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Attorneys for Plaintiffs

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	Civil No. 11-00307 AWT **PLAINTIFFS' REPLY IN SUPPORT OF OBJECTION TO NOTICE OF COMPLIANCE**

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 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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Rather than undertaking the open-minded reconsideration of the Beretania Street Tunnel Alternative ordered by this Court, Defendants have prepared a *post hoc* rationalization designed to make their preferred elevated heavy rail route (known as "the Project") look good by comparison.

To make the Beretania Street Tunnel Alternative seem as damaging as possible, Defendants inaccurately assumed that would requires the use and demolition of various historic (and allegedly-historic) properties.

To make the Beretania Street Tunnel Alternative seem as expensive as possible, Defendants (1) included a costly and unnecessary station at Ka'aahi and (2) misleadingly compared the longest and costliest version of the Beretania Street Tunnel Alternative to the shortest and least costly version of the Project.

To make the Beretania Street Tunnel Alternative seem as environmentally disruptive as possible, Defendants expressed concerns about a number of environmental "factors," but failed to disclose that those same "factors" are equally applicable to the Project.

And throughout this sorry exercise in *post hoc* rationalization, Defendants failed properly to apply Section 4(f) of the Department of Transportation Act and its implementing regulations.

More fundamentally, Defendants' zealous efforts to rationalize their predetermined outcome ignored the forest for the trees. The fundamental purpose

of Section 4(f) — the reason for undertaking this re-evaluation — is to avoid using historic resources for transportation projects. 49 U.S.C. § 303(a). And even under the biased, arbitrary and capricious analyses in Defendants' Supplemental Environmental Impact Statement ("SEIS"), the historic resources that would be used by the Project are ***more numerous*** and have ***greater cultural significance*** than those implicated by the Beretania Street Tunnel Alternative.

In this regard, the Chinatown Historic District merits special note. The National Register of Historic Places identifies Chinatown as the most extensive and well-preserved historic neighborhood in Honolulu. AR 152845. As explained in greater detail below, Defendants' own studies admit that the Project would adversely affect the Chinatown Historic District in numerous respects. AR 39837-39. Any reasonable view of "the forest" would conclude that the Beretania Street Tunnel Alternative's complete avoidance of impacts to Chinatown is vastly more important than the alleged impacts to a dilapidated, never-studied, heavily-modified florist building on which Defendants have (erroneously) based their decision.

Plaintiffs respectfully request that Defendants' SEIS, Defendants' Amended Record of Decision ("ROD"), and the analyses contained in those documents be invalidated as arbitrary and capricious.

I. Defendants' Analysis Of The Beretania Street Tunnel Alternative Was Arbitrary And Capricious

Defendants' Section 4(f) evaluation of the Beretania Street Tunnel Alternative is memorialized in Chapter 3 of the SEIS. AR 153887-153941. That evaluation was arbitrary and capricious in multiple respects.

As explained in Section I.A, Defendants' *post hoc* rationalization of the Project relies on inaccurate assumptions, flawed financial calculations, and admitted violations of Section 4(f)'s implementing regulations.

As explained in Section I.B, Defendants compounded those errors by concluding that the Project is the "least harm" Section 4(f) alternative despite the fact that the Beretania Street Tunnel Alternative would cause less harm to historic resources and parklands protected by the statute.[1]

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

Section 4(f) prohibits approval of a transportation project that would use an historic resource or a public park unless there is no feasible and prudent avoidance alternative. 49 U.S.C. § 303(c); 23 C.F.R. § 774.3.

[1] The SEIS provided limited information in response to Plaintiffs' questions about the Project's purpose and need. AR 154085. Plaintiffs originally objected to the SEIS on that ground. Pl. Objection at 25-26. Since that time, Defendants have provided additional information in their briefs and in the recently-lodged supplemental administrative record. That information satisfies Plaintiffs' concerns. Plaintiffs withdraw the argument in part V of their moving papers (Pl. bjection at 25-26).

This Court ordered Defendants to evaluate 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,[2] and directed that such evaluation be carried out with an "open mind."[3] Summary Judgment Order (Dkt. 182) at 27; Remedy Phase Transcript (Dkt. 197) at 5:1-11.

Under Section 4(f), the legal questions to be answered in such an analysis must include (1) whether the alternative avoid using Section 4(f) resources and (2) whether the alternative is feasible and prudent. *See* 23 C.F.R. § 774.17 (definition of "feasible and prudent avoidance alternative"). Defendants' SEIS failed in both respects.

1. Defendants Inaccurately Assumed That The Beretania Street Tunnel Alternative Must Use 4(f) Resources

The SEIS inaccurately assumes that the Beretania Street Tunnel Alternative must use the King Florist building, McKinley High School, and the OR&L property. AR 153905-13. On the basis of that inaccurate assumption, Defendants

[2] It is undisputed that the Project would use both the Chinatown Historic District and the Dillingham Transportation Building.

[3] The Supreme Court has likewise recognized the danger — and, for an agency, the temptation — of *post hoc* rationalization during a re-consideration process. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420-21 (1971); (danger of *post hoc* rationalization after remand; agency explanation "must be viewed critically"); *see also Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985) (same).

concluded that the Beretania Street Tunnel Alternative does not avoid using Section 4(f) resources. AR 153913. As explained below, that conclusion was arbitrary and capricious.

a. King Florist

The SEIS assumes that the Beretania Street Tunnel Alternative will effect a Section 4(f) use by demolishing the King Florist building. AR 153911. As explained in Plaintiffs' moving papers, there are two problems with that assumption: (1) there is no evidence that King Florist is historic and (2) King Florist need not be demolished. Pl. Objections at 12-15.

King Florist Is Not Historic

Defendants' analysis of King Florist is predicated on the assumption that the building is an historic site protected by Section 4(f). AR 153911. The record simply does not support that assumption.

In order to qualify as an historic site, King Florist must be eligible for listing in the National Register. 23 C.F.R. § 774.17 (definition of "historic site"). To be eligible for listing in the National Register, the building must meet at least one of four eligibility criteria and retain its historic integrity.[4] 36 C.F.R. § 60.4.

[4] Historic integrity generally refers to the extent to which a building remains in its original, historic state. *See* National Register of Historic Places Bulletin 15, § VIII (*available at* http://www.nps.gov/nr/publications/bulletins/pdfs/nrb15.pdf).

The SEIS includes a conclusory statement to the effect that King Florist is "potentially eligible" for listing in the National Register under "Criterion C." AR 153911. Criterion C establishes National Register eligibility for buildings that are distinctive, are the work of a master architect, or that possess high artistic value. 36 C.F.R. § 60.4. But the record contains no ***evidence*** or ***analysis*** demonstrating that King Florist satisfies that standard. AR 153911.

Defendants' briefing likewise fails to identify evidence of King Florist's eligibility for the National Register. City at 15-16; Fed. at 9-12. Defendants refer to a chart appended to a "Draft Historic and Archaeological Technical Report." City at 15-16; Fed. at 10. But that chart does ***not*** conclude that King Florist is eligible for listing in the National Register; rather, it states that more research is needed to confirm whether eligibility criteria have been met. AR 61856 (chart designating King Florist "NMR"); AR 61852 ("NMR" means "needs more research").[5] There is no evidence that the necessary research was ever performed. And the final version of the "Historic Technical Report" says nothing about King Florist. AR 37883-38014 (final report); 38015-38038 (chart appended to final report).

It is also worth noting that Defendants have made no argument whatsoever on the issue of historic integrity. They do not dispute that historic integrity is

[5] The City also cites a second page of the 2006 Draft Report (City at 15-16 citing AR 61827), but that page does not even mention King Florist. *See* AR 61827.

required for National Register Eligibility. *See* 36 C.F.R. § 60.4. Nor do they dispute the photographic evidence of substantial modifications to King Florist — and the building's consequent loss of historic integrity — timely submitted by Plaintiffs during the SEIS process. *See* AR 154078-79 (comment Den-5 and response thereto).

Essentially conceding that the record does not support King Florist's eligibility for listing in the National Register, Defendants invite the Court to uphold their analysis on the ground that it reflects a "consistent" effort to apply a "protective" approach to Section 4(f). City at 15-16; Int. at 8-10.

Contrary to their assertion, Defendants have ***not*** consistently extended Section 4(f) protections to non-historic sites. In fact, throughout this litigation Defendants have argued for just the opposite: a restrictive view of Section 4(f) under which the statute's distinctive concept of "use" only applies to property that has conclusively been determined historic. Two examples:

- "Plaintiffs are simply wrong in claiming … burials are automatically eligible for listing on the National Register without a specific eligibility determination … [s]ites are only subject to Section 4(f) if they are 'on or eligible for inclusion on the National Register'" City Motion for Summary Judgment (Dkt. 145-1) at 32.
- "Now, I know Your Honor is entirely familiar as a result of this case…but just to restate that section 4(f) applies only to historic

> sites determined to be eligible for inclusion on the National Register." Remedies Phase Transcript (Dkt 197) at 23.

Defendants fail to address or explain these prior representations to the Court. City at 11-15; Fed. at 8-12; Int. at 8-10.

King Florist Need Not Be Demolished

The SEIS concluded that the King Florist building must be demolished to make way for the McCully rail station. AR 153911. In doing so, it erroneously assumed that Beretania Street Tunnel Alternative must be positioned directly against the buildings on the south side of King Street. *Id*.; *see also* 154078-79 (comment Den-5 and response thereto). If the rail line were positioned over the center of the street — as it is in virtually all other portions of its route — there would be no need to demolish King Florist. *See* AR 153911.

The Federal Defendants argue that Plaintiffs waived this argument by failing to raise it during the SEIS process. Fed. at 10-11. They are mistaken. Plaintiffs' comments on the Draft SEIS explicitly state:

> "There is no reason to believe that the guideway must butt up against the buildings on the south side of King Street (in other portions of the Project, the guideway is positioned over the middle of the street)."

AR 154079 (comment Den-5). That was more than enough to alert the FTA and the City to Plaintiffs' position. Therefore, the argument was not waived. *Lands*

Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010) (no waiver where "enough clarity is provided that the decision maker understands the issue raised"); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (no waiver where party "alerted the agency to its position and claims").

The Federal Defendants also assert that positioning the Beretania Street Tunnel Alternative over the middle of King Street is impractical because it would require "a very large aerial structure" that could create "engineering complexities as well as [ ] obvious visual impacts." Fed. at 11. This argument appears nowhere in the SEIS, and, for that reason alone, it must be rejected. AR 153911, 154078-79 (SEIS); *Motor Vehicle Mfrs. Ass'n v. State farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action can only be upheld on basis stated during the administrative process). Moreover, Defendants' preferred Project already proposes "a very large aerial structure" that creates "obvious visual impacts"; it would be arbitrary and capricious to reject the Beretania Street Tunnel Alternative on the basis of those same factors. *Se. Alaska Conservation Council v. Fed. Hwy. Admin.*, 649 F.3d 1050, 1059 (9th Cir. 2011).

b. McKinley High School

The McKinley High School campus covers approximately 8 acres along the route of the Beretania Street Tunnel Alternative. AR 153888, 153909-10 (location); 154088 (acreage). A portion of the campus is listed on the National

Register of Historic Places and is therefore an "historic site" protected by Section 4(f); the remainder of the campus is not. AR 154086-90. The National Register contains a map establishing a clear boundary line separating the historic, 4(f)-protected portion of McKinley High School from the remainder of the campus. AR 154090.

Defendants' SEIS states that the Beretania Street Tunnel Alternative would use McKinley High School by incorporating a small portion of the campus into the Pensacola rail station. AR 153909. No other basis for a "use" finding is identified. *Id*.[6]

In their comments on the Draft SEIS, Plaintiffs pointed out that the portion of the McKinley High School campus proposed to be incorporated into the Pensacola station is clearly outside the boundary of the National Register-listed historic site and, for that reason, the Beretania Street Tunnel Alternative would not effect a "use" within the meaning of Section 4(f). SEIS at A-76 (comment Den-4).

In the final SEIS, Defendants justified their use finding on the basis of a guidance document known as the Section 4(f) Policy Paper. *See* AR 154078. (response to comment Den-4).

[6] The Federal Defendants insinuate an alternative basis for finding a use of McKinley High School by repeatedly mentioning "visual impacts." Fed. at 8-9. But the SEIS is quite clear: The use of McKinley High School is limited to incorporation of a small sliver of land into the Pensacola rail station. *See*, *e.g.*, AR 153909 ("the use is limited to a grassy area adjacent to King Street").

Plaintiffs' moving papers then explained that the Policy Paper language on which the SEIS relied is inapplicable to the McKinley High School campus. Pl. Objection at 11. By its own terms, the language applies where the boundaries of an historic site have not yet been established. Section 4(f) Policy Paper at 28.[7] It does not apply where, as here, the National Register provides a clear and explicit boundary line. *Id*.

None of the Defendants contends that the land proposed to be incorporated into the Pensacola station is within the National Register boundary McKinley High School. City at 10-15; Fed. at 8-9; Int. at 8-10. Instead, they ask the Court to uphold their analysis on the ground that 23 C.F.R. § 774.11(e)(1) allows them to apply Section 4(f) to non-historic sites and that they have consistently followed this "protective" approach. City at 11-15; Fed. at 8-9.

There are two fundamental, fatal problems with Defendants' argument. First, as explained above, Defendants have ***not*** consistently applied a "protective" approach to Section 4(f). Second, the SEIS states that Defendants based their use finding for McKinley High School on specific language from the Policy Paper, not on 23 C.F.R. § 774.11(e)(1). AR 154078. (response to comment Den-4). An agency's decision can only be upheld (if at all) on the basis articulated in the

[7] The Section 4(f) Policy Paper is attached to the Declaration of Matthew Adams (Dkt. 257-1).

decision itself. *Motor Vehicle*, 463 U.S. at 43. Therefore, the SEIS cannot be upheld on the basis of 23 C.F.R. § 774.11(e)(1).

Defendants strenuously argue that their analysis of McKinley High School is consistent with their "protective" analysis of three other sites — the Dillingham Transportation Building, the Chinatown Historic District, and the OR&L property. City at 13-15; Fed. at 9. But none of the three examples supports Defendants' position:

- The National Register defines the boundary of the Chinatown Historic District. AR 718-21, 152852, 153937. The Project will cross the National Register-defined boundary and pass directly through the District. *Id*.
- The National Register also defines the boundary of the Dillingham Transportation Building historic site. AR 39878. The Project will use a portion of the property within that boundary. *Id*.
- The OR&L property is not listed on the National Register (though it is eligible for listing), and therefore lacks Register-defined boundaries. According to Defendants' SEIS, however, the entire property is historic. AR 153906-07 (referring to property as National Register-eligible). The Project would cross through the property boundaries. *Id.*

In sum, each of the three examples cited by Defendants involves a situation where the Project will directly use land from within the boundary of an historic site.[8] In contrast, the Beretania Street Tunnel Alternative will remain entirely outside of the National Register-defined boundary of the historic site at McKinley High School.

c. The OR&L Property

The Oahu Railway & Land (or "OR&L") property has been determined eligible for listing in the National Register of Historic Places and is therefore protected by Section 4(f).[9]

Defendants' SEIS assumes that the Beretania Street Tunnel Alternative will use the OR&L property for an underground rail station at Ka'aahi. AR 153906-09. But, as explained in Plaintiffs' moving papers, there is no evidence justifying (or even purporting to justify) the need for an underground rail station at this location. Pl. Objection at 9-10. Indeed, the record shows that the Ka'aahi station would be within 1,500 feet of the site of the Iwilei rail station. AR 153888, 153906-09.

None of the Defendants identifies record evidence supporting, justifying, or even addressing the underlying need for an underground station at Ka'aahi. City at 7-10; Fed. at 6-7. Instead, Defendants try to sidestep the issue by asserting that

[8] The HECO Downtown Plant, mentioned in passing by the Federal Defendants (Fed. at 9) involves a similar situation: the Project will directly use land from within the boundary of the historic site. AR 727.

[9] The property also contains several resources which are individually eligible for listing.

"Iwilei is a station on the Project alignment - not on the [Beretania] Tunnel Alternative alignment." Int. at 8; *see also* City at 7-8 (same), Fed. at 6-7 (same).[10]

This is only accurate in a hyper-technical sense: The Beretania Street Tunnel Alternative is east of Iwilei Station; therefore, Iwilei Station is technically part of the "Project" rather than the Beretania Street Tunnel Alternative. AR 153887 (2006 Alternatives Analysis contains definition of Beretania Street Tunnel Alternative); AR 49569-71 (2006 Alternatives Analysis defines Beretania Street Tunnel Alternative as extending east of Iwilei).

Defendants' proposed distinction between the Iwilei and Ka'aahi stations does not explain why a rail station is necessary in the first place. See AR 154078 (comment Den-3, raising issue); AR 154079 (response to Den-3 fails to address). If there is no need to put a station in this area, the OR&L property need not be used. For this reason, too, Defendants' analysis is arbitrary and capricious.

[10] The City pushes the argument farther than its co-Defendants, boldly asserting that Iwilei is not "common to the Project and the Beretania Street Alternative." City at 8. Plaintiffs note that just four months ago, while seeking permission to proceed with property acquisitions near Iwilei, the City submitted to the Court a map suggesting that Iwilei Station and nearby areas are, in fact, common to the Project and the Beretania Street Tunnel Alternative (and could therefore be acquired without risking prejudice to the ongoing SEIS process). *See* Declaration of Jerry Iwata in Support of Second Motion to Modify Injunction, Exhibit 1 (Dkt. 243-3).

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 (definition of " feasible and prudent avoidance alternative"). Defendants' SEIS concludes that the Beretania Street Tunnel Alternative is imprudent. AR 153934. That conclusion is arbitrary and capricious in three respects: Defendants relied on flawed financial analyses; the "other factors" identified in Defendants' ROD do not support a finding of imprudence; and Defendants violated Section 4(f)'s implementing regulations.

a. Defendants Relied On Flawed Financial Analyses

Defendants' primary basis for finding the Beretania Street Tunnel Alternative imprudent is financial: They claim that it would increase the cost of the rail line by approximately $960 million, or 19%.

Under Section 4(f), cost increases only justify a finding of imprudence if they reach an "extraordinary magnitude." 23 C.F.R. 774.17 (definition of feasible and prudent avoidance alternative). "Merely a substantial increase is not enough." Final Rule, 73 Fed. Reg. 13368, 13392 (Mar. 12, 2008). Indeed, 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 do not dispute any of these authorities.[11]

Plaintiffs' moving papers explained that Defendants over-estimated the cost of the Beretania Street Tunnel Alternative by erroneously assuming that the (costly) Ka'aahi rail station must be included. Pl. Objection at 15-16. In response, Defendants have recycled their arguments related to the OR&L property. City at 20; Fed. at 14. For all of the reasons set forth above, those arguments should be rejected.

Plaintiffs' moving papers also explained that Defendants' financial analysis should be rejected because it is based on an arbitrary and capricious cost comparison: The cost of the Beretania Street Tunnel Alternative from Iwilei to the rail system's planned terminus at the University of Hawaii-Manoa versus the cost of the Project between Iwilei and the Ala Moana Center (well short of the planned terminus).[12] Pl. Objection at 15-18. In other words, Defendants compared the longest and costliest version of the Beretania Street Tunnel Alternative to the shortest and least costly version of the Project.

[11] The City objects to a different issue involving the *Stop H-3* case. That issue is addressed on pages 19-20.

[12] There is no doubt that Defendants do, in fact, plan to extend the Project to the University of Hawaii-Manoa. The 2010 EIS prepared for the Project refers to the University of Hawaii-Manoa as a "planned extension" and states that rail service to the University will be completed "prior to 2030." AR 364.

All of Defendants' conclusions about the cost of the Beretania Street Tunnel Alternative are based on this misleading, apples-to-oranges comparison. Therefore, their analysis was arbitrary and capricious. *See, e.g., Druid Hills Civic Ass'n v. Fed. Hwy. Admin.*, 772 F.2d 700, 717 (11th Cir. 1985) (invalidating 4(f) analysis for failure to provide a meaningful comparison between alternatives); *City of S. Pasadena v. Slater*, 56 F.Supp. 2d 1106, 1121 (C.D. Cal. 1999) (flawed definition of alternative renders 4(f) evaluation arbitrary and capricious).

Had Defendants applied a proper cost comparison — for example, the cost of connecting Iwilei to the University of Hawaii-Manoa via the Project versus the cost of connecting Iwilei to the University via the Beretania Street Tunnel Alternative — they would have found that the capital cost of the two alternatives differs by less than 2%. SEIS at 113. A 2% cost difference falls well short of what is necessary to demonstrate imprudence under Section 4(f). 23 C.F.R. § 774.17 (definition of imprudence requires cost increase to reach "extraordinary magnitude"); *Stop H-3*, 740 F.2d at 1452 (10% cost increase could not reasonably be considered imprudent).

Defendants argue that they were not required to develop a proper cost comparison because the Court's Summary Judgment Order does not specifically address the planned University of Hawaii-Manoa rail terminus. City at 21; Fed. at 13 n.4. The argument is simply too cute to be convincing. This Court ordered

Defendants to fully reconsider a tunnel beneath Beretania Street. Summary Judgment Order (Dkt. 182) at 27. Defendants ***chose*** to evaluate an extended version of the Beretania Street Tunnel Alternative stretching from Iwilei to the planned terminus. Had they followed the Court's direction to prepare a full, open-minded re-evaluation, Defendants would have compared their chosen version of the Beretania Street Tunnel Alternative to a version of the Project that likewise extended to the planned terminus.[13] Their failure to do so was arbitrary and capricious whether or not the Summary Judgment Order explicitly mentioned the University of Hawaii-Manoa. *Druid Hills*, 772 F.2d at 717.

Defendants also contend that the law of the case doctrine dictates a finding that the Beretania Street Tunnel Alternative is imprudent. City at 20; Fed. at 13-14. In doing so, they rely on the Court's prior decision to uphold Defendants' analysis of the King Street tunnel. *Id*. But the King Street tunnel and the Beretania Street tunnel are different alternatives, were evaluated at different times and in different Section 4(f) analyses, and raise different legal and factual issues. The Court's decision to uphold the King Street tunnel did not address either of the two cost issues presently in dispute regarding the Beretania Street Tunnel

[13] In the alternative, Defendants could have evaluated shorter versions of both alternatives.

Alternative (*i.e.*, Ka'aahi station and the cost comparison presented in the SEIS).[14] Order (Dkt. 182) at 24-27. Therefore, the law of the case doctrine does not dictate a finding that the Beretania Street Tunnel Alternative is imprudent. *See, e.g., U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1186 (9th Cir. 2001) (law of the case limited to issues decided); *Hegler v. Borg,* 50 F.3d 1472, 1475 (9th Cir. 1995) (law of the case "clearly does not extend to issues [the] court did not address").

As expected (*see* Pl. Objection at 17-18), Defendants also assert that the cost of the Beretania Street Tunnel Alternative exceeds available funds — namely, the $5.544 billion programmed in the Project's Full Funding Grant Agreement. City at 21-22; Fed. at 14. But, as explained in Plaintiffs' moving papers, Section 4(f) does not mandate that the Beretania Street Tunnel Alternative be less expensive than the Project. Objection at 17-18.

The City also takes issue with some of Plaintiffs' citations to the *Stop H-3* case. City at 22-23. In *Stop H-3*, the Ninth Circuit held that a cost increase of 10% did not render a highway alternative imprudent. *Stop H-3*, 740 F.2d at 1452. The City argues at great length that this holding does not establish a universal, numerical threshold for determining imprudence. City at 22-23. But that is beside the point. Plaintiffs have not requested (and do not request) that this court

[14] If it had, there would have been no reason for Defendants to prepare an SEIS in the first place.

establish a universal threshold. Rather, *Stop H-3* is cited because it is binding circuit authority addressing a claim of imprudence on the basis of cost. The City may not like the outcome of *Stop H-3*, but the case is quite obviously applicable.

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

In an effort to paper over the above-described deficiencies in the SEIS' cost analysis, Defendants' ROD presents a laundry list of "other factors" allegedly justifying rejection of the Beretania Street Tunnel Alternative. AR 154429.

Plaintiffs' moving papers explained at length and in detail why these "other factors," whether considered individually or cumulatively, do not justify a finding of imprudence. Pl. Objection at 18-22. That explanation revealed two pervasive problems with Defendants' "other factors" analysis. *Id.*

First, most of the "factors" on which Defendants rely are standard environmental and construction issues common to large building projects: parking spaces, lane closures, the possibility of finding contaminated soil, etc. They are not the sort of "truly unusual factors" or "unique problems" necessary to establish imprudence. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 at 413 (1971).[15]

[15] The City takes issue with Plaintiffs' reference to "unique problems," arguing that multiple minor factors can combine to justify a finding of imprudence. City at 24-25. But the City has only presented half the story. Under Section 4(f), multiple

Second, many of the "factors" identified by Defendants affect the Project just as surely as the Beretania Street Tunnel Alternative: visual impacts, proximity to parks, engineering complexities, etc. *See Se. Alaska Conservation Council*, 649 F.3d at 1059 (arbitrary and capricious to reject alternative for reasons also applicable to proposed project).

For both reasons, the "other factors" identified in the ROD do not justify a finding that the Beretania Street Tunnel Alternative (but not the Project) is imprudent.

Defendants' counter-arguments largely consist of clumsy attempts to re-characterize Plaintiffs' position and/or the wording of the SEIS. City at 24-31; Fed. at 14-18. However, three of Defendants' claims are worth a more detailed analysis:

- Karst. Defendants assert that the Beretania Street Tunnel Alternative is "more likely than the Project to encounter sensitive karst formations."[16] Fed. at 16; City at 28. But they have not actually engaged in detailed geotechnical testing for the Beretania Street Tunnel Alternative. The possibility of encountering karst remains speculative.

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minor factors can ***only*** combine to justify a finding of if they "cumulatively cause ***unique problems*** or impacts of ***extraordinary*** magnitude." 23 C.F.R. § 774.17 (definition of "feasible and prudent alternatives analysis" part (3)(vi)) (emphasis added). Even when considered cumulatively, the collection of straightforward construction issues raised by the Defendants does not represent anything "unique" or extraordinary."

[16] Karst refers to a certain type of limestone.

- Thomas Square. The City refers to the Beretania Street Tunnel Alternative's alleged impacts on Thomas Square, noting the existence of protected views in that area. City at 26. The City fails to mention that the Beretania Street Tunnel Alternative would be screened from Thomas Square by trees (*see* figure 24 at AR 153921); that the Beretania Street Tunnel Alternative will not use Thomas Square (AR 153901); and that the Project would cross more protected view planes than the Beretania Street Tunnel Alternative (Pl. Objection at 20 n.8; AR 505-12, 532-48; AR 153921).
- Historic Properties. The City and the FTA repeatedly assert that the Beretania Street Tunnel Alternative will have an "adverse effect" on 47 historic properties clustered along King Street. Fed. at 15; City at 27. The term "adverse effect" is a term of art describing significant negative impacts to historic properties. *See* 36 C.F.R. § 800.5. But there is no record evidence that these 47 properties are, in fact, historic. As with King Florist (which is located in the midst of the 47 properties), Defendants have simply assumed eligibility. Moreover, there is no record evidence describing or analyzing the impacts these properties (allegedly) will suffer.

Finally, Plaintiffs note the irony of Defendants' continuing objection to including issues related to the United States Courthouse in their evaluation of prudence. Unlike the fairly standard collection of factors on which Defendants rely, the concerns expressed by the United States District Court for the District of

Hawaii are the sort of "truly unusual factor" or "unique problem" that ***can*** establish imprudence. *See Overton Park,* 401 U.S. at 413.

c. Defendants' Analysis Of Prudence Violated Section 4(f)'s Implementing Regulations

The Court's Summary Judgment Order explicitly ordered Defendants to "fully consider the prudence and feasibility of the Beretania tunnel alternative." SJ Order at 27. In undertaking this evaluation of prudence and feasibility, Defendants were required to comply with Section 4(f)'s implementing regulations. Those regulations define imprudence as "severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) resource." 23 C.F.R. § 774.17 (definition of “feasible and prudent avoidance alternative).

In other words the applicable regulatory standard provides that even if "severe problems" exist, an alternative is not imprudent unless those problems "substantially outweigh" the importance of preserving the Section 4(f) resource at issue. *Id*.; *see also* Final Rule, 73 Fed. Reg. at 13391-92. Defendants' SEIS failed to apply this standard. In fact, the SEIS explicitly admits that its feasibility and prudence analysis did not consider Chinatown or the Dillingham Transportation Building at all. AR 154082-83 (comment Den-18 and response thereto).

Defendants propose several reasons why they were not required to do so. City at 31-32; Fed. at 18-20. None has merit. This Court explicitly required Defendants to evaluate the feasibility and prudence of the Beretania Street Tunnel

Alternative. SJ Order at 27. And it is indisputable (and undisputed) that the regulatory standard articulates the proper definition of prudence and feasibility.

Defendants also argue that their failure to apply the regulatory standard for prudence should be excused because a "weighing" analysis was separately prepared in connection with the FEIS' "least overall harm" analysis. City at 32; Fed. at 19-20. But "least overall harm" and "prudence and feasibility" are different regulatory concepts, and are subject to different regulatory requirements. *Compare* 23 C.F.R. 774.3(c) (least overall harm) *with* 23 C.F.R. § 774.17 (feasible and prudent avoidance alternative). Defendants cannot simply substitute one analysis for the other. Indeed, a separate section of the City's brief essentially admits as much. *See* City at 36 ("The 'extraordinary magnitude' test ***does not*** apply to the least harm analysis") (emphasis original). Furthermore, as explained in the section immediately below, Defendants' "least overall harm" analysis was arbitrary and capricious in its own right.

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

In situations where there is no feasible and prudent alternative to the use of an historic property, "only the alternative that [ ] causes the least overall harm in light of the statute's preservation purpose" may be approved. 23 C.F.R. § 774.3(c) (emphasis added). Defendants' conclusion that the Project — rather than the

Beretania Street Tunnel Alternative — was the least overall harm alternative. was arbitrary and capricious in several respects. [17]

1. Defendants' Least Overall Harm Determination Was Contrary To Section 4(f)'s Preservation Purposes

Section 4(f) implementing regulations mandate that the least overall harm alternative be determined "in light of the statute's preservation purposes." 23 C.F.R. § 774.3(c)(1). Chief among those purposes is avoiding the use of historic sites. 49 U.S.C. § 303(a).

Defendants' 2010 EIS concluded that the Project will unavoidably use five historic sites: the OR&L property (AR 714-18); the Chinatown Historic District (AR 718-721); the Dillingham Transportation Building (AR 721-727); the HECO Downtown Plant (AR 727); and the Halekauwila Street Lava Rock Curbs (AR 709).

According to Defendants' SEIS, the Beretania Street Tunnel Alternative would unavoidably use three historic sites: the OR&L property; McKinley High School; and King Florist. AR 153913.

Thus, it is undisputed that the Beretania Street Tunnel Alternative would use fewer historic sites than the Project. And once the SEIS's arbitrary and capricious evaluation of the OR&L property, McKinley High School, and King Florist is

[17] Plaintiffs address the issue of least overall harm without waiving any argument regarding the prudence of the Beretania Street Tunnel Alternative.

corrected, it becomes even clearer that the Beretania Street Tunnel Alternative causes least overall harm in light of the statute's preservation purposes." 23 C.F.R. § 774.3(c)(1).

2. The Beretania Street Tunnel Alternative Preserves Exceptionally-Significant Historic Resources

Section 4(f)'s implementing regulations also mandate that a "least overall harm" determination be shaped by "the relative significance of each Section 4(f) property." 23 C.F.R. § 774.3(c)(1)(iii).

The historic sites that would be used by the Project but preserved by the Beretania Street Tunnel Alternative — the Chinatown Historic District and the Dillingham Transportation Building — are exceptionally significant historic resources. *See* Pl. Objection at 24 (citing AR 39837-44, 39878-83). The National Register identifies Chinatown, in particular, as "the most extensive area in Honolulu reflecting a contiguous architectural and historic character which recalls a sense of time and place" and "one of the few areas of Honolulu which has maintained a sense of identity as a community over the years." AR 152845.

Defendants do not dispute that the Chinatown Historic District and the Dillingham Transportation Building are exceptionally-significant historic resources. Nor do they contend that the resources (allegedly) used by the Beretania Street Tunnel Alternative are of equal value.

Instead, Defendants take the position that the Beretania Street Tunnel Alternative will cause more intense harm to Section 4(f) resources than the Project. City at 35-36; Fed. at 21. In their view, the Beretania Street Tunnel Alternative is more harmful because it requires the complete demolition of King Florist, whereas the Project involves minimal impacts on non-historic features of Chinatown and the Dillingham Transportation Building. *Id*.

There are two fundamental problems with Defendants' position. First, it is based on the erroneous assumptions that King Florist (1) is historic and (2) must be demolished. Second, Defendants have badly misrepresented the impacts of the Project on Chinatown and the Dillingham Transportation Building. In addition to physically taking non-historic pieces of the two properties, the Project will have devastating impacts their historic settings, appearances, and significance.

Indeed, Defendants' own "Historic Effects Report," prepared in connection with the 2010 EIS, admits that the Project would have an adverse effect on the Dillingham Transportation Building's historic setting, feeling, and association. AR 39878-80. The Report concludes that the Project would "diminish the property's expression of its historic character" (AR 39880); would "alter historically significant visual relationships [to] the property" (*id*.); and would "obscure its

historic appearance to an observer" (*id*.). [18] Contrary to Defendants' assertion , the Project's harm is not limited to "a station entrance in a modern plaza next to the building." *See* City at 35.

Defendants' Historic Effects Report also admits that the Project would have an adverse effect on the Chinatown Historic District. AR 39837-39. The Report concludes that the Project would "alter historically significant design features within the Chinatown Historic District" (AR 39838); would "visually interrupt and partially block" historically significant views (AR 39838); would "introduce a design element…that is out of character with [the] historic setting" (AR 39839); and would "obscure the property's historic character" (*id*.). Defendants' suggestion that the Project's impacts on Chinatown will be limited to "a station entrance…in a parking lot" (*see* City at 35) is misleading, inaccurate, and should be rejected.

3. Defendants Relied On Their Arbitrary And Capricious Evaluation Of "Other Factors"

Defendants' least harm analyses of costs, delays, and environmental consequences appear virtually identical to their analyses in the context of prudence, and are arbitrary and capricious for the same reasons.

The City contends that Plaintiffs' discussion of prudence is insufficient to address Defendants' "least overall harm" financial analysis. City at 26-27. Not so.

[18] Page 1 of Plaintiffs' moving papers contains an American Institute of Architects rendering illustrating some of these impacts. The Dillingham Transportation Building appears on the left of the rendering.

In discussing the prudence of the Beretania Street Tunnel Alternative, Plaintiffs have identified two problems with Defendants' cost estimates: the estimates erroneously assume that a costly rail station at Ka'aahi is necessary and unreasonably compare the cost of an extended version of the Beretania Street Tunnel Alternative to the cost of a shorter version of the Project. Both of these fundamental errors also render Defendants' least overall harm evaluation arbitrary and capricious.

4. Defendants Failed Properly To Account For The United States Courthouse

Defendants' least overall harm analysis also failed properly to address the United States Courthouse. The Beretania Street Tunnel Alternative's ability to avoid the potential safety issues raised by the District Court (AR 154094) weighs against the Project and should have been considered. 23 C.F.R. § 774.3(c)(1)(vi).

5. Defendants Do Not Have Discretion To Disregard Section 4(f)'s Implementing Regulations

Finally, the City argues for deference. City at 36-38. The argument should be rejected. While it is true that ***the FTA*** (not the City) may be entitled to a certain amount of deference on technical issues, that discretion does not allow Defendants to violate or ignore the clear requirements of Section 4(f)'s implementing regulations. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953,

960 (9th Cir. 2005); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002). Those regulations place very explicit limits on the outcome of a least overall harm analysis:

> Where the factors favoring the selection of the alternative with greater harm to Section 4(f) property do not ***clearly and substantially*** outweigh the factors favoring the alternative with less harm to Section 4(f) property, the alternative with less harm to Section 4(f) property ***must*** be selected.

Final Rule, 73 Fed. Reg. at 13,372.

Here, "the alternative with less harm to Section 4(f) property" is the Beretania Street Tunnel Alternative and "the alternative with more harm to Section 4(f) property" is the Project. The Project would use more Section 4(f) properties. The Project would use more important Section 4(f) properties. And, contrary to Defendants' erroneous assertions, the Project's use of Section 4(f) properties would be more damaging. Defendants' SEIS did not demonstrate — or even purport to demonstrate — that these factors are "substantially outweighed" by other considerations. Therefore, it was arbitrary and capricious for Defendants to conclude that the Project is the least harm alternative.

Dated: January 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 5,983 words, exclusive of those parts excluded by Local Rules 7.5 and 56.1, which is less than the 6,000 words permitted by the Court's January 16, 2014 Order.

DATED: January 17, 2014

/s/ Matthew G. Adams
MATTHEW G. ADAMS

CERTIFICATE OF SERVICE

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

PLAINTIFFS' REPLY IN SUPPORT OF OBJECTION TO NOTICE OF COMPLIANCE

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