Honolulu Historic Preservation Agreement
Talking Points

The regulation of the Advisory Council on Historic Preservation (ACHP) implementing section 106 of the National Historic Preservations Act requires that, for Federally funded undertakings that adversely affect historic properties, a Section 106 agreement on actions to mitigate these adverse effects be developed and signed by the Federal funding agency, the State Historic Preservation Officer, and the ACHP, if the ACHP is participating in the consultation.

Standard FTA practice is to require that the grantee also be a full signatory to a historic preservation agreement, because such agreements require significant action by the grantee during final design and construction of the grantee's project. However, the grantee's signature is not explicitly required by the ACHP's historic preservation regulation.

In accordance with this standard practice, FTA is requiring the City and County of Honolulu to be a signatory to the Section 106 agreement for the Honolulu High Capacity Transit Corridor Project (along with the Hawaii State Historic Preservation Officer, the Advisory Council on Historic Preservation, which is participating in the consultation, and FTA). However, being a signatory is not a legal requirement, but an FTA staff determination regarding the level of grantee commitment that should be required to advance the project in light of relevant factors and context.

Given that a Full Funding Grant Agreement will not be in place until sometime in the future (the project is not yet approved into PE), and that the City is contemplating project actions before that time through Pre-Award Authority and Letters of No Prejudice, FTA staff is concerned that there be sufficient legal mechanisms in place to ensure compliance by all parties with the mitigation actions embodied in the Section 106 agreement.

FTA understands that the City has determined that a City Council action is required for the City to enter into a binding agreement such as the Section 106 agreement. FTA staff believes that any additional time required for this action will not significantly affect the project timeline and will provide for a higher degree of visibility and information among local officials of the mitigation activities that will be necessary to the project.

FTA has prepared three major EISs in the past (in the 1980's, in the 1990's, and in 1999-2003) on New Starts projects in the same general Honolulu corridor, and none of these New Starts projects has been built. All died due to local opposition or state and local funding shortfalls. If the current project is destined to suffer the same fate in a City Council vote, it would be better if that happened sooner rather than later, after more funds have been spent on project planning and design. Similarly, if mitigation necessary to the project is of concern to the City Council, it is better to establish this early rather than later. To withhold information and avoid consent from the City Council as a means of expediting the NEPA process is inconsistent with FTA policies to maximize public information regarding FTA projects.

City staff has countered that in 1992 the City was not required to be an invited signatory, but signed as a concurring party, which is the approach they wish to use in the current situation. However, FTA assumed that the City's concurrence in the 1992 MOA was binding. FTA was not aware at the time of the City's current interpretation that concurrence is not binding on the City.

Also, there has been a change in practice since 1992. The ACHP used to discourage full signatories other than the Federal agency, SHPO, and ACHP on the theory that the Federal agency would have to take greater responsibility for implementing the agreement if other agencies were not full and equal parties to the agreement. The ACHP has learned since that time about the relationship between Federal grant-making agencies and project sponsors and has changed its approach to consultations and now recognizes that the signature of the project sponsor who will implement the project is desirable. However, the regulation still reflects the former practice of only requiring signatures by the Federal agency, SHPO, and, if participating, the ACHP.