From: Souki, Jesse K.
To: VanWyk, Christopher (FTA)
CC: Woo, Donna M; Marler, Renee (FTA)
Sent: 1/11/2010 9:15:44 AM
Subject: RE: TRNS Section 4(f) Clarification re the Pearl Harbor Naval Station

CONFIDENTIAL AND PRIVILEGED COMMUNICATION

Chris,

Thank you for clarifying.

Under the approach we discussed in this email thread, the analysis might be as follows:

(1) The Pearl Harbor Naval Station physically takes or occupies property within the proposed NRHP district boundary.
(2) If we assume the above portion of the proposed district is a non-contributing element, there would be no "actual" use of a Section 4(f) resource.
(3) Assuming SHPO will only concur in an adverse effect determination under Section 106, the project should apply a constructive use analysis to ensure no constructive use impacts on the proposed NRHP district.

Including the above assumptions, does that sum up the process for this particular resource?

Sincerely,
Jesse K. Souki
Deputy Corporation Counsel
City and County of Honolulu
Tel.: (808) 768-5135

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From: Christopher.VanWyk@dot.gov [mailto:Christopher.VanWyk@dot.gov]
Sent: Monday, January 11, 2010 4:25 AM
To: Souki, Jesse K.
Cc: Woo, Donna M; Renee.Marler@dot.gov
Subject: RE: TRNS Section 4(f) Clarification re the Pearl Harbor Naval Station

Jesse,

I just need to clarify the terminology in your email. The first question is not whether contributing elements receive "impacts" from the project, but whether the project physically takes or occupies contributing elements (which presumably includes land within the property boundary for those elements. Once you determine there is no "actual" use, you would then need to determine whether there is a constructive use. That said, if there is a no adverse effect finding, there would be no "constructive use" because the threshold for the latter is higher than the threshold for a Section 106 adverse effect finding.

Thanks,
Chris

From: Souki, Jesse K. [mailto:jsouki@honolulu.gov]
Sent: Friday, January 08, 2010 5:46 PM
To: VanWyk, Christopher (FTA)
Cc: Woo, Donna M; Marler, Renee (FTA)
Subject: RE: TRNS Section 4(f) Clarification re the Pearl Harbor Naval Station

Chris,

I think this will be helpful to our planners.

If I understand correctly, Section 4(f) will not apply simply because the project is within the proposed NRHP historic district (i.e., Navy ICRMP). Being within the proposed historic district is a Section 4(f) "use" only if it impacts contributing elements for listing the district. Whether the FTA determines an adverse effect with SHPO concurrence is not determinative of Section 4(f) "use." If an adverse effect is determined, Section 4(f) would only be triggered by a constructive use.

Thank you for your patience.

Sincerely,
Jesse K. Souki
Deputy Corporation Counsel
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From: Christopher.VanWyk@dot.gov [mailto:Christopher.VanWyk@dot.gov]
Sent: Friday, January 08, 2010 12:02 PM
To: Souki, Jesse K.
Cc: Woo, Donna M; Renee.Marler@dot.gov
Subject: RE: TRNS Section 4(f) Clarification re the Pearl Harbor Naval Station

Jesse,

I won't have time to develop a fulsome response today, but in short, I continue believe that an "actual" Section 4(f) use would not occur if the only physical use of land is of non-contributing elements. If in that situation you had an adverse effect finding, the only way Section 4(f) would apply would be through a constructive use.

De minimis only comes into play once you have determined there is an actual use of Section 4(f) property.

Let me know if that clarifies things or not.

Thanks!
Chris

From: Souki, Jesse K. [mailto:jsouki@honolulu.gov]
Sent: Friday, January 08, 2010 2:34 PM
To: VanWyk, Christopher (FTA)
Cc: Woo, Donna M
Subject: TRNS Section 4(f) Clarification re the Pearl Harbor Naval Station

CONFIDENTIAL AND PRIVILEGED COMMUNICATION

Chris,

Good morning (Hawaii Time).

I have a question for you based on a comment you made in Wednesday's phone call with the Navy, FTA, RTD, and SHPO. Unfortunately, I left the call early, so I only heard the conversation up to the point where FTA, Navy, and SHPO agreed that the Navy's Integrated Cultural Resource Management Plan (ICRMP) boundary should also serve as the proposed boundary for the NRHP. Now that the Pearl Harbor Naval Station falls within a proposed NRHP boundary, the SHPO commented that she would take the issue of whether to make a "no adverse effect" determination under advisement.

After I left the call, the planners from RTD told me that you suggested that even if the SHPO made an adverse effect finding for the Pearl Harbor Naval Station, Section 4(f) may not apply if portions of the historic district affected do not contribute to the historic significance of the district. Do I understand your comment correctly?

I did a bit of research, and found that the FHWA Section 4(f) Policy Paper from March 1, 2005, supports your comment as follows:

> Question C: How does Section 4(f) apply in historic districts on or eligible for National Register?
>
> Answer C: Within a National Register (NR) listed or eligible historic district, Section 4(f) applies to the use of those properties that are considered contributing to the eligibility of the historic district, as well as any individually eligible property within the district. It must be noted generally, that properties within the bounds of an historic district are assumed to contribute, unless it is otherwise stated or they are determined not to be. For those properties that are not contributing elements of the district or individually significant, the property and the district as a whole must be carefully evaluated to determine whether or not it could be used without substantial impairment of the features or attributes that contribute to the NR eligibility of the historic district.
>
> The proposed use of non-historic property within an historic district which results in an adverse effect under Section 106 of the NHPA will require further consideration to determine whether or not there may be a constructive use. If the use of a non-historic property or non-contributing element substantially impairs (see Question 2 B) the features or attributes that contribute to the NR eligibility of the historic district, then Section 4(f) would apply. In the absence of an adverse effect determination, Section 4(f) will not apply. Appropriate steps, including consultation with the SHPO and/or THPO, should be taken to establish and document that the property is not historic, that it does not contribute to the National Register eligibility of the historic district and its use would not substantially impair the historic district.

However, I also found that along with the publication of the 2008 regulations for Section 4(f), 23 C.F.R. part 774, the FHWA/FTA included a "Section-by-Section Analysis of NPRM Comments and the Administration's Response." See 73 FR 13368-13401, Mar. 12, 2008.

Regarding the applicability of Section 4(f) under 23 C.F.R. § 774.11(e), the FHWA/FTA noted the following:

> Other comments stated that the section did not adequately address "negligible" impacts to large historic districts. We think that changes to the proposed language to address this issue are not warranted. For example, in the case of historic districts, the assessment of effects under Section 106 of the National Historic Preservation Act would be based on the effect to the district as a whole, as opposed to individual impacts on each contributing property. Accordingly, when an assessment of effects on the overall historic district is performed, if the effects on the historic district are truly negligible, then the result of the assessment of effects would be a "no adverse effect" on the historic district. With appropriate concurrences, such finding would qualify the project as having de minimis impact and therefore not subject to further consideration under Section 4(f).

See id. at 13380.

Regarding the definition of *de minims* under 23 C.F.R. § 774.17, the FHWA/FTA noted the following:

> Several comments recommended changes to the definition of a de minimis impact for historic sites. One comment stated that the proposed definition of de minimis impact for historic sites did not adequately emphasize that the determination of "no adverse effect" or "no historic property affected" must be made in accordance with the requirements of the Section 106 regulation, including consultation. The FHWA and FTA agree and have reworded the definition to emphasize that the Administration must determine, in accordance with the Section 106 regulation, that there is no adverse effect or that no historic property is affected. Another comment recommended language that would allow adverse effects to contributing elements of a historic district to be considered a de minimis impact if the historic district, as a whole, is not adversely affected. The FHWA and FTA did not adopt this suggestion because Section 106 policy and regulations define how adverse effects to historic districts are to be considered.

See id. at 13391.

The above comments and responses are consistent with my understanding of 23 C.F.R. § 774.17, which define *de minimis* impact is as follows:

> (1) For historic sites, *de minimis* impact means that the Administration has determined, in accordance with 36 C.F.R. part 800 that **no historic property is affected** by the project or that the project will have **"no adverse effect"** on the historic property in question."

Emphasis added.

Given the new regulations and administration's response to NPRM comments, it seems that a "no historic property is affected" or "no adverse effect" determination by FTA with the concurrence of SHPO is a prerequisite for a *de minimis* finding. Am I reading the regulations correctly?

If not, would the FTA support an analysis that Section 4(f) does not apply to the portions of Makalapa housing historic district (as delineated by the Navy's ICRMP), if it is found that the affected portion does not contribute to the historic significance the district? I think such a finding would be reasonable and in good faith given that, among other things, Radford Drive bisects the ICRMP boundary, no historic housing is located in the approximately 400 foot north-south grassy area between the proposed NRHP as recommended by Mason Architects for the project, and Mason Architects previously drew the ICRMP boundary for Navy management purposes more broadly than when it drew the proposed NRHP boundary based on the NRHP criteria. There may be other reasons that the planners and Mason Architects could provide.

Thank you for any guidance and clarification. Please feel free to call me at 808-768-5135, or let me know when it is a good time for me to call you.

Sincerely,
Jesse K. Souki
Deputy Corporation Counsel
City and County of Honolulu
Tel.: (808) 768-5135

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