Appendix A—Judgment and Partial Injunction Order of the United States District Court in HONOLULUTRAFFIC.COM et al. vs. FEDERAL TRANSIT ADMINISTRATION et al.

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,

CV No. 11-0307 AWT

JUDGMENT AND PARTIAL INJUNCTION

FAITH ACTION FOR COMMUNITY EQUITY; PACIFIC RESOURCE PARTNERSHIP; and MELVIN UESATO,

Intervenors - Defendants.

After briefing, hearing, and disposition of this case on the merits, *see HonoluluTraffic.com v. Fed. Transit Admin.*, 2012 WL 1805484 (D. Hawaii 2012) (partial grant of summary judgment); Order on Cross-Motions for Summary Judgment, filed Nov. 1, 2012 ("Summary Judgment Order"), the parties and the court addressed the appropriate remedy. The parties submitted additional briefing on the scope of any remedies, including any equitable relief. The remedy phase was fully argued and heard on December 12, 2012. After due consideration of those arguments, briefs, and the record, the court now enters its final Judgment, which shall include partial injunctive relief, as set forth below.

As reflected in its prior orders, the court granted summary judgment to Plaintiffs on three of their § 4(f) claims – claims arising under § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303. The court granted summary judgment to Defendants on all other claims raised by Plaintiffs, which include Plaintiffs' remaining § 4(f) claims, all claim arising under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and all claims arising under § 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. In entering its partial permanent injunction, the court has considered the well-recognized equitable factors that apply, *see, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010), and finds that, to the extent Defendants actions are enjoined, the four-factor test, on balance favors Plaintiffs, including: (1) irreparable injury: (2) the inadequacy of monetary relief; (3) the balance of hardships; and (4) the public interest.

IT IS, THEREFORE, ADJUDGED that **t**his matter is remanded to the Federal Transit Administration, but without vacatur of the Record of Decision, to comply with the court's Summary Judgment Order.

DEFENDANTS, their officers, agents, servants, employees, and attorneys; and all other persons who are in active concert or participation with them, are hereby restrained and enjoined from conducting any construction activities and real estate acquisition activities in Phase 4 of the Honolulu High-Capacity Transit Corridor Project (the "Rail Project"). This injunction on Phase 4 construction activities shall terminate 30 days after Defendant Federal Transit Administration files with the court notice of Defendants' compliance with the Summary Judgment Order and evidence of such compliance, unless Plaintiffs file an objection within said 30-day period specifying how the Federal Transit Administration has failed to comply with the Summary Judgment Order. If such objection is timely filed, this injunction shall remain in effect pending the court's resolution of Plaintiffs' objection(s).

This injunction shall not prohibit, and Defendants may prepare, Phase 4 engineering and design plans, conduct geotechnical training, and conduct other pre-construction activities, including any activities that are appropriate to complete the additional analysis required by the Summary Judgment Order. This injunction shall not apply to Phases 1 through 3 of the Rail Project.

Within 150-180 days of the issuance of this Judgment, and every 90 days thereafter, Defendants shall file a status report setting forth the status of Defendants' compliance efforts with the terms of the Summary Judgment Order. Either by stipulation of all parties or upon noticed motion, Defendants may apply to except any activity otherwise prohibited by this injunction from its terms.

In the exercise of its discretion, the court determines that each party shall bear its own costs.

Dated: December 27, 2012.

/s/ *A. Wallace Tashima*
United States Circuit Judge
Sitting by designation

Appendix B—Summary Judgment Order of the United States District Court in HONOLULU-TRAFFIC.COM et al. vs. FEDERAL TRANSIT ADMINISTRATION et al.

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,

FAITH ACTION FOR COMMUNITY EQUITY; PACIFIC RESOURCE PARTNERSHIP; and MELVIN UESATO,

Intervenors - Defendants.

Civ. No. 11-00307 AWT

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

HonoluluTraffic.com, et. al ("Plaintiffs"), claim that the City and County of Honolulu (the "City") and the Federal Transit Administration ("FTA") (collectively, "Defendants") have violated three federal statutes in the process of approving a twenty-mile elevated guideway rail transit project (the "Project"): (1) Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303; (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h; and (3) Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f. Now pending before the court are the parties' cross-motions for summary judgment, which have been fully briefed and argued. For the reasons set forth below, Plaintiffs' motion is **granted in part**, with respect to three claims arising under Section 4(f). Defendants' motion is **granted in part**, with respect to all other claims.

I. Background

On December 27, 2005, the FTA published a Notice of Intent ("2005 NOI") to prepare an Alternatives Analysis ("AA") and an Environmental Impact Statement ("EIS") for a transit project in Honolulu. AR 9700. The stated purpose of the Project was to provide improved mobility through the busy twenty-five-mile west-east transportation corridor between Kapolei and the University of Hawaii at Manoa ("UH") and Waikiki. *Id.* The City undertook a scoping process and prepared an AA reviewing four alternatives: a no build alternative; improvements to the existing bus system ("the transportation system management alternative"); an elevated express bus/carpool lane alternative (the "managed lanes alternative"); and a railway alternative (the "fixed guideway alternative"). AR 247 at 322. The AA concluded that the fixed guideway alternative was the only one that satisfied the Project's purpose and need. *Id.* at 329. The Honolulu City Council subsequently selected the fixed guideway transit system as the locally preferred alternative. *Id.* at 296, 323.

The FTA then published a second Notice of Intent to prepare an EIS on March 15, 2007 ("2007 NOI"). AR 9696. The 2007 NOI requested public comment on five possible transit technologies: light-rail; rapid-rail (steel wheel on steel rail); rubber-tire guided; magnetic levitation; and monorail. *See id.* A five-member panel of experts appointed by the City Council reviewed responses to that request, as well as twelve responses from transit vehicle manufacturers and, in February 2008, on a vote of four-to-one, selected steel-wheel-on-steel as the technology for the Project. AR 247 at 331. Honolulu voters subsequently approved a City Charter amendment to establish a steel-on-steel rail system. *Id.*

Defendants then prepared a Draft EIS ("DEIS") and a Final EIS ("FEIS"). *See* AR 247; 7223. The DEIS and FEIS analyzed only four alternatives: the no build alternative and three elevated, fixed guideway, steel-on-steel railway routings. AR 247 at 331-37. All three fixed guideway options ran down the twenty-mile corridor between Kapolei and Ala Moana Center, but via slightly different routes. *Id.* One fixed guideway option ran via Salt Lake Boulevard, a second via the airport, and the third via both Salt Lake Boulevard and the airport. *Id.* The FEIS selected the airport route as the preferred alternative. *Id.* at 337-38. The FEIS also included an evaluation of the Project's potential use of land from historic resources and public parks, pursuant to Section 4(f). *Id.* at 680. The FEIS concluded that the Project would use some historic resources in downtown Honolulu, including the Chinatown Historic District, but found that there was no feasible and prudent alternative to such use. *Id.* at 718-27.

The FTA's Record of Decision ("ROD") approving the Project was issued on January 18, 2011. AR 30. The FTA, the City, the Advisory Council on Historic Preservation, the Hawaii State Historic Preservation Officer ("SHPO"), and the United States Navy also entered into a Programmatic Agreement ("PA") pursuant to § 106 of the NHPA, which was incorporated into the ROD. AR 30 at 30-42, 83-228. The Project is to be funded using local tax revenues and federal funding from the New Starts program, *see*

49 U.S.C. § 5309, and is to be constructed in four phases. AR 247 at 362, 777.

On May 12, 2011, Plaintiffs filed this action, alleging that the FEIS and ROD approving the Project did not comply with the requirements of NEPA, Section 4(f), NHPA, and the regulations implementing those statutes. (Compl., Doc. 1).

II. The Legal Standard

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

"The Administrative Procedure Act ('APA') provides authority for the court's review of decisions under NEPA and Section 4(f) . . . ." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir. 2008). "Under the APA, the district court may only set aside agency actions that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). A decision is arbitrary and capricious

> only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 1152-53 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). An agency has discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

III. Merits

A. Section 4(f) Claims

Section 4(f) provides that the Secretary of Transportation (the "Secretary") may approve a transportation project requiring the "use" of a public park or historic site of

national, state, or local significance only if: (1) "there is no prudent and feasible alternative" to using the site; and (2) the project includes "all possible planning" to minimize harm to the site resulting from the use. 49 U.S.C. § 303. Section 4(f) therefore imposes a substantive mandate on agencies implementing transportation improvements. *N. Idaho Cmty. Action Network*, 545 F.3d at 1158.

When a court reviews a Section 4(f) determination, it must ask three questions:

> First, the reviewing court must determine whether the Secretary acted within the scope of his authority and whether his decision was reasonably based on the facts contained in the administrative record. Second, the reviewing court must determine whether the Secretary's decision was arbitrary, capricious or an abuse of discretion because he failed to consider all relevant factors or made a clear error of judgment. Third, the reviewing court should decide whether the Secretary complied with the applicable procedural requirements.

Ariz. Past & Future Found., Inc. v. Lewis, 722 F.2d 1423, 1425 (9th Cir. 1983) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)); *see also Adler v. Lewis*, 675 F.2d 1085, 1091 (9th Cir. 1982).

Plaintiffs' Section 4(f) claims fall into three categories. First, Plaintiffs claim that Defendants failed to identify Native Hawaiian burial sites and other traditional cultural properties ("TCPs") prior to the issuance of the ROD. Second, Plaintiffs assert that Defendants erroneously concluded that the Project would not constructively use Aloha Tower, Irwin Park, Walker Park, and Mother Waldron Park.[1] Third, Plaintiffs claim that Defendants failed to meet Section 4(f)'s substantive mandate, because Defendants erroneously determined that there were no feasible and prudent alternatives to the Project and because Defendants did not engage in all possible planning to minimize harm to Section 4(f) sites. Each of these claims is addressed in turn below.

1. Failure to Identify Native Hawaiian Burial Sites and Traditional

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[1] Plaintiffs' claimed that the Project "used" a number of other sites protected under Section 4(f), other than those discussed in this Order. Plaintiffs' attack on those other sites has been disposed of in an earlier summary judgment ruling. *See HonoluluTraffic.com v. Fed. Transit Admin.*, 2012 WL 1805484 (D. Hawaii 2012).

Cultural Properties

a. Burial Sites

The first step in a Section 4(f) analysis is the identification of possible Section 4(f) sites that could be "used" by the project. Federal regulations provide that "[t]he potential use of land from a Section 4(f) property shall be evaluated as early as practicable in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. § 774.9(a). Section 4(f) approval of a project must be made either in the FEIS or the ROD. § 774.9(b). Plaintiffs claim that Defendants have violated Section 4(f) by taking a "phased approach" to the identification of underground Native Hawaiian burial sites that could be disturbed along the route of the elevated guideway. Native Hawaiian burial sites, including those discovered during construction, qualify as historic sites protected under Section 4(f), as long as they are included in, or eligible for inclusion in, the National Register of Historic Places. *See* 23 C.F.R. §§ 774.11(f), 774.17.

Defendants admit that they have not yet carried out Archaeological Inventory Surveys ("AISs") to identify undiscovered burial sites across the entire twenty-mile length of the Project, even though Defendants concede that it is possible, and even likely in some areas, that the construction of the stations and columns of the elevated guideway may disturb such sites. Defendants explain that they made the decision to wait because completion of an AIS requires excavation to a depth of five feet, AR 111849 at 111853, and the exact positioning of the Project's stations and columns had yet to be determined at the time the ROD was approved. Consequently, to complete an AIS at that time, Defendants would have had to excavate far more areas, and could potentially have disturbed far more archaeological sites, than would be necessary once project plans were complete. *See* 23 C.F.R. § 771.113(a)(1)(iii) (prohibiting final design activities on a transportation project until after the FEIS and ROD are complete).

Instead, Defendants produced an Archaeological Resources Technical Report in August 2008. *See* AR 37676. The Report used a number of resources, including soil

survey data, archaeological records, land survey maps, and field observations, in order to identify all known burial sites and to predict the likelihood of finding burials in each phase of the project. *See id.* at 37686, 37710-11. The Report also suggested that there were many reasons not to carry out a full archaeological survey of the fixed guideway route prior to issuance of the ROD, including that the identification of resources beneath sidewalks, streets, and highways would significantly disrupt traffic, that the cost of the project would greatly increase if a full survey was undertaken, and that the survey would need to take place over a larger area than would actually be affected by the guideway because the footprint of the guideway was not yet known. *Id.* at 37704. The Report concluded that a reasonable, good faith effort had been made to identify resources located within the Project alignments. *Id.*

In addition, prior to the issuance of the ROD, Defendants performed an AIS for Phase I of the Project; the document ran nearly five hundred pages. AR 59459. The FTA explains in its briefing that it was possible to complete the first AIS at an early stage because the western portion of the Project is less developed than downtown Honolulu and less likely to contain burial sites from traditional Hawaiian times. *See* Doc. 157 at 15. In the PA, Defendants also provided for the protection and avoidance of later-discovered burials, specifying that subsurface testing will be conducted at each column location prior to construction and that efforts will be made to alter the construction plan to avoid newly-discovered burial sites with in-place significance. *See* AR 30 at 92-93; *see also* 23 C.F.R. § 774.9(f) ("Section 4(f) may apply to archaeological sites discovered during construction . . . . In such cases, the Section 4(f) process will be expedited and any required evaluation of feasible and prudent avoidance alternatives will take account of the level of investment already made.").

Plaintiffs argue that these efforts amount to just the sort of "phased approach" to

the identification of Section 4(f) sites that has been rejected in Ninth Circuit precedent.[2] In *North Idaho Community Action Network*, the plaintiffs challenged a proposed highway project under Section 4(f). 545 F.3d at 1151. The Department of Transportation ("DOT") conceded that it had decided to take a phased approach to the identification of Section 4(f) and NHPA Section 106 historic sites, and so had not yet conducted any analysis of three of the four project phases, even though the ROD had already issued. *Id.* at 1158. The Ninth Circuit concluded that the DOT's action was in violation of Section 4(f), because the Section 4(f) evaluation must be completed prior to the issuance of the ROD. *Id.* at 1158-59.

Two D.C. Circuit cases have also discussed the timing of Section 4(f) evaluations. In *Corridor H Alts., Inc. v. Slater*, the Federal Highway Administration ("FHWA") approved a ROD for a highway, but made that approval conditional on the future identification of Section 4(f) properties in fourteen sections of the project. 166 F.3d 368, 371-72 (D.C. Cir. 1999). The court held that this action was in violation of Section 4(f) because the agency failed to make any preliminary Section 4(f) determinations prior to the issuance of the ROD. *Id.* at 373.

In contrast, in *City of Alexandria v. Slater*, the court upheld the FHWA's Section 4(f) analysis for plans to replace a bridge. 198 F.3d 862, 863-73 (D.C. Cir. 1999). The FHWA identified a number of historic sites along the project corridor and published a Section 4(f) evaluation prior to the approval of the ROD, but postponed the identification of Section 4(f) sites in areas where construction-related activities would occur, because the FHWA had yet to identify the locations that would be used for those activities. *Id.* at 865, 872. The court concluded that, given that the identification of the construction

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[2] In particular, Plaintiffs point to concerns voiced by the Oahu Island Burial Council ("OIBC"), National Trust for Historic Preservation, and a DOT official, all of whom suggested that it was important not to defer detailed identification of burial sites, especially in the downtown area, which is known to have a high concentration of undiscovered burials. *See* AR 125000 at 125005; 125208 at 125210; 124858 at 124858-59; 124645.

locations would require substantial engineering work that could not be conducted until after the ROD issued and that the sites postponed were merely "ancillary" to the project, Section 4(f) did not forbid the "rational planning process" adhered to by the FHWA. *Id.* at 873. It was not enough for the plaintiffs to argue that it would have been "feasible" to identify all Section 4(f) sites prior to the issuance of the ROD; "the standard of 'feasibility,' while relevant to whether an agency may use 4(f) properties, has no application in determining when the agency must identify them." *Id.*

This case differs from those prior cases. Unlike in *City of Alexandria*, the sites that Defendants have left unidentified until further engineering planning takes place are not "ancillary," but are those unidentified burial sites running directly down the fixed guideway route. On the other hand, in contrast to *North Idaho Community Action Network* and *Corridor H*, Defendants here have not deferred *all* Section 4(f) site identification to a later date; in fact, Defendants have made a significant effort to identify all known burials and predict the location of unknown burials.

The key question is whether Defendants have made a satisfactory effort to identify Section 4(f) sites. Plaintiffs contend that Defendants should have made *all* possible efforts to identify undiscovered burial sites down the main project corridor, while Defendants argue that only *reasonable* efforts were necessary, not full excavation of the guideway route.

Determining the necessary level of effort requires reference to NHPA § 106. All of the cases discussed above agreed that, because Section 4(f) historic sites are defined as properties on or eligible for listing on the National Register, the agency must first complete the Section 106 process for identification of historic properties in order to satisfy its Section 4(f) obligation to identify protected historic sites. *N. Idaho Cmty. Action Network*, 545 F.3d at 1159 ("[B]ecause the § 4(f) evaluation cannot occur until after the § 106 identification process has been completed, the § 106 process necessarily must be complete by the time the ROD is issued."); *City of Alexandria*, 198 F.3d at 871;

Corridor H, 166 F.3d at 370-71.

Federal regulations implementing § 106 provide that "the agency shall take the steps necessary to identify historic properties within the area of potential effects." 36 C.F.R. § 800.4(b). In describing the level of effort required to meet this mandate, the regulations provide:

> The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.

36 C.F.R. § 800.4(b)(1). Consequently, Because Section 4(f) compliance is predicated on identification of historic sites via the § 106 process, if an agency makes a "reasonable and good faith effort" to identify historic sites, the agency's Section 4(f) responsibility should also be satisfied.

Defendants have made a significant effort to pinpoint all known archaeological sites along the project route, and crafted a plan for dealing with any sites that may be later discovered as construction progresses. *See Valley Cmty. Pres. Comm. v. Mineta*, 373 F.3d 1078, 1089 (10th Cir. 2004) (holding that the FHWA had met its Section 4(f) obligations where a PA was adopted to deal with any impacts to previously unidentified cultural resources discovered during construction). Because Defendants have made this "reasonable and good faith effort" to identify § 106 sites, they have satisfied their obligation to identify Section 4(f) sites prior to the issuance of the ROD. Accordingly, Plaintiffs' Section 4(f) challenge to the identification of burial sites is rejected.

b. Traditional Cultural Properties

Section 4(f) also protects properties of traditional religious and cultural importance to Native Hawaiian organizations if they are included in or eligible for inclusion in the National Register. 23 C.F.R. § 774.17. *National Register Bulletin 38* "provides the

recognized criteria for the . . . identification and assessment of places of cultural significance." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 at 807 (9th Cir. 1999). *Bulletin 38* defines a TCP as a property that is eligible for inclusion on the National Register because of its association with cultural practices or beliefs of a living community that are (a) rooted in the community's history, and (b) important in maintaining the continuing cultural identity of the community. *Bulletin 38* at 1. Plaintiffs claim that Defendants have failed to make sufficient effort to identify TCPs that could be used by the Project. Because TCPs are not necessarily subterranean, Plaintiffs argue, Defendants cannot assert that they did not identify TCPs because they are hidden underground or difficult to identify.

Although Defendants prepared a Cultural Resources Technical Report, it did not decide the § 106 or Section 4(f) eligibility of the cultural resources identified, but instead jumped ahead to focus on possible adverse effects to those resources. *See* AR 38098. In the FEIS, Defendants identified only one TCP, Chinatown, and stated that the City would conduct a study to evaluate the project area for the presence of other TCPs. AR 247 at 623, 632, 718. If the FTA determined that any of later-identified TCPs were eligible for inclusion on the National Register, then the City would meet with the § 106 consulting parties to identify measures to avoid, minimize, and mitigate adverse effects to those properties. *Id.* at 623. The PA also stated that preliminary cultural resources research had identified one TCP, Chinatown, and that, within 30 days of the ROD, the City would undertake a study to determine the presence of unidentified TCPs. AR 30 at 91. Neither the FEIS nor the PA explained why Defendants did not undertake a comprehensive study to identify TCPs at an earlier time.

There is no discussion in the record of the Section 4(f) eligibility of any identified TCPs other than Chinatown, and the FEIS and PA suggest that only "preliminary" efforts have been made to investigate whether meaningful cultural properties are situated within the Project corridor. Because Defendants have presented no reason why it would have

been unreasonably difficult to identify such above-ground TCPs prior to issuance of the ROD, this decision to delay full study of above-ground TCPs was arbitrary and capricious.

Before continuing with the Project in any way that may use unidentified TCPs, Defendants must complete their identification of above-ground TCPs within the corridor. *See N. Idaho Cmty. Action Network*, 545 F.3d at 1160-61 (construction need be delayed during completion of Section 4(f) evaluation only for those phases of the project for which such evaluation had not yet been completed). For any TCPs identified, Defendants must conduct a complete Section 4(f) analysis. The ROD must be supplemented to include any newly identified TCPs. The FEIS must also be supplemented to the extent that this process requires changes that "may result in significant environmental impacts 'in a manner not previously evaluated and considered.'" *Id*. at 1157 (quoting *Westlands Water Dist. v. Dep't of Interior*, 376 F.3d 853, 873 (9th Cir. 2004)).

2. Constructive Use Determinations

Plaintiffs also challenge Defendants' determination that the rail project would not constructively use four specific sites. A Section 4(f) site is "used" when land is permanently incorporated into a transportation facility, when there is a temporary occupancy of land that is adverse in terms of the statute's preservation purpose, or when there is a constructive use of land. 23 C.F.R. § 774.17; *see also Adler*, 675 F.2d at 1092 (noting that the term "use" is to be construed broadly to include areas that are significantly, adversely affected by a project but are not physically taken).

The regulations provide:

> A constructive use occurs when . . . the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the property are substantially diminished.

23 C.F.R. §774.15(a); *see also Adler*, 675 F.2d at 1092 (observing that off-site activities are governed by Section 4(f) if they could create "sufficiently serious impacts that would

substantially impair the value of the site in terms of its prior significance and enjoyment"). To make a constructive use determination, the agency must first identify the current activities, features, or attributes of the property which qualify for protection under Section 4(f), then must analyze the proximity impacts of the Project on the property and, finally, must consult with officials with jurisdiction over the property. 23 C.F.R. § 774.15(d).

The regulations provide some examples of constructive use, including: (1) when the projected noise level increase substantially interferes with the use and enjoyment of an urban park where serenity and quiet are significant attributes, § 774.15(e)(1)(iv); (2) when the proximity of the project obstructs or eliminates the primary views of an architecturally significant historical building or substantially detracts from the setting of a property which derives its value in substantial part due to its setting, § 774.15(e)(2); and (3) when vibration impacts substantially impair the use of a property, § 774.15(e)(4). Conversely, there is no constructive use where the impact of project noise levels does not exceed the FTA noise impact criteria or where the increase in projected noise levels is barely perceptible. § 774.15(f)(2)-(3).

The Ninth Circuit has addressed issues of proper constructive use determination in a handful of cases. *See, e.g.*, *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 533 (9th Cir. 1994) (agreeing with the FHWA's conclusion that parks were not constructively used where construction occurred over bike trails and the highway corridor ran adjacent to a park); *Ariz. Past & Future Found.*, 722 F.2d at 1429-30 (determining that there was no abuse of discretion when the agency determined that no historic sites would be adversely affected by a project); *Adler*, 675 F.2d at 1093 (agreeing that the agency did not err when it determined that fifty sites were not constructively used); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976) (concluding, without detailed explanation, that a petroglyph rock would be used by a highway that would pass near the rock); *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972) (determining that

encirclement of a campground by a freeway is a constructive use).[3]

These principles and precedents inform the analysis of the four sites that remain at issue here, Aloha Tower, Walker Park, Irwin Park, and Mother Waldron Park.

a. Aloha Tower

Plaintiffs contend that Defendants erred in determining that the Project would not constructively use Aloha Tower because the Project will alter views of the tower from inland. The National Register of Historic Places nomination form for Aloha Tower explains that the tower is a modernist interpretation of a Gothic tower and that it traditionally served as a symbol of warm welcome for visitors who arrived by sea and who could see the white tower from fifteen miles away. AR 152826 at 152827-28. The tower remains a symbol of Hawaii's investment in tourism at a time when sea travel was the island's main link with the rest of the world. *Id.* at 152828. The tower was also a center of planning for military operations in World War II. *Id.*

The Project will sit 420 feet inland of the tower, in the median of the six-lane Nimitz Highway. AR 247 at 746. Defendants' Historic Effects Report, published in April 2009, concluded that views from the ocean to the tower and views from the tower's observation deck to the ocean and island are a historic visual feature of Aloha Tower and would not be impaired by the project. AR 39555 at 39872. The Report also noted that Aloha Tower is often not visible from points inland, because of vegetation and the many high-rise buildings in downtown Honolulu. *Id.* at 39872-73. Consequently, even if views

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[3] Cases from other circuits provide further guidance. *See, e.g.*, *Coal. Against a Raised Expressway (CARE) v. Dole*, 835 F.2d 803, 811 (11th Cir. 1988) (determining that there was a constructive use of historic buildings and a park that were immediately adjacent to a highway based on the cumulative effects of air pollution, noise impacts, and view impacts); *Citizen Advocates for Responsible Expansion, Inc. (I-CARE) v. Dole*, 770 F.2d 423, 441-42 (5th Cir. 1985) (concluding that a Section 4(f) report was deficient where it gave no consideration to the effects that a highway would have on a garden nine feet away and because it would border on the ridiculous to suggest that a highway would have minimal effects on a historic building with exterior features that would be greatly impacted by the highway).

of the tower from inland were obstructed by the project, no historically significant visual features would be altered. *Id.*

In its Section 4(f) analysis, the FEIS noted that Aloha Tower qualifies for protection as a historic property because of its Art Deco design elements and its historic associations with the harbor. AR 247 at 745-46. The FEIS concluded that Aloha Tower will still be visible from many vantage points inland and that, while some views of the tower from inland would be altered, the project would not block any views. *Id.* at 746. Consequently, the Project would not substantially impair views of the tower's design elements nor alter its historic setting; therefore, Aloha Tower would not be constructively used. *Id.*; *see also* AR 30 at 183 (ROD concluded that there was no direct impact on the tower). However, the FEIS also indicated that the guideway structure would partially block a view of the Aloha Tower from the Fort Street Mall. AR 247 at 512; *see also id.* at 540 (noting that the guideway and columns will block portions of views towards the water along a number of downtown streets), 528 (visual simulation of the change to the view from Fort Street Mall).

Plaintiffs point to the AA, which stated that, if the railway project was routed along Nimitz Highway, there would be "severe visual impacts" for Aloha Tower. *See* AR 9556 at 9623. This evidence, however, is not enough to show that Defendants' Section 4(f) use determination as to Aloha Tower was arbitrary and capricious. The ROD shows that Defendants thoroughly considered the impacts to views from and of Aloha Tower and reasonably concluded that the historically significant views of the tower were those from the sea. Accordingly, Plaintiffs' claim that Defendants' no-use determination for Aloha Tower was erroneous is rejected.

b. Walker Park

Plaintiffs claim that Defendants' determination that the Project would not use Walker Park was erroneous because the Project would impair Walker Park's historic associations and because Defendants failed to analyze noise and visual impacts on the

park. Walker Park is a small triangular urban park in downtown Honolulu, about 150 feet inland of Nimitz Highway. AR 247 at 731; *see also* AR 62527 at 62527-37, 62682 at 62682-85 (photographs of the park and surrounding area). It is surrounded by high-rise buildings and the at-grade Nimitz Highway. AR 247 at 731. The park provides shade in the busy downtown area and is primarily used by pedestrians walking through the area. *Id.* It contains a fountain and a seating area, and is bordered by mature palm trees. *Id.*; *see also id.* at 690 (noting that Walker Park provides shade, but has no benches, picnic tables, or other amenities). The park is eligible for the National Register for its associations with the development of the waterfront and central business district and as an early example of created greenspace in that area. *Id.* at 744. Accordingly, Walker Park is eligible for Section 4(f) protection both as a public park and a historic site.

A number of supporting documents in the record discuss Walker Park. The Historic Effects Report noted that the inland edge of the rail project guideway would be about twenty feet from the seaward edge of the park boundary. AR 39555 at 39861. The Report concluded, however, that there would be no adverse effect on Walker Park's historic features because the Project would not affect the property's integrity of location nor alter its design elements. *Id.* The Report also stated that no historically significant viewsheds to or from the property were identified, that no audible or atmospheric effects to the property were identified, and that the project would not diminish Walker Parker's expression of its historic character. *Id.* at 39862.

A number of Noise and Vibration Technical Reports were prepared for the project. *See* AR 33642, 42163, 72897. To create these reports, the FTA conducted noise measurements at representative locations along the project corridor to establish existing environmental noise conditions. AR 33642 at 33651. An October 2009 Report established that a location near Walker Park experienced 67 decibels of existing noise, and that the project noise exposure would be 65 decibels, below the FTA threshold for unacceptable noise impacts. AR 72897 at 72926.

The FEIS concluded that there would be no adverse noise and vibration impacts to Walker Park. AR 247 at 729. In addition, Walker Park would not be constructively used because the Project would not change views from within the park of the business district it serves and would not substantially impair the park's historic associations. *Id.* at 731, 744; *see also* AR 30 at 181-82 (stating that the project will nominally affect seaward views from the park, but not views of the business district it serves); *but see id.* at 540-41 (noting that trains traveling on the guideway will create light and glare and that overall visual effects in the area of the Dillingham Transportation Building will be significant).

Defendants considered impacts to Walker Park both as a park and as a historic site, and Plaintiffs have not specified any historically significant views that will be impacted by the railway. Plaintiffs complain that Defendants did not examine historic documents describing the park, but because they nevertheless considered the historic integrity of the park, they were not required to do so. Moreover, the FEIS analyzed the impact to the park's visual qualities and found that the surrounding trees would protect the park. Plaintiffs also complain about the sound impact analysis in the FEIS, but Plaintiffs mistakenly rely on raw, unanalyzed sound data in the record, *see* AR 22575 at 22649-50. In any case, Walker Park is mainly used as a pedestrian thoroughfare and there is no evidence that quiet and serenity are significant features of the park necessitating special protection. Defendants' determination that Walker Park would not be used was neither arbitrary nor capricious.

c. Irwin Park

Plaintiffs challenge Defendants' no-use determination as to Irwin Park, claiming that Defendants never analyzed noise impacts on Irwin Park and that Defendants did not analyze the project's impact on protected landscape features of the park. Irwin Park consists primarily of parking lots with grass medians and is adjacent to Aloha Tower and Piers 10/11. AR 39555 at 39865; *see also id.* at 39869-70 (visual simulation of effects). The inland setting of the park contains Nimitz Highway and non-historic high-rise

development. *Id.* at 39866. The park mostly serves as a parking lot for surrounding office buildings, but has high-quality scenic seaward views and provides seating areas heavily used at lunchtime by workers. AR 247 at 690, 731. The park is eligible for listing on the National Register because of its associations with the beautification of the waterfront and with William G. Irwin, and because it represents the work of leading landscape architect, Robert O. Thompson. *Id.* at 746. The Project will be located in the median of the highway, seventy feet inland of the park and 200 hundred feet inland of the main seating area. *Id.* at 732.

The Historic Effects Report found that the Project would not alter design elements or features of the park, would have no effect on the property's integrity of design or setting, and would not alter any historically significant views. AR 39555 at 39866. Additionally, there were no audible or atmospheric effects identified. *Id.* The Noise and Vibration Report measured sound at the nearby Aloha Tower Marketplace, one of the locations considered representative of "all noise-sensitive land uses along the corridor," and found that the Project would have no serious sound impacts on the area. AR 33642 at 33695, 33673; *see also* AR 72897 at 72919 (predicting noise impacts for sites near Irwin Park).

The FEIS concluded that there would be no constructive use of the park, considered both as a public park and a historic site. AR 247 at 732. There would be no noise impact at the nearby Aloha Marketplace above existing levels.[4] *Id.* at 561. The project would not cause noise and vibration impacts and would only partially obstruct views towards non-historic office buildings. *Id.* at 732. Views of the water from the park and views of the park from the harbor or Aloha Tower would not be obstructed and the

[4] Plaintiffs complain that the FEIS' noise impact conclusions were derived from measurements taken away from Irwin Park at a busy marketplace. However, Irwin Park is an urban park adjacent to a heavily-used highway, and it was not unreasonable for Defendants' experts to rely on sound measurements taken at a representative location only a block away from Irwin Park.

historic attributes of the park would not be impaired. *Id.* at 746-47. Defendants also thoroughly considered the park's historic attributes, including its landscaping and the "feeling" of the park. Their decision, thus, was not a violation of Section 4(f).

d. Mother Waldron Park

Finally, Plaintiffs argue that Defendants' no-use determination for Mother Waldron Park is erroneous, because there was no analysis of the noise impacts on the park and because the project will have negative impacts on the park's historic and artistic features. Mother Waldron Park contains a playground with Art Deco architectural and landscape design elements and is eligible for listing in the National Register because of its association with the nationwide playground movement and as an excellent example of Art Deco design by a well-known architect. AR 39555 at 39909; *see also* AR 153157 at 153169 (National Register nomination form for Mother Waldron Park, noting that it is a flat, open, landscaped area containing one of only two playgrounds in Honolulu that retains its historic integrity); AR 62630-35 (photographs of the park). The park is set in a mixed-use commercial and industrial area and is surrounded by vacant lots, warehouses, commercial buildings, and an apartment building. AR 247 at 732. The guideway will be twenty feet away from the park boundary, about seventy feet from the playground and 290 feet from the volleyball court. *Id.* The guideway will be thirty-five to forty feet high. *Id.* at 747.

Unlike the other Section 4(f) sites discussed above, there is a great deal of evidence in the record that the project's impacts on Mother Waldron Park will be quite serious. The Historic Effects Report observed that the Project would have an adverse effect on the historic playground, because the playground is primarily an outdoor recreation facility and so the Project would adversely affect the integrity of the park's setting. AR 39555 at 39909. The guideway would introduce a new element into the setting in close proximity and would therefore affect the park's feeling and historic character; the park has high integrity of feeling, conveying its origins as a New Deal-era

park, and the guideway is out of character with the historic appeal of the playground. *Id.* at 39910. The Visual and Aesthetic Resources Technical Report includes a visual simulation of the project's effects on the park and concludes that the overall visual effect would be high. AR 33496 at 33599-602. The FTA also commented on the FEIS, noting that there would be "devastating" impacts on seaward views of and over the park from the apartment buildings inland of the guideway. AR 72988 at 72998.

The FEIS and ROD glossed over these troubling observations. The FEIS concluded that Mother Waldron Park would not be constructively used because there would not be a substantial impairment of any visual or aesthetic features that contribute to the park's use and enjoyment. AR 247 at 732. In addition, the FEIS concluded that, while the visual impacts of the project on the park would be significant and would contrast significantly with the scale and character of the park, *id.* at 512, primary views of the playground would not be eliminated and the project would not substantially impair the park's design elements. *Id.* at 747. Finally, the FEIS provided noise measurements taken at Mother Waldron Park indicating that the noise exposure would be below the FTA's impact criteria. *Id.* at 561; *see also* AR 72897 at 72920. The PA likewise concluded that there would be no impact to the park from the Project and that it would not affect design elements or aesthetic features that contribute to the park's use and enjoyment, although there would be an effect to the setting. AR 30 at 185.

Because the FEIS and PA did not adequately address why alterations to Mother Waldron Park's historic setting did not amount to constructive use, the no-use determination was arbitrary and capricious. *Cf. I-CARE*, 770 F.2d at 441-42. Before continuing with any part of the Project that may constructively use Mother Waldron Park, Defendants must reconsider their no-use determination, taking full account of evidence that the Project will significantly affect the park. If Defendants conclude that the Project will, in fact, constructively use Mother Waldron Park, they must seek prudent and feasible alternatives to such use, or otherwise mitigate any adverse impact from

constructive use of the park. 49 U.S.C. § 303(c). The ROD must be supplemented accordingly. The FEIS must also be supplemented, to the extent that this process affects its analysis or conclusions. *N. Idaho Cmty. Action Network*, 545 F.3d at 1157.

3. Section 4(f) Alternatives Analysis and Planning

a. Feasible and Prudent Alternatives

The FTA may only approve a project using a public park or historic site if there is no prudent and feasible alternative to using that land. 49 U.S.C. § 303(c). Accordingly, a Section 4(f) evaluation must include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative. 23 C.F.R. § 774.7. A feasible and prudent alternative "avoids using Section 4(f) property and does not cause other severe problems of a magnitude that substantially outweighs the importance of protecting the Section 4(f) property." 23 C.F.R. § 774.17. An alternative is not feasible if it cannot be built as a matter of sound engineering judgment. *Id.* An alternative is not prudent if, among other things, it "compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need" or it "results in additional construction, maintenance, or operational costs of an extraordinary magnitude." *Id.*

I. Managed Lanes Alternative ("MLA")

Plaintiffs claim that the MLA was a feasible and prudent alternative to the use of Section 4(f) sites in downtown Honolulu, including Chinatown and the Dillingham Transportation Building, and that Defendants erroneously failed to consider it as such. Defendants respond that the MLA was imprudent because it did not satisfy the purpose and need of the Project.

Ninth Circuit case law is clear that alternatives that do not accomplish the stated purpose of a project may be rejected as imprudent. *See Alaska Ctr. for the Env't v. Armbrister*, 131 F.3d 1285, 1288-89 (9th Cir. 1997) (holding that if an alternative does not meet the purpose of a project, then the agency does not need to show that "unique problems" or "truly unusual factors" make the alternative imprudent under Section 4(f));

Ariz. Past & Future Found., 722 F.2d at 1428; *see also City of Alexandria*, 198 F.3d at 873 (noting that the D.C. Circuit has squarely held that an alternative cannot be prudent if it does not satisfy the transportation needs of the project). The guidance laid out in the FHWA Section 4(f) Policy Paper further supports this conclusion. *See* AR 21938 at 21945 (explaining that any alternative that is determined not to meet the need of the project is not feasible and prudent).

The stated purpose of the FEIS was to provide high-capacity rapid transit in the highly congested east-west transportation corridor between Kapolei and UH Manoa; to provide faster, more reliable public transportation service than could be achieved by buses in mixed-flow traffic; to provide reliable mobility in areas where people of limited income and an aging population live; to serve rapidly developing areas of the study corridor; and to provide an alternative to private automobile travel. AR 247 at 312. Assuming that this purpose was not overly narrow, a possibility discussed in further detail in Part III.B, *infra*, then the MLA was legitimately rejected as imprudent as long Defendants did not arbitrarily and capriciously conclude that the MLA failed to meet the purpose of the Project.

The FEIS explained that the MLA was considered during the AA but was rejected because it would not meet the Project's purpose and need; specifically, the MLA would not moderate congestion, would be less effective at providing faster and more reliable transportation service and alternatives to private automobile travel, and would not support transportation equity. AR 247 at 321-27. The ROD confirmed that the MLA was eliminated because it failed to meet the Project's purpose, because it would not have improved mobility or reliability in the corridor. AR 30 at 36. These conclusions were based on the AA, which found after detailed study of two versions of the MLA that it would result in an increase in vehicle hours of delay and would not encourage smart growth. AR 9434 at 9541-42. Moreover, buses using the MLA would continue to be affected by congestion at entry and exit points from the elevated lanes. *Id.* at 9544.

Plaintiffs cite a response letter from HonoluluTraffic.com, dated November 4, 2009, subsequent to the close of the FEIS comment period, as evidence that the MLA would serve the purpose of the project, because it would greatly expand transit ridership and reduce traffic congestion. AR 71958 at 71960.[5] The letter cited a micro-simulation study showing that the MLA would reduce drive times even for people who never used the lanes. *Id.* at 71959. This evidence is not enough to demonstrate that Defendants' determination to the contrary was arbitrary and capricious. The record indicates that Defendants reasonably relied on the opinions of their own experts and decided that the MLA would not meet the purpose and need of the Project, therefore making it an imprudent alternative.

Still, Plaintiffs argue that this determination was not sufficient to satisfy Section 4(f), because Defendants did not *explicitly* state in the FEIS or the ROD that the MLA was imprudent because it did not meet the purpose of the Project. Plaintiffs point to no statute, regulation, or case requiring that Section 4(f) findings be made explicit in the record, however. "Magic words" are not required in a Section 4(f) analysis and courts may not "fly speck" a determination if it appears that all factors and standards were considered. *Adler*, 675 F.2d at 1095; *see also Hickory Neighborhood Def. League v. Skinner*, 910 F.2d 159, 163 (4th Cir. 1990) ("Although the Secretary's section 4(f) evaluation does not expressly indicate a finding of unique problems, the record amply supports the conclusion that the Secretary did determine that there were compelling reasons for rejecting the proposed alternatives as not prudent."); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) (observing that formal findings are not required in a Section 4(f) determination and that the entire record must be reviewed to ensure that there was consideration of the relevant factors and no clear error of judgment).

Review of the entire record reveals that there is ample evidence to support

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[5] Plaintiffs' argument that the MLA met the purpose and need of the Project is discussed in further detail in Part III.B, *infra.*

Defendants' determination that the MLA was not a feasible and prudent alternative for Section 4(f) purposes because it did not serve the project's purpose and need. The FEIS specifically noted in its Section 4(f) analysis that alternatives that would not meet the Project's purpose and need would not be prudent under § 774.17, and referenced the AA's determination that only the fixed guideway met the Project's purpose and need. AR 247 at 684. This analysis makes clear that Defendants recognized that the MLA had been found not to meet the purpose of the project in the AA; consequently, Defendants did not need to analyze the MLA's feasibility and prudence in the Section 4(f) analysis, because was already imprudent by implication. Accordingly, Plaintiffs' argument that Defendants failed to consider the prudence of the MLA alternative is rejected.

ii. Tunnel Alternatives

Plaintiffs also argue that Defendants did not consider two feasible and prudent alternate routes for the railway system, the King Street Tunnel alignment and the Beretania Street Tunnel alignment. Both would run underground and avoid using some above-ground Section 4(f) properties, including Chinatown and the Dillingham Transportation Building. The FEIS concluded that the tunnels were not prudent, because they would have increased the cost of the project by $650 million in 2006 dollars, which would be beyond the funding in the project plan. AR 247 at 705, 719-20; *see Citizens for Smart Growth v. Sec'y of the Dep't of Transp.*, 669 F.3d 1203, 1217 (11th Cir. 2012) (holding that extraordinarily high costs are sufficient foundation for finding an alternative imprudent). The rail project alternative actually adopted in the FEIS was estimated to cost $4.3 billion in 2009 dollars. *Id.* at 756-59.

Plaintiffs first argue that the $650 million estimate is not supported by the record, and that even a $650 million increase in project costs is not an "extraordinary" increase in cost such that the tunnel alternatives are rendered imprudent. Second, they claim that only the King Street Tunnel will cost $650 million, while the Beretania Street Tunnel would be cheaper, and that the FEIS therefore failed to adequately consider the Beretania

Street route.

As to Plaintiffs' first claim, there is good support in the record for the $650 million figure for the King Street Tunnel alternative. *See* AR 9434 at 9523, 9540 (noting that the King Street Tunnel alignment is the most expensive of the tunnel alignments); 67416 (Final Capital Costing Memorandum, 2006). Plaintiffs point to a 2007 cost estimate indicating that the King Street Tunnel would be significantly less expensive, AR 65304, but that report specifically noted that its estimates only covered construction costs and did not include utility relocation costs, underground station costs, track work, or other maintenance costs. *See id.* at 65334. Accordingly, it was not arbitrary and capricious for Defendants to conclude that the King Street Tunnel would cost $650 million in 2006 dollars.

Plaintiffs point out that a $650 million cost increase amounts to less than twenty percent of the total cost of the project without any tunnel. There is little guidance in prior case law discussing when a cost increase becomes excessive enough to make an alternative imprudent. *See Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 703 (3d Cir. 1999) (holding that costs were of a sufficiently extraordinary magnitude when building an alternative would cost many times the amount that the construction of the preferred alternative would cost). However, whether viewed as a dollar amount or as a percentage of the Project's total cost, giving at least some deference to the agency's financial judgment, the Court cannot conclude that it was arbitrary and capricious for Defendants to conclude that an additional $650 million would be an extraordinary added cost. Accordingly, Plaintiffs' claim that Defendants' determination that the King Street Tunnel alternative was imprudent for cost reasons is rejected.

The record is less clear, however, as to the exact cost estimate for the Beretania Street Tunnel, and Defendants admit that it might have been less costly than the King Street route. *See* AR 9434 at 9523, 9540; Doc. 157 at 29 n.13. The FEIS nevertheless rejected *both* the King Street and Beretania Street alternatives as imprudent based on the

$650 million cost estimate. *See* AR 247 at 705, 719-20.

Defendants now offer a number of reasons why the Beretania Street Tunnel did not meet the purpose and need of the Project, which they argue rendered it imprudent, even if the FEIS nowhere explicitly so found. Defendants suggest that the Beretania Tunnel would have posed risks to below-ground cultural resources, might have encountered groundwater during construction, and would have disturbed large areas on the surface downtown. *See* AR 65304 at 65321 (Tunnels and Underground Stations Technical Memorandum, generically describing possible problems with groundwater and the likelihood that hard rock tunneling would be necessary along the Beretania route), 65321 (noting the risk of shallow groundwater and ground and structure settlement during tunnel construction), 65328-29 (describing safety, noise, traffic, dust, and other concerns as a result of excavation and construction of tunnels). But other portions of the record indicate that the Beretania Street route could have been excavated using a tunnel boring machine, which would not disturb the surface and would dig at a level below most burial sites. AR 50082 at 50157 (Environmental Consequences Draft); *cf.* AR 51561 at 51595 (specifically noting that the *King Street alignment* could cause structural damage on adjacent sensitive buildings and could encounter groundwater issues).

As further justification for their decision, Defendants argue that the Beretania alignment would not serve the Project's purpose because it would not go to Ala Moana Center and would consequently serve fewer passengers. There is some indication in the record that this was a concern about the Beretania route. *See* AR 9434 at 9520 (noting that the Beretania Street Tunnel route would serve the fewest residents and jobs), 9540 (observing that the Beretania Street Tunnel route would provide poor transit benefits).

In other words, while Defendants have pointed to some justifications that could have provided support for a decision to reject the Beretania Tunnel alternative as imprudent, none of these concerns was articulated in the FEIS. In fact, at no point in the record did Defendants explicitly conclude that the Beretania alignment was either

inconsistent with the purpose and need of the Project or imprudent for any reason not related to cost concerns. While Section 4(f) review is based on a review of the entire record, *see Overton Park*, 401 U.S. at 420, Defendants' explanations appear to be *post hoc* rationalizations for their decision to reject the Beretania route. Defendants' failure to include full analysis of whether the Beretania option was a prudent and feasible alternative during the DEIS, FEIS, and ROD process was arbitrary and capricious.

Defendants must fully consider the prudence and feasibility of the Beretania tunnel alternative specifically, and supplement the FEIS and ROD to reflect this reasoned analysis in light of evidence regarding costs, consistency with the Project's purpose, and other pertinent factors. *See Citizens for Smart Growth*, 669 F.3d at 1217. Should Defendants determine, upon further examination of the evidence, that their previous decision to exclude the Beretania alternative because it would be imprudent was incorrect, they must withdraw the FEIS and ROD and reconsider the project in light of the feasability of the Beretania tunnel alternative. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.").

iii. Alternative Technologies

Plaintiffs claim that Defendants should have considered two alternative technologies, bus rapid transit and at-grade light-rail, as feasible and prudent alternatives that would avoid Section 4(f) sites. The FEIS and ROD rejected both of these technologies as not meeting the purpose and need of the Project and so, if that determination was proper, then both alternatives were properly found imprudent for the same reasons explained with respect to the MLA above. AR 247 at 324 (FEIS concludes that bus rapid transit would not meet purpose and need of the Project because buses would still operate in mixed traffic, congestion would not be alleviated, and it would not have encouraged growth in the project corridor); AR 30 at 35 (ROD explains that at-grade light-rail would not have met Project's purpose and need because it would not have

satisfied the mobility and reliability needs of the Project, as capacity would be too low, traffic lanes would need to be removed, and congestion would have been exacerbated).

There is ample support in the record for these determinations. Defendants consistently maintained in the FEIS and the ROD, as well as in their responses to comments, that the bus system would not alleviate congestion because of the problems with a mixed traffic system, and that at-grade rail would not satisfy the Project's objectives because it would have to consist of smaller railcars that would stop cross-traffic as they passed and be forced to halt if traffic accidents occurred. *See* AR 247 at 321-324; AR 30 at 35; AR 855 at 974-75. Accordingly, Defendants' decision not to consider these alternatives further was neither arbitrary nor capricious.

b. All Possible Planning

In order to approve a project that uses Section 4(f) sites, an agency must also include all possible planning to minimize harm to section 4(f) property. 23 C.F.R. § 774.3(c)(2). "All possible planning means that all reasonable measures identified in the Section 4(f) evaluation to minimize harm or mitigate for adverse impacts and effects must be included in the project." 23 C.F.R. § 774.17. The "all possible planning" clause requires that the federal agency make reasonable efforts to minimize harm to Section 4(f) sites by balancing the harm to the site by the proposed project with the harm to the same site by another alternative or a plan to implement mechanisms that would diminish that particular harm. *Adler*, 675 F.2d at 1094.

Plaintiffs argue that Defendants failed to include all possible planning in their Section 4(f) evaluation because they did not evaluate the use of Chinatown, as a TCP, by the Project passing through the district, and because Defendants failed to take into account that the railway would block views of the harbor from Chinatown. Defendants argue in response that they satisfied their planning obligations as to Chinatown, a historic site, when they entered into the PA pursuant to NHPA § 106.

In support of their contention that entering into a PA is all that is required to satisfy

their obligation to include "all possible planning" to minimize harm to Section 4(f) sites, Defendants point to the language of § 774.17:

> With regard to historic sites, the measures normally serve to protect the historic activities, features, or attributes of the site as agreed by the Administration and the official(s) with jurisdiction over the Section 4(f) resource in accordance with the consultation process under 36 C.F.R. part 800.

23 C.F.R. § 774.17. The plain meaning of this regulation indicates that engaging in "all possible planning" will *normally* serve to preserve the protected attributes of historic properties; it does not state that satisfying NHPA by entering into a PA will always and automatically satisfy Section 4(f) planning requirements. *See* AR 21948-49 (policy paper noting that mitigation of historic sites *usually* consists of those measures agreed to in accordance with the NHPA). In other words, it is conceivable that further reasonable mitigation possibilities could exist beyond those explored in a PA, and those must be considered to satisfy Section 4(f). In this case, the FEIS notes that the guideway was designed to be as narrow as possible in order to avoid negative impacts to Chinatown, and that community input will be sought on the Chinatown station design. The PA includes further measures to deal with cultural properties discovered during construction. AR 247 at 718-20; AR 30 at 61, 105-06. Plaintiffs have not suggested any reasonable mitigation measures that Defendants could have undertaken, but did not, in order to further mitigate impacts on Chinatown. Defendants have satisfied the "all possible planning" requirement, given these mitigating features described in the FEIS and PA.

B. NEPA Claims (Counts 1-4)

1. Purpose and Need

Plaintiffs claim that the statement of purpose and need in the FEIS was too narrow, thereby dictating that an elevated fixed guideway railway would be the only alternative that could meet the Project's stated purpose. An EIS is required briefly to specify the underlying purpose and need to which the agency is responding in proposing the alternatives in the EIS. 40 C.F.R. § 1502.13. The purpose and need statement in the

FEIS here was quite lengthy and specific. The following purposes were specified: (1) to provide high-capacity rapid transit in the highly congested corridor between Kapolei and UH Manoa; (2) to provide faster, more reliable public transportation than could be achieved by buses operating in congested mixed-flow traffic; (3) to provide reliable mobility in areas where people of limited income and an aging population live; (4) to serve rapidly developing areas; and (5) to provide additional transit capacity and an alternative to private automobile travel and to improve transit links. AR 247 at 312; *see also* AR 9696 at 9697-98 (stating similar goals in the 2007 NOI). Ultimately, only a fixed guideway rail system was determined to meet this purpose and need, and, as a result, the FEIS analyzed three fixed guideway rail systems using the same technology but traveling slightly different routes, as well as a no-build alternative. AR 247 at 319-37.

Defendants assert that this statement of purpose and need was developed throughout the AA process to respond to local needs and federal statutory goals.[6] Agencies enjoy "considerable discretion" in defining the purpose and need of a project, but they cannot define the project's objectives in "unreasonably narrow terms," such that only one alternative would accomplish the goals of the project and the EIS becomes a foreordained formality. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010); *see also Davis v. Mineta*, 302 F.3d 1104, 1118-20 (10th Cir. 2002). On the other hand, an agency may not frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals. *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). A district court evaluates an agency's statement of purpose for reasonableness. *Nat'l Parks &*

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[6] Federal regulations provide that an agency may use federally-supervised state-developed planning studies in order to produce a purpose and need statement. 23 C.F.R. § 450.318(a); *see also* 23 C.F.R. Pt. 450 App'x A at 11 ("With proper documentation and public involvement, a purpose and need derived from the planning process can legitimately narrow the alternatives analyzed in the NEPA process."). This is the process that Defendants followed.

Conservation Ass'n, 606 F.3d at 1070.

In assessing the reasonableness of a purpose and need statement in an EIS, the court must consider the statutory context of the federal action at issue. *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1070 (9th Cir. 2012); *see also Citizens Against Burlington*, 938 F.2d at 196 (stating that "an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives"); *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) ("Frequently, a pertinent guide for identifying an appropriate definition of an agency's objective will be the legislative grant of power underlying the proposed action.").

In this case, the statement of purpose and need, while highly detailed, was broad enough to allow the agency to assess various routing options and technologies for the fixed guideway. In addition, the stated purposes clearly and faithfully reflect the objectives of the statutes under which the FEIS arose. Specifically, 23 U.S.C. § 139(f)(3), one of the provisions of the Safe Accountable Flexible Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), provides that a federally-funded transportation project's purposes may include achieving a transportation objective identified in a local plan, supporting land use and growth objectives established in applicable federal, state, local, or tribal plans, and serving other national objectives, as established in federal law, plans, or policies. *See also* AR 22836 at 22858. The statute authorizing the federal New Starts transportation program states that it is in the interest of the United States to foster transportation systems that maximize safe, secure, and efficient mobility of individuals, minimize environmental impacts, and minimize fuel consumption. 49 U.S.C. § 5301(a). That statute also states that one of the purposes of the New Starts program is to provide financial assistance to state and local governments in order to improve mobility for elderly and economically disadvantaged individuals. § 5301(f)(4).

Providing high-capacity rapid transit in a specific congested corridor is an objective meant to achieve a local transportation objective articulated in a local transportation plan, consistent with SAFETEA-LU. § 139(f)(3)(A). Providing faster, more reliable public transit and providing reliable service to the poor and elderly similarly serves the goals of the New Start program. § 5301(a), (f)(4). Serving rapidly developing areas of the study corridor supports a local growth objective. 23 C.F.R. § 139(f)(3)(B). Finally, the provision of an alternative to private automobile travel arguably serves the purpose of minimizing environmental impacts and fuel consumption. § 5301(a). Because the statement of purpose and need did not foreclose all alternatives, and because it was shaped by federal legislative purposes, it was reasonable. Plaintiffs' argument to the contrary is accordingly rejected.

2. Reasonable Alternatives

An EIS must include a detailed statement on alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis "is the heart of the environmental impact statement" and must "rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14.

"In reviewing the sufficiency of an EIS, we employ 'a rule of reason' standard of review 'that inquires whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Ilio'ulaokaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006) (quoting *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)) (additionally noting that this standard "is not materially different than arbitrary and capricious review"). The agency must consider those reasonable alternatives that are within the range dictated by the nature and scope of the proposed action and sufficient to permit a "reasoned choice." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008). The touchstone for this inquiry is whether an EIS' selection and discussion of alternatives fosters informed decision-making

by the agency and informed public participation. *Block*, 690 F.2d at 767.

There are some limits on an agency's duty to consider alternatives. An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or inconsistent with its basic policy objectives. *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). There is no statutorily required minimum number of alternatives that must be considered and alternatives that do not advance the purpose of the project are not reasonable. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005); *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000). There is also no need separately to analyze alternatives that are not significantly distinguishable from those already considered or which have substantially similar consequences. *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990).

Plaintiffs challenge Defendants' assessment of reasonable alternatives under NEPA on a variety of grounds. During the AA process, Defendants considered an improved bus system and the MLA, but rejected them as inconsistent with the purpose and need of the Project; those two options were therefore not carried over to the FEIS. AR 247 at 321-27. As previously discussed, three fixed guideway routes and the no-build alternative were analyzed in the FEIS. *Id.* at 331. Plaintiffs argue that: (1) it was improper to remove alternatives from consideration during the AA process; (2) the MLA was rejected based on bad data and would, in fact, meet the purpose and need of the Project; (3) alternate rail technologies, such as magnetic levitation, were erroneously excluded from consideration as reasonable alternatives in the FEIS; and (4) Defendants erroneously refused to consider a route that would not pass by the federal courthouse. Each of these claims is addressed below in turn.

a. Use of the AA Process to Screen Alternatives

Federal regulations require that federal agencies cooperate with state and local agencies to the fullest extent possible in order to reduce duplication between NEPA and

state and local requirements. 40 C.F.R. § 1506.2; *see also Laguna Greenbelt*, 42 F.3d at 524 & n.6. A state-prepared AA can be used to comply with NEPA, as long as it meets certain prerequisites, including that: (1) the federal lead agency furnished guidance in the AA's preparation and independently evaluated the document, 23 U.S.C. § 139(c)(3); and (2) the AA was conducted with public review and a reasonable opportunity to comment, 23 C.F.R. § 450.318(b)(2)(ii)-(iii); *see also* AR 22836 at 22850 (AA result must be subject to public review and comment during the scoping of the EIS). A satisfactory AA can be used to screen preliminarily and eliminate unreasonable alternatives. 23 C.F.R. § 450.318(a), (d); *see also* 23 C.F.R. Pt. 450 App'x A at 12 ("Alternatives passed over during the transportation process because they are infeasible or do not meet the NEPA 'purpose and need' can be omitted from the detailed analysis of alternatives in the NEPA document, as long as the rationale for elimination is explained in the NEPA document.").

Plaintiffs argue that the AA used to eliminate the MLA from further consideration was inadequate, because it was not supervised by the FTA and because it was not subject to public comment. The record belies both of these assertions. There are a number of documents that indicate that the FTA played an active role in shaping, overseeing, and approving the AA. *See* AR 30 at 33 (ROD approval of AA); AR 150766 (internal FTA discussion about AA logistics); AR 150107 (City representative wrote to FTA to check about MLA's eligibility for federal funding); AR 150091 (FTA indicated that it would review AA prior to publication).

There were also many opportunities for public comment on the alternatives discussed in the AA. *See* AR 247 at 296 (City Council considered over 3,000 comments from the public on the AA before selecting the locally preferred alternative); AR 9434 at 9435 (AA states that City Council will conduct public hearings to solicit community views on the evaluated alternatives), 9554 (AA notes that over 200 meetings were held with members of the public while developing the AA); AR 16601 (AA Scoping Report published prior to release of AA); AR 68621 (City Council held thirteen public meetings

where public comment was sought on the AA).

Although the 2007 NOI may have discouraged public comment on the alternatives that had already been considered and rejected in the AA, there was sufficient opportunity on the whole for public comment both before publication of the AA and during the City Council meetings following publication. AR 9696 at 9699 ("Other reasonable alternatives suggested during the scoping process may be added if they were not previously evaluated and eliminated for good cause on the basis of the Alternatives Analysis and are consistent with the project's purpose and need."); *see also* AR 17157 at 17172 (NEPA Scoping Report states that "[c]omments that focus on a preference for alternatives that have previously been evaluated and eliminated from consideration are included in the appendices to this report but are neither summarized nor considered."). Accordingly, use of the AA to remove alternatives from consideration was not contrary to the statute or the regulations. Plaintiffs' argument to the contrary is therefore rejected.

b. MLA

Plaintiffs argue that the MLA was excluded from consideration as a reasonable alternative based on improper use of a version of the proposal that was designed to fail to meet the purpose and need, in conjunction with bad data. They contend that Defendants used this version of the MLA as a "straw man" to make the rail alternative look more appealing. In essence, Plaintiffs argue that Defendants erred when they did not consider the exact version of the MLA proposed by HonoluluTraffic.com in the AA.

HonoluluTraffic.com made a number of comments along these lines throughout the administrative process. *See* AR 855 at 2018-31; AR 16601 at 16715-27; AR 17157 at 17223-27; AR 71958 at 71958-60. It complained that the cost estimates for the MLA in the AA were "preposterous" because they were seven times higher than a comparable three-lane expressway built in Tampa; it argued that a cost estimate of $900 million was more accurate. AR 17157 at 17223-27. HonoluluTraffic.com also asserted that the AA underestimated the number of riders that would use the MLA, "killed the MLA

advantage" by extending the expressway's length and allowing HOVs to use it for free, and erroneously concluded that the MLA would never be eligible for New Starts Funding. *Id.* Finally, HonoluluTraffic.com insisted that the AA should have considered a three-lane version of the MLA, not just a two-lane version, as well as additional ingress and egress options. *Id.*

In support of the assertions made in the HonoluluTraffic.com comment letters, Plaintiffs point to an open letter written by an official involved in the construction of the Tampa elevated expressway project. AR 17157 at 17245-48. The official alleged that Defendants had intentionally misrepresented the facts associated with the cost and operation of the Tampa project in order to obscure the possibility that the MLA could provide congestion relief in Honolulu. *Id.* Plaintiffs also cite to comments made by the Transit Advisory Task Force on the MLA. AR 70839 at 70878-79 (suggesting that Defendants explore new ingress and egress options on the MLA to alleviate congestion and explain why the zipper lane was discontinued in the AA design of the MLA). Finally, Plaintiffs cite to a number of comments made by FTA employees about the MLA. *See* AR 150902 (FTA employee informs City that MLA is eligible for federal-aid highway funding, but states, "I don't speak for FTA Region 9."); AR 151052 (FTA staff member states that the MLA was supported by the right milestones and methodology); AR 151149 (FTA staff member recommends that the MLA be considered in the DEIS); AR 151155 (FTA staff member writes that MLA appears to be reasonable on its face).

Defendants' decision to limit their analysis to the two-lane versions of the MLA explored in the AA did not violate "the rule of reason." Indeed, Defendants addressed the many design alterations suggested by Plaintiffs' comments and found that they were not substantial. AR 247 at 798-802 (explaining that there were no substantial differences between the alternative studied in the AA and the "ideal" managed lanes option that would have resulted in a different outcome); AR 855 at 2090 (response letter to HonoluluTraffic.com explaining that zipper lane was eliminated to increase capacity in

both directions and that all of the suggested changes to the MLA design would still not fix the primary issue with the MLA, the performance of buses on local streets), 2092 (explaining that increasing the number of lanes in the MLA would not have relieved congestion and would have increased cost).

Defendants also adequately defended their MLA cost estimates; the Transit Advisory Task Force found that the Tampa project was not a good cost comparator because of the many differences between the two projects, *see* AR 55308 at 55311, that the cost estimates in the AA were "fair and accurate," and that the same costing techniques were used to price all of the alternatives analyzed in the AA. AR 855 at 2091. It was not unreasonable for Defendants to refuse to reassess a new version of the MLA in the FEIS, because there was no indication that the AA's assessment of the MLA was inaccurate or that changes to the MLA design would have made a difference. *See Headwaters*, 914 F.2d at 1181 (no need to separately analyze alternatives that are not significantly distinguishable from those already considered). Accordingly, Plaintiffs' claim that Defendants erred in refusing to consider MLA further is rejected.

c. Alternatives to Steel-Wheels-on-Steel

Plaintiffs also argue that Defendants failed to consider reasonable alternative technologies in the FEIS, including light-rail, monorail, magnetic levitation, and rubber-tired rail. These technologies were excluded from further consideration by a panel of experts during the DEIS scoping process, in favor of steel-on-steel technology. Plaintiffs complain that the panel of experts made their decision without proper public input and based on concerns such as cost, performance, and reliability, rather than the environmental advantages and disadvantages of each technology.

Defendants defend their decision to exclude alternate rail technologies on the basis that all five technologies were essentially environmentally equivalent, and an EIS need not consider indistinguishable alternatives. *See Headwaters*, 914 F.2d at 1181. There is evidence in the record that indicates that the panel of experts considered the

environmental effects of the various technologies, including air pollution, energy use, and noise impacts. AR 55188 at 55189 (panel reports that it concluded that steel wheel technology has noise impacts comparable to other technologies, better energy efficiency, and lower air quality impacts than the other four options).

In the FEIS, Defendants explained that the alternate rail technologies were eliminated because they are proprietary and did not offer substantial proven performance, cost, and reliability benefits compared to steel-on-steel technology. AR 247 at 790-91; *see also* AR 9319 (steel wheel technology is reliable, safe, high speed, and non-proprietary). The FEIS noted further that magnetic levitation is unproven for general use and that steel wheel systems can be designed to match the noise levels of magnetic levitation systems when in operation. *Id.*; *see also* AR 855 at 1803-04 (City letter explains that there is only one magnetic levitation system operating in the world, that it would require more energy and block more views, and that other systems can be designed to match its noise level); *but see* AR 22575 at 22682 (raw numbers indicating that magnetic level noise levels are lower before mitigation).

Neither the panel of experts nor the FEIS included a side-by-side comparison of the environmental effects of the various technologies, to make clear to the public which technologies provided the most environmental benefit. *See Block*, 690 F.2d at 767 (the touchstone for NEPA review is whether an EIS' selection and discussion of alternatives fosters informed decision-making by the agency and informed public participation). It is nevertheless clear that there were extensive opportunities for public comment on the various proposed rail technologies. *See* AR 247 at 283 (FEIS describes scoping process); AR 855 at 1803-04 (letter from City noting that public comments on each technology were accepted); AR 17157 at 17160-61 (NEPA scoping report describes public comments received at scoping meetings and in writing).

Because Defendants have presented adequate evidence that the environmental advantages of each technology were considered by the panel, and have shown that the

public had ample opportunity to comment, their decision to exclude alternate rail technologies from the FEIS was not arbitrary and capricious.

d. Alternatives to Route Past Courthouse

Finally, Plaintiffs argue that Defendants failed to consider reasonable alternatives to a route running past the federal courthouse because such routes would require approval from the City Council. For support, Plaintiffs rely on a letter written by locally-based federal judges expressing their concern about the positioning of the rail project past the courthouse. AR 855 at 930-34. Plaintiffs claim that the letter states that the judges spoke to the Chief of the City's Rapid Transit Division, who told them that alternative alignments were unlikely to be considered *because* they would require the approval of the City Council. In fact, the judges' letter states that the Chief said he did not feel there are any viable alternatives *and* that any change would require City Council approval. *Id.* There is nothing in the record to indicate that Defendants ever decided not to evaluate alternate routes because they wanted to avoid the need for City Council approval. *See, e.g.*, AR 855 at 937-38 (City letter in response to federal judges' letter explaining why the alignment had been selected). Plaintiffs' claim is unsupported by the record and is, therefore, rejected.

3. Analysis of Environmental Consequences

An EIS must contain a "reasonably thorough discussion" of a project's environmental consequences and mitigation measures. *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072-73; *see also* 42 U.S.C. § 4332(2)(C). The EIS must discuss the project's direct effects and reasonably foreseeable indirect and cumulative effects, including growth-inducing effects. 40 C.F.R. § 1502.16. However, an EIS need not discuss speculative consequences or discuss every conceivable environmental impact. *Ground Zero Ctr. for Non-Violent Actions v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1089-90 (9th Cir. 2004). While the EIS must discuss mitigation in some detail, a complete mitigation plan is not necessary. *Robertson v. Methow Valley Citizens Council*,

490 U.S. 332, 352 (1989).

A court's review of the discussion of environmental consequences in an EIS is limited to assessing whether the EIS includes a "hard look" at the environmental impacts of the proposed action. *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072. This requires a pragmatic judgment about whether the form, content and preparation of the EIS foster informed decision-making and informed public participation. *Id.*

Plaintiffs argue that the FEIS does not sufficiently examine the foreseeable environmental consequences of the Project because: (1) it does not account for potential impacts on air quality associated with fabricating and installing the guideway and transporting materials to the areas where the guideway will be built; and (2) it fails to account for the indirect and cumulative effects on land use and growth that will occur along the rail line and does not explain whether there are sensitive environmental resources that could be affected in those areas.

As to the first argument, Defendants gave the requisite "hard look" to the environmental consequences that could result from construction in the FEIS. *See* AR 247 at 551-54 (describing air pollutant emissions that will occur due to the project), 640-41 (describing effects of the construction phase), 645 (explaining that air pollution effects from construction will be limited to short-term increases in fugitive dust and airborne particulate matter and mobile-source emissions, and identifying mitigation measures). Accordingly, Plaintiffs' argument to the contrary is rejected.

As to the second, it is not entirely clear what specific environmental resources Plaintiffs contend will be threatened by the growth-inducing effects of the Project, but it is plain that Defendants also gave the required "hard look" at this issue. *See* AR 247 at 656 (noting that future development will be greatly influenced by factors outside of the control of Defendants), 657 (explaining that the project will not affect regional population, but will influence distribution and intensity of development in the study corridor and away from the less developed, more environmentally-sensitive areas of

Oahu), 672 (observing that the project is being built in an urbanized environment that will remain urbanized in the future and that the project could result in the preservation of a larger volume of undisturbed land outside of the project corridor, which would benefit ecosystems), 673 (analyzing the direct, indirect, and cumulative impacts of the project on water, street trees, and archaeological, cultural, and historic resources). This argument is therefore rejected as well.

4. Segmented Analysis

Plaintiffs claim that Defendants improperly segmented their NEPA analysis by preparing an FEIS for the rail project, which will run from Kapolei to Ala Moana Center, without also including environmental analysis of the impacts of planned extensions of the rail project between Ala Moana Center, and UH and Waikiki. Federal regulations provide that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). This includes connected actions, cumulative actions, and similar actions, as defined in 40 C.F.R. § 1508.25(a). Federal regulations further specify that an action assessed in an EIS dealing with a transportation improvement shall: (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) have independent utility or independent significance, *i.e.*, be usable and be a reasonable expenditure even if no further improvements in the area are made; and (3) not restrict consideration of alternatives or other reasonably foreseeable transportation improvements. 23 C.F.R. § 771.111(f).

Plaintiffs assert that the Kapolei to Ala Moana rail line and the Ala Moana to UH/Waikiki rail line are "connected actions." Actions are connected if they automatically trigger other actions which may require an EIS, cannot or will not proceed unless other actions are taken previously or simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification. § 1508.25(a)(1). Plaintiffs insist that the rail project was always intended to extend to Waikiki, and that the

segmentation of the project into smaller sections was an attempt to avoid analyzing environmental impacts to areas beyond the Ala Moana Center. *See* AR 9556 at 9566-68 (describing need for better rapid transit service to Waikiki, as a tourist center, and UH); AR 9696 (2007 NOI states that Defendants intend to prepare an EIS on a project running from Kapolei to UH and Waikiki); AR 9700 (2005 NOI states that travel corridor extends from Kapolei to UH and Waikiki).; AR 72134 at 72137 (letter from two City Councilmembers suggesting that the branch to Waikiki was intentionally left out of the DEIS to avoid addressing negative environmental impacts).

The Ninth Circuit applies an "independent utility" test to determine whether multiple actions are so connected as to mandate consideration in a single EIS. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). The court asks whether each of the two projects would have taken place with or without each other and thus have independent utility. *Id.* A number of Ninth Circuit cases have applied this test. *See, e.g.*, *id.* (concluding, in a challenge to two RODs, that the two projects were interdependent and therefore should have been assessed together); *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1112 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176-78 (9th Cir. 2011) (en banc), (finding, in challenge to a single permit issuance, that permitted project had independent utility because it did not depend on completion of later, not-yet-permitted phases of the project); *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (finding that an EA approving new road was improperly segmented when the EA did not consider the impact of timber sales that were the sole reason for building the road).

The rail project as defined in the FEIS, running from Kapolei to the Ala Moana Center, satisfies the independent utility test. While it is true that future extensions to Waikiki and UH may not have independent utility, Plaintiffs' challenge is not to an EIS dealing with those extensions and so the court need not address the independent utility of speculative future developments. The record amply supports the conclusion that the route

in the FEIS will serve a purpose even if the proposed extensions are never built. AR 247 at 791 (FEIS explaining that planned extensions were not included because no funding had been identified for them, but that the rail project had logical termini and independent utility from any extensions that may be constructed in the future); AR 9556 at 9568 (Ala Moana Center is served by more than 2,000 weekday bus trips and visited by more than fifty-six million shoppers annually). While the existence of the Project may strongly influence future decisions about whether an elevated rail line is built from Ala Moana to Waikiki and UH Manoa, the construction of an extension is not a foregone conclusion. Plaintiffs' argument that the NEPA analysis was impermissibly segmented is accordingly rejected.[7]

C. NHPA

Plaintiffs argue that Defendants have failed to meet their duty to assess the indirect effects that historic resources other than Chinatown and Merchant Street located near the rail stations will suffer due to the project. The NHPA requires agencies to assess whether historic properties will suffer adverse effects, which occur when an undertaking may alter, directly or indirectly, any of the characteristics that qualify a property for inclusion in the National Register. 36 C.F.R. § 800.5(a)(1). The agency must then consult with relevant parties to develop and evaluate alternatives and modifications to the undertaking that could avoid, minimize, or mitigate those adverse effects. 36 C.F.R. § 800.6(a); *Muckleshoot Indian Tribe*, 177 F.3d at 805 (observing that § 106 is a "stop, look, and listen" provision requiring agencies to consider the effects of their programs). A PA can serve as evidence of the agency's compliance with these requirements. 36 C.F.R. § 800.6(c).

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[7] Defendants contend that the FEIS did, in fact, analyze impacts of future extensions to Waikiki and UH. There is some evidence in the record to support this contention. *See* AR 247 at 554-64, 655; AR 33642 at 33654. There is, however, no need to decide that question at this time.

A review of the entire record reveals that Defendants sufficiently assessed the harm that rail station-induced growth could cause to historic sites near rail stations and set up a number of mitigation measures to deal with such effects. *See* 247 at 657-59 (recognizing that the project may increase the density of development near stations); AR 30 at 103-04 (PA providing that the City shall employ a architectural historian who shall monitor the integration of transit-oriented development and historic preservation in the vicinity of project stations), 104 (City shall monitor proposed demolition of resources built before 1969 within a 2,000 foot radius of each station), 105 (provides for meeting with consulting parties to discuss next steps if a significant adverse indirect or cumulative effect occurs to a historic resource). Defendants have therefore satisfied their duty to consult with the SHPO and to develop alternatives to mitigate possible adverse effects on historic properties. Accordingly, Plaintiffs' NHPA claim is rejected. *See Tyler v. Cuomo*, 236 F.3d 1124, 1129 (9th Cir. 2000).

III. Conclusion and Remedy

For the reasons set forth above:

A. The Court grants Plaintiffs' Motion for Summary Judgment (Doc. 109) with respect to: (1) their Section 4(f) claims that Defendants arbitrarily and capriciously failed to complete reasonable efforts to identify above-ground TCPs prior to issuing the ROD; (2) Defendants' failure adequately to consider the Beretania Street Tunnel alternative prior to eliminating it as imprudent; and (3) Defendants' failure adequately to consider whether the Project will constructively use Mother Waldron Park.

B. The Court grants Defendants' Motion for Summary Judgment (Doc. 145) with respect to all other claims raised in said motion.

C. The Court does not enter a final judgment and/or a permanent injunction at this time. While an injunction may be appropriate in this case, issuance of an injunction does not automatically follow, nor do the terms of any such injunction.

See N. Cheyenne Tribe v. Norton, 503 F.3d 836, 842 (9th Cir. 2007). Traditional standards of equity still govern. *Id.*; *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (sustaining district court's refusal to enjoin Navy's violations of Federal Water Pollution Control Act where the district court, instead, ordered the Navy to apply for a permit). Even assuming the issuance of an injunction is appropriate, it must be carefully tailored to provide a balanced remedy. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833-34 (9th Cir. 2002), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

To achieve these ends, the court invites briefing on whether a permanent injunction and/or a declaratory judgment should issue, and the scope of any such equitable relief, in order properly to assess the balance of equities between the parties, as well as where the public interest lies. To afford the parties the opportunity to brief and argue these issues, concurrently with this Order, the Court is issuing a Scheduling Order re Remedy

IT IS SO ORDERED.

Dated this 1st day of November, 2012.

/s/ *A. Wallace Tashima*
A. WALLACE TASHIMA
United States Circuit Judge
Sitting by Designation

Appendix C—Correspondence

DEPARTMENT OF PARKS & RECREATION

CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR

TONI P. ROBINSON
DIRECTOR

JEANNE C. ISHIKAWA
DEPUTY DIRECTOR

May 22, 2013

Mr. Daniel Grabauskas
Executive Director and CEO
Honolulu Authority for Rapid Transportation
City and County of Honolulu
1099 Alakea Street, Suite 1700
Honolulu, Hawaii 96813

Dear Mr. Grabauskas:

RE: Mother Waldron Neighborhood Park; Honolulu Rail Transit Project

The Honolulu Authority for Rapid Transportation (HART) has consulted with the City and County of Honolulu Department of Parks and Recreation (DPR) pursuant to Section 4(f) of the Department of Transportation Act and other laws with regard to the potential effects of the Honolulu Rail Transit Project (HRTP) on Mother Waldron Neighborhood Park and Playground (Playground). DPR previously provided comments on the Draft Environmental Impact Statement and the Section 4(f) analysis regarding the HRTP. HART reinitiated consultation with DPR regarding the potential effects of the HRTP on the park usage after the December 2012 decision of the District Court for the District of Hawaii in Honolulutraffic.com v. Federal Transit Administration.

The Honolulu Park Board approved plans for the Playground in 1936, and Works Progress Administration workers completed the Playground in 1937. At that time, the Playground occupied 1.8 acres.

1n 1991-1992, the Hawaii Community Development Authority realigned Halekauwila Street, taking approximately 17%, or 12,700 square feet, of the Playground on the mauka end of the Playground (the playground end intended for use by younger children). The mauka end of the Playground lost its basketball and volleyball courts, wall and benches. The original playground equipment (parallel bars, swings, seesaw and sandbox) was replaced with modern playground equipment. The playground area in the mauka portion of the Playground was again reconfigured around 2006, adding a children's climbing structure.

Approximately 1.5 acres remain of the 1.8-acre original playground.

The current recreational features of the Playground include a playground with a climbing structure, basketball courts, volleyball courts, benches and open grass areas that are used for informal sporting activities, picnicking and daytime resting. Students from Voyager Public Charter School use the Playground. A farmers' market with a typical attendance of 5 vendors and 75 customers per week is held at the Playground on Monday mornings.

Basketball, playground, picnicking and volleyball are the activities designated for the Playground. Between 2009 and 2012, DPR has permitted various organized uses of the Playground.

A survey of park activity conducted by HART between November 9, 2012, and November 20, 2012 shows that the primary use of the Playground is by residents who camp in the Playground with sleeping mats, blankets, food coolers and bags, and wash and dry laundry around the comfort station. Nighttime observation indicated that this group of daytime users leaves the Playground during its hours of closure. Use by this resident population is concentrated around the comfort station.

Walkers, joggers, and dog walkers using or crossing the Playground were the second-most frequently observed use, followed by basketball, play-structure and bicycling use. Observed organized sporting events included a youth sports day and coaching of youth basketball skills. The majority of recreational use occurs in the makai portion of the Playground. Only the limited use of the play-structure is located adjacent to Halekauwila Street. Non-recreational uses included a weekly farmers' market and food bank delivery to neighborhood elderly.

The Playground qualifies for protection under Section 4(f) because (1) it is eligible for listing on the National Register under Criterion A, for its association with the national playground movement, and under Criterion C, for its architectural and landscape design by Harry Sims Bent, and (2) it is a public park. DPR concurs that overall (combined) proximity impacts would not substantially impair the activities, features, or attributes that qualify the Playground for protection under Section 4(f).

The Playground's setting is not an element of its National Register eligibility. We concur with HART's assessment that the Playground's setting has already been substantially altered, both by the fact that the buildings and uses that originally surrounded the Playground no longer exist and by the fact that the Playground's size and configuration were altered in the 1990s.

We also concur that the Playground's association with the national playground movement (Criterion A) will be unaffected by the HRTP's proximity to the mauka Playground boundary. To the extent that the Playground's equipment, architecture and layout still retain elements of the original design and features (Criterion C), the HRTP will not affect them. It will be located adjacent to the part of the Playground that retains the least integrity with respect to the original design and equipment, and will not, in any case, alter the design or intended use of the Playground.

The HRTP's proximity will not substantially impair the features and uses of the Playground. HART's recreational use survey indicates that the largest number of Playground users, who use the Playground as a living and resting space during the hours that it is open, are not sensitive to context. The HRTP would increase access for them (and for other users) but would not impair their use of the Playground. Other non-recreational users, such as dog walkers, joggers, picnickers and people who use the Playground for the farmers' market, will not be substantially impaired by the existence of the HRTP outside the Playground's boundaries.

The basketball and volleyball courts are at the end of the Playground farthest from the HRTP. Users of the courts will see the HRTP if they look towards the mauka end, where the view currently is of an apartment building. We concur with HART's conclusion that this change in the view will not substantially impair their recreational use.

The playground equipment for young children is closest to the HRTP, at the mauka end of the Playground. At present, users at the mauka end of the Playground look out across a street to an apartment building. The view of the apartment building will now be interrupted by the HRTP's pillars. We concur with HART's conclusion that this alteration in the view will not substantially impair the use of the mauka end of the Playground. The shade that the HRTP pillars and guideway provide during morning hours may be beneficial to users at that end of the Playground.

The HRTP will not restrict access to the Playground; in fact, HRTP will likely increase recreational use of the Playground, since two Rail stations are in close proximity. The effect of the HRTP will probably be overshadowed by the effect of the major high-rise projects planned for the property adjacent to the Playground. We anticipate more people using the Playground, both when people move into the high-rises, and when the HRTP is completed. Certainly, the Playground's comfort station usage will increase as a result of the HRTP, unless toilet facilities are provided at the HRTP station one block from the Playground. Increased use of the Playground is consistent with DPR's goal of maximizing park and recreational benefits to the public within limited available resources.

The HRTP would have little effect on the existing noise level at the Playground, and the noise analysis conducted by HART demonstrated that the HRTP would not cause a noise impact at the Playground. Vibration impacts from the HRTP will meet criteria protecting places where people sleep, and there will be no pile driving near the Playground to cause construction impacts. We concur with HART's analysis that these proximity impacts will not substantially impair any of the features that provide the Playground with protection under Section 4(f).

Therefore, DPR supports your non-use determination of the Playground, for the purpose of reconsideration of the Section 4(f) Non-Use Determination for Mother Waldron Neighborhood Park.

Should you have questions, please contact Rosalind Young, West Honolulu District Manager, at 522-7070.

Sincerely,

Toni P. Robinson
Director

HART

HONOLULU AUTHORITY for RAPID TRANSPORTATION

IN REPLY REFER TO:
CMS-AP00ENV-00238

Daniel A. Grabauskas
EXECUTIVE DIRECTOR AND CEO

April 17, 2013

Ms. Pua Aiu, Ph.D., Administrator
State Historic Preservation Division
Department of Land and Natural Resources
Kakuhihewa Building
601 Kamokila Boulevard, Suite 555
Kapolei, Hawaii 96707

Dear Dr. Aiu:

Subject: National Register of Historic Places (NRHP) Registration Form for Mother Waldron Playground, Honolulu Rail Transit Project (HRTP)

Please find enclosed a draft NRHP Registration Form for Mother Waldron Playground for your review and comment. Per Stipulation VI.C.2 of the Section 106 of the National Historic Preservation Act Programmatic Agreement for the HRTP, SHPD has 30 days to review and comment on NRHP Registration Forms.

Since Mother Waldron Playground was already listed on the Hawaii Register of Historic Places on June 9, 1988 as an element of the thematic group, "City and County of Honolulu Art Deco Parks," no additional coordination with your office is required regarding Stipulation VI.C, 3.

Please contact Mr. Stanley Solamillo of HART at (808) 768-6187 if you have any questions or if we can help facilitate your review in any way. Thank you for your continued support and review of this project.

Sincerely,

for Daniel A. Grabauskas
Executive Director and CEO

Enclosure

cc: Ms. Angie Westfall, SHPD
Ms. Faith Miyamoto, HART
Ms. Joanna Morsicato, HART

United States Department of the Interior
National Park Service

National Register of Historic Places Registration Form

This form is for use in nominating or requesting determinations for individual properties and districts. See instructions in National Register Bulletin, *How to Complete the National Register of Historic Places Registration Form*. If any item does not apply to the property being documented, enter "N/A" for "not applicable." For functions, architectural classification, materials, and areas of significance, enter only categories and subcategories from the instructions.

1. Name of Property

Historic name: Mother Waldron Playground
Other names/site number: N/A
Name of related multiple property listing:
N/A
(Enter "N/A" if property is not part of a multiple property listing

2. Location

Street & number: Bounded by Coral, Halekauwila, Pohukaina, and Cooke streets
City or town: Honolulu State: Hawaii County: Honolulu
Not For Publication: ☐ Vicinity: ☐

3. State/Federal Agency Certification

As the designated authority under the National Historic Preservation Act, as amended,

I hereby certify that this ___ nomination ___ request for determination of eligibility meets the documentation standards for registering properties in the National Register of Historic Places and meets the procedural and professional requirements set forth in 36 CFR Part 60.

In my opinion, the property ___ meets ___ does not meet the National Register Criteria. I recommend that this property be considered significant at the following level(s) of significance:

___national ___statewide ___local

Applicable National Register Criteria:

___A ___B ___C ___D

Signature of certifying official/Title: **Date**

State or Federal agency/bureau or Tribal Government

In my opinion, the property ___ meets ___ does not meet the National Register criteria.

Signature of commenting official: **Date**

Title : **State or Federal agency/bureau or Tribal Government**

4. National Park Service Certification

I hereby certify that this property is:

___ entered in the National Register

___ determined eligible for the National Register

___ determined not eligible for the National Register

___ removed from the National Register

___ other (explain:) _____

Signature of the Keeper Date of Action

5. Classification

Ownership of Property

(Check as many boxes as apply.)

Private:	☐
Public – Local	X
Public – State	X
Public – Federal	☐

Category of Property

(Check only **one** box.)

Building(s)	☐
District	☐
Site	X
Structure	☐
Object	☐

Number of Resources within Property
(Do not include previously listed resources in the count)

Contributing	Noncontributing	
1		buildings
1	2	sites
		structures
		objects
2	2	Total

Number of contributing resources previously listed in the National Register 0

6. Function or Use
Historic Functions
(Enter categories from instructions.)
RECREATION AND CULTURE/outdoor recreation

Current Functions
(Enter categories from instructions.)
RECREATION AND CULTURE/outdoor recreation
LANDSCAPE/park

7. Description

Architectural Classification
(Enter categories from instructions.)
MODERN MOVEMENT
Moderne
_____
_____
_____
_____
_____

Materials: (enter categories from instructions.)
Principal exterior materials of the property: _CONCRETE, ASPHALT, STONE_

Narrative Description
(Describe the historic and current physical appearance and condition of the property. Describe contributing and noncontributing resources if applicable. Begin with **a summary paragraph** that briefly describes the general characteristics of the property, such as its location, type, style, method of construction, setting, size, and significant features. Indicate whether the property has historic integrity.)

Summary Paragraph

Mother Waldron Playground is located between Halekauwila, Cooke, Pohukaina, and Coral streets. It is a modest park constructed in 1937 as a 1.76 acre (77,000 square feet) playground; it has been substantially altered from its original design since its initial construction, most recently in the 1990s. Built elements within the park include a comfort station and remaining portions of a low wall that encompasses the original park. The built components contain reserved design elements of the Art Moderne style, including a horizontal emphasis, rounded corners and piers, and streamlined appearance. Mother Waldron Playground has undergone several major alterations since its initial construction, including removal and replacement of some of the park's original features, and subsequent large expansions to compensate for other changes. The playground's setting just Diamond Head (southeast) of downtown Honolulu has transitioned from a mixed residential, commercial, and industrial area at the time of the park's construction into a major light industrial area now redeveloping into a mixed-use district.

Narrative Description

Architectural and Landscape Description

The playground has an essentially rectangular footprint and is divided into two halves: a large, Diamond Head (southeastern) grassy area and an Ewa (northwestern) paved area with an oval grassy center surrounded by a perimeter wall. A centrally located comfort station and low wall divides the two halves. Additional green space adjacent to the park is created by Coral Street's closure to vehicular traffic.

Ewa, Paved Area

The paved area is the original section of the park. It contains low walls, benches, a comfort station, and covered walkways all constructed of concrete brick. The brick has been painted tan throughout the park.

The paved area's landscaping consists largely of asphalt. Sandstone flagstone is used below the covered walkways and in the area in front of the comfort station's Ewa (northwest, Coral Street) elevation. The round elevated platform on the Ewa elevation is paved with the same flagstone. Ewa of this comfort station is an oval, grassy area. At the opening to Coral Street, the same sandstone flagstone is used and surrounded on either side by asphalt. Monkeypod and Royal Poinciana trees are found within the paved area as well as along the Coral Street perimeter wall. The paved area on the park's makai (southwest, Pohukaina Street) end contains two volleyball courts and one basketball court. The paved area on the park's mauka (northeast, Halekauwila Street) end contains small playground equipment. Clay brick, rather than the pervasive concrete brick, is used to border the sidewalk outside and around the paved park as well as provide paving at each convex curve entrance to the park.

Walls

Mother Waldron Playground's paved area is surrounded by an approximately three foot high perimeter wall. The wall is roughly nine inches thick. Along Coral Street, this wall zig-zags forming triangular points and provides a wide opening into the park. This wall is original. On the park's mauka and makai sides, the walls form rectangular zig-zags. Of these wall sections, neither are in their original locations nor contain original materials. The entire perimeter wall on Coral, Halekauwila, and Pohukaina streets is divided into three sections separated by two rows of recessed brick. The middle section of wall is perforated with alternating vertical and horizontal openings. Concrete coping on top of the wall consists of alternating zig-zag and straight edges and is slightly recessed from the wall's edges. These zig-zags hint at modest Art Deco stylistic influences, though the low wall expresses heavy influence from the streamlined, Art Moderne style. Three of the wall's four corners are convex curves with entrances into the park from the sidewalk. These entrances are anchored on either side by rounded piers. Rounded piers are also found on the park side of Coral Street's zig-zag wall junctures. The perimeter wall's Diamond

Head corner at Halekauwila Street is squared, does not allow access into the park, and is not original.

A lower, one foot high wall topped with terracotta tile runs along the paved area's Diamond Head border. This low wall connects to the higher wall at Halekauwila Street, connects to benches at the comfort station, then continues on the makai side of the comfort station before turning toward the open grassy area of the park and coming to an end.

Benches

Benches within Mother Waldron Playground are found in the alcoves created by the perimeter wall as well as in the middle of the park. These seating areas are fixed, permanent, built-in park fixtures. Along Coral Street, the triangular alcoves are filled with curved benches, whereas straight benches are found along Halekauwila and Pohukaina streets and the low wall separating the paved and grassy areas. The curved benches are original while the straight benches along Halekauwila and Pohukaina streets are not original. Two straight benches are found in the middle of the paved area and are original to the playground. Curved benches also follow beneath the comfort station's curved covered walkways, separating the paved area from the grassy area. All benches are narrower at the base than at the top, forming a triangular profile. The benches are topped with the same terracotta tile found on the park's low wall.

Comfort Station

The comfort station consists of a rectangular building flanked on either side by a curved covered walkway. The covered walkways' curves follow along the paved area's central grassy oval. The comfort station is single-story, low and horizontal, with a flat roof lined with zig-zag coping identical to that found on the perimeter walls. It is built of concrete bricks. Two rows of recessed concrete brick form horizontal lines across all of the building's facades near the water table and roofline. The comfort station displays influences of the streamlined, Art Moderne form and style.

At the comfort station's Ewa elevation, a central alcove lined with vertical pilasters forms the backdrop of a round, elevated platform. On either side of this alcove are open-air windows with vertical concrete grilles. The recessed row near the roofline intersects with the covered walkways' curved, flat roof. These covered walkways are supported by round columns with a horizontal band of recessed brick at the same level as the recessed brick at the comfort station's water table. The covered walkways' flat roofs project slightly over the piers. Where the covered walkways intersect with the Ewa elevation, a rounded wall the width of the covered walkway columns supports the walkway's roof and attaches to the building facade. These walls also help shield the entrances to the restrooms.

At the comfort station's mauka and makai elevations are open entrances to men's and women's restrooms. Drinking fountains are found in small oval alcoves near the entrances. Above the restroom entrances, the covered walkways' roofs intersect with the recessed row of brick near the roofline. On both the mauka and makai elevations, covered walkway columns abut the

comfort station. Diamond Head of each abutting covered walkway column is one small window identical to those found on the comfort station's Ewa elevation.

At the building's Diamond Head elevation, a small room projects from the center of the building. A small semi-circular roof projects from the top row of recessed brick to cover the entrance to the small room. The entrance is found on the makai side and is shielded from view by a short wall resembling the park's perimeter wall. This wall shares the same coping as the perimeter walls but is not perforated and contains no rows of recessed concrete brick. The projecting room's Diamond Head elevation also contains no recessed brick at the water table level. On the projecting room's mauka and Diamond Head elevations are two large vent openings covered by a metal grate. Four windows identical to those on the comfort station's Ewa elevation are found on the Diamond Head elevation, two on either side of the projecting room.

The comfort station's interior consists of two nearly-identical restrooms. Both contain one sink, several stalls, and a partially-enclosed changing area. The men's room contains a single urinal. The concrete walls and stall dividers are clad with white tile to the height of the stall walls. Above the tile the walls are painted. The stall doors are wood. The restroom floors are concrete. Although no plans for the comfort station interior were found, these interiors likely coincide with the comfort station's 1968 renovations.

Diamond Head, Grassy Area

Mother Waldron Playground's Diamond Head, rectangular grassy area was added to the park following Halekauwila Street's realignment in 1991-1992. Bound by Halekauwila Street, Cooke Street, Pohukaina Street and the original 1937 playground, this area contains no buildings, walls, benches, paving, or playground equipment. A brick, almond-shaped marker topped by a cast iron fence sits at the grassy area's corner at Halekauwila and Cooke streets. This marker is labeled *kapu*. *Kapu* means "forbidden" or "sacred," and the marker encircles an area where human remains were reinterred following Kakaako improvement projects in the 1990s. Royal Poinciana trees line the grassy area along Cooke Street with monkeypod trees clustered at the tree line's ends.

Former Coral Street Area

Mother Waldron Playground's Ewa area was added to the park around 1994-1995.[1] The area, formerly a portion of Coral Street, was closed between Halekauwila and Pohukaina streets following the completion of the 1991-1992 street realignment project. At both the mauka and makai ends of the former Coral Street area, trees were planted. Grass replaced the street pavement, but a small rectangular section of pavement remains near the former Coral Street entrance to Mother Waldron Playground.

[1] Letter from Michael N. Scarfone, Executive Director, Hawaii Community Development Authority, to Dona L. Hanaike, Director, Department of Parks and Recreation, December 14, 1994.

Alterations

Mother Waldron Playground has undergone major changes since its original construction. According to its Hawaii Register of Historic Places nomination form, completed in 1988, initial changes included renovations to the comfort station in 1968 and resurfacing the area in 1978. At that time, the park was bounded by Lana Lane on its Diamond Head border. The large grassy area now a part of the park contained commercial, residential, and industrial buildings for the majority of the playground's history.

In the 1980s, the Hawaii Community Development Authority (HCDA) began plans to help revitalize the industrial Kakaako area. Included in these community development plans were road reconfigurations aimed at improving Kakaako traffic patterns. In 1991-1992, the HCDA undertook street improvements along Halekauwila Street, among others. This realignment of Halekauwila Street required a taking of approximately 12,700 square feet of Mother Waldron Playground on the playground's mauka end; this represents approximately 17% of the original park that is no longer included in the present park.[2] To mitigate the taking and the subsequent diminished park size, the developed area Diamond Head of Lana Lane was removed. Lana Lane, separating the playground from the developed area, was also removed. Mother Waldron Playground was subsequently enlarged by approximately 54,000 square feet Diamond Head.[3] Although this 54,000 square foot area was officially designated for future use as part of Mother Waldron Playground, Coral Street's closure on the park's Ewa side was never officially considered part of the park until the mid-1990s when improvements were made to the former Coral Street area. This final change to Mother Waldron Playground's boundaries grew the park by an additional 25,800 square feet.

As a result of the taking, the mauka end of the playground lost its basketball court, perimeter wall, and benches. A perimeter wall and benches nearly identical to the original were reconstructed along Halekauwila Street, but the wall now connects to the original low wall topped by terracotta tile that remains extant; the tile was not used on the replacement wall. There is no longer a convex curved entrance at the original playground's Halekauwila Street and Lana Lane corner due to the alterations. The original court and play area was replaced with modern playground equipment.

Along Pohukaina Street, road widening related to district improvements forced the perimeter wall and benches to be removed and reconstructed approximately five to ten feet inside the playground's original boundary. To open Mother Waldron Playground to its newly-acquired 54,000 square feet Diamond Head, a higher wall running along Lana Lane and intersecting with the rear of the comfort station was removed and never replaced. The original handball court was also removed and never replaced.

[2] Documentation completed in 1985 stated that 8,400 square feet of Mother Waldron Playground would be removed due to Halekauwila Street's realignment; however, following realignment, plat maps indicate approximately 12,700 square feet was removed.
[3] State of Hawaii, et al., *Final Supplemental Environmental Impact Statement for the Kakaako Community Development District Plan* (Honolulu: Hawaii Community Development Authority, 1985), IV-45.

8. Statement of Significance

Applicable National Register Criteria
(Mark "x" in one or more boxes for the criteria qualifying the property for National Register listing.)

- [X] A. Property is associated with events that have made a significant contribution to the broad patterns of our history.
- [ ] B. Property is associated with the lives of persons significant in our past.
- [X] C. Property embodies the distinctive characteristics of a type, period, or method of construction or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components lack individual distinction.
- [ ] D. Property has yielded, or is likely to yield, information important in prehistory or history.

Criteria Considerations
(Mark "x" in all the boxes that apply.)

- [ ] A. Owned by a religious institution or used for religious purposes
- [ ] B. Removed from its original location
- [ ] C. A birthplace or grave
- [ ] D. A cemetery
- [ ] E. A reconstructed building, object, or structure
- [ ] F. A commemorative property
- [ ] G. Less than 50 years old or achieving significance within the past 50 years

Areas of Significance
(Enter categories from instructions.)
SOCIAL HISTORY
ENTERTAINMENT/RECREATION
ARCHITECTURE
LANDSCAPE ARCHITECTURE

Period of Significance
1937 – 1945

Significant Dates
1937

Significant Person
(Complete only if Criterion B is marked above.)

Cultural Affiliation

Architect/Builder
Bent, Harry Sims

Statement of Significance Summary Paragraph (Provide a summary paragraph that includes level of significance, applicable criteria, justification for the period of significance, and any applicable criteria considerations.)

Mother Waldron Playground in Honolulu, Hawaii, is eligible for the National Register of Historic Places. It is significant under Criterion A in the area of social history and entertainment/recreation for its association with the organized play and playground movement in the United States during the early twentieth century, and under Criterion C in the areas of architecture and landscape architecture for its Art Moderne playground design. The period of significance spans from 1937, when construction commenced, until 1945, when the playground movement that supported supervised play largely ceased and Honolulu's Board of Parks and Recreation was formed to rehabilitate Oahu's parks following World War II.

Narrative Statement of Significance (Provide at least **one** paragraph for each area of significance.)

Historical Narrative

Hawaii History

Early History

Polynesian settlers arrived in the isolated and uninhabited Hawaiian Islands as early as 300 A.D., with subsequent migrations taking place from the eleventh century through fourteenth century. Traversing the Pacific Ocean, these settlers brought with them a traditional land-based management system comprised of chiefs and commoners, as well as staple crops like wild ginger, gourds, taro, sugarcane, coconut, and sweet potato. A distinct Hawaiian culture evolved over time, celebrating unique stories and deities, and keeping order through a *kapu* governance system based on a strict code of conduct. By the time English Captain James Cook came to the islands in 1778, the islands' population was estimated as high as 300,000. Captain Cook named the islands the Sandwich Islands in honor of the Earl of Sandwich.[4]

Hawaiian Kingdom

Originally existing as a collection of independently ruled districts, the Hawaiian Islands were united as a single kingdom in 1810 by King Kamehameha I. Contact with Western sailing vessels gave the king access to weaponry enabling him to defeat his rivals. The king's death in 1819 led to the *kapu* system's demise, and Protestant missionaries, whalers, and traders arrived

[4] Edward Joesting, *Hawaii: An Uncommon History* (New York: W.W. Norton & Co., 1972), 13, 15, 27.

in the islands bringing Christianity and spreading disease that decimated the local population. The Hawaiian Kingdom, recognized as a sovereign nation, entered into treaties with foreign nations; the first such treaty with the United States took place in 1826. In 1840 Hawaii signed its first constitution, creating a government structure that included a representative body. Westerners continued flocking to the islands, bringing changes to Hawaii's economic structure and profiting from its lands and ideal trade route location. Sugarcane's rise as Hawaii's staple crop increased demand for labor, bringing immigrant workers from across the world to Hawaii.

Annexation

By 1885, a group of non-native businessmen formed the Hawaiian League and began discussing Hawaii annexation. The group pressured King Kalakaua to sign the Bayonet Constitution, stripping much of the king's authority and transferring it to a legislature comprised of a Hawaiian League majority. The king relented and signed the Bayonet Constitution on July 6, 1887. In 1891, Queen Liliuokalani assumed the throne and unsuccessfully attempted to repeal the Bayonet Constitution. This power struggle resulted in the Hawaiian League's overthrow of the monarchy; this coup was aided by United States Minister to Hawaii John L. Stevens and United States troops. Hearing of the overthrow, President Grover Cleveland ordered an investigation and called for the reestablishment of Hawaii's monarchy. Hawaii's Provisional Government instead pushed for United States annexation but failed to receive the required two-thirds vote in the United States Senate.

When William McKinley became president in 1897, Hawaii's annexation became a priority. The 1898 Joint Resolution annexed Hawaii and the 1900 Hawaiian Organic Act officially made Hawaii a United States territory. Hawaii became the fiftieth state in 1959.

Kakaako

The Kakaako district is situated between Honolulu and Waikiki on Oahu. The area long existed as swampland, and under the rule of King Kamehameha I, was used for fishing, canoe landings, salt production, cultivating taro, and religious practices. Although Honolulu Harbor experienced rapid growth through the 1800s, few lived in Kakaako during this time. In 1848, much of Hawaii's lands were turned over to private ownership in what was called the Great Mahele; the land in Kakaako became part of the Bernice Pauahi Bishop estate. By 1876, however, a government map of Oahu labeled the area as the "Kakaako Salt Works" with no major roads passing through the area. Roads between Honolulu and Waikiki bypassed Kakaako to the north. A decade later, Kakaako obtained an "Immigration Depot" and was the location of a battery, but otherwise little development occurred in the area.[5]

Continued growth in Honolulu eventually forced Kakaako's transition from a sparsely populated industrial area into a densely populated residential and commercial district. Demand for land near Honolulu Harbor led to the shallow reef adjacent to Kakaako being filled in and developed,

[5] Oahu Government Survey 1876, Registered Map No. 1380 (Hawaii Land Survey Division); Wall, W. A., Honolulu and Vicinity 1887, Hawaiian Government Survey (Library of Congress).

expanding the land comprising Kakaako. Now-defunct Fort Armstrong was constructed on this infill near the mouth of Honolulu Harbor. Eventually, large tracts of Kakaako land held by the Bishop and Curtis Perry Ward estates were subdivided. With the Honolulu Iron Works and Hawaiian Tuna Packers establishing businesses in Kakaako, other small enterprises soon followed. Residents quickly arrived: Hawaiian, Japanese, Portuguese, Filipino, and Puerto Rican families all found a home in Kakaako. Largely residing within their own housing "camps," these varying cultural groups lived and worked side-by-side in Kakaako, creating what has been referred to as a microcosm of Hawaii.[6]

By the mid-twentieth century, Kakaako's population began to decline as residential areas slowly yielded to Kakaako's current industrial uses. The area also fell into disrepair, and efforts were made by the HCDA to improve roadway infrastructure within Kakaako, including realignment of Halekauwila Street.[7] Future plans for Kakaako include increased residential housing units, repopulating an area that was once a thriving community.

The Playground Movement

Playgrounds developed out of concern for the poor, aiming to help mold children and young adults into law-abiding citizens. Directors were hired to organize activities at the playgrounds, instilling a sense of order to the parks. This early urban reform movement was also seen as a means to help recent immigrants assimilate into American culture. The earliest playgrounds were developed by private investors who built these spaces for public use in the 1880s. In the following decades, cities took a greater role in providing public playgrounds and recreation areas for their residents. The 1906 Playground Association of America aimed to promote physical and mental well-being through playgrounds across the country and sent members to assess select cities' particular recreational needs. By the 1930s, many cities had created full-fledged recreation departments to deal with recreation management and operations.

Honolulu's public playground development followed the national pattern and was promoted early on by the women leaders of the Free Kindergarten and Children's Aid Association. The group established the first public playground in Chinatown at Beretania and Smith streets in 1911. Over the years, the organization functioned as Honolulu's recreation department until the city's Recreation Commission was created in 1922 through the efforts of Henry Stoddard Curtis. Curtis, a former secretary of the Playground Association of America, surveyed Honolulu and urged the city to create new parks and playgrounds. Honolulu established a park board in 1931, hired Harry Sims Bent as park architect in 1933, and by 1936, forty playgrounds and social centers were supervised by the Recreation Commission.

Much of Honolulu's growth in park, playground, and recreational facilities, including Mother Waldron Playground, can be attributed to increased federal assistance from New Deal programs in response to the Great Depression. Both the Federal Emergency Relief Administration (FERA)

[6] Marsha Gibson, *Kaka'ako As We Knew It* (Honolulu: Mutual Publishing, 2011).
[7] State of Hawaii, et al., *Final Supplemental Environmental Impact Statement for the Kakaako Community Development District Plan* (Honolulu: Hawaii Community Development Authority, 1985); Austin, Tsutsumi, and Associates, Inc., *Kakaako Traffic Study* (Honolulu: Hawaii Community Development Authority, 1991).

and the Civil Works Administration (CWA) provided manpower for Honolulu's park construction initiative. Additional manpower came by way of the Works Progress Administration (WPA) and the National Youth Administration (NYA), which allowed Honolulu to employ playground directors.

Playgrounds did not exist as places where children were free to play on their own. Play existed not only for healthy development, but also as an educational tool that required organization and supervision. Thus, playground directors were employed to monitor the children's activities and act as a role model. The director helped organize team games, schedule activities, and restrict playground access to bullies. Through their various activities, playgrounds and recreation centers were seen as alternative choices to youth gangs, delinquency, or wasted time.[8]

Following World War II, the playground movement largely ceased, as child development experts began supporting unstructured play as more beneficial to children's development. Supervised play at parks and playgrounds as it existed prior to the war largely ceased. Honolulu's Parks Board merged with the Recreation Commission to form the Board of Public Parks and Recreation in 1946. The new board was tasked to rehabilitate Oahu's damaged parks.[9] By the end of the 1940s, American playgrounds began turning their focus to playground equipment aimed to allow free play and imagination rather than supervised play supported by recreation leaders.[10]

Harry Sims Bent

Harry Sims Bent, Mother Waldron Playground's architect, was born in Socorro, New Mexico, in 1896. After graduating from the University of Pennsylvania, Harry Sims Bent began his career working for prominent New York architectural firm Bertram Goodhue Associates. Bent's early work consisted primarily of building projects in the Los Angeles, California area, including the Los Angeles Central Library and several buildings at the California Institute of Technology.

In the late 1920s, Bent arrived in Honolulu assigned with supervising construction of the Academy of Arts as a representative and "resident architect" of Bertram Goodhue Associates. Following the Academy of Art's completion, Bent remained in Hawaii, first acquiring work through Bertram Goodhue Associates but later for his own independent practice.

Bent originally volunteered his time working on plans for the Honolulu Park Board in the 1930s, but ultimately worked on nearly all projects undertaken by the Board up through 1939. He was considered one of the most talented architects in Hawaii in the late 1920s-30s, with prominent Bertram Goodhue Associates and independent works including the C. Brewer Building,

[8] Robert R Weyeneth and Ann K. Yoklavich, *1930s Parks and Playgrounds in Honolulu: an Historical and Architectural Assessment* (Honolulu: Department of Parks and Recreation, 1987).
[9] Ann K. Yoklavich, *Overview of Historic Honolulu Parks* (Honolulu: Department of Parks and Recreation, 1987), 4.
[10] Susan G. Solomon, *American Playgrounds: Revitalizing Community Space* (Lebanon, NH: University Press of New England, 2005), 22.

Hanahauoli School, the Pineapple Research Institute at the University of Hawaii, and several residences. [11]

Bent's first task for the Honolulu Park Board was the Ala Moana Park project in 1933. The park's designed features included the canal bridge, entrance portals, sports pavilion, banyan court, and lawn bowling green. Other Bent park projects included Mother Waldron Playground, Kawananakoa Playground, Ala Wai Clubhouse, the Haleiwa Beach Park structures, and the Lanakila Park comfort station. Utilizing popular Art Moderne and Art Deco design elements, he aimed to create a modern look for his park work, a break from typical park and playground design. Bent incorporated contemporary design aesthetics into his park plans, while earlier playground examples addressed only functionality.

Bent returned to the mainland around 1940, and settled in Pasadena, California, where he continued his landscape design work. Major works during his post-Hawaii period included the landscape plan for Hancock Park in Los Angeles and the master plan for the Los Angeles County Arboretum. Bent died in Pasadena on March 19, 1959.

Margaret "Mother" Waldron

Margaret "Mother" Waldron was born on August 12, 1873, in Honolulu of mixed Hawaiian and Irish heritage. Her career began at Pohukaina School where she taught the fourth grade. Mother Waldron's time outside of school was spent as a volunteer playground director at Atkinson Park and welfare worker in Kakaako. Her duties included coaching boys' football and baseball and teaching girls and women household duties and jam-making.

For her fiftieth birthday, the boys and girls of Kakaako gave Mother Waldron a pin bearing the word "mother." The pin became Mother Waldron's most prized possession. Mother Waldron was credited with nearly single-handedly ridding Kakaako of its gangs and turning their members into law-abiding citizens. She helped transform the district's unpleasant reputation and would be greeted with "Aloha Mother" throughout Kakaako.[12]

Margaret Waldron died at St. Francis Hospital on May 8, 1936, and was buried on May 10, Mother's Day that year.[13]

Mother Waldron Playground

Mother Waldron Playground was originally a 1.76 acre site bounded by Coral, Halekauwila, and Pohukaina streets and Lana Lane on a parcel that the 1914 Sanborn Fire Insurance map noted contained the City and County Stables. Honolulu acquired the parkland in 1930 and 1931 through purchases and deeds from the territory of Hawaii. After several years, the Park Board

[11] Steve Salis, "Playful Architecture," *Hawaii Architect* (June 1985): 12-13.
[12] "Guava Class at Kakaako is Waldron Plan," *Honolulu Star-Bulletin*, February 27, 1930, 4.
[13] "Death Claims Mrs. Waldron, Friend of Poor," *Honolulu Advertiser*, May 8, 1936, 1.

approved and implemented Harry Sims Bent's plans for the playground in 1936. WPA labor was used to construct the park.

The site of the future playground was proposed to be named in 1930 for Margaret "Mother" Waldron, but she refused the honor.[14] Her name was given to the park following her death in 1936. Costing approximately $50,000 to construct, Mother Waldron Playground opened September 20, 1937 to much fanfare, including a performance by the Royal Hawaiian Band.[15]

Original Appearance of Mother Waldron Playground

Bent planned the playground following his successful design features at Ala Moana Park, implementing contemporary design elements reflecting the Art Moderne style. The symmetrical playground, situated in a dense residential, commercial, and industrial area, was designed to emphasize utility as well as beauty. Bent used concrete bricks to construct Mother Waldron Playground's walls, benches, and comfort station.

A perimeter wall delineated the playground boundaries along Coral, Pohukaina, and Halekauwila streets and Lana Lane. The wall contained horizontal and vertical perforated openings and was comprised of several brick courses, with some courses recessed to create horizontal bands. Each of the park's corners contained a convex curve entry with rounded piers anchoring the walls' ends. Along Coral Street, the wall was executed in a triangular zig-zag form and opened to Coral Street, while Halekauwila and Pohukaina streets provided squared zig-zag walls. Lana Lane's wall was straight, did not zig-zag, and contained no horizontal bands or perforations. The entire perimeter wall was topped by recessed concrete coping with alternating straight and zig-zag edges.

Laid out symmetrically, the park's mauka end was to be used by younger children while the makai end was to be used by older children. An oval, grassy area and comfort station divided the two halves at the playground's center. The park utilized an Art Moderne style that was increasing in popularity during the time, yet seldom used for parks and playgrounds. Both sides contained volleyball, basketball, and shuffleboard courts. The mauka end contained swings and seesaws, while the makai end contained handball courts.

Bent's central Art Moderne feature was a comfort station that employed a streamlined and unornamented facade, rounded corners and columns, and covered walkways curving away from the comfort station. The comfort station contained men's and women's restrooms, drinking fountains at the entrances of both restrooms, and changing areas inside. At the comfort station's center, a raised and rounded platform provided an outdoor stage area with a pilaster-lined alcove backdrop. The stage, its surrounding area, and floor beneath the covered walkway were paved with the same sandstone flagstone found at the park's Coral Street entrance.

[14] "Playground Given Name of Pioneer," *Honolulu Advertiser*, February 19, 1930, 1.
[15] "Waldron Playground—Kakaako Beauty Spot," *Honolulu Advertiser*, September 20, 1937, 5; "Playground to Open Monday," *Honolulu Star-Bulletin*, September 13, 1937, 12; "$50,000 Mother Waldron Park Officially Opened," *Honolulu Advertiser*, September 21, 1937, 1.

Park benches topped with terracotta tile were found within the perimeter wall in alcoves created by the wall's zig-zag as well as in the middle of each play area. Most benches were straight, but the benches along the Coral Street wall curved to fit their spaces. An additional low wall topped with terracotta was located beneath the comfort station's covered walkway, running parallel to the higher wall along Lana Lane. Trees were planted in openings created by the perimeter wall's zig-zag shape, providing shade to the park's users.[16]

Mother Waldron Playground's Use of Contemporary Architectural Styles

Harry Sims Bent's design for Mother Waldron Playground reflected heavy influence from the streamlined Art Moderne style popular at the time. Art Moderne emphasized horizontal lines, flat roofs, smooth surfaces, and curvilinear edges. Art Moderne and its counterpart, Art Deco, which utilized vertical lines and geometric patterns, were seen as a rejection of classical architectural themes. Both design motifs embraced architectural elements deemed appropriate for the modern era. Bent was inspired by these national architectural trends, and desired to create a playground that was viewed as a contemporary design expression, moving beyond mere playground utility.[17]

Changes to Mother Waldron Playground

According to the 1988 Hawaii Register of Historic Places nomination form that included Mother Waldron Playground, renovations were made to Mother Waldron Playground's comfort station in 1968. The form does not state the extent of the renovations; a visual inspection indicated that no substantial alterations occurred, as many original features and finishes remained intact. Additionally, the Department of Parks and Recreation resurfaced the playground in 1978.[18] In 1991-1992, Halekauwila Street was realigned through Mother Waldron Playground, removing approximately 12,700 square feet of the original park's mauka end and a small portion along Pohukaina Street. To mitigate this taking, the city added approximately 54,000 square feet of Mother Waldron Playground and removed Lana Lane greatly enlarging the park. The expansion included extending the park Diamond Head, removing the park's bordering wall along Lana Lane, and reconstructing the park's perimeter walls along Halekauwila and Pohukaina streets.[19] In 1994-1995, Coral Street was closed between Halekauwila and Pohukaina streets and included in the expansion of Mother Waldron Playground, adding approximately 25,800 square feet to the park. These additions are now considered non-contributing sites within the greater Mother Waldron Playground site.

[16] Research did not provide the specific varieties of trees originally planted at Mother Waldron Playground.
[17] Weyeneth and Yoklavich, *1930s Parks and Playgrounds in Honolulu,* 16.
[18] Mother Waldron Playground, City & County of Honolulu Art Deco Parks Hawaii Register of Historic Places nomination form, April 20, 1988.
[19] See above Architectural and Landscape Description: Alterations.

Prior Documentation of Mother Waldron Playground

Mother Waldron Playground was listed in the Hawaii Register of Historic Places on June 9, 1988, as an element of the thematic group "City & County of Honolulu Art Deco Parks," prior to the extensive 1990s changes.

The playground was documented on a Determination of Eligibility form by Mason Architects, Inc. in 2008. This documentation assessed the property as eligible for listing in the National Register under Criteria A and C; the Hawaii State Historic Preservation Division (SHPD) concurred with this finding.

This nomination exists as part of the legal requirements in the *Programmatic Agreement Among the U.S. Department of Transportation Federal Transit Administration, The Hawaii 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, Hawaii*.[20]

Information discovered while performing research for this nomination revealed substantial changes that occurred in the playground in the 1990s that were not described in the 2008 Determination of Eligibility form. This nomination considers those changes.

Significance Evaluation

Mother Waldron Playground is eligible for the National Register of Historic Places under Criterion A for its association with the national playground movement, which aimed to provide supervised play and character-molding opportunities. The property correlates with the rise of playground construction in urban areas throughout the United States.

Mother Waldron Playground is not eligible under Criterion B. Although the park is named in honor of Margaret "Mother" Waldron, the property is not associated with her productive life or her lasting contributions to the Kakaako community.

This property is also eligible under Criterion C for its architectural and landscape design by Harry Sims Bent. The property displays a streamlined Art Moderne appearance with some Art Deco elements, a modern approach and a display of Harry Sims Bent's desire to create a pleasing environment for the park's users. Contributing features to Mother Waldron Playground include the remaining original Art Moderne playground site and the streamlined comfort station building. Non-contributing features include an approximately 1.5 acre site nearly doubling the size of the remaining Mother Waldron Playground original site as well as the former Coral Street area. These non-contributing sites became an extension of Mother Waldron Playground

[20] *Programmatic Agreement Among the U.S. Department of Transportation Federal Transit Administration, The Hawaii 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, Hawaii*, (January 2011).

following Halekauwila Street improvements in 1991-1992 and continued Kakaako district improvements through 1994-1995. Still, the retention of the playground's prominent Harry Sims Bent designed features, including the zig-zag wall and comfort station, allows Mother Waldron Park to be eligible under Criterion C.

The property retains its original historic function; thus, its period of significance for Mother Waldron Playground spans from its construction date in 1937 until 1945, when supervised play largely ceased and Honolulu's Board of Parks and Recreation was formed to rehabilitate Oahu's parks following World War II.

Social History

Mother Waldron Playground is associated with the playground movement across the United States and Honolulu's need for recreational facilities within urban areas. Playgrounds were viewed as a means to reform urban youth and help create law-abiding citizens through structured play.

Entertainment/Recreation

Mother Waldron Playground provided recreational facilities for urban-dwelling youth. The park did not allow children to play freely; instead, belief systems at the time required organized play for children overseen by a playground director.

Architecture and Landscape Architecture

Mother Waldron Playground is an example of Harry Sims Bent's architecture and landscape architecture work. At the time, Bent acted as the Honolulu Park Board's chief designer, planning parks and playgrounds throughout the 1930s. His Art Moderne with Art Deco design represented a modern approach for Mother Waldron Playground. Bent's design fulfilled the needs required by "organized play" by dividing the park into two halves for different age groups and also providing a comfort station for users. The park demonstrates Bent's desire to create a functional yet aesthetically pleasing urban playground.

Period of Significance

The period of significance for Mother Waldron Playground spans from 1937, when construction commenced, until 1945, when the playground movement that supported supervised play largely ceased and Honolulu's Board of Parks and Recreation was formed to rehabilitate Oahu's parks following World War II.

Integrity Evaluation

Mother Waldron Playground retains a moderate level of integrity of location. Original portions of the playground remain in place, but other areas originally associated with the playground are no longer part of the site, and other areas not historically part of the playground have been added.

The playground has a low level of integrity of materials, design, and workmanship. Halekauwila Street's realignment and the widening of Pohukaina Street have compromised the park's design, removing over 12,700 square feet of the original park boundaries and demolishing and replacing original features, diminishing the integrity of workmanship and materials. However, although many original features of the park have been removed and replaced, the playground retains a modest amount of original features, including most of the zig-zag wall and the comfort station, to demonstrate a low integrity of materials and workmanship. Mother Waldron Playground does not retain integrity of setting outside of the park; within the park open spaces and a general playground appeal contribute to a moderate level of integrity of setting. The Kakaako area has transitioned over time from a mix-use commercial and residential district to a largely industrial area. Mother Waldron Playground is now surrounded by these industrial buildings. Mother Waldron Playground retains its integrity of feeling as an Art Moderne-designed playground and its integrity of association with the early-1900s playground movement. Therefore, the playground retains integrity of feeling and association.

9. Major Bibliographical References

Bibliography (Cite the books, articles, and other sources used in preparing this form.)

"$50,000 Mother Waldron Park Officially Opened." *Honolulu Advertiser,* September 21, 1937.

Austin, Tsutsumi, and Associates, Inc. *Kakaako Traffic Study*. Honolulu: Hawaii Community Development Authority, 1991.

"Death Claims Mrs. Waldron, Friend of Poor." *Honolulu Advertiser*, May 8, 1936.

Gibson, Marsha. *Kaka'ako As We Knew It*. Honolulu: Mutual Publishing, 2011.

"Guava Class at Kakaako is Waldron Plan." *Honolulu Star-Bulletin*, February 27, 1930.

Joesting, Edward. *Hawaii: An Uncommon History*. New York: W.W. Norton & Co., 1972.

Letter from Michael N. Scarfone, Executive Director, Hawaii Community Development Authority, to Dona L. Hanaike, Director, Department of Parks and Recreation, December 14, 1994.

Mother Waldron Playground, City & County of Honolulu Art Deco Parks Hawaii Register of Historic Places nomination form, April 20, 1988.

"Playground Given Name of Pioneer." *Honolulu Advertiser*, February 19, 1930.

"Playground to Open Monday." *Honolulu Star-Bulletin*, September 13, 1937.

Salis, Steve. "Playful Architecture." *Hawaii Architect* (June 1985): 12-13.

State of Hawaii. Oahu Government Survey 1876, Registered Map No. 1380. Hawaii Land Survey Division, 1876.

State of Hawaii, et al. *Final Supplemental Environmental Impact Statement for the Kakaako Community Development District Plan*. Honolulu: Hawaii Community Development Authority, 1985.

Solomon, Susan G. *American Playgrounds: Revitalizing Community Space*. Lebanon, NH: University Press of New England, 2005.

"Waldron Playground-Kakaako Beauty Spot." *Honolulu Advertiser*, September 20, 1937.

Wall, W.A. Honolulu and Vicinity 1887, Hawaiian Government Survey. Library of Congress, 1887.

Yoklavich, Ann K. *Overview of Historic Honolulu Parks*. Honolulu: Department of Parks and Recreation, 1987.

Weyeneth, Robert R., and Ann K. Yoklavich. *1930s Parks and Playgrounds in Honolulu: an Historical and Architectural Assessment*. Honolulu: Department of Parks and Recreation, 1987.

Previous documentation on file (NPS):

____ preliminary determination of individual listing (36 CFR 67) has been requested
____ previously listed in the National Register
_____previously determined eligible by the National Register
_____designated a National Historic Landmark
____ recorded by Historic American Buildings Survey #_____
_____recorded by Historic American Engineering Record # _____
____ recorded by Historic American Landscape Survey # _____

Primary location of additional data:

____ State Historic Preservation Office
____ Other State agency
____ Federal agency
____ Local government
____ University
____ Other

Mother Waldron Playground
Name of Property

Honolulu County, Hawaii
County and State

Name of repository: _____

Historic Resources Survey Number (if assigned): _____

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10. Geographical Data

Acreage of Property 3.76

Use either the UTM system or latitude/longitude coordinates

Latitude/Longitude Coordinates
Datum if other than WGS84:_____
(enter coordinates to 6 decimal places)

1. Latitude: 21.299251 Longitude: -157.858407
2. Latitude: Longitude:
3. Latitude: Longitude:
4. Latitude: Longitude:

Or
UTM References
Datum (indicated on USGS map):

☐ NAD 1927 or ☐ NAD 1983

1. Zone:	Easting:	Northing:
2. Zone:	Easting:	Northing:
3. Zone:	Easting:	Northing:
4. Zone:	Easting :	Northing:

Verbal Boundary Description (Describe the boundaries of the property.)

See Map Attachment

Boundary Justification (Explain why the boundaries were selected.)

Mother Waldron Playground's boundary includes the entire area presently called Mother Waldron Playground. This footprint includes a portion of the original playground, its Diamond Head expansion, and the former Coral Street area between Halekauwila and Pohukaina streets. Although the playground's size was altered in the 1990s, these changes did not affect the playground's use as a public playground. This boundary corresponds to the boundary concurred to by the Hawaii State Historic Preservation Division in an earlier 2008 eligibility assessment, despite 1990s changes to the playground.

The boundary encompasses all of the remaining original resources and features that comprise the property, as well as more recent additions. The National Register boundary has been prepared in accordance with guidelines established by the National Register Bulletin, "Defining Boundaries for National Register Properties."[21]

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11. Form Prepared By

name/title: Cultural Resources Team
organization: Honolulu Authority for Rapid Transportation
street & number: 1099 Alakea Street, 17th Floor
city or town: Honolulu state: Hawaii zip code: 96813
e-mail
telephone: (808) 566-2299
date: 2/1/2013

Additional Documentation

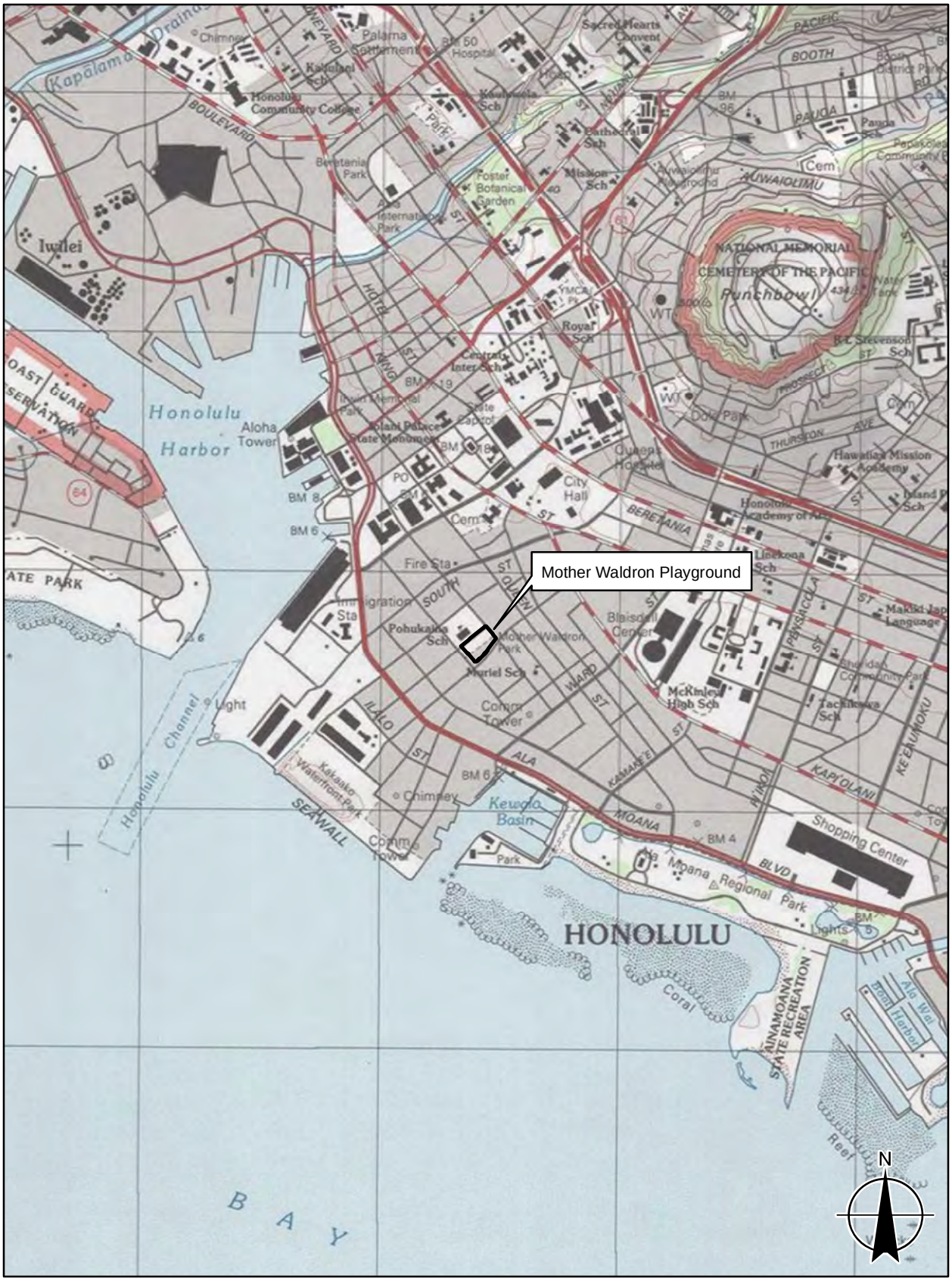
Submit the following items with the completed form:

- **Maps:** A **USGS map** or equivalent (7.5 or 15 minute series) indicating the property's location.
- **Sketch map** for historic districts and properties having large acreage or numerous resources. Key all photographs to this map.
- **Additional items:** (Check with the SHPO, TPO, or FPO for any additional items.)

[21] National Park Service, *National Register Bulletin: Defining Boundaries for National Register Properties* (Washington, D.C.: United States Department of the Interior, 1997).

Mother Waldron Playground
Bounded by Coral Street, Halekauwila Street, Pohukaina Street, and Cooke Street
City and County of Honolulu, Hawaii
Hawaii Register of Historic Places, No. 80-14-1388

Mother Waldron Playground

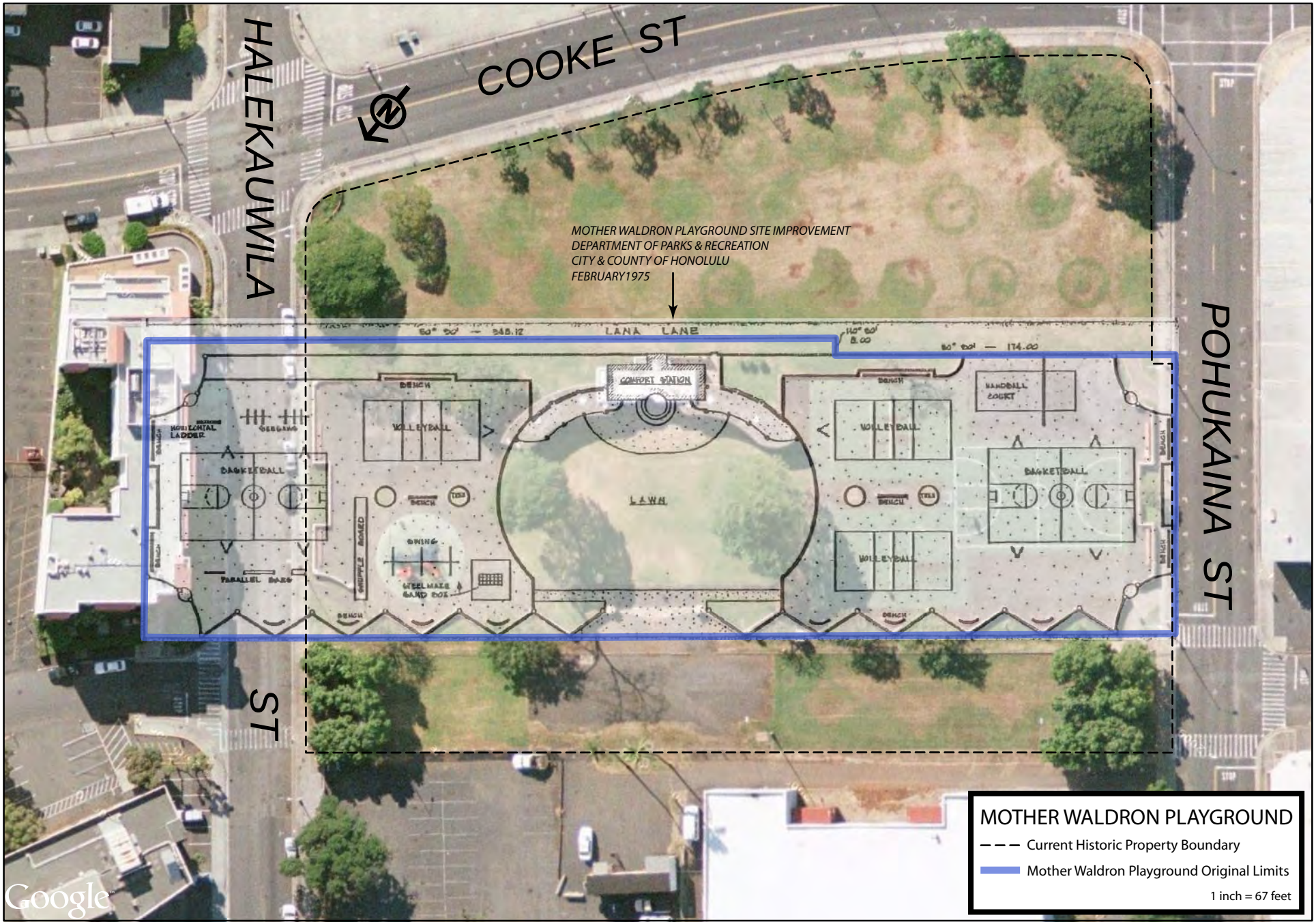


USGS Honolulu Quad, 1998

Property Boundary

1,000 Feet

1:24,000


HALEKAUWILA ST
COOKE ST
POHUKAINA ST
MOTHER WALDRON PLAYGROUND SITE IMPROVEMENT
DEPARTMENT OF PARKS & RECREATION
CITY & COUNTY OF HONOLULU
FEBRUARY1975
LANA LANE
COMFORT STATION
VOLLEYBALL
BASKETBALL
LAWN
HANDBALL COURT
SWING
PARALLEL BARS
BENCH
Google
MOTHER WALDRON PLAYGROUND
Current Historic Property Boundary
Mother Waldron Playground Original Limits
1 inch = 67 feet

Photographs

Submit clear and descriptive photographs. The size of each image must be 1600x1200 pixels (minimum), 3000x2000 preferred, at 300 ppi (pixels per inch) or larger. Key all photographs to the sketch map. Each photograph must be numbered and that number must correspond to the photograph number on the photo log. For simplicity, the name of the photographer, photo date, etc. may be listed once on the photograph log and doesn't need to be labeled on every photograph.

Photo Log

Name of Property: Mother Waldron Playground

City or Vicinity: Honolulu

County: Honolulu State: Hawaii

Photographer: Charles Greenleaf

Date Photographed: 11/17/2012

Description of Photograph(s) and number, include description of view indicating direction of camera:

1 of 8. View south toward Mother Waldron Playground from Halekauwila Street and Coral Street into original playground area

2 of 8. View north from Pohukaina Street and the former Lana Lane into original playground area

3 of 8. View northeast from wall along Pohukaina Street into original playground area

4 of 8. View southwest from Halekauwila Street and 1991-1992 expansion area toward original playground area

5 of 8. View north from Pohukaina Street toward original playground area and its former handball court

6 of 8. View northeast from Pohukaina Street toward original playground area and 1991-1992 expansion area

7 of 8. View northeast toward comfort station

8 of 8. View east toward comfort station from original playground entrance at Coral Street

Paperwork Reduction Act Statement: This information is being collected for applications to the National Register of Historic Places to nominate properties for listing or determine eligibility for listing, to list properties, and to amend existing listings. Response to this request is required to obtain a benefit in accordance with the National Historic Preservation Act, as amended (16 U.S.C.460 et seq.).

Estimated Burden Statement: Public reporting burden for this form is estimated to average 100 hours per response including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. Direct comments regarding this burden estimate or any aspect of this form to the Office of Planning and Performance Management. U.S. Dept. of the Interior, 1849 C. Street, NW, Washington, DC.

Photo 1.

Photo 2.

Photo 3.

Photo 4.

Photo 5.

Photo 6.

Photo 7.

Photo 8.

HAWAII COMMUNITY DEVELOPMENT AUTHORITY

KAKAAKO KALAEOA

Neil Abercrombie
Governor

Brian Lee
Chairperson

Anthony J. H. Ching
Executive Director

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Ref. No.: PL GEN 1.28a

March 13, 2013

Ms. Joanna Morsicato
Deputy Chief, Planning and Environment
Honolulu Authority for Rapid Transportation
1099 Alakea Street, Suite 1700
Honolulu, Hawaii 96813

Dear Ms. Morsicato:

Re: National Register of Historic Places Registration Form
for Mother Waldron Playground

Thank you for the opportunity to comment on the subject nomination form for the Mother Waldron Playground located in the Kakaako Community Development District Mauka Area. We offer the following comments on the application:

- The property, as presented in the narrative description, includes two areas that do not meet the significance criteria identified in Section 9, Page 11. The two areas include:

  a. A grassy area adjacent to the historic comfort station and perimeter walls. The grassy area is identified as TMK: 1-2-1-51: 003 and was constructed in 1992 as an expansion to Mother Waldron Playground under the Hawaii Community Development Authority's ("HCDA") Improvement District 3 project. The grassy area was previously owned by Kamehameha Schools and was comprised of two-story industrial warehouses built in the early 1950s.

  b. The former Coral Street, a functioning street, was closed and landscaped in the early 1990s.

  The significance criteria cited includes: (1) *Criterion A:* Area of social history and entertainment/recreation for its association with the organized play and playground movement in the United States during the early twentieth century; and

(2) *Criterion C:* Area of architecture and landscape architecture for its Art Moderne playground design. Neither the grassy area nor the former Coral Street are associated with the organized play and playground movement in the United States in the early twentieth century nor is of the Art Moderne playground design. These two areas should not be included as part of the historic Mother Waldron Playground.

We do, however, support the nomination of the comfort station, walls and benches designed by Harry Sims Bent. We note that this portion of Mother Waldron Playground (identified as TMKs: 1-2-1-51: 005 and 006) was placed on the Hawaii Register of Historic Places in 1989.

- In Section 7, Page 8, second paragraph, we note it was the HCDA, not the City and County of Honolulu that promulgated plans to revitalize the Kakaako District.

- In Section 7, Page 9, Item No. 8, Statement of Significance, the grassy area nor the former Coral Street are not associated with events that have made a significant contribution to the broad patterns of our history nor does it embody the distinctive characteristics of a type, period, or mention of construction or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components lack individual distinction.

- Section 9, Page 13, second paragraph, it was the HCDA, not the City and County of Honolulu that made efforts to improve roadway infrastructure in the Kakaako Community Development District. The HCDA is a State agency.

In summary, we respectfully ask that the grassy area and the former Coral Street be removed from the property description and the project site be contained to the area designed by Harry Sims Bent, including the walls, benches and comfort station.

Should you have any questions regarding this matter, please contact Mr. Deepak Neupane, Director of Planning and Development, at 594-0300 or via email at: deepak@hcdaweb.org.

Sincerely,

Anthony J. H. Ching
Executive Director

AJHC/DN/ST:ak