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**UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**

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

Plaintiffs,

vs.

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

Defendants.

Civ. No. 11-00307 AWT

ORDER ON DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

1 Pending before the Court are two Motions for Partial Summary Judgment filed by
2 the City and County of Honolulu and Wayne Yoshioka, Director of the City and County
3 of Honolulu Department of Transportation Services (collectively, “City Defendants”).
4 (Docs. 86, 95). The Court heard argument on the motions on April 18, 2012. For the
5 reasons stated below, both motions are **granted in part** and **denied in part**.

6 **I. Background**

7 Plaintiffs allege that the Final Environmental Impact Statement/Section 4(f)
8 Evaluation (“FEIS”) and Record of Decision (“ROD”) approving the Honolulu High-
9 Capacity Transit Corridor Project (“Rail Project”) do not comply with the requirements of
10 the National Environmental Policy Act (“NEPA”), Section 4(f) of the Department of
11 Transportation Act (“Section 4(f)”), the National Historic Preservation Act, and the
12 regulations implementing those statutes. (First Am. Compl., Doc. 117). Both of City
13 Defendants’ Motions for Partial Summary Judgment concern Plaintiffs’ claims under
14 Section 4(f), 49 U.S.C. § 303. Section 4(f)(c) prohibits the Secretary of Transportation
15 from approving a transportation project that requires the “use” of a public park, recreation
16 area, or wildlife and waterfowl refuge of national, state, or local significance, or land of a
17 historic site of national, state, or local significance, unless there is no prudent and feasible
18 alternative to using that land, and the program or project includes all possible planning to
19 minimize harm to the site.

20 Plaintiffs have informed the Court that they have found only limited evidence in
21 the administrative record that Defendants were aware of issues related to the Rail
22 Project’s impact on four sites specified in Plaintiffs’ First Amended Complaint: (1) the
23 Pacific War Memorial Site; (2) the Hawaii Employers Council Building; (3) the DOT
24 Harbors Division Building; and (4) the Tamura Building. (Doc. 96). Accordingly,
25 Plaintiffs state that they will no longer pursue Section 4(f) claims specific to those four
26 sites. (*Id.*).

27 **II. Legal Standard**

28 Summary judgment is proper where there is no genuine issue of material fact and

1 the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c); *Celotex*
2 *Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must draw all reasonable
3 inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*,
4 475 U.S. 574, 587 (1986).

5 **III. City Defendants' First Motion for Partial Summary Judgment: Standing**

6 **A. Background**

7 On January 23, 2012, Plaintiffs submitted standing declarations to Defendants,
8 pursuant to this Court's Rule 16 Scheduling Order (Doc. 66). (*See* Docs. 86-2-86-16). In
9 their first Motion for Partial Summary Judgment, City Defendants argue that Plaintiffs
10 lack Article III standing to pursue claims related to those Section 4(f) sites that Plaintiffs
11 failed to mention in their standing declarations, including: (1) Piers 10/11; (2) the Pacific
12 War Memorial Site; (3) the Makalapa Navy Housing Historic District; (4) the Hawaii
13 Employers Council Building; and (5) the Tamura Building. (Doc. 86).¹

14 City Defendants also argue that Plaintiffs lack Article III standing to pursue
15 Section 4(f) claims regarding three other Section 4(f) sites: (1) Ke'ehi Lagoon Park; (2)
16 Queen Street Park; and (3) Mother Waldron Park. Although these three sites are
17 mentioned in Plaintiffs' standing declarations, City Defendants argue that Plaintiffs have
18 failed to demonstrate an injury-in-fact with respect to those sites, because Plaintiffs do not
19 establish past use of those sites or concrete plans to visit them in the future.

20 The Federal Transit Administration ("FTA") and the other Federal Defendants
21 joined City Defendants' motion. (Doc. 87). Plaintiffs filed a response in opposition to
22 the motion, arguing that Section 4(f) does not require site-by-site demonstration of
23 injury-in-fact. (Doc. 93). City Defendants replied in support of their motion. (Doc. 105).

24 **B. Analysis**

25 In order to demonstrate Article III standing, an environmental plaintiff must

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27 ¹ As noted above, Plaintiffs have conceded their claims with respect to the
28 Pacific War Memorial Site, the Hawaii Employers Council Building, and the Tamura
Building. (Doc. 96).

1 demonstrate: (1) an injury-in-fact that is actual or imminent, and concrete and
2 particularized, in that it affects the plaintiff in a personal and individual way; (2) a causal
3 connection between that injury and the conduct being challenged; and (3) that it is likely
4 that the injury will be redressed by a decision favorable to the plaintiff. *Lujan v.*
5 *Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992). At the summary judgment
6 stage, each of these elements must be supported by affidavits or other evidence of specific
7 facts. *Id.* at 561.

8 The parties' central disagreement is over whether Plaintiffs must demonstrate an
9 injury-in-fact with respect to *each* of the Section 4(f) sites named in Plaintiffs' First
10 Amended Complaint, or whether it is sufficient for Plaintiffs to show an injury-in-fact
11 with respect to one or some, but not all, of the Section 4(f) sites. In essence, Defendants
12 argue that each Section 4(f) site enumerated in the First Amended Complaint must be
13 treated as a separate Section 4(f) claim for which Plaintiffs must independently establish
14 standing. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (observing that a plaintiff must
15 demonstrate standing for each claim he seeks to press) (quoting *DaimlerChrysler Corp. v.*
16 *Cuno*, 547 U.S. 332, 352 (2006)).

17 Only one court has ever directly considered whether a plaintiff is required to
18 establish site-specific standing in order to bring Section 4(f) claims. In an unpublished
19 decision, the Fourth Circuit found that the plaintiffs' declarations established Section 4(f)
20 standing with respect to a school complex, but not with respect to two other Section 4(f)
21 sites. *Piedmont Envtl. Council v. U.S. Dep't of Transp.*, 58 F. App'x 20, 24 (4th Cir.
22 2003).² Because the plaintiffs' declarations did not mention the latter two sites, the
23 plaintiffs failed to show that they would suffer any actual and imminent direct injury with
24 respect to those properties. *Id.*

25
26 ² Under Fourth Circuit Rule 32.1, citation in briefs and oral arguments to
27 unpublished dispositions issued prior to 2007 in district courts within the Fourth Circuit is
28 "disfavored." However, the decision may be cited if it has precedential value in relation to
a material issue in a case and if there is no published opinion that would serve as well.

1 No other decision appears to have directly considered the necessity of site-by-site
2 standing in a case where a plaintiff had established injury-in-fact as to one Section 4(f)
3 site, but not as to others. While Plaintiffs cite a number of decisions that appear to have
4 allowed Section 4(f) claims to go forward for multiple sites based on generalized,
5 non-site-specific claims of injury or based on a showing of injury-in-fact as to a single
6 Section 4(f) site, none of those decisions squarely addresses the issue of site-by-site
7 standing and the problem may not have been presented to those courts. *See Save Our*
8 *Heritage, Inc. v. FAA*, 269 F.3d 49, 54-56 (1st Cir. 2001); *Preservation Coalition of Erie*
9 *County v. FTA*, 129 F. Supp. 2d 551, 561-62 (W.D.N.Y. 2000); *Sierra Club, Ill. Chapter*
10 *v. U.S. Dep't of Transp.*, 962 F. Supp. 1037, 1040-42 (N.D. Ill. 1997).

11 In this Court's view, the approach taken by the Fourth Circuit in *Piedmont*
12 *Environmental Council* makes a great deal of sense, given that courts generally analyze
13 Section 4(f) claims regarding the "use" of historical sites and parks on a site-by-site basis.
14 *See Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 531-33 (9th Cir. 1994);
15 *Lakes Region Legal Def. Fund, Inc. v. Slater*, 986 F. Supp. 1169, 1199-1205 (N.D. Iowa
16 1997). Section 4(f) requires the FTA to make site-specific determinations about whether,
17 and to what extent, a transportation project will use a given park or historical site and so,
18 naturally, judicial review of the FTA's decisions is site-specific.

19 In *Laguna Greenbelt*, the Ninth Circuit analyzed a number of Section 4(f) claims
20 raised by the plaintiffs and held that the plaintiffs could not challenge the FHA's "no use"
21 determination for eight particular Section 4(f) sites on appeal, because they did not raise
22 challenges regarding those specific sites before the district court. 42 F.3d at 532. This
23 strongly suggests that the court viewed the plaintiffs' Section 4(f) challenges to various
24 sites as separate and independent claims, because even though the plaintiffs had raised
25 challenges to *some* Section 4(f) sites before the district court, that was not sufficient to
26 raise an issue as to other Section 4(f) sites. If each challenge to a Section 4(f) site
27 determination constitutes an independent claim, then *Davis* requires that Plaintiffs
28 independently establish standing for each Section 4(f) site. *See* 554 U.S. at 734.

1 The Court therefore agrees with Defendants that site-specific standing is required
2 in order to bring a Section 4(f) claim. It would not make sense to allow Plaintiffs to make
3 a claim about the Rail Project's impact on the Tamura Building, for example, merely
4 because Plaintiffs demonstrated that they would be injured by the Rail Project's impact
5 on the Pearl Harbor Monument. The two claims would be analytically distinct, and it
6 would not serve the purposes of Article III standing to allow Plaintiffs to challenge
7 agency action affecting a site that they had never used or visited and never intended to use
8 or visit in the future. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)
9 ("Accepting an intention to visit the National Forests as adequate to confer standing to
10 challenge any Government action affecting any portion of those forests would be
11 tantamount to eliminating the requirement of concrete, particularized injury in fact.").

12 In order to establish injury-in-fact, a environmental plaintiff must show that he or
13 she would be directly affected by the agency action at issue; it is not enough to show that
14 one has visited a site in the past if one has not alleged concrete plans to return in the
15 future. *Lujan*, 504 U.S. at 564 (holding that "some day" intentions to return do not
16 support a finding of imminent injury). Harm to the environment that affects recreational
17 or aesthetic interests suffices, but only if the plaintiff can show more than a vague desire
18 to return to the site. *Summers*, 555 U.S. at 494-96. However, where the recreational use
19 of a particular area has been extensive and in close proximity to the plaintiff, the Ninth
20 Circuit has found that the plaintiff's expressed intention to continue using the land is
21 sufficiently concrete to constitute an injury-in-fact. *Wilderness Soc., Inc. v. Rey*, 622 F.3d
22 1251, 1256 (9th Cir. 2010) (citing *White Tanks Concerned Citizens, Inc. v. Strock*, 563
23 F.3d 1033, 1039 (9th Cir. 2009)).

24 By failing to mention Piers 10/11, the Pacific War Memorial Site, the Makalapa
25 Navy Housing Historic District, the Hawaii Employers Council, and the Tamura Building
26 at any point in their standing declarations, Plaintiffs have failed to demonstrate standing
27 as to those sites. The Court therefore **grants** summary judgment to Defendants on each
28 of these sites, as well as any other sites not mentioned in the standing affidavits.

1 In addition, Plaintiffs have failed to demonstrate injury-in-fact with respect to
2 Ke'ehi Lagoon Park and Queen Street Park. Those two parks are mentioned in only one
3 of Plaintiffs' standing declarations, that of Donna Wong, the Executive Director of
4 Hawaii's Thousand Friends ("HTF"). (*See* Wong Decl., Doc. 86-8 at ¶ 4). Wong states
5 that HTF supports the preservation of public parks "such as Keehi Lagoon Park" and that
6 the Rail Project will "significantly impact the aesthetic, recreational, and historic values
7 of existing parks used by HTF members." (*Id.* at ¶ 4). She also states that HTF supports
8 the establishment of new public parks "such as Queen Street Park," adding, "I believe that
9 HTF members would visit such additional parks if they were available." (*Id.*). However,
10 Wong's declaration does not describe any HTF members' concrete plans to use those two
11 sites in the future, or specifically mention whether HTF members had regularly used
12 Ke'ehi Lagoon Park in the past. Wong's declaration simply does not provide evidence of
13 more than a "some day" or "vague" intention to use the two parks in the future. As a
14 result, the Court **grants** summary judgment to Defendants on Plaintiffs' Section 4(f)
15 claims as to Queen Street Park and Ke'ehi Park.

16 In contrast, Plaintiffs have demonstrated injury-in-fact as to Mother Waldron Park.
17 Mother Waldron Park is mentioned only once by Plaintiffs, in the declaration of Michelle
18 Matson, a member and former President of HTF. (*See* Matson Decl., Doc. 86-11).
19 Matson explains that she is a resident of Honolulu, and that she regularly attends
20 meetings and activities in downtown Honolulu and plans to continue to do so. (*Id.* at ¶¶
21 1, 3). She adds, "I frequent and enjoy the outdoor open space and gathering place
22 opportunities of the public parks in the downtown area, such as . . . Mother Waldron
23 Park." (*Id.* at ¶ 3). While Matson does not specify when or how often she plans to return
24 to Mother Waldron Park, she has expressed an intention to continue to use it. The Ninth
25 Circuit has found repeated past use of a local park sufficient to establish standing,
26 because it shows a tangible, continuing connection to a particular location. *See White*
27 *Tanks Concerned Citizens*, 563 F.3d at 1039. Consequently, the Court **denies** summary
28 judgment on standing grounds as to Mother Waldron Park.

1 **IV. City Defendants’ Second Motion for Partial Summary Judgment: Waiver**

2 **A. Background**

3 City Defendants’ second Motion for Partial Summary Judgment argues that
4 Plaintiffs have waived all Section 4(f) claims pertaining to specific sites that they did not
5 comment on during the administrative process. (Doc. 95). The Section 4(f) sites that
6 Defendants claim Plaintiffs failed to comment on include: (1) Pearl Harbor National
7 Historic Landmark; (2) Merchant Street Historic District; (3) DOT Harbors Division
8 Building; (4) Pacific War Memorial Site; (5) Makalapa Navy Housing Historic District;
9 (6) Hawaii Employers Council; and (7) the Tamura Building. Defendants also request
10 summary judgment as to any other Section 4(f) sites not specifically identified by
11 Plaintiffs during the notice-and-comment process on the Draft Environmental Impact
12 Statement (“DEIS”), FEIS, and ROD.

13 Plaintiffs filed a response in opposition, in which they claim that they did raise
14 concerns about: (1) the Pearl Harbor Landmark; (2) Merchant Street; and (3) Makalapa
15 Navy Housing. (Doc. 96). Plaintiffs further argue that the administrative record clearly
16 demonstrates that Defendants had independent knowledge of concerns about these three
17 sites. City Defendants filed a reply in support of their motion. (Doc. 104). Federal
18 Defendants did not join City Defendants’ motion.

19 **B. Analysis**

20 As an initial matter, the Court must **deny** Defendants’ catch-all request for
21 summary judgment on *any* Section 4(f) claims involving Section 4(f) sites not specifically
22 identified by Plaintiffs during the administrative proceedings. There is insufficient
23 evidence before the Court to determine whether such Section 4(f) claims, concerning
24 unspecified sites, could be saved by the “so obvious” exception to the exhaustion
25 requirement, further described below.

26 As earlier noted, Plaintiffs concede their Section 4(f) claims with respect to the
27 Pacific War Memorial Site, the Hawaii Employers Council, the DOT Harbors Division
28 Building, and the Tamura Building. Accordingly, the Court **grants** summary judgment to

1 Defendants on those sites.³ In addition, the Court need not address the parties' waiver
2 arguments with respect to the Makalapa Navy Housing site, as the Court granted
3 summary judgment to Defendants on that site on standing grounds for the reasons laid out
4 above. The parties' dispute on waiver grounds has therefore narrowed to two sites: (1)
5 the Pearl Harbor Landmark; and (2) the Merchant Street Historic District.

6 **1. Legal Standard**

7 The Administrative Procedure Act ("APA") requires that plaintiffs exhaust
8 administrative remedies before bringing suit in federal court. *Great Basin Mine Watch v.*
9 *Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). In the NEPA context, this means that a
10 plaintiff must structure its participation so that it alerts the agency to its positions and
11 contentions. *Id.* A plaintiff's comments, to be sufficient, must show why a particular
12 mistake by the agency was of possible significance to the agency's result. *Vt. Yankee*
13 *Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978). The
14 purpose of the exhaustion requirement is to avoid premature claims and to ensure that the
15 agency is given the opportunity to bring its expertise to bear to resolve a claim. *Great*
16 *Basin Mine Watch*, 456 F.3d at 965. If a plaintiff fails to meet exhaustion requirements,
17 its claim is waived and will not be considered by a federal court. *See Dep't of Transp. v.*
18 *Public Citizen*, 541 U.S. 752, 764-65 (2004).

19 The Court agrees with Defendants that these same exhaustion principles apply in
20 the Section 4(f) context. Judicial review of Section 4(f) is governed by the APA. *See N.*
21 *Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir.
22 2008). Moreover, the Ninth Circuit has applied exhaustion principles quite expansively.
23 *See Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (applying exhaustion
24 doctrine to agency decision under National Forest Management Act); *see also Portland*
25 *Gen. Elec. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023 (9th Cir. 2007) ("As a

26
27 ³ The Court notes that it previously granted summary judgment to Defendants
28 on the Pacific War Memorial Site, the Hawaii Employers Council, and the Tamura Building,
on standing grounds, above.

1 general rule, we will not review challenges to agency action raised for the first time on
2 appeal.”).

3 The Ninth Circuit has held that the exhaustion requirement should be interpreted
4 broadly. *Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058,
5 1065 (9th Cir. 2010). Comments that alert an agency to an argument in general terms are
6 enough to avoid waiver, as long as the agency is given the opportunity to bring its
7 expertise to bear to resolve the claim. *Lands Council*, 629 F.3d at 1076. Precise legal
8 terms need not be used in the comment, but the issue must be raised with sufficient clarity
9 to allow the decision maker to understand and rule on the issue raised. *Nat’l Parks &*
10 *Conservation Ass’n*, 606 F.3d at 1065. There is no bright-line standard as to when this
11 requirement has been met, and so courts must consider exhaustion arguments on a
12 case-by-case basis. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th
13 Cir. 2002).

14 Even if Plaintiffs did not sufficiently comment on the two sites at issue, Plaintiffs’
15 claims may not be waived if the FEIS’ flaws were “so obvious” that there was no need for
16 a commenter to point them out specifically in order to preserve the ability to challenge the
17 FEIS. *Public Citizen*, 541 U.S. at 765; *‘Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083,
18 1092-93 (9th Cir. 2006). If the agency had “independent knowledge” of the issues that
19 concerned the plaintiffs, then the “so obvious” exception allows plaintiffs to bring a claim
20 that they did not exhaust. *Barnes v. United States*, 655 F.3d 1124, 1132 (9th Cir. 2011).

21 Defendants argue that, in order for the “so obvious” exception to apply, Plaintiffs
22 must show that Defendants have “acknowledged” the allegedly obvious flaw. (*See Doc.*
23 *104 at 16-17*). While it is true that the three Ninth Circuit cases discussing the “so
24 obvious” requirement found that the government had knowledge of the claim at issue
25 specifically because the government itself had researched or commented on the issue,
26 none of these decisions explicitly requires that the government have acknowledged an
27 error in order for a plaintiff to demonstrate that the government had “independent
28 knowledge” of a flaw. *See Barnes*, 655 F.3d at 1132-34; *‘Ilio’ulaokalani Coal.*, 464 F.3d

1 at 1091-93; *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 559 (9th Cir. 2000).

2 The cases instead imply that a plaintiff need only show that the agency was aware of the
3 problem, not that the agency explicitly recognized the problem's existence.

4 **2. Pearl Harbor National Historic Landmark**

5 The Court concludes that Plaintiffs did not exhaust their Section 4(f) claim with
6 respect to Pearl Harbor during the notice-and-comment process on the Rail Project.

7 Plaintiff HTF commented on Defendants' DEIS, noting that Pearl Harbor was among the
8 community facilities that would be directly affected by the Rail Project and complaining
9 that the DEIS did not provide information about direct, indirect, or cumulative impacts on
10 such facilities and that there were no details provided about the DEIS' Section 4(f)
11 evaluation. (AR 000855 at 1916-18). However, HTF's comment did not suggest that
12 HTF was concerned about any *specific* negative impact on the site. Although HTF was
13 not required to describe its claim with any precise legal terminology, HTF did not
14 comment with sufficient clarity to put Defendants on notice that HTF was concerned that
15 the Rail Project would "use" Pearl Harbor in violation of Section 4(f).

16 Moreover, Plaintiffs have not demonstrated that the FEIS' flaws were "so obvious"
17 as to allow Plaintiffs to raise unexhausted claims with respect to Pearl Harbor. Plaintiffs
18 point to two letters from the National Park Service, a letter from the Environmental
19 Protection Agency, and a letter from the Hawaii State Historic Preservation Division.
20 Generally, the letters express concern that the DEIS did not consider the impact of
21 proposed station locations within the Pearl Harbor Landmark and did not give enough
22 attention to potential noise and visual impacts on the site. (AR 000855 at 00887-88, 893,
23 971, 1106). Defendants have persuasively shown that they addressed the concerns raised
24 in those letters, both by changing the route of the Rail Project and by conducting further
25 analysis of the noise and visual impacts of the Project. (AR 30 at 000170; AR
26 129243-44). As a result, the comments from those three groups would not have made
27 "obvious" any flaw in the FEIS, because Defendants had already made an effort to
28 address them.

1 Because Plaintiffs failed to exhaust their Section 4(f) claim as to Pearl Harbor
2 during the notice-and-comment process, and because they have failed to show that
3 Defendants had “independent knowledge” of their challenge to the Rail Project’s “use” of
4 Pearl Harbor, the Court **grants** summary judgment to Defendants on Plaintiffs’ Pearl
5 Harbor Section 4(f) claim.

6 **3. Merchant Street Historic District**

7 To demonstrate that Plaintiffs commented on the Section 4(f) use of the Merchant
8 Street Historic District, Plaintiffs cite three comment letters written by Matson, which
9 highlighted four protected sites (Aloha Park, Irwin Park, the Dillingham Transportation
10 Building, and Mother Waldron Park), and also mentioned a protected view that Plaintiffs
11 now claim is inside of the Merchant Street area. (AR 000855 at 2490-91, 95-99; AR
12 017157 at 17344-48). Plaintiffs also cite a letter written by HonoluluTraffic that argued
13 in favor of a “Managed Lanes Alternative” that would avoid “most significant 4(f)
14 properties” and a letter from HTF noting that the Rail Project would “change the visual
15 character of the streetscape and the historical disconnection [sic] between downtown and
16 the waterfront.” (AR 071958; AR 000855 at 001922).

17 None of the comments cited by Plaintiffs, however, mentions the Merchant Street
18 Historic District by name. While Matson’s comment letters could be read to touch on the
19 subject of the Merchant Street viewscape, it would be equally fair for the FTA to have
20 read Matson’s letters as expressing concerns only with respect to the four protected sites
21 named in the letters, the Aloha Tower, Irwin Park, the Dillingham Transportation
22 Building, and Mother Waldron Park. The Court concludes that these comments did not
23 raise any issue as to the “use” of the Merchant Street area with sufficient clarity to allow
24 Defendants to understand and bring their expertise to bear on the claim raised. Plaintiffs’
25 comments thus did not satisfy the exhaustion requirement.

26 Plaintiffs argue in the alternative that Defendants had independent knowledge of
27 the Section 4(f) issues with respect to Merchant Street based on letters from the Advisory
28 Council on Historic Preservation and the Hawaii Historic Foundation, which raised

1 concerns about indirect and cumulative effects of the Rail Project on the Merchant Street
2 area. (AR 059002-03, AR 059005-07). Plaintiffs also point to Defendants' own notes,
3 which acknowledged concerns about impacts on the Merchant Street Historic District and
4 responded to those concerns. (AR 59177-79).

5 Plaintiffs' reliance on Defendants' notes is misplaced. Defendants' notes reveal
6 that Defendants tried to address the concerns raised in public comments about the
7 Merchant Street Area. Plaintiffs therefore appear to be arguing that Defendants' response
8 to those comments was inadequate, not that Defendants altogether failed to respond.
9 "When the argument is one of degree, rather than an outright failure to address, the
10 plaintiff must raise that argument during the comment period or be precluded from
11 litigating it at a later date." *League of Wilderness Defenders v. Bosworth*, 383 F. Supp.
12 2d 1285, 1296-97 (D. Or. 2005). It would be unreasonable to hold that Defendants'
13 attempts to address the comment letters concerning the Merchant Street District were
14 "obviously" flawed, when Plaintiffs made no effort to point out those flaws themselves.

15 The Court therefore **grants** summary judgment to Defendants on Plaintiffs'
16 Section 4(f) claim as to Merchant Street for failure to exhaust.

17 **V. Conclusion**

18 For the reasons set forth above,

19 **IT IS HEREBY ORDERED:**

- 20 1. City Defendants' first Motion for Partial Summary Judgment (Doc. 86) is
21 **denied** with respect to Plaintiffs' Section 4(f) claim regarding Mother
22 Waldron Park. The motion is **granted** as to Plaintiffs' Section 4(f) claims
23 concerning Piers 10/11, the Pacific War Memorial Site, the Makalapa Navy
24 Housing Historic District, the Hawaii Employers Council Building, the
25 Tamura Building, Ke'ehi Lagoon Park, Queen Street Park, and any other
26 Section 4(f) sites not mentioned in Plaintiffs' standing declarations.
- 27 2. City Defendants' second Motion for Partial Summary Judgment (Doc. 95)
28 is **granted** with respect to the DOT Harbors Division Building, the Pearl

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Harbor National Historic Landmark, and the Merchant Street Historic District. The motion is **denied** as to any other Section 4(f) sites not specifically identified by Plaintiffs during the notice-and-comment process and not specified by name in City Defendants' motion.

DATED this 17th day of May, 2012.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by designation