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**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,

v.

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

Case No. 11-00307 AWT

AMICUS CURIAE
**MEMORANDUM OF THE
NATIONAL TRUST FOR
HISTORIC PRESERVATION**

Hon. A. Wallace Tashima

Action Filed: May 12, 2011

Trial Date: None Set

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.

Defendants.

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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.
Defendants.

I. INTRODUCTION

This lawsuit addresses the failure of federal, state, and local agencies to comply with Section 4(f) of the Department of Transportation Act—among other serious legal deficiencies—in connection with the permitting of the Honolulu High-Capacity Transit Corridor Project (“Project”). This massive elevated rail project will cut through the historic core of Honolulu, Hawaii, and will also adversely affect other historic properties along its 20-mile length, including the Pearl Harbor National Historic Landmark District.

Unlike other federal historic preservation laws, such as the National Historic Preservation Act and the National Environmental Policy Act, Section 4(f) contains a substantive prohibition on the construction of transportation projects requiring the “use” of historic sites, park and recreational areas, and wildlife and waterfowl refuges, unless (1) there is no prudent and feasible alternative to using the

resources and (2) the project includes all possible planning to minimize harm. 49 U.S.C. § 303(c); 23 C.F.R. Part 774.

Neither one of these prongs has been satisfied here. Among other things, Defendants never fully identified all historic resources prior to approving the Project. Nor did they properly acknowledge that many of the known historic resources would be harmed substantially through “constructive use” by the Project. As a result, the Defendants failed to avoid and minimize harm to all of the historic resources “used” by the Project, as required by Section 4(f). For the following reasons, the Court should grant the Plaintiffs’ Cross-Motion for Summary Judgment and order the Defendants to comply with Section 4(f).

II. BACKGROUND ON SECTION 4(f)

Section 4(f) of the Department of Transportation Act is the most stringent federal historic preservation law ever enacted. It reflects Congress’s directive that the protection of historic resources and parks be given “paramount” importance in transportation planning. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13 (1971). Although minor changes to Section 4(f) have occurred since it was established, federal courts have repeatedly validated the importance of this policy goal and need for compliance with Section 4(f)’s mandates. *See Id.* at 404-05; *Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis*, 701 F.2d 784,

787-88 (9th Cir. 1983); *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1985).

Section 4(f)'s mandate is substantive rather than procedural in nature. Protected sites *cannot* be “used” in transportation projects unless there is “no feasible and prudent” avoidance alternative and “all possible planning” is incorporated to minimize harm resulting from the use. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3. When deciding whether a protected site will be “used,” the Ninth Circuit construes the term broadly. *Adler v. Lewis*, 675 F.2d 1085, 1092 (9th Cir. 1982) (“Even off-site activities are governed by § 4(f) if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment”); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445, 452-53 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976) (6-lane highway passing within 100-200 feet of a historic petroglyph rock would result in constructive “use”).

Moreover, the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) have adopted regulations to define the “use” of Section 4(f)-protected sites. Under these regulations, a “use” of protected property occurs when: (1) land from a 4(f) property is permanently incorporated into a transportation project; or (2) there is a temporary occupancy of a 4(f) site that causes adverse impacts that are contrary to the statute’s preservation purposes; or

(3) when constructive use of the site occurs. *See* 23 C.F.R. § 774.17. As the following discussion will show, the Defendants—by violating Congress’s Section 4(f) mandates and the FTA’s own regulations promulgated pursuant to 4(f)—have not complied with either the letter or the spirit of the law.

III. ARGUMENT

This *Amicus Curiae* Memorandum will address two ways in which the Defendants have violated Section 4(f). First, Defendants improperly deferred the full identification of all historic resources until after the Project’s approval. As a result, Defendants cannot substantiate the conclusion that the Project will not require the “use” of additional historic sites. Second, Defendants ignored indirect effects on historic resources, even though they amounted to a “constructive use,” and thus failed to recognize or satisfy the applicable stringent mandate of Section 4(f) to avoid and minimize harm.

A. The Defendants’ Unlawful Approach to Evaluating Project Impacts

The Defendants used an unlawful approach to evaluating project impacts that has essentially precluded the consideration of alternatives that would otherwise avoid or minimize harm as required by law. In particular, the Defendants’ approach will result in adverse effects on Native Hawaiian burials and traditional cultural properties (TCPs), which the Defendants failed to consider as required under Section 4(f).

The impact to Native Hawaiian burials is likely to occur in the downtown segment of the project—the last segment proposed to be built—because the proposed alignment is within an area that has an extremely high likelihood of burials, based on prior construction experience. AR 247 at 645 (determination of "high likelihood" resources). Notwithstanding this likelihood, the City refused to conduct a survey prior to the final decision on the project, a decision the FTA never challenged. AR 124858 at 124858-59 (National Trust's letter objecting to deferral of studies); AR 000030 at 000085, 000092-95 (ROD adopts phased approach); AR 247 at 645 (determination of "high likelihood" resources). This deferral of the identification of historic resources was improper and unlawful. *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368 (D.C. Cir. 1999). As a result, Section 4(f) bars the project's funding and approval. *Citizens to Preserve Overton Park*, 401 U.S. at 411.

The City's and FTA's deferral of identification efforts violated Section 4(f) in the same way described in *Corridor H*. In *Corridor H*, a case in which the National Trust participated as an *amicus*, the U.S. Court of Appeals for the District of Columbia Circuit held that an agency violates Section 4(f) when it postpones making determinations as to whether sites impacted by a planned project qualify

for Section 4(f) protection until after the project was approved.¹ Because Defendants failed to identify all historic resources prior to approval of the project in violation of the FTA's own regulations, 23 C.F.R. §§ 774.9, 774.11, the Defendants cannot assert or substantiate that they attempted all feasible and prudent alternatives to avoid these sites, or that they planned in any way to minimize harm.

Nothing in the Section 4(f) regulations authorizes the FTA to intentionally defer Section 4(f) compliance until after issuance of the Record of Decision (ROD), without having first identified Section 4(f) sites that would be "used" by the Project.² Consequently, Defendants' determinations regarding burials and TCPs are not entitled to any deference, because to do so would conflict with Section 4(f)'s requirements and preservation-centric purpose. *Thomas Jefferson*

¹ Significantly, the *Corridor H* court found that even though a programmatic agreement that uses a phased or deferred approach for identifying historic resources may be sufficient to satisfy Section 106 of the National Historic Preservation Act, such an approach does not satisfy the substantive mandate of Section 4(f). *Corridor H*, 166 F.3d at 372.

² "With respect to historic and cultural properties, the regulation establishes an affirmative responsibility of the administrative agency and the applicant to identify historic properties on or eligible for the National Register of Historic Places. This is to be done early in the . . . compliance process; thus, it is not expected that there will be late identification of historic [resources]." 52 Fed. Reg. 32646 (Aug. 28, 1987) (emphasis added); "[I]f it is reasonably foreseeable that a property would qualify as eligible for the National Register prior to the start of construction, then the property should be treated as a historic site for the purposes of this section." 23 C.F.R. § 774.13(c).

Univ. v. Shalala, 512 U.S. 504, 512 (1994) (While deference is normally due an agency's interpretation of its own rules, that is not the case where "an alternative reading is compelled by the regulation's plain language." (internal quotation marks omitted)).

This position is especially absurd following the District of Columbia Circuit Court's ruling in *Corridor H*, where the court specifically instructed the FHWA that it must consider all historic resources prior to approving the highway project. 23 C.F.R. §§ 774.9(a), (b). *Corridor H*, 166 F.3d at 373. Therefore, FHWA has been put on notice that this type of procedural avoidance of Section 4(f)'s requirements is unlawful. Moreover, *Corridor H* is important for this Court to consider because it forms the basis for the Ninth Circuit's ruling in *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1158-59 (9th Cir. 2008) ("We hold, consistently with the District of Columbia Circuit's decision in *Corridor H*, that an agency is required to complete the § 4(f) evaluation for the entire Project prior to issuing its [Record of Decision].")

Here, in direct contravention of *Corridor H* and *North Idaho Community Action Network*, the Defendants violated Section 4(f) by failing to identify and evaluate Native Hawaiian burials and other traditional cultural properties prior to construction. Native Hawaiian burials, or *iwi kapuna*, may be eligible for listing in

the National Register of Historic Places and therefore qualify as Section 4(f) resources. 23 C.F.R. §§ 774.11(e), 774.17 (definition of historic sites includes National Register-eligible resources); 36 C.F.R. § 60.4 (eligibility criteria). TCPs are resources eligible for inclusion in the National Register because of their association with cultural practices or beliefs of a living community that are rooted in the community's history and are important to that community in maintaining the cultural identity of its members. 23 C.F.R. §§ 774.11(e), 774.17; PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERVICE, DEP'T OF THE INTERIOR, NATIONAL REGISTER BULLETIN 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 11-12 (1998) (hereafter "TCP GUIDELINES," available at <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>).³

In regards to traditional cultural properties, other than burials, Defendants likewise ignored the identification of TCPs until after project approval, with the exception of Chinatown. *See* note 4, *supra*. Nevertheless, Defendants' Section 4(f) evaluation makes no mention of Chinatown's traditional cultural significance.

³ In addition, TCPs, and "the beliefs and institutions that give them significance, should be systematically addressed in programs of preservation planning and in the historic preservation components of land use plans. One very practical reason for this is to simplify the identification and evaluation of [TCPs] that may be threatened by construction and land use projects." PARKER & KING, TCP GUIDELINES, at 5.

FEIS at 5-39. This type of deferred identification, however, is not allowed under Section 4(f) for the reasons stated above. *E.g., Corridor H Alternatives*, 166 F.3d at 372-74. The Court should grant summary judgment to the Plaintiffs for this reason alone.

Moreover, the Defendants' position is especially egregious because the project's Programmatic Agreement expressly recognizes the historic nature and deep value of Hawaiian burials⁴ and traditional cultural properties⁵ and the need to protect them. Thus, to allow this project as approved to move forward would make a "joke of the feasible and prudent alternatives standard." *Named Individual*

⁴ The Programmatic Agreement (PA) developed for the Project under Section 106 of the National Historic Preservation Act included provisions addressing the Project's impacts on Native Hawaiian burials and traditional cultural properties. With respect to burials, the PA required the City to develop an Archaeological Inventory Survey (AIS) Plan to include all areas of direct ground disturbance by the project for each construction phase. PA at 6-7. Pursuant to the PA, any Native Hawaiian burials discovered during the AIS "shall be treated as previously identified burial sites." PA at 6. Moreover, the PA required the City to consult with the O'ahu Island Burial Council on issues related to the AIS survey. PA at 6-7. As was the case in *Corridor H*, however, it is important to note that the PA under Section 106 allowing identification of these resources after the ROD is only sufficient for compliance with Section 106 requirements, not for meeting the more stringent substantive requirements of Section 4(f).

⁵ With respect to TCPs, under the terms of the PA it was agreed that "[t]he City will complete all fieldwork, [National Register] eligibility and effects determinations, and consultation to develop treatment measures *prior to the commencement of construction*." PA at 5-6 (emphasis added). The PA also provided that "[t]he City shall complete any treatment measures prior to undertaking each construction phase that would adversely affect a TCP." PA at 6. Again, this timing is only permissible under Section 106 not Section 4(f).

Members of San Antonio Conservation Soc’y v. Texas Hwy. Dep’t, 446 F.2d 1021, 1023 (5th Cir. 1971), *cert. denied*, 406 U.S. 993 (1972).

As the Fifth Circuit has recognized, “[W]e not only decline to give such an approach our imprimatur, we specifically declare it unlawful.” *Id.*; *see also D.C. Federation of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (expectation that future planning may minimize harm to historic properties does not relieve the agency of its responsibility for complying with Section 4(f) prior to approving the project); *Monroe Co. Conservation Council, Inc. v. Volpe*, 472 F.2d F.2d 693, 700-01 (2nd Cir. 1972) (“The statutory mandate [of Section 4(f)] is not fulfilled by vague generalities or pious and self-serving resolutions or by assuming that someone else will take care of it. *The affirmative duty to minimize the damage to parkland is a condition precedent to approval . . . and the Secretary must withhold his approval unless and until he is satisfied that there has been, in the words of the statute, ‘all possible planning to minimize harm to such park’* and that full implementation of such planning to minimize harm is an obligated condition of the project.”) (emphasis added).

B. “Constructive Use” of Historic Resources in Violation of Section 4(f)

The Defendants in this case acted arbitrarily and capriciously in making constructive use determinations under Section 4(f). In completing the Final

Environmental Impact Statement (“FEIS”), the Defendants systematically circumvented Section 4(f)’s mandate to avoid the use, including constructive use, of protected recreational and historic resources. A “use” determination is “not limited to the concept of a physical taking, but includes areas that are significantly, adversely affected by the project.” *Adler*, 675 F.2d at 1092. Planned actions in close proximity to a protected site are also governed by Section 4(f) and will be prohibited “if they could create sufficiently serious impacts that would substantially impair the value of the site in terms of its prior significance and enjoyment.” *Id.*

Throughout the FEIS, the Defendants failed to recognize the extent of the impacts caused by the Project that, while they fall short of a direct taking of property, will still result in substantial, negative impacts on protected 4(f) sites. As currently planned, the Project will substantially impair protected sites, including Aloha Tower, Mother Waldron Neighborhood Park, Walker Park, and Irwin Memorial Park and other sites, by interfering with protected views, disrupting protected settings, and interfering with recreational uses. Taken together, these negative impacts caused by the Project’s proximity to protected 4(f) sites, clearly constitute a “constructive use” of the protected sites discussed below. 23 C.F.R. § 774.17.

Under the FHWA's regulations, constructive use occurs when a transportation project does not actually incorporate protected property, but it "substantially impairs" the "protected activities, features, or attributes" that qualify the property for protection under Section 4(f). *Id.* § 774.15(a). In making a determination of constructive use, the agency is required to: identify the protected features, activities, or attributes of the site that qualify it for protection and which are sensitive to proximity impacts; analyze the proximity impacts on the site that would be caused by the project; and, consult with the officials who have jurisdiction over the protected property. *Id.* § 774.15(d).

Additionally, the FHWA's 4(f) regulations have identified examples of situations where constructive use occurs because a project's proximity will "substantially impair esthetic features or attributes" of a protected site. *Id.* § 774.15(e)(2). Examples cited include a project sited in close proximity such that it "obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a Section 4(f) property which derives its value in substantial part due to its setting." *Id.*

Despite Section 4(f)'s clear requirement that the impacts on protected sites caused by a project's proximity must be considered, the FEIS fails to adequately consider the proximity impacts of the Project on Aloha Tower, Mother Waldron Neighborhood Park, Walker Park, and Irwin Memorial Park. This is especially

true in regards to Aloha Tower, where the historic viewshed is a significant part of its protected features. By blocking views of the Tower from the water, the Project would substantially impair one of the most important character-defining features of the Tower—the view—in much the same way as the Project would impair views of historic resources in the parks discussed above. For this reason, the Project as approved violates Section 4(f).

Constructive use under Section 4(f) has previously been considered in a factually similar case. In *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423 (5th Cir. 1985), the court of appeals held that the expansion of an existing elevated highway, which would have come within 20 to 80 feet of four historic buildings⁶ in Fort Worth, Texas and within five feet of the Water Garden, an acclaimed 4.3-acre urban park, constituted a “constructive use” of these resources protected by Section 4(f).

In rejecting the defendants’ contention that the project would not constructively “use” the sites, the Court devoted substantial time to addressing the

⁶ The buildings threatened by the project were National Register-listed or eligible structures constructed in the 1930s that were excellent examples of architecture during the period of modern Fort Worth’s early development. The properties were: (1) The Fort Worth Main Post Office Building, a 50-year-old Renaissance Revival style building; (2) The Texas & Pacific Freight Terminal, an Art Deco three-building complex that is one of the most prominent features of the Fort Worth skyline; (3) The Texas & Pacific Passenger Terminal, a 13-story Art Deco office building; and (4) The Fort Worth Public Market Building, one of Fort Worth’s few surviving examples of commercial Spanish Colonial Revival architecture.

impacts to the Water Garden. The south end of the park closest to the existing overhead highway includes an amphitheater and large area of greenspace that is frequently used for outdoor events. *Id.* at 426. The planned highway expansion project would place the overhead nine feet, rather than forty-five, feet from the park's southern edge and the base of the overhead's support columns would be located only five feet from the park's boundary. *Id.* Evidence at trial was submitted stating that the overhead highway structure would create "a massive 'wall-like' appearance to people within the park. The resulting visual and aesthetic impact would give the park an uninviting, inhumane quality and detract from its carefully conceived design." *Id.* at 435-36.

Additionally, oak trees that had been carefully planted along the park's southern boundary wall to screen views of the existing overhead highway would be ineffective in screening the new, larger overhead structure. *Id.* Views from inside the park that were not screened by trees would become particularly undesirable. In an ineffective attempt to address these concerns, the defendants included within their study a conclusory statement that "The aesthetic effect of this project will be in harmony with its environment and visually pleasing to the community." *Id.* at n. 14. The court noted that because there was "no showing as to how the appellees arrived at that conclusion, the administrative record must be viewed as incomplete, unreviewable, and incapable of supporting that statement." *Id.*

The court also focused particularly on the adverse impacts to the Post Office building and explained that the planned construction would bring the existing overhead highway to within 20-40 feet of the facade of the historic Post Office. The court noted that the overhead highway's expansion near the Post Office and at virtually the same height would:

create an awning-like effect on the front of the building, shading the building during parts of the day, obscuring practically any view of the sky, obstructing a view of the façade for all but close passers-by, and giving people standing on the steps of the Post Office a view of the numerous and rather unattractive Overhead support columns.

Id. at 427 & n.2. The court went on to note that the Texas and Pacific buildings would suffer similar negative effects. *Id.* The court wrote that “it borders on the *ridiculous* to suggest that the expanded Overhead would have minimal impacts on the Post Office” in reaching its determination of constructive use. *Id.* at 442 (emphasis added). As a result of the *I-CARE* decision, the highway expansion project was ultimately redesigned and was built on a different alignment that completely avoided harm to the identified historic properties and the existing elevated highway was removed.⁷

⁷ Transportation projects involve unique planning complexities and given their scope are capable of causing significant harm to a great number of protected cultural resources. For other examples of how federal courts have handled Section 4(f) concerns in this context, see *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1121-23 (C.D. Cal. 1999). Plaintiffs sought an injunction to halt the planned extension of Route 710 in Southern California. Despite the proximity of the

In the present case, the impacts upon Honolulu's protected parks and historic buildings caused by the proximity of the planned elevated transit corridor are similar to, but even worse, than those in the *I-CARE* case. In *I-CARE*, the construction was intended to expand an existing transit project that would increase the magnitude of existing adverse impacts on the historic properties. In contrast, the historic resources in Honolulu negatively impacted by the transit corridor Project currently do not suffer from any negative impacts caused by inappropriate, out-of-scale development. If the Project is completed as planned, the "massive wall-like" intrusion and the "awning effect" described by the *I-CARE* court will stretch across protected sites throughout downtown Honolulu including Mother Waldron Neighborhood Park, Walker Park, Irwin Memorial Park and the Aloha Tower. *See also Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 439 (9th Cir. 1976) (holding that construction of a planned six-lane highway project on Oahu that would pass within 100 to 200 feet of a significant petroglyph rock was a "constructive use" under Section 4(f) due to its proximity to the resource).

planned route to the historic resources, the defendants issued a finding that the project would not result in *any* constructive uses of eligible historic resources. In reaching its decision granting a preliminary injunction - an injunction that remains in effect to this day - the court noted the "serious questions going to the merits as to whether the defendants abused their discretion in finding that the 710 Freeway Project will not result in any constructive uses of eligible historic resources." *Id.* at 1123. *See also Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (interstate highway that would encircle a campground would result in a constructive use).

This issue was addressed again in *Coalition Against a Raised Expressway, Inc. (CARE) v. Dole*, 835 F.2d 803 (11th Cir. 1988). In *CARE*, the construction of a new elevated expressway immediately adjacent to a historic city hall building, a historic railroad terminal and a small local park was held to constitute a constructive use under Section 4(f). In support of their determination that the project did not constructively use the three protected sites, the transportation defendants argued that the impacts on the properties were not substantial because the properties were already located in a busy downtown area. *Id.* at 811. The Defendants pointed to existing traffic and to the busy warehouse district nearby to support their argument that the addition of a raised expressway would not significantly add to the existing negative impacts in the area. *Id.* The court rejected this line of reasoning and ruled that the cumulative impact on the sites from the expected increase in noise and air pollution combined with the obstructed view resulted in a constructive use. *Id.* at 812.

In reaching its decision, the court found that historic resources located within 43-100 feet of the highway project would significantly impair the view of the protected properties. “The highway would cut off the city hall's view of the river and the docks. Conversely, it would reduce the view from the river of the city hall's architecture. For the park and the railroad terminal, the highway would

replace the view of downtown with the sight of the seventeen foot concrete pillars holding up the freeway.” *CARE*, at 812.

The Project at issue in this case similarly will cause cumulative significant adverse effects on protected resources. The impacts caused by diminished views, additional noise, and the degradation of the protected historic context and settings, taken together clearly constitute a constructive use.

As in *I-CARE*, *CARE*, and *Stop H-3*, the Project in the case at bar will take unspoiled sites and subject them to proximity impacts such as noise, vibration and visual intrusions that will permanently blight Honolulu’s unique and irreplaceable historic resources. The failure to acknowledge these constructive uses evades compliance with Section 4(f) and creates an inaccurate picture of the magnitude of the protected historic and recreational resources that will be adversely impacted by the construction of the Project as planned. Moreover, the Defendants relied on the erroneous constructive use determinations in the FEIS to issue a finding declaring that there are no reasonable and prudent alternatives to the use of downtown Honolulu’s 4(f) resources and approve the Project. Because this finding was based on a deficient study full of inconsistent, factually unsupportable use determinations for protected sites, the decision to approve the Project was arbitrary, capricious, and an abuse of discretion in direct violation of Section 4(f) protections. The significant adverse impacts caused by the Project on the Section 4(f)-protected

sites of Mother Waldron Neighborhood Park, Walker Park, Irwin Memorial Park and the Aloha Tower are described fully below.

1. Aloha Tower

Aloha tower is an important historic site and local landmark to Honolulu citizens. The 184-foot Art Deco tower, constructed in 1926, is eligible for the National Register under Criterion A because of its association with the development of tourism and for its use during World War II as a harbor control tower. FEIS 5-67. The Project will construct the elevated guideway approximately 420 feet from the tower. The FEIS notes that the tower serves as “a local landmark from the inland area” and further notes that although views will not be entirely blocked, they will be altered. *Id.* It also notes that the Project will be visible from the Tower’s observation deck. Despite recognizing the tower’s landmark status and noting that views will be altered, the FEIS concludes that there is no constructive use of the property. This conclusion defies a common sense application of the Section 4(f) constructive use regulations addressing proximity impacts. The failure to make a constructive use finding under these circumstances is arbitrary, capricious, and an abuse of discretion.

2. Mother Waldron Neighborhood Park

The FEIS provides a very brief discussion of the impacts of the Project on Mother Waldron Park. The Project’s elevated guideway, which is planned to be

between 3-4 stories tall, will run in a line 20 feet away from the edge of the park's greenspace, about 70 feet from the playground area, and approximately 290 feet away from the volleyball court. FEIS 5-53. Simple common sense leads to the conclusion that there will be significant disruptions of the park's setting and recreational uses as a result of visual impacts on this small urban park caused by locating a three story overhead guideway 20 feet from the park's boundary. In an attempt to explain away the effects that the Project's extremely close proximity to the park will cause, the FEIS states that "[t]he park is surrounded by vacant lots, warehouse, commercial buildings, and an apartment building. It does not derive a substantial part of its value from its visual setting."

This statement entirely misapprehends the purpose of urban park space. A neighborhood park provides an important venue for social interaction, physical activity, and opportunities to connect with nature. Connecting with nature includes enjoying a view of greenspace that is as unencumbered by manmade development as is possible in an urban environment. A park, such as Mother Waldron Neighborhood Park, that is located in a very urbanized setting often provides the only opportunity for greenspace in the area, making the protection of the park especially important. The picture included in Figure 5-39 clearly shows that the Project's huge overhead guideway will be the new dominant visual feature of the park. FEIS 5-53. To avoid addressing this obvious constructive use of the park

caused by the Project's proximity, the FEIS makes the conclusory assertion that the park "does not derive a substantial part of its value from its visual setting." This conclusion is unsupported by facts or evidence and thus is arbitrary, capricious and an abuse of discretion. FEIS 5-53.

In addition, the FEIS fails to adequately consider that in addition to its recreational and greenspace value, Mother Waldron Neighborhood Park is a historic resource. On June 9, 1988, the site was listed on the Hawaii Register of Historic Places as one site included in the thematic group "City and County of Honolulu Art Deco Parks." FEIS 5-68. The park was designed by Harry Sims Bent and is considered a good example of the Art Deco/Art Moderne styles in hardscape. Despite the impacts on views of the park from outside and the addition of the Project as a new dominant visual element to park visitors, the FEIS irrationally concludes that there is no constructive use of the park. *See* FEIS, Figures 4-37; 4-38.

The FEIS is also largely silent on the impacts to the park's art deco wall features other than to make an unsupported—and incorrect—statement that the park's design elements will not be substantially impaired. FEIS 5-68. The failure to fully consider the impacts of the Project on the Park's historic features from which the park derives a significant part of its value and is one of the reasons that it is protected under Section 4(f) is arbitrary, capricious and an abuse of discretion.

3. Walker Park

In a review with deficiencies similar to those noted above, the FEIS also failed to adequately consider the effects of the Project on Walker Park in reaching its decision that there will be no constructive use. Walker Park is a pocket park located between office buildings. It is eligible for listing on the National Register for its status as an “early example of a created greenspace in the Central Business District” and for its place in the development of the Honolulu’s Central Business District and downtown waterfront. FEIS 5-65.

The FEIS notes that the Project’s elevated guideway will be located about 50 feet from the park’s edge, and that views from the park will be impacted. In addition, the FEIS notes that views of the park from an outside vantage point will not be affected. Then, the FEIS, without further considering the visual impacts on the park caused by the proximity of the Project, summarily concludes that there is no constructive use of the park because its “historic associations” are not impacted. This line of faulty reasoning is used in the FEIS repeatedly. This conclusory assertion is unsupported with facts or reason yet again and again the FEIS notes adverse impacts on protected sites caused by the Project but then states that because the value of the site is found in its “historic associations,” that the identified impacts are irrelevant. This approach is wrong and completely fails to

understand the types of attributes that qualify a site for listing on the National Register.

The National Park Service promulgates regulations that establish the criteria for listing historic resources on the National Register. In listing the criteria the NPS regulations note that eligible sites possess “integrity of location, design, setting, materials, workmanship, feeling, and association.” 36 C.F.R. § 60.4. A National Register-eligible greenspace such as Walker Park is listed both because of its historic associations and because of its integrity as a park. A park is defined in large part by its setting. This Project which creates aesthetic intrusions into the historic park’s context substantially diminishes the resource’s historical value. This substantial diminishment clearly constitutes a constructive use of the site.

4. Irwin Memorial Park

The FEIS also concluded that there is no constructive use of Irwin Memorial Park. Irwin is a large park located downtown that is eligible for listing in the National Register under multiple criteria including its association with the well-known Hawaiian philanthropist and businessman William G. Irwin, its association with beautification efforts along the Honolulu waterfront and as the work of Robert O. Thompson, an important landscape architect. FEIS 5-67. The Project requires the elevated guideway to run within the median of the adjacent roadway approximately 70 feet from the park’s edge and 200 feet from one of the park’s

main seating areas. FEIS 5-53. The FEIS states that it will not obstruct the ocean views from the park or views of the park from Aloha Tower and the harbor.

Notwithstanding these conclusions, the FEIS fails to consider that inland views of the park will be affected. Moreover, as discussed above, the FEIS makes conclusory decisions that constructive use of the park will not occur because the “historic associations” will not be impacted. The FEIS reaches this conclusion without referring to any facts or reasoning, but merely making a bald assertion that the park’s features and activities will not be impaired because it “is already bordered by [a] busy highway.” FEIS 5-68; 5-53. This conclusion is wholly unsupported by the record and is arbitrary, capricious, and an abuse of discretion.

IV. CONCLUSION

For the reasons stated above, the Court should grant the Plaintiffs’ motions for summary judgment and conclude that the Defendants violated Section 4(f) of the Department of Transportation Act. In addition, the Court should require a full assessment of impacts on historic resources and all other Section 4(f) sites so that Defendants can determine prudent and reasonable alternatives and engage in planning to minimize harm.

CERTIFICATE OF COMPLIANCE

This *Amicus Curiae* Memorandum complies with the type-volume limitations set forth in the Court's Order Extending Time and Amending the Rule 16 Scheduling Order (ECF No. 138) because the memorandum is less than 30 pages and is limited to discussing those issues raised by Plaintiffs in their Memorandum in Support of Plaintiffs' Motion for Summary Judgment (ECF No. 109-1). This memorandum also complies with the typeface requirements of LR 10.2(a) because it has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 14-point Times New Roman.

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