



\$5 Billion Honolulu Rail Transit Project Gets Green Light

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In a decision of national importance for rail transit and highway projects, the Ninth Circuit Court of Appeals rejected NEPA and Section 4(f) challenges to the 20-mile Honolulu Rail Transit Project. *HonoluluTraffic.Com v. Federal Transit Administration*, No. 13-15377 (9th Cir. February 18, 2014). On the same day, the District Court for the District of Hawaii dissolved a temporary injunction on construction in the downtown Honolulu portion of the Project. *HonoluluTraffic.Com v. Federal Transportation Administration*, No. 11-0307 AWT (D. Haw. February 18, 2014). The two decisions remove the last legal barriers to completion of the \$5 billion Project which will connect West Oahu with downtown Honolulu and serve major commercial and tourist destinations, including Pearl Harbor, the Honolulu Airport, downtown Honolulu, and the Ala Moana Center.

The decision has national implications because it recognizes that federal transportation agencies may (1) define a project's purpose and need and the range of alternatives based on the objectives described in an approved regional transportation plan, and (2) narrow the range of alternatives based on prior state and local studies of project alternatives.

Nossaman acted as lead counsel to the City and County of Honolulu and Nossaman partner Robert Thornton argued the cases in the Ninth Circuit and the District Court.

Purpose of Project May Be Defined by Regional Transportation Plan and Statutory Objectives.

The Ninth Circuit rejected Plaintiffs' claim that the purpose and need for the Project was too narrow and limited alternatives to rail alternatives. The Court concluded that transportation agencies may define the purpose of a transportation project in accordance with the objectives of the applicable regional transportation plan and the intent of federal transportation statutes. The regional transportation plan here determined that high-capacity rail transit connecting west Oahu with downtown Honolulu was necessary to implement Honolulu's smart growth land use policies. The federal law authorizing the FTA's New Starts

program, in turn, includes the objectives of minimizing fuel consumption and improving mobility for transit-dependent communities.

Federal Agency May Use Prior State Studies to Narrow Range of Alternatives.

Plaintiffs' claimed that the Federal Transit Administration had violated NEPA because it had relied on an earlier City study of non-rail alternatives to narrow the range of alternatives evaluated in detail in the EIS. The Ninth Circuit held that federal law authorized the FTA to use the City's analysis of non-rail alternatives to narrow alternatives because the FTA furnished guidance to the City, and the City provided an opportunity for public comment on the alternatives analysis.

Federal Agency May Determine that Non-Rail Alternatives Are Not Prudent Under Section 4(f) Where the Alternative Does Not Meet the Project Purpose and Need.

The Ninth Circuit also rejected Plaintiff's' claim that FTA violated section 4(f) of the Transportation Act (49 U.S.C. § 303) when it determined that non-rail alternatives advocated by the Plaintiffs were not prudent alternatives because the alternatives did not meet the Project's purpose and need. The Court concluded that FTA reasonably determined that the Plaintiffs' preferred alternatives would not achieve the purposes identified in the regional transportation plan, including supporting the City's land use policies and providing improved mobility for transit-dependent communities.

FTA Complied with Section 4(f) When it Postponed Sub-Surface Investigations But Made a Reasonable, Good Faith Effort to Identify Archaeological Sites.

Finally, the Ninth Circuit rejected Plaintiffs' claim that Section 4(f) required the FTA to conduct sub-surface investigations for potential archaeological resources prior to approving the Record of Decision. The Court distinguished prior decisions in holding that the FTA complied with Section 4(f) here because it (1) made a reasonable, good faith effort to identify potential archaeological sites, and (2) developed an appropriate plan to address archaeological sites that may be identified during construction. The decision is the first court of appeals' decision to expressly address the requirements of section 4(f) with regard to potential, but unknown, below-ground archaeological sites.

District Court Dissolves Temporary Injunction on Construction in Downtown Honolulu.

On the same day as the Ninth Circuit decision, the District Court for the District of Hawaii rejected Plaintiffs' objection to the Defendants' analysis of a tunnel alternative under Section 4(f) and dissolved the temporary injunction on construction activities in downtown Honolulu. In December 2012, the District Court had ordered FTA and the City to conduct additional analysis of three Section 4(f) issues in the downtown portion of the Project, including whether a tunnel alternative was a feasible and prudent alternative to the use of two historic sites. The District Court concluded that the FTA reasonably determined that the tunnel alternative did not avoid the use of Section 4(f) sites and that the approved Project alignment was the least harm alternative under Section 4(f).