

Revised 2/7/2012.

The latest revision are marked in red

Revised further in green 3/30/2012

Revised further in brown 5/14/2012.

## ***Where the Rail Project stands today***

Here is the sequence of events that has to occur before the City can begin building rail:

1. The City/HART has been given permission by the FTA to enter the Final Design phase. However, FTA put so many qualifications on their “approval” of the financial plan that it is not really an approval at all. See our discussion on the main page of December 29.
2. Congress must approve the \$1.5 billion in federal funding for the project.
3. The FTA and the City must agree on a Full Funding Grant Agreement (FFGA) that will for the first time spell out what federal funds will be available to the City.
4. The City received a Letter of No Prejudice (LONP) on February 6 allowing it begin limited construction of rail up to \$185 million using City funds. We are not filing for a preliminary injunction to stop this since the City has informed us, and the court, that they are not going to do any work that they cannot subsequently replace and repair should we prevail in our lawsuit. (See our posting of February 6).
5. During this period the city and FTA must also prevail in the federal lawsuit, Honolulutraffic.com et al. v. FTA and the City. The final hearing before Judge Tashima will be heard on August 21, this year, at 10:00 AM in Federal Courthouse PJKK, Honolulu.

The precarious state of the financial plan for rail was made clear to the City when they were given permission to enter the Preliminary Engineering process a year ago. [The Federal Transit Administration \(FTA\) wrote,](#)

“Further, the City should be aware that FTA's standards for the financial rating are higher for entry into final design than for entry into PE. The higher standard for final design includes an assessment of the robustness of the financial plan against increases in costs, shortfalls in revenue streams, and competing demands on funding sources. Some elements of the current financial plan may not fare well in the stress tests that FTA will apply to evaluate robustness. These elements include the projected revenue stream from the General Excise Tax, the diversion of FTA Section 5307 funds from ongoing capital needs of the bus system, and the increasing share of the City's annual budget that is required to fund the transit system. Were this plan submitted today in support of a request to advance the project into final design, its weaknesses would likely cause FTA to deny the request. Therefore, continued development and strengthening of the financial plan will be a crucial part of the PE effort.”

Further the FTA wrote in its FY 2011 Financial Assessment,

“Given that GET surcharge revenues are highly leveraged in the financial plan, any shortfall in revenue would have material consequences on the City's ability to finance the local share of project cost, unless other sources of capital funds are identified.”

And here is what the FTA wrote in their FY2011 Financial Assessment:

“The capital cost estimates/planning assumptions sub-factor is rated *Low*. The major factors contributing to this rating are: (i) material downside risks to the GET surcharge revenue forecast, and consequently the inability to cover all debt service cost; (ii) no net debt capacity; and (iii) lack of information to substantiate the City's capacity to absorb a material amount (up to \$535 million) of cost risk. In addition to these concerns, bus capital funding - clearly needed as evidenced by the relatively old age of the bus fleet - depends on a much higher level of Federal funding than has previously been the case.”

These concerns were made clear to the City prior to the bombshell revealing that the City and the EPA had entered into a consent decree for a \$3.5 billion revamp of the City sewer collection system to be completed by 2020 and a further \$1.55 billion for sewage treatment plants to be upgraded by 2034. Including finance charges this will total \$7.2 billion.

For the City to make the financial plan robust is going to be extremely difficult, if not impossible, since the City is legally only allowed to use the GE tax surcharge, private funds, state and federal funds for construction; it may not use the General Fund.

In addition, the FTA made it clear that for rail construction they do not like the City using the \$244 million in federal funds originally scheduled for bus purchases.

The City has nowhere else that it can legally turn to make up the shortfalls except federal New Starts funds presently forecast at \$1.55 billion. That amount is so far out of line with what other cities are being awarded that only through Senator Inouye stretching his influence to the limit is Honolulu being considered for such a large sum.

The strange thing about the approval of the City/HART financial plan is that virtually all the same issues are raised in the approval letter. See the FTA letter at: [www.honolulutraffic.com/FTA\\_letter\\_122911\\_OCR.pdf](http://www.honolulutraffic.com/FTA_letter_122911_OCR.pdf)

Our initial legal action was a complaint filed in federal court on May 11, 2011 by plaintiffs, Honolulutraffic.com, Governor Ben Cayetano, Judge Walter Heen, Professor Randal Roth, Senator Sam Slom's SBH Educational Foundation, Hawaii's Thousand Friends, Dr. Michael Uechi MD, and Cliff Slater, against the Federal Transit Administration (FTA) and the City and County of Honolulu (City). **Subsequently, Outdoor Circle has become a plaintiff.**

Since then the City and the FTA have responded separately denying everything and, in addition, have jointly filed Motions to dismiss some of the plaintiffs, and to dismiss some of our allegations concerning historic properties. Our attorneys believe these are nuisance motions intended to delay matters and to try run up our legal bills so that we would be unable to continue with the lawsuit.

We have replied to their motions and the first phase of our lawsuit, Honolulutraffic.com et al. vs. FTA and the City and County of Honolulu, will be heard in Federal Courtroom *AHA KAULIKE* (place of equity) this Wednesday at 10:00 AM by Judge A. Wallace Tashima, a Senior Ninth Circuit Judge of California. The order of business is first to hear the Defendants' Motion for Partial Judgment on the Pleadings, followed by a Status/Scheduling Conference.

The hearing and the subsequent judge's ruling resulted in the city/FTA Motion being denied on both counts. The judge has further ordered the city/FTA to produce the Administrative Record in its entirety by February 6, 2012. The scheduling conference

resulted in an estimate that the final hearings and rulings should take place in mid-Summer.

We now have the Administrative Record and have made it available to the media. It is a very large 43.5 gigabyte file. We have complained to the Court about missing documents and redactions that we do not understand. Judge Tashima has ordered the City/FTA to produce their Privilege Log by February 6 in order that he may ascertain whether the omissions and redactions are justified. We have subsequently received the log.

City/FTA's (a) motion for partial summary judgment re plaintiffs' standing, and (b) motion for partial summary judgment re waiver are set for hearing on 11 April 18, 2012, at 10:00 a.m., at the PJKK Courthouse, Honolulu, Hawaii. The hearing was held but we have yet to hear of the outcome.

Full details of the environmental process are available at [www.honolulutraffic.com/processdocs.htm](http://www.honolulutraffic.com/processdocs.htm)

Full details of the lawsuit are at [www.honolulutraffic.com/LegalProcessDocs.htm](http://www.honolulutraffic.com/LegalProcessDocs.htm)