IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15277

HONOLULUTRAFFIC.COM; *et al*,

Plaintiffs-Appellants,

v.

FEDERAL TRANSIT ADMINISTRATION; *et al.*

Defendants-Appellees,

and

FAITH ACTION FOR COMMUNITY EQUITY; *et al.*

Defendants-Intervenors-Appellees

On Appeal from the United States District Court,
For the District of Hawaii
Civil No. 11-00307 AWT

PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE

NICHOLAS C. YOST (35297)
MATTHEW G. ADAMS (229021)
DENTONS US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

Attorneys for Plaintiffs-Appellants
HONOLULUTRAFFIC.COM; *et al.*

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I. INTRODUCTION

If this Court does not act, the very integrity of historic Honolulu, its Chinatown, and its waterfront will be forever despoiled.

This case concerns the City and County of Honolulu's efforts to use billions of dollars in federal funds to force an ill-conceived elevated heavy rail line through the heart of downtown Honolulu, despite the fact that other, less-damaging alternatives exist. Those efforts violate section Section 4(f) of the Department of Transportation Act, which declares that "it is the policy of the United States Government that special effort should be made to preserve…public park and recreation lands…and historic sites" from transportation projects.[1] In the words of the Supreme Court, Section 4(f) serves as a "plain and explicit bar" to the use of federal funds for transportation projects that would irreparably harm parks and historic resources.[2]

Moreover, by illegally discarding every means of addressing Honolulu's transportation issues except an elevated heavy rail system, the City and the Federal

[1] 49 U.S.C. § 303(a); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 404-406 n.1-2 (national policy).

[2] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971). *Citizens to Preserve Overton Park* remains the only Supreme Court case to address Section 4(f).

Transit Administration violated the National Environmental Policy Act ("NEPA"), which mandates consideration of all reasonable alternatives.[3]

The City recently revealed that it intends to begin construction of the Project at the end of September, 2013. Plaintiffs-Appellants respectfully request expedited treatment so that this appeal may be resolved on its merits prior to construction, thereby avoiding the possibility of mootness, irreparable harm, and emergency motions for injunctive relief.

II. FACTUAL AND PROCEDURAL HISTORY

A. THE HONOLULU HIGH-CAPACITY TRANSPORTATION CORRIDOR PROJECT

Plaintiffs-Appellants ("Appellants"),[4] challenge the approval of the Honolulu High-Capacity Transportation Corridor Project ("the Project"), an elevated heavy rail system proposed to be built through the downtown Honolulu waterfront and across 20 miles of the southern portion of the island of Oahu, significantly impacting a variety of natural, historic, and cultural resources (including Native Hawaiian burials) and creating a massive new 4-story concrete barrier along the way.

[3] 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14.

[4] Appellants are a coalition of business, environmental, Native Hawaiian, and community leaders.

The Project is proposed to be built in four phases. Phases 1, 2, and 3 of the Project include approximately 17 of the rail line's 20 miles.[5] Phase 4 is limited to the easternmost portion of the rail line and is scheduled to be built after Phases 1, 2, and 3.[6]

In approving the Project, the City Defendants-Appellees (the "City")[7] and the Federal Defendants-Appellees (the "Federal Transit Administration" or "FTA")[8] were required to comply with both NEPA and Section 4(f). As relevant here, NEPA required the FTA (1) to define the "Purpose and Need" for the Project broadly enough to permit consideration of other options[9] and (2) to "[r]igorously explore and objectively consider all reasonable alternatives" to proceeding with the Project.[10] Section 4(f) prohibited the FTA from approving any transportation

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[5] Declaration of Matthew Adams In Support Of Plaintiffs-Appellants' Motion To Expedite ("Adams Dec.") ¶ 2, Ex. A

[6] Adams Dec. ¶ 2, Ex. A.

[7] The City Defendants-Appellees include the City and County of Honolulu and Michael Formby, the City's Director of Transportation Services. The City is the proponent of the Project.

[8] The Federal Defendants-Appellees include the Federal Transit Administration ("FTA"); the United States Department of Transportation; and Leslie Rogers, Peter Rogoff, and Ray LaHood (federal officials sued in their official capacities). The FTA is the lead federal agency charged with reviewing and overseeing the Project.

[9] *Nat'l Parks & Conservation Ass'n v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010) *cert denied* 130 S. Ct. 1783 (2011).

[10] 40 C.F.R. § 1502.14.

project that would significantly impact (or "use") a park or historic resource unless there was no feasible and prudent alternative.[11]

In purported compliance with these (and other) requirements, FTA and the City prepared an "Environmental Impact Statement and Section 4(f) Evaluation" ("EIS"). But the EIS did not provide a detailed evaluation of any transit options other than elevated heavy rail — indeed, the only "alternatives" evaluated in detail were two elevated heavy rail lines passing along virtually-identical routes.[12] Most notably, the EIS did not evaluate in detail a Bus Rapid Transit alternative, a light rail alternative, or the alternative of developing a system of high-occupancy vehicle lanes.[13] Instead, the EIS stated that those alternatives had been eliminated from consideration before the impact statement was prepared.[14] That approach violated NEPA and predetermined a violation of Section 4(f).

[11] Section 4(f) prohibits federal approval or funding of a transportation project that will use a public park or an historic resource unless "there is no prudent and feasible alternative" and "the…project includes all possible planning to minimize harm." 49 U.S.C. § 303(c); *see also* 23 C.F.R. § 774.3(a) (reiterating same prohibition in Section 4(f) implementing regulations).

[12] Adams Dec. ¶ 3, Ex. B.

[13] Adams Dec. ¶ 3.

[14] Adams Dec., ¶ 3.

B. THE DISTRICT COURT DECISION

1. Alternatives To Elevated Heavy Rail

The District Court nonetheless concluded that Appellees' decision to exclude from the EIS a detailed analysis of alternatives to elevated heavy rail did not violate NEPA and Section 4(f). That conclusion — from which Appellants now appeal — was erroneous in several respects. The District Court's principal errors include the following:

First, approval of the Project was subject to Section 4(f)'s 2008 implementing regulations.[15] The 2008 regulations supersede any inconsistent provisions of previously-issued regulations or guidance.[16] The District Court improperly based its decision on pre-2008 guidance and case law which are inconsistent with the explicit and mandatory requirements set forth in the 2008 Section 4(f) regulations (and with underlying law).[17]

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[15] *See* 73 Fed. Reg. 13368 (March 12, 2008) (regulations become effective on April 11, 2008); 76 Fed. Reg. 4150 (January 24, 2011) (final action on Project taken in January, 2011).

[16] *See*, *e.g.*, 73 Fed. Reg. 13368, 13374 (March 12, 2008) ("The [] 'Section 4(f) Policy Paper'…remains in effect except where it could be interpreted to conflict with this regulation, in which case the regulation takes precedence").

[17] *See* Adams Dec. ¶ 4, Ex. C at 21:23 to 22:6 (relying on pre-2008 case law and "Section 4(f) Policy Paper"). In particular, the District Court erred by relying on pre-2008 case law and guidance for the proposition that an agency can summarily reject alternatives deemed inconsistent with project purposes without weighing the (perceived) drawbacks of those alternatives against the value of preserving Section 4(f) resources. *Compare id*. (citing case law and Section 4(f) Policy Paper for the

Second, the District Court erroneously accepted the FTA's representation that Bus Rapid Transit is indistinguishable from the "Transportation System Management" (or "TSM") alternative rejected by the City in 2006.[18] The administrative record clearly shows that the TSM alternative rejected by the City in 2006 did not include a new Bus Rapid Transit system; indeed, the TSM alternative did not include any major new transit projects.[19]

Third, in upholding Appellants decision to exclude Bus Rapid Transit from detailed consideration in the EIS, the District Court erroneously ignored the fact that *just three years earlier* the City and FTA had published a separate EIS concluding that Bus Rapid Transit was the best transit alternative for the Honolulu area.[20] The District Court never explained how the alternative the City and FTA

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proposition that no weighing analysis is necessary) *with* 73 Fed. Reg. 13368, 13391 (2008 regulations "require[] the [agency] to take into consideration the importance of protecting the Section 4(f) property"); *see also* 23 C.F.R. § 774.17 (definition of feasible and prudent avoidance alternative).

[18] Adams Dec. ¶ 6, Ex. E at 70:19-24.

[19] A 2006 document titled "Detailed Definition of Alternatives Hawaii High-Capacity Transit Corridor Project" explains that while the TSM alternative includes minor changes to the pre-existing bus system, but does not include any "major capital investment." *See* Adams Dec. ¶ 7, Ex. F (AR 49517). According to the FTA's own regulations, a Bus Rapid Transit system is a "major capital investment." *See, e.g.*, 49 C.F.R. § 611.103(a).

[20] Adams Dec. ¶ 12, Ex. J (comparing alternatives and concluding that Bus Rapid Transit is best).

previously deemed best could properly be dismissed without detailed analysis just a few years later.[21]

Fourth, the District Court concluded that (1) the Purpose and Need for the Project was defined broadly enough to allow for consideration of reasonable alternatives to a heavy rail system[22] *and, simultaneously,* that (2) the City and FTA properly rejected every single alternative to a heavy rail system as inconsistent with the Project's Purpose and Need.[23] There is no logical way to reconcile the two conclusions.[24]

2. Traditional Cultural Properties, Mother Waldron Park, and Beretania Tunnel

While the District Court erred in upholding Appellees' approach to addressing alternatives to elevated heavy rail, it properly ruled for Appellants on three other issues arising under Section 4(f). Specifically, the District Court held

[21] Adams Dec. ¶ 4, Ex. C at 21-29, 32-39 (discussion of alternatives fails to mention separate Bus Rapid Transit EIS).

[22] Adams Dec. ¶ 4, Ex. C at 29-32.

[23] Adams Dec. ¶ 4, Ex. C at 2 (elevated heavy rail alternative was the only one to satisfy the Project's purpose and need), 32-39 (upholding NEPA alternatives analysis).

[24] Indeed, the District Court's erroneous decision to uphold a statement of Purpose and Need for a "transit" project which eliminates all non-rail alternatives ensured its equally erroneous failure to enforce NEPA's requirement to examine "all reasonable alternatives" and 4(f)'s requirement to select an alternative which avoids impacts to both historic sites (including burials) and parks.

that Appellees violated Section 4(f) by: (1) failing to identify and evaluate Traditional Cultural Properties ("TCPs") before approving the Project; (2) arbitrarily and capriciously concluding that the Project will not use Mother Waldron Park, a public park and historic site; and (3) failing to consider whether a short section of the rail line could be routed through a tunnel beneath Beretania Street.[25]

C. THE DISTRICT COURT'S JUDGMENT AND PARTIAL INJUNCTION

After further briefing and oral argument regarding the appropriate remedy for Appellees' three violations of Section 4(f), the District Court issued a "Judgment and Partial Injunction" (the "Judgment").[26] The Judgment enjoined construction in Phase 4 of the Project, but it did not invalidate FTA's approval of the Project and it explicitly authorized construction in Phases 1, 2, and 3 of the Project to proceed.[27]

D. THE STATE BURIALS CASE

Unlike the District Court, the Hawaii Supreme Court properly determined that the Project should be enjoined for failing to comply with historic preservation laws. In *Kaleikini v. Yoshioka*, 283 P.3d 60 (Haw. 2012), it held that the City

[25] Adams Dec. ¶ 4, Ex. C at 12, 19-21, 24-27, 44.

[26] Adams Dec. ¶5, Ex. D.

[27] Adams Dec. ¶5, Ex. D.

violated state laws protecting Native Hawaiian burials and cultural resources and it prohibited any construction until the City completes Archaeological Inventory Surveys (often referred to as "AISs") for the entire Project route.[28] Construction of the Project is temporarily stayed pending the City's compliance with that mandate.

E. THE CITY'S CONSTRUCTION SCHEDULE AND MOTION TO DISMISS

While this matter was before the District Court, Appellants worked with the City and the FTA to schedule a relatively prompt hearing, thereby avoiding the need for the case to be heard multiple times (once in the context of proceedings for preliminary/temporary injunctive relief and a second time in the context of motions for summary judgment).[29]

In an effort to resolve this appeal in an equally efficient manner, Appellants spent approximately two weeks trying to obtain information about the status of the City's construction plans.[30] During conversations with counsel for the FTA and counsel for the City, counsel for Appellants requested specific information about the City's construction plans and proposed that the parties develop a mutually-agreeable schedule allowing this appeal to be resolved prior to the City's planned

[28] *Kaleikini v. Yoshioka*, 283 P.3d 60, 71-81 (Haw. 2012)

[29] Adams Dec. ¶ 8.

[30] Adams Dec. ¶ 8-9.

construction date.[31] Finally, on April 4, 2013, Counsel for the City responded that it was not possible to provide a more specific timetable for construction.[32]

Instead, on April 5, 2013, the City filed a motion to dismiss this appeal. The City's motion to dismiss argues that this Court lacks jurisdiction under 28 U.S.C. § 1291 because the Judgment (which says, on its face, "the court now enters its final judgment") lacks finality.[33] The City's motion to dismiss implicitly concedes that even if this Court lacks jurisdiction under 28 U.S.C. § 1291, appellate jurisdiction would exist under 28 U.S.C. § 1292.[34]

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[31] Adams Dec. ¶ 9.

[32] Adams Dec. ¶ 9, Ex. G.

[33] City Defendants-Appellees' Motion to Dismiss (Ninth Cir. Dkt. Entry 8) at 8-15; Adams Dec. ¶ 5, Ex. D at 2 ("the court now enters its final judgment"). The Intervenors-Appellees joined in the City's Motion to Dismiss (Ninth Cir. Dkt. Entry 9). The Federal Appellees later filed a "Response in Support" of the City's Motion to Dismiss (Ninth Cir. Dkt. Entry 10). Neither the Intervenors-Appellees nor the Federal Appellees made any arguments not raised by the City.

[34] *See* 28 U.S.C. § 1292(a)(1) (appellate jurisdiction over interlocutory orders granting or denying injunctive relief); Adams Dec. ¶ 5, Ex. D at 2-3 (Judgment grants in part and denies in part Appellants' request for permanent injunction). Although the City properly concedes (in a footnote) that jurisdiction may exist under 28 U.S.C. §1292, it erroneously contends that such jurisdiction does not extend to the merits of the case. City Defendants-Appellees' Motion to Dismiss (Ninth Cir. Dkt. Entry 8) at 16 n.2. Because the merits of the case determined the scope of the District Court's injunction, this Court would have jurisdiction over both. *See Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 824 (9th Cir. 2002) abrogated on other grounds as stated in *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008).

On April 12, 2013 (one week after counsel for the City stated that it was not possible to provide a specific timetable for construction), *Pacific Business News* published an article about the status of the Project.[35] The article quotes the Executive Director of the Honolulu Agency for Rapid Transit ("HART"), the City agency charged with building and operating the Project, as saying that the City plans to start construction at the end of September, 2013.[36]

On April 15, 2013, Appellants filed their opposition to the City's motion to dismiss this appeal.[37] Appellants' opposition explained that the appeal should not be dismissed because (1) the Judgment is a final decision (as it says right on its face) and (2) even if the Judgment were an interlocutory order, this Court would have jurisdiction under 28 U.S.C. § 1292(a)(1).[38]

Appellants' opposition brief also explained that the City's request to postpone appellate review makes little practical sense. This appeal determines *whether* NEPA and Section 4(f) permit a heavy rail system to be built; the City's supplemental analysis merely addresses the details of *how* the City would implement the fourth and final phase of such a system. Postponing the former

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[35] Adams Dec. ¶9, Ex. G (statement of counsel) and ¶ 11, Ex. I (article).

[36] Adams Dec. ¶ 11, Ex. I.

[37] Plaintiffs-Appellants' Opposition To Motion To Dismiss (Ninth Cir. Dkt. 11-7).

[38] Plaintiffs-Appellants' Opposition To Motion To Dismiss (Ninth Cir. Dkt. 11-7) at 8-20.

inquiry until the latter inquiry is complete would be grossly inefficient.[39] It would also risk mooting the case.[40] And it would unnecessarily increase the overall cost of resolving this dispute by forcing the parties to resort to emergency motion practice.[41]

In short, expedition of this case — rather than delay — will best serve the interests of both fairness and efficiency. Therefore, Appellants now respectfully move for expedited treatment pursuant to Circuit Rule 27-12.

III. THERE IS GOOD CAUSE FOR EXPEDITED TREATMENT

Circuit Rule 27-12 provides that "[m]otions to expedite briefing and hearing may be filed and will be granted upon a showing of good cause."[42] Rule 27-12 further specifies that good cause "includes, but is not limited to, situations in which…in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot."[43] Here, there is good cause to grant Appellants'

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[39] Plaintiffs-Appellants' Opposition To Motion To Dismiss (Ninth Cir. Dkt. 11-7) at 11-16.

[40] Plaintiffs-Appellants' Opposition To Motion To Dismiss (Ninth Cir. Dkt. 11-7) at 11-13.

[41] Plaintiffs-Appellants' Opposition To Motion To Dismiss (Ninth Cir. Dkt. 11-7) at 13-14.

[42] Circuit Rule 27-12.

[43] Circuit Rule 27-12.

motion because expedited treatment would avoid mootness, avoid irreparable harm, and promote judicial economy.

A. MOOTNESS

In this appeal, Appellants will demonstrate that Appellees violated NEPA and Section 4(f) by failing to consider and adopt alternatives to building an elevated heavy rail line.[44] The City has now revealed plans to begin construction of its elevated heavy rail line at the end of September.[45] Expedited treatment would allow this Court to hear the merits of the appeal before construction begins, thereby avoiding the possibility of mootness. In the absence of expedited treatment, on the other hand, construction of (at least) three of the rail line's four phases will be well under way by the time the appeal is heard, creating a significant risk of mootness.[46]

B. IRREPPARABLE HARM

Expedited treatment is also necessary in order to avoid irreparable harm. The Project would cause significant, unmitigable impacts to a variety of

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[44] *See* part II.B.1, above.

[45] Adams Dec. ¶ 11, Ex. I.

[46] *See* Circuit Rule 27-12 (good cause for expedited treatment where appeal *may* become moot). For the record, Appellants neither argue nor concede that the entire appeal *will* be mooted the moment construction begins. But the City's plan to begin construction before this Court can review the merits of the case clearly demonstrates that the appeal *may* become moot in the absence of expedited treatment. *See* Circuit Rule 27-12.

environmental, historic, and cultural resources. Expedited treatment would allow this Court to hear the case prior to the City's planned construction date, thereby avoiding a significant risk that irreparable harm will occur while the appeal is pending.[47]

C. JUDICIAL ECONOMY

Expedited treatment would also promote judicial economy. In the absence of expedited treatment, the dangers of mootness and irreparable harm could only be addressed by seeking injunctive relief. Proceedings for injunctive relief would require multiple filings in multiple courts,[48] all of which would be largely duplicative of the parties' briefing on the merits of the appeal.[49] More than five months remain before the City's planned construction date — plenty of time for the parties to brief the case in an orderly fashion and proceed to a decision without

[47] Circuit Rule 27-12.

[48] Fed. R. App. P. 8 (party must ordinarily move first in the district court).

[49] The first element of the standard for granting injunctive relief pending appeal is the likelihood that appellants will succeed on the merits of their appeal. *See, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 692, 694-71 (9th Cir. 2011) (stay pending appeal). If this case is not expedited, the parties would brief the merits of their appellate positions at least three different times: once in the context of Appellants' request to the District Court for an injunction pending appeal; a second time in the context of a request to this Court for an injunction pending appeal (or, should the District Court grant Appellants' request for an injunction pending appeal, in the context of Appellees' likely appeal of that decision); and a third time in the context of the "merits" of the appeal.

resorting to a costly, inefficient, and potentially-burdensome series of emergency requests for, oppositions to, and appeals from injunctive relief.[50]

IV. STATUS OF TRANSCRIPT PREPARATION

Appellants timely ordered the preparation of all transcripts on March 13, 2013. Transcript requests were completed (and a Certificate of Record filed) on April 5, 2013.

V. POSITION OF OPPOSING COUNSEL

Beginning on March 25, 2013, counsel for the Appellants spent approximately two weeks attempting to negotiate a mutually-agreeable schedule with counsel for the City and FTA.[51] Ultimately, neither the City nor FTA would agree to expedite the case.[52]

Counsel for FTA expressed three concerns: (1) the complicated nature of the Project, (2) the size of the administrative record, and (3) the fact that the City opposes expediting the case.[53]

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[50] Appellants note that *if* injunctive relief should nonetheless become necessary (if, for example, the City decides to significantly accelerate its construction timetable), expedited treatment would help minimize the delays (and therefore costs) associated with an injunction. In previous proceedings, the City has suggested that even a short injunction may be costly; expedited treatment would avoid that risk.

[51] Adams Dec. ¶9, Ex. G.

[52] Adams Dec. ¶9, Ex. G.

[53] Adams Dec. ¶9, Ex. G.

Counsel for the City took the position that it is premature to discuss a schedule for resolving this appeal because (1) Appellants have not yet filed their opening brief and (2) the City believes that this Court lacks jurisdiction to hear the appeal under 28 U.S.C. § 1291.[54]

Appellants understand that counsel for the Intervenor-Defendant Appellees ("Intervenors") shares the City's position. Counsel for Appellants requested that counsel for Intervenors clarify any inaccuracies in that understanding, but has not yet received any response to that request.[55]

VI. RELIEF REQUESTED

A. BRIEFING SCHEDULE

In view of (1) the current Time Schedule Order, (2) the City's plan to begin construction at the end of September and (3) the fact that the current briefing schedule is temporarily suspended pending the outcome of the City's Motion to Dismiss,[56] Appellants respectfully request the following briefing schedule:

[54] Adams Dec. ¶9, Ex. G.

[55] Adams Dec. ¶ 10, Ex. H.

[56] Circuit Rule 27-11.

	Current	Proposed
Appellants' opening brief and excerpts of record	May 22, 2013	The later of (a) May 15, 2013 or (b) 10 days after this Court decides the City's Motion to Dismiss
Appellees' answering brief and excerpts of record	June 14, 2013	The later of (a) June 10, 2013 or (b) 30 days after service of Appellants' opening brief
Appellants' optional reply brief	Within 14 days of service of Appellees' answering brief	Within 14 days of service of Appellees' answering brief

Appellants also request that no further extensions to briefing deadlines be granted. This is an administrative record review case, the administrative record was prepared more than a year ago, all parties are in possession of the administrative record, and all parties thoroughly reviewed and briefed the contents of the administrative record during the District Court proceedings. There is no reason why appellate briefing should be delayed.

B. ORAL ARGUMENT

Appellants understand that this Court has scheduled sessions on August 8 and 9 in Pasadena, California, and on August 12, 13, 14, 15, and 16 in Anchorage, Alaska and San Francisco, California. Appellants respectfully request that this case be scheduled for oral argument on one of those dates (or as soon thereafter as

is convenient for the Court) so that this appeal may be resolved on the merits prior to the City's construction of the Project and without the need for emergency motions regarding an injunction pending appeal.

Dated: April 19, 2013

DENTONS US LLP

By /s/ Nicholas C. Yost
NICHOLAS C. YOST
MATTHEW G. ADAMS
Attorneys for Plaintiffs-Appellants
HONOLULUTRAFFIC.COM
THE OUTDOOR CIRCLE
HAWAII'S THOUSAND FRIENDS
SMALL BUSINESS HAWAII
ENTREPRENEURIAL EDUCATION FOUNDATION
BENJAMIN CAYETANO
CLIFF SLATER
WALTER HEEN
RANDALL ROTH
DR. MICHAEL UECHI