UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

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

Plaintiffs,

vs.

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

Defendants.

Civ. No. 11-00307 AWT

ORDER ON MOTION FOR JUDICIAL NOTICE

Pending before the Court is Defendants' Request for Judicial Notice (Doc. 37-2), which was filed in conjunction with and in support of Defendants' Motion for Partial Judgment on the Pleadings. Because the Court believes that it will be helpful to counsel to have the Court's ruling on the request for judicial notice before the motion for partial judgment on the pleadings is argued, the Court now rules on the pending request for judicial notice. For the reasons stated below, Defendants' Request is granted in part and denied in part.

I. Background

Plaintiffs filed this action on May 12, 2011, alleging that Defendants' Final Environmental Impact Statement/Section 4(f) Evaluation ("FEIS") and Record of Decision ("ROD"), both of which concern the Honolulu High-Capacity Transit Corridor Project ("Project"), do not comply with the requirements of the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department of Transportation Act ("Section 4(f)"), the National Historic Preservation Act ("NHPA"), and the regulations implementing those statutes. (Compl., Doc. 1). Defendants filed a Motion for Partial Judgment on the Pleadings, seeking to dismiss particular Section 4(f) claims as waived and to dismiss certain Plaintiffs, who Defendants alleged failed to participate in the notice-and-comment administrative proceeding leading up to the ROD's release. (Doc. 37). In support of their motion, Defendants submitted 23 exhibits, labeled "A" through "W," and a Request for Judicial Notice of those exhibits and various other "public record facts." (Docs. 37-2 to 40-10).

II. Defendants' Request for Judicial Notice

A. Legal Standard

As a general rule, a district court may not consider materials outside of the pleadings when ruling on a motion for judgment on the pleadings. Fed. R. Civ. P. 12(d). However, the district court may consider facts that are contained in materials of which the court may take judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999). Accordingly, the court may consider materials incorporated by

reference into the complaint or matters of public record appropriate for judicial notice. *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

Documents are considered incorporated by reference when the complaint necessarily relies upon the document or the contents of the document are alleged in the complaint, the document's authenticity is not in question, and there are no disputed issues as to the document's relevance. *Id.*; *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The court can consider the full text of the judicially noticed document, even if the complaint mentions only portions of the document. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996).

Moreover, a court can take judicial notice of a fact that is "not subject to reasonable dispute" in that it is either generally known within the court's territorial jurisdiction or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The latter category includes matters of public record. See *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

B. Exhibits A-C

Exhibits A, B, and C consist of the Draft Environmental Impact Statement ("DEIS"), the FEIS, and the ROD of the Project. The contents of portions of all three of these documents are alleged in the Complaint. (*See, e.g.*, Doc. 1 at ¶¶ 29-31, 66, 70, 73, 89-93). The authenticity of these documents has been attested to by Faith Miyamoto, the Chief Planner for the Honolulu Authority for Rapid Transportation. (Doc. 40-11). Exhibits A and B, the DEIS and FEIS, include appendices recording a number of public comments made at various stages of the notice-and-comment process; Exhibit C, the ROD, includes a summary, by subject matter, of comments submitted on the FEIS. As a result, although these exhibits do not comprise the entire administrative or public record in this case, they are clearly relevant to Defendants' assertions that Plaintiffs' did not comment on particular subjects or at particular times.

Because the contents of Exhibits A, B, and C are alleged in the Complaint, their

authenticity is not in question, and they are clearly relevant to resolution of Defendants' Motion, this Court can consider these documents in full as incorporated by reference in the Complaint. *Coto Settlement*, 593 F.3d at 1038; *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405 n.4. Thus, Defendants' Request for Judicial Notice of Exhibits A, B, and C is granted.

C. Exhibits E-K and M-W

Exhibits E, F, G, H, I, J, K, M, N, O, P, Q, R, S, T, U, V, and W consist of two pieces of legislation, a certificate of voting results, five notices published in the *Federal Register* or elsewhere, and ten comments made by various Plaintiffs during the notice-and-comment process leading up to publication of the ROD. The court may judicially notice the existence of these documents because they are matters of public record, capable of accurate and ready determination, and not subject to reasonable dispute. Fed. R. Evid. 201(b).

While Plaintiffs do not object to judicial notice of the existence of these documents, they do object to any judicial notice of Defendants' descriptions of the exhibits included in their Request for Judicial Notice. (Doc. 42). Judicial notice is not appropriate for matters open to interpretation, speculation, or other reasonable dispute. *See J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 440 (9th Cir. 2010) (an interpretation of statements contained in a document is not judicially noticeable if subject to reasonable dispute); *Lawrence v. CFTC*, 759 F.2d 767, 776 n.17 (9th Cir. 1985) (speculative facts are not a proper matter for judicial notice). As a result, the Court grants Defendants' Request for Judicial Notice as to the existence of the documents in Exhibits E through K and M through W, but declines to judicially notice any of Defendants' accompanying interpretations of the content or impact of those documents.

D. Exhibit D

Exhibit D is a document entitled *O'ahu Regional Transportation Plan 2030*; in their Request, Defendants ask for notice of this document, as well as a description of the O'ahu Metropolitan Planning Organization ("MPO") and its responsibilities. (Doc. 37-2

at ¶ 4). While the Court grants Defendants' Request to take notice of the existence of the document labeled Exhibit D, for the reasons outlined above concerning matters of public record, the Court declines to take notice of Defendants' description of the creation of the MPO, its duties, and its role in the approval of the *O'ahu Regional Transportation Plan 2030*. Defendants have not supplied the necessary information for the Court to verify the truth of those facts, Fed. R. Civ. P. 201(d), and thus those facts remain subject to reasonable dispute and inappropriate for judicial notice.

E. Exhibit L

Exhibit L is a comment letter written by Plaintiff HonoluluTraffic. Plaintiffs argue that this exhibit is not appropriate for judicial notice because it is an individual comment containing personal opinions and so is subject to reasonable dispute. (Doc. 42). However, Plaintiffs did not object to judicial notice of the existence of any of the other comments for which Defendants requested judicial notice and do not cite to any case law or clearly explain why a letter should be treated differently than the other written and oral comments in Defendants' Request. The existence of the comment letter is a matter of public record not subject to reasonable dispute. *See S.F. Baykeeper v. W. Bay Sanitary Dist.,* 2011 U.S. Dist. LEXIS 54883, at *133 n.13 (N.D. Cal. 2011). As such, the court grants Defendants' Request for Judicial Notice as to the existence of Exhibit L.

F. "Public record facts" in ¶ 18

Defendants have withdrawn their request that the Court take judicial notice of the fact that the Federal Transit Administration and the City of Honolulu conducted an "extensive outreach program." (Doc. 37-2 at ¶ 18; Doc. 48). Consequently, the Court denies judicial notice of the remainder of that paragraph of Defendants' Request, because it merely makes reference to portions of the FEIS, Exhibit B, which has already been noticed, as set forth above.

G. "Public record facts" in ¶ 28

Defendants request judicial notice that the "public record is devoid of any comments" by certain plaintiffs regarding the FEIS, citing Exhibit C as establishing such

an absence of fact. (Doc. 37-2, ¶ 28). The court denies this request. Exhibit C contains only a summary of the public comments made on the FEIS and does not include a list of the names of the people who commented on the FEIS. Because the Court has not been furnished with a list of the individuals who commented on the FEIS, it is impossible for the Court to conclude, at this stage, that certain Plaintiffs were not among the commenters. Thus, this paragraph does not represent a matter capable of accurate and ready determination. Fed. R. Civ. P. 201(b).

H. "Public record facts" in ¶¶ 11, 15, and 23

Defendants request judicial notice that the "public record is devoid" of comments from certain Plaintiffs regarding the alternative scoping process, during two notice-and-comment periods, and on the DEIS. (Doc. 37-2 at ¶¶ 11, 15, 23). This request is denied for two reasons. First, the Court does not have the full "public record" before it; the DEIS and FEIS, which do not represent the entire administrative record, provide the only evidence before the Court that certain Plaintiffs did not comment during the periods alleged by Defendants. Thus, the Court does not have sufficient information to conclude that the public record as a whole is "devoid" of such comments and these paragraphs represent matters subject to reasonable dispute. Fed. R. Civ. P. 201(b).

Second, while the Court has concluded above that it can consider the DEIS and FEIS at this stage, it is not appropriate for the Court to take judicial notice of the "absence of fact" based on analysis of those public records. The out-of-circuit district court cases Defendants cite in their Request do not, in fact, support Defendants' argument in favor of judicial notice of a failure to exhaust administrative remedies. Those cases instead suggest that a district court may take judicial notice of administrative publications and then use those documents to make its own independent determination as to whether the record is devoid of required comment or action by a plaintiff in the process of deciding the underlying motion. *See Marcelus v. Corr. Corp. of Am.*, 540 F. Supp. 2d 231, 235 n.5 (D.D.C. 2008) (taking judicial notice of an administrative complaint and then concluding *independently* that the complaint showed a failure to exhaust administrative remedies);

Cordero v. AT&T, 73 F. Supp. 2d 177, 185-90 (D.P.R. 1999) (taking judicial notice of EEOC filing and then using that filing as *evidence* of a failure to exhaust administrative remedies); *cf. Feistel v. U.S. Postal Serv.*, 2008 U.S. Dist. LEXIS 121259, at *4 (E.D. Wis. May 12, 2008) (directly taking judicial notice of "failure to exhaust" when the issue was not contested). Thus, the Request for Judicial Notice of the "facts" presented in ¶¶ 11, 15, and 23 is denied.

III. Conclusion

For the reasons set forth above, Defendants' Request for Judicial Notice is **granted in part** and **denied in part**.

Accordingly,

IT IS ORDERED:

(1) Defendants' Request for Judicial Notice is **granted** as to Exhibits A-C.

(2) Defendants' Request for Judicial Notice is **granted** as to Exhibits D-W, but such notice is limited only to the existence of those documents.

(2) Defendants' Request for Judicial Notice is **denied** as to the "public record facts" in ¶¶ 11, 15, 18, 23, and 28.

DATED this 31st day of October, 2011.

A. Wallace Tashima
United States Circuit Judge
Sitting by Designation