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FAITH ACTION FOR COMMUNITY EQUITY,
MELVIN UESATO, AND
THE PACIFIC RESOURCE PARTNERSHIP

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; DR. MICHAEL UECHI; and THE OUTDOOR CIRCLE,

Plaintiffs,

vs.

FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS,

Civil No: 11-00307 AWT

RESPONSE OF INTERVENOR DEFENDANTS FAITH ACTION FOR COMMUNITY EQUITY, MELVIN UESATO, AND THE PACIFIC RESOURCE PARTNERSHIP TO PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE [ECF NO. 257]; CERTIFICATE OF SERVICE

(Caption continues on next page)

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; ANTHONY FOXX, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services,

Defendants, and

FAITH ACTION FOR COMMUNITY EQUITY; THE PACIFIC RESOURCE PARTNERSHIP; and MELVIN UESATO,

Intervenor Defendants.

(Presiding: The Honorable A. Wallace Tashima)

Date Action Filed: May 12, 2011
Hearing Date: February 6, 2014
Hearing Time: 10:00 a.m.

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RESPONSE OF INTERVENOR DEFENDANTS FAITH ACTION FOR COMMUNITY EQUITY, MELVIN UESATO, AND THE PACIFIC RESOURCE PARTNERSHIP TO PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE

I. INTRODUCTION

Intervenor Defendants Faith Action for Community, the Pacific Resource Partnership and Melvin Uesato ("**Intervenor-Defendants**") submit this response to Plaintiffs' Objection to the Defendants' Notice of Compliance (ECF No. 257). To avoid repetition, Intervenor Defendants' join in the Federal Defendants' and City Defendants' Response to Plaintiffs' Objection.

Intervenor Defendants represent Hawai'i's low-income and Native Hawaiian communities – many of whom live in West O'ahu, cannot afford a private automobile and thus, are entirely dependent on Honolulu's antiquated and inequitable public transportation system. It is the members of these communities who suffer the most from Honolulu's reliance on the private auto as the primary mode of transportation, and the resulting extreme traffic congestion between West West O'ahu and Downtown Honolulu.

For several decades, Hawai'i's citizens and elected officials have debated how to develop a feasible public transportation system that (1) will provide a modern, efficient and equitable alternative to highways and the private automobile and (2) implements Honolulu's "smart growth" land use policies. The Honolulu Rail Transit Project ("**Project**") is the product of that robust and open debate at all levels of government. The Honolulu electorate endorsed the Project on several

occasions – most recently in the 2012 mayoral election – again after a full and open public debate.

Plaintiffs personally disagree with the policy choice and political decisions made by Hawai‘i’s citizens and its elected officials. Throughout the administrative process, and in this litigation, Plaintiffs advocated for a highway-oriented alternative that would continue reliance on the private automobile, promote urban sprawl, and discriminate against transit-dependent communities. Plaintiffs lost the public debate in every applicable administrative and legislative forum in the State of Hawai‘i and in the federal government. The Project as approved by the City and FTA is supported by the City Council, the Governor of Hawai‘i and every member of the Hawai‘i Congressional delegation.

This Court held that the Federal Transit Administration (“**FTA**”) complied with the National Environmental Policy Act (“**NEPA**”) in its evaluation of the Project and alternatives to the Project. The Hawai‘i Supreme Court similarly concluded that the City’s analysis of the Project complied with the Hawai‘i Environmental Protection Act – the Hawai‘i counterpart to NEPA. *See* Haw. Rev. Stat. §§ 343-1 to 343-8; *Kaleikini v. Yoshioka,* 128 Hawai‘i 53, 283 P.3d 60 (2012).

After having promoted a highway-oriented alternative before every administrative, legislative and judicial forum for more than a decade, Plaintiffs now, cynically, suggest that another rail transit alternative – the Beretania Street

Tunnel Alternative ("**Tunnel Alternative**") should be built. Plaintiffs ***never mentioned*** the Tunnel Alternative during the five year administrative process leading to the 2011 approval of the Final Environmental Impact Statement by the City and FTA. Plaintiffs do so here with full knowledge that Defendants could never build the Tunnel Alternative because the additional billion dollars that is required to construct it is simply not available given the reality of significant constraints on state and federal transportation budgets. It is also very unlikely that the Tunnel Alternative could ever obtain many necessary environmental and regulatory approvals because it would have greater impacts on historic properties in Downtown Honolulu.

Plaintiffs' transparent strategy is to seek to delay construction of the Project and increase the Project's cost. It is, of course, a common tactic by project opponents to seek to kill a proposed transportation facility by delaying the project through litigation in the expectation that litigation delays will increase project costs to the point where the project cannot be built. The Court, however, need not countenance such litigation tactics in this case.

The Final Supplemental Environmental Impact Statement ("**FSEIS**") documents that the Tunnel Alternative:

(1) Does not avoid Section 4(f) resources and therefore is not an avoidance alternative under 49 U.S.C. § 303 ("**Section 4(f)**").

(2) Would result in the direct use of four historic properties, including "one of the most elegant examples of Spanish Colonial revival architecture in Hawai'i." SAR00153909 [FSEIS at 43].

(3) Would require demolition, removal or alteration of three historic properties. SAR00153922, 153906 [FSEIS at 40]; SAR00153922, 153911 [FSEIS at 56, 45].

(4) Would run above ground and adjacent to 41 other historic properties. SAR00153925 [FSEIS at 59].

(5) Would have adverse impacts on views to and from Thomas Square – a viewshed area designated as significant by local ordinance. SAR00153922 [FSEIS at 56].

(6) Would increase the construction costs by nearly one billion dollars – an increase of an "extraordinary magnitude" under any reasonable, common sense definition of the term. SAR00153917 [FSEIS at 65].

(7) Would have multiple adverse impacts that cumulatively render the Tunnel Alternative not prudent. SAR00153933-153934 [FSEIS at 67-68].

(8) Would cost substantially more than the Project. SAR00153940-153941 [FSEIS at 74-75].

It is undisputed that the Tunnel Alternative does not avoid Section 4(f) resources and therefore it is not a Section 4(f) avoidance alternative. Since

Plaintiffs cannot contest this fact, they attempt to second-guess technical, engineering determinations by FTA regarding the design of the Tunnel Alternative and the Tunnel Alternative stations. In doing so, Plaintiff mischaracterize or misstate the analysis in the FSEIS.

Plaintiffs have conceded that the arbitrary and capricious standard of review applies to this Court's review of the Notice of Compliance. They have not and cannot overcome their burden under that standard of review. Under the arbitrary and capricious standard, courts must conduct a "'particularly deferential review of an agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Lands Council v. McNair,* 537 F.3d 981, 987(9th Cir. 2008) (*en banc*) (citation omitted). The factual determinations by FTA regarding the Tunnel Alternative are classic examples of decisions within the "agency's discretion and field of expertise." Accordingly, the Court should dismiss Plaintiffs' Objection to the Notice of Compliance and dissolve the Court's injunction.

II. THE FTA DETERMINATIONS REGADING THE TUNNEL ALTERNATIVE ARE NOT ARBITRARY AND CAPRICIOUS.

After nearly three years of litigation, there is only one issue remaining for the Court to decide: Whether FTA was arbitrary and capricious in its determination that the Tunnel Alternative is not a feasible and prudent alternative under Section 4(f)? There are multiple, ***independent***, reasons why the FTA decision regarding the Tunnel Alternative is not arbitrary and capricious:

(1) It is undisputed that the Tunnel Alternative is not an avoidance alternative because it will result in the direct use of four historic properties. Because it does not avoid Section 4(f) resources, the Tunnel Alternative is not a "feasible and prudent" alternative. 23 C.F.R. § 774.17 (definition of "feasible and prudent alternative").

(2) In addition to the use of the four historic properties, the Tunnel Alternative (significant portions of which are above ground) would traverse a corridor with a very high concentration of historic properties. The FSEIS documents that the Tunnel Alternative would be adjacent to 41 other historic properties subject to Section 4(f). SAR00153922 [FSEIS at 56]. Additionally, the Tunnel Alternative would adversely affect the views to and from Thomas Square – a park and listed historic property that is designated a "significant" viewshed by local ordinance. SAR00153918-153921 [FSEIS at 53, 55].

(3) The capital cost of the Tunnel Alternative is $960 million (in year of expenditure dollars) more than the capital cost of the Project. Because of the nearly one billion dollars in added capital costs, the finance and interest costs would also be significantly greater for the Tunnel Alternative. SAR00153917 [FSEIS at 65]. Increased costs of this magnitude make the Tunnel Alternative "not prudent" under any reasonable, common sense definition of the term. 23 C.F.R. § 774.17 (definition of "feasible and prudent alternative", ¶(3)(iv)). Indeed, this Court previously found that a similar cost increase for the King Street Tunnel

Alternative rendered that alternative "not prudent." 11/1/12 SJ Order at 25 (ECF No. 182). In reaching this conclusion, the Court gave "at least some deference to the agency's financial judgment." *Id.* The same deference should be applied to FTA's judgment about the increased capital cost of the Tunnel Alternative.

(4) The Tunnel Alternative has multiple adverse impacts that cumulatively render the Tunnel Alternative not prudent. *See* 23 C.F.R. § 774.17 (definition of "feasible and prudent alternative, ¶(3)(vi)). These impacts include: impacts on parks and historic properties; settlements risks from tunnel construction; traffic and business disruption; delayed transportation benefits and the extraordinary additional cost of the Tunnel Alternative. FSEIS at 67.

(5) The Tunnel Alternative is not the "least harm" alternative under Section 4(f) regulations. 23 C.F.R. § 774.3(c). The Tunnel Alternative would permanently incorporate land from one National Register-listed property and require the alteration, demolition or relocation of three other historic properties. SAR00153922 [FSEIS at 40] (OR&L property buildings); SAR00153907-153909 [FSEIS at 541-43] (filling station at OR&L), SAR00153897 [FSEIS at 31]; *see also* SAR, 2007531; AR00000704 [TMK List from Historic and Archeological Technical Report at 2, p. B-7] (King Florist building).

The Tunnel Alternative also has other adverse impacts that Section 4(f) regulations indicate are appropriate to consider as part of the "least overall harm"

analysis. 23 C.F.R. § 774.3; SAR00153934-153941 [FSEIS at 68-75] (Summary of analysis of factors in "least harm" analysis).

Plaintiffs are simply wrong in their assertion that the use of historic properties at OR&L could be avoided by having rail transit passengers use the Iwilei Station instead of the Ka'aahi Street Station on the Tunnel Alternative. Contrary to Plaintiffs' claim, the FSEIS does not propose the construction of two rail stations for the Tunnel Alternative. The Iwilei Station is a station on the Project alignment – not on the Tunnel Alternative alignment. Plaintiffs' uninformed opinion that the location of the Tunnel Alternative station could be changed does not withstand serious scrutiny. As explained in the City Defendants' Response, the station location proposed by Plaintiffs at the location of the Iwilei Station violates several engineering and safety requirements. *See* City Defendants' Response at 10-11.

III. THE FSEIS EMPLOYED A CONSISTENT METHODOLOGY TO EVALUATE THE USE OF SECTION 4(F) RESOURCES BY THE PROJECT AND THE TUNNEL ALTERNATIVE.

Plaintiffs challenge the methodology used in the FSEIS to evaluate the impacts of the Tunnel Alternative on McKinley High School – a Section 4(f) property that is "the oldest high school in the State" and "one of the most elegant examples of Spanish Colonial revival architecture in Hawai'i." SAR00153909 [FSEIS at 43.] They claim that the FSEIS overstates the impact of the Tunnel Alternative on the High School. Plaintiffs' argument fails for several reasons.

First, the FSEIS used a consistent methodology to evaluate impacts of the Project and the Tunnel Alternative on Section 4(f) resources. As stated in the FSEIS, "[t]he same approach to historic property boundaries as used in the evaluation of the Project . . . was applied to the properties along the Beretania Street Tunnel Alternative." SAR00153898 [FSEIS at 32]. Use of a consistent methodology for evaluating impacts of a project and project alternatives is fundamental to sound environmental decision-making. A central function of any alternative analysis is to provide the public and the decision-makers with an objective comparison of the environmental impacts of different alternatives.

Here, Plaintiffs propose a double standard that would use one methodology for evaluating the impacts of the Tunnel Alternative on Section 4(f) resources and a different, and more rigorous, methodology for analyzing the impacts of the Project on Section 4(f) resources. If Plaintiffs' preferred methodology were applied to the Project, the Project would not result in the use of three Section 4(f) properties (Dillingham Transportation Building, Chinatown Historic District, and OR&L Company parcel). *See* City Defendants' Response at 14-16.

Clearly, it was not arbitrary and capricious for the FSEIS to employ a consistent methodology to evaluate the use of Section 4(f) resources by the Project and also by the Tunnel Alternative. Indeed, to do otherwise would have been arbitrary.

Second, selection of an appropriate methodology by the agency to evaluate the impacts of project alternative is within the agency's discretion under Section 4(f) regulations. *See* 23 C.F.R. § 774.11(e)(1). It is precisely the type of agency technical determination to which the courts are required to defer. *Lands Council*, 537 F.3d at 993. The Court's "task is simply to ensure that the procedure followed by the [agency] resulted in a reasoned analysis of the evidence before it[.]" *Friends of Endangered Species v. Jantzen,* 760 F.2d 976, 986 (9th Cir. 1985) (rejecting challenge to agency methodology used to evaluate impacts of development project on endangered species).

Here, the FSEIS used a consistent methodology to evaluate the use of Section 4(f) resources by the Project and the Tunnel Alternative. The methodology is consistent with the objectives of Section 4(f) because it results in a "use" finding when either a project or an alternative uses land on a parcel subject to Section 4(f). Moreover, the State Office of Historic Preservation reviewed and approved this methodology for analyzing impacts to historic properties. AR00000622 [FEIS at 4-181].

IV. THERE ARE "SUBSTANTIAL DIFFERENCES" IN THE CONSTRUCTION COSTS OF THE PROJECT AND THE TUNNEL ALTERNATIVE.

The FSEIS documents that the capital costs of the Tunnel Alternative are $960 million more than capital cost of the Project. This Court has already concluded that a similar increase in cost rendered the King Street Tunnel

Alternative not prudent. 11/1/12 SJ Order at 25. The FSEIS further documents that funds are simply not available to pay for the extraordinary increased cost of the Tunnel Alternative. SAR00153917 [FSEIS at 65] (The additional cost of the Tunnel Alternative "would be greater than all available funding sources and would exceed available funding for contingencies.").

Plaintiffs' argument that a one billion dollar increase in cost is not "extraordinary" in the context of this Project defies common sense. But the Court need not decide whether the increased cost of the Tunnel Alternative is "extraordinary" in order to uphold the FTA's determination. Because the Tunnel Alternative does not avoid the use of Section 4(f) resources, the applicable test is whether there is a "substantial difference" in the cost of the Project and the cost of the Tunnel Alternative. 23 C.F.R. § 774.3(c)(vii). Where, as here, FTA determines that both the project and the alternative will "use" Section 4(f) resources, the agency is required to identify the alternative that "[c]auses the least overall harm . . . by balancing [seven] factors." 23 C.F.R. § 774.3(c)(1). The seventh factor required to be considered by the FTA is "[s]ubstantial differences in costs among the alternatives." *See Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d 202, 212-13 (1st Cir. 2011) (even if no single factor, standing alone, would justify a finding that an alternative is imprudent, that finding may still be supported "by the totality of the factors. In

making judgment calls of this sort, an agency is both entitled and obliged to consider the totality of the circumstances.").

The FSEIS evaluated all seven factors in detail and compared the Project and the Tunnel Alternative under each factor. SAR00153934-153941 [FSEIS at 68-75]. With regard to the seventh factor, regarding "substantial increases in cost," the FSEIS states:

> [T]he . . . Tunnel Alternative would cost about $650 milion (2006) dollars more than the Project, which translates to $960 million [Year of Expenditure]) in capital costs more than the Project (Table 9). [T]he 19-percent increase in the project costs (YOE) for the . . . Tunnel Alternative would result in project costs being greater than all available funding sources and would exceed available funding for contingencies. . . .

SAR00153940-153941 [FSEIS at 74-75]. FTA's conclusion that the $960 million dollar additional cost of the Tunnel Alternative is a "substantial difference" cannot be seriously disputed. It is not arbitrary and capricious.

Plaintiffs attempt to ignore this obvious "substantial difference" by comparing the cost of the Tunnel Alternative against the cost of extending the Tunnel Alternative to the University of Hawai'i campus at Mānoa ("**UH Mānoa**"). This is a fallacious comparison. First, the FEIS found that the extension to UH Mānoa ***could not be constructed because no funding is available***. AR00000763 [FEIS at 113-114]. Second, the applicable regulations require the agency to compare the cost of the Project against the cost of the alternative under consideration – not against the cost of an alternative that was previously rejected because it was not possible to fund the alternative. 23 C.F.R. § 774.3(c)(vii).

Plaintiffs are sophisticated litigants who obviously understand that funding is not available to fund the construction and operation of the extension to UH Mānoa. But Plaintiffs' proposal to extend the Tunnel Alternative to UH Mānoa is entirely consistent with their litigation strategy of seeking to kill the Project by delaying its construction and increasing its cost to the point where it could never be completed.

V. CONCLUSION.

The people of Honolulu have waited several decades for a modern public transit system – a transit system that (1) provides a fast, efficient and equitable alternative to the private automobile, and (2) is consistent with the City's "smart growth" land use policies. The Project approved by the City and FTA is the culmination of over a decade of engineering and environmental analysis of the Project and many alternatives. The public and Hawai'i's elected officials have repeatedly endorsed the Project. Congress, the Hawai'i Legislature and the City Council have approved the funding necessary to build and operate the Project. FTA and the City have entered into a Full Funding Grant Agreement and Congress has appropriated construction funds pursuant to the Grant Agreement. Construction of the Project is well underway.

FTA and the City have fully complied with the Court's SJ Order. Intervenor Defendants respectfully request that the Court dismiss Plaintiffs' Objection to the Notice of Compliance and dissolve the Court's injunction.

DATED: Honolulu, Hawaii, January 6, 2014.

/s/ William Meheula
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