FOR COMMUNITY EQUITY; MELVIN UESATO, and THE PACIFIC RESOURCE PARTNERSHIP, Intervenor Defendants.	Civil No: 11-00307 AWT **CITY DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT;** CERTIFICATE OF COMPLIANCE; DECLARATION OF ROBERT D. THORNTON; EXHIBIT A (Presiding: The Honorable A. Wallace Tashima, United States Circuit Judge Sitting by Designation) Date Action Filed: May 12, 2011 Hearing Date: August 21, 2012 Time: 10 A.M. Judge: Honorable A. Wallace Tashima No Trial Date Set

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. SECTION 4(f) 3

A. Treatment of Unknown Native Hawaiian Burials 3

B. Section 4(f) Compliance Was Not Arbitrary and Capricious 9

C. Identification of TCPs 16

D. Use of Section (4)(f) Resources 17

1. Aloha Tower 17

2. Walker Park 20

3. Irwin Park 22

4. Mother Waldron Park 23

III. ELIMINATION OF ALTERNATIVES THAT WERE NOT FEASIBLE AND PRUDENT 24

A. Managed Lane Alternative (“MLA”) 24

B. Downtown Tunnels 28

C. Alternative Transit Technologies 32

D. All Possible Planning to Minimize Harm Was Met 32

IV. NEPA 33

A. Purpose and Need 33

B. Analysis of Alternatives 37

C. Environmental Consequences of the Project and the Alternatives 40

D. Segmentation 42

V. NATIONAL HISTORIC PRESERVATION ACT 44

VI. REMEDY 44

VII. CONCLUSION 46

TABLE OF AUTHORITIES

Page(s)

Cases

Ariz. Past & Future Foundation v. Lewis
722 F.2d 1423 (9th Cir. 1983) 31

Chevron U.S.A. Inc. v. Natural Res. Def. Council
467 U.S. 837 (1994) 4, 22, 34

Citizens to Preserve Overton Park v. Volpe
401 U.S. 402 (1971) 27, 31

City of Alexandria v. Slater
198 F.3d 862 (D.C. Cir. 1999) 15

City of Carmel-by-the-Sea v. U.S. Dep't of Transp.
123 F.3d 1142 (9th Cir. 1997) 31

City of New York v. Mineta
262 F.3d 169 (2d Cir. 2001) 34

Coalition Against a Raised Expressway, Inc. v. Dole
835 F.2d 803 (11th Cir. 1988) 23, 24

Coalition on Sensible Transp. v. Dole
826 F.2d 60 (D.C. Cir. 1987) 26

Corridor H Alternatives v. Slater
166 F.3d 368 (D.C. Cir. 1999) 14, 15

Daly v. Volpe
514 F.2d 1106 (9th Cir. 1975) 42

Friends of Pioneer St. Bridge Corp. v. Fed. Highway Admin.
150 F. Supp. 2d 637(D. Vt. 2001) 27

Friends of Southeast's Future v. Morrison
153 F.3d 1059 (9th Cir. 1998) 36

Hickory Neighborhood Def. League v. Skinner
910 F.2d 159 (4th Cir. 1990) 26

TABLE OF AUTHORITIES

Page(s)

Monsanto Co. v. Geertson Seed Farms
130 S. Ct. 2743 (2010) 44

Morongo Band of Mission Indians v. Federal Aviation Administration
161 F.3d 569 (9th Cir. 1998) 42

Named Individual Members of the San Antonio Conservation Society v. Texas Department of Transportation
446 F.2d 1013 (5th Cir. 1971) 42, 43, 44

National Parks & Conservation Association v. Bureau of Land Management
606 F.3d 1058 (9th Cir. 2010) 35, 36

North Idaho Community Action Network v. United States Department of Transportation
545 F.3d 1147 (9th Cir. 2008) 14, 15, 45

Robertson v. Methow Valley Citizens' Council
490 U.S. 332 (1989) 38, 41

Save Barton Creek Association v. FHWA
950 F.2d 1129 (5th Cir. 1992) 43, 44

Statutes

5 U.S.C. § 706(2) 31

49 U.S.C. § 5301(b)(5) 36

49 U.S.C. § 5301(f)(4) 36

49 U.S.C. § 5309(c)(1) 36

Rules

65 Fed. Reg. 76,698 (Dec. 12, 2000) 12

TABLE OF AUTHORITIES

Page(s)

Regulations

23 C.F.R. pt. 450, app. A. 38

23 C.F.R. § 771.111(f)(1)-(3) 42

23 C.F.R. § 771.113(a) 8

23 C.F.R. § 774.15 .... 17, 18, 21

23 C.F.R. § 774.17 .... 9, 25, 30

23 C.F.R. § 774.7(a) 26

23 C.F.R. § 774.9(c) 8

36 C.F.R. § 800.4(b)(1) 5, 8

36 C.F.R. § 800.4(c)(2) 5

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
AA or Alternatives Report	Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report
Advisory Council	Advisory Council on Historic Preservation
AIS	Archaeological Inventory Survey
Am.Br.	*Amicus Curiae* Memorandum of the National Trust for Historic Preservation
APA	Administrative Procedure Act
APE	Area of Potential Effects
AR	Administrative Record
BRT	Bus Rapid Transit
City	City and County of Honolulu
City's Brief or CityBr.	MEMORANDUM (1) IN SUPPORT OF CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, (2) IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND (3) IN RESPONSE TO MEMORANDUM OF AMICUS CURIAE NATIONAL TRUST FOR HISTORIC PRESERVATION [ECF #145-1]

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	**Definition**
EIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
HEPA	Hawai‘i Environmental Policy Act of 1974
HOT	High Occupancy Toll
HOV	High Occupancy Vehicle
Intervenors’ Reply Brief or Int.Reply	INTERVENTORS FAITH ACTION FOR COMMUNITY EQUITY, MELVIN UESATO AND THE PACIFIC RESOURCE PARTNERSHIP’S MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT [109] FILED ON 4/6/12 AND IN SUPPORT OF INTERVENOR DEFENDANTS’ CROSS MOTION FOR SUMMARY JUDGMENT [ECF #144]
Kako‘o	Arms-length preservation consultant
Lead Agencies	Federal Transportation Administration and the City and County of Honolulu

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	**Definition**
Makai	Toward the ocean
Mauka	Toward the mountain
MLA	Managed Lane Alternative
National Register	National Register of Historic Places
National Trust	National Trust for Historic Preservation
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOI	Notice of Intent
Noise Impact Manual	Transit Noise and Vibration Impact Assessment Manual
O‘ahu MPO	O‘ahu Metropolitan Planning Organization
OIBC	O‘ahu Island Burial Council
ORTP	O‘ahu Regional Transportation Plan 2030, as amended
PA	Programmatic Agreement

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
Plaintiffs Opening Brief or Pl.Br.	PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT [ECF #109]
Plaintiffs' Opposition Brief or Pls'.Opp'n	PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF #155]
Project	Honolulu High-Capacity Transit Corridor Project
RFI	Request for Information
ROD	Record of Decision
RTP	Regional Transportation Plan
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SEC	Sound Exposure Level
Section 106	16 U.S.C. § 470
Section 4(f) or 4(f)	49 U.S.C. § 303

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
Section 4(f) Property	Land from publicly owned parks, recreational areas, wildlife and waterfowl refuges, or public and eligible historical sites
SHPD	Hawai‘i State Historic Preservation Division
SHPO	Hawai‘i State Historic Preservation Officer
TCPs	Traditional Cultural Properties
Technical Report	Archaeological Resources Technical Report, AR2:00037676-37882
TOP 2025	Transportation for Oah‘u Plan
Transportation Systems Management	Improvements to existing transportation system without major capitol investments
Tunnel Technical Memorandum	Tunnels and Underground Stations Technical Memorandum

CITY DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs have a heavy burden to establish that the Defendants' approval of the Honolulu High-Capacity Transit Corridor Project ("Project") was arbitrary and capricious. The Federal Transit Administration's ("FTA") factual determinations and interpretation of its own technical regulations are accorded deference by the Court. Plaintiffs have failed to meet their burden.

- The City and FTA ("Lead Agencies") conducted a reasonable, good faith investigation of the potential known and unknown Section 4(f) sites along the entire Project alignment, including alternative alignments.
- The State Historic Preservation Office ("SHPO") and the Advisory Council on Historic Preservation ("Advisory Coucil"), the two expert agencies vested by federal law to opine regarding the adequacy of cultural resource investigations, concurred that the FTA's investigation of cultural resources complied with the reasonable good faith standard.
- No known Native Hawaiian burials have been identified in the area that would be disturbed by the Project, and if any National Register eligible burials are located, ***the City has committed to avoid them***.

Thus, there can be no "use" of unknown burials or other cultural sites under 4(f).

- FTA carefully assessed impacts to the urban parks and the Aloha Tower. The FTA determination of no constructive use is not arbitrary and capricious.
- The determination that the Managed Lane Alternative ("MLA"), did not meet the Project purpose and need, and is not prudent, is supported by the record. Alternatives involving a downtown tunnel were not prudent for several reasons including their extraordinary cost.
- The Purpose and Need statement appropriately reflects statutory goals, including transportation equity.
- FTA considered a reasonable range of alternatives.
- The record supports the elimination of the MLA because it did not meet purpose and need.
- Construction-related impacts were not evaluated. The Project's Environmental Impact Statement ("EIS") evaluated the Project's effects on growth inducement, and appropriately considered state evaluations of growth.

- The Project has independent utility and logical termini, and is not illegally "segmented." Alternative transportation solutions regarding future extensions are not foreclosed.

The record supports the Lead Agencies' decision to approve the Project rather than the MLA, Plaintiffs' preferred policy approach. Plaintiffs have ignored contrary evidence in the record, selectively quoted documents, and even misquoted the record. When viewed in its entirety, however, the record reflects a detailed, rigorous multi-year analysis of the Project by FTA and establishes that the approval of the Project was not arbitrary and capricious.

II. SECTION 4(f)

A. Treatment of Unknown Native Hawaiian Burials

Plaintiffs' lengthy and repetitive discussion of Section 4(f) as it ***may*** apply to Native Hawaiian burials ultimately makes one legal point. Plaintiffs' position is that Section 4(f) ***requires*** FTA to assess the presence of unknown, unidentified Native Hawaiian burials by completing below-ground surveys for unknown burials on every inch of the alternative Project alignments prior to the approval of the Project. Plaintiffs have failed to establish that Section 4(f) requires this Plaintiffs' preferred approach or that FTA's careful, reasonable approach to the investigation and avoidance of unknown, unidentified burials is arbitrary and capricious.

According to Plaintiffs' Opposition, Section 4(f) prohibits the approval of the Project until an Archaeological Inventory Survey ("AIS")[1] (a creature of Hawaii state law), has been completed which incorporate subsurface investigation along wide swathes, and possibly every inch, of the Project corridor,[2] and presumably along every alternative corridor.

Plaintiffs' Opposition avoids any discussion of the applicable standard of review, which requires Plaintiffs to show that it would be arbitrary and capricious for FTA to comply with Section 4(f) in any other manner. Because FTA interpreted its own Section 4(f) regulations in making its compliance finding, Plaintiffs also must show that FTA's interpretation of its regulations is so completely at odds with FTA's governing law that the FTA interpretation is unreasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1994) ("*Chevron*"). Plaintiffs have not met this burden.

Plaintiffs' Opposition runs down a number of blind alleys in its failed effort to prop up their argument. In order to focus the Section 4(f) analysis on the legal

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[1] *See* Pls'.Opp'n at 23-24 (asserting that the only legally compliant "appropriate level of effort" is to prepare complete AISs for the entire Project route).

[2] Plaintiffs state that it is impossible to argue, "with a straight face," that the Project's detailed Archaeological Resources Technical Report could possibly comply with Section 4(f) when that report acknowledges that a particular area between specified Downtown streets "has not been the subject to intensive archaeological subsurface investigation." Pls.'Opp'n at 21 and n.16. Completing an AIS requires excavation to a depth of approximately five feet. AR7:00111849 at 111853.

issues that matter, however, it is important to reiterate that the record establishes four important facts:

1. No archaeological site – including burials or cultural properties – is subject to Section 4(f) unless it is first determined to be "eligible for inclusion on the National Register." 36 C.F.R. § 800.4(c)(2). While it is possible that a burial discovered in the future could meet the requirements for eligibility for inclusion, the issue here is the appropriate level of effort for searching for unknown resources that have not been determined to be eligible for listing in the National Register.

This relevant standard is a "reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1). This standard applies to the evaluation of ***potential*** Section 4(f) archaeological resources. CityBr. at 18. Pages 21-27 of the City's Brief explain why this standard was met. Plaintiffs' straw man argument to the contrary misstates the City's position, ignores this record, and misapplies precedent.

2. No known, identified Native Hawaiian burial is at issue in this litigation. The extensive review conducted for the Archaeological Resources Technical Report ("Technical Report"), discussed in the City's Brief at 23-24, did not identify any burials that would be affected by the Project, and no burials have been discovered since that date. This is not a case of ignoring known resources.

3. <u>If eligible Native Hawaiian burials are identified, the Defendants have agreed to avoid those resources</u>. Because of this commitment to avoidance, there is no possibility of the "use" of ***unidentified potential*** Section 4(f) resources, contrary to Plaintiffs' claim that "FTA made its project approval without knowing whether the project would 'use' 4(f) resources." Pls.'Opp'n at 26. As the record establishes:

> Completing an Archaeological Inventory Survey requires ***excavation to a depth of approximately five feet*** . . . . At an early time, the City communicated the intent to complete the archaeological inventory survey during Final Design so that only areas intended for disturbance by the project would be excavated. The OIBC [O'ahu Island Burial Council] expressed concern that such an approach would provide information too late to be able to decide how to treat the resources. In response to this concern, the City agreed to accelerate the sampling to the PE phase. The City also added language to the PA that stated that if native Hawaiian burials are found, and the OIBC determines that they should be preserved in place, then ***the guideway columns may be relocated a limited distance along the guideway at most column locations, straddlebent supports may be used, or special sections developed to modify span length allowing for preservation in-place to be viable in those locations***.

AR7:00111849 at 111853 [emphasis added); *see also* AR1:00000030 at 94 (PA).

To ensure that this commitment will be fulfilled, the City agreed to hire an arms-length consultant ("Kako'o") to act as the PA Project Manager. The Kako'o, a preservation professional, is required to coordinate reviews and deliverables,

"independently monitor, assess and report to the consulting parties on compliance by the City," and provide guidance to contractors. AR1:00000030 at 88-91, 108.

The negotiations leading to this outcome were lengthy and painstaking. By November 2009, the facilitator of a meeting among the signatory and consulting parties reported that 80 drafts of the PA had been prepared (AR3:00060533 at 60537), and many more were circulated before the PA was signed over a year later. The signatory parties, including the SHPO and ACHP, demanded – and received – strong assurance of the protection of historic and archaeological resources before they were willing to concur with the PA. The efforts memorialized in the FTA's Record of Decision ("ROD"), and agreed to by the SHPO and Advisory Council, comply with Section 4(f).

4. FTA Did Not Defer Section 4(f) Compliance. The City's Brief could not have been any clearer: "Plaintiffs and Amicus National Trust ***incorrectly state*** that the FTA deferred Section 4(f) compliance until after issuance of the ROD CityBr. at 19. Plaintiffs' Opposition nevertheless states, repeatedly that the City claims that FTA "properly deferred" Section 4(f) compliance.

On the contrary, it remains the City's position that FTA complied with Section 4(f) and that this compliance was not deferred. To reiterate: FTA studied the entire Project corridor for potential burials and other TCPs. CityBr. at 20. An Archaeological Technical Report was prepared during the Alternatives Analysis

("AA") process, and a detailed Archaeological Resources Technical Report ("Technical Report"), for the entire Project Corridor (AR2:00037676), expanded on that report. CityBr. at 22-23. The information obtained was widely disclosed, and was the subject of intensive consultation by a broad range of agencies and organizations. CityBr. at 20-21. A final Section 4(f) evaluation is included in the Final EIS (AR1:00000247 at 680-752) and a Section 4(f) determination, consistent with FTA regulations, was made in the ROD. AR1:00000030 at 41.

In addition to archaeological studies done to support the Section 4(f) determination, the FTA, the SHPO, and the Advisory Council established a process for additional studies of potential below-ground archaeological and cultural resources when design and engineering is more complete, allowing for precise investigation. CityBr. at 25. This process avoids the enormous environmental harm, including harm to potential burials, that would result from conducting AISs – especially in urban areas – before column location is determined. The detailed level of engineering required for column placement cannot be completed prior to the approval of the Final EIS. 23 C.F.R. § 771.113(a); CityBr. at 31. Moreover, FTA regulations anticipate the possibility of archaeological resources being identified after the Section 4(f) determination, and lay out a process for a determining if a supplemental determination is required. 23 C.F.R. § 774.9(c).

This comprehensive process is a "reasonable and good faith effort to carry out appropriate identification efforts" under 36 C.F.R. § 800.4(b)(1) (CityBr. at 26) and it constitutes "all possible planning to minimize harm". 23 C.F.R. § 774.17; CityBr. at 27.

B. <u>Section 4(f) Compliance Was Not Arbitrary and Capricious</u>

To support their Section 4(f) claim, Plaintiffs flyspeck the record to find sentences in isolated e-mails that they view as unfavorable. An e-mail from an FTA staffer that was sent more than a year before negotiations concluded over the PA, for example, represented concerns that were subsequently addressed. Pls'.Opp'n at 8 n.7. A cited letter from amicus National Trust, not surprisingly, presents the National Trust's views. This level of "evidence" – unofficial, superseded – is cited to "prove" that the Defendants simply ignored concerns about unknown burials. Pls'.Opp'n at 7-8. These e-mails represent individual opinions at particular points in time, are not entitled to deference, and have no legal status.

In contrast, concurrence by the SHPO and Advisory Council that FTA conducted an adequate evaluation of potential archaeological sites ***does*** have legal status. CityBr. at 26-27. Plaintiffs ignore the Advisory Council's concurrence, however, and belittle the legal effect of the SHPO's concurrence as "nonsense." Pls'.Opp'n at 14. The weakness of Plaintiffs' position is exposed by their claim that the PA does not have any effect on Section 4(f) compliance because the ROD

did not explicitly cite to Section 4(f) when discussing the PA. Pls'.Opp'n at 15. The ROD itself did, of course, make a Section 4(f) determination, based on technical reports, the FEIS, and the SHPO and Advisory Council's agreement that potential archaeological resources had been adequately evaluated. AR1:00000030 at 41-42. Plaintiffs have the burden of establishing that this Section 4(f) determination was arbitrary and capricious. Their cited assortment of e-mails does not meet this burden, especially when weighed against all the evidence in the record and the concurrence of the Advisory Council and SHPO.

Plaintiffs also argue that FTA violated Section 4(f) by relying on the Technical Report because the Technical Report, standing alone, does not make all the findings or contain all the information set forth in the regulations governing Section 4(f). Pls'.Opp'n at 19-20. Defendants have never contended, however, that FTA made its Section 4(f) finding within the Technical Report. As the ROD states clearly, the Section 4(f) finding is made within the ROD. The ROD refers to the additional information in the record, including the PA and the EIS, which in turn refers to the Technical Report and other evidence in the record. AR1:00000030 at 41-42. There is no requirement for the Technical Report itself to make all the necessary Section 4(f) determinations.

Plaintiffs also failed to support their claim that FTA violated the "reasonable good faith" standard. After belittling the Technical Report, Plaintiffs

incongruously claim that Section 4(f) requires the completion of AISs – a creature of state law – because the Technical Report says so. Pls'.Opp'n at 24. It is not even accurate, as Plaintiffs state, that the Technical Report "explicitly states that an AIS is the 'appropriate level of effort.'" It says no such thing. While the Technical Report is one part of the reasonable good faith level of effort; it does not define it. As discussed in the City's Brief, the "reasonable good faith level of effort" includes the Technical Report, as well as all of the information and obligations set forth in the ROD, including the PA and the EIS.

Plaintiffs' attempt to establish a new legal standard for "appropriate level of effort" is equally wide of the mark. Plaintiffs state that "Section 4(f) gives historic resources (including archaeological resources like burials) 'paramount importance.'" Pls'.Opp'n at 24-25. Unless and until unknown burials are determined to be eligible for the National Register, however, this assertion would not even apply to burials. Compounding this problem, Plaintiffs assert that "reasonable level of effort" really means that ***all*** concerns must give way to the "paramount" concern of identifying and evaluating unknown Native Hawaiian burials. Pls'.Opp'n at 25. According to Plaintiffs, "reasonable" really means "without consideration of any other factor." Under Plaintiffs' test, no amount of environmental disruption, no cost, no traffic or business disruption would be significant enough to affect the decision to conduct subsurface archaeological

investigations, because resources that ***may*** potentially exist and that ***may*** potentially be eligible for listing on the National Register are "paramount." If applied beyond the four corners of Plaintiffs' Opposition, this test would impose extraordinary burdens on activities proposed in any populated area where underground archaeological features ***might*** exist.

Plaintiffs' proposed standard is not, however, the law. As discussed in the City's Brief (but not addressed in the Plaintiffs' Opposition), the Advisory Council definition of what constitutes a "reasonable good faith" level of effort does not require sub-surface investigations at all. The definition was intended to provide the federal agencies and the SHPO with "flexibility" to decide what level of effort is appropriate depending on the applicable facts and circumstances. 65 Fed. Reg. 76,698, 77,719 (Dec. 12, 2000); CityBr. at 26.

Finally, Plaintiffs label Defendants' concern about conducting large-scale, unfocused subsurface archaeological excavations that could disrupt burials as "cynical." Pls'.Opp'n at 27. As Plaintiffs themselves state, however, OIBC "has vividly characterized the disruption of *iwi kupuna* as 'akin to disrobing a living person and physically handling them against their will.'" Pls'.Opp'n at 5 (quoting AR9:00125000 at 125001). In the very next paragraph (not quoted by Plaintiffs), OIBC stated:

> Hence, even the possibility of the archaeological inventory survey that might encounter *iwi kupuna*

> through careful hand excavation is worrisome for Native Hawaiians. More troubling is the thought of archaeological investigation via backhoe excavation. And worse still is the notion of inadvertent intrusion into burials and destruction of *iwi kupuna* by high-powered, modern construction tools.

AR9:00125000 at 125002. *See also* Technical Report (AR2:00037676 at 37704) (until there is certainty regarding column placement, testing outside the Project footprint could disturb archaeological resources that would not otherwise be disturbed by the Project). Thus, Plaintiffs advocate for possible handling of *iwi kupuna* that would not have been disturbed but for the AISs they seek to require of Defendants.

Plaintiffs claim that Defendants can avoid ground disturbance when testing for burials. Pls'.Opp'n at 27 n.18. As OIBC recognized, however, "archaeological excavation (rather than ground penetrating radar that would be ineffective in sand deposits)" is needed in the areas most likely to contain burials. AR9:00012500 at 125007. As a result, the PA requires that the AIS for Phase 4 evaluate all areas that will be disturbed by the Project. This evaluation may include "subsurface testing at each column location, utility relocation, and major features of each station and traction power substation location based on preliminary engineering design data" in Phase 4, the area where burials are most likely to be found. AR1:00000030 at 92. This approach ensures that ***100%*** of the area that will be affected by project components in Phase 4 will be evaluated for underground

resources – but no more than the affected area. This careful approach represents the most "appropriate" effort to protect burials while ensuring a thorough investigation.

Plaintiffs continue to argue that this case is just like *Corridor H Alternatives v. Slater,* 166 F.3d 368 (D.C. Cir. 1999), but it is not. In *Corridor H*, ***known, protected historic sites*** were not identified and the Section 4(f) analysis was entirely deferred. The agency in *Corridor H* acknowledged as much: "[i]n recognition of the fact that the section 4(f) process could not be completed prior to the identification of the protected historic sites pursuant to section 106, the ROD specified that its approval of the project was conditional only." *Id*. at 372. Plaintiffs argue that the entire Section 4(f) analysis was not deferred in *Corridor H* based on the fact that the ROD stated that the project would not constructively use two battlefields. The court, however, found that the agencies had failed to comply with Section 4(f) and explicitly stated that it "***need not address***" their finding relating to the battlefields. *Id*. at 373-74 (emphasis added). Plaintiffs' contention that *Corridor H* involved any level of Section 4(f) compliance is therefore not supported by the *Corridor H* holding.

Similarly, in *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147 (9th Cir. 2008), the agencies conceded that they had "conducted a detailed § 106 identification process and

§ 4(f) evaluation ***only*** with respect to the Sand Creek Byway phase of the Project, and ***have not done so with respect to the remaining three phases of the Project***." *Id*. at 1158 (emphasis added). The "record of extensive outreach, consultation, and the agreement of stakeholder agencies with FTA's evaluation of resources along the entire corridor" distinguishes this case from *North Idaho*. CityBr. at 28. Plaintiffs have made no response to this salient distinction; they merely repeat their mantra of "phased approach" without acknowledging the strong record of identification and evaluation of historic resources along the entire Project corridor that distinguishes this case from *Corridor H* and *North Idaho.*

Plaintiffs' effort to distinguish *City of Alexandria v. Slater,* 198 F.3d 862 (D.C. Cir. 1999), also overlooks the most salient facts of both cases. *City of Alexandria* found that Section 4(f) had been met when the agency "identified historic properties along the entire project corridor and documented its findings prior to approval in both a Memorandum of Agreement and a Section 4(f) Evaluation," just as occurred in the present case. *Id*. at 873. This made the situation "quite distinguishable" from *Corridor H. Id*. It is true, as Plaintiffs emphasize, that the case involved ancillary facilities, but the court by no means carved out a Section 4(f) exemption for ancillary facilities. The court's holding was based on the need for precise identification of resources, which required substantial engineering work that would not be conducted until the post-EIS design

stage. *Id.*; CityBr. at 34. This is also true in the present case, as final support column locations for guideways and stations cannot be determined until additional, post-NEPA engineering has been completed.

C. <u>Identification of TCPs</u>

Plaintiffs criticize Defendants for responding succinctly to Plaintiffs' three-paragraph argument that the analysis of Traditional Cultural Properties ("TCPs") was deferred. (Pls'.Br. at 19-20; CityBr. at 35-36; Pls'.Opp'n at 31.) Defendants responded to the argument that was made. The Plaintiffs have never before raised the issues involved in the Section 4(f) critique of the 2008 Cultural Technical Report that appears, for the first time, in their Opposition Brief. Plaintiffs did not take issue with the 2008 Technical Report either during the lengthy administrative process or in their Opening Brief. They have waived the right to raise these arguments, for the first time, in their Opposition.

In any case, Plaintiffs' arguments are without merit. Their statement that the analysis of TCPs was deferred is wrong, and the remainder of their argument hinges on this assertion. For all of the reasons discussed above, the evaluation of Native Hawaiian burials was not deferred, nor was the assessment of all other TCPs. Plaintiffs claim (for the first time) that the Cultural Resources Technical Report that exhaustively evaluated TCPs (AR2:00038098 – 38350) does not meet a whole host of criteria. Plaintiffs insist, for example, that the Report was required

to identify how the Project will "use" resources, or feasible and prudent avoidance alternatives, under Section 4(f), despite the fact that Section 4(f) does not apply to these resources unless they are determined eligible for listing on the National Register. *See* CityBr. at 36.

As the City's Brief states and the Plaintiffs cannot refute, the Lead Agencies conducted a good faith, comprehensive evaluation of potential TCPs, the SHPO and Advisory Council concurred in this evaluation, and the PA establishes protection for potential TCPs in the event that additional research reveals a previously unidentified TCP.

D. Use of Section (4)(f) Resources

All of the claims discussed below raise allegations of constructive use. Section 4(f) only requires a finding of constructive use when proximity impacts are ***so severe*** that the activities, features or attributes that qualify the property for protection under Section 4(f) ***are substantially diminished***. 23 C.F.R. § 774.15.

1. Aloha Tower

Plaintiffs incorrectly contend that views of Aloha Tower from the inland "are the primary views" of the Tower (Pls'.Opp'n at 36), and that the Project's impact on these views require a finding of constructive use. To establish that FTA's determination was arbitrary and capricious, Plaintiffs would have to show that the Project's impacts on those views will be "***so severe***" that Aloha Tower's

historical attributes will be "***substantially diminished***." 23 C.F.R. § 774.15. Plaintiffs have not met their burden.

Aloha Tower was nominated to the National Register because of its connection to the development of Hawaii as a tourist designation for travelers from the mainland and for its role as a harbor control tower during World War II. AR1:00000247 at 746. As the EIS observes, "Aloha Tower was intended to serve as a landmark for those arriving by boat; therefore, its connection to the harbor is historically important." *Id.* The National Register nominations for the Aloha Tower emphasize its role in welcoming visitors arriving by sea and do not mention views of the Tower from the land. ARSupp.1:00152826 at 152826-152831 and ARSupp.1:00152832 at 152832-152843. The views of the Tower from the harbor are the "primary views" of the Tower, and the Project will not affect these views or "substantially diminish" the Tower's historic attributes.

While the Project will affect some inland views of the Tower, it "will not impact views of the tower's design elements nor alter its historic setting." AR1:00000030 at 183. Sitting in their offices, however, Plaintiffs' attorneys claim to have determined that this is not true, based on their own visual "impact analysis" of the Aloha Tower. To support their "analysis," Plaintiffs quote only the underlined language from the EIS:

> The guideway and columns will reduce the open character of the streetscape, create shade and shadows,

> and block portions of makai views along the following perpendicular streets: Kekaulike, Maunakea, Nuʻuanu, Bethel, Fort, Bishop, and Richards.

AR1:00000247 at 540 (*cited in* Pls'.Opp'n at 37). Plaintiffs do not disclose, however, that this discussion is ***not*** an assessment of visual impacts of the Project on Aloha Tower. It is a general discussion of visual effects on the streetscape. Based on their maps and their feelings about what "makes sense," however, Plaintiffs contend that, because the referenced streets are oriented towards Aloha Tower, the Project will necessarily make constructive use of Aloha Tower. Pls'.Opp'n at 37. They assert that aerial photos and engineering drawings showing conceptual profiles of the Project guideway (AR2:00039555 at 39979-80 (cited in Pls'.Opp'n at 37)) provide support. In fact, these plans do not illustrate views from any of the referenced viewpoints. Plaintiffs' assertion that "the Section 4(f) regulations ***dictate*** a finding of constructive use" under these circumstances is empty hyperbole.

In fact, although Plaintiffs did not cite it, the Draft EIS contains a visual simulation of the view from Fort Street towards the Aloha Tower. AR1:00072423 at 72459. The picture illustrates that the Project is "just visible through the trees." *Id*. The Final EIS concludes that the Project's impact on the view from Fort Street towards Aloha Tower is "low." AR1:00000247 at 512.

The lack of evidence to support Plaintiffs' contentions is merely underscored by their reliance on a single statement in the 2006 AA (Pls'.Opp'n at 38 (citing AR1:00009556 at 9623)). The AA preceded the preparation of the EIS, the detailed Section 4(f) analysis, and the concurrence with the analysis of impacts on the Aloha Tower by the SHPO and the Advisory Council (AR1:00000030 at 121-122). The Lead Agencies' assessment of the Aloha Tower was not arbitrary and capricious.

2. Walker Park

Walker Park, is a small park set among urban office buildings next to the Nimitz Highway, "is primarily used by pedestrians walking through downtown. It does not provide any benches, picnic tables, or other amenities." AR1:00000247 at 690, 731; *see also* AR3:00062527-62537; AR3:00062682-62685. The Project will be constructed in the middle of the six-lane Nimitz Highway bordering Walker Park. AR1:00000247 at 723, 731.

The record shows that:

> the property's setting was not identified as a historically significant feature of the property. Non-historic high-rise development lies immediately mauka and Koko Head [east] of the property. The expanded alignment of heavily travelled Nimitz Highway forms the property's makai boundary. These properties and features within the property's setting and viewshed do not contribute to its historic significance. Furthermore, no historically significant viewsheds to or from this property were identified.

AR2:00039555 at 39861-62. Plaintiffs' claim that the attributes of Walker Park were "never actually evaluated" is specious.

Plaintiffs appear to be confused about the science of noise measurement and the calculations of noise impacts. The "reference Sound Exposure Level" ("SEL") that Plaintiffs picked out of the record (Pls'.Opp'n at 41) is not a measure of impact. It is one factor in the calculation required by FTA's "Transit Noise and Vibration Impact Assessment" Manual ("Noise Impact Manual"), which requires the consideration of the SEL, the number and speed of trains, the distance, and the geometry, which includes blocking features such as the three-foot parapet wall on the guideway. AR1:00022575 at 22595 (overview), 22649 – 22650, and 22654. Therefore, the record does not establish that the noise impact will be "82 decibels," as Plaintiffs mistakenly believe. Pls'.Opp'n at 41.

Impacts are determined by how loud an area is over a defined time period, a measure known as Leq. The Project would generate 56 dBA Leq at Walker Park as shown in Figure 4-56 (AR1:00000247 at 561). This is below the FTA criterion level of 68 dBA Leq. AR1:00022575 at 22624, AR1:00000247 at 561.

FTA has determined that a constructive use does not occur where "projected operational noise levels of the proposed transit project do not exceed the noise impact criteria . . . in the FTA's guidelines." 23 C.F.R. § 774.15(f)(2). The noise impact criteria in FTA's guidelines were met and the FTA's interpretation is

accorded *Chevron* deference. *Chevron,* 467 U.S. at 866. The determination that there is no constructive use of Walker Park is not arbitrary and capricious.

3. <u>Irwin Park</u>

Irwin Park is a small site with mature landscaping, used as a parking lot. AR3:00062573-62591. Plaintiffs' argument that the Project, located entirely outside the park in the middle of the six-lane Nimitz Highway, will substantially diminish the park's importance in exemplifying the work of a local landscape architect is difficult to follow. It appears, however, that Plaintiffs believe that FTA was required to find constructive use of Irwin Park because the Project will create a visual contrast with the landscaping of the Park.

Plaintiffs criticize the City for discussing ***views*** of the landscaping. Pls'.Opp'n at 46 (City's discussion "ridiculous"). According to Plaintiffs, the issue is whether the "contrast" with the Project would "conflict" with the landscaping. Pls'.Opp'n at 46-47.

Of course, there is no way to assess visual "contrasts" and "conflicts" without evaluating the Project's visual impacts. As the PA states, "The Project would be constructed mauka of the park in the median of an adjacent highway. The Project would not obstruct excellent makai views from the park or views of the park from the harbor and Aloha Tower." AR1:00000030 at 183. FTA's finding of no "use" of Irwin Park is not arbitrary and capricious.

Plaintiffs inaccurately claim that Defendants cited no support for the "counterintuitive proposition" that noise levels one block east of Irwin Park are representative of noise levels at Irwin Park. Pls'.Opp'n at 47. Plaintiffs are wrong. The City cited the Noise and Vibration Technical Report is cited to support this fact. CityBr. at 46. Plaintiffs may find this "simply not possible to believe" (Pls'.Opp'n at 47), but Plaintiffs' intuitions and beliefs are not sufficient to meet their burden.

4. **Mother Waldron Park**

Plaintiffs raise no new points about Mother Waldron Park. They simply believe that FTA must find that the Project is a constructive use because it will "loom" over an historic feature. Pls'.Opp'n at 49. FTA determined that the proximity of the Project to the Park would not substantially diminish the historic features of the Park, for all the reasons discussed in the City's Brief. CityBr. at 47-48.

Plaintiffs unsuccessfully attempt to equate the "looming" effect with the constructive use in *Coalition Against a Raised Expressway, Inc. v. Dole*, 835 F.2d 803 (11th Cir. 1988) ("*CARE*"). As discussed in the City's Brief, no Section 4(f) determination had been made in *CARE*, and the court found site-specific evidence of air pollution, noise, impacts on views, and dirt and debris from an elevated

highway. CityBr. at 39-40. *CARE* is inapposite to a constructive use determination in this case.

Plaintiffs' mistake about noise evaluation, discussed under Walker Park, also applies here. Plaintiffs also misunderstand Project noise exposure. Project noise exposure is a measure of the noise that the Project alone would generate, not the total noise in an area from all sources including the Project. AR1:00022575 at 22625. It is not "implausible" that Project noise exposure is less than existing noise in the area. It merely reflects how little the small amount of additional noise generated by the Project would affect the total noise level in the park.

III. ELIMINATION OF ALTERNATIVES THAT WERE NOT FEASIBLE AND PRUDENT

A. Managed Lane Alternative ("MLA")

As the City's Brief stated, "An alternative that does not meet the purpose and need of the project may be rejected as not prudent. . . Because the MLA would not meet the purpose and need of the Project, the MLA is not a prudent alternative to avoid the use of Section 4(f) resources." CityBr. at 49, 50-51. Defendants clearly ***did*** dispute Plaintiffs' argument that the MLA was inappropriately eliminated from consideration as a Section 4(f) alternatives, and Plaintiffs' claim of "waiver of opposition" has no merit.

Plaintiffs' entire legal claim is based on the following statement from FHWA's "Section 4(f) Policy Paper": "Therefore, it is possible for an alternative

that was examined but dismissed during the preliminary NEPA alternative screening process to still be a feasible and prudent avoidance alternative under Section 4(f)." AR1:00021938 at 21946 (quoted in Pls'.Opp'n at 54). Consistent with their disturbing practice of deleting inconvenient words from quoted material, Plaintiffs omitted the first word – "therefore." "Therefore" referred to the preceding sentence, which nullifies their argument. That sentence states: "However, simply because under NEPA an alternative (***that meets the purpose and need***) is determined to be unreasonable, does not by definition, mean it is imprudent under the higher substantive test of Section 4(f)." AR1:00021938 at 21946 (emphasis added). FTA's rejection of the MLA is consistent with the FHWA policy paper. The MLA, which does not meet purpose and need, cannot be prudent.

Plaintiffs also mis-characterize the FTA's Section 4(f) regulation. As reflected in the cases cited in the City's Brief (CityBr. at 50-51), the regulation states that an alternative is "not prudent" if it compromises achievement of the stated purpose and need. 23 C.F.R. § 774.17 (definition of "feasible and prudent avoidance alternative", ¶3(i)).

Plaintiffs argue that the AA itself had to make a Section 4(f) finding of imprudence (Pls'.Opp'n at 55 (heading (2)); *id*. at 57), despite the fact that neither Section 4(f) nor SAFETEA-LU requires a Section 4(f) finding prior to the adoption

of the ROD. Plaintiffs also contend that all pertinent evidence relating to a Section 4(f) finding has to be "formally documented in a 4(f) evaluation." Pls'.Opp'n at 58.

Plaintiffs cite 23 C.F.R. § 774.7(a) to support both of these assertions. This regulation requires Section 4(f) evaluations to "include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative" and "summarize the results of all possible planning to minimize harm to the Section 4(f) property." 23 C.F.R. § 774.7(a). It does not require the AA to include this documentation, nor does it require all supporting evidence to be contained within the Section 4(f) evaluation. In any event, the ROD includes the Section 4(f) findings and references the EIS for additional documentation. AR1:00000030 at 41-42.

Furthermore, Courts may uphold the agency decision under Section 4(f) based on evidence in the record that is not discussed in the agency's Section 4(f) evaluation. *Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990) ("Although the Secretary's section 4(f) evaluation does not expressly indicate a finding of unique problems, the record amply supports the conclusion that the Secretary did determine that there were compelling reasons for rejecting the proposed alternatives as not prudent"); *Coalition on Sensible Transp. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) ("The record demonstrates consideration of the

relevant factors" even though the agency did not make a formal determination; noting that "formal findings are not required in a § 4(f) determination" (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 417 (1971)); *Friends of Pioneer St. Bridge Corp. v. Fed. Highway Admin*., 150 F. Supp. 2d 637, 655 (D. Vt. 2001) (upholding rejection of alternatives as imprudent because "while the 4(f) document itself may not have fully evaluated each alternative, there can be little question that the record contains rather extensive evaluations of the alternatives"). The record as a whole clearly upholds the agency's determination that the MLA does not meet Purpose and Need and therefore is not prudent.

Plaintiffs' claim that the MLA is "prudent" relies entirely on a letter sent by Plaintiff Honolulutraffic.com[3] and ignores the remainder of the record. The letter attempts to redefine the Project's Purpose and Need in order to show that the MLA met the Project's purpose, and it relies on evidence (a study by Panos Prevedouros, a member of Honolulutraffic.com) that the FEIS had already addressed, concluding that it did not alter the analysis of the MLA. AR1:00000855 at 2030, 2088. The MLA does not meet Purpose and Need and is not a "prudent" alternative under Section 4(f).

[3] Plaintiffs note that the letter did not receive a response (Pls'.Opp'n at 51) but fail to disclose that the comment period on the Draft EIS ended on February 6, 2009. AR1:00009690. The referenced letter was sent nine months later, on November 4, 2009, well outside the comment period. AR4:00071958. The ROD adopted in January 2011 includes the FTA findings regarding the MLA. AR1:00000030 at 36.

B. Downtown Tunnels

Among the reasons for FTA's determination that the Beretania and King Street Tunnels were infeasible and imprudent was the fact that they would increase the cost of the Project by an extraordinary magnitude. Plaintiffs assert "waiver," claiming that Defendants' cost estimates were based on a 2006 estimate rather than a 2007 document. Plaintiffs' claim that a 2007 memorandum showed that the tunnel alternatives would cost 80% less than the estimate in the FEIS is simply wrong.

Plaintiffs' so-called cost estimate is from the May 14, 2007 "Tunnels and Underground Stations Technical Memorandum" ("Tunnel Technical Memorandum"). AR3:00065304. The $96 million (AR3:00065304 at 65336) to $118 million (AR3:00065304 at 65335) figures are for the ***bare cost of tunnel tube construction*** for the King Street tunnel – without the 35% markup for contractor costs, which the Tunnel Technical Memorandum includes (but Plaintiffs did not). As the Tunnel Technical Memorandum states clearly (but Plaintiffs failed to disclose),

> [T]he cost estimates presented in this report are strictly for the construction of the underground tunnel structure and do not include utility relocation costs, underground station costs, track work that would be installed in the tunnels, or transit system controls that would be installed in the tunnels (i.e. train control systems and ventilation).

AR3:00065304 at 65334.

These additional costs are significant, and cannot responsibly be ignored. As stated in the Tunnel Technical Memorandum, "The cost estimates to relocate utilities and build the stations were presented in the *Capital Costing Memorandum* for the project." AR3:00065304 at 65334. The October 23, 2006 Capital Costing Memorandum, contained in the record at AR3:00067416,[4] reveals that stations are more expensive than the tunnel itself. The total cost for underground stations was estimated at $256 million. AR3:00067416 at 67581 (line 20.03). Additional right-of-way for the tunnel portals and stations added $33 million. AR3:00067416 at 67582, 67602. Site work and utility relocation for the tunnel costs $18 million. AR3:00067416 at 67601, 67581.

The Tunnel Technical Memorandum also did not include cost contingencies (AR3:00067416 at 67420; AR3:00067416 at 67582, 67602), state tax (AR3:00067416 at 67582, 67602), design and professional costs, and unallocated contingency (AR3:00067416 at 67583, 67603).

All of these costs can ***only*** be determined using the 2006 Capital Costing Memorandum. Plaintiffs' claim that the use of 2006 data was "impermissible" stems entirely from their failure to review and understand the 2006 data, which

[4] The Capital Costing Memorandum provides detail on each of the component costs of constructing an underground rail transit line. AR3:00067416. The costs for each section of the Project are summarized at AR3:00067428. A detailed breakdown of the costs of each cost component of Section V is provided at AR3:00067580-67589.

were clearly referenced in the 2007 Tunnel Technical Memorandum. Plaintiffs' "cheap" tunnel cost is not supported by the record.

Based on the consideration of all of these costs (and not even including the increased maintenance costs for tunnels), the FEIS concluded that the construction cost of the King Street Tunnel Alternative was $650 million (in 2006 dollars). AR1:00000247 at 719. Extending the tunnel to avoid Section 4(f) properties increased the cost to $1 billion in 2006 dollars. CityBr. at 53. Even without considering the environmental and other severe impacts of the tunnels (City Brief at 52-56), increased costs of this magnitude alone make the tunnels not prudent. *See* 23 C.F.R. § 774.17 (definition of "feasible and prudent alternative", ¶3(iv); *see also* ¶3(vi) multiple factors as independent basis for "not prudent" determination).

Plaintiffs' offhand assertions regarding the Project sponsors' ability to pay the extraordinary costs of the tunnels are not supported by the record. CityBr. at 52-54. Plaintiffs also claim that FTA did not balance harms and benefits through a weighing process. Pls'.Opp'n at 66 n.46. This position can only be based on Plaintiffs' earlier – refuted – contention that Section 4(f) requires all evidence to be contained within a single, formal document. For all the reasons discussed above, this is not the case. The factors weighed in determining the imprudence of the tunnel alternatives are discussed, and documented, in the City's Brief at 54-56.

Plaintiffs finally contend that record evidence documenting financial, environmental, and technical problems associated with the tunnel alternatives is a "post hoc" justification that may not be considered. Pls'.Opp'n at 67-68. Plaintiffs' argument is contrary to established case law governing judicial review of agency decisions under the arbitrary and capricious standard of review of APA Section 706(2)(A).

Review under this standard is based on a review of "the whole record." 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park*, 401 U.S. at 415; *Ariz. Past & Future Foundation v. Lewis*, 722 F.2d 1423, 1425 (9th Cir. 1983). The reviewing court is not limited to the evidence cited in the agency decision document as long as the evidence is in the record. *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1167 (9th Cir. 1997) ("Although the Final Environmental Impact Statement/Report does not discuss the potential for economic or population growth, it does reference several local planning documents . . . which specifically include construction of the Hatton Canyon freeway").

Plaintiffs erroneously suggest that guidance such as Bulletin 38 was not considered by the Defendants because the guidance does not appear in the Administrative Record. Pls'.Opp'n at 29 n.21. In fact, Bulletin 38 was referenced in the PA. AR1:00000030 at 91. Pls'.Opp'n at 30. Further, Defendants informed Plaintiffs that such technical bulletins (one of hundreds of such guidance

documents issued by various agencies) would not be included in the record. *See* Exhibit A to Declaration of Robert Thornton.

C. **Alternative Transit Technologies**

From the bottom of page 68 through the bullets on page 70, Plaintiffs' Opposition repeats their Opening Brief. The only new argument is that a Bus Rapid Transit ("BRT") system or at-grade rail might be "prudent" alternatives, despite the fact that these alternatives were eliminated for failing to meet Purpose and Need. For the same reasons stated above, the FTA's determination was not arbitrary and capricious.

D. **All Possible Planning to Minimize Harm Was Met**

Plaintiffs' claim that "all possible planning" requirements were not met for Aloha Tower relies on the same single sentence, from the same 2006 document, that Plaintiffs cited to show "use" of Aloha Tower. *See* Section II.D.1. above. That single sentence does not overcome the subsequent more detailed analyses that determined that Aloha Tower would not be used, and does not establish that this determination was arbitrary and capricious.

With respect to Chinatown, Plaintiffs continue to argue that mitigation measures were not sufficient. The PA documents such measures, including consultation on station design (AR1:00000030 at 96), updating the National Register listing (AR1:00000030 at 100), funds for preservation of private property

in Chinatown (AR1:00000030 at 104), and additional tracking of non-project changes to Chinatown (AR1:00000030 at 105). The FTA, the SHPO and the Advisory Council all concurred that these mitigation measures would minimize impacts on Section 4(f) properties. The requirement to engage in all possible planning was met.

IV. NEPA

The NEPA section of Plaintiffs' Opposition repeats, often verbatim, many of the arguments made in Plaintiffs' Opening Brief. To avoid additional repetition, the discussion below will identify and focus on the new arguments made in the Plaintiffs' Opposition.

A. Purpose and Need

Plaintiffs' first non-repetitive argument (bottom of page 78-79) attempts to refute the significance of SAFETEA-LU in determining Purpose and Need. Plaintiffs attempt to portray the AA process required by SAFETEA-LU as separate from and incompatible with NEPA. Plaintiffs claim that the "relevant question" for this Court to consider is not whether the SAFETEA-LU AA process complies with NEPA, but only whether NEPA (presumably unsullied by SAFETEA-LU) was satisfied. Although Plaintiffs may resent the contaminating influence of SAFETEA-LU, the fact remains that Congress adopted SAFETEA-LU and

Congress authorized the procedure that FTA followed. The Purpose and Need satisfies the AA process ***and*** NEPA.

Plaintiffs then complain that the Purpose and Need statement resulted in the rejection of alternatives. Pls'.Opp'n at 79-80. This is true. As Plaintiffs themselves admit subsequently, FTA regulations explaining the connection between the AA and the NEPA process "allows discarding alternatives which fail to meet the purpose and need, which is fair enough." Pls'.Opp'n at 98, n.58 (citing 23 C.F.R. pt. 450 app. A). *See also* CityBr. at 68.

FTA's interpretation and application of the referenced regulatory materials are subject to *Chevron* deference, as explained in the City's Brief at 58-59. Plaintiffs incorrectly claim that the fact that FTA's regulations are applied in a NEPA case requires *Chevron* deference to be diverted to the Council on Environmental Quality ("CEQ") Pls'.Opp'n at 84. The deference due to CEQ when it interprets ***its own*** NEPA regulations, however, does not eliminate deference due to the FTA's interpretation of its own regulations that may bear on the application of NEPA. *See, e.g., City of New York v. Mineta*, 262 F.3d 169, 177 (2d Cir. 2001) (agency's interpretation of its own regulations entitled to *Chevron* deference in a NEPA case).

In fact, Plaintiffs simply refuse to accept that the federal Lead Agency (FTA) has an important role to play in the NEPA process, through SAFETEA-LU

and through the interpretation and application of the agency's ***own*** governing law and regulations. In fact, Plaintiffs attempt to deny the federal Lead Agency ***any*** appropriate role in developing Purpose and Need. Remarkably, Plaintiffs assert that the federal lead agency's statutory objectives do not serve as a guide in determining Purpose and Need. Pls'.Opp'n at 80-81. Plaintiffs incorrectly base their argument that Purpose and Need should not be affected by statutory objectives on the fact that the Project is a "regular" project with a "non-federal" project proponent. Pls'.Opp'n at 80-81 n.54.

In their very next paragraph, however, Plaintiffs cite *National Parks & Conservation Association v. Bureau of Land Management,* 606 F.3d 1058 (9th Cir. 2010), which focused precisely on the need for non-federal purpose and need to be guided by the statutory and regulatory frameworks governing the Lead Agency. In *National Parks*, the Ninth Circuit stated that, when addressing the purpose and need for a non-federal project, "'an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, ***in the agency's statutory authorization to act, as well as in other congressional directives***.'" *Id*. at 1070 (citation omitted) (emphasis added).

The essential inquiry, according to *National Parks*, is "to determine whether the [federal lead agency]'s purpose and need statement properly states the [federal lead agency's] purpose and need, against the background of a private need, in a

manner broad enough to allow consideration of a reasonable range of alternatives." *Id*. at 1071. *National Parks* did not invalidate the purpose and need statement at issue in the case ***because*** it incorporated statutory goals. Rather, the Court objected to the fact that it ***only*** incorporated one statutory goal out of the four project goals, with the other three representing narrow, private goals. *Id*. at 1072. Plaintiffs' claim that the Project's Purpose and Need incorporates *too many* statutory goals is at odds with NEPA and with the Ninth Circuit's precedent. *See also Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998) (upholding purpose and need when one goal was "to implement Forest Plan direction for the Project Area" and the Forest Plan, in turn, listed among its goals wilderness, timber, visual, fish and wildlife).

Plaintiffs claim to be uncertain of the statute that is implemented through the Project's Purpose and Need (Pls'.Opp'n at 80-81), but this can only be the case if they ignored the clear exposition of this issue in the City's Brief at 60-61 (49 U.S.C. § 5309(c)(1) requires incorporation of planning and community goals as well as transportation goals; 49 U.S.C. § 5301(f)(4) and 49 U.S.C. § 5301(b)(5) promote the mobility of low income and minority residents).

Plaintiffs are particularly dismissive of the transportation equity need derived from federal law and included in the Purpose and Need, brushing it off as "serving specific areas and demographics." Pls'.Opp'n at 78, 83. In their

discussion of alternatives, Plaintiffs merely assert – with no record support – that "[l]ow income communities could easily be served by the express buses using the MLA." Pls'.Opp'n at 92-93.

As set forth in the Intervenors' Reply Brief, in which the City joins, the record shows that the MLA will not meet the transportation equity need. Int.Reply at § II.

Because the need for transportation equity does not support Plaintiffs' ***policy*** preference for highway expansion in O'ahu, they have trivialized the need to increase mobility of low-income residents. Federal law ***requires*** Lead Agencies to address the transportation needs of low income populations, and the Purpose and Need is valid.

B. Analysis of Alternatives

Plaintiffs' centerpiece argument, commencing on page 88, comes down to an insistence that the public and the agencies did not know about the MLA. Plaintiffs appear to believe that, if the public and the agencies had known about the MLA, it would have been considered as an alternative in the EIS.

There can be no doubt, however, that the public and the agencies knew about the MLA. In their zeal to fly-speck the scoping documents to focus selectively on words that do not sound as welcoming as the Plaintiffs would have liked, the Plaintiffs ignored all of the evidence summarized in the City's Brief. This

evidence demonstrates that the MLA was taken seriously from the start – explored, modified to improve performance, examined, and re-examined. CityBr. at 73-74. No matter how often the MLA was visited, revisited, cast or recast, it simply did not meet Purpose and Need.

Plaintiff's legal argument relating to public notice is that "specific procedural requirements" were not met during the scoping process because the AA was "not 'subjected to public . . . review during the EIS scoping process' as required." Pls.'Opp'n at 87-88.[5] Plaintiffs neglected to disclose in their Opening Brief that the Notice of Intent for the scoping process ***did***, in fact, make the AA available for public review. CityBr. at 70-71. In an effort to sidestep this inconvenient fact, which the City Brief discusses at 70-71, Plaintiffs now argue that availability for public review does not matter. Plaintiffs now simply assert that the process is "inconsistent with NEPA" (Pls'.Opp'n at 89), based on nothing more than generalized statements regarding the importance of making information available to the public. The careful process of developing and evaluating alternatives described in the City's Brief, demonstrates that "the relevant information will be made available to the larger audience." *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 349 (1989).

[5] Plaintiffs' source for these "specific legal requirements" is SAFETEA-LU Environmental Review Final Guidance, adopted by FTA and FHWA. 23 C.F.R. pt. 450, app. A.

Plaintiffs' remaining arguments largely repeat their Opening Brief. Plaintiffs argue (contrary to NEPA and as addressed in the City's Brief at 75-76) that it was arbitrary and capricious to reject the MLA based on Purpose and Need. They claim (without support) that the MLA would have met purpose and need if the "City's errors" had been corrected[6] or if Task Force recommendations had been adopted. CityBr. at 73-81. Plaintiffs also repeat their argument about the choice of steel wheel on steel rail technology almost verbatim, including claims about noise and environmental impacts that were already addressed and refuted in the City's Brief. CityBr. at 81-84.

Finally, Plaintiffs repeat their misleading argument alleging that an alternative alignment, which would have avoided the Federal building in which the Federal District Court for Hawai'i is located, was rejected "because" it would require City Council approval. Pls'.Opp'n at 96-97. Despite the fact that the City's Brief pointed out that the Plaintiffs' argument materially misquoted the subject letter (CityBr. at 84-85), Plaintiffs' Opposition includes the same misrepresentation.

Plaintiffs' Opposition adds one paragraph stating that the letter should be read as demonstrating that the judges themselves "believed" that City Council action was the impediment to adopting a different alternative. Pls'.Opp'n at 97-98.

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[6] *See, e.g.*, AR9:00144634; AR10:00144635; AR10:00124633.

Plaintiffs' theory about the judges' belief does not change the record. The record establishes that alternative alignments were studied several times but were not adopted because they would cause severe impacts on the environment, historic properties, and traffic. CityBr. at 85. *See also* AR1:00000855 at 937-38.

C. Environmental Consequences of the Project and the Alternatives

Plaintiffs' Opening Brief cited the wrong parts of the EIS to support their assertion that the EIS does not address construction-related air impacts. The City's Brief pointed out this error. CityBr. at 86-87. Plaintiffs' Opposition merely repeats its initial assertion even ***repeating*** the reference to ***the wrong portion of the EIS***. Pls'.Opp'n at 99. The sole new argument is that Plaintiffs' failure to comment during the administrative process did not constitute waiver because the precise location of a fabrication facility was not determined until the ROD. *Id*. at 100.

Plaintiffs had not previously raised any issues relating to the precise location of the facility, and they had every opportunity to comment on construction effects during the administrative process. The EIS states that construction staging areas and plans "will be identified and developed by the contractors and approved by the City." AR1:00000247 at 429. The EIS discloses that "[t]he effects of activities in the staging areas known at this time are included in the discussion of construction effects on the natural and built environment." AR1:00000247 at 641. The EIS

evaluates construction effects and mitigation. AR1:00000246 at 640. With regard to air quality, the two impacts identified are increased fugitive dust and mobile-source emissions. AR1:00000247 at 645. The EIS states that the Rail Project will comply with State fugitive air pollutant emissions. AR1:00000247 at 645. The contractor will select the appropriate measures to comply with fugitive dust requirements, and the EIS identifies measures that can be used. AR1:00000247 at 645. Nothing more is required. *Robertson*, 490 U.S. at 35 (NEPA does not require detailed mitigation plan).

Plaintiffs repeat, again almost verbatim, their desultory argument that the FEIS did not "account for" the indirect and cumulative impacts from growth as they affect "environmental resources." Pls'.Opp'n at 100-101. There is one change from their Opening Brief. For the ***first time***, Plaintiffs attempt to identify the allegedly affected resources: "for example," such resources might include "sensitive resources (habitat, wetlands, etc.)." (*Id*. at 100.) Plaintiffs again fail to cite to or refute the City's discussion of and record citations to the EIS, including the EIS's analysis of growth inducement and of potential impacts on resources. CityBr. at 88-89; *see especially* n.19.

Plaintiffs instead make bald assertions about "instigat[ing] massive change in land development patterns" (Pls'.Opp'n at 100) and the Project's "explicit, growth-inducing purpose" (*Id*. at 101). These claims are simply wrong. Plaintiffs

ignore the EIS's careful consideration of existing plans, and they failed to refute the discussion in the City's Brief, including the precedent cited in the City's Brief at 89. *See also Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 580 (9th Cir. 1998). ("[T]he project was implemented in order to deal with existing problems; the fact that it might also facilitate growth is insufficient to constitute a growth inducing impact.")

D. Segmentation

Plaintiffs mischaracterize the City's argument. The City did not argue that "segmentation is justified" (Pls'.Opp'n at 103). Rather, the City demonstrated that the 20-mile scope of the Project complies with long-established NEPA regulations and case law governing the scope of NEPA evaluations. CityBr. at 92-93; 23 C.F.R. § 771.111(f)(1)-(3); *see, e.g., Daly v. Volpe*, 514 F.2d 1106, 1110-11 (9th Cir. 1975) (approving EIS evaluating 7-mile section of Interstate highway).

Plaintiffs' only argument to the contrary is that it "is hard to see how" approval of the Project would "not constrict consideration of the projected extension . . . ." Pls'.Opp'n at 103. This issue was addressed in the City's Brief at 91.

Plaintiffs' sole legal support is an entirely inapposite Fifth Circuit case, *Named Individual Members of the San Antonio Conservation Society v. Texas Department of Transportation*, 446 F.2d 1013 (5th Cir. 1971) ("*Named Individual*

Members"). This case addressed an overt effort to avoid analyzing a road through a park. Because of controversy over building a road through a park, the two end segments were treated as the "project," leaving the middle part – connecting the two ends through the park – for later review. There was no pretense that this "project" definition had any purpose other than to temporarily defuse the park controversy. *Id*. at 1022-23.

The Fifth Circuit discussed this case in *Save Barton Creek Association v. FHWA*, 950 F.2d 1129 (5th Cir. 1992). In distinguishing *Named Individual Members*,[7] the court observed dryly that "[i]t was deemed significant that segments of the highway on both sides of the park were to be constructed with federal funds, and ***none of the three segments had logical termini or independent utility***." *Id*. at 1141 (emphasis added). In contrast, *Barton Creek* found that the consideration of two individual segments of a proposed Austin Outer Loop highway did not constitute unlawful segmentation because the highway segments were "planned to be constructed if at all at different times in the future over a period of years," and because "each segment will serve a highly useful urban traffic purpose even if no other segments of the Outer Loop are ever constructed." *Id*. Similarly, the Project has logical termini and independent utility, and planned extensions will be

[7] The *Barton Creek* court refers to the case as *San Antonio*.

constructed, if at all, in the future over a period of years. Like *Barton Creek*, it is easily distinguishable from *Named Individual Members*.

Contrary to Plaintiff's unsupported statement, it is hardly "inconsistent" for the EIS to address the cumulative impacts of such an extension. As part of the cumulative impact analysis required by NEPA, the EIS addresses "transportation projects . . . anticipated to be completed on O'ahu by 2030." AR1:00000247 at 661. The planned extensions are among those projects because they "are included in the ORTP." *Id*. As a result, the FEIS addressed their impacts to the extent that they are foreseeable. This cumulative impact analysis does not affect the definition of the Project.

V. **NATIONAL HISTORIC PRESERVATION ACT**

The City Defendants join in the Federal Defendants' Reply Memorandum.

VI. **REMEDY**

The City's Brief described why law and equity require additional proceedings in the event that the Court determines that the FTA committed some error. CityBr. at 93-95. The Court may not enjoin the Project without first considering evidence on all of the four factors applicable to injunctions (irreparable injury, inadequate remedies at law, balance of hardships, and public interest). *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010); *see also*

N. Idaho Cmty. Action Network, 545 F.3d at 1160 ("we find it unnecessary to enjoin the entire Project while the Agencies complete the necessary evaluation.")

Material evidence that is relevant to these factors is outside of the record. Just one example is the fact that the City has now completed below-ground archaeological resource investigations on much of the Project alignment (including completion of investigations within the first two construction sections of the Project). ***No burials have been identified***. See Intervenors' Opening Brief at 70-71; http://www.honolulutransit.com/planning/iii-identification-and-protection-of-archaeological-sites-and-burials.aspx (AIS Report West O'ahu Farrington Highway, and AIS Report (Kamehameha Highway Guideway). As explained in the City's Brief, the Project is important to the continued quality of life enjoyed by the people of Hawaii and to the economy of the State.

VII. CONCLUSION

The City Defendants respectfully request the Court to grant their Motions for Summary Judgment and deny the Plaintiffs' Motion for Summary Judgment.

DATED: July 13, 2012

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