

IX. Programmatic Agreement for Archaeological Sites

The City shall ensure that the following measures are carried out before each construction phase:

A) Initial Planning

1. The APE for archaeological site identification shall be defined as all areas of direct ground disturbance. This includes any areas excavated for the placement of piers to support the elevated structures, foundations for buildings and structures, excavations for utility installation, grading to provide parking, or other construction-related ground disturbance including preparation of construction staging areas.
2. Development of an Archaeological Inventory Survey Plan (AISP) within the APE for each construction phase that shall be submitted to and approved by the SHPD.

3. _____

B) Conduct archaeological fieldwork as presented in the AISP. Fieldwork phase shall include:

1. Pedestrian inventory within the APE, and
2. A sample survey of ground-penetrating radar (GPR), with subsurface inspection as warranted, and
3. A subsurface testing regime for locations identified in the ASIP, and
4. Analysis, including C¹⁴ dating, and palynology, and
5. A report summarizing the results of the field work and analysis that shall be submitted to and approved by the SHPD.
6. Based on the results of the archaeological inventory survey field work and in consultation with the SHPD, develop a Treatment Plan for each construction phase. The treatment plan will combine the results of the archaeological fieldwork with existing archaeological and cultural resource data to further test an appropriate sample of the Project's subsurface impacts (e.g., columns and utilities). Treatment plans shall be submitted to and approved by the SHPD.

C) Mitigation Plan

Subsequent to the archaeological inventory survey fieldwork and in consultation with the SHPD, develop mitigation plans as appropriate. The mitigation plans may include:

1. Archaeological Monitoring Plan

Develop an archaeological resources monitoring plan specifying the locations

Comment [MM1]: Does this make sense? I appreciate that TCPs could be both historic and cultural resources, but this sentence seems to sort of conflate the two.
I deleted because this will be done prior to MOA.

within the construction phase area that require a monitor and describing the level of monitoring necessary. The monitoring plan will be developed and implemented by a qualified archaeologist, meeting the Secretary of the Interior's Professional Qualifications Standards for Archeology (Federal Register, Vol. 48, No. 190, page 44738-9).

A follow-up monitoring report for the Project shall be submitted to and approved by the SHPD. The monitoring report, containing the location and description of any human burial remains discovered during the course of the Project shall remain confidential and precise location data may be provided in a separate confidential index.

2. Burial Treatment

Burial treatment documents (that may include Burial Treatment Plans, a Burial Site Component of a Data Recovery Plan, and a Burial Site Component of a Preservation Plan) will be prepared for review and approval by the SHPD and OIBC as appropriate under law. Any remains found on federal or Department of Hawaiian Homelands properties will be addressed as appropriate under NAGPRA in coordination with the applicable agency.

3. Data Recovery Programs

- a. Data Recovery Programs (including Data Recovery Plans and Data Recovery Reports prepared for review and approval by the SHPD) will be prepared as appropriate in consultation with the SHPD.
- b. If archaeological monitoring encounters cultural deposits, consultation with the SHPD will occur and be documented regarding the need for data recovery work for these areas.
- c. Completion of data recovery work must be verified by the SHPD prior to initiation of construction within the area of these sites.
- d. Data recovery plan(s) shall be submitted by the City to the SHPD for review and approval.

D. Amendments to this agreement for Archaeological Sites

1. Any party to the MOA as described in this section may request that any item or stipulation of this MOA be amended; whereupon the parties to the MOA shall consult with each other in accordance with 36 CFR Part 800 to consider such amendment.
2. Should any party to this MOA object to the plans prepared pursuant to the MOA as described in this section within 30 days from receipt, the FTA shall consult with the objecting party to resolve the objection. If the FTA determines that the objection cannot be resolved, the FTA shall forward all documentation relevant to the dispute to the Advisory Council on Historic

Comment [MM2]: Everything in this part (D) and Part E originated from the PA. Should we delete it all, save item 2 (which we could move below) and let the next part of the MOA govern the whole thing?

Preservation (Council). Within 30 days after receipt of all pertinent documentation, the Council will either:

- a. Provide the FTA with recommendations, which the FTA will take into account in reaching a formal decision regarding the dispute; or
 - b. Notify the FTA that it will comment pursuant to 36 CFR 800.6(b), and proceed to comment. Any Council comment provided in response to such a request will be taken into account by the FTA in accordance with 36 CFR 800.6(c)(2) with reference to the subject of the dispute.
3. Any recommendation or comment provided by the Council to address such objections will be understood to pertain to the subject of the dispute. The FTA's responsibility to carry out all actions under this MOA as described in this section that are not the subject of the dispute will remain unchanged.

E. Termination of the MOA

1. If necessary and appropriate, the SHPD may request, at any time, a review of the MOA stipulations as described in this section. This MOA shall be effective upon signing of the MOA and considered in full force and effect until replaced by future agreement, or until the Project is fully implemented.

2. Interim archaeological monitoring reports for phases implemented shall be submitted by City DTS to SHPD no later than 90 days from the completion of each phase of the Project. Once the Project has been completed and the monitoring plan submitted and approved, this MOA as described in this section shall terminate by its own course without the necessity of further action by any of the other signatories to this MOA.

GENERAL PROVISIONS

- A) Dispute Resolution:** Should FTA or the SHPD object to any action proposed pursuant to this MOA, FTA and the SHPD shall consult to resolve the objection. If FTA determines that the objection cannot be resolved, FTA shall notify the Director of the SHPD (Director) and request a recommendation in the matter. Any Director recommendations provided in response to such a request will be taken into account by the FTA, with reference only to the subject of the dispute. The responsibility of FTA to carry out all actions under this MOA that are not the subjects of the dispute will remain unchanged.
- B) Amendment:** If one of the signatories believes that the terms of the MOA cannot be carried out, or that an amendment to the terms must be made, that signatory will immediately consult with the other signatories to develop amendments. If an amendment cannot be agreed upon, the dispute resolution process set forth in Part A of this section will be followed.

- C) **Termination:** Any signatory to this MOA may terminate the MOA by providing 30 days written notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. Termination of this MOA would require compliance with 36 CFR Part 800. This MOA may be terminated by the execution of a subsequent agreement that explicitly terminates or supersedes its terms.
- D) **Duration:** This MOA will be null and void if its terms are not carried out within four (4) years from the date of its execution. Documentation tasks that need to be completed prior to construction commencement (all stipulations listed under Section I above) shall be initiated within 4 years of the date of execution and completed before any construction on any portion of the project begins. Should all parties deem an extension to this MOA necessary, such extension will be treated as an Amendment under Part B of this section.

Can we add a severability clause to this also in case something changes in the PA, it does not open the rest of the MOA.

Execution of this Memorandum of Agreement by FTA and SHPD and implementation of its terms are evidence that FTA has met its responsibility under Section 106 of the National Historic Preservation Act and HRS §6E and §13-275 and has taken into account the effects of the undertaking on historic properties.

This agreement and attached exhibits constitute the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this agreement. No waiver, consent, modification or change of terms of this agreement shall bind either party unless in writing and signed by both parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of FTA to enforce any provision of this agreement shall not constitute a waiver by FTA of that or any other provision.

Comment [MM3]: Will there be any?

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals as of the day and year hereinafter written.

SIGNATORIES:

**U.S. DEPARTMENT OF TRANSPORTATION FEDERAL TRANSIT
ADMINISTRATION (FTA)**

By: _____
Director

_____ **Date**

HAWAI'I STATE HISTORIC PRESERVATION DIVISION (SHPD)

By: _____
Administrator

Date