

**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

ON THE FOLLOWING MEASURE:

H.B. NO. 1037, H.D. 1, RELATING TO CIVIL ACTIONS.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Friday, February 27, 2009 **TIME:** 11:00 AM

LOCATION: State Capitol, Room 308
Deliver to: State Capitol, Room 306, 2 Copies

TESTIFIER(S): Mark J. Bennett, Attorney General,
or Lisa M. Ginoza, First Deputy Attorney General,
or Robin Kishi, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

This bill abolishes the government's joint and several liability in all tort cases, and limits the government's liability to its proportionate share of fault, as the Legislature originally intended when it enacted section 663-10.5, Hawaii Revised Statutes. This is accomplished by deleting the exception for highway maintenance and design claims, which was inserted in 2006. Additionally, this bill clarifies that joint and several liability under section 663-10.9, Hawaii Revised Statutes, does not apply to governmental entities. This is accomplished by deleting paragraph (4) of section 663-10.9.

Currently, in a claim with multiple defendants arising out of an accident on a government roadway, if the person primarily at fault cannot pay his or her share of the court-ordered damages, then the government must pay the damages attributed to that person, in addition to the damages attributed to the government -- even if the court has found that the government is only nominally at fault. As

a result, the State and counties expend millions of dollars to pay damages for which they were not at fault.

In cases where highway maintenance and design are at issue, section 663-10.9(4) allows courts to find that governmental entities are jointly and severally liable with the primary tortfeasor when there is "reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based." Unfortunately, Hawaii courts have applied section 663-10.9(4) even when there was only one prior occurrence and it was not under similar circumstances.

For example, in Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086 (1999), a vehicle struck and ramped off a guardrail along Kuhio Highway on Kauai, then struck a utility pole. Two passengers died. At the time, the vehicle was traveling at 80 mph, and the driver's blood alcohol content level was more than twice the legal limit. At trial, the following percentages of fault were assigned: 65 percent to the driver, 15 percent to the passengers, and 20 percent to the State. The Hawaii Supreme Court held that the State was jointly and severally liable under section 663-10.9(4) because the State had "reasonable prior notice of a prior occurrence under similar circumstances." In reality, only a single accident had occurred in the vicinity, seven years earlier, and it had not involved the subject guardrail. Nonetheless, because the driver did not pay his full portion of the court ordered damages, the State, in addition to paying its own proportionate share, was required to pay the damages left unpaid by the driver.

Similarly, in Kaeo v. Davis, 68 Haw. 447, 719 P.2d 387 (1986), a vehicle struck a utility pole along Palolo Avenue in Honolulu. The driver had been drinking beer before the accident. At the time of the accident, the vehicle was traveling over the speed limit. Plaintiff-passenger offered evidence of four prior accidents that had occurred near the site. The Hawaii Supreme Court held that the State was jointly and severally liable under section 663-10.9(4)

because the four accidents constituted "reasonable prior notice of a prior occurrence under similar circumstances." In reality, the four accidents had occurred over a span of six years, during which signs and markers along the road had been modified. Further, none of the prior accidents was at the site of the subject accident. But again, because the driver did not pay his full portion of the court-ordered damages, the State, in addition to paying its own proportionate share, was required to pay the damages left unpaid by the driver.

We believe the existence of just one prior accident is not an accurate, fair, or even relevant indicator of reasonable prior notice, because what constitutes "similar circumstances" is subject to varying interpretation and inconsistent application. A judge in one case might decide that "similar circumstances" means a prior accident one mile from the subject accident, at which site there is a completely different road geometry. Another judge might decide that "similar circumstances" means a prior accident that involved absence of barriers, even though the subject accident involved absence of signage. This lack of consistency in court decisions creates uncertainty for State and county transportation engineers, and makes it extremely difficult for them to develop appropriate policies and procedures.

Moreover, if a court finds that a governmental entity is only 1 percent at fault and the primary tortfeasor is 99 percent at fault, but finds that the governmental entity had "reasonable notice," then the governmental entity must pay 100 percent of the damages if the primary tortfeasor does not pay. This puts governmental entities in the role of insurer and excess insurer for drivers who are primarily at fault in highway maintenance and design cases. This result is an inappropriate use of government resources, and is contrary to the original intent of section 663-10. (The legislative history of section 663-10.5 shows that the Legislature intended to supercede any and all previous statutory provisions that made the State and counties jointly and severally liable, including section 663-10.9.)

Furthermore, the "one-prior" occurrence standard of section 663-10.9(4) is contrary to the practices of highway engineers throughout the United States. Highway engineers use accident ratios to determine whether an investigation is warranted. Such ratios are typically a function of the number of accidents divided by the traffic volume for a designated length of highway, and not merely "one-prior." Section 663-10.9(4) holds Hawaii's governmental entities to an unreasonable standard.

Tortfeasors ought to be held reasonable for the torts they cause. This bill is necessary to ensure that governmental entities and their taxpayers do not continue to pay damages for which they are not at fault.

We therefore respectfully request passage of this measure.

LINDA LINGLE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

BRENNON T. MORIOKA
DIRECTOR

Deputy Directors
MICHAEL D. FORMBY
FRANCIS PAUL KEENO
BRIAN H. SEKIGUCHI
JIRO A. SUMADA

IN REPLY REFER TO:

February 27 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1037, HD 1

COMMITTEE ON FINANCE

We support this bill.

The Department of Transportation (DOT) strongly feels that justice is served when all parties are accountable for their share of court-determined negligence. The public and taxpayers who contribute to the State Highway Fund should not be held accountable for the negligence of others. The current law on joint and several liability puts a tremendous strain on our State Highway Fund and the Department's ability to improve our highways.

The DOT continues to address safety improvements of our State Highway System through a systematic analysis of accident rates and prioritization versus the occurrence of a single motor vehicle accident. Our ability to address safety will be enhanced using this methodology through passage of the bill.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110
HONOLULU, HAWAII 96813
Phone: (808) 768-5193 • Fax: (808) 768-5105 • Internet: www.cc.honolulu.gov

MUFI HANNEMANN
MAYOR



CARRIE K.S. OKINAGA
CORPORATION COUNSEL
DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

February 26, 2009

The Honorable Marcus R. Oshiro, Chair
and Members of the Committee on
Finance
The House of Representatives
State Capitol
Honolulu, Hawaii 96813

Re: Support of House Bill No. 1037, Relating to Civil Actions

Dear Chair Oshiro:

Thank you for the opportunity to provide testimony in support of House Bill No. 1037. The City and County of Honolulu indeed supports the Legislature's modification to Hawai'i Revised Statutes, sections 633-10.5 and 663-10.9, and its intention to eliminate governmental entities exposure to joint and several liability in lawsuits, including those involving allegations of negligent roadway design, construction and maintenance.

The City offers reasons for its support of Bill 1037 and its eliminating joint and several liability in roadway design and maintenance cases. In light of the Hawai'i's courts' past interpretation of joint and several liability for governmental entities (HRS § §663-10.5 & 10.9), this Bill redresses issues of fairness and proportionality lost in past roadway cases. For instance, in *Kienker v. Bauer*, the Supreme Court of Hawai'i interpreted HRS §663-10.9 to make governmental entities part of the exception to abolition of joint and several liability. The result in that case was that the government, via joint and several liability, was responsible for all damages in roadway design cases, even when the government is found to be as little as 20% at fault. Theoretically, the governmental entity could be jointly and severally liable on as little as 1% degree of comparative fault.

In *Kienker*, the State was required to pay the entire \$1.1 million in damages, instead of its 20% proportionate share. This sort of result is neither new, nor uncommon, and it continues to occur. For example, see *Taylor-Rice v. State*, where the State was jointly and severally liable for damages undeniably caused by a drunken driver who fled the police and caused a fatal accident. Although the aforementioned cases involve the State as a party defendant, this office regularly sees similar, flimsy allegations made against the City and its departments.

The Honorable Marcus R. Oshiro, Chair
Committee on Finance
February 26, 2009
Page 2

Under this jurisprudence, attorneys can easily, and often make, roadway design claims in their motor vehicle accident tort cases. The reality is that roadways cannot be perfectly designed, constructed and maintained. Consequently, subjecting governmental entities to joint and several liability for roadway design, construction and maintenance cases is to make government the *de facto* excess insurance carrier for underinsured and uninsured motorists who are the actual, substantial and prime causes to injuries to other motorists. This is not fair to the general public, as it drains the public treasury, and it is simply disproportionate, draconian and unjust. Not only do such claims deplete the funds necessary to satisfy legitimate claims, they also tax the resources necessary to defend against them.

The City believes that HB 1037 overcomes the past judicial interpretation of HRS §663-10.5 (e.g., *Kienker v. Bauer*), by the inclusion of the simple language placed at the beginning of the amendment to section 10.5, which reads as follows: "Any other law to the contrary notwithstanding." In *Kienker*, the lack of this language caused the court to determine that the exclusion of governmental entities from joint and several liability was subject to the exceptions to under HRS 633-10.9. We sincerely appreciate your effort to stem the tide of these frivolous actions, as reflected in HB 1037.

Very truly yours,


CARRIE K.S. OKINAGA
Corporation Counsel

CKSO:rdl

CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7741
FACSIMILE: (808) 270-7152

February 26, 2009

The Hon. Marcus R. Oshiro, Chair
The Hon. Marilyn B. Lee, Vice Chair
and Committee Members
House Committee on Finance
State Capitol
415 South Beretania Street
Honolulu, HI 96813

Re: H.B. No. 1037, H.D. 1, Relating to Civil Actions
Hearing Date: Friday, February 27, 2009
Time: 11:00 a.m.
Place: Conference Room 308

Dear Chair Oshiro, Vice Chair Lee, and Committee Members:

On behalf of the County of Maui and the Department of the Corporation Counsel, I testify in support of H.B. No. 1037, H.D. 1, relating to civil actions and government tort liability.

H.B. No. 1037, H.D. 1, abolishes joint and several liability for government entities in all cases under Chapter 663, Hawaii Revised Statutes, so that government entities are liable for only that percentage share of damages, if any, that are actually attributable to the government entities.

H.B. No. 1037, H.D. 1, will not relieve government from paying for damages caused by government. It prevents taxpayers from paying for the negligence of other tortfeasors. H.B. No. 1037, H.D. 1, will help ensure fairness and equity for government entities who, because of their perceived "deep pockets", may otherwise be required to pay more than their fair share in traffic accident lawsuits.

Thank you for your consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Brian T. Moto", is written over the typed name.

BRIAN T. MOTO
Corporation Counsel

S:\ALL\BTM\Legislature\HB1037HD1_Feb 26 2009.wpd

xc: The Hon. Charmaine Tavares, Mayor
Sheri Morrison, Managing Director

William P. Kenoi
Mayor



Lincoln S.T. Ashida
Corporation Counsel

Katherine A. Garson
Assistant Corporation
Counsel

COUNTY OF HAWAII
OFFICE OF THE CORPORATION COUNSEL

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

February 26, 2009

The Honorable Marcus R. Oshiro, Chair,
and Members
Committee on Finance
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Oshiro and Members of the Committee:

Re: Testimony in Support to House Bill 1037, HD1
Hearing: Friday, February 27, 2009, at 11:00 a.m., Conference Room 308

The County of Hawaii ("County") supports House Bill 1037, HD1, that clarifies that government entities are only liable in certain cases for the percentage share of the damages they actually caused. The County has presented similar written testimony for House Bill 1037 to Joseph Souki, Chair, and Members of the Committee on Transportation, for a hearing held on February 2, 2009.

Government should not be the deep pocket that pays for the fault or negligence of inattentive drivers, or other tortfeasors. The following case will demonstrate the importance of limiting the County's liability exposure to damages fairly linked to its proportionate share of liability.

A. Kienker v. Bauer.

In 2006, in *Kienker v. Bauer*, the Hawaii Supreme Court clarified the statutory provision relating to joint and several liability upon the governmental entities. The *Kienker* case involved a finding of the court that the State should have installed a left turn lane at the intersection of Queen Ka'ahumanu and the Police Station access road.

The Kienker accident occurred on July 5, 1997. The accident occurred when defendant Danielle Bauer, who was traveling at a rate of 60 miles per hour, crossed the center line of the highway and struck the plaintiff's car head-on. Apparently, prior to the accident there were three to four vehicles that were stopped behind a vehicle attempting to make a left turn from Queen Ka'ahumanu Highway onto the Police Station access road. According to the decision, the car traveling in front of Bauer came to an abrupt

The Honorable Marcus R. Oshiro, Chair,
and Members
February 26, 2009
Page 2

halt. Bauer began to veer to the right, but finding the shoulder of the road blocked, swerved her automobile to the left. The County was not involved in the case so we are not familiar with all the facts or the record on appeal. However, what we are concerned about is the fact that a government entity would be held 20 percent liable but end up paying all of the judgment for what appears to be an avoidable accident if defendant Bauer had been driving with ordinary caution. The facts in the case indicate that at least three to four cars were able to safely stop behind the car that was waiting to make a left turn.

The court based its finding of negligence against the state by finding that an accident that occurred in 1992 was reasonable notice to the state that they needed to install a left turn lane. The court also found that the increase in traffic volume, queuing conditions at the intersection and some rear-end collisions also constituted notice to the state of a "defective condition." Frankly, given the increase in traffic on state and county highways on all the islands, there are quite probably numerous places where stopping to make a left turn on a two lane highway has resulted in rear-end collisions. Does that mean the state and counties have to install a left turn lane wherever one such accident has occurred and traffic has increased? This probably describes every left turn rear end collision in the state.

Installation of channelized left turn lanes frequently require not only widening the highway but acquiring additional right-of-way and can require significant expense on the part of the government agency. Given the fact that most of the state and county highways on the Big Island are two-lane, there are numerous places on the island where installation of left turn lanes or traffic lights would enhance public safety. There are far more road projects that the county would like to address than there are funds. Consequently, the county has to make an annual assessment of where to spend its highway dollars. Do you spend your money on multiple left turn lanes or do you allocate your funds to retrofitting bridges so they will survive earthquakes. Is the left turn lane at this intersection more important than the left turn lane at another location. Given limited highway funds, the County has to make choices every year on which projects to fund. Large projects, such as bypass highways, new roads and intersection improvements where the traffic count is higher can eat up the funds quickly. When the island is hit by major flooding as it has been several times in the past decade, the county has to allocate millions to repair roads and bridges that wash away, limiting funds to do improvements elsewhere. Installation of a left turn lane is not the same as whether the county had notice that a guardrail, or street or directional signs needed to be installed as it can require significantly more planning, design and expense.

While the injury to Mr. Kienker is tragic, it is essentially the fault of defendant Bauer who could have avoided the accident if she had been driving slower, been

The Honorable Marcus R. Oshiro, Chair,
and Members
February 26, 2009
Page 3

attentive to traffic and been acting in a prudent manner under the circumstances. The fact that three to four cars in front of her were able to stop is significant.

B. Conclusion.

Prior to the *Kienker* decision, the County has been able to resolve many of its cases in a prompt and reasonable manner. Moreover, the County did not run up unreasonable trial costs and expenses because it focused on defending itself more on the liability issue, rather than concentrating on the damages to the plaintiff(s). Those benefits to the County in evaluating the value of a particular lawsuit have evaporated.

Lawsuits are filed against the County to get a "deep pocket." There will continue to be an increase in trial costs and expenses because we still must aggressively prepare our cases to dispute the values of the economic and non-economic damages by the plaintiff(s). In addition, the settlement demands have been skewered to much higher amounts than in the past

We humbly request that the County's exposure to damages be fairly linked to its proportionate share of liability. This bill will provide our County more fiscal responsibility to its citizens by avoiding the potential crippling of its budgeting and planning for critical programs, services and infrastructures by eliminating joint and several liabilities against the County, and other governmental entities. Anything less creates too much uncertainty as to adequately providing all of our citizens the benefits of the governments' programs, services and infrastructures.

The County respectfully thanks the Committee for the opportunity to present testimony on this matter.

Thank you for your consideration of our testimony.

Sincerely,



JOSEPH K. KAMELAMELA
Deputy Corporation Counsel,
Litigation Supervisor
County of Hawai'i

JKK:fc

c via email only:

Kevin Dayton, Executive Assistant
Bobby Jean Leithead-Todd, Acting Deputy Planning Director

BERNARD P. CARVALHO, JR.
Mayor



AMY I. ESAKI
County Attorney

OFFICE OF THE COUNTY ATTORNEY

COUNTY OF KAUA'I, STATE OF HAWAII
MO'IKEHA BUILDING
4444 RICE STREET, SUITE 220
LIHLI'E, KAUA'I, HAWAII 96766-1300
TEL (808) 241-4930
FAX (808) 241-6319

Deputies
Darren M. Suzuki, First Deputy
Mona W. Clark
Margaret H. Sueoka
James K. Tagupa
Jennifer S. Winn

February 25, 2009

**TESTIMONY FROM THE OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUA'I TO THE HOUSE COMMITTEE ON FINANCE**

HEARING ON HOUSE BILL NO. 1037, HD 1

Date: Friday, February 27, 2009
Time: 11:00 a.m.
Place: Conference Room 308
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

House Committee on Finance
Honorable Marcus R. Oshiro, Chair
Honorable Marilyn B. Lee, Vice Chair
Committee Members

Re: Testimony of the Office of the County Attorney,
County of Kaua'i, on House Bill No. 1037, HD 1
Relating to Civil Actions

My name is Amy Esaki, County Attorney, County of Kaua'i, testifying on behalf of the County of Kaua'i.

The County of Kaua'i strongly supports the intent of House Bill No. 1037, HD 1.

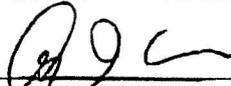
The purpose of HB 1037, HD 1 is to clarify that government entities are only liable in certain cases for the percentage share of the damages actually caused by that government entity. This bill eliminates the retention of joint and several liability for claims relating to the maintenance and design of highways pursuant to section 663.10.9.

The deletion of joint and several liability for claims relating to the maintenance and design of highways is supported by the County of Kaua'i as it eliminates joint and several liability for these specific types of claims which have been made against the County of Kaua'i, presumably due to the fact that the County is seen as a "deep pocket" for recovery.

HB 1037, HD 1 assures that governmental entities will only be liable for the percentage share of the damages actually attributed to the governmental entities even in tort actions relating to the maintenance and design of highways.

Thank you for your consideration.

**OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUAI**



AMY I. ESAKI

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ), formerly known as the CONSUMER
LAWYERS OF HAWAII, IN OPPOSITION TO H.B. No. 1037, HD 1

February 27, 2009

To: Chairman Marcus Oshiro and Members of the House Committee on Finance:

My name is Bob Toyofuku and I am testifying for the Hawaii Association for Justice (HAJ) in opposition to H.B. No. 1037, HD 1.

HAJ has always opposed arbitrary limitations on responsibility for negligent injury to others. The primary focus of this testimony is on the highway maintenance and design exception that is contained in HRS §663-10.9. This measure would eliminate the exception for highway design and maintenance that has been a part of the law since §663-10.9 was passed during the special session of 1986.

The limited governmental responsibility for joint and several liability for highway maintenance and design was a considered decision based upon sound public policy in 1986. Its inclusion in government's general exception from joint and several liability found in §663-10.5 was deliberate and not a mere oversight. Both House and Senate unanimously agreed that government plays a unique role in and bears a commensurate responsibility for highway maintenance and design. A Senate Standing Committee Report confirmed that the Senate "also retained the provisions of the bill relating to motor vehicle accidents involving the maintenance and design of highways . . . who have had reasonable prior notice of dangerous conditions, since public policy is better served by holding tortfeasors who know of dangerous conditions responsible for their negligence in failing to take reasonable precautions to prevent injury or death to others."

Further, in 2006, in HB No. 237, CD 1 where joint and several liability was expressly retained for maintenance and design of highways, this legislature in Conference Committee Report 86-06 stated that “your Committee on Conference acknowledges government’s unique role in highway maintenance and design and the strong public policy of providing safe roads for Hawaii’s families, as expressed in the past legislative history on this subject.”

Government has a unique responsibility for highways. Highways are not like beach parks or hiking trails. Drivers have no opportunity or control over the safe design and maintenance of roads and highways. Citizens are totally at the mercy of government to exercise reasonable care in building and maintaining safe roads and highways. It is because of this unique control and responsibility over highway design and maintenance that government should carry a commensurate degree of accountability, particularly when it neglects known dangerous conditions that expose drivers and their families to correctable dangers that result in preventable injuries and deaths.

Joint and several liability for highway maintenance and design under section 663-10.9 (4) is imposed only where government has actual knowledge of dangerous conditions gained from prior similar accidents or substantial negligence of 25% or more. This is not the traditional “deep pocket” situation where joint and several liability is imposed for a minimal 1% responsibility. No matter how negligent government is in the maintenance and design of highways, joint and several liability is not imposed unless there is actual knowledge or negligence of 25% or more. This provision immunizes government from joint liability where its role is trivial or for minor technical violations. It provides a considered and fair balance of protection and accountability for both

government and those injured by the government's failure to safely maintain and design our streets and highways.

These public policies remain as important today as they did then. In many respects, they are even more important today because of the changing demographics and development of our communities. On Oahu, the shift in development from urban Honolulu to Central and Leeward communities means more workers commuting to their jobs and students going to school spend more time on the road and travel farther than ever before. On neighbor islands, new developments have changed many rural settings to urban communities with increasing traffic loads. Our research in 2006 indicated that over 1,100,000 vehicles travel over 9,300,000,000 miles annually with 10,000 -12,000 major accidents killing 120 -140 people along with many thousands more fender-benders that result in over \$360,000,000 of damages. Traveling on our streets and highways is the single most dangerous activity for most of our citizens. It is even more critical today that government responsibly carries out its unique role of safely designing our streets and highways, as well as correcting known dangerous conditions to prevent unnecessary injury and death. The existing law fairly balances the interests of government, taxpayers and the commuting public.

HAI asks that this measure be held. Thank you for the opportunity to present this testimony.



**Hawaii Chapter
AMERICAN PUBLIC WORKS ASSOCIATION**

Chapter Office
501 Sumner Street, Suite 620
Honolulu, HI 96817

Telephone
(808) 531-1308
Facsimile
(808) 521-7348

2009 Officers

President
Corey Matsumoto, P.E.
SSFM International, Inc

Vice-President
John Lamer, P.E.
City & County of Honolulu
Dept of Design & Construction

Treasurer
Lance Zhai, P.E.
State of Hawaii
Department of Transportation

Secretary
Jason Lau, P.E.
The Lantaco Consulting Group

Directors

Education
Rodney Haraga, P.E.
ept of Design & Construction

Membership
Robert Prunzio
City & County of Honolulu
Dept of Facility Maintenance

Newletter
Jimmy Kurata, P.E.
State of Hawaii
Dept of Accounting and General Services

Publity
Trevin Chang
SSFM International, Inc

Awards
Clyde Kumabe, P.E.
State of Hawaii
Dept of Accounting and General Services

Chapter Delegate
Hagen Litt, P.E.
Hawaiian Electric Company, Inc

Chapter Historian
Lester Fukuda, P.E.
HDR/Hawaii Pacific Engineers

Past President
Chandra Tanaka
Actus Lead Lease

February 26, 2009

FAX: 586-6001

Hearing Date: Friday, February 27, 11:00 a.m., Conference Room 308 (JUD Committee)

Honorable Representative Marcus R. Oshiro, Chair, Marilyn B. Lee, Vice Chair, and Members of the House Committee on Finance

Subject: HB 1037 HD1 - Relating to Civil Actions

Honorable Chair Oshiro, Vice Chair Lee, and Committee Members,

The American Public Works Association Hawaii Chapter represents over one hundred engineering design professionals in public and private sector. **We Strongly Oppose HB 1037 HD1, Relating to Civil Actions.** This bill leaves the engineering design professional exposed to full joint and several liability from third party lawsuits and left behind again to pay for the State's Tort Liability. Typically the design professional represents the State and Counties as their design consultants and design according to their standards, codes and the Agencies approve our design and construction. Why should the engineering design professional be left with the bulk of tort liability when the State is the one that benefits from the transportation systems in Hawaii?

The current legal status in Hawaii is such that the liability risks for design professionals much more significant than the profit or even the fees especially for highway projects. This bill eliminates joint and several liability only for government sector and shifts the risk unfairly to design professionals and the Contractors. It is reasonable that if protection from joint and several liability is granted to the Government then it should be extended to the design professional working on these projects on behalf of the Government.

We feel that it is unfair for the design professional industry to be burdened with Joint and Several liability. Please **OPPOSE** this bill.

Thank you for an opportunity to express our views regarding this bill.

Sincerely,
American Public Works Association, Hawaii Chapter

Lester H. Fukuda, P.E., FACEC



Gray • Hong • Nojima & Associates, Inc.
CONSULTING ENGINEERS

Daniel S.C. Hong, PE
Sheryl E. Nojima, PhD, PE
Michael H. Nojima, PE, LEED AP
Paul T. Matsuda, PE, LEED AP
Rusty B. Bungayao
Gavin Y. Masaki, PE

841 Bishop Street, Suite 1100
Honolulu, Hawaii 96813-3915
Telephone: (808) 521-0306
Fax: (808) 531-8018
email@grayhongnojima.com

February 26, 2009

FAXED TESTIMONY TO: House Finance Committee, Fax No. 586-6001

Hearing Date: Friday, February 27, 11:00 a.m., Conference Room 308 (FIN Committee)

Honorable Representatives Marcus R. Oshiro, Chair, Marilyn B. Lee, Vice Chair, and Members of the House Committee on Finance

Subject: **HB 1037, Relating to Civil Actions**

Dear Chair Oshiro, Vice Chair Lee, and Committee Members,

Gray, Hong, Nojima & Associates, Inc., a Hawaii-owned and -operated small business engineering firm strongly opposes HB 1037, Relating to Civil Actions. **UNLESS** the list of "governmental entities" is amended to include the government's contracted professional architects, engineers and land surveyors licensed under Chapter 464.

We strongly support tort reform and the fair allocation of risk and damages. Since the Government and the public derive far greater benefit from public works than the Government's contracted design consultants, it is reasonable that protection from joint and several liability granted to the Government is extended to the government's contracted consultants. Otherwise more of the risk is unfairly shifted to these consultants.

Since paragraph 2 of the bill defines "governmental entity" for the purposes of this section only, the government's design consultants can be included as follows (added language underscored):

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, or any professional architect, engineer or land surveyor licensed pursuant to Chapter 464 and contracted by the government entity.

Thank you for an opportunity to express our views regarding this bill.

Sincerely,

GRAY, HONG, NOJIMA & ASSOCIATES, INC.

Sheryl E. Nojima, PhD, PE
President

TESTIMONY BEFORE
HOUSE COMMITTEE ON FINANCE

By Joseph P. Viola
Hawaiian Electric Company, Inc.

11:00 a.m., February 27, 2009

House Bill 1037 HD1
Relating to Civil Actions

Chair Oshiro, Vice Chair Lee, and members of the Committee on Finance:

My testimony is presented on behalf of Hawaiian Electric Company (“HECO”) and its subsidiaries, Hawaii Electric Light Company (“HELCO”) and Maui Electric Company (MECO”). For ease of reference, I will refer to all three companies collectively as “HECO.”

I.

HECO opposes HB 1037 HD 1 unless it is amended. HECO utilizes the State and county highways to provide electricity to the public. If joint and several liability in highway cases is abolished for government entities, then, in fairness, it should be abolished for HECO and other public utilities as well. Otherwise, government will be protected at the potential great expense of public utilities. Therefore, we respectfully request that the Committee either:

1. Amend the Bill to provide similar protections to public utilities that locate their facilities within the public highways (as was done in 2005 in Act 185), or
2. Hold HB 1037 HD1 without further action.

II.

This Bill would impact HECO in highway motor vehicle accident cases involving utility poles. In those cases, plaintiffs often sue (a) HECO, (b) the State or county responsible for that highway, and (c) any joint owners of the pole.¹ Plaintiffs have argued that utility pole location is part of the highway design or maintenance, and, on that basis, seek to hold the government and utility companies jointly and severally liable for damages.² HECO and the government entities have also been sued as joint tortfeasors in slip and fall cases involving pull boxes or other utility facilities in the public sidewalks. However, under HB 1037 HD1, the State and counties could never be held jointly and

¹ Other joint pole owners may include Hawaiian Telcom Company and the State or City and County.

² See Hawaii Revised Statutes (“HRS”) § 663-10.9(4) (joint and several liability preserved in tort actions relating to highway maintenance and design, which includes “utility poles” (text attached)).

severally liable for highway maintenance or design. That would shift undue risk to HECO.

Because of the way joint and several liability works, defendants who have the ability to pay -- such as the government and the public utilities -- are at risk to pay far more than any proportionate share of liability they may be assigned. Therefore, by limiting the government's liability, alone, the Bill would effectively shift greater liability exposure in highway cases to the other so-called "deep pockets" -- the public utilities. However, there is no justification for increasing the utilities' risk in these cases. Public utilities do not plan, design or build the highways. Indeed, governmental rules, regulations and design play a significant role in determining where utilities may locate their poles and facilities within the highways.

So, any reasons justifying abolishment of joint and several liability for the State and counties in highway cases should apply equally to the public utilities. The Legislature recognized that the government and public utilities deserve similar protection in highway cases when it passed Act 185 in 2005 (now codified as HRS § 264-20), which extended liability protection to the State, counties and public utilities with respect to flexibility in highway design. *See* § 264-20(b)(4) (text attached).

The same fair result can be accomplished by amending HB 1037 HD1 so that HRS section 663-10.5 would, instead, read as follows:

"§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability. Any other law to the contrary notwithstanding, including but not limited to sections 663-10.9, 663-11 to 663-13, 663-16, 663-17, and 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity. [~~provided that joint and several liability shall be retained for tort claims relating to the maintenance and design of highways pursuant to section 663-10.9]~~ In any such case, where one of the other tortfeasors is a public utility, then, likewise, the public utility shall be liable for no more than that percentage share of the damages attributable to the public utility.

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this

State or any county. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1.

For purposes of this section, the liability of a government entity or public utility shall include its vicarious liability for the acts or omissions of its officers and employees."

Alternatively, the same result can be achieved by amending HB 1037 HD1 to add a new section 2 as follows:

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§663- Liability of public utility companies limited in highway cases. Notwithstanding section 663-10.9, public utility companies with facilities on or within public highways shall not be held jointly and severally liable for recovery of economic or non-economic damages in motor vehicle accidents involving tort actions relating to maintenance and design of highways."

Otherwise, this Bill should be held without further action.

Thank you for the opportunity to testify on this matter.

Hawaii Revised Statutes § 663-10.9 (Underscore added):

§663-10.9 Abolition of joint and several liability; exceptions. Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

(A) Intentional torts;

(B) Torts relating to environmental pollution;

(C) Toxic and asbestos-related torts;

(D) Torts relating to aircraft accidents;

(E) Strict and products liability torts; or

(F) Torts relating to motor vehicle accidents except as provided in paragraph (4);

(3) For the recovery of noneconomic damages in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned; and

(4) For recovery of noneconomic damages in motor vehicle accidents involving tort actions relating to the maintenance and design of highways including actions involving guardrails, utility poles, street and directional signs, and any other highway-related device upon a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. In actions in which the affected joint tortfeasor has not been shown to have had such reasonable prior notice, the recovery of noneconomic damages shall be as provided in paragraph (3).

(5) Provided, however, that joint and several liability for economic and noneconomic damages for claims against design professionals, as defined in chapter 672, and certified public accountants, as defined in chapter 466, is abolished in actions not involving physical injury or death to persons.

Hawaii Revised Statutes §264-20 (underscore added):

§264-20 Flexibility in highway design; liability of State, counties, and public utilities. (a) If a highway, including any bridge, principal and minor arterial road, collector and local road, or street, requires new construction, reconstruction, preservation, resurfacing (except for maintenance surfacing), restoration, or rehabilitation, the department of transportation with regard to a state highway, or a county with regard to a county highway, may select or apply flexible highway design guidelines consistent with practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials. Flexibility in highway design shall consider, among other factors:

- (1) Safety, durability, and economy of maintenance;
- (2) The constructed and natural environment of the area;
- (3) Community development plans and relevant county ordinances;
- (4) Sites listed on the State or National Register of Historic Places;
- (5) The environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity;
- (6) Access for other modes of transportation, including but not limited to bicycle and pedestrian transportation;
- (7) Access to and integration of sites deemed culturally and historically significant to the communities affected;
- (8) Acceptable engineering practices and standards; and
- (9) Safety studies and other pertinent research.

(b) Any other law to the contrary notwithstanding, any decision by the State, the department of transportation, a county, or any officers, employees, or agents of the State, the department of transportation, or a county to select or apply flexibility in highway design pursuant to this section and consistent with the practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials shall not give rise to a cause of action or claim against:

- (1) The State;
- (2) The department of transportation;
- (3) The counties;
- (4) Any public utility regulated under chapter 269 that places its facilities within the highway right of way;
or
- (5) Any officer, employee, or agent of an entity listed in paragraphs (1) to (4).

(c) The exception to liability provided in subsection (b) applies only to the decision to select or apply flexibility in highway design pursuant to this section and does not extend to design, construction, repair, correction, or maintenance inconsistent with subsection (a).

February 25, 2009

FAXED TESTIMONY TO: House Finance Committee, Fax No. 586-6001

Hearing Date: Friday, February 27, 11:00 a.m., Conference Room 308 (FIN Committee)

Honorable Representatives Marcus R. Oshiro, Chair, Marilyn B. Lee, Vice Chair, and Members of the House Committee on Finance

Subject: **HB 1037, Relating to Civil Actions**

Dear Chair Oshiro, Vice Chair Lee, and Committee Members,

Fukunaga & Associates, Inc. is a Hawaii-owned and managed Civil & Environmental Engineering firm operating in Hawaii since 1969. We strongly oppose **HB 1037, Relating to Civil Actions**, UNLESS the list of "governmental entities" is amended to include the government's contracted professional architects, engineers and land surveyors licensed under Chapter 464.

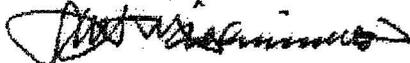
Fukunaga & Associates strongly supports tort reform and the fair allocation of risk and damages. Since the Government and the public derive far greater benefit from public works than the Government's contracted design consultants, it is reasonable that protection from joint and several liability granted to the Government is extended to the government's contracted consultants. Otherwise more of the risk is unfairly shifted to these consultants.

Since paragraph 2 of the bill defines "governmental entity" for the purposes of this section only, the government's design consultants can be included as follows (added language underscored):

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, or any professional architect, engineer or land surveyor licensed pursuant to Chapter 464 and contracted by the government entity.

Thank you for an opportunity to express our views regarding this bill.

Very truly yours,



Jon K. Nishimura, P.E.
President
Fukunaga & Associates, Inc.



ACEC

AMERICAN COUNCIL OF ENGINEERING COMPANIES
of Hawaii

President

Norman Kawachika, P.E.
SSFM International
Ph: (808) 531-1308
Fx: (808) 521-7348

President-Elect

John Katahira, P.E.
The Limetaco Consulting Group
Ph: (808) 596-7790
Fx: (808) 596-7361

Treasurer

Sheryl Nojima, Ph.D.
Cray Hong Nojima & Assoc.
Ph: (808) 521-0306
Fx: (808) 531-8018

Secretary

Douglas Lee, P.E.
Brown and Caldwell
Ph: (808) 523-8499
Fx: (808) 533-0226

Past President

Jon Nishimura, P.E.
Fukunaga & Assoc.
Ph: (808) 944-1821
Fx: (808) 946-9339

National Director

Janice Marsters, Ph.D.
Engineering Solutions
Ph: (808) 488-0477
Fx: (808) 488-3776

Directors

Terrance Arashiro, P.E.
Austin, Tsutsumi & Assoc.
Ph: (808) 533-3646
Fx: (808) 526-1267

Beverly Ishii-Nakayama, P.E.
Shigemura, Lau, Sakanaashi,
Higuchi & Assoc.
Ph: (808) 942-9100
Fx: (808) 942-1899

Joel Yuen, P.E.
Insynergy Engineering
Ph: (808) 521-3773
Fx: (808) 521-3993

Ginny M. Wright
Executive Director
P.O. Box 88840
Honolulu, HI 96830
Ph: (808) 234-0821
Cell: (808) 741-4772
Fx: (808) 234-1721
Email: gwright@acec-hawaii.org
Website: www.acec-hawaii.org

February 25, 2009

FAXED TESTIMONY TO:

House Finance Committee. Fax No. 586-6001

Hearing Date: Friday, February 27, 11:00 a.m., Conference Room 308 (FIN Committee)

Honorable Representatives Marcus R. Oshiro, Chair, Marilyn B. Lee, Vice Chair, and Members of the House Committee on Finance

Subject: **HB 1037, Relating to Civil Actions**

Dear Chair Oshiro, Vice Chair Lee, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing 70 consulting engineering firms, strongly opposes HB 1037, Relating to Civil Actions, **UNLESS the list of "governmental entities" is amended to include the government's contracted professional architects, engineers and land surveyors licensed under Chapter 464.**

ACECH strongly supports tort reform and the fair allocation of risk and damages. Since the Government and the public derive far greater benefit from public works than the Government's contracted design consultants, it is reasonable that protection from joint and several liability granted to the Government is extended to the government's contracted consultants. Otherwise more of the risk is unfairly shifted to these consultants.

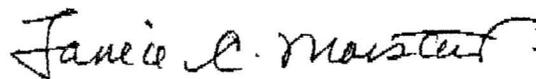
Since paragraph 2 of the bill defines "governmental entity" for the purposes of this section only, the government's design consultants can be included as follows (added language underscored):

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county, or any professional architect, engineer or land surveyor licensed pursuant to Chapter 464 and contracted by the government entity.

Thank you for an opportunity to express our views regarding this bill.

Sincerely,

American Council of Engineering Companies of Hawaii



Janice C. Marsters
National Director