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

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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

Plaintiffs,

vs.

FEDERAL TRANSIT ADMINISTRATION; LESLIE ROGERS, in his official capacity as Federal Transit Administration Regional Administrator; PETER M. ROGOFF, in his official capacity as Federal Transit Administration Administrator; UNITED STATES DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; THE CITY AND COUNTY OF HONOLULU; and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu, Department of Transportation Services,

Defendants, and

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

Intervenor Defendants.

Civil No: 11-00307 AWT

CITY DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE; CITY DEFENDANTS' OBJECTION AND MOTION TO STRIKE IMPROPER ARGUMENT IN PLAINTIFFS' OBJECTION TO NOTICE OF COMPLIANCE; CERTIFICATE OF SERVICE

(Presiding: The Honorable A. Wallace Tashima)

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
Advisory Council	Advisory Council on Historic Preservation
AROD	Amended Record of Decision
AR	Administrative Record
City	City and County of Honolulu
Draft SEIS	Draft Supplemental Environmental Impact Statement
EPA	Environmental Protection Agency
Ewa	Westward
FSEIS	Final Supplemental Environmental Impact Statement/Section 4(f) Evaluation
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
HART	Honolulu Authority for Rapid Transportation
Judgment	Judgment and Partial Injunction dated December 27, 2012 (ECF No. 202)
Koko Head	Eastward
Makai	Toward the ocean (south)
Mauka	Toward the mountains (north)
National Register	National Register of Historic Places

ACRONYM AND ABBREVIATION LIST

Acronym or Abbreviation	Definition
NEPA	National Environmental Policy Act
Notice of Compliance	Notice of Compliance with Judgment and Partial Injunction (ECF No. 202) and Order on Cross-Motions for Summary Judgment (ECF No. 182) ("Notice of Compliance") (ECF No. 250)
OR&L	O'ahu Rail and Land Company Property
Pl. Br.	Plaintiffs' Objection to Notice of Compliance (ECF No. 257)
Project	Honolulu Rail Transit Project
SAR	Third Administrative Record Supplement
Section 4(f) or 4(f)	49 U.S.C. § 303
Section 4(f) Property	Land of significant publically owned parks, recreation areas, wildlife and waterfowl refuges, and land of a historic site
SHPO	Hawai'i State Historic Preservation Officer
SJ Order	Court's Summary Judgment Order dated November 1, 2012 (ECF No. 182)
TCPs	Traditional Cultural Properties
Tunnel Alternative	Beretania Street Tunnel Alternative

I. INTRODUCTION.

The Court's Summary Judgment Order ("SJ Order") (ECF No. 182) required Defendants to: (1) complete identification of above-ground Traditional Cultural Properties ("TCPs") within the Honolulu Rail Transit Project ("Project") corridor; (2) reconsider the no-use determination for Mother Waldron Park; and (3) fully consider the prudence and feasibility of the Beretania Street Tunnel Alternative ("Tunnel Alternative"). In compliance with the SJ Order and the related Judgment and Partial Injunction (the "Judgment") (ECF No. 202), the Defendants prepared a Draft Supplemental Environmental Impact Statement/Section 4(f) Evaluation ("Draft SEIS"), circulated the Draft SEIS for public review and comment, and conducted a public hearing on the Draft SEIS.

On September 30, 2013, the Federal Transit Administration ("FTA") and the Honolulu Authority for Rapid Transportation ("HART")[1] approved the Final Supplemental Impact Statement/Section 4(f) Evaluation ("FSEIS"). SAR00153853. The FTA also executed an Amended Record of Decision ("AROD"). SAR00154415[2] [FSEIS, App. F].

Plaintiffs' Objection to the Defendants' Notice of Compliance with the SJ Order does not include any objections to the Defendants' compliance with the SJ

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[1] HART is a semi-autonomous agency established by the City.

[2] "AR" denotes the administrative record lodged at the time of the Court's initial proceedings. "SAR" denotes the third supplement to the administrative record for

Order regarding TCPs or Mother Waldron Park. Therefore, Plaintiffs have waived any further argument on these issues.[3] The only issue remaining before the Court is whether the FTA's findings and determinations regarding the Tunnel Alternative are arbitrary and capricious.

The Tunnel Alternative, which has above and below ground components, is in one of the most densely-developed areas of downtown Honolulu. The Tunnel Alternative, like the Project, would unavoidably "use" properties that are protected by Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 ("Section 4(f)"). Historic resources subject to Section 4(f) are particularly prevalent in the historically rich area traversed by the Tunnel Alternative.

Plaintiffs contend that the Tunnel Alternative's Section 4(f) impacts could have been avoided, but their arguments are based on mischaracterizations of the record and unrealistic assumptions about engineering options. They also assert that the Tunnel Alternative's impacts on historic resources are not as significant as the Project's impacts. In fact, the Tunnel Alternative would result in the "use" of four Section 4(f) properties, including the ***destruction and relocation*** of three properties. The Project within the same section of the rail corridor would only affect small, non-historic portions of parcels on which Section 4(f) resources are located.

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the Amended ROD lodged with the Court on December 20, 2013.

Plaintiffs also belittle the other extraordinary effects of the Tunnel Alternative, including its additional cost: $650 million in 2006 dollars, or $960 million in year of expenditure dollars. This Court previously found that a $650 million added cost for the King Street Tunnel Alternative rendered that alternative "not prudent" under Section 4(f). SJ Order at 25. For the same reason, the Tunnel Alternative is not a prudent alternative. *Earl Old Pers. v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) ("under the 'law of the case' doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court in the same case." [citation omitted].)

A $960 million increase in the construction cost of the Project is 19% of the total capital cost of the Project. This extraordinary additional cost would ensure that the Project could not be constructed – which is Plaintiffs' single-minded goal. Plaintiffs' policy preference does not override the FTA's faithful implementation of the agency's Section 4(f) regulations or the agency's reasoned judgment within its expertise. The Court should conclude that the Defendants complied with the SJ Order and should dissolve the injunction.

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3 See *United States v. Anekwu*, 695 F.3d 967, 985 (9th Cir. 2012).

II. FACTS.

On November 1, 2012, the Court issued its SJ Order (ECF No. 182), which ruled in favor of Plaintiffs on three claims arising under Section 4(f), and in favor of Defendants on all other issues.

On December 27, 2012, the Court issued its Judgment (ECF No. 202), remanding three issues to the FTA for additional studies and analyses consistent with the SJ Order, and enjoining construction and real estate acquisition activities in Phase 4 of the Project.

On May 31, 2013, the FTA circulated the Draft SEIS for public comment. On July 9, 2013, Defendants conducted a public hearing regarding the Draft SEIS. SAR00154896, 00155126-155173.

On September 30, 2013, FTA and HART signed the FSEIS, and the FTA also signed the AROD documenting the FTA's decisions in response to the SJ Order. SAR00153853 [FSEIS]; 154415 [AROD]. On October 8, 2013, the City Defendants filed the Notice of Compliance with the SJ Order (ECF No. 250).

III. STANDARD OF REVIEW.

Plaintiffs have conceded,[4] and the Court has concluded,[5] that the arbitrary and capricious standard of review applies to the Court's review of Defendants'

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[4] Plaintiffs' Scheduling Conference Memorandum, p. 4 (Dec. 4, 2013) [ECF No. 263].

compliance with the SJ Order. *See also, Nw. Coal. For Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 590-91 (9th Cir. 1988).

Under this standard, the FTA's determinations must be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, [or] unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2). The arbitrary and capricious standard "is narrow, and [the courts do] not substitute [their] judgment for that of the agency." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) (quotation omitted). Courts "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* (citation omitted).

The reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). The agency's decision is "entitled to a presumption of regularity," and a court cannot substitute its judgment for that of the agency. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971)) ("*Overton Park*").

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[5] Scheduling Conference Order, ¶ 2 (Dec. 11, 2013) [ECF No. 264].

Courts must conduct a "particularly deferential review of an 'agency's predictive judgments about areas that are within the agency's field of discretion and expertise . . . as long as they are reasonable.'" *Lands Council v. McNair*, 537 F.3d at 993 (9th Cir. 2008) (citation omitted).

IV. THE FSEIS ANALYSIS OF THE TUNNEL ALTERNATIVE MET ALL SECTION 4(F) REQUIREMENTS.

A. Substantial Evidence Establishes That the Tunnel Alternative Is Not a Feasible And Prudent Avoidance Alternative.

1. The Tunnel Alternative Is Not An Avoidance Alternative Because It Would Use Four Section 4(f) Properties.

The Tunnel Alternative would permanently incorporate land from one National Register-listed property and three National Register-eligible properties. A direct use of a Section 4(f) property occurs when property is permanently incorporated into a proposed transportation project. 23 C.F.R. § 774.1; AR00000683 [FEIS at 5-4]. Therefore, the Tunnel Alternative uses all of these properties. Because it uses four Section 4(f) properties, the Tunnel Alternative is not an avoidance alternative. *See* Section 4(f) Policy Paper at 11 ("The Section 4(f) regulations refer to an alternative that would not require the use of any Section 4(f) property as an avoidance alternative"), 13 ("A project alternative that avoids one Section 4(f) property by using another Section 4(f) property is not an avoidance alternative." *See also* Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites, 73 Fed. Reg. 13,373 (March 12, 2008) ("2008 Final

Rule") ("[T]he selection of an alternative in instances where all viable alternatives use some Section 4(f) property must be distinguished from the selection process where there is a viable alternative that avoids using Section 4(f) property.")

The National Register-listed property, McKinley High School, is "the oldest high school in the State" and "one of the most elegant examples of Spanish Colonial revival architecture in Hawai‘i." SAR00153909 [FSEIS at 43.]. Two of the National Register-eligible properties are located on the O‘ahu Railway and Land Company ("OR&L") Parcel, including (1) the OR&L Terminal Building and the OR&L Office/Document Storage Building (addressed as one Section 4(f) property) and (2) the former filling station on the OR&L parcel. SAR00153922, 153906 [FSEIS at 56, 40]. The third National Register-eligible parcel is King Street Florist. SAR00153922, 153911 [FSEIS at 56, 45].

a) OR&L Parcel

Plaintiffs acknowledge that Section 4(f) protects the historic resources on the OR&L parcel. Pl. Br. at 9. Construction of the Tunnel Alternative's Ka‘aahi Street Station indisputably would use the OR&L Office/Document Storage Building, the OR&L Terminal Building, and a former filling station located on the OR&L parcel. SAR00153907-153909 [FSEIS at 41-43], *see also* SAR00154601-154602 [FEIS App. F].

Plaintiffs' nonetheless assert that the Tunnel Alternative will not "use" these historic properties, based on a mistaken belief that Tunnel Alternative does not

require construction of the Ka‘aahi Street Station. Pl. Br. at 9-10. Plaintiffs’ argument is based on two factual errors. First, they assert that the FSEIS proposes the development of “two rail stations (Iwilei and Ka‘aahi Street) within 1,500 feet of each other.” Pl. Br. at 9. The FSEIS does ***not*** propose the construction of two rail stations in this area for the Tunnel Alternative. Plaintiffs’ mistake is also based on their second factual error: the belief that the Ka‘aahi Street Station and the Iwilei Station are “common to the Project and the Beretania Street Alternative.” *Id*. (citing FSEIS at 22). In fact, ***only*** the Ka‘aahi Street Station would be built for the Tunnel Alternative, and ***only*** the Iwilei Station would be constructed for the Project. *See* SAR0015388 [FSEIS at 22]. There are no stations that are common to the two alignments within the area addressed by the FSEIS.

Plaintiffs cite a map that identifies station locations for the Tunnel Alternative with red rectangles. SAR00153888 [FSEIS at 22]. The Ka‘aahi Street Station is denoted by a red rectangle, and therefore would be constructed for the Tunnel Alternative. In contrast, grey rectangles identify the station locations for Project. The Iwilei station is represented by a ***grey rectangle***.

In addition to the map legend that presents this information, the SEIS lists the stations that would be constructed for the Tunnel Alternative. The list includes Ka‘aahi but not Iwilei. SAR00153889 [FSEIS at 23].

Finally, Plaintiffs claim that the FSEIS did not respond to their comment requesting a justification of the Ka‘aahi Street Station. Pl. Br. at 9. This claim

mischaracterizes the record. The response to comment Den-3 explains that the Ka‘aahi Street Station has always been part of the Tunnel Alternative, and further explains why the station could not be moved ‘Ewa (generally west)[6] to the location of the Project’s Iwilei Station. SAR00154077 [FSEIS, App. A at A-75]. As explained in the response to comment Den-3 and in Section 3.3.1 of the FSEIS, the station for the Tunnel Alternative could not be moved ‘Ewa to the Iwilei Station location “because stations must be on a flat and straight track section to meet Americans with Disabilities Act requirements”. *Id.* [FSEIS at 41]. Project design criteria require stations to be located on tangent (straight) track with a desirable grade of 0.5% or less and an absolute maximum of 1.0%. AR00041652 at 41671, 41676. The Ka‘aahi Street Station is located at the ‘Ewa end of the tunnel, in a straight section with a constant, less than 0.5% grade for the tracks entering and exiting the station, as required for safe operation. Immediately ‘Ewa of the station, the tracks would transition from underground to elevated at a 6% grade and would traverse a series of horizontal curves. AR00050056 [*Alternatives Analysis Final Alignment Plans and Profiles*]; *see also* SAR00153907 [FSEIS at 41], 00154077. The Iwilei Station site, in contrast, cannot be used for the Tunnel Alternative because the grade would be at 6%. It would be located where the guideway is transitioning vertically from the elevated alignment along Dillingham Boulevard to

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[6] Toward the ‘Ewa plain. *See* SAR00153887.

a trench section before entering the tunnel, within the horizontal transition area between two reversing curves. This transition area prevents construction of the straight, flat track section needed for the safe loading and unloading of the train. *Id.*, *see also* SAR00153890 [FSEIS at 24, Figure 5], 153887 [FSEIS at 41] (discussion of transition occurring west of Ka‘aahi Street).

The FSEIS also examines the possibility of moving the station Koko Head (to the east), but this would place the station in A‘ala Park, another Section 4(f) resource. The construction would still result in substantial disturbance of the OR&L parcel, resulting in the use of ***both*** the OR&L parcel and A‘ala Park. SAR00153907 [FSEIS at 41].

The FSEIS examines the options for avoiding or reducing impacts of the Tunnel Alternative on Section 4(f) resources and concludes that it is impossible to avoid the use of two historic properties on the OR&L parcel. This analysis supports the location of the Ka‘aahi Street Station, which would unavoidably use the OR&L parcel.

b) McKinley High School.

The Pensacola Street Station, required for the Tunnel Alternative, would use National Register listed McKinley High School. The Tunnel Alternative’s station entrance, elevated platforms, support structure, and ground-level station features would use the High School property. Because “station construction would permanently incorporate land into a transportation use and introduce visual

elements, which would diminish the integrity of the property's setting," the Tunnel Alternative "would have a direct use of the historic property." SAR00153909 [FSEIS at 43].

Plaintiffs challenge the methodology that resulted in this determination. They assert that FTA's use determination violates Section 4(f) because it takes into account the incorporation of land from the McKinley High School parcel. Plaintiffs claim that Section 4(f) only allows FTA to find that use has occurred when land is included within the National Register boundary of the historic resource at the time it was listed. Pl. Br. at 10-11.

Plaintiffs' argument is simply wrong. Nothing in Section 4(f) limits FTA's use evaluation to the National Register boundary; to the contrary, the law's purpose is protective, not restrictive. 23 U.S.C. § 138(a), 49 U.S.C. § 303(a) (requiring "special effort" to preserve historic sites). FTA's Section 4(f) regulations state that a use of a Section 4(f) property occurs when "land is permanently incorporated into a proposed transportation project." 23 C.F.R. § 774.17. A "Section 4(f) property" is defined as "land of an historic site of national, State, or local significance." *Id*. The regulations provide FTA with discretion to apply Section 4(f) protections to properties that are not even on or eligible for the National Register, when appropriate. 23 C.F.R. § 774.11(e)(1). FTA's determination that assessing effects on the "land" involves considering the parcel on which an historic site is located is well within its regulatory authority.

The Court's "task is simply to insure that the procedure followed by the (agency) resulted in a reasoned analysis." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (rejecting challenge to agency methodology.)

Plaintiffs' only support for their assertions is a claim that the FHWA Section 4(f) Policy Paper (2012) does not support FTA's position. Pl. Br. at 11. The referenced section of the Policy Paper emphasizes that the "[s]election of boundaries is a judgment" based on the nature of the property. FHWA Section 4(f) Policy Paper (2012) at 15. The Policy Paper observes that "[l]egal property boundaries often coincide with the proposed or eligible historic site boundaries, ***but not always*** and, therefore, should be individually reviewed for reasonableness." *Id*. at 28 (emphasis added).

Plaintiffs are correct that this section of the Policy Paper refers to applications for National Register listing. McKinley High School is already listed in the National Register, and FTA's boundary determination was made in the context of Section 4(f) use, not National Register listing. The referenced language nonetheless provides useful guidance for FTA's Section 4(f) obligation to determine when "land" is used – a term that is not defined by the statute or the regulations. While the Policy Paper states that "[f]or historic properties, the boundary of the Section 4(f) resource is ***generally*** the NR boundary" (Section 4(f) Policy Paper at 7), nothing in the Policy Paper limits FTA's discretion or prevents

it from implementing a protective standard when it evaluates the effects of transportation projects on historic properties.

Furthermore, FTA applied this methodology consistently throughout the Section 4(f) analysis for the Project. As stated in the FSEIS, "[t]he same approach to historic property boundaries as used in the evaluation of the Project documented in Section 4.16.3 was applied to the properties along the Beretania Street Tunnel Alternative." SAR00153898 [FSEIS at 32].

Plaintiffs' preferred methodology would actually be far more favorable to the Project than to the Tunnel Alternative, if it were applied consistently. Had the FTA applied the Plaintiffs' preferred methodology, the Project would ***not*** use the following historic properties:

- Dillingham Transportation Building: When this building was listed on the National Register in 1979, the area of historic significance was limited to the building and landscaping between the building and the sidewalk. AR00152899 at AR00152908 (Statement of Significance only references building scale, texture, and quality) and AR00152908 (Description of Physical Appearance only describes the building and a small landscaped area between the building and the sidewalk). The FEIS found that the Project would only use about 3,000 square feet of a modern plaza next to the Dillingham Transportation Building, "on the same parcel." AR00000721 [FEIS at 5-42]. The FEIS states that

"this landscaped plaza is not a contributing element to the NRHP-listed building but is ***part of the parcel*** listed on the NRHP". *Id.* (emphasis added). FTA found that the Project would "use" this resource solely because the Project would permanently incorporate land from within the boundaries of the parcel. *Id.*

- Chinatown Historic District: The conclusion that the Project would use Chinatown is based on the use of 0.3 acre of a parcel that is a ***non-contributing element*** of the area designated as historic in the listing documents. As the FSEIS states, a station entrance will occupy a small amount of land in a parking lot. Because this land is ***on a parcel*** containing contributing elements of the Chinatown Historic District, it is considered a use, despite the fact that the station entrance will not use any properties that are contributing elements to the Chinatown Historic District. AR00000718 [FEIS at 5-39]. The station would be located "beside non-contributing modern buildings" in a parking lot. *Id.*
- OR&L Company Parcel: The Tunnel Alternative would require the temporary support, relocation, or removal of the OR&L Office-Document Storage Building and the former filling station. SAR00153907 [FSEIS at 41]. The Project, in contrast, would not use any of the historic buildings eligible for listing in the National

> Register. FTA made a Section 4(f) use determination with regard to the Project solely because Project construction would occur on an access easement that crosses the back section of this large parcel, outside the area of historic significance. AR00000714 [FEIS at 5-35], 717 [FEIS at 5-38] "[T]he Terminal and Office/Storage Buildings will not be physically altered."), SAR00153938 [FSEIS at 72]. "The portions of each property being used are non-contributing elements". If Plaintiffs' preferred methodology were applied to the OR&L parcel, the Tunnel Alternative would use two Section 4(f) properties while the Project would use ***none***.

If FTA consistently applied Plaintiff's preferred methodology, it would find that the Project would ***not*** use: the OR&L parcel; the Chinatown Historic District; or the Dillingham Transportation Building. But Plaintiffs do not propose a consistent application of the same methodology. They propose a double standard that favors the Tunnel Alternative: consider the entire parcel for properties affected by the Project, but only consider National Register boundaries for properties affected by the Tunnel Alternative. Plaintiffs' approach, unlike FTA's consistent analysis, would be arbitrary and capricious.

c) The King Florist Building.

FTA identified King Florist as potentially eligible for listing in the National Register. SAR00153904 [Table 2, FSEIS at 38]; *see also* AR00061827 (Draft

Historic and Archaeological Technical Report[7] general discussion of resources), 61856 (lists King Florist as an identified historic resource). This determination reflects a consistent methodology for identifying Section 4(f) resources. *Id*. at AR00061814.

This methodology was accepted by the State Historic Preservation Officer ("SHPO"), the official with jurisdiction regarding historic properties. AR00000622 [FEIS at 4-181].[8] In addition, FTA and the City solicited the views of the SHPO and the Advisory Council for Historic Preservation on resources identified as eligible for listing in the National Register. SAR00153985 [FSEIS at 119].

The FSEIS concluded that King Florist has "similar age, integrity, and significance as properties found eligible during consultation and that are located within the Area of Potential Effects for the Project." SAR00154078 [FSEIS, App. A at A-76]. This determination was based on reviews by qualified architectural historians (SAR0015385 [FSEIS at 119]) and was accepted by the officials with expertise and jurisdiction regarding historic properties.

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[7] Plaintiffs' brief points out an error on one page of the Final SEIS 4(f), which referred to "DTS 2006." Pl. Br. at 12, citing Final SEIS/4(f) at 45. This "DTS 2006" citation should have been "DTS2007b," *Honolulu High-Capacity Transit Corridor Project Historic and Archaeological Technical Report*, which was correctly identified and cited on Page 56 of the Final SEIS.

[8] *Citizens for the Scenic River Bridge v. Skinner*, 803 F.Supp. 1325, 1338 (D. Md. 1991) (not arbitrary and capricious to follow advice of state historic preservation

Plaintiffs disparage the King Florist building as small, run-down, and altered. Pl. Br. at 24-25. Plaintiffs might similarly describe Texeira House, a small, substantially altered private home that FTA determined the Project will use under Section 4(f). AR00000704 [FSEIS at 5-25]; SAR00154594 [FSEIS, App. F at TMK12009018].[9] FTA's consistent application of its standard to the Tunnel Alternative and the Project alike is not arbitrary and capricious.

Plaintiffs also claim that King Florist would not need to be demolished. This claim is based on their unsupported disagreement with FTA's and the City's engineering judgments. In comments on the Draft SEIS, Plaintiffs stated vaguely that "[t]here is no reason to believe" that the guideway could not be "positioned over the middle of the street." SAR00154079 [FSEIS, App. A at A-77]. The FSEIS thoroughly addresses this assertion, explaining that no street median exists that would allow the safe construction of guideway columns without impeding access to cross streets and driveways. Plaintiffs now assert, again without support, that "there is no reason why supports that straddle the roadway (with columns on each side)" could not be used. Pl. Br. at 14.[10] They cite the example of straddle-

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officer).

[9] Other examples include: Pu'uhale Market (AR00040123); Fuel Oil Pump House (AR00040112); Forty Niner Saimin (AR00040104); and Six Quonset Huts (AR00040133).

[10] Plaintiffs failed to raise their "straddle bent" claim during the administrative process; the objection is waived. *Dep't of Transportation v. Pub. Citizen*, 541 U.S.

bents on Halekauwila Street (Pl. Br. at 14), which is only a two-lane road. South King Street, in contrast, is four lanes with two parking lanes, which would require approximately double the span-width shown over Halekauwila Street. The entire guideway would be higher and more massive. Aside from the structural and cost issues associated with such a design, the visual impacts on historic properties along King Street would be severe. *See* SAR00153911-153912 [FSEIS at 45-46] discussion and depiction of historic properties).

Plaintiffs' assertions are unfettered by engineering expertise or reality; they do not even rise to the level of back-of-the-napkin calculations. As established by the FSEIS's discussion of avoidance alternatives and measures to minimize harm (SAR00153911-153912 [FSEIS at 45-46]), efforts to reduce Section 4(f) impacts of a project with specific engineering requirements, in an intensively developed area, create difficult technical engineering tradeoffs. The FSEIS fully addresses avoidance alternatives and measures to minimize harm, and FTA's determination that the Tunnel Alternative would use King Florist is not arbitrary and capricious.

2. The Tunnel Alternative Is Not Prudent.

The FSEIS concludes that the Tunnel Alternative is not a feasible and prudent avoidance alternative. The Tunnel Alternative is not an avoidance alternative. It therefore is not a prudent and feasible avoidance alternative. *See*

752, 764-65 (2004).

Section 4(f) Policy Paper at 13 (only avoidance alternatives are evaluated for feasibility and prudence).

As required by the SJ Order, the FSEIS nonetheless evaluated feasibility and prudence. Although the Tunnel Alternative was found to be feasible as a matter of engineering,[11] FTA found that the Tunnel Alternative is not prudent because of severe environmental effects and the extraordinary increase in the cost of the Alternative (SAR00153933, 153982-153983 [FSEIS at 67, 116-17]). The extraordinary increase in the cost of the Tunnel Alternative alone makes it imprudent. Cumulatively, severe environmental effects and the extraordinary increase in the cost of the alternative make the Tunnel Alternative not prudent. SAR00153934 [FSEIS at 68], 154429 [AROD at 13].

The FSEIS provides a well-supported analysis of these factors. Plaintiffs' claims to the contrary[12] are based on distorted representations of the record.

a) The Tunnel Alternative is Not Prudent Because It Will Result in Additional Costs of Extraordinary Magnitude.

The FSEIS establishes that the Tunnel Alternative would increase the capital cost of the Project by $960 million, or 19% over the cost of the Project.

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[11] SAR00153913-153915 [FSEIS at 47-49], SAR00154429 [AROD at 13]; *see* 23 C.F.R. § 774.17.

[12] These claims include footnote 6 on page 17 of Plaintiffs' Brief, in addition to Plaintiffs' arguments in chief at pages 15-16 of their brief.

SAR00153917 [FSEIS at 65]; SAR00155199-155242 [detailed cost estimates].[13] As the FSEIS observes, this additional cost "would be greater than all available funding sources and would exceed available funding for contingencies." *Id*.

This Court previously found that, "giving at least some deference to the agency's financial judgment, the Court cannot conclude that it was arbitrary and capricious for Defendants to conclude that an additional $650 million would be an extraordinary added cost." SJ Order at 25. The Court's determination on this issue is the law of the case. *Earl Old Pers. v. Brown*, 312 F.3d at 1039. The fact that the Tunnel Alternative will also cost an additional $650 million (in 2006 dollars), or $***960 million*** more in year-of-expenditure dollars renders the Tunnel Alternative imprudent. The similarity in the cost of the two tunnel alternatives demonstrates that the Tunnel Alternative will result in an extraordinary added cost. Plaintiffs' arguments to the contrary are rife with factual errors.

Plaintiffs' first assertion, that the Ka'aahi Street Station is "duplicative" (Pl. Br. at 15-16), has been shown to be wrong. *See* Section IV.A.1.a above. The Ka'aahi Street station, but no "duplicative" Iwilei Station, would be constructed for the Tunnel Alternative.

Plaintiffs then contend that the financial analysis was based on an "improper" comparison. Plaintiffs argue that the FSEIS should have been based on

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[13] The 2006 cost estimates for the Tunnel Alternative were updated for the 2013 SEIS.

the evaluation of an alternative that extended the Project to UH Manoa, in order to make the Project the same length as the Tunnel Alternative. Pl. Br. at 16. The Final EIS already considered, and rejected, the extension to UH Manoa because there is no available funding to construct the extension. SAR00153979-153980 [FSEIS at 113-14]. The SJ Order did not require the FSEIS to revive alternatives that were previously rejected, and the scope of the FSEIS is limited to the analysis required by the SJ Order.

The FSEIS nonetheless did consider the cost of the Project with the extension compared to construction of the Tunnel Alternative. It concluded that the extension of the Tunnel Alternative to UH Manoa would cost ***even more*** than construction of the Project with the extension to UH Manoa. *Id*. This analysis only confirms the conclusion that the Tunnel Alternative would result in costs of an extraordinary magnitude. The FEIS found that the extension to UH Manoa ***could not be constructed because no funding is available***. AR00000763 [FEIS at 113-114].

The Tunnel Alternative, which costs even more than the UH Manoa extension, would result in costs of such an extraordinary magnitude that no transit system could be constructed. The fact that the Tunnel Alternative would increase capital costs over an alternative that has already been rejected on the basis of cost, even if the increase is "less than 2%," (Pl. Br. at 17), does not support Plaintiffs' claim that the Tunnel Alternative is prudent. Rather, it shows that the Tunnel

Alternative is even more imprudent than an alternative that cannot be constructed because of excessive cost.

Plaintiffs characterize this increase of 2% ***over the cost of an alternative that was too costly to be constructed*** as a 2% increase over the cost of the Project. Pl. Br. at 17. In fact, as established by the FSEIS, the Tunnel Alternative would cost 19%, or $960 million, more than the Project. SAR00153931 [FSEIS at 65]; *see also*, SAR00155199-155242 [Detailed cost estimates].

Plaintiffs then cite *Stop H-3 Assoc. v. Dole*, 740 F.2d 1442 (9th Cir. 1984) ("*Stop H-3*") for the proposition that a cost increase of less than 10% could not reasonably be considered imprudent. Pl. Br. at 17. Not only does this reference fail to address the "prudence" of an alternative that would cost ***19% more***, but Plaintiffs' underlying premise – that *Stop H-3* establishes a rule that cost percentages are the only or primary factor to consider in determining extraordinary cost – is fallacious.

The critical distinction between this case and *Stop H-3* is the fact that the extensive record in this case establishes that the increased cost of the Tunnel Alternative would prevent its construction. SAR00153931-153933 [FSEIS at 65-67]. *Stop H-3* was not based on any such record, and no analysis of the effect of the cost increase was provided. In fact, *Stop H-3*'s entire analysis of the issue of extraordinary cost comprises three sentences and a footnote. The footnote observes that "the District Court made no mention of the increased cost of the

alternative" when it analyzed the prudence of the alternative in question. 740 F.2d at 1451, n.6. Without a District Court record to review for substantial evidence, the court merely concluded that an increased cost of around 11% of the project budget did not reach the "extraordinary magnitude" required by the Supreme Court in *Overton Park*, 401 U.S. at 1452.

If *Stop H-3*'s holding were applied indiscriminately to every case, as Plaintiffs propose, it would impose a strict "more than 11 per cent" rule that would be unrelated either to the context of the project in question or to the meaning of the statutory obligation to determine whether an alternative is "prudent." *See Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d 202, 208 (1st Cir. 2011) (reasoning that the Supreme Court's decision in *Overton Park*, which was cited by *Stop H-3*, is not a "broad, inflexible holding" that "displace[s] the statutory directive that the agency determine whether an alternative is 'prudent'"). Section 4(f) obligations are not delineated by "magic words, selectively culled" from opinions addressing different projects. *Id*. "[T]he agency's obligations are what the statute says they are," and the court's "focus must be on the statute ***and its application to the facts at hand***." *Id*. (emphasis added).

The facts at hand support the conclusion that the Tunnel Alternative is not prudent. Findings of extraordinary cost increases have been upheld even where "no cost studies were performed," based on reasonable assumptions about costs.

See, e.g., *Concerned Citizens Alliance v. Slater*, 176 F.3d 686, 703 (3rd Cir. 1999). In this case, the conclusion is based on cost studies. SAR00155199-155242 [cost studies]. The estimate of the cost to construct the Tunnel Alternative used the same methodology as the estimate for the King Street Tunnel which this Court concluded was not a prudent alternative because of its cost. SJ Order at 25; SAR00154082 [FSEIS at 116]. The record similarly supports FTA's conclusion that the Tunnel Alternative is not prudent.

b) Other Factors Identified in the FSEIS and Amended ROD, in Conjunction With the Financial Analysis, Support a Finding of Imprudence.

FTA determined that Tunnel Alternative is not prudent based on the cumulative consideration of (1) impacts on parks and historic properties, (2) settlement risks from tunnel construction, (3) environmental effects related to construction, including visual impacts, impacts on historic architecture, and traffic and business access disruption, (4) delayed benefits from the system, and (5) the extraordinary increase in the cost of the Tunnel Alternative. SAR00153933-153934 [FSEIS at 67-68].

Plaintiffs' claim that "none" of these factors supports a finding of imprudence (Pl. Br. at 18) fails for several reasons. The first is that the analysis of prudence does not require any single factor to rise to a level of imprudence. FTA's Section 4(f) regulations specifically require the consideration of multiple factors which, while individually minor, would cumulatively cause unique problems or

impacts of extraordinary magnitude supporting a finding of imprudence. 23 C.F.R. § 774.17(3); *see also Safeguarding the Historic Hanscom Area's Irreplaceable Res., Inc. v. F.A.A.*, 651 F.3d at 212-13 (even if no single factor, standing alone, would justify a finding that an alternative is imprudent, that finding may still be supported "by the totality of the factors. In making judgment calls of this sort, an agency is both entitled and obliged to consider the totality of the circumstances.") Plaintiffs' claim that an imprudence finding must be based only on "truly unusual factors" (Pl. Br. at 22) does not take into account the fact that the cumulative consideration must also consider factors that are "individually minor."

Plaintiffs' scattershot attacks on the individual factors that cumulatively resulted in the imprudence finding also fail to establish that FTA's conclusion was arbitrary and capricious. Plaintiffs' first argument (that the ROD is inconsistent with the FSEIS (Pl. Br. at 18)) relies on a misleading summary of the record. Plaintiffs state accurately that the FSEIS found that the Tunnel Alternative would have some long-term impacts that are similar to the Project. *Id.*, quoting FSEIS at 52. However, Plaintiffs neglected to quote the last sentence in the same paragraph, which states that the Tunnel Alternative "would substantially differ from the Project regarding visual, historic architecture, archaeological, and construction impacts." SAR00153919 [FSEIS at 53]. This statement introduces a 13-page analysis in the FSEIS (SAR00153919-153933 [FSEIS at 53-67]) and provides the

basis for the FTA's determination that the Tunnel Alternative is not prudent. SAR00154429 [AROD at 13].

Plaintiffs' next assertion (that the FSEIS "proves" that the Tunnel Alternative would have "'similar' impacts on parkland" (Pl. Br. at 18)) is also misleading. The FSEIS states that the Tunnel Alternative would travel as an elevated guideway adjacent to five City parks and in a tunnel adjacent to two additional parks. SAR00153922 [FSEIS at 56]. The word "similar" appears in this context:

> The effects on the [five] parks adjacent to the elevated guideway would be similar to the effects of the Project on Mother Waldron Neighborhood Park. . . and Irwin Memorial Park. . . because the elevated guideway would be adjacent to the edge and visible from the five parks. The one exception would be Thomas Square, which, as described under Visual Impacts above, includes protected significant public views. . . .

Id.

Plaintiffs' out-of-context quote of the single word "similar" fails to disclose that the Tunnel Alternative would have visual impacts on ***five*** parks, compared to the Project's visual impacts on ***two*** parks. Plaintiffs' statement also does not disclose the impact of the Tunnel Alternative on Thomas Square's significant and protected public views. These factors provided the basis for FTA's consideration of the Tunnel Alternative's impacts on parks. SAR00154429 [AROD at 13].

Plaintiffs completely fail to address the Tunnel Alternative's adverse effects on historic properties, which are described in detail in the FSEIS (SAR00153922-

153925 [FSEIS at 56-59]), aside from repeating Plaintiffs' inaccurate claim that the Tunnel Alternative would "use" fewer historic resources. Pl. Br at 18. In fact, the FSEIS determined that the Tunnel Alternative would have adverse effects on ***47 historic properties***, compared to 15 historic properties adversely affected by the Project. SAR00153925 [FSEIS at 59]; *see also* SAR00153923 [FSEIS at 57, Table 7], 153924 [FSEIS at 58, Table 8]). The FSEIS describes the nature of the adverse effects (SAR00153923 [FSEIS at 57]) and the methodology for reaching this conclusion (the same methodology as applied to the Project) (*id*.). FTA's consideration of the Tunnel Alternative's impacts on historic properties is not arbitrary and capricious.

Plaintiffs then contend that FTA's Section 4(f) regulations prohibit FTA from considering settlement risks from construction during its prudence evaluation. Pl. Br. at 19. Their only support for this claim is a general reference to the "definitions" section of the regulations (23 C.F.R. § 774.17), which does not support their argument. As previously discussed, the definition of "feasible and prudent avoidance alternative" ***requires*** consideration of a wide range of impacts during the "prudence" analysis, including environmental impacts and "unusual factors." 23 C.F.R. § 774.17. No regulatory provision prevents FTA from considering construction impacts.

The FSEIS found that "tunnel construction creates an unavoidable risk of subsidence and resulting damage to buildings in the area of subsidence. This is a

well-recognized risk associated with construction of tunnels in areas with the geological characteristics of this portion of Hawai‘i." SAR00154079 [FSEIS at App. A at A-77]. While this risk could "largely" be mitigated through design, so that the Tunnel Alternative was "feasible" as a matter of engineering, the risk could not be eliminated. *Id*. It was not arbitrary and capricious for FTA to consider risk of settlement and damage to adjacent buildings as a result of tunneling below the water table through mixed ground conditions (SAR00153930 [FSEIS at 64]; *see also* 153913-153914 [FSEIS at 47-48]), as well as considering a range of other environmental and community impacts from tunnel construction, including the likelihood of disrupting karst formations (SAR00153927, 153929 [FSEIS at 61, 63]), the potential release of soil contaminants (SAR00153929), and the transportation and disposal of 490,000 cubic yards of spoils (*id*.).

Plaintiffs criticize FTA's consideration of delayed benefits (Pl. Br. at 19, citing AROD at 13), contending both that delay does not matter, because earlier sections would not be delayed, and that delay is an appropriate punishment for not having selected the Tunnel Alternative in the first place. Pl. Br. at 19-20. Plaintiffs' disagreement with FTA on these matters does not render FTA's findings arbitrary and capricious. The FSEIS found that the construction of the Tunnel Alternative would delay system opening by approximately two years, and that the delay in benefits to system users is an additional impact. SAR00153933 [FSEIS at 67]. The FSEIS describes the need for transit improvements and the conditions

that would result from delay, including more traffic delays, more unpredictability of travel time, a delay in supporting city planning, and a continuation of burdens on minority and low-income residents. SAR00153880-153882 [FSEIS at 114-116]. It was not arbitrary or capricious for FTA to consider these factors.

Plaintiffs' next claim asserts that the ROD's reference to visual impacts is "ridiculous." Pl. Br. at 20. The FSEIS establishes that the Tunnel Alternative would cross view corridors protected as "prominent" and "significant" by Honolulu ordinances. SAR00153919-153921 [FSEIS at 53-55]. The methodology for determining the significance of visual impacts was the same as for the analysis of the Project. SAR00153919 [FSEIS at 53]. As noted in the FSEIS, the Tunnel Alternative "avoids some, but not all, visual impacts of the Project and would introduce other visual impacts." SAR00154080[FSEIS App. A at A-78]. The FSEIS also documents visual impacts on historic architecture, concluding that the Tunnel Alternative would affect 47 properties, compared to 15 affected by the Project. SAR00153922-153925 [FSEIS at 56-59]. It was not arbitrary and capricious for FTA to consider visual impacts in its prudence determination.

Plaintiffs then claim that the AROD's reference to "traffic and business disruption during construction" as a potential problem is "contrary to common sense." Pl. Br. at 20. Common sense needs to be informed by the record, which documents that the duration of construction of the underground stations would be much longer and the area required for the tunnels would be larger than for elevated

guideway (SAR00154080-154081 [FSEIS, App. A at A-78-79]); that 49,000 round-trip truck trips, or 63 one-way trips per day, will be required to and from the Ka‘aahi Street portal site to transport tunnel spoils (SAR00153919 [FSEIS at 53]);[14] and that impacts on properties along King Street would be substantial because the Tunnel Alternative’s guideway would run along the side of the street rather than in the middle, eliminating street parking and access to some driveways. SAR00153930-153931 [FSEIS at 64-65].

Contrary to Plaintiffs’ claims (Pl. Br. at 21, fn. 9), the FSEIS does disclose and compare the impacts of lane closures for the Project compared to the Tunnel Alternative. During the 33-month construction period for the underground station, lanes in Beretania Street and adjacent streets would be closed for periods extending up to several months. Two to three lanes of Beretania Street would be closed. In contrast, construction of the elevated guideway and Chinatown Station for the Project would require substantially shorter periods of lane closures on Nimitz Highway. SAR00153930-153931 [FSEIS at 64-65]. It was not arbitrary and capricious for FTA to consider traffic and business disruption during construction.

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[14] Plaintiffs claim that the statement that 63 one-way truck trips would be needed for the Tunnel Alternative overlooks Project impacts. Pl. Br. at 21, n. 9. The SEIS states clearly that these truck trips are needed for removal of tunnel spoils, an impact that is unique to the Tunnel Alternative. SAR00153929 [FSEIS at 63], 154054 [FSEIS App. A at A-52 (response to Comment Mol-5)].

Finally, Plaintiffs contend that the Tunnel Alternative would address "important safety risks" that were "identified" by the United States District Court for the District of Hawaii. Pl. Br. at 21. Plaintiffs cite a copy of a letter submitted by Judge Susan Oki Mollway (Pl. Br. at 21, citing FSEIS, App. A at A-92-A-94), but they fail to disclose that this letter received a full response in the FSEIS (SAR00154051-154055 [FSEIS, App. A at A-49-53]). The FSEIS documents that the U.S. Marshals' Service and Federal Protective Service reviewed the issues raised in Judge Mollway's letter and concluded that "the Project 'does not pose any additional threat to the Courthouse beyond that of surface traffic.'" SAR00154051 [FSEIS, App. A at A-49]. Security mitigation has been offered beyond the requirements of federal security guidelines applicable to the building and its uses. *Id*. Plaintiffs' alleged "safety risks" are not supported by the record. Furthermore, neither Section 4(f) nor the SJ Order requires an analysis of the prudence and feasibility of the Project. SAR00154051-154052 [FSEIS, App. A at A-50]. FTA's conclusions are not arbitrary or capricious.

c) The Section 4(f) Evaluation Complies With FTA's Implementing Regulations.

Plaintiffs claim that there is a regulatory requirement to determine whether problems with the Tunnel Alternative substantially outweigh "the importance of preserving the Section 4(f) properties at issue." Pl. Br. at 23. Plaintiffs likely are referring to the definition of a "feasible and prudent avoidance alternative," which is an alternative that "avoids using Section 4(f) property and does not cause other

severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17.

As discussed above, the Tunnel Alternative is neither an avoidance alternative nor is it prudent. Therefore, there is no obligation to determine whether the Tunnel Alternative causes other severe problems of a magnitude outweighing Section 4(f) protection.

Plaintiffs may be expressing a mistaken belief that FTA must weigh the Tunnel Alternative's severe problems against ***the Project's*** impacts on Section 4(f) resources. SAR00154082-154083 [FSEIS, App. A at A-80-81] (Plaintiffs' Comment Den-18, claiming that an evaluation must be made of the Chinatown Historic District and the Dillingham Transportation Building). But the regulation[15] on its face only applies to ***prudent avoidance*** alternatives. The Tunnel Alternative is not a prudent avoidance alternative. Plaintiffs' claim has no merit. In any event, as discussed in the next section FTA ***did*** compare the impacts of the Project and the Tunnel Alternative as part of the "least overall harm" analysis.

3. The Project is the Least Overall Harm Alternative.

Because neither the Tunnel Alternative nor the Project avoids the use of Section 4(f) resources, FTA must approve the alternative that causes the least

overall harm. 23 C.F.R. § 774.3(c). FTA determined that the Project is the least harm alternative. SAR00154429 [AROD at 13]. Plaintiffs' challenge to this determination failed to mention that FTA must consider ***seven factors*** in making this determination, including all of the following:

> (i) The ability to mitigate adverse impacts to each Section 4(f) property . . .;
>
> (ii) The relative severity of the remaining harm, after mitigation, to the protected activities, attributes, or features that qualify each Section 4(f) property for protection;
>
> (iii) The relative significance of each Section 4(f) property;
>
> (iv) The views of the official(s) with jurisdiction over each Section 4(f) property;
>
> (v) The degree to which each alternative meets the purpose and need for the project;
>
> (vi) After reasonable mitigation, the magnitude of any adverse impacts to resources not protected by Section 4(f); and
>
> (vii) Substantial differences in costs among the alternatives.

23 C.F.R. § 774.3(c). The balancing and weighing of these factors is within the discretion of FTA, based on "the facts and circumstances of the particular project and Section 4(f) properties involved." 2008 Final Rule, 73 Fed. Reg. at 13,372.

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15 23 C.F.R. § 774.17 (Definition of "Feasible and prudent alternative").

Section 3.7 of the FSEIS (SAR00153934-153941 [FSEIS at 68-75]) analyzes all of these required factors. This evaluation is summarized in the FSEIS. SAR00153941 [FSEIS at 75]. While the Project would use more properties that are listed on the National Register, the Project would result in the least harm to Section 4(f) properties. SAR00153935-153938 [FSEIS at 69-72]. The Project also would have less severe non-Section 4(f) impacts (based on impacts on historic architecture and construction impacts) (SAR00153940 [FSEIS at 74]), and would cost substantially less than the Tunnel Alternative (SAR00153940-153941 [FSEIS at 74-75]).

Plaintiffs claim that this determination is arbitrary and capricious because the Tunnel Alternative would use fewer Section 4(f) resources. Pl. Br. at 24. In fact, both alternatives would use an identical number (four) of Section 4(f) protected historic properties within the area evaluated in the FSEIS, with one additional *de minimis* use by the Project. SAR00153936 [FSEIS, Table 11 at 70]. Furthermore, as the Section 4(f) Policy Paper states, this element of the analysis cannot be based solely on quantity:

> Not all uses of 4(f) resources have the same magnitude of impact and not all 4(f) resources have the same quality. A qualitative evaluation is required. For example, evaluation of the net impact should consider whether the use of the 4(f) property involves:
>
> 1) A large taking or a small taking in relation to the overall size of the resource, or
>
> 2) Shaving an edge of a property as opposed to cutting

> through its middle, or
>
> 3) Altering part of the land surrounding an historic building rather than removing the building itself, or
>
> 4) Examining the key features of the 4(f) resource, or
>
> 5) An unused portion of a park rather than a highly used portion.

AR00021946-47 [FHWA Section 4(f) Policy Paper at 5-6].

Accordingly, the FSEIS acknowledges the significance of the Chinatown Historic District and Dillingham Transportation Building. SAR00153938 [FSEIS at 72]. It also evaluates the significance of the Project's use of these resources. In the case of Chinatown, a station entrance would be located in a parking lot in the same parcel as buildings that are contributing elements to the Historic District, but the Project would not alter those buildings. SAR00153936 [FSEIS at 70]. With respect to the Dillingham Transportation Building, the only effect would be the location of a station entrance in a modern plaza next to the building. Again, the historic building would not be altered.

Overall, the FSEIS concludes that the Project's use of Section 4(f) resources is limited to construction within the parcel boundary of historic properties. No removal, relocation, or alteration of historic structures would result. *Id*. The Tunnel Alternative, in contrast, would require the ***demolition, removal, relocation, or alteration*** of the OR&L Office/Document Storage Building, the former filling station on the OR&L parcel, and the King Florist Building. This much greater

significance of the Tunnel Alternative's impacts on Section 4(f) properties supports the conclusion that the Project would result in the least harm to Section 4(f) properties. SAR00153935-153938 [FSEIS at 69-72].

The analysis of non-Section 4(f) environmental impacts also supports the conclusion that the Tunnel Alternative would have a greater magnitude of adverse impacts, including impacts related to historic architecture, construction duration, and construction-related traffic impacts. SAR00153940 [FSEIS at 74].

Finally, the FSEIS supports the conclusion that the Tunnel Alternative would result in a substantial difference in cost: $960 million, or a 19% increase over the Project. This would "result in project costs being greater than all available funding sources and would exceed available funding for contingencies. No additional sources have been identified that could fund the $960 million cost increase." SAR00153940-153941 [FSEIS at 74-75].

Plaintiffs contend that their discussion of "prudence" addresses this factor (Pl. Br. at 25), but it does not. Plaintiffs only address the "extraordinary magnitude" test applied when excessive costs provide the basis of an imprudence finding. Pl. Br. at 17-18. The "extraordinary magnitude" test ***does not*** apply to the least harm analysis, where the test is "substantial differences" in cost. 23 C.F.R. § 774.3(c). [16] As stated in the 2008 Final Rule:

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[16] In other words, even if the court were to conclude that the increase in cost does not satisfy the "extraordinary magnitude" test, the Court should uphold the FTA's

> Since this factor is a comparison of the costs of alternatives under consideration, all of which use Section 4(f) property. . . ***the difference in cost would not have to be ''extraordinary,''*** but [] the magnitude of the difference would determine its appropriate weight when balancing it with the other factors. . . . When deciding whether to consider a cost difference ''substantial,'' . . . FTA may consider factors such as the percentage difference in the cost of the alternatives; how the cost difference relates to the total cost of similar transportation projects in the applicant's annual budget; and the extent to which the increased cost for the subject project would adversely impact the applicant's ability to fund other transportation projects.

73 Fed. Reg. at 13,373 (emphasis added). The Court must defer to FTA's interpretation of the statute reflected in 23 C.F.R. § 774.3(c). *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 866 (1994).

Plaintiffs provide no justification for their assertion that $960 million, or 19% of the Project's cost, is not a "substantial difference" in cost between the alternatives.

Overall, when there is no feasible and prudent avoidance alternative, FTA "may determine that a serious problem identified in factors (v) through (vii) outweighs relatively minor net harm to a Section 4(f) property." Policy Paper at 16. It was not arbitrary and capricious for FTA to conclude that the Project is the least harm alternative, based on its well-supported consideration and weighing

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determination because of the "substantial differences" between the cost of the Project and the Tunnel Alternative.

of all seven factors listed in the FTA's section 4(f) regulations. 23 C.F.R. § 774.3(c)(i)-(vii.) Where, as here, an agency interprets its own regulations, the court is required to defer to the agency "'unless that interpretation is "plainly erroneous or inconsistent with the regulation.'"" *Decker v. Nw. Envtl. Def. Ctr.*, 133 S.Ct. 1326, 1337 (2013) (citation omitted).

V. THE FSEIS MET ALL REQUIREMENTS TO CONSIDER INFORMATION REGARDING PURPOSE AND NEED.

The FSEIS fully discloses and considers information regarding the Tunnel Alternative's ability to meet purpose and need. It concludes that the Tunnel Alternative would meet purpose and need and was not imprudent on that basis. SAR00153915-153917 [FSEIS at 49-51]. For all of the reasons discussed in the previous section, however, the FSEIS and AROD concluded that the Tunnel Alternative is not an avoidance alternative, is not prudent, and is not the least harm alternative.

Plaintiffs claim, vaguely, that the FSEIS should have considered whether "other alternatives" might be avoidance alternatives. Pl. Br. at 26. They cite FSEIS pages that only address the Tunnel Alternative and do not specify what "other alternatives" they believe should be addressed.

The FSEIS fully considered the information regarding the Tunnel Alternative's purpose and need, and it fully considered the consequences of this information. Plaintiff's nebulous claim that something more is needed is not

sufficient to overturn the rigorous analysis and full disclosure provided by the FSEIS. Furthermore, the scope of the FSEIS is limited by the SJ Order.[17]

VI. CONCLUSION.

The Court should dismiss Plaintiffs' Objection to the Notice of Compliance dissolve the Court's injunction.

DATED: January 6, 2014

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[17] The Court does not have jurisdiction to consider Plaintiffs' new NEPA claim. See City Defendants' Objection and Motion to Strike filed concurrently.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rules 7.5 and 56.1 of the United States District Court for the District of Hawai‘i, the CITY AND COUNTY OF HONOLULU (“City”) and MICHAEL FORMBY, in his official capacity as Director of the City and County of Honolulu Department of Transportation Services (collectively, “City Defendants”), state that City Defendants’ accompanying **CITY DEFENDANTS’ RESPONSE TO PLAINTIFFS’ OBJECTION TO NOTICE OF COMPLIANCE** contains **8,839** words, including headings, footnotes and quotations, but not counting he case caption, table of contents, table of authorities, exhibits or certificate of service, as calculated by the word count properties of the Microsoft Word software.

DATED: January 6, 2014

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