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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' REPLY IN SUPPORT OF REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF** Hon. A. Wallace Tashima Action Filed: May 12, 2011 Trial Date: None Set

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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In response to the invitation of the City and County of Honolulu ("City") and the direction of the Court, Plaintiffs respectfully submit this final reply to the City's proposed opposition brief ("Proposed Opposition").[1] *See* December 12, 2012 Transcript of Proceedings ("Transcript") at 32:14-23, 44:15-20 (discussing reply brief).[2]

I. PLAINTIFFS SEEK NARROWLY TAILORED RELIEF

The City's Proposed Opposition does not appear to contest Plaintiffs' entitlement to injunctive and/or declaratory relief. Instead, the City argues that Plaintiffs' request for relief is simply too broad. Proposed Opposition at 2-14. The City is mistaken. As explained below, Plaintiffs' request for relief is carefully and narrowly tailored.

A. Partial Vacatur Of The Federal Defendants' Record Of Decision Is Appropriate.

The majority of the City's Proposed Opposition is devoted to arguments about the Plaintiffs' request for relief ***against the Federal Defendants***. Proposed Opposition at 2-14. The City has not provided any support for the proposition that it is entitled to argue on the Federal Defendants' behalf. Moreover (and as

[1] As the City admits, the Court's November 1 Scheduling Order does not authorize the City's filing of an opposition brief. *See* Transcript at 32:10-14. Plaintiffs have opposed the City's filing and have moved to strike the City's proposed brief. *See* Plaintiffs' Statement of Opposition and Motion to Strike (Doc. 195). The Court has not yet ruled on the City's application to file the brief or Plaintiffs' motion to strike the brief.

[2] A copy of the Transcript is attached hereto as Attachment A.

explained in greater detail below), the City's arguments are contrary to law and unsupported by the evidence before this Court.

1. Partial Vacatur Is Appropriate

Plaintiffs have requested that the Court vacate and set aside the portion of the Federal Transit Administration's ("FTA's") Record of Decision ("ROD") purporting to find that the agency complied with section 4(f). *See* Plaintiffs' Request for Injunctive and Declaratory Relief (Doc. 188) ("Plaintiffs' Request for Relief") at 39-45.

Plaintiffs' legal argument in favor of partial vacatur is very straightforward and is clearly set forth in their Request for Relief. *See* Request for Relief at 39-41. In brief:

- This Court has held that the Defendants acted arbitrarily and capriciously and in violation of Section 4(f).[3]
- The Administrative Procedure Act ("APA") explicitly provides that "the reviewing court shall…hold unlawful and set aside any agency action, findings, and conclusions found to be arbitrary and capricious."[4]
- The Ninth Circuit has only departed from this approach in circumstances where vacating a ROD would lead to severe environmental harm and/or regulatory disruption.[5]

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[3] Order on Cross-Motions for Summary Judgment (Doc. 182) ("Order") at 12, 20, 25-27.

[4] 5 U.S.C. § 706(2).

[5] *See California Communities Against Toxics v. U.S. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (safety of power supply); *Cook Inletkeeper v. U.S. EPA*, 400 Fed. Appx. 239, 241-42 (9th Cir. 2010) (applicability of Clean Water Act); *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995)

- The Ninth Circuit has variously described those circumstances as "limited," "rare," and "unusual."[6]

- Partial vacatur of the ROD would not lead to anything approaching the severe environmental harm (*e.g.*, potential extinction of an endangered species) or regulatory disruption (*e.g.*, thwarting operation of Clean Air Act or Clean Water Act) recognized by the Ninth Circuit as justifying remand without vacatur.[7]

One of the most notable features of the City's Proposed Opposition is its failure to dispute — or even to address — the five points listed above. The City does not dispute that the Court has determined the Defendants' actions with respect to §4(f) to be arbitrary and capricious. Proposed Opposition at 3-4. The City does not dispute that the APA specifically directs reviewing courts "to set aside any agency action, findings, and conclusions found to be arbitrary and capricious." *Id.* The City does not dispute that the Ninth Circuit has only departed from the general APA rule in "limited," "rare," and "unusual" circumstances involving severe environmental harm and/or regulatory disruption. *Id.* And the City does not even attempt to explain whether this case presents circumstances previously recognized by the Ninth Circuit as justifying remand without vacatur (*e.g.*, potential extinction of a species, thwarting application of federal pollution control laws, etc.). *Id.*

(extinction of endangered species); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (applicability of Clean Air Act); Plaintiffs' Request for Relief at 39-40 (discussing cases).

[6] *California Communities Against Toxics*, 688 F.3d at 994 ("limited"); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("rare"); *W. Oil & Gas*, 633 F.2d at 813 ("unusual").

[7] *See* Plaintiffs' Request for Relief at 40-41 (comparing cases).

Instead, the City suggests that Plaintiffs have improperly relied on *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), calling the case "wholly inapplicable." *See* Proposed Opposition at 4. That is nonsense. *Overton Park* is the first and only Supreme Court case to address section 4(f). *Overton Park* is also considered one of the leading Supreme Court cases on judicial review and remedies under the APA. *See* Mandelker, *NEPA Law and Litigation* §3.6 at 3-11 (2005). In discussing the requirements of the APA, *Overton Park* accurately describes the statute as providing that "agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Overton Park*, 401 U.S. at 413-14. Plaintiffs can understand why the City might wish that the Supreme Court had come to a different conclusion.[8] But the City is wrong in suggesting that *Overton Park* is "wholly inapplicable."

The City also claims that "remand without vacatur is particularly appropriate where…[it] will cause the loss of substantial federal funds," citing *Allied Signal v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). Proposed Opposition at 3. But *Allied Signal* did not address "the loss of substantial federal funds"; on the contrary, the D.C. Circuit made it quite clear that the amount of

[8] It is worth noting that both the City and the Federal Defendants studiously avoided any mention of *Overton Park* in their initial remedies briefs. Neither brief contains a single mention of Overton Park. *See* Memorandum of City Defendants in Response to the Court's Scheduling Order (Doc. 189) (City Remedies Memo") at ii-iii ; Federal Defendants' Remedy Brief (Doc. 185) at ii-iii.

federal funding involved in the case was "not great." *Allied Signal*, 988 F.2d at 152-53. Instead, the *Allied Signal* decision turned on the fact that vacatur would have created inequitable windfall profits for some regulated entities. *Allied Signal*, 988 F.2d at 152-53. In other words, the *Allied Signal* court based its holding on the inequitable financial consequences of vacatur (*i.e.*, windfall profits for those who had previously profited from the arbitrary and capricious regulation) rather than the financial impact of vacatur on the federal government (*i.e.*, the "loss of substantial federal funds" to which the City misleadingly and inaccurately refers). *See Allied Signal*, 988 F.2d at 152-53 ("To be sure, the costs are not great, absolutely or as a proportion of the [agency]'s…budget. But that alone is hardly a reason to create such a windfall. Accordingly, we refrain from vacating the rule.") (citations omitted).

Moreover, there is a fundamental factual distinction between *Allied Signal* and this case. In *Allied Signal*, vacatur would have required the federal government to refund permitting fees collected in prior years, creating a significant disruption. *Allied Signal*, 988 F.2d at 151. In this case, vacatur would prevent the federal government from prematurely dispensing funds for a Project which requires further review. The City has attempted to cloud this distinction by suggesting that both cases involve "loss of federal funds." Proposed Opposition at 3. But that suggestion is too cute to be convincing. In *Allied Signal*, the "loss of federal funds" referred to a costly and disruptive financial loss suffered by the

federal government itself. In this case, "loss of federal funds" refers to the City's concern that compliance with section 4(f) may cause it to miss out on future federal funding opportunities. In other words, in our case, unlike *Allied Signal*, there has been no "loss" (because the hoped-for funding remains in the future) and the "loser" would not be a federal entity.

2. Plaintiffs' Request For Partial Vacatur Is Not Overbroad

The City suggests that Plaintiffs' request for vacatur represents an impermissible, overbroad attempt to enjoin any further work on the Project. Proposed Opposition at 4-14. That is simply untrue.

Plaintiffs' request for relief against the City is quite explicitly limited to preventing (1) actions that could result in harm to section 4(f) resources; (2) actions that could result in harm to potential TCPs (practically speaking, section 4 of the Project, as well as the small area of section 1 identified in the Lee Declaration); and/or (3) actions that could prejudice the outcome of the Defendants' reconsideration of the Beretania Street tunnel alternative. Plaintffs' Request for Relief at 47-48.

Plaintiffs have not asked the Court to enjoin other actions by the City. *Id*. For example, Plaintiffs have not asked the Court to enjoin (1) design activities, (2) construction activities not impacting the areas/resources identified above, or (3) property acquisition activities not affecting the areas/resources identified above. *Id*.

3. Partial Vacatur Is Necessary

That said, if the City wishes to engage in those activities, it must do so ***without*** a Full Funding Grant Agreement ("FFGA"). As explained in Plaintiffs' Request for Relief, an FFGA commits the United States to obligate present and future federal funds to a transportation project. 49 U.S.C. § 5309(k)(2)(D)(i); Plaintiffs' Request for Relief at 41-46. On November 19, the FTA issued a notice to Congress of the agency's intent to enter a $1.55 billion FFGA for the Project — apparently without further analyses or proceedings to cure the agency's section 4(f) violations.[9] *See* Plaintiffs' Request for Remedy at 42 (providing full factual background). The proposed FFGA locks in federal funding for the Project as a whole, including the portions of the Project in which this Court found violations of section 4(f). *See* 49 U.S.C. §§ 5309(k)(2)(C)(ii), 5309(k)(2)(D)(i); Supplemental Declaration of Faith Miyamoto (Doc. 192-15), Exhibit 28 (proposed FFGA).

The FTA will not build or operate the Project; instead, its primary role is to decide whether to provide funding, and, if so, how much. *See*, *e.g.*, AR 000247 at 000338-64 (describing construction and operation of Project by City). Thus, the proposed FFGA represents ***the*** decision remaining to be made by the FTA with respect to the Project.

[9] Indeed, as Plaintiffs' counsel discussed in the hearing (and without rebuttal by Defendants) as far as the documents provided by Defendants reveal, the FTA's notice totally failed to inform the Congress that this court had found three violations of section 4(f).

During the December 12 remedies hearing, this Court properly noted the importance of making sure that Defendants do not take steps that would defeat or limit an open-minded reconsideration of TCPs, Mother Waldron Park, and the Beretania Street tunnel under section 4(f). Transcript at 5:1-11. Section 4(f) only applies to federal agencies within the United States Department of Transportation. 49 U.S.C. § 303(c); 23 C.F.R. § 774.17 (definition of "Administration" does not include local agencies). Therefore, the FTA — and not the City — is responsible for the reconsideration (and for ensuring that the reconsideration process takes place without prejudice).

By its actions, the FTA has made it clear that it intends to execute the FFGA as soon as possible.[10] If the FTA is allowed to execute the FFGA before completing its reconsideration, the reconsideration process will have been divorced from any actual agency decision-making. And if that occurs, the reconsideration — and section 4(f) — will have been reduced to a sham. *See Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1327, 1329 (4th Cir. 1972) ("sham" reconsideration); *Monroe County Conservation Council v. Volpe*, 472 F.2d 693,

[10] On November 19, the FTA issued a notice stating the agency's intent to execute an FFGA with the City. The FTA has refused to provide Plaintiffs' counsel with the notice. *See* Plaintiffs' Request for Relief at 42 n.26 (describing efforts to obtain information about notice). However, it appears that the notice would allow the FTA and the City to execute the FFGA as early as December 19, 2012. *See* 49 U.S.C. § 5309(k)(5) (execution of FFGA allowed 30 days after notice). Neither of those points was disputed by the City or the FTA during the December

703 (2d Cir. 1972) ("It defies reason to think that the federal government should obligate itself to a project which has not yet complied with federal law").

Therefore, partial vacatur of the portion of FTA's ROD purporting to find compliance with section 4(f) (and, in so doing, purporting to authorize execution of the FFGA) is essential.[11] This can readily be accomplished by vacating the section of the ROD labeled "Section 4(f) Findings." *See* AR 000030 at 000041-42. Alternatively, it can be done by vacating the portions of the FEIS and ROD sections of the FEIS and ROD dealing with the section 4(f) issues/resources for which the Court has found violations of law. *See* AR 000030 at 000041-42 (ROD); AR 000347 at 000705, 718-21, 732, 747.

The City suggests that any delay in executing the FFGA will cause great damage to the Project. *See* Proposed Opposition at 4-11. But the evidence suggests otherwise. The Project is anticipated to cost more than $5 billion, of which the FTA will provide approximately $1.5 billion. *See* Supplemental Miyamoto Dec., Exhibit 28, Attachment 3A (Project budget). In other words, the Project requires the City to spend approximately $3.5 billion even if the FFGA is

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12 remedies hearing. *See*, *e.g.*, Transcript at 9:5 to 10:24 (plaintiffs counsel invites Defendants to clarify timing).

[11] In light of the serious consequences of the FFGA and the fact that the timing of this brief is due to the City's insistence on filing untimely opposition papers, Plaintiffs respectfully invite the Court's attention to (1) the possibility of a temporary stay on execution of the FFGA until such time as a final order on remedies can be issued and/or (2) a slight amendment to Plaintiffs' request for relief whereby the FFGA would be invalidated (rather than merely prevented).

executed. *Id*. If the City wishes to continue the Project while the FFGA is pending, it can use that money (or a portion of it) to do so. See, e.g., AR 000247 at 000756-59 (discussing use of City excise tax funds and City's General Obligation bonds for capital investment). Indeed, the FEIS suggests that the City always intended to build the first portion of the Project with its own funds. *See, e.g.*, AR 000247 at 362 (phase 1 to be built solely with local funding).

II. THE CITY'S CLAIMS OF HARDSHIP ARE INACCURATE AND/OR UNSUPPORTED

The City's Proposed Opposition suggests that Plaintiffs' proposed remedy will cause "very adverse economic and environmental consequences." Proposed Opposition at 7. Tellingly, that statement is not supported by any citations.

In the past, the City has asserted that any delay in the Project would result in significant cost increases arising from the City's construction contracts. *See, e.g.*, City Remedies Memo at 11-15. However, the City has not actually put those contracts into evidence. As an evidentiary matter, the City's claims of financial hardship must fail.

Moreover, the City appears to have entered most (if not all) of the relevant contracts while this case was pending. In other words, the City knew that the Project could be delayed or enjoined and nonetheless decided to take on additional contract liability. The City was proceeding at its own risk, and, as a matter of equity, is not entitled to claim financial hardship. *See, e.g., National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); *Conservation Congress v.*

United States Forest Service, 803 F. Supp. 2d 1126, 1133-34 (E.D. Cal. 2011); *Quechan Tribe v. United States Dep't of the Interior*, 755 F.Supp. 2d 1104, 1121 (S.D. Cal. 2010).

In addition, the City's Proposed Opposition fails to reveal that the Project budget contains a line item for "unallocated contingencies" (*i.e.*, unexpected delays or costs). *See* Miyamoto Supplemental Declaration, Exhibit 28, Attachment 3A; Willoughby Declaration ¶ 10. There is no reason to believe that "unallocated contingencies" cannot be used to defray the cost of delay. Miyamoto Supplemental Declaration, Exhibit 28, Attachment 3A. And the total amount available for "unallocated contingencies" is quite large. *Id.* (approximately $100 million).

It is also worth noting that the project is already delayed by the Hawaii Supreme Court's ruling that the City must prepare Archaeological Inventory Surveys ("AISs") for the entire Project. *See Kaleikini v. Yoshioka*, 283 P.3d 60, 71-81 (Haw. 2012). The City estimates that its AIS work will not be complete until September, 2013. Declaration of Thomas Willoughby (Doc. 189-4) at ¶ 11a. The City has provided no reason to believe that the reconsideration required by this Court cannot also be completed by September, 2013. On the contrary, at least one of the City's own declarents seems to believe that is possible. Declaration of Faith Miyamoto (Doc. 189-5) at ¶ 9 (TCP studies are "on track for completion and approval…by September 2013").

At various times, the City and other Defendants have also raised concerns about harm to the environment, to transportation equity, and to employment. Environmental and transportation equity issues are addressed on pages 27 to 29 of Plaintiffs' Request for Relief. With respect to employment, (1) Project construction is already stopped (and workers idled) pending the City's completion of AISs, so Plaintiffs' proposed remedy would not "throw people out of work"; (2) Plaintiffs' proposed remedy would allow considerable design and construction work to continue during the FTA's reconsideration process, thereby preserving many of the local jobs about which Defendants have expressed concern; and (3) while one City declarent has asserted that "an average of 10,000 jobs each year will be attributable to rail construction," (Grabauskas Declaration (Doc. 189-1) at ¶ 11), the City has provided no evidence that 10,000 new jobs have been created or that any party to this litigation would lose a job as a result of Plaintiffs' proposed remedy.

III. THE CITY'S PROPOSED REMEDY ORDER DOES NOT ENSURE AN APPROPRIATE RECONSIDERATION OF §4(F) ISSUES AND DOES NOT AVOID IMPACTS TO SEGMENT 4 OF THE PROJECT

Finally, the City urges that its proposed remedy would ensure an appropriate reconsideration section 4(f) issues and would avoid interim impacts to 4(f) resources in segment 4 of the Project. Not so. For the reasons set forth above, the City's proposed remedy would allow the FTA to issue its final and most important approval before complying with section 4(f). *See* section I.A.3, above. As the

Court has accurately noted, the City's proposal would also allow continued property acquisition in segment 4, thereby committing the City to a specific route or wasting millions of dollars. Transcript at 31:2-19. And, of course, the City's proposed remedy would not address concerns about the TCP in segment 1 identified in Plaintiffs' Request for Relief.

Respectfully submitted,

Dated: December 14, 2012

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations set forth in Local Rule 7.5 because the brief contains 3,154 words, excluding the parts of the brief exempted by that rule. This brief complies with the type face requirements of Local Rule 10.2(a) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 14-point Times New Roman.

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