

NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAO KALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL

CIVIL NO. 11-1-0206-01 GWBC
(DECLARATORY RELIEF)

APPEAL FROM:

- (1) FINAL JUDGMENT FILED ON AUGUST 8, 2011
- (2) JULY 5, 2011 ORDER GRANTING DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011
- (3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE DEFENDANTS' SUBSTANTIVE JOINDER IN DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF

ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Defendants-Appellees.

HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011

(4) JULY 5, 2011 ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING OF MARCH 23, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI'I

HON. GARY W.B. CHANG

CITY APPELLEES' MEMORANDUM IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL FILED MARCH 9, 2012

DECLARATION OF JOHN P. MANAUT; EXHIBITS "A" - "B"

DECLARATION OF FAITH MIYAMOTO

DECLARATION OF KENNETH TORU HAMAYASU

DECLARATION OF THOMAS WILLOUGHBY

CERTIFICATE OF SERVICE

ROBERT C. GODBEY 4685
Corporation Counsel
DON S. KITAOKA 2967
GARY Y. TAKEUCHI 3261
Deputies Corporation Counsel
Department of Corporation Counsel
530 S. King Street, Room 110
Honolulu, Hawai'i 96813
Telephone No. (808) 768-5193

CARLSMITH BALL LLP
JOHN P. MANAUT 3989
LINDSAY N. MCANEELEY 8810
Special Deputies Corporation Counsel

2200 American Savings Bank Tower
1001 Bishop Street
Honolulu, Hawai'i 96813
Telephone No. (808) 523-2500
Facsimile No. (808) 523-0842

Counsel for City Defendants-Appellees
WAYNE YOSHIOKA in his official capacity as
Director of the City and County of Honolulu's
Department of Transportation Services, CITY AND
COUNTY OF HONOLULU, HONOLULU CITY
COUNCIL, PETER CARLISLE in his official
capacity as Mayor, CITY AND COUNTY OF
HONOLULU DEPARTMENT OF
TRANSPORTATION SERVICES, AND CITY AND
COUNTY OF HONOLULU DEPARTMENT OF
PLANNING AND PERMITTING

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Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC

CITY APPELLEES' MEMORANDUM IN
OPPOSITION TO PLAINTIFF-
APPELLANT'S MOTION FOR
INJUNCTIVE RELIEF PENDING
APPEAL FILED MARCH 9, 2012

I. INTRODUCTION

On January 31, 2011, Plaintiff-Appellant Paulette Ka'anohiokalani Kaleikini ("Appellant") filed a Complaint for Declaratory and Injunctive Relief ("Complaint"), challenging decisions made by the City and State Defendants-Appellees (collectively, "Appellees") with respect to the Honolulu High-Capacity Transit Corridor Project, also known as the rail project ("Project"). Fundamentally, Appellant did not sustain her burden to prove that Appellees engaged in any wrongful conduct or that there were existing threats of irreparable harm to any burial along the entire course of the Project. Therefore, the trial court dismissed Appellant's case on summary judgment. Appellant filed her Notice of Appeal on August 11, 2011. She did not then ask for an injunction pending appeal. Nor did she request expedited briefing. Today, the case is fully briefed, awaiting only this Court's decision on the merits. Yet only now, nearly seven months after filing her appeal, Appellant for the first time seeks extraordinary, immediate, mandatory injunctive relief. She cites no change, no new development, no imminent harm that could suddenly warrant such emergency relief. There simply is none. This Motion should be denied, and the appeal should be considered and decided on its already complete record in the ordinary course.

To obtain injunctive relief pending appeal, Appellant must demonstrate both a near certainty of prevailing on the merits and a genuine, non-speculative, irreparable harm that will be suffered if the injunction is not granted. Appellant has not remotely satisfied those burdens. She identifies no actionable violation of any statute, rule, or Constitutional provision by Appellees. There remains no evidence of any real threat of irreparable harm or injury to a single burial anywhere along the entire proposed route for the Project. The very relief Appellant seeks -- that

an archaeological inventory survey (“AIS”) be done in the Kaka‘ako area before final decisions are made and ground disturbing construction activity commences in that area -- is exactly what the City Appellees are performing and will continue to perform, as required by the Project’s Programmatic Agreement (“PA”). No ground disturbing activity is even scheduled to commence in the fourth construction phase (Kaka‘ako area) of the Project *until March 2015*, so there is no credible argument that any burial sites will be threatened with irreparable injury during the pendency of this appeal.

Appellant cannot demonstrate a likelihood of success on the merits of her appeal, much less the requisite near certainty that she will prevail. The agencies involved in the Project have scrupulously fulfilled their legal obligations, with great sensitivity to burial issues and the handling of possible unknown burials that might be encountered during construction. The environmental review process requirements of HRS Chapter 343 (“Chapter 343” or “HEPA”) were all satisfied. Potential impacts regarding the possibility of encountering unknown burials were evaluated and disclosed, along with appropriate mitigation measures, in the Project’s comprehensive Final Environmental Impact Statement (“FEIS”). The information contained in the FEIS was sufficient to allow the accepting authority to make an informed, reasoned decision about the Project. Appellant cannot show this decision was arbitrary and capricious and, therefore, cannot show any violation of HEPA. The requirements of HRS Chapter 6E (“Chapter 6E”) were likewise satisfied.

The Project’s governing PA was expressly intended to safeguard possible unknown burials that may be impacted by the Project. The plan to investigate and handle the existence of any unknown burials along the Project’s alignment was developed in consultation with the State Historic Preservation Division (“SHPD”), who ultimately consented to the approach set forth in the PA. All involved federal, state and local agencies are contractually bound to adhere to the PA’s procedures for handling unknown burials, which comport with Chapter 6E. Nonetheless, Appellant seeks to enjoin the entire Project based only on her personal disagreement about SHPD’s discretionary determination to approve the timing of when the AIS will be performed before construction begins. Such a personal difference of opinion is not actionable as a matter of law, much less grounds for an injunction. An agency’s discretionary policy determinations about how and when a project should proceed are entitled to deference and cannot be overturned unless proven arbitrary and capricious. No such showing has been, or can be, made by Appellant here.

The balance of harms also weighs heavily against an injunction. Even a 6-month halt of the Project would expose the City to a potential loss of over \$113 million, and potentially result in the loss of \$1.55 billion in federal funding, which would jeopardize the entire \$5.2 billion Project. The practical effect of any injunction now is that it could very well kill the Project -- which cannot be quantified in dollars alone, and would irreparably harm the City and the citizens of O'ahu. By contrast, Appellant cannot demonstrate any irreparable harm on her side. The record shows the AISs for all Phases of the Project will be completed by 2012, *years before* any ground disturbing construction activity will commence in Kaka'ako in 2015. One of the very purposes of the PA is to preserve the protections afforded under Chapter 6E. The lack of any irreparable harm is underscored by Appellant's unexplained delay of many months in bringing this Motion. There is no urgency, no harm demonstrated, and clearly nothing to warrant immediate injunctive relief pending consideration of this appeal.

Appellant simply cannot satisfy the very high burden to receive emergency injunctive relief pending this appeal. Respectfully, the Motion should be denied.

II. FACTUAL BACKGROUND

A. THE HONOLULU HIGH-CAPACITY TRANSIT CORRIDOR PROJECT

The Project consists of a 20-mile elevated fixed guideway rail system that will run from West O'ahu to Ala Moana Shopping Center. (See SR.66:2-23 to 2-24, Fig.2-8 to 2-11.) The Project, which is intended to improve transit in the highly congested East-West corridor of O'ahu, will be built in four construction phases ("Phases") over ten years: (a) Phase 1: East Kapolei to Pearl Highlands; (b) Phase 2: Pearl Highlands to Aloha Stadium; (c) Phase 3: Aloha Stadium to Middle Street; and (d) Phase 4: Middle Street to Ala Moana Center. (SR.66:2-46 to 2-47; Fig. 2-41.) Under the binding terms of the FEIS and PA,¹ no ground-disturbing construction activity can occur in a given Phase of the Project until the AIS process is completed and SHPD approval is obtained for that Phase. (SR.66:4-176 to 4-196; Ex. A, R.40::112-15.)

B. THE PROJECT'S ENVIRONMENTAL REVIEW PROCESS

In accordance with their obligations under the National Environmental Policy Act ("NEPA") and HEPA to evaluate and disclose the potential environmental effects of the Project, the City and the Federal Transit Administration ("FTA") (as co-lead agencies) undertook a

¹ The PA, which is available in the Record on Appeal at R.40 at 103-143 (without attachments), is also attached hereto as Exhibit "A" for the Court's convenience.

comprehensive environmental review process between 2006 and 2010. (See SR.66:S-1 to S-12; R.40 at 95-98, ¶¶ 6(a)-(m).) In June 2010, the City and FTA approved the joint NEPA-HEPA FEIS. (SR. 66.) The FEIS addresses agency and public comments to the Draft Environmental Impact Statement (“DEIS”), documents the Project’s potential impacts on the environment (including archaeological and cultural resources), and identifies measures for mitigating these impacts. (SR.66; R.40:97, ¶ 6(j).) Following public comment on the FEIS, and receipt of a recommendation for approval from the State Office of Environmental Quality Control (“OEQC”), Governor Neil Abercrombie accepted the FEIS under HEPA and its implementing regulations on December 16, 2010. (R.48:268-288.)

As part of the environmental review process, Cultural Surveys Hawaii, Inc. (“CSH”), a prominent and reputable archaeological consulting firm, was retained to evaluate, among other things, the potential impacts of the Project on archaeological resources, including burials. (R.44:150, ¶ 8.) To accomplish this, CSH: (1) consulted with SHPD and other knowledgeable stakeholders; (2) conducted an extensive review of existing archaeological documentation, geological and depositional characteristics, and field inspections within the study corridor; and (3) developed a qualitative rating system for evaluating and describing the potential archaeological impacts. (R.42:254-257; R.48:323, ¶¶ 8-9; SR.66:4-178.) The results of these studies are set forth in the Project’s *Archaeological Resources Technical Report* (“Archaeological Report”).² (R.42:219-428.)

Based on the findings in the Archaeological Report, the FEIS disclosed the presence of archaeological resources documented by previous studies within the Project’s alignment. (SR.66: 4-183 to 4-185.) The FEIS also disclosed that “subsurface cultural layers related to Native Hawaiians [] may include religious or cultural artifacts and resources, including iwi

² The City also retained Ku‘iwalu LLC to perform a cultural impact assessment for the Project that involved: (1) identifying and consulting with individuals and groups with expertise on cultural resources, practices, and beliefs; (2) conducting field surveys by canvassing select areas of the Project corridor; (3) conducting semi-focused interviews of cultural experts or people familiar with details of cultural practices that could be adversely impacted; (4) making site visits; and (5) reviewing pertinent archival documents. (See R.42:438, 455-59; R.44:151, ¶ 9; SR.66:4-179 to 4-180.) The results of this study are set forth in the Project’s *Cultural Resources Technical Report* (“Cultural Report”) (together with the Archaeological Report, the “Technical Reports”). (R.42:429-739.) These Technical Reports were fully considered during the environmental review process, were made available for agency and public review and comment and were among the studies expressly incorporated into the FEIS. (See SR.66:4-176 to 4-196, § 4.16; R.44:150-52, ¶¶ 8-13; R.48:323-24, ¶¶ 10-12.)

kupuna or Hawaiian burials.” (SR.66:4-183, 4-185.) The FEIS further identified and disclosed three types of archaeological resources that could be affected: burials, pre-contact archaeology and post-contact archaeology. (*Id.*) The FEIS also disclosed that the probability of encountering burials within the Phase 4 developed sub-areas of Dillingham, Downtown and Kaka‘ako is “High.” (R.66:4-184, Fig. 4-73.) Given the likelihood of encountering presently unknown burials, the FEIS identified mitigation measures and procedures for ensuring the protection of burials that may exist in a Phase. (R.66:4-178 to 4-179, 4-191 to 4-196; R.48:252-267.)

C. THE PROJECT’S PROGRAMMATIC AGREEMENT AND PLAN FOR AISs

In accordance with Hawai‘i State Historic Preservation and Burial laws, set forth in HRS Chapter 6E and HAR Title 13, the City consulted with SHPD during its evaluation of the Project’s potential impacts to historic, archaeological and cultural resources. (Ex. B, R.48:317-319, ¶¶ 7-16; ³ *see also* Miyamoto Decl., ¶ 9.) Because the City determined that the Project would have impacts on certain historic and archaeological properties, and that the Project would likely have impacts on presently unknown burials, SHPD was provided an opportunity to review and comment on the Project’s potential impacts to these resources in accordance with HRS § 6E-42. (*Id.*) SHPD also participated as a consulting party in the required consulting process under Section 106 of the National Historic Preservation Act of 1966 (“Section 106”). (Ex. A, R.40:103.) As part of these processes, the City and FTA coordinated and consulted extensively with SHPD and other Section 106 consulting parties, including the O‘ahu Island Burial Council (“OIBC”), to determine how best to identify presently unknown historic resources and how to minimize, mitigate or avoid effects that the Project may or will have on those resources. (Ex. B, R.48:311-314; R.40:98, ¶ 6(m).) This led to the development of the PA, which provides, *inter alia*, procedures to identify, evaluate and protect historic properties, including burials, along the Project’s 20-mile alignment. (Ex. A; Ex. B, R.48:318, ¶ 9(e); Miyamoto Decl., ¶ 9.)

As set forth in the PA, the FTA, SHPD and others determined that a “phased approach” to more detailed and intrusive ground-disturbing investigation of burials through AISs was appropriate for this Project. (Ex. A, R.40:112-115; Ex. B, R.48:318-20, ¶¶ 10-16, 23.) Under this “phased approach,” an AIS will be performed for each Phase of the Project and approved by SHPD before ground-disturbing construction work can begin in that particular Phase. (Ex. A, R.40:112-115; Ex. B, R.48:319-320, ¶¶ 13-23; SR.66:4-178 to 4-179.) Section III of the PA,

entitled “Identification and Protection of Archaeological Sites and Burials,” provides that the City, in consultation with SHPD, will develop an AIS plan following the requirements of HAR § 13-276 for the area of potential effect (“APE”) (defined as “areas of direct ground disturbance”) within each Phase of the Project. (Ex. A, R.40:112, §III(A).) The City is then required to perform the approved AIS fieldwork for each Phase, and submit a final report summarizing its findings to SHPD for approval. (Ex. A, R.40:113-114, §III(C).) (See Miyamoto Decl., ¶ 10.)

The PA provides that any native Hawaiian burials (*iwi kupuna*) discovered during the AIS process will be considered “previously identified” burial sites, as defined under Chapter 6E and HAR § 13-300-2. (Ex. A, R.40:112, § III(A)(3).) Thus, OIBC will have jurisdiction to determine their treatment (*i.e.*, whether the burial should be preserved in place or relocated) pursuant to HAR § 13-300. (*Id.*) The PA further provides that if OIBC determines that a burial should be preserved in place, available avoidance measures include modifying column locations, design and span length, or finding alternative utility locations. (*Id.* at 112, § III(B)(4); *id.* at 114, § III(D)(2).) If presently unknown burials are identified by the AIS, the City must develop and implement a treatment plan, in consultation with SHPD and in accordance with Chapter 6E and HAR § 13-300, to avoid, minimize or mitigate adverse effects upon these resources. (*Id.* at 114, § III(D).) As appropriate, the City is also required to develop and implement, in consultation with SHPD, approved mitigation plans. (*Id.* at 114-15, § III(E).) The AIS fieldwork must be approved by SHPD prior to completion of final design in Phases 1, 2, and 3 and prior to beginning final design for Phase 4. (*Id.* at 113, §§ III(B)(2), (C).) This ensures that the presence of any identified burials can be considered during final design for each Phase and measures taken to avoid and/or minimize adverse effects to these resources. (*Id.*) (See Miyamoto Decl., ¶ 10.)

Section XII of the PA addresses “Post Review Discoveries,” or archaeological resources that, notwithstanding the completion of the AIS process, may be discovered during the course of construction. (Ex. A, R.40:128-130.) Consistent with HRS § 6E-43.6 and its implementing regulations, in the event of any such “inadvertent discoveries of burials,” all work in the vicinity must immediately stop and the area must be secured to avoid any additional disturbance to the burial. (*Id.* at 129, § XII(B).) HRS § 6E-43.6; HAR § 13-300-2, -40. SHPD, in consultation with the landowner, OIBC, and any recognized cultural or lineal descendants or Native Hawaiian

³ The Declaration of Pua‘alaokalani Ai of SHPD, which is available in the Record on Appeal at R.48 at 315-320, is also attached hereto as Exhibit “B” for the Court’s convenience.

Organizations for the Project, will determine whether the burial should be relocated or preserved in place. (*Id.* at 129, § XII(B).) If SHPD determines that a burial should be preserved in place, the City can modify the column placement and design to allow for this. (*Id.* at 129, § XII(C)(1).) Work shall remain halted until the treatment plan is completed and any other requirements of law are met. (*Id.* at 129, § XII(B).)

Because construction within a given Phase of the Project cannot commence until the AIS process is completed and approved by SHPD as provided by the PA, the PA preserves the protections afforded historic properties and burials under Chapter 6E and its regulations. (See Ex. B, R.48:318-320, ¶¶ 10-24; R.48 at 324-329, ¶¶ 13-32.) The plan itself was developed in consultation with SHPD, who *considered* the impacts of the Project as a whole and determined that given the Project's length, timeline and construction Phases, performing AISs on a Phase-by-Phase basis was not only permissible under Chapter 6E, but an appropriate and practical way to address and mitigate potential impacts to archaeological resources along the Project's alignment. (Ex. B, R.48: 318-320, ¶¶ 10-24.) Accordingly, on January 13, 2011, William J. Aila, Jr., the State Historic Preservation Officer ("SHPO") and Interim Chairperson of the Board of Land and Natural Resources executed the PA, thereby providing SHPD's *written concurrence* to the phased approach to the Project as provided in HRS § 6E-8(a). (Ex. A, R.40:142; Ex. B. R.48:319, ¶¶ 12-13.)

D. STATUS OF AISs AND PROJECTED CONSTRUCTION SCHEDULE

The City's efforts to perform AISs for the four construction Phases are significantly underway and on track for completion by the end of 2012. (Miyamoto Decl., ¶¶ 12-16.) An AIS for Phase 1 has already been completed and no burials were identified; the AIS report for Phase 1 was approved by SHPD on April 19, 2010. (*Id.* at ¶ 12; R.40:360.) The AIS fieldwork for Phase 2 is complete and no burials were found; an AIS report is being finalized for submittal to SHPD. (Miyamoto Decl., ¶ 12.) The AIS plan for Phase 3 has been approved by SHPD, and fieldwork for this Phase is expected to be completed by June 2012. (*Id.*) Following significant consultation with SHPD, OIBC, lineal and cultural descendants, Native Hawaiian Organizations, and other interested parties (including Appellant) concerning the scope of the AIS for Phase 4, SHPD approved an AIS plan for this Phase. (*Id.* at ¶¶ 13-14.) So far, no burials have been discovered. (*Id.* at ¶ 14.) The AIS fieldwork for Phase 4 is expected to be completed in or about November 2012. (*Id.*) Utility relocation activities, which precede construction of the Project's guideway elements, are not expected to reach Phase 3 until approximately March 2014 and

Phase 4 until approximately March 2015. (*Id.* at ¶ 15.) Therefore, if any burials are discovered during the AIS fieldwork for Phases 3 and 4, there is ample time to make design adjustments and develop and implement treatment plans, as appropriate, to ensure that no burials are unnecessarily or inappropriately impacted by the Project. (*Id.*)

III. PROCEDURAL HISTORY

On January 31, 2011, Appellant filed her Complaint. (R.40:21-34.) City Appellees filed a Motion to Dismiss Complaint and/or for Summary Judgment on February 9, 2011. (R.40:64-416.) After three days of hearing, on March 23, 2011, the Court granted the City Appellees' Motion in full, granted State Appellees' Substantive Joinder, and denied Appellant's pending motion for preliminary injunction [filed on February 23, 2011] as moot. (Tr.36 at 76-77; R.52:273-281, 286-289.) Appellant's motion for reconsideration was denied. (R.52:282.) Final Judgment was entered in favor of Appellees on August 8, 2011. (R.52 290-293.)

On August 11, 2011, Appellant filed her notice of appeal. (R.52 at 297-316.) Appellant filed her Opening Brief on October 21, 2011. On December 21, 2011, Appellant filed an Application to Transfer this case from the ICA to the Supreme Court; this request was granted on January 17, 2011. Meanwhile, City Appellees filed their Answering Brief on December 30, 2011. Appellant filed her Reply Briefs on January 11, 2012. Nearly two full months after the close of briefing, on March 9, 2012, Appellant filed the instant motion for injunctive relief.

IV. LEGAL STANDARD

An injunction is an extraordinary and drastic remedy, which should only be granted in very limited circumstances. *See Morgan v. Planning Dept., County of Kauai*, 104 Hawai'i 173, 188-189, 86 P.3d 982, 997-998 (2004). Because it is such an extraordinary remedy, an injunction should not be granted unless the movant, who bears the burden of persuasion, makes a "clear showing" that the requested relief is warranted. *See Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865 (1997); 42 Am. Jur. 2d, *Injunctions* § 248 ("the burden of proving that a preliminary injunction should be issued rests entirely and always with the moving party.").

Generally, to qualify for injunctive relief, a moving party must show: (1) it is likely to succeed on the merits; (2) the balance of irreparable harm favors the issuance of an injunction; and (3) the public interest supports granting such an injunction. *See Stop Rail Now v. DeCosta*, 120 Hawai'i 238, 243, 203 P.3d 658, 663 (App. 2008). However, when a party seeks an injunction pending appeal, a stronger showing is required. Under such circumstances, a movant

must show not just *a likelihood* of success on the merits, but a “substantial likelihood” or “great likelihood, approaching near certainty” that it will prevail. *Id.* (citations omitted); *Life of the Land v. Ariyoshi*, 59 Haw. 156, 165, 577 P.2d 1116, 1122 (1978) Moreover, mandatory injunctions, which command the performance of certain acts, are “particularly disfavored, and should not be issued unless the facts and law *clearly* favor the moving party.” *DeCosta*, 120 Hawai‘i at 243, 203 P.3d at 663 (citations omitted).

V. ARGUMENT⁴

A. APPELLANT IS NOT SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF HER CLAIMS

1. Appellant Cannot Show Any Actionable Violation of HRS Chapter 6E

a. Appellant Has Not Made the Necessary Showing of Irreparable Injury to Give Rise to a Private Right of Action Under Chapter 6E

Chapter 6E, which sets forth the procedures for identifying and handling historical resources, including burials, is a reasonable regulation of rights recognized under the Hawai‘i Constitution; Appellant does not challenge this. Chapter 6E, however, expressly limits the circumstances under which a private party may seek injunctive relief. HRS § 6E-13(b) provides:

Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration, or transfer of the property or burial site.

This is contrasted with the *broader* enforcement authority expressly delegated to the Board of Land and Natural Resources and the Attorney General. *See* HRS §§ 6E-10.5 to 12 (outlining the procedures related to enforcement of Chapter 6E, and the penalties and remedies available for violations); HRS § 6E-13(a) (giving the Attorney General broad enforcement power to seek

⁴ HRAP 8(a) provides that a motion seeking an injunction during the pendency of an appeal “shall ordinarily be made in the first instance to the court or agency appealed from.” If such a request is made to an appellate court, the motion “shall show that application to the court appealed from for the relief sought is not practicable, or that the court appealed from has denied an application, or has failed to afford the relief the applicant requests[.]” HRAP 8(a) (emphasis added). Appellant neither sought the requested relief in the court appealed from, nor made *any* showing, much less the necessary showing, for a motion for injunctive relief pending appeal brought in the appellate Courts. Accordingly, Appellant’s motion is plainly defective under HRAP 8(a) and should be denied on that basis alone.

injunctive relief for “violations and threatened violations”). Thus, notwithstanding the recognized importance of protecting historical resources, it is clear from the plain text of Chapter 6E that the legislature did not intend for an unbridled or limitless *private* right of action, and that the circumstances that give rise to such a private right of action are limited to those where a plaintiff can bring forth admissible evidence to “show” that a historic property or burial is facing irreparable harm from demolition, alteration or transfer.⁵

Appellant cannot make the showing necessary to maintain a private right of action under Chapter 6E. Appellant has not identified any specific historic property or burial site that is currently threatened by the Project. Nor has she shown that there is any non-speculative threat of irreparable injury in the form of improper demolition, alteration or transfer of any currently unknown historic property or burial site along the Project’s entire alignment.⁶ Appellant cannot make this showing because the PA requires completion of the AIS process, as well as SHPD approval, before any ground-disturbing construction activity commences in any given construction Phase. Even if there were a violation of any procedure under Chapter 6E or its implementing regulations, that the agency somehow ignored (which City Appellees clearly deny), Appellant has nonetheless failed to show there is any non-theoretical risk of irreparable harm to any historic property or burial site by planned construction activity, or that there can be such a threat based on the process developed and approved by SHPD in the PA.⁷ Based on the

⁵ This is distinguishable from *County of Hawai‘i v. Ala Loop Homeowners* where, because no statutory provision provided an express private right of action in HRS Chapter 205, the Court affirmed a direct cause of action under the Constitution, based on the absence of existing statutory basis to assert a claim. *See* 123 Hawai‘i 391, 235 P.3d 1103 (2010). Here, Chapter 6E is a reasonable state regulation of a private right of action pertaining to burials.

⁶ Appellant’s arguments and purported unrefuted evidence that there is a potential harm in the form due to “bureaucratic inertia” are nothing more than policy driven opinions that ignore the protections set forth in the PA, are based on the outcomes of previous, factually distinguishable projects that did not have anything remotely resembling the PA, and are pure conjecture about potential future harm, which does not provide a right to relief.

⁷ Appellant’s allegations of general procedural violations do not give rise to a private cause of action under Chapter 6E. As set forth above, in the absence of a showing of irreparable harm to a protected site, procedural violations of Chapter 6E are left to DLNR and the Attorney General to address. *See* HRS §§ 6E-10.5 to 13; *compare* HRS § 6E-13(a) with HRS § 6E-13(b). Similarly, because Chapter 6E requires a showing of irreparable injury to a “historic property or a burial site,” Appellant’s allegations of procedural injuries to *herself* are not actionable. Moreover, contrary to Appellant’s contention, Appellant, as a cultural descendant of the Kaka‘ako area, has been afforded her full right to consultation regarding identification and

foregoing, Appellant cannot be found to have made the showing of irreparable harm necessary to bring an action under Chapter 6E.

b. SHPD's Determination that a Phased Approach to the Archaeological Review Process Comports with Chapter 6E and is Entitled to Deference

Even if Appellant were found to have made a sufficient showing to give rise to a colorable claim under HRS § 6E-13(b), Appellant cannot show a substantial likelihood of prevailing on the merits of her Chapter 6E claims. The gravamen of those claims is that Chapter 6E “requires” that the City complete a *single* AIS for the *entire* Project *before any construction* on the Project may commence, and that the phased approach to AISs set forth in the PA, therefore, violates Chapter 6E. This phased approach, however, was developed in consultation with, and expressly authorized by SHPD, who is charged with implementing Chapter 6E and who, based on its own interpretation of Chapter 6E and its regulations. SHPD has determined that the PA appropriately safeguards the protections afforded burials under Chapter 6E and is consistent with the authority granted to SHPD under Chapter 6E and its regulations. (Ex. B, R.48:315-320.) These determinations are entitled to considerable deference and should not be overturned unless Appellant can show that they are plainly erroneous or inconsistent with the underlying legislative purpose. *See Lee v. Elbaum*, 77 Hawai‘i 446, 457, 887 P.2d 656, 667 (App. 1993) (“[A]n administrative agency’s interpretation of its own rules is entitled to ‘deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.’”). Appellant cannot make this showing.

(1) Chapter 6E Gives SHPD Discretion to Determine What Constitutes a “Project” Under this Statute

Chapter 6E delegates authority over the state historic preservation program to the SHPO, who carries out this mandate through SHPD. *See* HRS § 6E-5; HAR § 13-275-1(b). Thus, when “projects” may impact historic properties, including burials, SHPD must be consulted, have an opportunity to review and comment on the “project” (HRS § 6E-42; HAR § 13-284-3) and provide its written concurrence to the “project” (HRS § 6E-8; HAR § 13-275-3). All of Appellant’s arguments in support of her Chapter 6E claims are premised on the flawed assumption that the term “project” *must* be construed to mean the *whole* 20-mile stretch of the Project, and *cannot* mean the Project *Phases* (or anything else that SHPD could have determined

protection of burial sites that may exist in Phase 4, which includes Kaka‘ako. (Miyamoto Decl., ¶ 13.)

appropriate). Contrary to Appellant's assumption and argument, however, neither the plain terms of Chapter 6E or HAR Title 13, nor public policy mandates such an unrealistically narrow interpretation and application of the word "project."

A "project" for purposes of Chapter 6E is defined as:

any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, subsidies, loans, or other forms of funding assistance from the State or its political subdivisions or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the State or its political subdivisions.

HRS § 6E-3; HAR §§ 13-275-2, 13-284-2. The breadth of this definition gives SHPD, the agency charged with overseeing the historic preservation process, regulating archaeological resources, and adopting rules to carry out the purposes of Chapter 6E, necessary and appropriate discretion to determine the scope of a given "project" for Chapter 6E purposes. *See HRS § 6E-3; see also Unite Here! Local 5 v. City & County of Honolulu*, 123 Hawai'i 150, 176, 231 P.3d 423, 449 (2010) ("[A]n administrative agency's authority includes those implied powers that are reasonably necessary to carry out the powers expressly granted.") (*See Ex. B, R.48:318-320, ¶¶ 10, 23; R.48 at 324-327, ¶¶ 18-24.*) As the Circuit Court properly found, both the entire 20-mile Project, as well as each of its four separate Phases, fit within the definition of "project." SHPD agreed and determined that despite being part of a larger project, the Project's Phases can be considered separate "projects" for purposes of Chapter 6E, and that the phased approach to the AIS process set forth in the PA comports with Chapter 6E. (Ex. B, R.48:316-320, ¶¶ 5-23.)

(2) **SHPD's Approval of the Phased Approach to the Archaeological Review Process Was Not Arbitrary and Capricious**

There can be no dispute that SHPD was advised about the Project and given an opportunity to review and consider the Project's effects on historic properties, including burials. There can also be no dispute that SHPD provided its express approval and concurrence to the phased approach to archaeological studies set forth in the PA, in accordance with the requirements of Chapter 6E. (Ex. B, R.48:316-320, ¶¶ 5-23.) *See HRS §§ 6E-8, 6E-42; HAR §§ 13-284-3, 13-275-3.* There are numerous justifications for this approach, including the magnitude of the Project, the heavily urbanized nature of much of the Project's alignment, the need to acquire or otherwise gain access to private property to perform AIS excavations, the federal government's funding requirements, and the fact that later final design will determine final column placement; thus, any additional archaeological testing could be outside the Project's

actual footprint and therefore unnecessarily disturb burials that would otherwise not have been impacted by the Project. (See e.g. R.42:249 at 3-2; R.48:326-327, ¶¶ 22-23.)

Appellant argues that phasing the historic preservation process is *per se* unlawful because it is not explicitly *authorized* under Hawai‘i law. Appellant notes that the implementing regulations for the historic review process under the National Historic Preservation Act of 1966 (16 U.S.C. § 470f) explicitly allow for a phased approach.⁸ She incorrectly argues that because Hawai‘i does not have a similar express *authorization* for phasing, it is therefore *prohibited* under state law. To state the obvious, mere absence of authorization does not equal a prohibition. And, Appellant ignores that where Hawai‘i law is silent, the court can seek guidance from federal law. *See Price v. Obayashi*, 81 Hawai‘i 171, 181, 914 P.2d 1364, 1375 (1996). Given this principle, and since federal law expressly permits a phased approach to review of historic properties, had the legislature intended to *prohibit* phasing the AIS process for large projects, it would have said so. Appellant cannot legitimately imply a prohibition based on the lack of an express statutory provision. A phased approach is both consistent and harmonious with instructive federal law, and is a reasonable, practical and prudent approach with SHPD’s oversight discretion, particularly for this 20-mile-long, ten-year Project.

Appellant also argues that the phased approach to the AIS process is fundamentally at odds with the goals of historic preservation. Given the PA’s preservation and assurance of Chapter 6E protections for burials, this argument is meritless. Indeed, by the express terms of the PA, SHPD has retained the right to provide continued oversight for the AIS process, to review and comment on each Phase of the Project in accordance with HRS § 6E-42 and HAR § 13-284-3, and to concur with the completed AISs for each Phase, before ground-disturbing construction can commence in a Phase, in accordance with HRS § 6E-8 and HAR § 13-275-3. (See Ex. A, R.40:112-115; Ex. B, R.48 at 319-320, ¶¶ 14-23.) By doing so, SHPD has ensured that any burials along the Project’s alignment will be given the full protections afforded to them by the law, and has thus ensured that the goals of Chapter 6E are given full effect. Appellant’s argument that if burials are not identified “prior to decisionmaking,” or before the commencement of any construction for the Project, that they are *necessarily* at risk of improper treatment completely ignores the strict protections set forth in the PA and is founded on the fear

⁸ See 36 CFR 800.4(b)(2) (authorizing a phased approach to federal highway projects and other corridor or large land area developments constructed over many miles and long time periods where adequate protections for historic resources are in place).

that the City Appellees may – at some theoretical time in the future – violate their obligations under the PA. Appellant’s flawed argument and fears do not support a finding that the decision to perform phased AISs was *arbitrary and capricious*.

Appellant also attempts to argue that phasing the AIS is unlawful under Chapter 6E because it is akin to the prohibition against *segmentation* under EIS law. However, the principle of “illegal segmentation” is a creature of environmental disclosure laws under NEPA and HEPA, and does not apply at all to Chapter 6E. (See R.50:22-28.) First, while HEPA contains an express prohibition against segmentation of a project within the environmental review process as a whole, as explained by case law, there is no analogous or comparable prohibition in Chapter 6E.⁹ See HRS § 343-2, HAR §§ 11-200-2, 11-200-7; *Kahana Sunset Owners Ass'n v. County of Maui*, 86 Hawai'i 66, 947 P.2d 378 (1997). Moreover, as the Circuit Court found, this is consistent with the differing goals, policy considerations and scope of protection of these two different statutes. (See Tr.36 at 64-75.) For example, while the purpose of HEPA is to evaluate the impacts of a project on the environment as a whole in a single EIS disclosure document, including air, land, water, social, and ecological considerations, etc., Chapter 6E focuses on the identification and protection of specific historic resources, including burials and their immediate

⁹ HEPA requires that for certain proposed “actions,” the environmental impacts and mitigation measures be evaluated and disclosed. An “action” is defined under HEPA to mean “any program or project to be initiated by any agency or applicant.” HRS § 343-2, HAR § 11-200-2. While this definition is similar to the term “project” under Chapter 6E, HEPA requires that an “action” be defined to include all substantially related components of a proposed project, such that a single EIS (or EA) will be prepared to address the impacts of the project as a whole, so that no areas or parts of the project to be constructed are missing from consideration. See *Sierra Club v. Dep't. of Transp.*, 115 Hawai'i 299, 336-338, 167 P.3d 292, 329-331 (2007). Thus, in defining the scope of a particular “action,” HEPA regulations, as set out in HAR § 11-200-7 require that:

A group of actions proposed by an agency or an applicant shall be treated as a single action when: (1) The component actions are phases or increments of a larger total undertaking; (2) An individual project is a necessary precedent for a larger project; (3) An individual project represents a commitment to a larger project; or (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

This regulation is intended to prevent an agency from “segmenting” a project and omitting from the EIS document a discussion of all component parts of a project and their cumulative effects. See *Sierra Club*, 115 Hawai'i at 338, 167 P.3d at 33. This illegal segmentation issue is entirely a creature of EIS law and there is no similar rule, regulation or prohibition under Chapter 6E.

surrounding archaeological context, which necessarily covers a more limited geographical area. (See Tr.36 at 68-75; HRS § 6E-2; 1992 Haw. Sess. Laws Act 113 § 1). The HEPA process requires a single EIS document that discloses potential environmental impacts over the entire 20 miles of the Project (not just a part or “segment” of the Project), whereas in contrast, Chapter 6E is intended to ensure that appropriate protections are afforded to specific burial sites before any ground-disturbing construction occurs -- which the PA expressly provides for within each Phase. Therefore, the concept of segmentation under HEPA is entirely separate and distinguishable from the protections contemplated in Chapter 6E. Segmentation of a project in the EIS context, where a component part or segment of a project is not evaluated at all, has nothing to do with the Chapter 6E plan for protecting individual burial sites at any specific point or area within the 20-mile Project. The concerns and policies underlying both of these separate statutory schemes are fully preserved and protected here by the FEIS and PA. The entire 20-mile rail route is fully evaluated for environmental impacts as disclosed in the FEIS, which does not illegally segment or fail to address a component part or Phase within the entire 20-mile length. Separately, the PA provides a reasonable plan to handle the possible discovery of unknown burials encountered before construction commences in each Phase in order to satisfy Chapter 6E.

2. Appellant Cannot Show Any Violation of HRS Chapter 343 Because the FEIS Disclosed Sufficient Information Regarding the Potential Impacts to Burials to Enable a Reasoned Decision

Appellant attempts to argue that the comprehensive FEIS prepared for this Project is insufficient on its face under HEPA solely because it does not reference a completed AIS. This argument is unsupported by any legal precedent. *Cf.* Motion at 4. (“Final EIS[s] often include an AIS.”). Indeed, there is no provision anywhere under HEPA, its regulations, or in case law that requires that an EIS must reference an AIS to be sufficient. Moreover, Appellant’s suggestion that where an AIS is required under Chapter 6E, it therefore becomes a “necessary study” under HEPA, turns fundamental legal principles on their head, as it improperly blurs the lines between these distinct statutory schemes with distinct purposes, and effectively asks the Court to legislate a Chapter 6E survey requirement into HEPA.

What HEPA does require is that an EIS identify environmental impacts and develop mitigation measures to avoid or reduce any anticipated adverse impacts. However, “[n]either HRS Chapter 343 nor the administrative rules of Chapter 200 indicate the level of detail or specificity that should be included on any given subject. The statute and rules were

designed to give latitude to the accepting agency as to the content of each EIS.” *Price* 81 Hawai‘i at 183, 914 P.2d at 1376 (emphasis added). Thus, when evaluating the sufficiency of an EIS under Chapter 343, Hawai‘i courts apply the **rule of reason**, under which:

an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

Price, 81 Hawai‘i at 182, 914 P.2d at 1375 (emphases added; internal citations omitted).

Moreover, a court does “not wish to substitute its judgment for that of an agency within the executive branch of government....” *Id.* Citing *Stop H-3 Ass’n v. Lewis*, 538 F. Supp. 149, 159 (D. Haw. 1982), the Hawai‘i Supreme Court has emphasized:

A court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a “hard look” at environmental factors.

If the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be “arbitrary and capricious,” given the known environmental consequences.

The court should not be used as a quasi-legislative or quasi-executive forum by those who are dissatisfied with policy decisions made by governing bodies. The environmental laws were neither meant to be used as a “crutch” for chronic fault-finding, nor as a means of delaying the implementation of properly [accepted] projects.

Accordingly, courts are reluctant to “second guess” the decision-making body regarding the sufficiency of an EIS.

Price, 81 Haw. at 182-83 n.12, 914 P.2d 1375-76 n. 12; *see also Citizens for Protection of North Kohala Coastline v. County of Hawaii*, 91 Hawai‘i 94, 107, 979 P. 2d 1120, 1133 (1999) (court will not substitute its judgment for decision-making body’s determination of sufficiency of an EIS). Thus, the question is not whether, according to Appellant or her expert - or even the Court - certain information *could* have been included in the FEIS, or whether including such information would have provided the accepting authority with *additional* helpful information, but whether the City engaged in a good faith effort to satisfy its disclosure obligation under HEPA and whether the resulting disclosures and mitigation measures addressed in the FEIS and associated PA are sufficient to satisfy the rule of reason.

When properly looking at the content of the FEIS, it is clear that, given the extensive studies and evaluation of archaeological and cultural resources that were performed for the Project, and the resulting disclosures that fully addressed the potential for impacts to possible unknown burials and how those impacts would be mitigated, the FEIS meets this standard. As set forth in Section II(B), *supra*, the potential impacts to burials along the Project's alignment were in fact thoroughly evaluated through extensive archaeological and cultural studies that were fully disclosed in the FEIS. (See SR.66:4-176 to 4-196, § 4.16 "Archaeological, Cultural, and Historic Resources".) Based on these disclosures, which included CSH's determination that the probability of encountering burials in Phase 4 of the Project is "High," *mitigation measures* were developed to ensure that all such resources - known and unknown - would be afforded appropriate protection before actual construction. The information set forth in the FEIS, its underlying technical reports, and the PA, was compiled in a good faith effort to comply with HEPA and confirms that the issue of presently unknown burials was indeed fully disclosed and was the subject of extensive consideration, by federal, state and local authorities. While Appellant disagrees with the approach adopted, that does not make the approach arbitrary and capricious; and there is nothing in the record that otherwise supports such a finding. The FEIS plainly provided the Governor with sufficient information to make an informed decision about the Project, and his decision to approve the FEIS is entitled to a presumption of regularity and judicial deference. *See Elbaum*, 77 Hawai'i at 457, 887 P.2d at 667; *Price*, 81 Hawai'i at 182 n.12, 914 P.2d at 1375-76, n.12. Accordingly, Appellant cannot show a *significant likelihood* of prevailing on her claim that the FEIS is inadequate merely because it lacks an AIS.

3. Appellant Cannot Show Any Violation of Chapter 205A Because the Record Shows that Agencies Properly Considered Burials When Making Decisions

Appellant cannot show a likelihood of success on her claim that Appellees failed to give full consideration to cultural and historic values in violation of Chapter 205A. This meritless claim is squarely refuted by the extensive consideration of these values evidenced in the Technical Reports, FEIS and the PA. Appellant effectively concedes as much by failing to even raise this argument in the Motion. As such, City Appellees will not further address this argument here. This argument is fully briefed in City Appellees' Answering Brief, if necessary.

B. THE BALANCE OF HARMS WEIGHS HEAVILY AGAINST INJUNCTIVE RELIEF AT THIS STAGE OF THE PROCEEDINGS.

As a threshold matter, because Appellant cannot show a *near certainty* of success on the merits of her claims, this Court need not reach the remaining two prongs of the test for injunctive relief, and her Motion should be denied. *See Ariyoshi*, 59 Haw. at 165, 577 P.2d at 1122 (where movant fails to satisfy first prong of test for injunctive relief, Court should not consider other elements of the test.). But even if the Court looks past the test's first prong, the balance of harms plainly weighs against an injunction.

1. Appellant Cannot Demonstrate Any Irreparable Harm Warranting an Injunction at this Stage of the Proceedings

Neither Appellant, nor any burials, will be irreparably harmed if the Motion is denied. There is no known threat to any existing burial anywhere along the entire corridor alignment. Nor is there any present threat that an unauthorized or improper alteration of an unknown burial site is occurring or will occur anywhere. Fear of a speculative harm does not establish a real threat of bureaucratic inertia or otherwise rise to an actionable level warranting injunctive relief. Contrary to Appellant's arguments, because all of the procedures and protections afforded to burials under Hawaii law are expressly preserved in the PA, allowing the Project to proceed in accordance with the PA's terms and conditions PA will not result in any unauthorized disturbance of burials. *Compare* HRS § 6E-43.5 & HAR Chapter 300 *with* Ex. A, R.40:112-115.

The PA provides that burials discovered during the AIS process for any of the Phases will be considered "previously identified" burials subject to the jurisdiction of OIBC pursuant to HAR Chapter 300. (*Id.*) Because the AIS for each Phase will be completed prior to final design in that Phase, if OIBC determines that a burial must be preserved in place, modifications to the final design of the Phase can be made in efforts to avoid the burial. (*Id.*) Halting the Project until the AIS is completed for the Project's entire length will not further promote the protections that any discovered burials are already entitled to under Hawaii law. Appellant cannot show that allowing the Project to proceed will result in any harm.

Appellant's delay in bringing this Motion further confirms that injunctive relief is not warranted at this late stage of the proceedings. Had there been any true threat of irreparable harm, Appellant would have sought expedited briefing, and made her Motion much sooner. Instead, Appellant consciously chose *not* to file this Motion contemporaneously with her notice of appeal, or when she filed her opening brief, or when she sought to transfer this case from the

ICA, or when she filed her reply briefs. Those repeated choices demonstrate the complete absence of urgency. Instead, Appellant waited nearly seven months after filing her appeal, and two months after the close of briefing to seek this extraordinary relief, without even suggesting why it is suddenly warranted *now*, after the City incurred over \$3.7 million on the work Appellant seeks to stop. (Hamayasu Decl. ¶ 15.) Appellant's inaction demonstrates the absence of any imminent harm or need for urgent action. *See, e.g., Lydo Enter., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action.").

2. Issuance of an Injunction Pending Appeal Would Result in Severe and Potentially Irreparable Harm to the City

Issuance of an injunction that halts all work on the Project until an AIS is completed for all four Phases of the Project, or until this Court rules on the appeal, would have severe and potentially irreparable consequences for the City, State and the public. As detailed in the attached declarations, even a 6-month delay pending consideration of the appeal on the merits would expose the City to over \$113 million in delay damages. (*See* Willoughby Decl., ¶¶ 10-16.) These damages would significantly exceed the cost of having to remove any structures that are built, or otherwise reversing and remediating the effects of any construction that takes place during this period. (*Id.* at ¶ 10.) In addition to contract delay damages, an injunction will also (a) put at risk the critical federal funding of approximately \$1.55 billion, loss of which could be fatal to the Project; (b) undo the City's financial plan, since the collection of the 0.5% general excise tax surcharge was based on assumptions about construction completion; (c) require sustaining HART without productive work, which would cost over \$14 million per year in salaries and fringe benefits; and (d) have significant impacts on our workforce and economy, putting hundreds if not thousands of Project-related jobs on hold. (*Id.* at ¶ 13-14.) To the extent that an injunction prevents the Project from going forward now or in the future, the public will also suffer the irreparable loss of the Rail system, which was specifically intended and determined to benefit the community by alleviating traffic congestion, providing faster, more reliable public transportation, accommodating future growth, and reducing pollution, as fully detailed in the FEIS's Build versus No-Build alternative analysis. (*Id.* at ¶¶ 5-12.) Based on an absence of a threat of imminent harm to Appellant or any burials along the Project corridor, and

the significant harm that Appellees and public will suffer if an injunction does issue, the balance of harms clearly weighs against injunctive relief during the pendency of the appeal.

C. PUBLIC INTEREST CONSIDERATIONS WEIGH AGAINST AN INJUNCTION

Chapters 6E and 343 set forth the policies and requirements for evaluating, disclosing and mitigating impacts to burials. These statutes delegate responsibility for ensuring compliance with them to SHPD in the first instance, and OEQC and the Governor in the second, and give these entities discretion in making decisions affecting their implementation. The respective agencies and accepting authority have engaged in significant and meaningful efforts to comply with the environmental laws at issue and have determined that the requirements of Chapters 6E and 343, along with their implementing regulations, have been properly complied with, and that the Project is consistent with their underlying policies. Appellant's arguments to the contrary are simply personal policy disagreements that ask this Court to second-guess the agencies or invent new requirements that do not exist in these statutes and regulations. Appellant has not shown that the decisions by SHPD, OEQC or the Governor, or the decisions made by the City in reliance on these determinations, were arbitrary, capricious, or otherwise unlawful. Issuance of an injunction under these circumstances would improperly substitute Appellant's policy preferences for those of the legislative and executive branches. Such a ruling would fundamentally undermine the statutory and regulatory authority of these agencies and offend the fundamental principle of separation of powers. These are plainly matters involving an overriding public interest, which weigh heavily against the issuance of an injunction.

VI. CONCLUSION

For the reasons set forth above, the City respectfully requests that this Court deny Appellant's Motion and proceed to decide this case on the merits of the appeal as briefed. If an injunction is considered, then a HRAP 8 (a) bond should be posted to cover the Project's losses.

DATED: Honolulu, Hawai'i, March 16, 2012.

/s/ John P. Manaut
ROBERT C. GODBEY
DON S. KITAOKA
GARY Y. TAKEUCHI
JOHN P. MANAUT
LINDSAY N. MCANEELEY
Counsel for City Defendants-Appellees

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAO KALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
(DECLARATORY RELIEF)

APPEAL FROM:

- (1) FINAL JUDGMENT FILED ON AUGUST 8, 2011
- (2) JULY 5, 2011 ORDER GRANTING DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, AND CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011
- (3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE APPELLEES' SUBSTANTIVE JOINDER IN DEFENDANTS WAYNE YOSHIOKA, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, AND CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011
- (4) JULY 5, 2011 ORDER DENYING

PLAINTIFF'S MOTION FOR
RECONSIDERATION OF THE COURT'S
MARCH 23, 2011 ORAL RULINGS FILED
APRIL 4, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAII

HON. GARY W.B. CHANG

DECLARATION OF JOHN P. MANAUT

I, JOHN P. MANAUT, do declare under penalty of law as follows:

1. I am one of the attorneys of record for City Respondents/Defendants-Appellees, Wayne Yoshioka in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, City and County of Honolulu, Honolulu City Council, Peter Carlisle in his official capacity as Mayor, City and County of Honolulu Department of Transportation Services and City and County of Honolulu Department of Planning and Permitting (hereinafter collectively "City Appellees") in this matter.

2. This declaration is made on my personal knowledge and I am authorized and competent to testify to the matters herein.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Programmatic Agreement, without attachments, which was filed in the underlying First Circuit Court case with the Declaration of Faith Miyamoto in support of City Appellees' motion to dismiss on February 9, 2011, and is cited in the Answering Brief as R. 40 at 103-143.

4. Attached hereto as Exhibit "B" is a true and correct copy of the Declaration of Pua'alaokalani Ai, which was filed in the underlying First Circuit Court case with the City Appellees' Opposition to Plaintiff's Motion for Preliminary Injunction, on February 23, 2011, and is cited in the Answering Brief as R. 48 at 315-320.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, March 16, 2012



JOHN P. MANAUT

EXHIBIT “A”

PROGRAMMATIC AGREEMENT

Among the

U.S. Department of Transportation Federal Transit Administration

The Hawai'i State Historic Preservation Officer

The United States Navy

and the Advisory Council on Historic Preservation

Regarding the

Honolulu High-Capacity Transit Corridor Project

in the City and County of Honolulu, Hawai'i

WHEREAS, the City and County of Honolulu (City) Department of Transportation Services (DTS) is proposing the Honolulu High-Capacity Transit Corridor Project (Project or Undertaking) on O'ahu and is seeking financial assistance from the U.S. Department of Transportation Federal Transit Administration (FTA) for the Project, which is therefore a Federal undertaking subject to Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. § 470f) and its implementing regulation at 36 C.F.R. pt. 800; and

WHEREAS, the proposed Project is an elevated, electrically powered, fixed guideway transit system in the east-west travel corridor between East Kapolei and the Ala Moana Center via the Honolulu International Airport with an approximate length of twenty (20) miles and twenty-one (21) stations; and

WHEREAS, the City Council has authorized DTS to enter into this Programmatic Agreement (PA) through Resolution 10-305, CD 1 on November 22, 2010; and

WHEREAS, by operation of law, Section 16-129 of the Revised Charter of the City and County of Honolulu 1973, as amended, provides that all lawful obligations and liabilities owed by or to the City relating to the City's fixed guideway mass transit system shall be assumed by the Honolulu Authority for Rapid Transportation on July 1, 2011; and

WHEREAS, pursuant to 36 C.F.R. pt. 800, the FTA has consulted with the Hawai'i State Historic Preservation Division (SHPD), which is the State Historic Preservation Office, and the following parties:

- Advisory Council on Historic Preservation (AHP)
- U.S. Navy (U.S. Naval Base Pearl Harbor)
- Historic Hawai'i Foundation
- National Park Service (NPS)
- National Trust for Historic Preservation
- University of Hawai'i Historic Preservation Certificate Program

- AIA Honolulu
- Hawai'i Community Development Authority
- Office of Hawaiian Affairs
- O'ahu Island Burial Council
- Hui Mālama i Nā Kūpuna O Hawai'i Nei
- Royal Order of Kamehameha
- Ahahui Ka'ahumanu
- Hale O Nā Ali'i O Hawai'i
- Māmakakaua: Daughters and Sons of the Hawaiian Warriors
- Association of Hawaiian Civic Clubs
- Ali'i Pauahi Hawaiian Civic Club
- Ka Lei Maile Ali'i Hawaiian Civic Club
- King Kamehameha Hawaiian Civic Club
- Nānāikapono Hawaiian Civic Club
- Hawaiian Civic Club of Wahiawa
- Ahahui Siwila Hawai'i O Kapoiei Hawaiian Civic Club
- Waikīkī Hawaiian Civic Club
- Princess Ka'ulani Hawaiian Civic Club
- Wai'anae Hawaiian Civic Club
- Merchant Street Hawaiian Civic Club
- Prince Kūhiō Hawaiian Civic Club
- Pearl Harbor Hawaiian Civic Club
- Hawaiian Civic Club of 'Ewa-Pu'uloa
- Kalihi-Pālama Hawaiian Civic Club
- Hawaiian Civic Club of Honolulu; and

WHEREAS, in accordance with 36 C.F.R. § 800.10, FTA has notified the Secretary of the Interior of the consultation for FTA's adverse effect determination that the undertaking will have an adverse effect on the United States Naval Base, Pearl Harbor National Historic Landmark (NHL), and the CINCPAC Headquarters Building 250 NHL, and as a result, the NPS has been designated to participate formally in the consultation; and

WHEREAS, the public and consulting parties have been afforded the opportunity to consult and comment on the Project; and

WHEREAS, the FTA, in consultation with the SHPD, has defined the undertaking's Area of Potential Effects (APE) as depicted in Attachment 1 for the Airport Alternative; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the proposed Project would have an adverse effect on historic properties listed in the National Register of Historic Places (NRHP) or eligible for listing in the NRHP; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the following historic properties will be adversely affected by the Project: Honouliuli Stream Bridge; Waikeli Stream Bridge and Span over OR&L Spur; 1932 Waiawa Stream Bridge; Waimalu Stream Bridge; Kalauao Spring Bridge; Kalauao Stream Bridge; United States Naval Base, Pearl Harbor NHL; CINCPAC Headquarters Building NHL; Makalapa Navy Housing Historic District; Ossipoff's Aloha Chapel, SMART Clinic, and Navy-Marine Corps Relief Society; Hawai'i Employers Council; Afuso House; Higa Fourplex; Teixeira House; Lava Rock Curbs; Six Quonset Huts; Kapālama Canal Bridge; True Kamani Trees; Institute for Human Services/Tamura Building; Wood Tenement Buildings; Oahu Rail & Land Co. Office and Document Storage Building; Oahu Rail & Land Co. Terminal Building; Nu'uana Stream Bridge; Chinatown Historic District; Merchant Street Historic District; HDOT Harbors Division Offices; Pier 10/11 Building; Aloha Tower; Irwin Park; Walker Park; HEKO Downtown Plant; Dillingham Transportation Building; and Mother Waldron Playground; and

WHEREAS, an adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for the inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, craftsmanship, feeling, or association as summarized in Attachment 2 from the Project's technical reports and the Project's Final Environmental Impact Statement (EIS). Adverse effects may include reasonably foreseeable effects caused by the Project that may occur later in time, be farther removed in distance, or be cumulative; and

WHEREAS, the FTA, in consultation with the SHPD, has determined that the Project may adversely affect archaeological sites listed in or eligible for listing in the NRHP, but effects cannot be fully assessed prior to the approval of FTA financial assistance; and

WHEREAS, the FTA and the SHPD have agreed that a phased approach to identification and evaluation of archaeological sites is appropriate, pursuant to 36 C.F.R. § 800.4(b)(2); and

WHEREAS, the timing of activities listed in this PA are estimated based on FTA granting approval to enter final design in 2011, and FTA signing a full-funding grant agreement during 2012. The Project is anticipated to be completed in four construction phases: Phase 1: East Kapolei to Pearl Highlands, Phase 2: Pearl Highlands to Aloha Stadium, Phase 3: Aloha Stadium to Middle Street, and Phase 4: Middle Street to Ala Moana Center. The City may request and FTA may approve minor construction on Phase 1 to begin prior to FTA granting approval for the project to enter final design; and

WHEREAS, the DTS has included minimization and avoidance measures during project design, including, but not limited to, narrow guideway design, route selection, station location selection, and contained station footprints, to avoid and minimize adverse effects on historic properties; and

WHEREAS, all built components will follow the Project's *Design Language Pattern Book*; and

WHEREAS, consulting parties and the public will be offered the opportunity to provide ongoing comments on station design and transit-oriented development planning at neighborhood design workshops; and

WHEREAS, the City has implemented zoning "overlay districts" to preserve individual and groupings of historic and cultural resources, through the application of architectural and other design guidelines and standards for developments surrounding them; and such overlay districts are already established for Chinatown, Merchant Street, and the Hawai'i Capital (civic center) areas; and

WHEREAS, City Ordinance 09-04 (2009), *Relating to Transit-Oriented Development* (TOD Ordinance), requires the establishment of transit-oriented development zones (TOD Zone) and implementing regulations around every transit station which, among other things, shall include (1) The general objectives for the particular TOD Zone in terms of overall economic revitalization, neighborhood character, and unique community historic and other design themes; (2) Desired neighborhood mix of land uses, general land use intensities, circulation strategies, general urban design forms, and cultural and historic resources that form the context for TOD; and (3) Identification of important neighborhood historic, scenic, and cultural landmarks, and controls to protect and enhance these resources; and

WHEREAS, the TOD Ordinance cannot preempt applicable state and federal historic preservation laws such as Hawai'i Revised Statutes (HRS) Chapter 6E, *Historic Preservation*, and Section 106 of the NHPA; and

WHEREAS, the City will comply with development controls in Special District Regulations in Chapter 21 of the Revised Ordinances of the City and County of Honolulu 1990 (ROH) which include policies that safeguard special features and characteristics of particular districts, such as the Chinatown and Merchant Street Historic Districts, to allow for their preservation and enhancement; and

WHEREAS, the Project will cross lands controlled or owned by the federal government and is subject to an approval of that crossing by the applicable federal agencies, which may elect to adopt this PA at any time; and

WHEREAS, this PA was developed with public involvement pursuant to 36 C.F.R. § 800.2(d) and 800.6(a), and the public was provided opportunities to comment on the Project and its adverse effects; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), FTA has notified the ACHP of its adverse effect determination with the required documentation, and the ACHP has chosen to participate formally in the consultation; and

WHEREAS, the FTA, the ACHP, the U.S. Navy and the Hawaii State Historic Preservation Officer (SHPO) are signatories to this PA; and

WHEREAS, FTA invited the City and the NPS to be invited signatories to this PA; and

WHEREAS, FTA invited all other consulting parties to be concurring parties to this PA if they choose; and

WHEREAS, signatories, invited signatories, concurring parties and consulting parties are all consulting parties; and

WHEREAS, FTA commits to continued engagement and ongoing communication with the consulting parties for the duration of this PA; and

WHEREAS, any future extensions of the Project with federal involvement would undergo a separate independent review under the National Environmental Policy Act and Section 106 of the NHPA, and any such review will be guided by the approaches to treatment of historic properties included in this PA; and

WHEREAS, unless defined differently in this PA, all terms are used in accordance with 36 C.F.R. § 800.16; and

NOW, THEREFORE, FTA, ACHP, the Hawaii SHPO and the U.S. Navy agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the adverse effect of the undertaking on historic properties.

STIPULATIONS

The FTA will ensure that the terms of this PA are carried out and will require, as a condition of any approval of federal funding for the undertaking, adherence to the stipulations set forth herein.

I. Roles and Responsibilities

A. FTA Responsibilities—In compliance with its responsibilities under the NHPA, and as a condition of its funding award to the City under 49 U.S.C. § 5309 and any other subsequently identified FTA funding of the Undertaking, FTA will ensure that the City carries out the stipulated provisions of this PA in accordance with any applicable ACHP policy statements and guidelines.

B. SHPD Responsibilities—The SHPD shall specifically review and provide comments for work products completed as part of this PA.

C. ACHP Responsibilities—The ACHP will provide oversight and advise on disputes.

D. U.S. Navy Responsibilities – The U.S. Navy will work with the City, FTA, other signatories and consulting parties, and their contractors to coordinate and assist where necessary, in carrying out the stipulations listed below that affect Navy interests and Navy properties.

E. City Responsibilities—The City shall represent the interests of FTA and coordinate all activities described in the PA to carry out the stipulations below. The City will consult with the SHPD and other agency staff, as appropriate, in planning and implementing the stipulations of this PA. The City shall submit all plans and documents required by this PA in a timely and accurate manner to the SHPD and other agencies, as stipulated, for review. The City shall also ensure that all treatment measures developed by the City and as a result of consultation are compliant with government-wide policies and regulations.

F. Qualifications of Personnel—Unless otherwise specified, all work carried out under the terms of this PA shall be conducted and/or supervised by cultural resources professionals (historians, architectural historians, historic architects, and/or archeologists, as appropriate) who meet the Secretary of the Interior's Professional Qualification Standards set forth in *Procedures for State, Tribal, and Local Government Historic Preservation Programs*, 36 C.F.R. pt. 61, Appendix A.

G. The City shall provide an architectural historian through the completion of Project construction, who meets the qualifications described in Stipulation I.E for the purpose of coordinating Section 106 Project activities with other City departments (e.g., Department of Planning and Permitting (DPP)) and to ensure consideration of historic preservation in TOD and other development projects along the Project corridor.

H. PA Project Manager

The City shall fund an independent PA Project Manager (*Kako'o*) within six (6) months of the PA being signed to assist with the coordination of all reviews and deliverables required under the terms of the PA.

The *Kako'o* shall meet the *Secretary of the Interior's Professional Qualification Standards* set forth at 36 C.F.R. pt. 61 regarding qualifications for preservation professionals in the areas of history, archaeology, architectural history, architecture or historic architecture.

Procurement

To the extent permissible by applicable state and federal procurement laws, the FTA and SHPD shall review and approve (1) the procurement request for the *Kako'o* prior to the release of such request, (2) the qualifications of the final candidates under consideration by the City prior to the final selection of the *Kako'o* by the City, and (3) the scope of work of the *Kako'o* to be included in the City's contract with the *Kako'o*, in order to ensure that the *Kako'o* duties and responsibilities are consistent with the provisions of this Stipulation .

Upon making its selection of the *Kako'o*, the City shall provide written notification thereof to the FTA, SHPD and other Signatory and consulting parties.

Duration

The *Kako'o* shall serve during the design and construction process for the Project. The *Kako'o* shall continue to perform the *Kako'o*'s responsibilities for the duration of this PA pursuant Stipulation XIV.D.

Roles and Responsibilities

The *Kako'o*'s principal task shall be to independently monitor, assess and report to the consulting parties on compliance by the City with this PA, specifically, the implementation of the measures to resolve adverse effects stipulated herein.

In addition, the City shall continue to engage, as part of its Project design team, consultant(s) which have professional qualifications meeting Secretary of the Interior's professional standards in the areas of history, archaeology, architectural history, architecture, or historic architecture, as appropriate, to carry out the specific provisions of this PA. The City shall also continue to be responsible for the performance of further studies, evaluations and other tasks required to meet the Stipulations set forth in this PA.

In this context and consistent with the independent monitoring, reporting and advisory role assigned to the *Kako'o* under this PA, the *Kako'o* shall perform the following responsibilities:

1. Establish and coordinate consultation and Project status update meetings as stipulated in Stipulations III.B and IX.B. On an as needed basis, additional

meetings may be held to address unforeseen effects on historic properties determined to be eligible within the APE as provided for in Appendix A.

2. Establish and maintain lines of project-related communication and consultation with the consulting parties and the design and construction engineers, including oversight and monitoring of internet sites created for the Project.
3. Monitor, assess and report, in writing, to the consulting parties on mitigation related to Phases I through IV and any associated deliverables of this PA that are to be reviewed by the consulting parties (Stipulations III through XII).
4. Monitor and report on the City's compliance during the design and construction process for the Project with the special historic preservation design guidelines referred to in Stipulation IV.A, Design Standards.
5. Monitor and report on work performed on historic properties with respect to measures to resolve adverse effects caused by the Project in accordance with Stipulations IX.C (demolition monitoring) and X.C (construction monitoring) of this PA.
6. Coordinate regularly with the FTA and SHPD in connection with the Kako'o's observations and recommendations regarding the progress of the Project in implementing measures to resolve adverse effects called for under this PA.
7. Report to the City, the FTA and SHPD concerning the existence, if any, of previously unidentified adverse effects of the Project on historic properties within the APE (that is, adverse effects which are not otherwise materially identified in the PA).
8. Submit written reports concerning the progress of the Project in the implementation of the Stipulations set forth herein in accordance with the reporting requirements in Stipulation XIV.E., with copies available to any other interested party who so requests.
9. Address requests by consulting parties to review deliverables and documentation that are provided to concurring parties.
10. Collect any comments from the consulting parties that identify impacts different from those stated in this PA to historic properties located within the APE for City and FTA processing. The Kako'o shall research the issues presented as described in Appendix A and prepare a recommendation for the disposition of the request and action by FTA. The notification process for consulting parties to submit requests for consideration is outlined in Appendix A of this PA.

11. Provide administrative support and technical assistance required by the consulting parties to meet the terms of this PA such as the timely submission of deliverables and the issuance of regular public updates regarding historic preservation issues.
12. Develop a best practice manual related to historic properties and a Section 106 "lessons learned" case study on the Project that may be helpful to future Section 106 processes on this and other projects. The best practice manual and "lessons learned" case study will be made available to the consulting parties and other interested parties within one (1) year of the completion of Phase 1 construction. When complete, FTA will make the best practice manuals available on their public website.

II. Traditional Cultural Properties

A. Through preliminary cultural resources research for the Project, the FTA and the City have only identified one Traditional Cultural Property (TCP), the Chinatown Historic District. Within thirty (30) days of execution of this PA, the City shall undertake a study, at the request of the consulting parties, to determine the presence of previously unidentified TCPs within the APE, which includes cultural landscapes if present. Prior to construction commencement, the City shall meet with the SHPD, consulting parties, and other parties with expertise, including Native Hawaiian organizations (NHOs) to discuss and identify potential TCPs, as defined by the National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Building on cultural practices analysis already completed to address Act 50, Session Laws of Hawaii 2000 requirements, the City shall undertake studies to evaluate these TCPs for NRHP eligibility in accordance with guidance in National Register Bulletin 38. The TCP study shall be completed by qualified staff with experience in ethnographic studies and TCP assessments for NRHP eligibility.

If FTA determines that eligible TCPs are present, the City will complete effects assessments and seek SHPD concurrence on both eligibility and effects determinations. SHPD will have thirty (30) days to review eligibility and effect determinations. If FTA or the SHPD determine that there are adverse effects on eligible TCPs, the City shall meet with consulting parties to identify measures to avoid, minimize, or mitigate adverse effects. The City will complete all fieldwork, eligibility and effects determination, and consultation to develop treatment measures prior to the commencement of construction. The City shall complete any treatment measures prior to undertaking each construction phase that would adversely affect a TCP. Regardless of effect determination, the City will complete NRHP nominations for properties that meet the NRHP criteria for TCPs. The SHPD, NPS and consulting parties, including NHOs, will review draft NRHP nominations and provide comments within thirty (30) days of receipt. The City will consider all comments when completing final NRHP nominations. The City will submit final NRHP nominations to SHPD.

III. Identification and Protection of Archaeological Sites and Burials

The City shall implement the following archaeological stipulations before each of the four construction phases.

A. Initial Planning

1. The APE for archaeological resources is defined as all areas of direct ground disturbance by the Project. This APE for archaeology includes any areas excavated for the placement of piers to support the elevated structures, foundations for buildings and structures, utility installation, grading to provide parking, or other construction-related ground disturbance, including preparation of construction staging areas. The APE includes the new location of any utilities that will be relocated by the Project.
2. The City shall develop an Archaeological Inventory Survey (AIS) Plan for the APE for each construction phase and shall submit it to the SHPD. The SHPD will provide comments to the City to be taken into account in revising the AIS plan or accept the AIS Plan within thirty (30) days. The AIS Plan shall follow the requirements of Hawai'i Administrative Rules (HAR) Chapter 13-276, *Rules Governing Standards for Archaeological Inventory Surveys and Reports*.
3. The O'ahu Island Burial Council (OIBC) will have jurisdiction to determine the treatment of previously identified Native Hawaiian burial sites pursuant to HAR Chapter 13-300, *Rules of Practice and Procedure Relating to Burial Sites and Human Remains*. Any *iwi kupuna* (Native Hawaiian burials) discovered during the AIS shall be treated as previously identified burial sites.

B. OIBC, Lineal and Cultural Descendents, and NHO Consultation

1. Within sixty (60) days of execution of this PA, the City shall consult with the OIBC, lineal and cultural descendants, NHOs and other interested parties that are identified in discussion with OIBC, about the scope of investigation for the AIS Plan for construction of Phase 4. The City shall provide preliminary engineering plans and existing utility maps to assist in the scoping process. The AIS Plan will provide for investigation of the entire Phase 4 area, including from Waikamilo Road to Ala Moana Center. In the portion of Phase 4 with the greatest potential for resources as identified in the *Honolulu High-Capacity Corridor Project Archaeological Resources Technical Report* (RTD 2008n), the AIS Plan will evaluate all areas that will be disturbed by the Project. The AIS Plan will include a review of historical shoreline location, soil type, and, where indicated by conditions, the survey measures listed in Stipulation III.C, including subsurface testing, for each column location, utility relocation, and major features of each station and traction power substation location based on preliminary engineering design data. The AIS Plan shall be submitted to the SHPD within four (4) months of execution of this PA. SHPD will provide comments on the AIS Plan to the City within sixty (60) days. The City will incorporate any timely

comments in revising the AIS Plan. Archaeological investigation will begin following approval of the AIS Plan by the SHPD.

2. The City shall complete the AIS for Phase 4 (Middle Street to Ala Moana Center) prior to beginning final design for that area.

3. The City shall inform OIBC of the status of the AIS. The City will continue to meet regularly with the OIBC, either as a taskforce, or with the council of the whole, for the duration of the construction period of the Project.

4. The City, in coordination with the OIBC, lineal and cultural descendants, NHOs, and other interested parties that are identified in discussion with OIBC shall complete a draft protocol for consultation regarding treatment of any *iwi kupuna* identified during the AIS. It shall be provided to the OIBC for review within six (6) months of the execution of this PA. The protocol shall address, at minimum, a process for communication about any identified *iwi kupuna*, definitions that will be applied to the Project, identification and inclusion of lineal and cultural descendants and NHOs, and workflow of actions prior to and upon identification of *iwi kupuna* during AIS. The workflow shall provide for options to avoid moving *iwi kupuna* (preservation in place) versus relocation options. Avoidance shall include relocation of columns, change of column design to or from a center alignment to straddle bent or other alternatively-supported design, modification of span length, and alternate utility locations. The City will take into account any comments provided within sixty (60) days from the OIBC, lineal and cultural descendants, NHOs and other interested parties to finalize the draft protocol. The City will proceed in accordance with the protocol once it is approved by FTA. Nothing in this protocol will supersede HRS § 6E 43.5, or HAR Chapter 13-300.

5. Dispute Resolution Specific to Stipulation XIV.C: Should the parties identified in this stipulation be unable to resolve elements identified in this stipulation, the parties would first consult with the signatories to this PA for guidance. Should the parties still be unable to resolve the dispute, the provisions of Stipulation XIV.C would take effect.

C. Fieldwork—The City shall conduct archaeological fieldwork as presented in the AIS Plan. For construction Phases 1, 2 and 3, the archaeological fieldwork shall be completed in advance of the completion of final design for each phase so that the presence of any sensitive archaeological sites/burials discovered during fieldwork may be considered during final design and measures incorporated to avoid and/or minimize adverse effects on historic properties. The City shall inform OIBC of status of the archaeological investigation. Fieldwork required by the AIS Plan shall include, but not be limited to, the following:

1. Reconnaissance survey (archival research and visual inspection by pedestrian inventory) within the APE,

2. A sample survey of subsurface conditions with ground-penetrating radar (GPR), and subsurface inspection as warranted,
3. A subsurface testing regime for locations identified in the AIS Plan,
4. A description of archaeological methods specific and applicable to the findings will be used in analysis, and
5. Draft and final reports summarizing the results of the fieldwork and analysis shall be submitted to the SHPD for review and approval.

D. Treatment Plans—Based on the results of the AIS fieldwork and in consultation with the SHPD, the City shall develop a specific treatment plan to avoid, minimize, or mitigate adverse effects on historic properties including archeological sites and burials pursuant to applicable state laws, including HRS Chapter 6E, *Historic Preservation*, and HAR Chapter 13-300, *Rules of Practice and Procedure Relating to Burial Sites and Human Remains*, for each construction phase. Treatment plans shall be submitted to the SHPD for approval. Upon approval by the SHPD, the City shall implement the treatment plan.

1. Any human remains found on lands owned or controlled by the federal government will be addressed in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 et seq., in coordination with the affected land management agency.
2. The City confirms that guideway columns may be relocated a limited distance along the guideway at most column locations, straddle-bent supports may be used, or special sections developed to modify span length allowing for preservation in-place to be viable in those locations. If the OIBC determines that a burial is to be relocated, the City will consult with the OIBC to determine appropriate reinterment, which may include relocation to Project property in the vicinity of the discovery.

E. Mitigation Plans—Subsequent to the archaeological fieldwork and development of the treatment plan, the City, in consultation with the SHPD, shall develop mitigation plans as appropriate. The mitigation plans may include the following:

1. **Archaeological Monitoring Plan**
 - a. The City may develop an archaeological resources monitoring plan specifying the locations within the construction area that require a monitor and describing the level of monitoring necessary. The monitoring plan will be developed and implemented by a qualified archaeologist, meeting the *Secretary of the Interior's Professional Qualification Standards for Archeology*, 48 Fed. Reg. 44738-9 (Sept. 29, 1983).
 - b. The City shall develop a follow-up monitoring report per HAR § 13-279-5 for the Project and shall submit it to the SHPD for approval. The monitoring report, if it contains the location and description of human

burial remains discovered during the course of the Project, shall remain confidential. Precise location data may be provided in a separate confidential index. The monitoring report for the construction phase of the Project shall be submitted by the City to the SHPD no later than ninety (90) days after the completion of construction of that phase.

2. Data Recovery Programs

- a. Data Recovery Programs (including Data Recovery Plans and Data Recovery Reports) will be prepared by the City as appropriate in consultation with the SHPD. Data Recovery Programs shall be submitted for review and approval by the SHPD.
- b. Whenever possible, technological means will be used to avoid potential human remains and archaeological resources to minimize disturbance.
- c. Completion of data recovery work must be verified by the SHPD prior to initiation of construction within the area of these sites.
- d. Data recovery plans that specify the disposition of recovered objects shall be submitted by the City, in consultation with the FTA and the Navy (as applicable), to the SHPD for review and approval and shall be in compliance with applicable laws, such as HAR Chapter 13-278, *Rules Governing Standards for Archaeological Data Recovery Studies and Reports*, and should be consistent with 36 C.F.R. Part 79, *Curation of Federally-Owned and administered Archaeological Collections*.

F. Curation—The City will curate recovered materials in accordance with applicable laws, such as HAR Chapter 13-278 and 36 C.F.R. 79. The City shall consult with public and private institutions to pursue an opportunity to provide public access to the recovered materials. Interpretive materials as described in Stipulation VII of this PA at one or more stations may incorporate archaeological materials recovered during development of the Project.

Any human remains found on lands owned or controlled by the federal government will be addressed in accordance with NAGPRA in coordination with the affected land management agency.

IV. Design Standards

A. The City shall develop standards for, and maintain and update the Project's *Design Language Pattern Book* for use in all Project elements. The pattern book shall be available electronically. For stations within the boundary of or directly adjacent to an eligible or listed historic property, the City shall comply with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, and will make every reasonable effort to avoid adverse effects on historic properties. If the FTA,

the City and the Kako'o find that the standards cannot be applied, the City shall consult with the consulting parties to develop a treatment plan to minimize and mitigate adverse effects on the historic property.

B. The City shall conduct a minimum of two neighborhood design workshops for the stations in each of the Project phases. The City shall notify all consulting parties of the workshops and consider any comments received when completing station design.

C. At the earliest practicable time during preliminary engineering, prior to Project entry into final design, the City shall provide preliminary engineering design plans for built components of the Project, such as stations, guideway, and directly related Project infrastructure improvements, to consulting parties for review and comment. For stations within boundaries of or directly adjacent to listed or eligible historic properties, the City shall also provide plans during the final design phase. The consulting parties shall provide the City with comments on the plans within 30 days of receipt. The City shall consider and provide written documentation of that consideration on the project website of all comments provided by the consulting parties prior to completing preliminary engineering or final design plans.

V. Recordation and Documentation

A. Within ninety (90) days of execution of this PA, the City shall complete draft historic context studies related to relevant historic themes within the APE. This type of study assists in documenting the history of the affected area and may be used in developing NRHP nominations for historic properties in the area.

1. The City will develop a draft scope of work for the studies describing the context themes, research methodology, report format, photography specifications, and schedule for completion. The City will circulate a draft scope of work to the consulting parties.
2. Any comments received by the City from consulting parties within thirty (30) days of receipt of the draft scope of work will be considered by the City in developing a final scope of work in consultation with the SHPD.
3. Initial field work and photography for each study theme shall be completed prior to construction commencement in relevant geographic areas.
4. The City shall submit draft context studies to the SHPD for review, and all comments provided by the SHPD will be reconciled in consultation with the City within thirty (30) days while preparing the final studies.
5. Copies of the final studies shall be distributed to repositories listed in Stipulation XIV.E.5.

B. The City shall complete Cultural Landscape Reports (CLR) related to historic properties along the Honolulu High-Capacity Transit Corridor.

1. Within ninety (90) days of execution of this PA, the City shall develop a draft scope of work for the CLRs describing the cultural landscapes to be studied, research methodology, report format, photography specifications, and project schedule. All work shall follow NPS guidance and standards, as appropriate, including National Register Bulletin 30, *Guidelines for Evaluating and Documenting Rural Historic Landscapes* and National Register Bulletin 18, *How to Evaluate and Nominate Designed Landscapes*, as well as relevant information presented in NPS, *Guidelines for the Treatment of Cultural Landscapes*. The City shall circulate a copy of the draft scope of work to the consulting parties.
2. Any comments received by the City from consulting parties within thirty (30) days of receipt of the draft scope of work will be considered by the City in developing a final scope of work in consultation with the SHPD.
3. Initial field work and photography for each study area shall be completed prior to construction commencement in that area.
4. The City shall submit draft CLRs to the SHPD and consulting parties for review based upon a distribution list defined in advance in cooperation with the consulting parties. The SHPD will provide comments within thirty (30) days of receipt of draft materials. SHPD will have forty-five (45) days for review if multiple reports come in within ten days of each other. The City will consider all comments from the consulting parties and stakeholder groups while preparing final versions.
5. Copies of the final CLRs shall be distributed to repositories listed in Stipulation XIV.E.5.

C. Historic American Building Survey (HABS), Historic American Engineering Record (HAER), and Historic American Landscape Survey (HALS) Recordation

1. The City shall consult with the NPS HABS/HAER/HALS (HHH) coordinator in the Pacific West Regional Office to determine which of the historic properties that received adverse effect determinations will be documented by completing HHH recordation. After this determination, the NPS will stipulate the appropriate type and level of HHH documentation for each property.
2. The City shall ensure that all HHH documentation for properties identified in Stipulation V.C.1 is completed in accordance with NPS recommendations, including requisite draft and final submission requirements.
3. The City shall ensure that final HHH documentation is completed for a property and accepted by NPS prior to commencement of activities that could impact the historic property and/or affect its integrity.

4. The NPS shall provide comments on draft report submittals within 30 days of receipt and will provide comments on final report submittals within 30 days of receipt. If the City includes multiple reports in a submittal or submits multiple reports within a 10-day period, NPS will be allowed 45 days for review.

5. The City may request NPS to review the photographic documentation portion of a HHH report prior to completion of the full report, to accommodate construction schedules. The City shall only make such requests when the pace of the construction schedule makes it unlikely that a draft and final HHH report can be completed and reviewed in time for construction to commence on or near the specific property. In such instances, the City shall submit the archival black and white prints and negatives to NPS for review. NPS will provide comments within 30 days of receipt. The City will ensure that the full draft HHH report is submitted within six (6) months of NPS approval of photographic documentation.

D. The City shall engage a professional photographer to complete archival photography to NRHP standards for all resources that received adverse effect determinations that are not subject to HHH documentation under Stipulation V.C. Photographic documentation will include, at a minimum, representative views of relevant historic structures associated with each historic property, and representative views of the surrounding setting of each historic property. These photographs will be offered to the repositories listed in Stipulation XIV.E.5. Per the schedule established by Stipulation XIV.E.3, the City shall consult with the SHPD to determine an appropriate level of written documentation for each above-ground historic property that is not documented under Stipulation V.C or VI. The SHPD will review this documentation upon completion.

E. The City shall have digital photographs taken by a professional photographer, in conjunction with the input of a supervising architectural historian, to document select resources and view sheds within the APE. These photographs shall be taken prior to construction commencement and shall be used for interpretive materials, publications, cultural landscape reports, and historic context studies. Photographs will focus on NRHP-eligible resources and unique landscape features. Approximately 150 views will be submitted. These photographs will be housed at the City Municipal Library with copies submitted to the SHPD.

F. The City shall take a comprehensive video of the Project corridor prior to construction commencement. Video documentation shall be completed by a professional videographer and will consist of unedited footage filmed from a moving vehicle. The Project corridor shall be filmed from the vehicle in each direction, from Ala Moana to 'Ewa, and 'Ewa to Ala Moana. This film will be housed at the City Municipal Library with a copy submitted to the SHPD.

VI. National Register of Historic Places/National Historic Landmark Nominations

A. The City shall complete a NRHP Multiple Property Documentation (MPD) for Modern/Recent Past historic properties dating from 1939-1979. Additionally, the City shall complete a single Multiple Property Submission (MPS), including all appropriate accompanying documentation.

1. The City and SHPD will consult with property owners to obtain access and determine their consent to the proposed listing. Listing procedures shall be consistent with HAR Chapter 13-197, *Practice and Procedure before the Hawaii Historic Places Review Board* and HAR Chapter 13-198, *The Hawaii and National Registers of Historic Places Programs*.

Should owners object to listing or access, the City shall document the properties to the extent possible from public right-of-way and using available research or alternative properties may be selected by the City, in consultation with SHPD, for documentation. The SHPD will determine appropriate listing procedures according to Hawai'i Administrative Rules for the properties whose owners do not consent.

2. As part of the MPD, the City will propose a list of Modern/Recent Past historic properties determined eligible for the NRHP to be advanced for nomination and will circulate it to the consulting parties.

3. The City will consider any comments received from the consulting parties within thirty (30) days in developing a final list in consultation with the SHPD.

4. The City shall submit a draft MPS nomination form to the SHPD and NPS for review and comment. The SHPD and NPS will provide any comments within thirty (30) days of receipt. The City shall consider all timely comments while preparing the final MPS documentation.

B. Pending the U.S. Navy approving the work and providing access to the site and relevant records, the City, in consultation with the Navy, or the Navy, if it chooses, shall complete an update to the Pearl Harbor NHL nomination and the CINCPAQ Headquarters NHL nomination. For the Pearl Harbor NHL amendment, emphasis shall focus on those resources closest to the APE and to those not previously documented in the existing nomination. All work shall be coordinated with the Navy and follow the guidelines set forth in *National Park Serv., U.S. Dep't of the Interior, How to Prepare National Historic Landmark Nominations* (1999). The work shall be carried out and approved by persons meeting the professional qualifications for historical architect or architectural historian in *The Secretary of the Interior's Historic Preservation Professional Qualification Standards*, 62 Fed. Reg. 33,713-14, 33719-20 (June 20, 1997). The City shall submit a draft document to the NPS, Navy, and SHPD. The City shall consider all comments received from NPS, Navy, and SHPD within 30 days in preparing the final NHL nomination. The City will provide the Navy with the updated NHL nominations and accompanying documentation, including requisite maps and photographs for submittal to the NPS.

C. National Register Nominations

1. The City shall complete NRHP nomination forms and/or amendments for all 31 of the 33 properties (Attachment 2) that received adverse effect determinations located along the Project corridor (note that two resources are NHLs and are addressed in Stipulation VI.B). The City shall complete NRHP nomination forms for the potential Little Makalapa Navy Housing Historic District—although FTA has determined that the Project will have no adverse effect on this potential district. See Section 4.16 of the Project's Final EIS. The City will consult with the SHPD to determine if nomination forms for properties already listed in the NRHP should be updated and/or amended. The City and SHPD will consult with property owners to obtain access and determine their consent to the proposed listing. Should owners object to listing or access, the City shall document the properties to the extent possible from public right-of-way and using available research. This information will be provided to the SHPD, who will determine appropriate listing procedures according to Hawai'i Administrative Rules for owners who do not consent. All work shall conform to guidance presented in relevant National Register Bulletins. The City will complete all appropriate accompanying documentation, including photographs and mapping.
2. The City will submit draft nomination forms to the SHPD for review. The SHPD will provide comments within thirty (30) days of receipt. The City will consider the comments and submit final NRHP nomination forms following the established procedures of the National Park Service under 36 C.F.R. § 60.6(g). Final nomination forms will be completed before the Project begins revenue service operations.

In addition, the City shall complete nomination forms for Makalapa Navy Housing District and the Little Makalapa Navy Housing District, shall provide the forms for review by the SHPD and the Navy, and submit the nominations forms to the National Park Service under 36 C.F.R. § 60.6(g) or, if the Navy chooses, under 36 C.F.R. § 60.9. Final nomination forms shall be submitted to the National Park Service prior to the second Pearl Harbor Station design workshop as described in Stipulation IV.B.

3. The City will also coordinate with the SHPD to nominate these historic properties to the Hawai'i Register of Historic Places if they are not already included.

D. Properties documented in the MPS required by Stipulation VI.A will not be documented on separate, individual NRHP forms beyond what is included in the MPS.

E. All NRHP and Hawai'i Register of Historic Places nominations will follow the procedures set forth in HRS Chapter 6E, *Historic Preservation*, and HAR Chapter 13-198, *The Hawaii and National Registers of Historic Places Programs*, as appropriate. Completion of the stipulated NRHP nominations does not guarantee listing; the Keeper

of the NRHP may determine that the properties are not eligible for listing. Listing of any property in the NRHP is subject to NPS review and approval.

F. The City shall develop a searchable database of historic properties within the APE in a format suitable for public use. The database will include an interactive geographic component and include property information (e.g., property name, address, tax map key, construction date, architect, etc.). The City will initiate database development prior to construction commencement and will update and maintain the database for the duration of this PA. The Navy reserves the right to approve the inclusion of any Navy historic properties in any public database.

G. The City will consult with the SHPD to develop a strategy for making this database and its information available to any organization with the authority and ability to develop, maintain, and support a public research database at the end of construction.

VII. Educational and Interpretive Programs, Materials, and Signage

The City shall implement the following stipulations before revenue service begins.

A. The City shall complete an interpretive plan for the Project area and install interpretive signage at appropriate locations. The interpretive plan will highlight historical themes (e.g., Native Hawaiian History, Native Hawaiian Culture, Immigrant History, Plantation Culture, Architecture, Government, Agriculture, Transportation, Military, etc.) and will interpret these themes at an appropriate station location. Interpretive signage will be installed at or near relevant transit stations and, where appropriate, inside transit vehicles.

B. The City shall complete a color brochure describing the history of the area along the transit line. All materials shall also be produced in a digital format for electronic and/or online distribution. Upon completion, 1,000 physical copies of the product shall be printed and made available at stations to transit riders.

C. The City shall prepare materials for children, such as a coloring book or child-friendly game that would educate children about relevant local history. The materials shall be prepared by professional historians and a professional illustrator. The City shall solicit student input to propose and develop the content for the materials. All materials shall also be produced in a digital format for electronic and/or online distribution. The materials will be available on the Project website.

D. The City shall establish a Humanities Program that will explore human histories, cultures, and values. This program will enhance visitor and resident exposure to the depth of history and culture in the vicinity of the Project. The Humanities Program will educate the public about important topics in Hawaiian history through conferences/seminars, research fellowships, media programs, exhibits, lectures, and publications. The Humanities Program will also consider conducting select architectural surveys as a component of the potential program that may inform other program

aspects. The City will develop this program's goals in consultation with consulting parties, and the City will provide one hundred thousand dollars (\$100,000) to fund this program. The City will establish subcommittees to achieve the goals of the Humanities Program and meet at agreed-upon intervals. In the absence of additional funding from the City, the Humanities Program will continue until all designated funds are exhausted or until revenue service begins, whichever occurs later.

E. The City will develop and implement an educational effort/program to encourage the rehabilitation of historic properties located along the transit route. This effort will include printed and electronic information about proper rehabilitation practices; benefits of historic designation; financial incentives available for eligible properties; and existing resources for assistance in pursuing these options. The City will hold two meetings and/or public workshops with owners of historic properties to disperse this information. The City will invite all owners of eligible or listed properties located within the APE and also within a 2,000-foot radius of station locations to the two meetings/workshops and will also announce the meetings/workshops to the public on the Project website. The meeting/workshops will be completed before revenue service begins. At the conclusion of the effort, the City will submit a summary report to the consulting parties.

F. Based on the content developed in Stipulation VII.A, the City will develop an educational field guide of the historic properties (including historic districts) along the transit route. The City will make the field guide available to the public in both print and electronic formats.

G. Consulting parties will be invited to participate in a kick-off meeting to develop a work plan, content for deliverables, and schedule for all products required within Stipulation VII. The City will circulate a draft of the work plan, preliminary content outline, and schedule to consulting parties following the kick-off meeting. The City will consider all comments received within thirty (30) days while preparing the final work plan and schedule in consultation with the SHPD.

H. The City will submit drafts of all work products required in Stipulation VII to the consulting parties for review and comment. The consulting parties will provide comments on the content, design, and other relevant product components within thirty (30) days of receipt of draft materials. The City will consider all comments while preparing final versions.

VIII. Mitigation for Specific Historic Properties

A. All lava rock curbstones removed along the edges of pavement because of Project-related work shall be retained by the City for reuse and reinstallation. The stones will be marked prior to removal, stored securely, and replaced at their approximate original mile-point locations prior to the beginning of revenue service operation. Any stones that are damaged or destroyed during extraction or reinstallation shall be replaced with in-kind materials.

B. The bridge rails on the Kapālama Canal Bridge must be replaced or retrofitted to meet current safety standards. The City will maintain or replace the rails to match the appearance of the historic rails and to maintain existing views to and from the bridge. The City shall consider *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, in developing draft plans to provide to SHPD for review per Stipulation IV.

C. The City will replace true kamani trees within the corridor as close as feasible to the current location of the group of 28 true kamani trees on the makai side of Dillingham Boulevard that will be removed. The City will replace the trees prior to revenue service operation. In consultation with the SHPD landscape plans will be developed by the City during final design so that new plantings will provide similar advantages to the community. If new plantings do not provide "equitable mitigation" (e.g., older mature trees that are removed), additional younger trees will be planted that will, in time, develop similar benefits.

D. Improvements to Adversely Affected Parks

1. The City will invite consulting parties, property owners, and other stakeholders to participate in a kick-off meeting to discuss improvements to adversely affected historic parks. Based upon design standards contained in Stipulation IV, and considering comments offered at the kick-off meeting, the City will develop and circulate a draft park improvement plan to consulting parties. The City will consider all comments received within thirty (30) days while preparing the final plan in consultation with the SHPD.

2. The City shall consider *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, and make every effort to avoid adverse effects on historic properties.

3. The City will ensure completion of the park improvement plan before construction is complete.

4. Project funds in the sum of seven hundred fifty thousand dollars (\$750,000) shall be budgeted for implementation of the parks improvement plan. Should the City, following consultation with consulting parties, property owners, and stakeholders, determine that circumstances preclude improving these parks, Project funds budgeted for parks shall be transferred for use to the Honolulu High-Capacity Transit Corridor Project Historic Preservation Committee (Stipulation IX.B).

IX. Measures to Address Reasonably Foreseeable Indirect and Cumulative Effects Caused by the Project

A. The City shall include a staff position for a qualified Project architectural historian, defined in Stipulation I.F. The architectural historian shall oversee completion of the

stipulations of this PA, coordinate with the SHPD, Keko'o and other consulting parties, and coordinate with the Department of Planning and Permitting (DPP) regarding land use planning activities, including the integration of transit-oriented development with historic preservation in the vicinity of Project stations.

B. The City, in consultation with the consulting parties, shall create, chair, and provide technical, administrative, and financial support for the operation of a Honolulu High-Capacity Transit Corridor Project Historic Preservation Committee (HPC). The City shall allocate two million dollars (\$2,000,000) within the Project's budget to fund the program administered by the HPC. The City will create and schedule the first meeting of the HPC within three months after execution of this PA. Prior to the creation of the HPC, the City will submit to the SHPD for approval, a list of the agencies, groups, and organizations that will be invited to be represented and serve on the HPC. The HPC shall comprised the following seven (7) members: the director of DTS, or his designee, to serve as a voting member and chair of the HPC; one representative, or its designee, from each of the following: SHPD, DTS, and DPP; and one representative each from three (3) non-governmental groups or organizations with expertise in historic preservation, cultural resources, architecture, planning, or landscape architecture. The HPC shall establish the goals, criteria, program guidelines, administrative procedures, and funding distribution for the disposition of these funds that will be provided by the City for exterior improvements to both Project related and other eligible or listed historic properties (including contributing resources within historic districts) within the Project's APE consistent with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68, accomplished through grants provided under this section. The HPC shall also consult with the City and SHPO on the existence of potential unforeseen adverse effects as a result of Project actions on the Chinatown and Merchant Street Historic Districts.

The HPC shall identify and select an entity or entities that will administer the funds for the purposes established. This entity or entities shall be compliant with the requirements of ROH Chapter 6, Article 29, as amended, *Standards for the Appropriation of Funds to Private Organizations*. The City will dissolve the HPC when the funds are exhausted, but not before six (6) months after completion of the Project and no later than three (3) years after completion of the Project, whichever occurs first.

C. To examine Project impacts related to development along the Project corridor, the City shall monitor the proposed demolition of resources built before 1969 within the APE and within a 2,000-foot radius of each station. This shall occur by monitoring demolition permits. The City shall establish a baseline for demolitions by calculating an annual average and standard deviation of demolitions that occurred within these areas between 2005 and 2008. The City shall include this baseline data and an explanation of its relevance to project planning and implementation in the first six-month report submitted pursuant to Slipulation XIV.E.3. The SHPD shall provide location information on previously identified eligible or listed historic properties within the 2,000-foot radius of each station location. If and when in any year during project construction the number of demolitions of listed or eligible resources within the APE or resources within the

station areas built before 1969 is greater than one standard deviation above the baseline, then the City shall notify the consulting parties during each scheduled quarterly and annual review of the PA.

D. If any Signatory to this PA finds during the duration specified in Stipulation XIV.D that there is likely to be a significant adverse indirect or cumulative effect on a resource determined eligible for the National Register as part of the Section 106 process for this project and that the adverse effect was not evaluated in this PA, that Signatory shall notify FTA. Post-review direct effect discoveries are handled in stipulation XII.A.

If consulting parties identify during the duration of this PA that a significant adverse indirect or cumulative effect on a resource determined eligible for the National Register as part of the Section 106 process for this project was not evaluated in this PA, the consulting party shall follow procedures identified in Stipulation I.H.10.

Upon such notification, FTA will call a meeting of the consulting parties to discuss what next steps would be appropriate under the new circumstances to mitigate the effects on such resources.

E. In the Chinatown and Merchant Street Historic Districts, these specific additional requirements shall apply regarding unanticipated cumulative adverse effects referenced in Stipulation IX. D, above:

1. During design, implementation, testing, and the first six months of full operation of the Project, the City shall follow the process described below to address unanticipated and reasonably foreseeable present and future non-Project actions that could, in combination with the Project, have cumulative adverse effects on the historic resources in the Chinatown and Merchant Street Historic Districts (hereinafter, the "Two Historic Districts") that may cause irreversible or long-term adverse effects on qualifying characteristics of the Two Historic Districts that were to be preserved or protected based upon the terms of this Agreement or other executed Section 106 Agreement document(s) associated with the Two Historic Districts.

2. City shall request all City agencies that are constructing projects related to the Project within the Two Historic Districts to submit preliminary documents to the City to allow coordination of the Project activities with such other work and to allow the City's assessment of the Project to include the potential for unanticipated cumulative adverse effects on the Two Historic Districts.

3. City, its historic preservation consultants, and the Kako'o, in cooperation with the FTA, will consult with SHPO and the Project Historic Preservation Committee in assessing whether there is an unanticipated cumulative adverse effect related to the Project in the Two Historic Districts.

4. If FTA, the City and SHPO agree that Project plans or completed activities in conjunction with unanticipated and reasonably foreseeable present and future

non-Project actions are likely to result in unanticipated cumulative adverse effects on the Two Historic Districts per Stipulation IX.D., above, then the City, in consultation with FTA, shall consider measures with respect to the Project to mitigate or minimize such effects, including technical or financial measures for the protection, rehabilitation, or repair and Project design modifications. Disagreements between the City and SHPO, including those related to effects findings, will be resolved pursuant to Stipulation XIV.C.

5. City shall make all appropriate City-generated and prepared documentation related to the Project for Section 106 purposes and utilized in consideration of unanticipated indirect and cumulative adverse effects in Section IX.D. available to the consulting parties via the Project website. Consulting parties will be notified of the documentation posting to the Project website via electronic notification. SHPO, ACHP, the Navy and FTA will respond within 30 days of receipt of all required documentation. All other consulting parties shall have 21 days to comment on the documentation. The City will provide paper copies of such documentation to consulting parties upon request. Should consulting parties fail to respond within 30 days after receipt of all documentation, it shall be assumed that they have no comments on the proposed action or mitigation, if any, to minimize or mitigate unanticipated cumulative adverse effects.

6. The review of the documentation by all parties per Section IX.D. shall focus on the historic elements of the Two Historic Districts, as defined in the state or National Register of Historic Places, which may be caused by the Project relative to unanticipated cumulative adverse effects.

7. City, in coordination with FTA, and SHPO will consider and respond to comments about the Project related to the Two Historic Districts from consulting parties as provided for in Stipulation I.H.10. The review, in particular, will address the potential for unanticipated cumulative adverse effects on the Two Historic Districts. The review will also attempt to resolve specific disagreements about how City intends to address unanticipated cumulative adverse effects per Section IX.D. of this Agreement. If City, in consultation with SHPO is unable to reach a resolution with the consulting parties who have commented pursuant to Section I.H.10 regarding an unanticipated cumulative adverse effect on the Two Historic Districts, the City will notify the FTA, and as appropriate, consult with the ACHP, in accordance with Stipulation X.I.V.

F. In addition to the mitigation presented in this stipulation, mitigation for indirect and cumulative effects is provided in Stipulations IV.A-B and VII.A-F.

X. Construction Protection Plan

A. During final design, DTS, in cooperation with its contractors and FTA, will develop a Construction Mitigation Plan (CMP). The CMP will include a Noise and Vibration Mitigation Plan. Per requirements to be included in the FTA Record of Decision (ROD) and FTA guidance entitled, *Transit Noise and Vibration Impact Assessment*, FTA-VA-90-1003-06 (2006) (FTA Guidance Manual), DTS shall perform quantitative assessments of both noise and vibration which will inform the CMP. Noise and vibration control plans will be updated every six (6) months. The updated plans should predict the construction noise and vibration impacts at sensitive receptor locations based upon the proposed construction equipment and methods. Appropriate construction plan noise and vibration mitigation measures shall be employed as identified in FTA's Guidance Manual.

Numeric limits and monitoring measures will be developed to minimize noise and vibration impacts. Vibration criteria included in Table 12-3, *Construction Vibration Damage Criteria*, of the FTA Guidance Manual will be applied. Note that most historic properties in the corridor are non-engineered timber or masonry; a criterion of 0.2 inches per second of peak particle velocity would be applicable to these structures. Noise and vibration mitigation strategies will be included in the Noise and Vibration Mitigation Plan.

B. Before Project construction begins, the City shall meet with the construction contractor(s) to review and transmit the CMP.

C. The City will monitor Project construction to ensure that the measures in the CMP are implemented and shall provide a record of monitoring activities in progress reports prepared pursuant to Stipulation XIV.E.

D. With the cooperation of the Navy, the City shall complete post-construction noise monitoring as stipulated in the Project's Final EIS within U.S. Naval Base, Pearl Harbor NHL.

E. The City, in consultation with FTA shall ensure that any inadvertent damage resulting from the Project to historic properties shall be repaired, to the extent possible, in accordance with *The Secretary of the Interior's Standards for the Treatment of Historic Properties*, 36 C.F.R. pt. 68. The City, in consultation with the FTA, shall submit a scope of work or treatment plan to address inadvertent damage to the SHPD for comment before initiating repairs.

XI. City Contractors and Contract Adherence to PA

FTA and the City shall ensure that contracts developed in the implementation of all construction phases of the Project shall expressly refer to and require compliance with the stipulations of this PA. Contractors responsible for work set forth in this PA shall have qualified staff that meets the *Secretary of Interior's Professional Qualification*

Standards, 48 Fed. Reg. 44,738-39 (Sept. 29, 1983) for history, archaeology, architectural history, architecture, or historic architecture with experience in historic preservation planning to ensure the satisfactory compliance with the terms of the PA during the design and construction of each project construction phase.

The Kako'o will provide guidance regarding the implementation of the terms of this PA to all contractors, particularly those involved in construction-related activities.

The City shall require, on an annual basis, or more frequently as circumstances require, historic preservation and cultural awareness training for the construction contractors and employees. The training shall include information related to the following topics:

- a) Illegal collection and disturbance of historic and prehistoric cultural materials, including human remains.
- b) Scope of applicable laws and regulations.
- c) Initial identification and reporting of archeological materials, human remains, and historic buildings or structures that may potentially be discovered during the course of their work.

Training materials, schedules and lists of persons trained will be made available to the consulting parties of this PA and other interested parties on an annual basis.

XII. Post-Review Discoveries

A. Post-review discoveries are not anticipated for built historic properties. Notwithstanding, the City agrees to cease all work in the vicinity of the discovery should an unanticipated adverse effect on a built historic property be found during construction. The City will notify the signatories and provide information about the unanticipated adverse effect and the City's proposed treatment plan within a period of three (3) business days. Signatories will provide comments on the City's proposed treatment plan within three (3) business days. The City, in consultation with FTA and SHPD, will consider any timely comments in developing a final treatment plan. FTA will not allow work to resume in the vicinity of the unanticipated adverse effect until a treatment plan has been finalized. The City will proceed in accordance with the treatment plan.

B. Because of the linear nature of the Project and because any areas excavated for the placement of piers to support the elevated structures, foundations for buildings and structures, utility installation, grading to provide parking, or other construction-related ground disturbance, including preparation of construction staging areas and the new location of any utilities that will be relocated by the Project, will be the subject of a comprehensive AIS, post-review archaeological discoveries after completion of AISs are not anticipated.

In the event of any inadvertent discoveries of burials, the OIBC shall be included in consultation as specified in HAR § 13-300-40. When suspected human skeletal remains are found, the City shall ensure that all work in the vicinity stops and that a City

archaeologist will secure the area to avoid any additional disturbance, pursuant to HRS § 6E-43.6. If the remains are identified to be human, the City will notify SHPD as required by law. (Non-human remains that are determined by the Project archaeologist not to be a protected resource will be documented in Project files and no further action taken.) With confirmed human skeletal remains, the archaeologist must also notify the OIBC, the County Coroner's Office, and the County Police Department. With all inadvertent burial finds, SHPD determines burial treatment, either preservation in place or relocation, in consultation with the landowner, the district representative of the OIBC, and any recognized cultural or lineal descendants or NHOs for the Project. Pursuant to §§ 6E-43.6(c) and (d), SHPD has one (1) day to make its treatment determination for single burials and two (2) days for multiple burials found on O'ahu. Recognizing the extent of the Project and the sensitivity of any discoveries, the Project will allow an extended time for SHPD determination of treatment by an additional three (3) days for a total of four (4) days for single burials and five (5) days for multiple burials; provided that this extension of time shall not affect other obligations, duties, or responsibilities required under HRS Chapter 6E and applicable regulations. Information generated in the AISs in Stipulations III.B, III.C and III.D will assist SHPD and OIBC in identifying and notifying lineal and cultural descendants and defining a treatment plan since background research is an integral component of the AIS. Construction must remain halted in the vicinity of the burial find until SHPD's treatment decision has been carried out or any other requirements of law have been met.

C. The City, in consultation with the OIBC and the SHPD, will be responsible for carrying out the burial treatment for post-review discoveries.

1. For preservation in place, the City will modify the planned construction to allow for the remains to stay in place in accordance with the burial treatment plan.
2. Pursuant to HRS § 6E-43.6(f), in cases where remains are archaeologically removed, SHPD shall determine the place of relocation, after consultation with the City, OIBC, affected property owners, representatives of the relevant ethnic group, and any identified lineal descendants, as appropriate.

Parties Identified in this Stipulation XII.C will consider the inclusion of either of the following two provisions in a post-review discovery treatment plan: (1) If a reinterment site was not identified in a Treatment Plan in Stipulation III.D, the City will disinter the remains, curate the remains at the Project site until the associated Project phase is completed and then immediately arrange for reinterment within the Project area; or (2) If reinterment sites are identified as part of the Treatment Plans in Stipulation III.D, immediate reinterment to those identified sites will be the preferred practice

3. The City will document burial treatment in either a "burial site component of an archaeological data recovery plan" for burials that are relocated, or a "burial site component of an archaeological preservation plan" that documents the burial

treatment that was carried out. These plans/reports document the conditions of the discovery, the burial treatment, access and any subsequent measures that have been agreed to by the landowner to safeguard either the relocation site or the preserve site. The City will record preserved or relocated burial sites with the Bureau of Conveyances so that the burial sites are not further disturbed in the future.

D. Any human remains found on lands owned or controlled by the Federal government will be addressed in accordance with NAGPRA in coordination with the affected land management agency.

XIII. Public Information

Elements of public involvement and information are included throughout this PA. In addition, the City shall undertake the following:

A. To keep the public informed about PA implementation, the semi-annual progress reports described in Stipulation XIV.E will be posted on the Project website.

B. With the exception of sensitive information or locations, the City shall add all documentation completed as part of this PA to the historic properties database that will be created as part of Stipulation VI.F. However, if the consulting parties agree, the sensitive information or locations may be included in a password-protected mode.

C. At any time during implementation of the activities covered in this PA, should an objection pertaining to this PA or the effect of any activity on historic properties be raised by a member of the public, FTA will notify the signatories to this PA and take the objection into account, consulting with the objector, and should the objector so request, with any of the parties of this PA, to resolve the objection.

XIV. Administrative Provisions

A. **Implementation Schedule**—Within sixty (60) days of the execution of this PA, the City shall develop a schedule for the implementation of the provisions of this PA. The City will submit the schedule to the signatories and concurring parties for review and comment. The final schedule will include timelines and milestones for completion of deliverables and will be posted on the Project website. The City will update the schedule to reflect Project changes and will notify the signatories and concurring parties of any alterations to the schedule.

B. **Project Modifications**—Should the Project alignment be changed in any way that FTA determines results in a change to the APE, the City shall update the APE maps, and FTA and the City, in consultation with other consulting parties, shall ensure that the requirements of this PA are met, after further consultation and assessment of effects, with regard to the new portions of the APE.

C. Dispute Resolution—Should any Signatory or Invited Signatory to this PA object to any action proposed pursuant to the PA, the FTA shall consult with the objecting party to resolve the objection. If the FTA determines that the objection cannot be resolved, the FTA shall forward all documentation relevant to the dispute, including FTA's proposed resolution, to the ACHP.

1. Within thirty (30) days after receipt of all pertinent documentation, the ACHP shall provide the FTA with its advice on the resolution of the objection. FTA will then prepare a written response that considers any timely advice offered by the ACHP or by other signatories to the PA. FTA will provide all consulting parties with a copy of this written response and proceed according to its final decision.
2. If the ACHP does not provide its advice regarding the dispute within thirty (30) days of receiving appropriate documentation about the dispute, FTA may make its final decision on the dispute and proceed accordingly. Prior to reaching a final decision, FTA shall prepare a written response that considers any timely comments by other signatories to the PA and provide them and the ACHP with a copy of that response.
3. The responsibility of the FTA and the City to carry out all actions that are required by this PA and are not affected by the dispute remains unchanged.

D. Duration

1. This PA shall take effect on the date it is signed by the last Signatory and shall be in effect for ten (10) years from the date of execution, or terminated pursuant to Stipulation XIV.I. At least six (6) months prior to the end of the 10-year period, FTA will provide an update on the status of the work associated with all stipulations. At that time, and before the 10-year period elapses, the signatories may amend the content of the PA, which may include extension of the duration of the PA, in accordance with Stipulation XIV.H if they determine that it is necessary to complete all stipulations.

E. Monitoring and Reporting

1. Any Signatory to this PA may request, at any time, a review of the implementation of the terms of this PA.
2. For the first twenty-four (24) months following the implementation of this PA, the City shall hold quarterly (every three (3) months) meetings with the consulting parties to discuss implementation of this PA including near-term planned activities.
3. Every six (6) months following the execution of this PA, until it expires or is terminated, the City shall provide all signatories to this PA a summary report detailing the work undertaken pursuant to its terms. Such report shall include

any scheduling changes proposed, any problems encountered, and any disputes or objections received during efforts to carry out the terms of the PA.

4. After the 24-month period mentioned in Stipulation XIV.E.2, above, FTA shall conduct annual meetings of consulting parties to discuss implementation of this PA over the preceding year and planned activities for the coming year. FTA shall evaluate the effectiveness of this PA and whether any amendments or changes are needed based on the City's summary reports or Project modifications and provide its evaluation to the signatories prior to the meeting.

5. Work products not containing sensitive information will be submitted to the following repositories so that the information generated is made available to the public: SHPD, State Publications Distribution Center (15 copies), University of Hawai'i, and the Municipal Library (3 copies).

F. Emergency Situation—Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106 of the NHPA and this PA. In the event that an emergency situation should occur during the Project, FTA shall follow the provisions of 36 C.F.R. § 800.12.

G. Coordination with Other Federal Involvement—In the event that the City or other agency applies for additional federal funding or approvals for the Honolulu High-Capacity Transit Corridor Project and the undertaking remains unchanged, such funding or approving agency may comply with Section 106 of the NHPA by agreeing in writing to the terms of this PA and notifying the signatories. Any necessary amendments will be considered in accordance with Stipulation XIV.H.

H. Amendments—Any Signatory to this PA may propose that this PA be amended, whereupon the signatories to the PA shall consult to consider such amendment. Any amendment must be agreed to in writing by all signatories. The amendment will be effective on the date a copy with all signatures is filed with the ACHP.

I. Termination—If any Signatory to this PA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other Signatory parties to attempt to develop an amendment per Stipulation XIV.H. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any Signatory may terminate the PA upon written notification to the other signatories. Once the PA is terminated and prior to work continuing on the undertaking, FTA must either: (1) execute a new agreement pursuant to 36 C.F.R. § 800.6; or (2) request, take into account, and respond to comments of the ACHP under 36 C.F.R. § 800.7. FTA shall notify the signatories as to the course of action it will pursue. This PA may be terminated by the execution of a subsequent agreement that explicitly terminates this PA or supersedes its terms.

Execution of this PA by FTA, SHPD, and the ACHP and implementation of its terms evidence that FTA has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers, Regional Administrator Date: _____

Hawai'i State Historic Preservation Officer

William J. Alfa, Jr., Interim Chairperson of the Board of Land and Natural Resources Date: _____

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii Date: _____

Advisory Council on Historic Preservation

John M. Fowler, Executive Director Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wayne Y. Yoshioka, Acting Director, Department of Transportation Services Date: _____

National Park Service

Christine S. Lehnertz, Regional Director, Pacific West Region Date: _____

CONCURRING PARTIES

Historic Hawai'i Foundation

Date: _____

National Trust for Historic Preservation

Date: _____

University of Hawai'i Historic Preservation Certificate Program

Date: _____

AIA Honolulu

Date: _____

Hawai'i Community Development Authority

Date: _____

Office of Hawaiian Affairs

Date: _____

O'ahu Island Burial Council

Date: _____

Royal Order of Kamehameha

Date: _____

The Ahahui Ka'ahumanu

Date: _____

Hui Mālama i Nā Kūpuna O Hawai'i Nei

Date: _____

Hale O Nā Ali'i O Hawai'i

Date: _____

Māmakakaua: Daughters and Sons of the Hawaiian Warriors

Date: _____

Association of Hawaiian Civic Clubs

Date: _____

Ali'i Pauahi Hawaiian Civic Club

Date: _____

Ka Lel Malle Ali'i Hawaiian Civic Club

Date: _____

King Kamehameha Hawaiian Civic Club

Date: _____

Nānāikapono Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of Wahiawa

Date: _____

Ahahui Siwia Hawai'i O Kapolei Hawaiian Civic

Date: _____

Waikiki Hawaiian Civic Club

Date: _____

Princess Ka'ulani Hawaiian Civic Club

Date: _____

Wa'ianae Hawaiian Civic Club

Date: _____

Merchant Street Hawaiian Civic Club

Date: _____

Prince Kūhiō Hawaiian Civic Club

Date: _____

Pearl Harbor Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of 'Ewa-Pu'u'uloa

Date: _____

Kalihi-Pālama Hawaiian Civic Club

Date: _____

Hawaiian Civic Club of Honolulu

Date: _____

APPENDIX A - Consulting Party Comment Review and Disposition Process

If there are unanticipated effects on historic properties identified within the APE found after the execution of the Programmatic Agreement (PA), the process developed in this PA and applicable appendix to resolve any adverse effects upon such properties shall satisfy Section 106 responsibilities pursuant to 36 C.F.R. § 800.13. If there is an inadvertent discovery of burial remains that are not "historic property" as defined under 36 C.F.R. § 800.16(l), Stipulation XII of this PA and HRS § 6E-43.6 shall apply. If there is an inadvertent discovery of a historic property, Stipulation XII of this PA shall apply.

The following procedure has been developed to implement Stipulation I.H of the PA. The PA Project Manager (*Kako'o*) will manage the review and disposition of comments from consulting parties related to this Appendix A as part of its assigned responsibilities.

NOTIFICATION PROCESS

1. Notification letter must come from a consulting party.
2. Notification letter should include the following information:
 - Consulting party contact information including telephone number, email, and mailing address.
 - Identify the impacted resource (i.e., a historic property, historic district, a property that was previously not considered historic, other).
 - Provide a general description of unforeseen impact.
 - Explain how the impact is different from what is stated in the Final Environmental Impact Statement (Final EIS).
 - Identify the possible cause of the impact.
 - List any additional information or related studies.
3. Send or deliver the notification letter to the Department of Transportation Services (DTS) at the City and County of Honolulu and FTA Region IX noting the project identification (HHCTCP) and subject (Section 106 Programmatic Agreement) to:

Wayne Y. Yoshioka
Acting Director
Department of Transportation Services
650 S. King Street, Third Floor
Honolulu, HI 96813-3017

Ted Matley
FTA Region IX
P.O. Box 21648
201 Mission Avenue, Suite 1650
San Francisco, CA 94105

4. DTS and FTA will share the letter with the *Kako'o*. Within 30 calendar days of DTS and FTA receiving the notification letter, the *Kako'o* shall research or cause to be researched the issues listed in the notice, and write a recommendation for the disposition of the request for action by FTA.

5. The *Kako'o*, the City and the FTA shall consult with the Consulting Parties regarding the notification and appropriate action.

6. Within seven calendar days of receiving the recommendation from the *Kako'o*, FTA will take appropriate action and communicate the outcome of their review and decision to all of the Consulting Parties.

Attachments

Attachment 1: APE for Historic Resources; APE for Archaeological Resources
(CD enclosed)

Attachment 2: Information on Resources with Adverse Effect Determinations

HHCTOP Programmatic Agreement
Final – January 2011

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers

Leslie T. Rogers, Regional Administrator

JAN 11 2011

Date:

Hawai'i State Historic Preservation Officer

Date:

William J. Alla, Jr., Interim Chairperson of the Board of Land and Natural Resources

United States Navy

Date:

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Advisory Council on Historic Preservation

John M. Fowler

John M. Fowler, Executive Director

1/8/11

Date:

INVITED SIGNATORY PARTIES

City and County of Honolulu

Date:

Wayne Y. Yoshioka, Acting Director, Department of Transportation Services

National Park Service

Date:

Christine S. Lehnertz, Regional Director, Pacific West Region

HHCTCP Programmatic Agreement
Final – January 2011

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

Leslie T. Rogers, Regional Administrator

Date: _____

Hawai'i State Historic Preservation Officer

maunakea
William J. Aila, Jr., Interim Chairperson of the Board of Land and Natural Resources

Date: 1/13/11

United States Navy

Rear Admiral Dixon R. Smith, Commander, Navy Region, Hawaii

Date: _____

Advisory Council on Historic Preservation

John M. Fowler, Executive Director

Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wayne Y. Yoshikawa
Wayne Y. Yoshikawa, Acting Director, Department of Transportation Services

Date: 1/10/11

National Park Service

Christine S. Lahnartz, Regional Director, Pacific West Region

Date: _____

HHCTCP Programmatic Agreement
Final – January 2011

J. Native Hawaiian Organization (NHO)— If, at any time during implementation of the provisions of this PA, an NHO informs the City or FTA that it attaches religious and cultural significance to properties within the APE, FTA shall invite that NHO to participate in reviews and consultation carried out under the terms of this PA.

SIGNATORY PARTIES

Federal Transit Administration

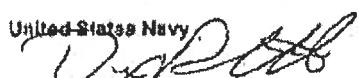
Leelle T. Rogers, Regional Administrator

Date: _____

Hawai'i State Historic Preservation Officer

William J. Aila, Jr., Interim Chairperson of the Board of Land and Natural Resources

United States Navy



Date: 1/12/11

Rear Admiral Dixon P. Smith, Commander, Navy Region, Hawaii

Advisory Council on Historic Preservation

John M. Foster, Executive Director

Date: _____

INVITED SIGNATORY PARTIES

City and County of Honolulu

Wynne Y. Yoshioka, Acting Director, Department of Transportation Services

Date: _____

National Park Service

Christine B. Lehnertz, Regional Director, Pacific West Region

Date: _____

EXHIBIT “B”

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUA'ALAOKALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Defendants.

CIVIL NO. 11-1-0206-01 GWBC
(Declaratory Judgment)

DECLARATION OF PUA'ALAOKALANI AIU

DECLARATION OF PUA'ALAOKALANI AIU

I, PUA'ALAOKALANI AIU, do declare under penalty of law as follows:

1. I am the Administrator of the State Historic Preservation Division ("SHPD") of the Hawaii State Department of Land and Natural Resources ("DLNR"). This Declaration is based on my personal knowledge and information from business or public records

which are maintained in the ordinary course of business and from entries made therein at or near the time of the events so recorded. I am authorized and competent to testify to the matters herein.

2. SHPD is charged with implementing the Historic Preservation Program under Hawai'i Revised Statutes ("HRS") Chapter 6E and Hawai'i Administrative Rules ("HAR") Chapter 13.

3. I am personally aware of and was involved, as SHPD Administrator, in the consultation process that resulted in the execution of a Programmatic Agreement ("PA") for the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project ("Project"). The United States Department of Transportation, Federal Transit Administration ("FTA") is the lead agency for the consultation on the PA. The project sponsor is the City and County of Honolulu, Department of Transportation Services.

4. The Project consists of an approximately 20-mile grade-separated fixed guideway rail system anticipated to be completed in four construction phases ("Phases"): (i) Phase 1: East Kapolei to Pearl Highlands; (ii) Phase 2: Pearl Highlands to Aloha Stadium; (iii) Phase 3: Aloha Stadium to Middle Street; and (iv) Phase 4: Middle Street to Ala Moana Center.

5. Because there is an effect on historic properties, Section 106 of the National Historic Preservation Act of 1966 is applicable. Pursuant to this Act, there was a consultation process to address ways to minimize, mitigate, or avoid effects to historic resources under state law during the construction of the Project. The PA is the outcome of that process.

6. As required under HRS § 6E-8 for governmental projects, the DTS and the FTA must provide SHPD with an opportunity for review and comment on the effect of the Project on historical properties or burial sites that may be encountered in the Project's area of potential impacts.

7. Beginning in 2006, consultants for the Project prepared a series of extensive archaeological, historical and cultural technical reports related to historic properties, and also consulted with SHPD regarding: the May 31, 2007 Historic and Archaeological Technical Report (incorporated into the City's Alternative Analysis Report); the August 15, 2008 Archaeological Resources Technical Report; and the August 15, 2008 Cultural Resources Technical Report incorporated by reference into the Project's Draft Environmental Impact Statement ("DEIS") and Final EIS ("FEIS").

8. The 2007 and 2008 technical reports, which were provided to and reviewed by SHPD, provided extensive cultural, historical and archaeological data that served as a basis for developing a plan for identifying historic properties that may be impacted by the Project, including archaeological and burial sites.

9. The following is a summary of certain documents reviewed during the extensive consultation that has taken place between SHPD and DTS in relation to the Project:

a. On November 7, 2007, a copy of the May 31, 2007 Historic and Archaeological Technical Report prepared for the City by Mason Architects Inc. and Cultural Surveys Hawai'i, Inc. for the Alternatives Analysis Report, which addresses burials and burial handling issues for the Project, was submitted to SHPD for its information.

b. On August 25, 2008, a copy of the August 15, 2008 Archaeological Resources Technical Report Honolulu High-Capacity Transit Corridor Project prepared for the City by Cultural Surveys Hawai'i, Inc for the DEIS, which addresses burials and burial handling issues for the Project, was submitted to SHPD for review and any comment.

c. On August 25, 2008, a copy of the August 15, 2008 Cultural Resources Technical Report Honolulu High-Capacity Transit Corridor Project prepared for City

by Cultural Surveys Hawai‘i, Inc. for the DEIS, which addresses burials and burial handling issues for the Project, was submitted to SHPD for review and any comment.

d. On February 17, 2010, a copy of the AIS for Phase I Report was submitted to SHPD for review and comment. On March 19, 2010, written comments to this report were provided by SHPD. A revision of the February 17, 2010 report that addressed SHPD comments was submitted to SHPD for review and comment on April 7, 2010. On April 19, 2010, approvals to the revised report were sent by SHPD from State Historic Preservation Officer Nancy A. McMahon to Dr. Hal Hammatt of Cultural Surveys Hawai‘i, Inc., the City’s Project Consultant, regarding approval of the Phase I AIS and allowing work to proceed in construction Phase 1. A true and correct copy of the SHPD approval letter is attached to the Declaration of Faith Miyamoto as Exhibit I.

e. On January 7, 2011, a copy of the Project’s PA was submitted for SHPD review and comment. The PA includes a process for addressing the discovery of burials and other archaeological and cultural artifacts under state and federal law during the construction of the Project. SHPD was consulted regarding this process and believed the PA appropriately safeguarded the protections afforded under HRS Chapter 6E and is consistent with the authority granted to SHPD under HRS Chapter 6E and its regulations. The PA was executed on behalf of SHPD by William Aila, Jr., the State Historic Preservation Officer and Interim Director of the Department of Land and Natural Resources, on January 13, 2011.

10. It is SHPD’s position that neither HRS § 6E-8 nor HRS § 6E-42 requires the completion of an Archaeological Inventory Survey (“AIS”) for the entire project prior to SHPD’s approval of the plan set forth in the PA.

11. The above-referenced technical reports were reviewed by SHPD and the plan as set forth in the PA was subject to public participation including review by the O‘ahu

Island Burial Council ("OIBC") at its regular meeting. All comments were appropriately considered prior to the finalizing of the PA.

12. The PA was executed by William J. Aila, Jr., the State Historic Preservation Officer and Interim Chairperson of DLNR, on January 13, 2011, and accepted by the FTA in its Record of Decision ("ROD"), dated January 18, 2011.

13. The PA is SHPD's written concurrence to the phased construction approach, as required by Haw. Rev. Stat. § 6E-8 and HAR § 13-275-3.

14. As stated in Section III of the PA, an AIS will be developed and completed in consultation with SHPD and the OIBC for each Phase of the Project before completion of design and commencement of ground-disturbing construction for each respective Phase. Section III of the PA also provides that if any burials are discovered during the AIS for each successive Phase, they shall be treated as "previously identified" burial sites, and subject to the jurisdiction of the OIBC, pursuant to HAR §13-300.

15. SHPD considered the likely impacts of the Project on historic properties, including subsurface archaeological and burial sites.

16. SHPD has determined that the appropriate way to address and mitigate these potential impacts is as set out in the PA.

17. An AIS will be prepared for each construction Phase before construction in that Phase commences. Any burials identified by the AIS will be treated as "previously identified" and subject to the jurisdiction of OIBC. Other burials not identified by the AIS will be treated as "inadvertent discoveries" subject to jurisdiction of SHPD and afforded the protections listed in Haw. Rev. Stat. § 6E-43.6. Any unauthorized or improper demolition, alteration, or transfer of burial sites would violate chapter 6E and related rules.

18. SHPD is advised by the City that no ground-disturbing activity will occur in any construction Phase of the Project until an AIS has been performed.

19. The AIS for construction of Phase 1 of the Project has been completed by the City's consultants and the AIS report was approved by SHPD by letter dated April 19, 2010.

20. Pursuant to State law and the PA, SHPD will review, consult and approve the remaining three AISs for the project before ground-disturbing activities begin in each respective phase.

21. Pursuant to State law and the PA, if and to the extent AISs reveal Native Hawaiian burials, then OIBC has the right to determine the disposition of the burials.

22. SHPD anticipates the timely, orderly and coordinated completion of the AIS for each Phase of the Project prior to any ground-disturbing activities in areas impacted by such phase of the Project.

23. It is SHPD's position that this phased approach to identification and handling of archeological resources provided for in the PA, satisfies the historic preservation review process set forth under Chapter 6E and its regulations.

24. To the best of my knowledge and information, at all relevant times, SHPD has fully complied with its duties under HRS Chapter 6E and related rules and regulations pertaining to the processes and approvals involving burial issues related to the rail project.

I declare under penalty of law that the foregoing is true and correct, in accordance with Rule 7(g) of the Rules of the Circuit Courts of the State of Hawai'i.



PUA ALAOKALANI AIU, Ph.D

NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity
as Director of the City and County of
Honolulu's Department of Transportation
Services, et. al.,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
DECLARATION OF FAITH MIYAMOTO

DECLARATION OF FAITH MIYAMOTO

I, FAITH MIYAMOTO, do declare under penalty of law as follows:

1. Since July 1, 2011, I have been the Chief Planner for the Honolulu Authority for Rapid Transportation ("HART"), City and County of Honolulu ("City"). From July 1, 2007 to June 30, 2011, I was the Chief of Transit Planning and Environmental Studies at the Rapid Transit Division of the City's Department of Transportation Services ("DTS"). From 1990 to June 2007, I was a Planner at the Transportation Planning Division of DTS. This Declaration is based on my personal knowledge and information from business records which are maintained in the ordinary course of business by the City and HART and/or their consultants and from entries made therein at or near the time of the events so recorded. I am authorized and competent to testify to the matters herein.

2. My duties and responsibilities as a Planner at DTS and as the Chief of Transit Planning and Environmental Studies at DTS included the management for DTS of the public review and comment process, and the preparation of environmental studies with regard to the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project

(“Project”), including the Alternatives Analysis Report, the Draft Environmental Impact Statement and the Final Environmental Impact Statement. My duties as a Planner at DTS and as the Chief of Transit Planning and Environmental Studies at DTS also included coordination with the Federal Transit Administration (“FTA”) regarding the environmental studies concerning the Project. Presently, as the Chief Planner for the Honolulu Authority for Rapid Transportation (“HART”), my duties include ensuring compliance with environmental requirements and mitigation commitments for the Project, such as the completion of archaeological inventory surveys (“AISs”) and the avoidance and/or minimization of adverse effects on historic properties.

3. Prior to July 1, 2011, the Project was sponsored by DTS in conjunction with the joint lead federal agency, the FTA. As of July 1, 2011, HART assumed all lawful obligations and liabilities owed by or to the City related to the Project pursuant to Section 16-129.2 of the Revised Charter of the City and County of Honolulu, 1973, as amended. Therefore, the Project is currently sponsored by HART and the FTA.

4. The Project consists of an approximately 20-mile grade-separated fixed guideway rail system that begins at the University of Hawai‘i - West O‘ahu (near the Kroc Center), and proceeds East via Farrington Highway and Kamehameha Highway (adjacent to Pearl Harbor), to Aolele Street serving the Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center. The entire system will operate in an exclusive right-of-way and will be elevated or grade-separated, except in a short, at-grade location near Leeward Community College. The Project will include 21 transit stations, a vehicle maintenance storage facility near Leeward Community College, park-and-ride lots at some stations, traction power substations, and the acquisition of rail vehicles and maintenance

equipment. The purpose of the Project is to provide high-capacity rapid transit in the highly congested East-West corridor between the Kapolei and Ala Moana areas.

5. The Project is anticipated to be completed in four consecutive linear construction phases (“Phases”) over the course of ten years: (i) Phase 1: East Kapolei to Pearl Highlands; (ii) Phase 2: Pearl Highlands to Aloha Stadium; (iii) Phase 3: Aloha Stadium to Middle Street; and (iv) Phase 4: Middle Street to Ala Moana Center.

6. As the Project sponsor, DTS served as a co-lead agency with the FTA in conducting the environmental review process to comply with applicable State and Federal laws governing actions that may have impacts on the environment, including historic and cultural resources. This included the preparation of a joint National Environmental Policy Act (“NEPA”) and Hawai‘i Revised Statutes Chapter 343 (commonly referred to as the “Hawai‘i Environmental Policy Act” or “HEPA”) Draft Environmental Impact Statement (“DEIS”) and Final Environmental Impact Statement (“FEIS”).

7. The Project also addresses and considers both Federal and State historic preservation laws, set forth in Section 106 of the National Historic Preservation Act of 1966 (“Section 106”) and the Hawai‘i State Historic Preservation Program and burial laws set forth in HRS Chapter 6E (“Chapter 6E”), and their respective implementing regulations.

8. On October 27, 2009, the City Council authorized the DTS Director to sign the Project’s Programmatic Agreement (“PA”) by adopting Resolution No. 09-306, CD1. After subsequent consultation and amendments to the PA at the request of the consulting parties, the City Council re-authorized entry into the PA by adopting Resolution No. 10-305, CD1, on November 22, 2010. The PA is a method to satisfy federal requirements of Section 106. The PA also includes a process, developed through consultation with various participating parties,

including the State Historic Preservation Division (“SHPD”) of the Department of Land and Natural Resources (“DLNR”), for addressing Hawai‘i state law concerning the discovery of previously undocumented and unknown burials and other archaeological and cultural artifacts that may be uncovered during the construction of the Project. The PA was assigned to HART effective July 1, 2011.

9. During the environmental review process, the City notified SHPD about the Project and provided SHPD with an opportunity to review and comment on the potential impact of the Project on historical properties, including burial sites, as required under HRS § 6E-42. The City coordinated and consulted with SHPD to develop an appropriate plan for investigating and handling archaeological and burial sites that may be impacted by the Project. This plan is set forth in the PA, which was executed by William J. Aila, Jr., the State Historic Preservation Officer and Interim Chairperson of the Board of Land and Natural Resources, on January 13, 2011, and by the FTA on January 11, 2011. The PA is an attachment to the FTA Record of Decision (“ROD”), dated January 18, 2011.

10. As stated in Section III of the PA and throughout Section 4.16 of the FEIS, an AIS will be developed and completed in consultation with SHPD and the O‘ahu Island Burial Council (“OIBC”) for each Phase of the Project before completion of final design and commencement of construction in each respective Phase. Section III of the PA further states that the AIS for Phase 4 (Middle Street to Ala Moana Center) shall be completed prior to beginning final design for that Phase. Section III of the PA also provides that if any burials are discovered during the AIS for each Phase, they shall be treated as “previously identified” burial sites, and subject to the jurisdiction of the OIBC, pursuant to Hawai‘i Administrative Rules (“HAR”) § 13-300. The PA further provides that if OIBC determines that a burial should be preserved in place,

available avoidance measures include modifying column locations, design and span length, or finding alternative utility locations. If presently unknown burials are identified by the AIS investigation, HART must develop and implement a treatment plan, in consultation with SHPD and in accordance with HRS Chapter 6E and HAR § 13-300, to avoid, minimize or mitigate adverse effects upon these resources. HART is also required to develop and implement, in consultation with SHPD, additional approved mitigation plans, as appropriate. The AIS fieldwork must be completed and approved by SHPD prior to completion of final design in the case of Phases 1, 2, and 3 and prior to beginning final design for Phase 4. This ensures that the presence of any identified burials can be considered during final design for each Phase and measures taken to avoid and/or minimize adverse effects to these resources.

11. Because AISs will be completed for each construction Phase before ground-disturbing construction work in that Phase commences, and any burial that is discovered during this process will be subject to the jurisdiction of OIBC, the PA mandates that burials will be afforded all protections provided to them under Hawai‘i (and federal) law. As such, the Project does not pose a threat of harm or injury from any unauthorized or improper demolition, alteration, or transfer of burial sites.

12. The City’s efforts to perform AISs for the four construction Phases are significantly underway and on track for completion by the end of 2012. An AIS for Phase 1 has already been completed and no burials were identified. The final report for the Phase 1 AIS was approved by SHPD on or about April 19, 2010. The AIS fieldwork for Phase 2 is complete, and no burials were found. The AIS report for Phase 2 is being finalized for submittal to SHPD. The AIS plan for Phase 3 was submitted to and approved by SHPD on December 2, 2011. Fieldwork for the Phase 3 AIS is expected to begin in April 2012 and be completed by June 2012.

13. In accordance with the requirements of the PA, the City initiated the AIS process for Phase 4 within 60 days of execution of the PA and held a meeting with OIBC, lineal and cultural descendants, Native Hawaiian Organizations, and other interested parties identified in discussions with OIBC, on March 16, 2011 to discuss the AIS plan for Phase 4. Plaintiff-Appellant Paulette Ka‘anohiokalani Kaleikini (“Appellant”) attended this meeting. On April 27, 2011, an email was received from Appellant commenting on the Project PA, specifically regarding the AIS plan preparation and the consultation protocol for *iwi kupuna*. A total of 29 letters were received from Appellant and her extended family. These letters voiced similar concerns regarding the AIS Plan and consultation protocol, and were given due consideration by DTS and HART. Appellant attended a small group community meeting held on August 11, 2011 to address questions and concerns regarding the AIS plan for Phase 4 and the consultation protocol. Appellant also attended the September 14, 2011 O‘ahu Island Burial Council meeting, where she provided comments regarding the treatment of *iwi kupuna*, cultural monitors and curation. Appellant provided comments on the draft AIS Plan for Phase 4 in an email to Cultural Surveys Hawaii on September 25, 2011. Two community meetings were held on September 26, 2011 and November 2, 2011 to provide information regarding the AIS for Phase 4. Appellant received invitations to these two meetings, but did not attend either. On November 29, 2011, Appellant attended another small group community meeting, a Cultural Stakeholders’ Meeting, regarding the AIS work for Phase 4.

14. Following significant consultation regarding the scope of the AIS for Phase 4, SHPD approved the AIS plan for this Phase on October 25, 2011. The AIS is currently underway and no burials have been discovered to date. The AIS fieldwork for Phase 4 is expected to be completed in or around November 2012.

15. Utility relocation activities, which precede construction of the Project's guideway elements, are not expected to reach Phase 3 until approximately March 2014 and Phase 4 until approximately March 2015. Therefore, if any burials are discovered during the AIS fieldwork for either Phase 3 or Phase 4, there is ample time to make design adjustments, and develop and implement treatment and mitigation plans, as appropriate, to ensure that no burials are unnecessarily or inappropriately impacted by the Project.

16. Because the AIS fieldwork for Phase 4 is expected to be completed by November 2012, and ground-disturbing construction work is not expected to reach Phase 4 for at least two years after fieldwork completion, HART has ensured that there is ample time to coordinate with OIBC to ensure proper handling of any burials that are discovered during the AIS process, as well as make any design adjustments to that Phase that may be necessary to accommodate the decisions of OIBC with respect to any discovered burials.

17. Significant consideration of the issue of burials has always been afforded by the City and HART in their efforts to develop an appropriate plan to handle the potential discovery of presently unknown burials that may be encountered after site property acquisitions and approvals allow HART to commence ground intrusive AIS work for the proposed support columns and other site locations.

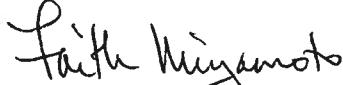
18. HART remains bound by the ROD and PA, and has every intention to honor its obligations to perform the AISs required by the PA. FTA, SHPD, OIBC and the Advisory Council on Historic Preservation will enforce HART's commitments with the added oversight of the other 29 consulting parties who participated in the Section 106 consultation process.

19. HART's position is that it has properly complied with HRS Chapter 6E, and received the necessary concurrence from SHPD to proceed with the Project in accordance with the terms and conditions set forth in the PA.

20. HART's position is that all cooperation among the responsible agencies, as required by HRS § 343-5 and HAR § 11-200-15, has occurred at all levels during the preparation of the State and Federal DEIS and FEIS, including all required coordination, consultation, consideration, review and concurrence with SHPD that culminated in the plan for handling archaeological and burial sites for the Project in the PA.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, March 16, 2012.



FAITH MIYAMOTO

NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity
as Director of the City and County of
Honolulu's Department of Transportation
Services, et. al.,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
DECLARATION OF KENNETH TORU
HAMAYASU

DECLARATION OF KENNETH TORU HAMAYASU

I, KENNETH TORU HAMAYASU, do declare under penalty of law as follows:

1. Since July 1, 2011, I have been the Interim Executive Director and Chief Executive Officer of the Honolulu Authority for Rapid Transportation ("HART"), City and County of Honolulu ("City"). Previously, from July 1, 2007, to June 30, 2011, I was the General Manager of the Rapid Transit Division of the City's Department of Transportation Services ("DTS"). In these capacities, I am personally aware of and was directly involved in the planning for the Honolulu High-Capacity Transit Corridor Project, otherwise known as the Rail Project ("Project"), co-sponsored by DTS and the United States Department of Transportation, Federal Transit Administration ("FTA"), and I oversee ongoing activities with respect to the development of the Project. This Declaration is based on my personal knowledge and information, and I am authorized and competent to testify to the matters herein.

2. The purpose of this declaration is to:
 - a. Summarize the relevance of the Project in light of the history of this critical East-West transportation corridor, and the anticipated population and employment increases through 2030;
 - b. Explain the importance of this critical public works project to the public that will be faced with rising gasoline prices, increasing traffic congestion and population growth shifts away from East and Windward O‘ahu towards the Ewa plain;
 - c. Explain how an injunction that halts or delays the construction of the Project will result in generalized harm to the public good and welfare involving significant traffic related concerns and will unnecessarily penalize the citizens of O‘ahu by negatively impacting the environmental quality and economic health of O‘ahu;
 - d. Explain other significant consequences that an injunction that halts or delays the construction of the Project would have, including but not limited to: putting at significant risk the future federal funding expected to fund a significant part of the Project, and thus possibly jeopardizing the Project itself due to a lack of funding; significant delay and/or termination damages related to ongoing construction contracts that are currently proceeding; and inflation to the net cost of the Project’s material and labor; and
 - e. Describe the cost for the work that has been completed on utility relocations and preliminary engineering test shafts from the date of Appellants’ notice of appeal, August 11, 2011, until now.

3. The Project consists of an approximately 20-mile grade-separated fixed guideway rail system that begins at the University of Hawai‘i - West O‘ahu (near Kroc Center), and proceeds east via Farrington Highway and Kamehameha Highway (adjacent to Pearl

Harbor), to Aolele Street serving the Airport, to Dillingham Boulevard, to Nimitz Highway, to Halekauwila Street, and ending at Ala Moana Center. The entire system will operate in an exclusive right-of-way and will be elevated or grade-separated, except in a short, at-grade location near Leeward Community College. The Project will include 21 transit stations, a vehicle maintenance storage facility near Leeward Community College, park-and-ride lots at some stations, traction power substations, and the acquisition of rail vehicles and maintenance equipment.

4. The Project is anticipated to be completed in four consecutive linear construction phases (“Phases”) over the course of ten years: (i) Phase 1: East Kapolei to Pearl Highlands; (ii) Phase 2: Pearl Highlands to Aloha Stadium; (iii) Phase 3: Aloha Stadium to Middle Street; and (iv) Phase 4: Middle Street to Ala Moana Center.

5. The purpose of the Project is to provide high-capacity rapid transit in the highly congested East-West corridor between the Kapolei and Ala Moana areas.

6. Increasing travel demand and public opposition to extensive freeway expansion began to develop in the early 1960s. The 1967 island-wide O‘ahu Transportation Study concluded that a fixed guideway transit system, serving a corridor between Pearl City and Hawai‘i Kai, would provide cost-effective transportation capacity as part of a larger transportation system expansion needed to meet increased demand. During the 1970s, 1980s and 1990s, numerous studies further explored options for a fixed guideway transit system. Some of these studies were done in coordination with the FTA and its predecessor, the Urban Mass Transportation Administration. In the late 1990s, work commenced on the Primary Corridor Transportation Project (also referred to as the “Bus Rapid Transit Project” or “BRT Project”). The BRT Project focused on alternatives that could be constructed within existing transportation

rights-of-way to provide mobility improvements at a lower cost and with fewer impacts than previous proposals. Some of the BRT facilities were completed, including extension of the morning reversible-flow “zipper lane” on the H-1 Freeway and additional transit stops.

7. Development of the O‘ahu Regional Transportation Plan (ORTP) 2030 was a system planning effort in 2004 and 2005 that identified and prioritized the H-1 travel corridor as having the greatest need for improved transit service. Therefore, the study corridor for the Project extends from Kapolei to the University of Hawaii - Manoa. In 2000, 63 percent of O‘ahu’s population of 876,200 and 80 percent of its 501,000 jobs were located within this corridor. By 2030, these distributions are expected to increase to 69 percent of the population and 83 percent of the employment as development continues to be concentrated into the Primary Urban Center and Ewa Development Plan areas.

8. The Project is intended to provide faster, more reliable public transportation service along this critical East-West corridor than can be achieved with buses operating in congested mixed-flow traffic. Vehicular traffic volumes on major roadways will increase substantially between now and 2030. Increases in morning peak-hour traffic across screenlines will likely range from approximately 10 to 50 percent, resulting in increases in average travel times. These increases in highway congestion would directly affect travel times on buses. Average transit speed has dropped by approximately 10 percent since 1984 (from 14.6 to 13.2 mph) and would continue to decline through 2030 to approximately 12.7 mph under the No Build Alternative. The Project, in combination with the bus system, will increase average transit speeds by approximately 25 percent compared to the 2030 No Build Alternative, leading to higher transit ridership and travel time savings for existing and new transit users. Transit travel times between major destinations will decrease up to 60 percent compared to the No Build

Alternative. In addition, with the No Build Alternative, travel reliability for both drivers and transit riders would decrease by 2030; reliability would worsen because delay on the roadway system would not be predictable from one day to another. With the Project, reliability for transit riders will increase substantially as trips are moved from buses operating on streets in mixed traffic and congested freeways to the grade-separated fixed guideway, which will provide a predictable travel time. Forty-three percent of transit trips and transit passenger miles will be carried on an exclusive fixed guideway that is not subject to traffic delay. As transit becomes a faster and thus a more attractive travel choice, ridership will increase.

9. The Project also supports the goals of the Honolulu General Plan and the ORTP by serving areas designated for urban growth. With the Project, approximately 60,000 additional residents and 27,000 new jobs will be located within walking distance to Project stations in 2030. The “second city” in Kapolei will experience transit travel times to Ala Moana Center that are reduced by 44 percent or more compared to the No Build Alternative.

10. The Project will reduce air pollutant emissions. It is anticipated that the Project will reduce mobile source regional transportation pollutant emissions by between 3.9 and 4.6 percent compared to the No Build Alternative. The Project will also decrease greenhouse gas emissions from transportation sources on O‘ahu. Assuming all electricity is generated from combustion of oil, the daily 2,440 million British thermal units saved by the Project will result in a daily reduction in greenhouse gas emissions of approximately 171 metric tons of carbon dioxide.

11. The Project will reduce the total transportation energy demand for transit and highway vehicles in 2030. The Project is anticipated to reduce daily transportation energy demand by approximately 3 percent compared to the No Build Alternative.

12. Construction of the Project will result in more jobs. An average of approximately 10,000 jobs each year will be attributable to rail construction.

13. The current construction that is ongoing in Phase 1 involves utility relocation and construction of pillars, columns and supports for the elevated guideway. This work is part of the initial construction work on the critical path. However, at least for the next several months, all such work is reversible. Moreover, halting this work for even 6 months would expose HART to over \$113 million in delay costs, which would significantly exceed the cost of removing any structures that are built, or otherwise reversing and remediating the effects of any construction. Therefore, allowing this reversible work to proceed and not halting the project by way of an injunction would be a much less intrusive and harmful approach to resolving the issues here pending appeal.

14. Other serious consequences that would result from delay to the Project include, but are not limited to, the following:

- a. A delay will put at risk the critical federal funding that HART anticipates receiving for the Project's construction, which could be fatal to the Project;
- b. A delay would require the Project's financial plan to be rewritten because the collection of the 0.5% general excise tax surcharge was based on assumptions about when construction would be completed;
- c. A delay may require sustaining HART without productive work. This would cost over approximately \$14 million per year in salaries and fringe benefits;
- d. A delay would suspend the effort to bring traffic relief to commuters and voters who have repeatedly supported the implementation of the Project; and

e. A delay of the Project will put much needed jobs in the State of Hawai‘i on hold.

15. The cost for the work that has been completed on utility relocations, preliminary engineering test shafts and administrative costs from the date of Appellants' notice of appeal, August 11, 2011, until now is approximately \$3,790,396.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai‘i, March 16, 2012.


KENNETH TORU HAMAYASU

NO. SCAP-11-0000611

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity
as Director of the City and County of
Honolulu's Department of Transportation
Services, et. al.,

Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
DECLARATION OF THOMAS J.
WILLOUGHBY

DECLARATION OF THOMAS J. WILLOUGHBY

I, THOMAS WILLOUGHBY, do declare under penalty of law as follows:

1. I am the Contracts and Controls Manager at Parsons Brinckerhoff ("PB"),

the general engineering consultant hired by the Honolulu Authority for Rapid Transportation ("HART"), City and County of Honolulu ("City"), in connection with the Honolulu High-Capacity Transit Corridor Project ("the Project"). This Declaration is based on my personal knowledge. I am authorized and competent to testify to the matters herein.

2. This declaration is submitted to detail and explain the estimated monetary losses that will result from the issuance of an injunction that stops or temporarily halts construction on the Project. This declaration does not address the potential losses that such an injunction may have on the \$1.55 billion dollars of anticipated federal funding for the Project, or the viability of the Project itself, which is estimated to cost approximately \$5.2 billion.

3. PB serves as the general engineering consultant ("GEC") providing design and construction management oversight, procurement and contract administration support to the

Project. As the GEC's Contracts and Controls Manager, I am responsible for the contract administration, change management, and cost/schedule control for all design and construction contracts associated with the Project. I started on the Project in December 2008 assisting in the preparation of procurement and contract documents for Design-Build and Design-Build-Operate-Maintain contracts. I played a lead role in development of the Project's Master Schedule that established the interface dates between various construction contracts, a key part of the interdependency between the contract schedules and the critical path to Project completion.

4. One of the roles I perform on the Project is the Contracts Manager that mitigates and manages changes. In this capacity, I have firsthand knowledge of the changes on the Project and their consequences in terms of cost, schedule and quality impacts. I work closely with HART procurement and legal services to perform my duties and report directly to the GEC's Project Manager as well as serve as an advisor to HART management teams. I also work closely with HART's configuration and risk management groups in coordinating and incorporating contingency management plans into the design and construction contracts.

5. I have over 37 years of project management experience working on large projects and programs with similar contract interfaces and complexities. My career started in cost and scheduling control preparing detailed schedules and budgets for large projects and programs containing multiple contracts and delivery methods. I have served in numerous roles on projects including contract administrator, estimator, project controls manager, deputy project manager and project manager. I have earned recognition in the industry and within PB by achieving "Principal Project Manager" certification which recognizes individuals that have successfully managed large and/or complex projects applying the full set of project management skills. I have served on PB's Project Management and Administration Development Committee

and have conducted hundreds of training courses in project management and control outside and inside PB. I provide mentoring to many employees and former employees on project management, risk, cost and scheduling control.

6. I am personally aware of the contracts procured for the Project, sponsored by HART and the United States Department of Transportation, Federal Transit Administration (“FTA”) by participating in the preparation of the procurement and contract documents, specifically sections involved with project management, quality management, changes, compensation and schedule requirements. I am currently managing the administration of the Project’s design and construction contracts and any changes to those contracts. For this Project, I am involved with all major changes to the Project’s contracts which qualifies me to testify to impacts of the costs and delays for this Project.

7. The purpose of the Project is to provide high-capacity rapid transit in the highly congested East-West corridor between East Kapolei and Ala Moana Center. The Project requires over 44 contracts with management consultants, designers, contractors, design-builders, and system wide design-build-operate-maintain professionals. Major activities provided by HART and their consultants are right-of-way acquisition, environmental permits, design and construction oversight and compliance to standards, utility relocation coordination and “third party” coordination.

8. A major component of HART’s activities for this complex Project, is contract interface management and collaboration. Each contract has a distinct interface with other contracts that typically involve schedule dependency. These interface milestones are stipulated in each contract’s special provisions addressing schedule requirements. Should these interface milestones be delayed later than specified the follow-on contract activities will also be

delayed with both cost and/or schedule impacts. Should these delays be significant, the Project may suffer delays and budget increases. Contingency in terms of schedule (time) and budget (cost) are allocated to contracts with known risks. For unknown risks and delays, the Project maintains an “unallocated” contingency of time and money. The system of management includes monthly status reports and analysis of the allocated and unallocated contingencies as well as making adjustments when necessary to maintain the overall schedule and budget.

9. I have prepared and maintain mathematical calculations that capture the anticipated harm and damages that would result from an injunction that halts the project for any period of time or that results in a “Construction Stop.” My calculations assume that work, other than construction-related work on the Project, could continue, including work on the Archaeological Inventory Surveys (AIS), planning and permitting activities, right-of-way acquisitions and relocations, and design activities. The calculations are based on a potential injunction issuing on or about March 16, 2012. Calculations for a different injunction period might be higher or lower, depending on the work ongoing at the time.

10. A “Construction Stop” starting on March 16, 2012 and lasting 6 months would potentially expose HART to a cost of at least **\$113,350,408** in monetary losses. This amounts to a loss exposure of at least **\$629,724 per day**. By contrast, it would be much less expensive if HART were to proceed with construction and then, if required by the Court, to remove any erected pillars and guideway elements and to restore the construction area to a condition that would allow future utilization and/or development of the property impacted from the Project’s construction. Removal of the above ground columns and structures expected to be completed in the next 6 months would cost approximately **\$2,893,800** based on an estimated completion value of \$11.5 million.

11. The design and construction contracts are divided into two groups by delivery method. The first group is the active Design-Build (DB) contracts which contain both design and construction responsibility. The second group of contracts is the Design-Bid-Build (DBB) contracts that have separate contracts for design followed by a bid period and will result in separate contracts for actual construction work. This second group only has a single active design contract; all others at this time have not been procured yet.

12. The potential cost impacts for the existing contracts that would be halted by a Project Construction Stop for 6 months, include the exposure of extending the contractors' overhead costs for the first three executed construction contracts, namely (1) the West Oahu Farrington Highway Design-Build contract, (2) the Kamehameha Highway Guideway Design-Build contract, and (3) the Maintenance and Storage Facility Design-Build contract. These costs were estimated to be \$13,350,000 based on established overhead extension ratios.

13. The potential cost impacts also include an inflation factor of 4.34% per year, which was based on the average Compound Annual Growth Rate for Steel, Concrete, Labor, Construction Equipment and Other Materials presented in the Honolulu High-Capacity Transit Corridor Project Cost Escalation Forecast – Fiscal Year 2011-2019, and used in the August 2011 Financial Plan for Entry into Final Design. Divided by 12 months, the inflation factor is 0.36% per month. In order to determine the financial harm that would result from inflation for a 6-month delay caused by a court-ordered injunction issued on or around March 16, 2012, the remaining contract value is multiplied by the inflation factor of 0.36% per month and the number of months that the Project will be delayed. For the 3 contracts listed in paragraph 12 and the Core Systems Design-Build-Operate-Maintain contract, the inflation costs for a 6-month delay are estimated to be \$21,651,897.

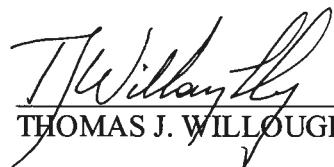
14. In coming up with its Project Estimate and Financial Plan, HART had expected to procure the contracts in accordance with a certain schedule. Therefore, inflation would apply to all construction contracts even if they have not yet been executed because a delay to the construction schedule would delay the timing of the award of other contracts that must be timed to coincide with the overall critical path to completion. This declaration is therefore “time sensitive,” and these estimates are based on when an injunction might issue. Inflation costs for construction contracts not yet executed is estimated to be \$41,330,347 for an injunction lasting 6-months. Therefore, a 6-month delay to the Project will cause a cost increase of approximately \$63 million for executed and pending construction contracts just in terms of inflation to the net cost of the Project’s construction material and labor, excluding contingency, finance charges and administrative costs.

15. Additionally, other costs subject to delay impacts relate to consulting contracts for the Project Management Consultant (“PMC”) and the GEC, and the cost of HART’s daily operations. For the purpose of calculating the delay cost of a “Construction Stop,” an estimated monthly expense or “burn rate” was used to determine current expenditures for the two consulting contracts and HART. A “burn rate” is the cost of operations to manage, oversee and administer the Project, typically stated in days or months. The burn rate for the PMC and the GEC can be calculated from monthly invoiced amounts. The burn rate stated for HART is based on an accounting of HART’s monthly expenditures. This burn rate is applied to the extension of time caused by any injunction. For a 6-month delay due to a “Construction Stop,” the cost impact for these matters is estimated to be \$37,018,164.

16. In sum, adding the potential delay costs for both Design and Construction Contracts and Consulting Contracts, as well as for HART's daily operations, a "Construction Stop" for six months would potentially cost over \$113,350,408, or \$629,724 per day.

I declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, March 16, 2012.



THOMAS J. WILLOUGHBY

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PAULETTE KA'ANOHIOKALANI
KALEIKINI,

Petitioner/Plaintiff-Appellant,

vs.

WAYNE YOSHIOKA in his official capacity as Director of the City and County of Honolulu's Department of Transportation Services, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE in his official capacity as Mayor, CITY AND COUNTY OF HONOLULU DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING, WILLIAM J. AILA JR. in his official capacity as Chairperson of the Board of Land and Natural Resources and State Historic Preservation Officer, PUAALAO KALANI AIU in her official capacity as Administrator of the State Historic Preservation Division, BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, NEIL ABERCROMBIE in his official capacity as Governor, and O'AHU ISLAND BURIAL COUNCIL,

Respondents/Defendants-Appellees.

CIVIL NO. 11-1-0206-01 GWBC
(DECLARATORY RELIEF)

APPEAL FROM:

- (1) FINAL JUDGMENT FILED ON AUGUST 8, 2011
- (2) JULY 5, 2011 ORDER GRANTING DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011
- (3) JULY 5, 2011 ORDER GRANTING CERTAIN STATE DEFENDANTS' SUBSTANTIVE JOINDER IN DEFENDANTS WAYNE YOSHIOKA IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CITY AND COUNTY OF HONOLULU'S DEPARTMENT OF TRANSPORTATION SERVICES, CITY AND COUNTY OF HONOLULU, HONOLULU CITY COUNCIL, PETER CARLISLE IN HIS OFFICIAL CAPACITY AS MAYOR, CITY AND COUNTY OF HONOLULU DEPARTMENT OF PLANNING AND PERMITTING'S MOTION TO DISMISS COMPLAINT AND/OR FOR SUMMARY JUDGMENT FILED FEBRUARY 9, 2011
- (4) JULY 5, 2011 ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING OF MARCH 23, 2011

CIRCUIT COURT OF THE FIRST CIRCUIT,
STATE OF HAWAI'I

HON. GARY W.B. CHANG

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below, a true and correct copy of the attached Opposition was duly upon the following parties by the method indicated below:

Electronically through JEFS

DAVID KIMO FRANKEL, ESQ. [x]

ASHLEY K. OBREY, ESQ.

Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813

Attorneys for Plaintiff-Appellant

WILLIAM J. WYNHOFF, ESQ. [x]

465 South King Street, Suite 300
Honolulu, Hawai'i 96813

Attorneys for Defendants-Appellees

WILLIAM J. AILA, JR., in his official capacity as
Chairperson of the Board of Land and Natural Resources
and State Historic Preservation Officer, PUA'ALAO KALNI
AIU in her official capacity as administrator of the State
Historic Preservation Division BOARD OF LAND AND
NATURAL RESOURCES, DEPARTMENT OF LAND
AND NATURAL RESOURCES, NEIL ABERCROMBIE,
in his official capacity as Governor

JAMES C. PAIGE, ESQ. [x]

S. KALANI BUSH, ESQ.

425 Queen Street
Honolulu, Hawai'i 96813

Attorneys for Defendant-Appellee
OAHU ISLAND BURIAL COUNSEL

DATED: Honolulu, Hawai'i, March 16, 2012.

/s/ John P. Manaut _____

ROBERT C. GODBEY

DON S. KITAOKA

GARY Y. TAKEUCHI

JOHN P. MANAUT

LINDSAY N. MCANEELEY

Counsel for Defendants-Appellees

WAYNE YOSHIOKA in his official capacity as
Director of the City and County of Honolulu's
Department of Transportation Services,
CITY AND COUNTY OF HONOLULU,
HONOLULU CITY COUNCIL, PETER
CARLISLE in his official capacity as Mayor,
CITY AND COUNTY OF HONOLULU
DEPARTMENT OF TRANSPORTATION
SERVICES, AND CITY AND COUNTY OF
HONOLULU DEPARTMENT OF PLANNING
AND PERMITTING