

NOSSAMAN LLP
ROBERT D. THORNTON (CA 72934)
Admitted *Pro Hac Vice*
rthornton@nossaman.com
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612
Telephone No. 949.833.7800
Facsimile No. 949.833.7878

EDWARD V.A. KUSSY (DC 982417)
Admitted *Pro Hac Vice*
ekussy@nossaman.com
1666 K. Street, NW, Suite 500
Washington, DC 20006
Telephone No. 202.887.1400
Facsimile No. 202.466.3215

CARLSMITH BALL LLP
JOHN P. MANAUT (HI 3989)
jpm@carlsmith.com
LINDSAY N. MCANEELEY (HI 8810)
lmcaneley@carlsmith.com
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, HI 96813
Telephone No. 808.523.2500
Facsimile No. 808.523.0842

ROBERT C. GODBEY (HI 4685)
Corporation Counsel
DON S. KITAOKA (HI 2967)
dkitaoka@honolulu.gov
GARY Y. TAKEUCHI (HI 3261)
gtakeuchi@honolulu.gov
Deputies Corporation Counsel
City and County of Honolulu
530 S. King Street, Room 110
Honolulu, HI 96813
Telephone No. 808.768.5240
Facsimile No. 808.768.5105

Attorneys for Defendants

THE CITY AND COUNTY OF HONOLULU and
WAYNE YOSHIOKA, in his official capacity as
Director of the City and County of Honolulu
Department of Transportation Services

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HONOLULUTRAFFIC.COM;
CLIFF SLATER; BENJAMIN J.
CAYETANO; WALTER HEEN;
HAWAII'S THOUSAND
FRIENDS; THE SMALL
BUSINESS HAWAII
ENTREPRENEURIAL
EDUCATION FOUNDATION;
RANDALL W. ROTH; and DR.
MICHAEL UECHI,

Plaintiffs,

vs.

FEDERAL TRANSIT
ADMINISTRATION; LESLIE
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

CIVIL NO. 11-00307 AWT

**ANSWER OF DEFENDANTS
THE CITY AND COUNTY
OF HONOLULU AND
WAYNE YOSHIOKA, IN HIS
OFFICIAL CAPACITY AS
DIRECTOR OF THE CITY
AND COUNTY OF
HONOLULU DEPARTMENT
OF TRANSPORTATION
SERVICES, TO PLAINTIFFS'
COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF
FILED MAY 12, 2011;
CERTIFICATE OF SERVICE**

(Presiding: The Honorable A.
Wallace Tashima, United States
Circuit Judge Sitting by
Designation)

HONOLULU; WAYNE
YOSHIOKA, in his official
capacity as Director of the City
and County of Honolulu,
Department of Transportation
Services,

Defendants.

**ANSWER OF DEFENDANTS THE CITY AND COUNTY OF HONOLULU
AND WAYNE YOSHIOKA, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF THE CITY AND COUNTY OF HONOLULU DEPARTMENT OF
TRANSPORTATION SERVICES, TO PLAINTIFFS' COMPLAINT FOR
INJUNCTIVE AND DECLARATORY RELIEF FILED MAY 12, 2011**

The CITY AND COUNTY OF HONOLULU and WAYNE YOSHIOKA, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services (collectively "City Defendants"), through counsel, answer Plaintiffs' Complaint for Injunctive and Declaratory Relief filed May 12, 2011 (the "Complaint") as follows:

Prior to July 1, 2011, the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project (the "Project"), was sponsored by the City and County of Honolulu, Department of Transportation Services ("DTS") in conjunction with joint lead agency, the Federal Transit Administration of the United States Department of Transportation (the "FTA"). As of July 1, 2011, the Honolulu Authority for Rapid Transportation ("HART") assumed all lawful obligations and liabilities owed by or to the City related to the Project pursuant to

Section 16-129.2 of the Revised Charter of the City and County of Honolulu, 1973, as amended. Therefore, the Project is currently sponsored by HART and the FTA.

The Project consists of a 20-mile fixed guideway rail system that begins in East Kapolei, and proceeds east via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street to serve the Honolulu Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center. The system will operate in an exclusive right-of-way and will be elevated, except in an area near Leeward Community College where it will be at-grade in an exclusive right-of-way. The elevated rail course will be supported by columns placed in drilled shafts between 6 and 10 feet in diameter. The Project will include 21 transit stations, park-and-ride facilities at certain stations, a maintenance and storage facility near Leeward Community College, traction power substations and other ancillary facilities to support the transit system.

The purpose of the Project is to provide high-capacity rapid transit in the highly congested east-west corridor between Kapolei and the Ala Moana areas along O'ahu's southern coast. The Project will be built in four distinct construction Phases over ten years: (a) Phase 1: East Kapolei to Pearl Highlands; (b) Phase 2: Pearl Highlands to Aloha Stadium; (c) Phase 3: Aloha Stadium to Middle Street; and (d) Phase 4: Middle Street to Ala Moana Center.

A Programmatic Agreement (the “PA”), which was developed in consultation with the State Historic Preservation Division (“SHPD”) of the State of Hawai‘i Department of Land and Natural Resources (“DLNR”) and other State and Federal government agencies and consulting parties, sets forth a plan for investigating and handling historic properties (including burial sites) that may be impacted by the Project. Extensive studies and reports prepared over many years were considered and support the underlying disclosures for environmental and historical review purposes. Full public review, comment and responses were afforded throughout the process. Plaintiffs’ challenge here is essentially a policy or political disagreement that is not actionable under any statute, rule or regulation applicable to this Project as it pertains to environmental disclosure, mitigation and historical review processes.

FIRST DEFENSE:

1. Plaintiffs’ Complaint fails to state a claim or cause of action upon which relief may be granted.

SECOND DEFENSE:

2. City Defendants deny the allegations contained in paragraphs 77, 79, 80, 81, 82, 83, 84, 85, 88, 89, 90, 91, 92, 93, 96, 104, 107, 108, 114, 117, 118, and 123 of the Complaint.

3. In response to paragraphs 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 75, 76, 87, 95, 98, 106, 110 and 120 of the Complaint, City Defendants admit only the existence of the recited statutes, rules and regulations and submit that said statutes, rules and regulations speak for themselves. Moreover, the applicability, characterization and interpretation of the recited statutes, rules and regulations are legal determinations that require consideration of not only the respective plain language of those statutes, rules and regulations, but any related statutes, rules and regulations, and case law interpreting any and all of said statutes, rules and regulations. Therefore, any allegations contained within the aforementioned paragraphs that relate to the applicability, characterization and/or interpretation of the recited statutes, rules and regulations are improper argument and legal conclusions, and are therefore denied. City Defendants further object to the allegations in the aforementioned paragraphs to the extent that they ignore any exceptions and/or other statutes, rules and regulations that may be applicable. City Defendants affirmatively state that they have complied fully with all statutes, rules and regulations applicable to environmental review process for the Project.

4. In response to paragraph 1 of the Complaint, City Defendants object to the allegations contained therein as improper argument and legal conclusions and, therefore, deny said allegations. City Defendants aver that the impacts of the

Project, along with appropriate mitigation measures, are properly disclosed in the Final Environmental Impact Statement (the “FEIS”).

5. In response to paragraph 2 of the Complaint, City Defendants deny that Plaintiffs’ have grounds for judicial review pursuant to Chapter 7 of the Administrative Procedure Act (“APA”), Section 305 of the National Historic Preservation Act (“NHPA”), or otherwise.

6. In response to paragraphs 3 and 4 of the Complaint, City Defendants admit that if this Court does have jurisdiction over some or all of the claims asserted, then venue would be proper in the District of Hawai‘i.

7. In response to paragraph 5 of the Complaint, City Defendants admit that 28 U.S.C. §§ 2201 and 2202 give the Court authority to grant declaratory relief and further necessary and proper relief based on a declaratory judgment or decree, but deny that such relief is warranted or appropriate in this case.

8. In response to paragraph 6 of the Complaint, City Defendants admit that final agency action has occurred for the Project, but deny that a viable justiciable controversy exists. City Defendants aver that final agency action was achieved in full compliance with all applicable laws, statutes, rules and regulations, and that Plaintiffs’ allegations to the contrary are based on mischaracterizations of facts and/or law and are otherwise unsupported or unsupportable.

9. In response to paragraph 7 of the Complaint, City Defendants admit that Plaintiff HonoluluTraffic.com is registered with the State of Hawai'i Department of Commerce & Consumer Affairs as a domestic nonprofit corporation, and that HonoluluTraffic.com submitted comment letters regarding the Project. City Defendants deny that the alternatives advocated by HonoluluTraffic.com in its comment letters were not evaluated in the FEIS in compliance with the National Environmental Policy Act and deny that HonoluluTraffic.com's comments and proposed alternatives were not evaluated or given full consideration during the federal environmental review process. City Defendants further deny that the Project will affect environmental, aesthetic, natural, recreational, cultural and/or historical resources in any manner that does not comport with applicable laws, rules or regulations and would give rise to an actionable harm to HonoluluTraffic.com. City Defendants aver that Defendants fully complied with all laws, statutes, rules and regulations applicable to the environmental review process for the Project, including but not limited to properly reviewing, considering and responding to comments submitted by HonoluluTraffic.com and all other timely submitted public comments, and adequately disclosing environmental impacts of the alternatives considered in the FEIS. City Defendants further aver that HonoluluTraffic.com's organizational and/or political reasons for opposing the Project, including its general

disagreement with the alternative approved by the FTA, are not actionable. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations so those allegations are denied until otherwise proven.

10. In response to paragraph 8 of the Complaint, City Defendants admit that Plaintiff Cliff Slater is registered with the State of Hawai‘i Department of Commerce & Consumer Affairs as the President and Director of Plaintiff HonoluluTraffic.com. The allegations regarding Mr. Slater having been “personally involved in the Project” are vague, ambiguous and misleading and are therefore denied. City Defendants aver that Mr. Slater did not exhaust administrative remedies. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining vague and ambiguous allegations in this paragraph which were calculated to suggest a basis for standing, including the allegations of generalized concerns about the impact of the Project on views and historic resources found in downtown Honolulu, and therefore deny said allegations and that Mr. Slater has standing in this action. Moreover, City Defendants aver that the Project’s potential impacts on views and historic resources were fully considered as part of the environmental review process and disclosed in the FEIS, along with appropriate mitigation measures. Mr. Slater has been a long time, vocal critic of the City’s efforts to provide relief

for traffic congestion in the primary transportation corridor along O‘ahu’s southern coast and most densely populated areas, and has continually opposed the promotion of public works projects to accomplish the objectives of the O‘ahu Metropolitan Planning Organization (“OMPO”). Mr. Slater’s personal and/or political differences of opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

11. In response to paragraph 9 of the Complaint, City Defendants admit Plaintiff Benjamin J. Cayetano’s recited prior public office positions. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations in this paragraph, including the vague and ambiguous allegations regarding Mr. Cayetano’s alleged time spent downtown and on Halekauwila Street, generalized concerns regarding the impact of the Project on the aesthetic appearance of these areas, or other vague and ambiguous allegations which were calculated to suggest a basis for standing, and therefore deny said allegations and that Mr. Cayetano has standing in this action. Further, City Defendants aver that Mr. Cayetano did not submit public comments regarding his alleged concerns with the Project during the environmental review process, or otherwise participate in any manner with the administrative process, and thus failed to exhaust appropriate administrative remedies. Moreover, City

Defendants aver that the Project's potential impacts on views and the aesthetics were fully considered as part of the environmental review process and disclosed in the FEIS, along with appropriate mitigation measures. Mr. Cayetano's personal and/or political differences of opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

12. In response to paragraph 10 of the Complaint, City Defendants admit Plaintiff Walter Heen's recited prior public office positions. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations in this paragraph, including the vague and ambiguous allegations regarding Mr. Heen's alleged concerns that the Project will be "destructive of the environment along and within the view of the proposed route" and cause disturbance to places of importance to Native Hawaiians, including burial sites, and other vague and ambiguous allegations calculated to suggest a basis for standing, and therefore deny said allegations and that Mr. Heen has standing in this action. City Defendants further deny that Mr. Heen's affiliation with the State of Hawai'i Office of Hawaiian Affairs ("OHA") provides an independent basis for him to personally allege violations of the laws, rules and regulations for the environmental review process without first participating in the public comment process and/or otherwise exhausting appropriate administrative

remedies. Moreover, City Defendants aver that the Project's potential impacts on views, aesthetics and Native Hawaiian culture (including the issues raised by OHA in its comment letter dated February 2, 2009) were fully considered as part of the environmental review process and disclosed in the FEIS, along with appropriate mitigation measures. Mr. Heen's personal and/or political differences in opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

13. In response to paragraph 11 of the Complaint, City Defendants admit Plaintiff Hawaii's Thousand Friends ("HTF") is registered with the State of Hawai'i Department of Commerce & Consumer Affairs as a domestic nonprofit corporation, with an original registration date of May 28, 1981. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations in this paragraph, including the vague and ambiguous allegations regarding HTF's members' use of and interest in lands and historic sites (including burials) which HTF alleges will be adversely affected by construction of the Project, as well as other vague and ambiguous allegations which were calculated to suggest a basis for standing, and therefore City Defendants deny said allegations and that HTF has standing in this action. City Defendants aver that the Project's potential impacts on lands and historic sites (including burials) were fully considered as part of the environmental review

process and disclosed in the FEIS, along with appropriate mitigation measures.

HTF's organizational and/or political differences of opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

14. In response to paragraph 12 of the Complaint, City Defendants admit that Plaintiff The Small Business Hawaii Entrepreneurial Education Foundation ("SBH") is registered with the State of Hawai'i Department of Commerce & Consumer Affairs as a domestic nonprofit corporation. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations in this paragraph, including the vague and ambiguous allegations calculated to suggest a basis for standing, and therefore deny said allegations and that SBH has standing in this action. Moreover, City Defendants aver that SBH did not submit public comments regarding its alleged concerns with the Project during the environmental review process, or otherwise participate in any manner in the administrative process, and thus failed to exhaust appropriate administrative remedies. Moreover, City Defendants aver that the Project's potential impacts on the environment were fully considered as part of the environmental review process and disclosed in the FEIS, along with appropriate mitigation measures. SBH's organizational and/or political differences in opinion

about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

15. In response to paragraph 13 of the Complaint, City Defendants admit Plaintiff Randall W. Roth's recited professional positions. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations in this paragraph, including the vague and ambiguous allegations calculated to suggest a basis for standing, and therefore deny said allegations and that Mr. Roth has standing in this action. Moreover, City Defendants aver that Mr. Roth did not submit public comments regarding his alleged concerns with the Project during the environmental review process, or otherwise participate in any manner with this administrative process, and thus failed to exhaust appropriate administrative remedies. Moreover, City Defendants aver that the Project's potential impacts on view planes, aesthetics and the environment were fully considered as part of the environmental review process and disclosed in the FEIS, along with appropriate mitigation measures. Mr. Roth's personal and/or political differences in opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

16. In response to paragraph 14 of the Complaint, City Defendants are without sufficient knowledge or information to form a belief as to the truth or

accuracy of the allegations in this paragraph, including the vague and ambiguous allegations calculated to suggest a basis for standing, and therefore deny said allegations and that Plaintiff Michael Uechi, M.D., has standing in this action. Moreover, City Defendants aver that Dr. Uechi's concerns, as articulated during the public comment period of the environmental review process and in paragraph 14 of the Complaint were fully considered and responded to as part of the environmental review process, and the potential impacts identified were disclosed in the FEIS, along with appropriate mitigation measures. Dr. Uechi's personal and/or political differences in opinion about the desirability of the Project or the appropriateness of the decisions by DTS and the FTA in light of these disclosed impacts are not actionable.

17. In response to paragraph 15 of the Complaint, City Defendants deny that all Plaintiffs have participated in the public process related to the approval of the Project and have exhausted available administrative remedies. City Defendants are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations so those allegations are denied until otherwise proven.

18. In response to paragraph 16 of the Complaint, City Defendants admit that the FTA is an agency within the U.S. Department of Transportation and was the joint lead agency with the City and County of Honolulu for the Project. City

Defendants further admit that the FTA issued a Record of Decision (“ROD”) for the Project. City Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 16 and affirmatively state that the Defendants’ actions with respect to the Project were taken in full compliance with all laws, rules and regulations applicable to the environmental review process.

19. In response to paragraph 17 of the Complaint, City Defendants admit that Leslie Rogers is the Regional Administrator of Region IX of the FTA, which includes western states, territories, and Hawai‘i, and that Mr. Rogers signed the ROD on behalf of the FTA. City Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 17 and affirmatively state that the Defendants’ actions with respect to the Project were taken in full compliance with all laws, rules and regulations applicable to the environmental review process.

20. In response to paragraph 18 of the Complaint, City Defendants admit that Peter Rogoff is the FTA Administrator. City Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 18 and affirmatively state that the Defendants’ actions with respect to the Project were taken in full compliance with all laws, rules and regulations applicable to the environmental review process.

21. In response to paragraph 19 of the Complaint, City Defendants admit that the FTA is an agency within the U.S. Department of Transportation. City

Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 19 and affirmatively state that the Defendants' actions with respect to the Project were taken in full compliance with all laws, rules and regulations applicable to the environmental review process.

22. In response to paragraph 20 of the Complaint, City Defendants admit that Ray LaHood is the Secretary of Transportation. City Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 20 and affirmatively state that the Defendants' actions with respect to the Project were taken in full compliance with all laws, statutes, rules and regulations applicable to the environmental review process.

23. In response to paragraph 21 of the Complaint, City Defendants admit the existence of the City and County of Honolulu as a governmental entity on the island of O'ahu in the State of Hawai'i. City Defendants further admit that DTS served as joint lead agency for the Project with the FTA. City Defendants deny the remaining allegations and other characterizations and conclusions in paragraph 21 and affirmatively state that the Defendants' actions with respect to the Project were taken in full compliance with all laws, statutes, rules and regulations applicable to the environmental review process.

24. In response to paragraph 22 of the Complaint, City Defendants admit that Wayne Yoshioka is the Director of DTS, but deny that the Court has

jurisdiction over him that is separate and apart from the City and County of Honolulu in this dispute. City Defendants deny the remaining allegations, and other characterizations and conclusions in paragraph 22, and affirmatively state that the Defendants' actions with respect to the Project were taken in full compliance with all laws, statutes, rules and regulations applicable to the environmental review process.

25. In response to paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Complaint, City Defendants submit that the allegations contained therein are incomplete, vague, ambiguous and/or mischaracterizations of the information about the Project disclosed in the FEIS and, therefore, City Defendants deny those allegations as stated. The allegations in said paragraphs selectively refer to and/or paraphrase the FEIS descriptions of the Project in a manner that distorts, takes out of context, and/or ignores the full, correct and accurate picture as set forth within the uncited provisions of the FEIS document. City Defendants aver that the FEIS speaks for itself and deny the allegations in the aforementioned paragraphs to the extent that they misrepresent, deviate, mischaracterize or distort the information about the Project described within the four corners of the FEIS.

26. In response to paragraph 55 of the Complaint, City Defendants submit that the allegations contained therein are vague, ambiguous and overbroad and, therefore, City Defendants deny those allegations as stated. Notwithstanding the

foregoing, City Defendants admit that in or about November 2002, DTS issued a document entitled “Final Environmental Impact Statement for the Primary Corridor Transportation Project,” and that in or about July 2003, the FTA and DTS jointly issued a separate document entitled “Primary Corridor Transportation Project, Final Environmental Impact Statement.” Said documents are public records and otherwise speak for themselves. City Defendants aver that the FEIS at 1-1 through 1-5 and other sections of the FEIS provides an appropriate description of the history of the Project and, therefore, City Defendants further deny the allegations in paragraph 55 to the extent that they mischaracterize or distort the factual background as set forth in the FEIS.

27. In response to paragraph 56 of the Complaint, City Defendants submit that the allegations contained therein are vague, ambiguous and overbroad and, therefore, City Defendants deny those allegations as stated. Notwithstanding the foregoing, City Defendants admit that on or about December 7, 2005, FTA published a notice of intent to prepare an alternatives analysis and EIS related to the Project in the *Federal Register*. City Defendants submit that said document is a public record and speaks for itself; however, City Defendants note that said document expressly provided in part that: “Alternatives proposed to be considered in the AA and draft EIS include No Build, Transportation System Management, Managed Lanes, and Fixed Guideway Transit.” City Defendants further admit that

on or about December 8, 2005, DTS published an EIS Preparation Notice related to the Project in the *State of Hawai'i Environmental Notice*. City Defendants submit that said document is a public record and speaks for itself; however, City Defendants note that said document expressly provided in part that “the purpose of the [Project] is to provide improved person-mobility in the highly congested east-west corridor[.]” City Defendants aver that the FEIS at 1-1 through 1-5 and other sections of the FEIS provides an appropriate description of the history of the Project and, therefore, City Defendants deny the allegations in paragraph 56 to the extent that they mischaracterize or distort the factual background as set forth in the FEIS.

28. In response to paragraphs 57 and 58 of the Complaint, City Defendants admit that the Alternatives Screening Memo Honolulu High-Capacity Transit Corridor Project (“2006 Alternatives Screening Memo”), which describes the initial screening of various alternative modes of travel, technologies and alignments for the study corridor, was prepared on or about October 24, 2006, consistent with FTA guidance on New Starts projects. City Defendants submit that the 2006 Alternatives Screening Memo is a public record and speaks for itself. Therefore, to the extent that allegations set forth in paragraph 57 and 58 regarding the 2006 Alternatives Screening Memo are incomplete, inconsistent with the 2006 Alternatives Screening Memo, attempt to re-characterize the information contained

within that document, or seek to attribute any meaning or relevance to that document, said allegations are denied. The remaining allegations contained within paragraphs 57 and 58 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

29. In response to paragraphs 59 and 60 of the Complaint, City Defendants admit that the Honolulu High-Capacity Transit Corridor Project Alternatives Analysis Report (“2006 Alternatives Report”), which provided further analysis of the four alternatives that were advanced from the 2006 Alternatives Screening Memo (*i.e.*, the No Build Alternative, Transportation System Management Alternative, Managed Lane Alternative, and Fixed Guideway Alternative), was produced on or about November 1, 2006. City Defendants submit that the 2006 Alternatives Report is a public record and speaks for itself. Therefore, to the extent that allegations set forth in paragraphs 59 and 60 regarding the 2006 Alternatives Report are incomplete, inconsistent with the 2006 Alternatives Report, attempt to re-characterize the information contained within that document, or seek to attribute meaning or relevance to that document, said allegations are denied. The remaining allegations contained within paragraphs 59 and 60 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

30. In response to paragraph 61 of the Complaint, City Defendants admit that following review of the alternatives analysis materials and consideration of nearly 3,000 comments received from the public, the City Council selected the Fixed Guideway Transit System as the Locally Preferred Alternative on December 22, 2006. Any remaining allegations contained within paragraph 61 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

31. In response to paragraph 62 of the Complaint, City Defendants admit only that on or about March 15, 2007, the FTA published a Notice of Intent to Prepare an Environmental Impact Statement in the *Federal Register*, which requested public and agency input on proposed alternatives, the Purpose and Need, and the range of issues to be evaluated in the EIS. The remaining allegations contained within paragraph 62 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

32. In response to paragraph 63 of the Complaint, City Defendants admit that HonoluluTraffic.com and other persons and entities submitted written statements in response to the referenced Notice of Intent to Prepare an Environmental Impact Statement. City Defendants submit that all such written statements speak for themselves. Therefore, to the extent that allegations set forth in paragraph 63 are incomplete, inconsistent with those written statements, attempt

to re-characterize the content of those statements, or seek to attribute any meaning or relevance to those statements, said allegations are denied.

33. In response to paragraph 64 and 65 of the Complaint, the City Defendants admit that as part of the technical review process, various transit vehicle manufacturers provided submittals detailing features of different vehicle technologies. City Defendants further admit that an independent panel of transit technology experts performed an extensive evaluation of the various proposed transit technologies and prepared a report summarizing its evaluation, which speaks for itself. City Defendants further admit that the steel wheel on steel rail technology was subsequently identified as the preferred technology for the Project. The remaining allegations contained within paragraph 64 and 65 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

34. In response to paragraph 66 of the Complaint, City Defendants admit that the FTA and DTS jointly prepared and issued the Draft Environmental Impact Statement (the "DEIS") for the Project in November 2008, and that the DEIS evaluated four alternatives in detail identified as a result of the alternatives screening process and NEPA scoping process. City Defendants deny that other alternatives were not evaluated during the federal environmental review process. City Defendants aver that appropriate alternatives were evaluated under FTA's

“New Starts” procedures and guidelines. City Defendants further submit that the DEIS speaks for itself. Therefore, to the extent that allegations set forth in paragraph 66 are incomplete, inconsistent with the DEIS, attempt to re-characterize the content of the DEIS, or seek to attribute any meaning or relevance to the DEIS, said allegations are denied. Any remaining allegations contained within paragraph 66 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

35. In response to paragraph 67 of the Complaint, City Defendants submit that any written comments to the DEIS speak for themselves. Therefore, to the extent that allegations set forth in paragraph 67 are incomplete, inconsistent with those comments, attempt to re-characterize the contents of those comments, or seek to attribute any meaning or relevance to those comments, said allegations are denied. Any remaining allegations contained within paragraph 67 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

36. In response to paragraphs 68 and 69 of the Complaint, City Defendants admit that HonoluluTraffic.com submitted written comments in connection with the DEIS. City Defendants submit that said written comments speak for themselves. Therefore, to the extent that allegations set forth in paragraphs 68 and 69 are incomplete, inconsistent with those comments, attempt to

re-characterize the contents of those comments, or seek to attribute any meaning or relevance to those comments, said allegations are denied. City Defendants further admit and aver that Defendants fully considered and responded to all timely submitted comments from HonoluluTraffic.com regarding the DEIS. The exact contents and context in which these responses were provided are included as part of the FEIS and speak for themselves. Any allegations set forth in paragraphs 68 and 69 that are incomplete, inconsistent with any such response, attempt to re-characterize the contents of any such response, or seek to attribute any meaning or relevance to any such response are denied. Any remaining allegations contained within paragraphs 68 and 69 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

37. In response to paragraph 70 of the Complaint, City Defendants admit that the FTA and DTS jointly prepared and issued the FEIS for the Project in June 2010. The remaining allegations in paragraph 70 are vague, ambiguous, overbroad, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

38. In response to paragraph 71 of the Complaint, City Defendants admit that HonoluluTraffic.com and others submitted written comments in connection with the FEIS. City Defendants submit that said written comments speak for themselves. Therefore, to the extent that allegations set forth in paragraph 71 are

incomplete, inconsistent with those comments, attempt to re-characterize the contents of those comments, or seek to attribute any other meaning or relevance to those comments, said allegations are denied. Any remaining allegations contained within paragraphs 71 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

39. In response to paragraph 72 of the Complaint, City Defendants admit that various consulting parties executed the PA for the Project in January 2011. City Defendants submit that the PA speaks for itself. Therefore, to the extent that allegations set forth in paragraph 72 are incomplete, inconsistent with the PA, attempt to re-characterize the content of the PA, or seek to attribute any other meaning or relevance to the PA, said allegations are denied. City Defendants deny that the PA only “purported” to be in compliance with NHPA and affirmatively aver that the PA comports with the applicable requirements of the NHPA and its implementing regulations, which specifically allow for the handling of this Project and related historic properties by a programmatic agreement, as well as the use of a phased approach to the identification and treatment of certain properties as set forth in 36 CFR § 800.4. All remaining allegations contained within paragraph 72 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

40. In response to paragraph 73 of the Complaint, City Defendants admit that the FTA issued the ROD on January 18, 2011, as executed by Defendant Rogers acting in his official capacity on behalf of the FTA. City Defendants submit that the ROD speaks for itself. Therefore, to the extent that allegations set forth in paragraph 73 are incomplete, inconsistent with the ROD, attempt to re-characterize the contents of the ROD, or seek to attribute any meaning or relevance to the ROD, said allegations are denied. All remaining allegations contained within paragraph 73 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

41. In response to paragraph 99 of the Complaint, City Defendants admit that a Section 4(f) analysis was performed for the Project. Any remaining allegations contained within paragraph 99 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

42. In response to paragraphs 100 and 101 of the Complaint, City Defendants submit that the FEIS speaks for itself, and therefore deny the allegations contained in said paragraphs, which are incomplete, inconsistent with the FEIS, attempt to re-characterize the contents of the FEIS, or seek to attribute meaning or relevance to the FEIS. City Defendants further object to the allegations in paragraphs 100 and 101 as vague, ambiguous, misleading and/or incomplete and, therefore, deny those allegations as stated. City Defendants aver

that the potential impact of the Project on any possible yet-to-be discovered historical, cultural and/or archaeological resources (including Native Hawaiian burials) was fully considered and disclosed in the FEIS and PA. Moreover, appropriate mitigation measures, and procedures for handling and protecting such resources were developed in consultation with SHPD, the Hawai'i State Historic Preservation Officer ("SHPO") and numerous other Section 106 consulting parties and are set forth in the FEIS, PA and other documents. In a prior lawsuit filed in the First Circuit Court, State of Hawai'i pertaining to the Project's disclosure of potential impacts to and plan for handling historical, cultural and/or archaeological resources, the court therein concluded that there was no violation of applicable Hawai'i laws and that the City was entitled to summary judgment as a matter of law. That ruling should be entitled to deference or comity.

43. In response to paragraphs 102 and 103 of the Complaint, City Defendants object to the allegations contained therein as vague, ambiguous, misleading and/or incomplete and, therefore, City Defendants deny those allegations as stated. City Defendants submit that any documents referenced in paragraphs 102 and 103 speak for themselves and, therefore, deny any allegations contained in said paragraphs, which are incomplete, inconsistent with those documents, attempt to re-characterize the contents of those documents, or seek to attribute meaning or relevance to those documents. City Defendants aver that the

PA, which was developed in consultation with and signed by Hawai'i's SHPO, expressly provides for a comprehensive phased approach to the identification and treatment of archaeological resources, as allowed under 36 CFR § 800.4. This phased approach to archaeological resources was incorporated by reference into the FEIS and ROD, and is proceeding as expressly provided for in the PA. These issues were already resolved in favor of the City Defendants in a prior challenge under State law in State court, which is entitled to judicial deference or comity.

44. In response to paragraph 111 of the Complaint, City Defendants admit that the referenced documents identify alternatives to the Project, but deny the remaining allegations in paragraph 111. City Defendants aver that appropriate consideration was given to alternatives and that the decision to proceed with the Project was made in full compliance with all applicable statutes, rules and regulations.

45. In response to paragraph 112 of the Complaint, City Defendants object to the allegations contained therein as improper argument and legal conclusions, and, therefore, deny said allegations. City Defendants aver that all reasonable and prudent alternatives were properly considered, as required by the statutes, rules and regulations applicable to this Project.

46. In response to paragraph 113 of the Complaint, City Defendants submit that the 2006 Alternatives Report speaks for itself. Therefore, to the extent

that allegations set forth in paragraph 113 are incomplete, inconsistent with the 2006 Alternatives Report, attempt to re-characterize the contents of the 2006 Alternatives Report, or seek to attribute any meaning or relevance to that document, said allegations are denied. All remaining allegations contained within paragraph 113 are vague, ambiguous, misleading and/or incomplete and, therefore, City Defendants deny those allegations as stated.

47. In response to paragraph 115 of the Complaint, City Defendants submit that the public documents referenced speak for themselves. Therefore, to the extent that allegations set forth in paragraph 115 are incomplete, inconsistent with those documents, attempt to re-characterize the content of those documents, or seek to attribute any other meaning or relevance to those documents, said allegations are denied. All remaining allegations contained within paragraph 115 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

48. In response to paragraph 116 of the Complaint, City Defendants submit that the documents referenced speak for themselves. Therefore, to the extent that allegations set forth in paragraph 116 are incomplete, inconsistent with the referenced documents, attempt to re-characterize the contents of the referenced documents or seek to attribute any meaning or relevance to those documents, said allegations are denied. All remaining allegations contained within paragraph 116

are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated.

49. In response to paragraph 121 of the Complaint, City Defendants admit that the Federal Transit Administration's approval of the project is subject to Section 106 of the NHPA, and aver that all necessary consultation and other requirements of Section 106 were satisfied, as disclosed in the FEIS, PA, ROD and other documents.

50. In response to paragraph 122 of the Complaint, City Defendants admit that various consulting parties executed the PA for the Project in January 2011, but submit that the PA speaks for itself. Therefore, to the extent that allegations set forth in paragraph 122 are incomplete, inconsistent with the PA, attempt to re-characterize the contents of the PA, or seek to attribute any meaning or relevance to the PA, said allegations are denied. All remaining allegations contained within paragraph 122 are vague, ambiguous, misleading or incomplete and, therefore, City Defendants deny those allegations as stated. City Defendants aver that the PA, which was developed in consultation with and signed by Hawai'i's SHPO, expressly provides for a comprehensive phased approach to the identification and treatment of archaeological resources, as allowed under 36 CFR § 800.4. This phased approach to archaeological resources was incorporated by reference into the FEIS and ROD, and is proceeding as expressly provided for in the PA. These

issues were resolved in favor of the City Defendants in a prior challenge under State law in State court.

51. In response to paragraphs 74, 78, 86, 94, 97, 105, 109 and 119 of the Complaint, City Defendants restate, reallege and incorporate all applicable responses above.

52. In response to the PRAYER FOR RELIEF of the Complaint, City Defendants deny all grounds stated for Relief.

53. City Defendants further deny each and every allegation not specifically admitted above.

THIRD DEFENSE:

54. The Court lacks subject matter jurisdiction over some or all of the alleged claims in the Complaint.

FOURTH DEFENSE:

55. Plaintiffs lack standing to assert some or all of the claims in the Complaint.

FIFTH DEFENSE:

56. Plaintiffs failed to exhaust their administrative remedies and/or waived the right to assert some or all of the claims in the Complaint.

SIXTH DEFENSE:

57. Plaintiffs' claims are not ripe for judicial review.

SEVENTH DEFENSE:

58. Plaintiffs' claims are moot, or were otherwise previously resolved for environmental and/or historical review compliance by a prior Hawai'i state court action on the same or related issues under State law.

EIGHTH DEFENSE:

59. Plaintiffs' claims are barred or precluded from review by the doctrine of primary jurisdiction.

NINTH DEFENSE:

60. Plaintiffs failed to name and identify parties who are required to be joined in the action under Rule 19 of the Federal Rules of Civil Procedure, including but not limited to the Honolulu Authority for Rapid Transportation, City and County of Honolulu.

TENTH DEFENSE:

60. Plaintiffs' claims are barred by the doctrine of laches.

WHEREFORE, Defendants request the Court to enter a judgment dismissing Plaintiffs' Complaint against the City Defendants with prejudice, and award City Defendants such additional and further relief as the Court deems just, equitable and proper.

Respectfully Submitted, July 18, 2011

/s/ Lindsay N. McAneeley

ROBERT D. THORNTON

EDWARD V.A. KUSSY

JOHN P. MANAUT

LINDSAY N. MCANEELEY

ROBERT C. GODBEY

DON S. KITAOKA

GARY Y. TAKEUCHI

Attorneys for City Defendants