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Re: Comments on Draft Supplemental Environmental Impact Statement/Section 4(f)  
Evaluation

Dear Sirs:

We submit the following comments on the Honolulu Rail Transit Project Draft Supplemental Environmental Impact Statement/Section 4(f) Evaluation (the "DSEIS") on behalf of the plaintiffs in *Honolulutraffic.com, et al v. Federal Transportation Administration*, United States District Court for the District of Hawaii Case No. 11-cv-00707-AWT.<sup>1</sup> Please be aware that some or all of the plaintiffs may also submit additional comments under separate cover.

As explained in greater detail below, the DSEIS is so inadequate as to preclude meaningful analysis, and therefore must be revised and recirculated for a second round of public and agency review. See 771.130(d) (SEISs subject to same procedural requirements as EISs); 40 C.F.R. § 1502.9 (recirculation of Draft EISs).

Specifically, the DSEIS (1) fails to address Traditional Cultural Properties ("TCPs"); (2) inaccurately assumes, without justification or supporting documentation, that the Beretania Street Tunnel Alternative will use historic sites, will not be prudent, and will not be the "least harm" option; (3) fails to provide the public with the documentation or analysis on which the document's Section 4(f) analysis of Mother Waldron Park is based; and (4) fails to consider significant new information and circumstance regarding other alternatives to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building.

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<sup>1</sup> It appears that neither the City nor the FTA arranged for notice of the DSEIS to be published in the Federal Register. Therefore, we submit these comments pursuant to the City's assurance (posted at [www.honolulustransit.org](http://www.honolulustransit.org)) that any comments postmarked by July 22, 2013 will be accepted. In submitting these comments on the details of the DSEIS (which assumes a heavy rail project), we in no way concede the more basic claims, raised in plaintiffs' Ninth Circuit appeal (United States Court of Appeals for the Ninth Circuit Case No. 13-15277), regarding the propriety of the City's and FTA's selection of elevated heavy rail in the first instance.

## **1. Failure To Address TCPs**

In the above-cited litigation, Judge A. Wallace Tashima explicitly held that (1) a Section 4(f) evaluation must address TCPs, (2) the Federal Transit Administration (“FTA”) illegally failed to address TCPs in its prior Section 4(f) evaluation for the Project, and (3) the FTA must remedy that failure by identifying and evaluating TCPs under Section 4(f).

Despite that very clear direction, the DSEIS fails to address TCPs. Instead, it states that “a separate evaluation is underway” related to TCPs. By (yet again) failing to include TCPs in its Section 4(f) evaluation, the FTA has violated Judge Tashima’s clear directions as well as Section 4(f).

The FTA’s ongoing refusal to address TCPs in a public EIS/Section 4(f) evaluation is particularly troubling in light of the fact that several studies prepared by the City have identified TCPs near the Project. The DSEIS’s failure to examine whether the Project will use (or otherwise impact) the identified TCPs. precludes meaningful public review of this important issue and requires revision and recirculation of the DSEIS.

## **2. The Beretania Tunnel Alternative**

The DSEIS’s analysis of the Beretania Tunnel Alternative is fundamentally flawed in several respects.

### **A. Use Of Historic Properties**

The DSEIS inaccurately assumes, without proper supporting documentation or analysis, that the Beretania Tunnel Alternative will result in the use of multiple Section 4(f) properties.

#### **1. Oahu Railway & Land Property**

The DSEIS improperly assumes that the Beretania Street Tunnel Alternative will result in an unavoidable Section 4(f) use of the historic resources on the Oahu Railway and Land Company (“OR&L”) property.

The City’s 2005-2006 Alternatives Analysis process (the “AA”) defined the Beretania Street Tunnel Alternative as a tunnel beginning near the intersection of Dillingham Boulevard and Ka’aahi Street, passing beneath the OR&L property and downtown Honolulu (thereby avoiding impacts to the OR&L property, the Chinatown Historic District, the Dillingham Transportation Building, and other historic structures and districts in the downtown area), transitioning to an aerial structure on the far side of downtown, and terminating at the University of Hawaii, Manoa.<sup>2</sup>

The AA made it clear that there were to be seven stations along this route: Beretania Street at the Fort Street Mall, Beretania Street at Alapai Street, South King Street at Pensacola Street, South King Street at Kalakaua Avenue, South King Street at McCully Street, South King Street at Hausten Street, and the University of Hawaii.<sup>3</sup>

The DSEIS claims to be an analysis of the Beretania Street Tunnel Alternative “as defined” in the AA.<sup>4</sup> But there are important — and unexplained — differences between the Beretania Street Tunnel Alternative “as defined” in the AA and the Beretania Street Tunnel Alternative presented in the DSEIS.

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<sup>2</sup> Alternatives Analysis Detailed Definition of Alternatives (Nov. 1, 2006) at 6-21.

<sup>3</sup> *Id.*

<sup>4</sup> DSEIS at 19.

Among other things, the DSEIS adds an eighth station at Ka'aahi Street, proposes to locate the new Ka'aahi Street station directly beneath the historic OR&L property, and, on that basis, concludes that the Beretania Street Alternative unavoidably requires use of the OR&L property within the meaning of Section 4(f).<sup>5</sup>

The DSEIS does not provide any explanation or justification for (or even alert the public to) these changes from the AA. Indeed, there does not appear to be any legitimate reason why the historic OR&L property must be used in this way. Neither the AA nor the DSEIS identifies any need for a station in this location. And if the City and the FTA feel that a station is necessary in this neighborhood, they could easily use a location closer to (or even overlapping with) the area they have reserved for the Project's nearby Iwilei station (either at ground level or above-ground), slightly repositioning the Kapalama station if needed.

## 2. McKinley High School

The DSEIS improperly assumes that the Beretania Street Tunnel Alternative will result in an unavoidable Section 4(f) use of McKinley High School, a portion of which is listed in the National Register of Historic Places.

The DSEIS does not provide any documentation of McKinley High School's listing in the National Register.

The DSEIS does not disclose that the Beretania Street Tunnel Alternative would be located outside the boundary of the historic school grounds (as that boundary appears in the National Register listing for McKinley High School on file with the National Park Service, a copy of which can be found in attachment 1 and at <http://pdfhost.focus.nps.gov/docs/NRHP/Text/80001281.pdf> ).

The DSEIS fails to address the fact that the Beretania Street Tunnel Alternative's Pensacola Street rail station would be screened from the historic portion of the school by a large, multi-story non-historic building (misleadingly labeled "McKinley High School" in DSEIS Figure 19).

## 3. 1915B S. King Street ("King Florist")

The DSEIS improperly assumes that the Beretania Street Tunnel Alternative will result in an unavoidable use of a building at 1915B S. King Street identified by the City and the FTA as "King Florist."

As an initial matter, we note that the actual address of King Florist appears to be 1296 S. Beretania St., not 1915B King Street.<sup>6</sup>

The DSEIS does not provide any documents or information indicating that 1915B S. King Street meets the statutory or regulatory eligibility criteria for listing in the National Register of Historic Places. In fact, it does not even provide a photograph of the building. Photographs of the building, which appears to have been significantly modified to accommodate a drive-through and a surface parking lot, can be found in attachments 3 and 4.

The DSEIS assumes that the McCully rail station will require demolition of 1915 S. King St.<sup>7</sup> But that station is to be located at the corner of S. King St. and McCully St., while 1915 S. King St. is located mid-

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<sup>5</sup> DSEIS at 19, 21, 38-40.

<sup>6</sup> See attachment 2.

<sup>7</sup> DSEIS at 43-45.

block between McCully St. and Pumehana St.<sup>8</sup> Moreover, the area between 1915 S. King St. and the proposed location of the McCully station consists primarily of surface-level parking lots; there does not appear to be any reason why these lots cannot be used for rail station infrastructure (without resorting to demolition).<sup>9</sup>

The DSEIS also suggests that 1915B S. King St. must be demolished in order to accommodate a “traction power substation” (a small steel enclosure for electrical equipment referred to as a “TPSS”).<sup>10</sup> But the City admits that the TPSS can simply be moved to another property.<sup>11</sup> And, as noted above, nearby surface parking lots appear to provide ample room for all necessary infrastructure.<sup>12</sup>

Finally, the DSEIS makes a vague, unsubstantiated suggestion that “the space requirements around the station entrance and station platforms would still require right of way acquisition at King Florist.”<sup>13</sup> This unsupported, conclusory assertion rings hollow. There are multiple lots available for use as station entrances/exits.<sup>14</sup> There is no reason to believe that the guideway must butt up against the buildings on the south side of King Street (in other portions of the Project, the guideway is positioned over the middle of the street). The idea of “acquiring right-of-way” is very different from the notion that all of 1915B S. King St. must be demolished.

## **B. Prudence and Feasibility**

The DSEIS concludes that the Beretania Street Tunnel Alternative is imprudent. That conclusion is flawed in numerous respects.

As an initial matter, we note that the DSEIS does not articulate a clear basis for a finding of imprudence. It appears to treat the cost of the Beretania Street Tunnel Alternative as the most important factor in evaluating the Alternative’s prudence.<sup>15</sup> But the document does *not* conclude that the cost of the Beretania Street Tunnel is enough, standing alone, to justify a finding of imprudence.<sup>16</sup> Instead, the DSEIS cites a mixture of (alleged) construction risks, visual impacts, traffic disruption, “delayed benefits,” and cost increases as combining to result in imprudence.<sup>17</sup>

“Construction risk” does not provide a reasonable basis to find the Beretania Street Tunnel Alternative imprudent. Engineering questions of this sort are properly considered in terms of “feasibility” rather than “prudence.”<sup>18</sup> And the DSEIS (properly) concedes that building the Beretania Street Tunnel Alternative is “feasible as a matter of technical engineering.”<sup>19</sup>

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<sup>8</sup> See attachment 4.

<sup>9</sup> See attachment 4.

<sup>10</sup> DSEIS at 43-44.

<sup>11</sup> DSEIS at 43.

<sup>12</sup> Attachment 4.

<sup>13</sup> DSEIS at 43.

<sup>14</sup> DSEIS at 44.

<sup>15</sup> DSEIS at 61-64.

<sup>16</sup> DSEIS at 64.

<sup>17</sup> DSEIS at 64.

<sup>18</sup> See 23 C.F.R. § 774.17.

<sup>19</sup> DSEIS at 46.

The DSEIS cites significant visual impacts as another reason to find the Beretania Street Tunnel Alternative imprudent.<sup>20</sup> That assertion is contrary to all common sense. The Project is elevated for its entire length. The Beretania Street Tunnel Alternative would be underground in the most visually sensitive part of the rail line (downtown Honolulu).

The DSEIS also references potential visual impacts on “protected view corridors” and buildings along S. King St. But the Project would cross more “protected view corridors” (and with greater effect) than would the Beretania Street Tunnel Alternative.<sup>21</sup> And, contrary to the DSEIS’s assertions, the AA process did not result in any findings of adverse effect for properties on S. King St. Moreover, even if S. King St. were truly unworkable, the City and the FTA could use Beretania Street instead.<sup>22</sup>

The DSEIS also suggests that the Beretania Street Tunnel Alternative is imprudent because it will result in traffic disruption. Again, the assertion is contrary to all common sense. The Project would require the City to build an elevated guideway, on surface streets, through the densest and highest-traffic area of downtown Honolulu. Construction of the Beretania Street Tunnel Alternative would occur underground, and therefore would not disrupt downtown surface-level traffic to the same extent. It is telling that the DSEIS includes no detailed traffic study or analysis.

The DSEIS briefly mentions “unique problems or unusual factors.” But it fails to address unique, unusual, and ***important*** factors raise by the United States District Court for the District of Hawaii.<sup>23</sup> The City and the FTA have steadfastly insisted that the Court’s comments on the Project are a non-issue (and have even gone so far as to represent to Judge Tashima that all of the Court’s concerns have been fully resolved). A July 8, 2013 letter from the United States District Court for the District of Hawaii says otherwise.<sup>24</sup> The letter, signed by Chief Judge Susan Oki Mollway on behalf of the entire Court, makes it clear that (1) the Project would cause severe safety problems at the Courthouse, (2) the Court has consistently made both the City and the FTA aware of these problems (even as the City and the FTA assured Judge Tashima that the Court’s concerns had been addressed), and (3) therefore (and for a number of reasons) the Project is ***less*** prudent than the Beretania Street Tunnel Alternative.

The DSEIS also mentions “delayed benefits” as justifying a finding of imprudence.<sup>25</sup> Presumably, the City and the FTA mean to suggest that the Beretania Street Tunnel Alternative cannot be completed as quickly as the Project. But these “delays” are attributable to (1) their own failure properly to evaluate the Beretania Street Tunnel Alternative in the original EIS and (2) their decision to proceed with construction of the Project before completing this SEIS. Had the City and the FTA simply complied with the law in the first place, the Beretania Street Tunnel Alternative could have been implemented on the same time schedule as the Project. Moreover, alleged damages associated with delay are already built into the DSEIS’s cost estimates; references to “delayed benefits” represent an impermissible attempt to double-count.

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<sup>20</sup> DSEIS at 50-57, 64.

<sup>21</sup> See, e.g., Final Environmental Impact Statement/Section 4(f) Evaluation at 4-60 to 4-110.

<sup>22</sup> As noted above, much of the DESIS’s analysis of visual impacts seems to assume that the guideway cannot be centered above S. King St. The document does not provide any justification for that assumption.

<sup>23</sup> DSEIS at 63.

<sup>24</sup> See attachment 5.

<sup>25</sup> DSEIS at 63.

It is also worth noting that the DSEIS does not present any **evidence** regarding delayed benefits. Among other things, the document does not contain any detailed timetable for tunnel construction or any evaluation of means to mitigation (alleged) delays, severely limiting the public's opportunity to provide meaningful input on these important issues.

The DSEIS asserts that cost increases associated with the Beretania Street Tunnel Alternative would be an "overwhelming factor" in rendering the alternative imprudent.<sup>26</sup> But there are several major problems with the DSEIS's evaluation of costs:

- The DSEIS's cost estimates seem to be recycled from the 2006 AA and the 2010 Final EIS. Judge Tashima has already ruled that these estimates cover the King Street tunnel, not the Beretania Street tunnel.
- The DSEIS's cost estimates are inconsistent with the City's own 2007 tunnel construction cost estimates.
- The DSEIS appears to compare the cost of Segment 4 of the Project (from Iwilei to the Ala Moana Center, stopping short of the rail line's intended terminus at the University of Hawaii-Manoa) with the entire Beretania Street Tunnel Alternative route (stretching from Iwilei to the intended terminus at the University of Hawaii-Manoa). The proper comparison is between the total cost of connecting Iwilei to the University of Hawaii-Manoa using the Project (via Ala Moana Center) with the total cost of connecting Iwilei to the University of Hawaii-Manoa using the Beretania Street Tunnel Alternative (via a downtown tunnel).<sup>27</sup>
- It is not clear whether the cost estimates in the DSEIS include the (below-ground) station at Ka'aahi Street. For the reasons set forth above, there is no basis to include that station.
- The DSEIS states that we have suggested shortening the rail line so that it does not reach Leeward Community College. That is simply not true. Our position is that the City and the FTA should consider deferring some of the construction at the Ewa end of the rail line (which currently consists of a significant amount of empty agricultural land), perhaps in connection with other cost saving measures, as a method of funding the Beretania Street tunnel. Further extensions at the Ewa end of the line are already contemplated and could be structured so as to include the deferred portion of the current Project.
- The DSEIS assumes that the budget for the rail project will be strictly limited to \$5.544 billion. But that number comes from the City's cost estimate and grant agreement for **the Project**.<sup>28</sup> There is no evidence that the Beretania Street Tunnel Alternative would be ineligible for additional federal, state, or local funding.

Finally, the DSEIS's evaluation of prudence is contrary to Section 4(f), the Section 4(f) regulations, and the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, (1971). Those authorities provide that an alternative is not imprudent unless it presents "severe problems" that

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<sup>26</sup> DSEIS at 64.

<sup>27</sup> This is particularly true in light of the fact that other parts of the DSEIS ask readers to assume that the Ala Moana-to-University of Hawaii extension of the Project will someday be built. See, e.g., DSEIS at 48.

<sup>28</sup> DSEIS at 62.

“substantially outweigh” the value of preserving the Section 4(f) resources at issue.<sup>29</sup> This analysis must begin “with a thumb on the scale” in favor of preservation.<sup>30</sup> Here, the Section 4(f) resources at issue — the Chinatown Historic District and the Dillingham Transportation Building — are nowhere mentioned or evaluated in the DSEIS’s discussion of imprudence.<sup>31</sup> The document utterly and completely fails to apply the “substantially outweighs” test. The City and the FTA have used neither the “thumb” nor the “scale.”

### **C. Least Harm**

For all of the reasons explained above, the Beretania Street Tunnel Alternative should be considered a feasible and prudent avoidance alternative. Therefore, the concept of “least harm” is not directly relevant. We make the following comments on the DSEIS’s “least harm” analysis without waiving any argument regarding the prudence of the Beretania Street Tunnel Alternative.

The DSEIS maintains that the Project is the “least harm” alternative. There are numerous problems with that conclusion.

It is undisputed that the Project would use more Section 4(f) resources than the Beretania Street Tunnel Alternative. Once the DSEIS’s egregiously flawed analysis of the OR&L property, McKinley High School, and “King Florist” is corrected, the distinction becomes even clearer: The Beretania Street Tunnel Alternative would result in use of at least 4 fewer Section 4(f) resources than would the Project.<sup>32</sup>

Perhaps seeking to obscure this critical fact, the DSEIS focuses on a meaningless criterion: square footage of direct use. In doing so, it fails to address the full extent of the significant adverse impacts the Project would have on Chinatown and the Dillingham Transportation Building. Contrary to the DSEIS’s suggestion, the Project would have severe impacts on both Chinatown and the Dillingham Building, even after mitigation, as evidenced in the 2010 Environmental Impact Statement and the City’s own Historic Effects Report (among other sources).<sup>33</sup>

The DSEIS also fails squarely to confront the fact that the resources that would be avoided by the Beretania Street Tunnel Alternative — and, in particular, the Chinatown Historic District and the Dillingham Transportation Building — are universally considered to be among the most important historic resources in Honolulu. Buildings like “King Florist,” a small, run-down, heavily-modified commercial building that has never been identified as historically significant (or even studied in detail!) simply do not have the same importance as the Chinatown Historic District and the Dillingham Transportation Building.

The DSEIS also fails to address other impacts on natural and historic resources that would be avoided by the Beretania Street Tunnel Alternative, including (but not limited to) adverse impacts on the historic Nuuanu Stream Bridge and other effects on jurisdictional waterways associated with the Project’s crossing of Nuuanu Stream.

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<sup>29</sup> In particular, see 23 C.F.R. § 774.17 and 73 Fed. Reg. 13368, 13391-92 (March 12, 2008).

<sup>30</sup> See 73 Fed. Reg. 13368, 13392 (March 12, 2008).

<sup>31</sup> DSEIS at 47-64.

<sup>32</sup> This does not include Mother Waldron Park, a disputed issue addressed below.

<sup>33</sup> See, e.g., Final Environmental Impact Statement/Section 4(f) Evaluation at 4-71, 4-99 to 4-107, 4-194, etc.; Historic Effects Report (April 14, 2009) at 293-303, 335-37, etc. Attachment 6 contains a visual simulation, prepared by the American Institute of Architects, showing the impacts of the Project on and near the Dillingham Transportation Building.

The DSEIS does not actually present the “views of the officials with jurisdiction” over Section 4(f) resources.<sup>34</sup> Instead, it presents the City’s assumptions about what those views might be.

The DSEIS’s discussion of “least harm” (like its discussion of prudence and feasibility) fails to address the important issues raised by the United States District Court for the District of Hawaii.

The DSEIS’s “least harm” assertions regarding construction, delays, costs, and alleged impacts are very similar to assertions made in the document’s discussion feasibility and prudence. We incorporate by reference our comments on feasibility and prudence.

Finally, we note that the DSEIS’s discussion and selection of a “least harm” alternative is directly contrary to the requirements of the Section 4(f) regulations and applicable Department of Transportation guidance, both of which mandate selection of the Beretania Street Tunnel Alternative as the option causing the least overall harm.

### **3. The DSEIS Fails The Information About Mother Waldron Park**

The DSEIS’s discussion of and conclusions about Mother Waldron Park is almost entirely based on a draft National Register form being prepared by the City. That form has not been provided to the public, making it virtually impossible to submit meaningful comments. This is particularly problematic because the conclusions of the draft National Register form with respect to visual and aesthetic impacts appear likely to be very different from the City’s previous conclusions about the impact of the Project on the visual environment near the Park.

We also note that page 97 of the DSEIS refers to prior public comments on Mother Waldron Park (“in response to public comments...”). To the best of our understanding, this DSEIS represents the first opportunity for public comment in the SEIS process. Please clarify.

### **4. The DSEIS Fails To Address Significant New Information**

An SEIS must address significant new information — indeed, that is its purpose. Here, there is significant new information regarding the availability of reasonable, feasible, and prudent alternatives to the City’s preferred elevated heavy rail Project.

The City previously claimed that none of the alternatives considered in the AA was reasonable, feasible, or prudent because only the Project would satisfy the Purpose and Need for action. The DSEIS admits, for the first time, that alternatives considered (and rejected) during the AA process would, in fact, meet the Purpose and Need for action just as well as the Project.<sup>35</sup>

The DSEIS should be significantly revised to address this significant new information by evaluating additional alternatives to the Project. Alternatives considered should include Bus Rapid Transit (including the Bus Rapid Transit project found to be reasonable, feasible, prudent, and “preferred” in EISs prepared by the City and the FTA in 2002-2003), light rail, and any alternative transit routes or configurations capable of avoiding impacts and/or use of downtown Honolulu’s historic resources and parks. The document must then be recirculated for public and agency comment.

Sincerely,

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<sup>34</sup> DSEIS at 68-69.

<sup>35</sup> DSEIS at 19, 47-49, 69.



Dentons US LLP

By:

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Nicholas C. Yost

cc: Betsy Merritt

Attachments