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Court fight may decide if rail stays on track

Support vanished for other ventures that faced legal battles

By Kevin Dayton

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The first open-court skirmish in the latest legal battle over Honolulu's \$5.17 billion rail project will get under way in federal court at the end of this month, and the largest public works project in Hawaii history may hang in the balance.

Supporters of rail often speak of the project as if it is a done deal, a view that was underscored by Mayor Peter Carlisle in a recent radio talk show.

"I think there's too much momentum now for it to be stopped, frankly," Carlisle said of the project.

But other observers on both sides of the issue acknowledge the rail project could be vulnerable to a loss of critically needed federal funding, and any delays because of a lawsuit could aggravate that risk.

The financial plan for the project assumes the federal government will give a huge boost to the Honolulu rail by injecting \$1.55 billion in federal New Starts funding, money that has not yet been formally committed to the project.

The delicate effort to secure those federal funds is mixed up in the continuing political turmoil in the U.S. Congress, and rail supporters such as City Councilman Breene Harimoto believe the Honolulu rail project simply can't afford to be sidetracked now.

Harimoto warned the Honolulu Authority for Rapid Transit Thursday that "if we have any delays in this project, my personal belief is it will be the end of rail. Any delay will be fatal."

Against that background, prominent opponents of rail have attacked the project with a lawsuit that is scheduled for a hearing in federal court on Nov. 30. They also pushed out new media messages designed to remind the public of old doubts and concerns about the entire rail effort.

Former Hawaii Democratic Gov. Ben Cayetano, who joined in the lawsuit, said he believes the state Legislature, the Honolulu City Council and the local media all failed to properly scrutinize the project, and instead have acted as if rail was "a done deal."

"When we began to take a look at some of the issues that we saw, and the kind of analysis that the city did, our feeling was that this thing was politically driven, rather than driven by sound engineering," Cayetano said. He said he believes former Mayor Mufi Hannemann pushed the rail project hard in the hope that it would help with Hannemann's unsuccessful effort to be elected governor.

The rail critics' lawsuit asks the federal court to block construction of the system until a supplemental environmental impact statement is done to correct the alleged problems.

Among other things, the critics demand that the city reconsider basic issues such as the route the city selected for the rail line to follow, and whether a monorail system, rubber-tired guided vehicles or some other technology would work better for Honolulu than the steel-wheel-on-steel-rail system the city selected.

THE RAIL OPPONENTS' approach mirrors efforts that have killed off a number of ambitious, high-profile projects across the state. Examples include the Hawaii Superferry inter-island ferry project, the Hokulia luxury residential development in Kona and the Outrigger telescopes project atop Mauna Kea on Hawaii island.

Environmentalists, Native Hawaiian groups and other opponents of each of those projects demonstrated that if work can be stalled or stopped by administrative or court appeals, the public or private financing for the projects can evaporate.

In each of those cases, the delays and loss of financing proved fatal to the project.

The stakes with rail are much higher. Enormous resources have already been committed to the rail project, including millions of dollars spent on studies, engineering and environmental reports.

More than \$342 million in local and federal funds have been spent on rail so far, and more than \$1.62 billion in contracts has been awarded to companies and consultants to design, build and operate the system.

The steel-wheel-on-steel-rail technology was endorsed by a panel of experts and Hannemann years ago, and Oahu voters approved the project at the polls in 2008.

Toru Hamayasu, interim executive director of HART, predicted the city will successfully defend the environmental impact statement, and will fend off opponents' efforts to stall or block the project in federal court.

"We were prepared for this type of challenge from the beginning of the process," he said. "In fact, the opponents have been very open about where and how they are going to challenge us, so to some extent thanks to that preview of what they were going to do, we were very diligent in preparing (the environmental impact statement)."

"I remain confident that this lawsuit will be concluded in our favor, so the risk of this delaying the project I think is minimal," Hamayasu said.

The rail critics who filed the lawsuit include long-time skeptics such as Cayetano and conservative businessman Cliff Slater. Joining them are former judge and former Hawaii Democratic Party Chairman Walter Heen, University of Hawaii law professor Randall Roth, Dr. Michael Uechi, the environmental group Hawaii's Thousand Friends, and the Small Business Hawaii Entrepreneurial Education Foundation.

The critics warn that rail is hugely expensive, and point out that the city acknowledges Oahu's traffic congestion will get worse even with rail. (The city replies that future traffic congestion would be much worse without rail).

The rail opponents have also sought to remind the public of troubling issues such as the effect the elevated rail project will have on views and noise levels in downtown Honolulu, and the effect it will have on Hawaiian burials almost certain to be uncovered during construction.

THE LAWSUIT APPEARS to challenge the environmental impact statement's handling of most of the major decisions the city has made on the project to date.

The suit alleges:

- » The environmental impact statement violates the National Environmental Policy Act, or NEPA, in a variety of ways, including failing to consider what critics say are potentially viable alternatives to rail. Those include toll roads or improvements to the bus system.
- » The EIS illegally ruled out alternatives to the steel-wheel-on-steel-rail train technology, and did not properly consider the noise and other environmental effects of steel-on-steel.
- » The NEPA law was also violated in the EIS because the document didn't adequately consider many reasonable alternative paths that the planned rail line could have taken.
- » The EIS should have evaluated the environmental impacts of the entire rail project, including future phases that are to extend to the University of Hawaii and Waikiki. The suit alleges the document evaluated the impacts of just the first 20 miles the city plans to build from Kapolei to Ala Moana.
- » The EIS violates Section 4(f) of the Department of Transportation Act for failing to identify and evaluate the impact of the project on cultural sites and Hawaiian burials.
- » And violations of the National Historic Preservation Act for allegedly failing to account for the impacts the project will have on historic properties along the rail route.

The suit asks the court to rule that the EIS is flawed, and to order the Federal Transit Administration to withdraw its approval of the document until a supplemental EIS is completed.

Lawyers for the city and federal authorities denied each of the allegations in their filings, and are arguing that Cayetano and almost all of the other plaintiffs should be disqualified from participating in the lawsuit because they failed to raise their concerns earlier in the process.

Hamayasu pointed to voluminous documentation and technical reports completed in 2008, 2009 and 2010 that are referenced in the EIS that he says properly address the concerns raised in the lawsuit.

"The notion that alternatives and various technologies were not properly considered is incorrect," Hamayasu said. "We followed a comprehensive process that included several layers of review and analysis, public scoping meetings and comment periods and more.

" ... This lawsuit is unfortunate and an unnecessary waste of taxpayers' dollars for the special interests of a select few. We in Hawaii know all too well how lawsuits can delay and increase costs of worthy projects, so it is our hope that this lawsuit is resolved quickly and in the taxpayers' favor."

Law professor Roth said he believes the court will finally order the city to do a "real" study of the various transit alternatives that will ultimately result in a better solution for Honolulu.

The case was assigned to Judge A. Wallace Tashima of the U.S. 9th Circuit Court of Appeals in San Francisco.