



HONOLULUTRAFFIC.COM

A COMMUNITY WIDE EFFORT TO KEEP ELEVATED RAIL OUT OF OUR CITY

June 4, 2015.

“It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow.”

James Madison. *Federalist* no. 62, February 27, 1788

HERE’S WHY THE COURT’S DECISION FAVORING RAIL WAS WRONG:

By Cliff Slater

In February 2014, a Ninth Circuit Court of Appeals three-judge panel upheld (3-0) Judge Tashima’s ruling against us in our case of *Honolulutraffic.com et al v. City of Honolulu and the Federal Transit Administration*.

The Ninth Circuit has been a major disappointment to us. First, when all our Hawaii Federal District Court Judges recused themselves from hearing our original suit, the Ninth Circuit had to appoint a non-Hawaii judge to hear the case. This case needed a multi-billion dollar decision that rested on the interpretation of a little known statute, Section 4(f), that is highly complex. We had sought and found attorneys who had expertise in this area. The Ninth Circuit appointed Judge A. Wallace Teshima, who had never heard a 4(f) case before. In subsequent hearings and rulings this became evident.

Then during the appeal process in our first hearing before the three-judge panel, they merely haggled over the jurisdictional issues with hardly a mention of the merits of the case.

The Court’s final denial of our appeal shows that they had read little of the record and since this was an Administrative Procedures Act case judged solely on the Administrative Record with no witnesses and no jury, it was disastrous for us.

Essentially, the Ninth Circuit found that an elevated heavy rail line running along our historic waterfront and through the center of town was “the environmentally preferable alternative” despite:

- **The Outdoor Circle** testifying that “elevated rail would be the greatest environmental threat to Hawaii in the last 100 years.”
- **Hawaii’s 1000 Friends** statement that rail “will forever mar our visual horizons.”
- All **Hawaii’s federal judges** writing in united opposition to the rail project.¹

- *The National Trust for Historic Preservation’s concerns that, “ ... the chosen alternative will result in substantial harm to numerous historic resources, by imposing a dramatic visual intrusion that interfere s with protected views, by disrupting settings that are crucial to the unique character of these resources, and by encouraging incompatible development. The negative impacts caused by the use of these protected sites could have been avoided if the FTA had considered feasible and prudent alternatives that would have avoided or minimized harm, as Section 4(f) mandates. Instead, the FTA dismissed alternatives, including a Managed Lanes Alternative (“MLA”) and a Bus Rapid Transit (“ BRT ”) system, without applying the stringent evaluation required by Section 4(f).ⁱⁱ*

We had argued that, among many alternatives, a BRT project using an expanded Zipper Lane and shoulder lane program was a more appropriate alternative since BRT totally avoided the use of our historic and environmental resources.

One BRT program was defined in the 2003 Bus Rapid Transit Final Environmental Impact Statement (2003 BRT FEIS). It called for an extensive two-way Zipper lane system part of which is already in place. Buses traveling towards downtown from the Kapolei and Mililani areas would spend the majority of their travel in uncongested zipper and shoulder lanes.

In 2003, Parsons Brinckerhoff (PB), the City, and the Federal Transit Administration (FTA) produced the 2003 BRT FEIS for Mayor Harris’ BRT Project. This 2003 BRT FEIS and the 2010 Final EIS for the elevated rail project (2010 Rail FEIS), show that the additional cost for elevated rail over the No-Build alternative will be ten times the cost of the 2003 BRT FEIS project. They also show that Parsons Brinckerhoff had projected greater ridership for BRT than they would subsequently project for rail. Further, the Country Express Bus C, a BRT line already in place at that time, today takes less time from Kapolei proper to Downtown than what is projected for the rail Project.

The following excerpt from the 2003 BRT FEIS was approved by PB and both the City and the FTA and it and the Record of Decision detail why BRT at that time was the environmentally preferable alternative.

- *“Public input received in hundreds of Vision Team and Oahu Trans 2K meetings and workshops attended by thousands of Oahu residents revealed widespread agreement that while an elevated transit system might serve the goals of improving in-town mobility and strengthening connections between communities, such a system would not foster livable communities. The predominant sentiment among thousands of participants was that a grade-separated transit system would be unacceptably: (1) intrusive on the visual environment; (2) divisive of communities; and (3) too expensive. These shortcomings were judged by public participants to outweigh the recognized benefits of a grade-separated system, i.e., high speed and capacity, increased reliability and reduced negative impact on the surface road system.*

- *“Honolulu's failure to complete the proposed elevated transit system a decade ago, and extensive public input into the current process, confirmed that a grade-separated system could not, because of its high costs, visual obtrusiveness, and community divisiveness, gain the level of local public and/or official acceptance necessary to sustain such an investment. All of the transit alternatives considered in the FEIS are therefore based on at-grade operation.”ⁱⁱⁱ*

Clearly in 2003, PB, the City, the FTA, and the public, all found that BRT was environmentally preferable to the elevated rail alternative. Yet only two years later the same people found that BRT was not even a “reasonable alternative.” Here’s how that came about:

In January 2005 in a letter to a Hawaii Federal Judge Susan Mollway, newly elected Mayor Hannemann made a “political decision” to abandon the BRT program in favor of an elevated heavy rail line.^{iv} This new mayor, with stated gubernatorial ambitions, abandoning BRT in favor of the rail line, at eight times the cost of the BRT, might seem unwise. However, given the subsequent amount of campaign contributions he generated from rail project suppliers, the switch to rail turned out to be a very wise political decision, if not a wise one for the taxpayers.

Later in 2005, the environmental process for rail began with an FTA Notice of Intent to perform an EIS in which BRT was not even mentioned among the alternatives to be considered.

Given all of the above, it is difficult to understand why the FTA would not consider BRT as a “reasonable alternative” worthy of detailed study. This is especially so since Congress considers that the Alternatives Analysis is “the heart of the process,” and for which the statute requires that the City and FTA “rigorously explore and objectively evaluate all reasonable alternatives.”^v

BRT shows up next in the 2006 *Alternatives Analysis Detailed Definition of Alternatives*^{vi} where it is listed as an alternative but it does not survive into the November 2006 *Alternatives Analysis* itself despite the FTA’s own lauding of the then existing three BRT lines. They wrote:

- *“With minimal capital investment, the current three routes of the Honolulu BRT system (Routes A, B, and C) have primarily served to reduce travel times (as much as one-third) and improve services for existing and new riders, most of whom switched from local routes to BRT routes.” Federal Transit Administration’s Honolulu BRT Project Evaluation Report. June 2006.^{vii}*

Nor is BRT mentioned in the *Draft Rail EIS of 2008*^{viii} either as a potential alternative or even as a description of its existence:

- *“Options evaluated and rejected included an exclusively at-grade fixed guideway system using light rail or bus rapid transit (BRT) vehicles, as well as a mix of options consisting of both at-grade and grade-separated segments.” And, “The [TSM] alternative included express bus service that operated as bus rapid transit in existing facilities.”^{ix}*

Nowhere in the environmental process is the performance of the existing BRT Route C mentioned other than by rail critics in their testimony submitted to the City and County of Honolulu (City) and the Federal Transit Administration (FTA).

The relevant federal statutes^x regarding the Honolulu Rail Project require that when federal funds are used for a new transportation facility, the City and FTA must “avoid the use [in its broadest sense including disrupting views] of significant ... historic sites as part of a project, unless there is no feasible and prudent alternative to the use of such land.”^{xi}

And, “to find that an alternative that avoids a [historic] resource is not “prudent” one must find that there are unique problems or unusual factors involved with the use of such alternatives.”^{xii}

Legally, “feasible” simply means that an alternative can be built, and “prudent” means (in our case) that it must meet the requirements of the Purpose and Need statement in the 2010 Rail FEIS. This states, “The purpose of the Honolulu High-Capacity Transit Corridor Project is to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and UH Mānoa.” “Rapid transit” is a term of art in public transportation for heavy grade-separated rail.^{xiii}

Further the statute says, “An EIS must state the underlying purpose and need for the proposed action.”^{xiv} and “... they may not define the project’s objectives in terms so “unreasonably narrow,” that only one alternative would accomplish the goals of the project.”^{xv}

The 2010 Rail FEIS’s “purpose” of providing a rapid transit line does not meet the requirement of stating the underlying purpose and need. And, for some inexplicable reason, the Court found that the EIS alternatives approved by FTA, which were three almost identical elevated rapid transit lines with only minor variants in their routing (80 percent of their routes were identical), was not an “unreasonably narrow” definition.

Second, the critically important purpose and need issues are the ones that are measured for effectiveness in the EISs and these are little different from one another as can be seen below.

Project Purpose and Need measurement of effectiveness in the 2010 Rail FEIS p. 7-2

- Improve corridor mobility
- Improve corridor travel reliability
- Improve access to planned development to support City policy to develop a second urban center
- Improve transportation equity

Project Purpose and Need measurement of effectiveness in the 2003 BRT FEIS p. 6-34

- Increase the people-carrying capacity of the transportation system in the primary transportation corridor by providing attractive alternatives to the private automobile;
- Support desired development patterns;

Improve the transportation linkage between Kapolei and Honolulu's Urban Core; and Improve the transportation linkages between communities in the Primary Urban Center (PUC).

The BRT is more effective in linking UH and Kapolei proper since BRT goes to the Transit Center in Kapolei proper while rail would stop several miles short in East Kapolei, and only the BRT could get to UH as the rail again stops several miles short at Ala Moana Center.

The one issue listed in the 2010 Rail EIS but not in the 2003 BRT FEIS is to, "improve transportation equity." However, the BRT wins handily here since the rail is funded by the highly regressive General Excise Tax (even the homeless pay this tax on food) whereas BRT is funded by the progressive property tax.

Other elements of the ruling that are in error are:

- A. The Court ruled that, "The purpose was defined in accordance with the statutorily mandated formulation of the transportation plan that preceded the FEIS. That plan was the 2004 Oahu Metropolitan Planning Organization, Regional Transportation Plan ("2004 ORTP"). The stated objectives comply with the intent of the relevant federal statutes." Ruling p. 17.

However, there was no ORTP plan that advocated rail issuing in 2004. The one advocating rail issued in April 2006, with major amendment in May 2007 (ORTPAmend_1.pdf). The Notice of Intent (NOI) mentioned in the Ruling (p.7.) issued in December 2005, a year earlier than the rail ORTP. The ORTP in place at the time the NOI issued was the 2001 ORTP, which does not have a plan for rail; only for BRT.^{xvi}

The ORTP issued in 2006 defined a rail system from Kapolei to UH and Waikiki for \$2.6 billion. The 2007 amendment was for the much shorter East Kapolei to Ala Moana Center, ignoring UH and Waikiki, for \$3.6 billion. The only reference to an ORTP issuing in 2004 is in a Defendant's brief (Memo_support_Defs_MSJ_060112.pdf). Was the Court only paying heed to the Defendants motions?

(Maybe that was the real reason for the second NOI, issued in early 2007: If the 2005 NOI could be ignored, then the documentation would be in the proper sequence).

- B. The Court wrote that, "A survey in 2004 showed broad public support for the concept of a rail system," In fact, the same Oahu MPO Survey Summary said in its entirety: "Based on the survey, most residents appear to accept the necessity of tax increases to fund specific capital projects, such as new road-building, road widening and extensions. Between a Rapid Rail system and the BRT, residents do not indicate a strong preference for one over the other." AR00050671 (emphasis added).
- C. The Court ruled that, "Plaintiffs' real quarrel with the process is that it failed to consider Plaintiffs' proposed three-lane MLA alternative." (p. 20) What is the basis of that

statement? Our stated consensus view was, “A community-wide effort to keep elevated rail out of our city.” Why did they think this? Half the plaintiffs were not comfortable with the MLA, an elevated highway.

Before



After



Summary

It is bizarre that the Ninth Circuit could tease meaning out of the federal environmental and historic preservation statutes to find that elevated rail running along our historic waterfront would be the “environmentally preferable alternative.”

People ask us constantly why we have not sued about the lies the City has told and which have been silently condoned by the FTA, or why don’t we sue over the unconscionable waste of money for rail, which has no measurable benefits, instead many disbenefits.

The fact is that one cannot sue the government for lying, or making stupid decisions. One can only sue that they did not follow the statutorily required process.

Endnotes:

- i http://www.honolulutraffic.com/Mollway_BS_Tunnel.pdf
- ii http://www.honolulutraffic.com/NTHP_Amicus_Brief_052313.pdf pp. 7-8.
- iii http://www.honolulutraffic.com/Page_2-57_2003_FEIS_BRT_Vol_1.pdf
- iv “The City and FTA approved a BRT system in 2003. In 2005, however, the City abandoned BRT, citing “a political decision” made by the new mayor of Honolulu. See 11 ER 2891 (“political decision” and “the new administration has no intention to pursue the former administration’s BRT project”). Although it abandoned BRT, the City continued to assert that the analysis in the 2002 EIS was valid.”
http://www.honolulutraffic.com/Appeal_051513.pdf pp. 12 & 13.
- v § 1502.14 Alternatives including the proposed action.
This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:
- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
 - (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
 - (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
 - (d) Include the alternative of no action.
 - (e) Identify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
 - (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.
- vi http://www.honolulutraffic.com/Draft_Det_Def_of_Alternatives_Memo.pdf
- vii http://www.nbrti.org/media/evaluations/Honolulu_BRT_Final_Report.pdf
- vii The following was the closest the Draft EIS came to discussing BRT
- **Transportation System Management Alternative**
In the Alternatives Analysis phase, the TSM Alternative was developed to evaluate how well a combination of relatively low-cost transit improvements could meet the study area’s transportation needs. FTA requires that the TSM Alternative reflect the best that can be done for mobility without constructing a new transit guideway. Bus service was

optimized, per FTA guidelines, by increasing bus service but without building a new fixed guideway for transit, such as a system of dedicated bus lanes. The analysis demonstrated that the Purpose and Need for the Project could not be met through a lower-cost, bus-based alternative alone.

- *After consideration of various service options and operating plans, routes, similar to today. Bus frequencies would have been increased during peak periods to provide improved service for work related trips, particularly from developing areas such as Royal Kunia, Koa Ridge, and Waiawa. The bus fleet was assumed to increase from 525 to 765 buses, and park-and-ride lots were assumed at West Kapolei, UH West O’ahu, Waipi’o, and Aloha Stadium. In addition, the present a.m. peak-hour only zipper lane would have been modified to operate in both the a.m. and p.m. peak periods, and relatively low-cost improvements would have been made on selected roadways to give priority to buses.* pp. 2-3 & 4. www.honolulutraffic.com/Total_DEIS_2008_D.pdf

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“Transportation System Management Alternative

In the Alternatives Analysis phase, the TSM Alternative was developed to evaluate how well a combination of relatively low-cost transit improvements could meet the study area’s transportation needs. FTA requires that the TSM Alternative reflect the best that can be done for mobility without constructing a new transit fixed guideway.

- *Bus service was optimized, per FTA guidelines, by increasing bus service but without building a new fixed guideway for transit, such as a system of dedicated bus lanes. The analysis demonstrated that the Purpose and Need for the Project could not be met through a lower-cost, bus-based alternative alone.*
- *After consideration of various service options and operating plans, the TSM Alternative was designed to serve the study corridor based on a hub-and-spoke network of bus routes, similar to today.*
- *The alternative included express bus service that operated as bus rapid transit in existing facilities.*
- *Bus frequencies would have been increased during peak periods to provide improved service for work-related trips, particularly from developing areas such as Royal Kunia, Koa Ridge, and Waiawa. The bus fleet was assumed to increase from 525 to 765 buses, and park-and-ride lots were assumed at West Kapolei, UH West O’ahu, Waipi’o, and Aloha Stadium. In addition, the present a.m. peak-hour-only zipper lane would have been modified to operate in both the a.m. and p.m. peak periods, and relatively low-cost improvements would have been made on selected roadways to give priority to buses.”*

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The National Environmental Policy Act, Section 4(f) of the 1966 Transportation Act, and the National Historic Preservation Act,

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“The statute explicitly prohibits the Secretary of Transportation from approving any project that requires the “use” [in the broadest definition] of historic sites or parkland, unless (1) there is no “prudent and feasible” alternative to the use of the sites.” Amicus pp. 4-5

http://www.honolulutraffic.com/NTHP_Amicus_Brief_052313.pdf

“Alternatives Analysis

The intent of the Section 4(f) statute and the policy of the USDOT is to avoid the use of significant public parks, recreation areas, wild life and waterfowl refuges and historic sites as part of a project, unless there is no feasible and prudent alternative to the use of such land.” 4F POLICY P.4.

In order to demonstrate that there is no feasible and prudent alternative to the use of 4(f) land, the evaluation must address both location alternatives and design shifts that totally avoid the 4(f) land. As noted before, supporting information must demonstrate that there are unique problems or unusual factors involved with the alternatives that avoid the use of 4(f) land, such as findings that these alternatives result in costs, environmental impacts or community disruption of extraordinary magnitudes.” <http://www.environment.fhwa.dot.gov/projdev/4fpolicy.pdf> p. 4.

xii “The leading United States Supreme Court case, commonly known as Overton Park, (Citizens to Preserve Overton Park v. Volpe , 401 U.S. 402 (1971)), held that to find that an alternative that avoids a 4(f) resource is not “prudent” one must find that there are unique problems or unusual factors involved with the use of such alternatives.” <http://www.environment.fhwa.dot.gov/projdev/4fpolicy.pdf> p. 2.

xiii This recently been changed to Rail Rapid Transit.

xiv **§ 1502.13 Purpose and need.**

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

xv Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1070 (9th Cir.2010)

xvi http://www.oahumpo.org/wp-content/uploads/2013/03/ortp_2025_report_final.pdf