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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; DR.
MICHAEL UECHI; and THE
OUTDOOR CIRCLE,

Plaintiffs,

v.

FEDERAL TRANSIT
ADMINISTRATION; LESLIE

Case No. 11-00307 AWT

**PLAINTIFFS' OBJECTION
TO NOTICE OF
COMPLIANCE**

Hon. A. Wallace Tashima

ROGERS, in his official capacity
as Federal Transit Administration
Regional Administrator; PETER
M. ROGOFF, in his official
capacity as Federal Transit
Administration Administrator;
UNITED STATES
DEPARTMENT OF
TRANSPORTATION; RAY
LAHOOD, in his official capacity
as Secretary of Transportation;
THE CITY AND COUNTY OF
HONOLULU; WAYNE
YOSHIOKA, in his official
capacity as Director of the City
and County of Honolulu
Department of Transportation.

Defendants.

And

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

Intervenor Defendants.

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I. INTRODUCTION

The Federal Transit Administration ("FTA") and the City and County of Honolulu ("City") continue their efforts to use more than \$5 billion of public funds to force an ill-conceived elevated heavy rail transit line (the "Project") through the heart of historic downtown Honolulu, despite the fact that other less-damaging alternatives exist.

A visual representation of the Project, prepared by the American Institute of Architects, appears below.



(SEIS at A-95)

One of the most obvious ways to avoid the Project's impacts on historic downtown Honolulu is to simply place the rail line in a tunnel. It is undisputed that building such a tunnel beneath Beretania Street would avoid impacts on two extremely important historic resources: The Chinatown Historic District and the Dillingham Transportation Building.

This Court properly held that Defendants' first attempt to evaluate a Beretania Street tunnel was arbitrary, capricious, and a violation of Section 4(f) of the Department of Transportation Act ("Section 4(f)"). It then ordered Defendants to prepare a new Section 4(f) analysis of the feasibility and prudence of a Beretania Street tunnel.

Defendants claim to have corrected their errors in a new "Supplemental Environmental Impact Statement/Section 4(f) Evaluation" (the "SEIS") and "Amended Record of Decision" (the "ROD").¹ But their second attempt to comply with Section 4(f) is no better than their first.

The SEIS and ROD do not provide the full and fair evaluation requested by the Court. Instead, they present a series of cynical, biased analyses clearly intended to justify the Project while and discrediting the Beretania Street Tunnel Alternative.

¹ The City submitted the SEIS and ROD as an attachment to the Declaration of Faith Miyamoto in Support of Notice of Compliance (Dkt. 251). To minimize bulk and repetition, the documents are cited as "SEIS at ___" and "ROD at ___."

As described in detail below, those analyses rely on inaccurate assumptions and ignore the clear and explicit requirements of Section 4(f). For both of those reasons, Plaintiffs respectfully request that the SEIS and the ROD be invalidated as arbitrary, capricious, and contrary to Section 4(f).²

II. BRIEF SUMMARY OF RELEVANT FACTUAL BACKGROUND

Between 2007 and 2010, Defendants prepared an "Environmental Impact Statement and Section 4(f) Evaluation" purporting to evaluate the Project pursuant to the requirements of Section 4(f) and the National Environmental Policy Act. AR 247-854. On January 18, 2011, the FTA issued a record of decision formally approving the Project. AR 30-246.

On May 12, 2011, Plaintiffs timely filed a complaint alleging, among other things, that Defendants approval of the Project violated Section 4(f). *See* Complaint (Dkt. 1).

On November 1, 2012, the Court issued an Order on Cross-Motions for Summary Judgment (Dkt. 182) finally resolving all outstanding merits arguments. As relevant here, the Summary Judgment Order held that Defendants' violated Section 4(f) by failing properly to evaluate a Beretania Street tunnel alternative and ordered Defendants to supplement the 2010

² Plaintiffs file these Objections without prejudice to or waiver of any claim, issue, or argument in *Honolulutraffic.com v. Federal Transit Administration*, Ninth Circuit Case No. 13-15277 (submitted August 15, 2013).

"Environmental Impact Statement and Section 4(f) Evaluation" with a full evaluation of the feasibility and prudence of the Beretania Street tunnel alternative.

On December 27, 2012, the Court issued a final Judgment (Dkt. 202) imposing a Partial Injunction on project construction, directing Defendants to file a "notice of compliance" upon meeting the requirements of the Summary Judgment Order, and directing Plaintiffs to file any objections to the notice of compliance within 30 days. The Judgment further specified that the Partial Injunction would remain in place pending resolution of any timely-filed objections.

The City filed a notice of compliance on October 8, 2013 (Dkt. 250-251).

III. SUMMARY OF LAW AND STANDARD OF REVIEW

This Court ordered Defendants to prepare supplemental analyses pursuant to the requirements of Section 4(f). In Section 4(f), Congress declared a national policy that "special effort should be made to preserve...public park and recreation lands...and historic sites." 49 U.S.C. § 303(a). The Supreme Court has held that this policy gives "paramount importance" to preventing parks and historic sites from being damaged by transportation projects. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Section 4(f) implements this policy by prohibiting approval of a transportation project that would use historic resources unless there is no feasible and prudent alternative. 49 U.S.C. § 303(c). In cases where no feasible and prudent alternative exists, Section 4(f) requires selection of the alternative causing "least harm" in light of the statute's preservation purposes. 23 C.F.R. § 774.3(c).

Violations of Section 4(f) are reviewed under the Administrative Procedure Act ("APA"). *N. Idaho Cmty. Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1152-53 (9th Cir. 2008).

The APA directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be [] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). Although this "arbitrary and capricious" standard is narrow, it "nonetheless requires the court to engage in a substantial inquiry...a thorough, probing, in-depth review." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citing *Overton Park*).

The APA also provides that an agency's decision can only be upheld (if at all) on the basis articulated in the decision itself; courts may not "make up for deficiencies" in agency decisionmaking by "supply[ing] a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also*

Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1071 n.7 (9th Cir. 2004) ("In no case are we to hypothesize [agency] rationales or accept [agency] post hoc rationalizations").³

IV. DEFENDANTS' ANALYSIS OF THE BERETANIA STREET TUNNEL ALTERNATIVE WAS ARBITRARY AND CAPRICIOUS

The Court ordered Defendants to evaluate "the prudence and feasibility of the Beretania tunnel alternative specifically" and to "supplement the FEIS and ROD." Order on Cross-Motions for Summary Judgment (Dkt. No. 182) at 27. That evaluation, memorialized in chapter 3 of the SEIS and pages 12-13 of the Amended ROD, was arbitrary and capricious in multiple respects.

As explained in section IV.A, below, Defendants relied on inaccurate assumptions, flawed financial calculations, and violated Section 4(f)'s implementing regulations in concluding that the Beretania Street Tunnel Alternative is not a feasible and prudent alternative to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building.

³ Defendants prepared their analyses in the form of a Supplemental Environmental Impact Statement or "SEIS". An SEIS is subject to the same requirements as a standard EIS unless alternative regulations or procedures have been approved by the Council on Environmental Quality ("CEQ"). 40 C.F.R. § 1502.9(c)(4). Defendants have neither proposed nor secured CEQ approval of "alternative procedures" for Supplemental EISs. In interpreting the relevant regulations, "substantial deference" is accorded to CEQ, not to the agency proposing the project at issue. *Andrus v. Sierra Club*, 44 U.S. 347, 357-58 (1979); *Alaska Ctr. for the Environment v. West*, 31 F. Supp. 2d 714, 721 (D. Alaska 1998), *aff'd* 157 F.3d 680 (9th Cir. 1998).

And, as explained in section IV.B, below, Defendants arbitrarily and capriciously concluded that the Project is the "least harm" alternative despite the fact that the Beretania Street Tunnel Alternative would use fewer historic sites and parklands.

A. Defendants Arbitrarily and Capriciously Concluded That The Beretania Street Tunnel Alternative Is Not A Feasible And Prudent Avoidance Alternative

This Court directed Defendants to prepare a Section 4(f) analysis evaluating whether the Beretania Street Tunnel Alternative is a feasible and prudent avoidance alternative to the Project's use of the Chinatown Historic District and the Dillingham Transportation Building.

Under Section 4(f), a feasible and prudent avoidance alternative "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17. "Severe problems" may include issues of infeasibility (questions of engineering) or issues of prudence (questions of project purposes, safety, or impacts). *Id.*

Inherent in the definition of "feasible and prudent avoidance alternative" are two analytical requirements: (1) Does the alternative avoid using Section 4(f) property? and (2) Does the alternative cause "severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property"? 23 C.F.R. § 774.17.

Defendants failed at both analytical steps. They inaccurately assumed that the Beretania Street Tunnel Alternative must use (and cannot avoid using) Section 4(f) property (section IV.A.1, below). And they arbitrarily and capriciously concluded that the Beretania Street Tunnel Alternative will cause "severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property" (section IV.A.2, below). For both reasons, their analysis was arbitrary and capricious.

1. Defendants Inaccurately Assumed That The Beretania Tunnel Alternative Must Use Additional Section 4(f) Properties

There is no dispute that the Beretania Street Tunnel Alternative would avoid the Project's use of the Chinatown Historic District and the Dillingham Transportation Building, both of which are historic sites protected by Section 4(f). AR 718-27; SEIS at 22 (map).

The SEIS nonetheless concludes that the Beretania Street Tunnel Alternative is not an "avoidance" alternative within the meaning of Section 4(f). That conclusion is based on the inaccurate assumption that the Beretania Street Tunnel Alternative must use three other Section 4(f) properties: The Oahu Railway & Land ("OR&L") parcel; McKinley High School; and the "King Florist" building. *See* SEIS at 39-47. As explained below, the Beretania Street Tunnel Alternative need not use any of the three.

a) The OR&L Parcel

The OR&L parcel is located at the far eastern edge of the Beretania Street Tunnel Alternative. SEIS at 22 (map). It is less than one-quarter of a mile southwest of the Iwilei rail station, the westernmost rail station common to the Project and the Beretania Street Alternative. *Id.*

The OR&L parcel has been determined eligible for listing in the National Register of Historic Places, and is therefore protected under Section 4(f). SEIS at 40.

The SEIS assumes that the Beretania Street Tunnel Alternative will use the OR&L parcel for construction of — and, after construction is complete, public access to — an underground rail station at Ka'aahi Street. SEIS at 41-43. But there does not appear to be any reason to place an underground rail station at this location. Doing so would put two rail stations (Iwilei and Ka'aahi Street) within 1,500 feet of each other. SEIS at 22 (map). By way of comparison, the Project would be approximately 20 miles long and would include 21 rail stations, none of which would be located within one-half mile of each other. *See* AR 338-344.

Plaintiffs' comments on the Draft SEIS explicitly raised the absence of any justification for the Ka'aahi Street rail station. SEIS at A-76. Tellingly, Defendants' responses to comments fail to address the issue. *See* SEIS at A-76 (comment Den-3 and response thereto).

It was arbitrary and capricious for Defendants to assume, without any apparent justification, that the OR&L Parcel must be used for an underground rail station.

b) McKinley High School

McKinley High School is located on King Street, near the middle of the Beretania Street Tunnel Alternative. SEIS at 22, 43-44 (maps and description). It is within a portion of the Beretania Street Tunnel Alternative that would be built above ground. *Id.*

The central portion of the McKinley High School campus contains a cluster of historic buildings which are listed in the National Register of Historic Places; the remainder of the campus is not historic and is not listed in the National Register. SEIS at A-84 to A-88. The National Register contains a map establishing a clear and explicit boundary line separating the National Register-listed portion of the McKinley High School campus from the non-historic portion of the campus. SEIS at A-88.

Defendants assume that the Beretania Street Tunnel Alternative will use McKinley High School by incorporating a small portion of the campus into the Pensacola Street rail station. SEIS at 43. That assumption is erroneous. The portion of the campus proposed to be incorporated into the Pensacola Street rail station is clearly outside the boundary of the National Register-listed historic site. SEIS at 44 (map showing station), A-88 (map showing

boundary). Therefore, there will be no "use" within the meaning of Section 4(f).⁴

Plaintiffs' comments on the Draft SEIS explained that the Pensacola Street rail station would be outside the boundary of the National Register-listed portion of the McKinley High School campus. SEIS at A-76. Plaintiffs also provided Defendants with a copy of the National Register map establishing the boundary. *Id.*; *see also* SEIS at A-84 to A-88.

In response, Defendants cite a guidance document known as the "4(f) Policy Paper" for the proposition that they have discretion to determine the boundaries of historic sites. SEIS at A-76 (response to comment Den-4). That is simply not the case. Defendants have no authority (and cite none) to unilaterally re-write a portion of the National Register of Historic Places. Moreover, the portion of the 4(f) Policy Paper on which Defendants rely only applies where an historic site's boundaries have not yet been established; it does not apply where, as here, the National Register provides a clear and explicit boundary line. *See* Declaration of Matthew Adams ¶ 2, Ex. A at 28 (Policy Paper, Question 2C).

⁴ In fact, the small piece of the campus that would be incorporated into the Pensacola Street rail station is screened from the National Register-eligible portion of the campus by a large, four-story non-historic building. SEIS at 44, A-76, A-88.

It was arbitrary and capricious for Defendants to assume that the Beretania Street Tunnel Alternative would incorporate a portion of the McKinley High School historic site into the Pensacola Street rail station.

c) The King Florist Building

The SEIS assumes that the Beretania Street Tunnel Alternative will use an historic resource by demolishing the King Florist building. SEIS at 45-46. There are two fundamental problems with that assumption: (i) there is no evidence that the King Florist building is historic and (ii) the King Florist building need not be demolished.

(i) The King Florist Building Is Not Historic

The SEIS provides virtually no information or evidence regarding the King Florist building. The document says that the building (i) was named for a former tenant, (ii) was built in 1945, and (iii) "was identified in the Alternatives Analysis as potentially eligible for listing in the [National Register] under Criteri[on] C because of its type, period, and method of construction." SEIS at 45. That is all. *Id.*

The SEIS identifies the source of these three bits of information as "DTS 2006." Unhelpfully, the "References" section of the SEIS contains multiple documents identified as "DTS 2006." None of the "DTS 2006" documents mentions the King Florist building. Nor does any other document in the administrative record discuss or evaluate the King Florist building's eligibility

for listing in the National Register. In short, there appears to be no evidence that the King Florist building is historic.

Plaintiffs' comments on the Draft SEIS specifically identified the fact that Defendants have provided "no documents or information indicating that [King Florist] meets the statutory or regulatory criteria for listing in the National Register of Historic Places." SEIS at A-76 (comment Den-5). Defendants' response does not provide any additional information about the King Florist building; instead, it vaguely claims that the building "has similar age, integrity, and significance as properties found eligible" for the National Register. SEIS at A-76. Defendants' response does not explain what is significant about the King Florist building or identify the other, allegedly-similar buildings to which they deem King Florist "similar." *Id.*

The complete absence of evidence establishing King Florist's eligibility for listing in the National Register (and, therefore, its eligibility for protection under Section 4(f)) is particularly troublesome in light of a photograph showing that the building has been significantly modified and lacks historic integrity. *See* SEIS at A-76 (comment Den-5, referring to photographs), A-90 (photograph). Plaintiffs provided Defendants with a copy of the photograph; Defendants have not disputed it. *Id.*

(ii) The King Florist Building Need Not Be Demolished

Defendants claim that the King Florist building must be demolished to make way for the McCully Street rail station. SEIS at 45. That claim is based on the assumption that the Beretania Street Tunnel Alternative must be positioned directly against the buildings on the south side of King Street. *See* SEIS at A-76 to A-77 (comment Den-5 and response thereto).

Plaintiffs' comments on the Draft SEIS challenged the assumption that the Beretania Street Tunnel Alternative must border the King Florist Building, noting that other parts of the rail line are positioned above the middle of the street. SEIS at A-77 (comment Den-5). In response, Defendants argued that the rail line could not be positioned above the middle of the street because the street is one-way. *Id.* (response to Den-5).

Defendants' argument makes little sense. While it might be unsafe to put support columns in the middle of a one-way street, there is no reason why supports that straddle the roadway (with a column on each side) could not be used. Indeed, that is one of the options Defendants have incorporated into other parts of the rail line. *See, e.g.*, SEIS at 93.

Defendants' inaccurate and unsupported assumptions that (i) the King Florist building is historic and (ii) the building must be demolished were arbitrary and capricious.

2. Defendants Arbitrarily and Capriciously Concluded That The Beretania Street Tunnel Alternative Is Imprudent

Under Section 4(f), an alternative is only imprudent if it causes "severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property" at issue. 23 C.F.R. § 774.17. Defendants' conclusion that the Beretania Street Tunnel Alternative is imprudent was arbitrary and capricious for each of the three reasons set forth below.

a) Defendants Relied On Flawed Financial Analyses

Defendants' finding of imprudence is based primarily on cost increases allegedly associated with the Beretania Tunnel Alternative. Cost increases can only justify a finding of imprudence if they reach "an extraordinary magnitude." 23 C.F.R. § 774.17; *see also* Final Rule, 73 Fed. Reg. at 13392 ("Merely a 'substantial cost increase' is not enough"). Indeed, the Ninth Circuit has explicitly held that under Section 4(f) "cost is a subsidiary factor in all but the most exceptional cases." *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1452 (9th Cir. 1984).

Defendants estimate that the Beretania Street Tunnel Alternative will increase the cost of the Project by approximately 19%. SEIS at 65. That estimate is arbitrary and capricious in two respects.

First, Defendants' cost estimate includes the below-ground station at Ka'aahi Street Station. SEIS at A-80 (response "Den-15" states that station is included in cost estimate). As explained above, that station is duplicative of

the Iwilei Station and its inclusion in the Beretania Tunnel Alternative cannot be justified (section IV.A.1.a, above). Therefore, Defendants have over-estimated the cost of the Beretania Street Tunnel Alternative.⁵

Second, Defendants' estimate is based on an improper comparison: The cost of segment 4 of the Project (from Iwilei to Ala Moana Center, stopping short of the rail line's planned terminus at the University of Hawaii-Manoa) versus the cost of the entire Beretania Street Tunnel Alternative (stretching from Iwilei all the way to the University of Hawaii-Manoa). SEIS at 65. As explained in Plaintiffs' comments on the Draft SEIS, Defendants should have compared the total cost of connecting Iwilei to the University of Hawaii-Manoa using the Project (via an elevated viaduct through the historic downtown and Ala Moana) and the total cost of connecting Iwilei to the University of Hawaii-Manoa using the Beretania Street Tunnel Alternative (via a downtown tunnel). SEIS at A-80 (comment Den-14).

Perhaps recognizing the merits of Plaintiffs' position, Defendants prepared a brief analysis comparing the cost of reaching the planned rail terminus at the University of Hawaii-Manoa via the Beretania Street Tunnel

⁵ Evidence in the record suggests that this over-estimate may be quite significant. The SEIS fails to provide specific estimated costs for the Ka'aahi Street Station. But Defendants' 2006 "Capital Costing Memorandum," on which the SEIS claims to be based, estimates the average cost of an underground station to be approximately \$80 million, measured in 2006 dollars. *See* AR 67615. If converted to Year of Expenditure ("YOE") dollars (to match Defendants' other cost estimates), that number would be even higher.

Alternative to the cost of reaching the planned rail terminus at the University of Hawaii-Manoa via the Project plus an extension of the rail line. SEIS at 113. That analysis reveals that the Beretania Street Tunnel Alternative would increase capital costs by less than 2%. *Id.*⁶

A 2% cost increase falls well short of the "extraordinary magnitude" necessary to justify a finding of imprudence. *See* 23 C.F.R. § 774.17. Indeed, in a prior case involving a Honolulu transportation project, the Ninth Circuit held that a cost increase of more than 10% could not reasonably be considered imprudent. *Stop H-3*, 740 F.2d at 1452 ("The Secretary could not have reasonably concluded...").

Defendants may argue that the Beretania Street Tunnel Alternative is imprudent because its costs would exceed the \$5.544 billion programmed in the Project's Full Funding Grant Agreement. *See, e.g.*, FEIS at 65, 113-114, A-80 (response Den-17). Or, in slightly different terms, now that Defendants have \$5.544 billion for the Project, they may claim it is imprudent to go beyond that amount. But that is not the law. Section 4(f) does not require Plaintiffs to demonstrate that the Beretania Tunnel Alternative will be less expensive than the Project; rather, it requires Defendants to prove that the

⁶ In fact, once the Ka'aahi Street station is removed from the comparison, the cost of the Beretania Street Tunnel Alternative is less than one percent higher than the cost of the Project. SEIS at 113 (difference of \$140 million (in Year Of Expenditure dollars) without removing station); AR 67615 (average cost of underground station is approximately \$80 million (in 2006 dollars)).

Beretania Tunnel Alternative will increase the cost of reaching the University of Hawaii-Manoa by an "extraordinary magnitude." 23 C.F.R. § 774.17.

Defendants have not met that burden.

b) "Other Factors" Identified In The ROD Do Not Support A Finding Of Imprudence

In an effort to bolster Defendants' financial analysis, the ROD presents a laundry list of "other factors" leading to their rejection of the Beretania Street Tunnel Alternative. ROD at 13. But none of the "other factors" supports a finding that the Beretania Street Tunnel Alternative is imprudent.

The ROD generally refers to the Beretania Street Tunnel Alternative's "environmental and long-term construction impacts." ROD at 13. But the SEIS found that "[t]he Beretania Street Tunnel Alternative would have long-term social, economic, environmental, community, and environmental justice impacts that are similar to the Project." SEIS at 52 (emphasis added).

The ROD also refers to the Beretania Street Tunnel Alternative's "impacts on parks and historic properties." ROD at 13. Again, the SEIS provides otherwise. The SEIS found that although the Beretania Street Tunnel Alternative and the Project would pass near different parks, the two options would have "similar" impacts on parkland. SEIS at 56. And, as explained in sections IV.A.1 and IV.B, the Beretania Street Tunnel Alternative would "use" fewer historic resources and parklands than would the Project.

The ROD mentions "construction risks" associated with soil subsidence. ROD at 13. Section 4(f)'s implementing regulations make it clear that engineering questions of this sort are properly considered in terms of "feasibility" rather than "prudence." 23 C.F.R. § 774.17. The SEIS and ROD properly concede that the Beretania Street Tunnel Alternative is "feasible as a matter of engineering." ROD at 13; SEIS at 47-49; see also SEIS at A-80 (response Den-7 notes that risk of soil subsidence "can largely be mitigated through design").

The ROD also identifies "delayed benefits" as an issue. ROD at 13. Presumably, this refers to Defendants' contention that the Beretania Street Tunnel Alternative will delay completion of the fourth (and final) phase of the rail line by approximately two years. But the Beretania Street Tunnel Alternative would not delay the completion or operation of the first three phases of the rail line. *See, e.g.*, SEIS at 28 (timelines); AR at 362 (phases of rail line will be placed into operation as they are completed). Nor would it delay or diminish the economic and employment benefits of this \$5 billion construction project.⁷

Moreover, any delays in implementing the fourth phase of the rail line are attributable to Defendants' failure to comply with Section 4(f), not to the

⁷ On the contrary, the Beretania Street Tunnel Alternative would extend and increase those benefits, a fact nowhere mentioned in the SEIS or the ROD. .

Beretania Street Tunnel Alternative. The rail line was proposed nearly 10 years ago; Defendants have had more than enough time to plan for a tunnel beneath Beretania Street

The ROD suggests that "visual impacts" of the Beretania Street Tunnel Alternative contribute to imprudence. ROD at 13. The suggestion is ridiculous. The Beretania Street Tunnel Alternative would cross historic downtown Honolulu (the most visually-sensitive portion of the rail line) in an underground tunnel. In contrast, the Project would be elevated for its entire length, and would have "significant" impacts on visual resources in downtown Honolulu and elsewhere. *See, e.g.*, AR 511-512 (charts identifying significant impacts), AR 540-544 (discussing downtown area).⁸ If the Project is visually "prudent," the Beretania Street Tunnel Alternative is even more so.

The ROD also refers to "traffic and business access disruption during construction" as a potential problem. ROD at 13. The assertion is contrary to common sense. Construction of the Beretania Street Tunnel Alternative would primarily occur underground. In contrast, the Project would require the City to

⁸ The SEIS (but not the ROD) says that the Beretania Street Tunnel Alternative "will cross view corridors protected as either prominent or significant" in Honolulu's municipal ordinances. SEIS at 53. But the SEIS fails to mention that the Project will cross an even greater number of protected view corridors. SEIS at 53; AR 505-507. To the extent that Defendants relied on protected view planes as a basis to dismiss the Beretania Street Tunnel Alternative, that reliance is arbitrary and capricious. *See Se. Alaska Conservation Council v. Fed. Hwy. Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011) (arbitrary and capricious to reject alternative where proposed project could have been rejected for the same reason).

build a three-story elevated viaduct, on surface streets, through the densest and highest-traffic area of Honolulu. There is no reason to believe that the Beretania Street Tunnel Alternative will create more disruption than the Project.⁹

Although the ROD refers to a number of "other factors" of little relevance to the evaluation of prudence, it fails to address a significant "factor" weighing in favor of the Beretania Street Tunnel Alternative. The United States District Court for the District of Hawaii's has made it clear that important safety risks associated with the Project have yet to be satisfactorily resolved. ROD at 13; SEIS at A-92 to A-94 (Court's concerns). Those risks would be entirely avoided by the Beretania Street Tunnel Alternative. SEIS at 22. The ROD's failure to address that important fact in the context of prudence was arbitrary and capricious.

In sum, while the "other factors" referenced in the ROD may help highlight some (but certainly not all) of the distinctions between the Project

⁹ In their responses to Plaintiffs' comments on the Draft SEIS, Defendants assert that construction of the Beretania Street Tunnel Alternative will require the closure of some lanes on surface roads. SEIS at A-87 (response Den-9). Defendants fail to mention that construction of the Project also requires surface lanes to be closed. *Id.*; see also AR 432-434 (lane closures for preparation of column foundations, installation of columns, construction of elevated structure, construction of elevated stations, and construction of support facilities). Defendants' responses to comments also claim that the Beretania Street Tunnel Alternative will require 63 construction truck trips per day. SEIS at A-78 to A-79 (response Den-9). But they fail to provide any information that can be used to compare the number of construction trips required for the Project with the number of construction trips required for the Beretania Street Tunnel Alternative. *Id.*

and the Beretania Street Tunnel Alternative (*e.g.*, rail line adjacent to one park rather than another, closure of traffic lanes for tunneling rather than closure of traffic lanes for overhead construction, etc.), none of the factors is "truly unusual," presents a "unique problem," or indicates that the Beretania Street Tunnel Alternative will impose additional "severe social, economic, or environmental impacts." *See* 73 C.F.R. § 774.17 (imprudence requires additional "severe social, economic, or environmental impacts"); *Overton Park*, 401 U.S. at 413 (imprudence requires "truly unusual factors" and "unique problems"). Indeed, the SEIS confirms that the social, economic, and environmental impacts of the Beretania Street Tunnel Alternatives would be "similar to the Project." SEIS at 52 (emphasis added). Therefore, the ROD's "other factors," whether considered individually or together, do not justify a finding of imprudence. 73 C.F.R. § 774.17; *Overton Park*, 401 U.S. at 413; *see also Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976) (distinguishing between "some discussion of advantages and disadvantages" and a proper determination of imprudence).

c) Defendants Violated Section 4(f)'s Implementing Regulations

Under Section 4(f)'s implementing regulations provide that an alternative is not imprudent unless it presents "severe problems" that "substantially outweigh" the importance of preserving the Section 4(f) resources at issue. 23 C.F.R. § 774.17.

Thus, the regulations "require[] the [agency] to take into consideration the importance of protecting the Section 4(f) property." Final Rule, 73 Fed. Reg. at 13391. Such consideration must "begin with a thumb on the scale of avoiding the Section 4(f) property." *Id.* at 13391-92.

Here, Defendants utterly and completely ignored the regulatory requirement that they determine whether the (alleged) problems with the Beretania Street Tunnel Alternative "substantially outweigh" the importance of preserving the Section 4(f) properties at issue. In fact, they admit as much. *See* SEIS at Page A-80 to A-81 (comment Den-18 and response thereto).

For this reason, too, Defendants' determination of imprudence should be rejected as arbitrary and capricious.

B. Defendants Arbitrarily and Capriciously Concluded That The Project Is The "Least Overall Harm" Alternative

In situations where there is no feasible and prudent avoidance alternative, Section 4(f) mandates that the lead agency "may *only* approve the alternative that [c]auses the least overall harm in light of the statute's preservation purpose." 23 C.F.R. § 774.3(c) (emphasis added, punctuation omitted).¹⁰

¹⁰ For the reasons set forth in section IV.A, above, the Beretania Street Tunnel Alternative is a feasible and prudent avoidance alternative. Therefore, Defendants' "least overall harm" analysis is not directly relevant. 23 C.F.R. § 774.3(c). Plaintiffs address the issue of "least overall harm" without waiving any argument regarding the prudence of the Beretania Street Tunnel Alternative.

Defendants found that the Project — rather than the Beretania Street Tunnel Alternative — is the "least overall harm" alternative. ROD at 13; SEIS at 68-75. That finding was arbitrary and capricious in several respects.

First, and most importantly, Defendants' finding is contrary to "the statute's preservation purpose." *See* 23 C.F.R. § 774.3(c). The purpose of Section 4(f) is to avoid the use of historic sites and parklands. 49 U.S.C. § 303(a). It is undisputed that the Project would use more Section 4(f) properties than the Beretania Street Tunnel Alternative. *Compare* AR 709, 718-27 (Project) *with* SEIS at 39-47 (Beretania Street Tunnel Alternative). Once the SEIS's arbitrary and capricious evaluation of the OR&L parcel, McKinley High School, and King Florist is corrected (section IV.A.1, above), the distinction becomes even clearer: The Beretania Street Tunnel Alternative would use at least four fewer Section 4(f) resources than the Project. *Id.*

Second, Defendants' finding fails to address the fact that the resources that avoided by the Beretania Street Tunnel Alternative — and, in particular, the Chinatown Historic District and the Dillingham Transportation Building — are among Honolulu's most important historic resources. *See, e.g.*, 39837-44, 39878-83. Even if it were subject to Section 4(f) protection, a small, run-down,

heavily-modified, never-studied building like King Florist would not have the same level of importance.

Third, Defendants' "least harm" analyses of costs, delays, and environmental consequences are very similar to their assertions on the topic of prudence, and are arbitrary and capricious for the same reasons. *See* SEIS at 52-67, 74-75.

Fourth, Defendants' "least harm" analysis, like their evaluation of prudence and feasibility, fails properly to account for the Project's potential impacts to the United States District Courthouse. SEIS at 74.

For each of these reasons, even if Defendants' "least harm" analysis were relevant it should be invalidated as arbitrary and capricious.

V. DEFENDANTS' FAILURE TO CONSIDER NEW INFORMATION AND CIRCUMSTANCES WAS ARBITRARY AND CAPRICIOUS

An SEIS must address significant new information and circumstances — indeed, that is its purpose. 40 C.F.R. § 1502.9(c).

Defendants have previously asserted that none of the alternatives to the Project in the 2006 "Alternatives Analysis" process could meet the purpose and need for the Project. On the basis of that assertion, they (successfully) argued that alternatives to the Project — including alternatives capable of avoiding the Project's use of Chinatown and the Dillingham Transportation Building would be imprudent.

In the SEIS, Defendants admit for the first time that some of the alternatives considered in the 2006 Alternatives Analysis (including, specifically, alternatives serving the Beretania Street area) would meet the purpose and need for the Project. SEIS at 49-51, A-82 (comment Den-30). This information is significant in that it demonstrates the viability of options previously criticized as imprudent. Therefore, Defendants' SEIS should have considered whether other alternatives might feasibly and prudently avoid the Project's use of Chinatown and the Dillingham Transportation Building. *See, e.g., Alaska Wilderness & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727-731 (9th Cir. 1995) (agency required reconsider the scope of its alternatives analysis in response to significant new information); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 694, 705-06 (10th Cir. 2009) (invalidating SEIS that failed to incorporate significant new information in alternatives analysis).

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and methods of service noted below, a true and correct copy of

PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE

was served electronically through CM/ECF:

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DATED: November 7, 2013

/s/Matthew G. Adams
MATTHEW G. ADAMS