

March 21, 2011

Governor Benjamin J. Cayetano
1926 Okoa Place
Honolulu, HI 96821

Dear Governor Cayetano:

We are delighted to have been retained to undertake this worthy battle -- and expect to succeed. We are looking forward to completing our work of analyzing the thousands of pages of the administrative record, drafting our complaint, and filing our lawsuit in the United States District Court for the District of Hawaii. Given the impacts of passage of time, marshalling the resources to file earlier rather than later will be advantageous to our case.

As you know, from our initial work we see the three most promising statutes on which to base our lawsuit as:

- Section 4(f) of the Transportation Act (4(f)).
 - > There exists an affirmative obligation for transportation projects to avoid historic sites if there are feasible alternatives. The Record of Decision (ROD) in this matter failed to avoid historic sites when feasible alternatives are present.
- National Environmental Policy Act (NEPA).
 - > Alternatives are the "heart" of the Environmental Impact Statement (EIS). 40 CFR 1502.14. The regulations provide that "all" reasonable alternatives must be studied and that each must receive substantially equal treatment.
 - > This EIS failed adequately to study multiple reasonable alternatives (including omitting entirely the Managed Lane Alternative).
 - > The EIS failed adequately to address both bus rapid transit and light rail alternatives, although both are reasonable alternatives.
 - > This EIS skewed the economics of the various alternatives with the effect of altering the "reasonableness" of certain of them.
 - > NEPA also requires that an entire project be studied at once and not "segmented" (which has the effect of appearing to reduce the cumulative impacts and then constrains the alternatives which are planned but not included in the original analysis). This EIS confines its analysis to 20 miles (between East Kapolei and Ala Moana Center) and explicitly declines to analyze "future planned extensions" (which include additions from East Kapolei to West Kapolei and from Ala Moana Center to UH Mānoa and to Waikiki). Once heavy rail is built over a middle segment, as a practical matter the feasibility of buses or light rail or some

other transit mode over the extensions is reduced. One U.S. Court of Appeals referred to such narrowing of future options by similar segmentation as a "joke." That joke should not be repeated in Honolulu.

- > NEPA requires use of scientifically valid methodology. Here the underlying population projections which are a predicate of the EIS's conclusions and the resulting ROD are dated and do not support the decision reached.
 - > Under NEPA the analysis of alternatives is predicated on responding to the "Purpose and Need" for the alternatives including the proposed project. 40 CFR 1502.13. The goal is to get at the underlying problem which occasions the analysis of alternative means of dealing with it. Here the underlying problem relates to the need to move people from west to east and east to west through Honolulu and its surrounds, bounded by mountains and the ocean, by Mauka and Mekai. However, this EIS defines the Purpose and Need as "provid[ing] high capacity rapid transit . . ." It confuses a potential alternative solution with the underlying purpose and need. So stated, all non-rapid transit alternatives are automatically excluded as failing to achieve the Purpose and Need. That violates the law.
- National Historic Preservation Act (NHPA).
 - > The NHPA similarly requires full analysis of alternatives which would avoid historic places as part of the statutory commitment to the safeguarding of our nation's historic heritage.
 - > Here too the transportation agencies failed to follow the law.

To conclude -- we are as you know, highly experienced with proceedings, including litigation, under the three statutes set out above. Indeed, as General Counsel of the White House Council on Environmental Quality Nick Yost was the lead draftsman of the Federal Government's NEPA Regulations, which bind the FTA. He was also last year's winner of the American Bar Association's Award for Outstanding Achievement in Environmental Law and Policy. He and his more junior colleague, Matt Adams, have worked together on numerous matters involving the statutes discussed above (with an exceedingly high success rate), and are, indeed, currently involved in litigation in the U.S. District Court for Hawaii involving both NEPA and the NHPA.

Sincerely,

SNR Denton US LLP


Nicholas C. Yost
Partner

cc: Cliff Slater