

ACT 185

S.B. NO. 1876

A Bill for an Act Relating to Highways.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Hawaii's rural communities are the heart and soul of the islands, reflecting the aloha spirit and natural beauty that are the essence of our State. As urbanization spreads throughout Hawaii, our rural communities are at risk of losing their unique identities. The imposition of uniform, conventional highway design can significantly alter and detract from the historical identities of these communities.

During the past decade, highway design has undergone significant change. Today, engineers and planners are employing greater flexibility in the way they design road projects through context-sensitive solutions and design. Through the use of the Federal Highway Administration *Flexibility in Highway Design* book, and the American Association of State Highway and Transportation Officials *Green Book*, and *A Guide for Achieving Flexibility in Highway Design* (May 2004), engineers and planners are able to consider more than safety and efficiency when building new roads or reconstructing old roads. These additional design considerations include the environment, scenic and historic preservation, community effects, and aesthetics.

Congress expressly acknowledged the importance of flexible highway design sensitive to the surrounding environment, especially in historic and scenic areas. Section 1016(a) of the Intermodal Surface Transportation Efficiency Act of 1991 allows approval of projects designed to allow for historic and scenic value preservation, while ensuring safe use. Highway design under the National Highway System Act (other than interstates) may consider the constructed and natural environment of the area, and the environmental, scenic, aesthetic, historic, community, and preservation impacts of the project. The National Highway System Act authorizes states the

flexibility to develop and apply criteria they deem appropriate for federal-aid projects not on the National Highway System. This federal policy framework recommends early identification of critical project issues and encourages thorough consideration of community concerns and input prior to any major decision that could limit other options.

Despite the flexibility under the Federal Highway Administration, American Association of State Highway and Transportation Officials, and federal law, Hawaii's state department of transportation (DOT) has been reluctant to develop and implement flexible design processes and guidelines that consider historical, scenic, and environmental impacts in highway construction.

The legislature adopts the concept of flexible highway design and determines as a matter of policy that the department should address these concerns by developing guidelines that:

- (1) Create a process to weigh community traditions, values, and practices, and environmental, aesthetic, and social impact with safety, financial, political, social, and economic policy considerations including the department's own institutional experience, cost benefit analysis, and relevant studies;
- (2) Lead to an overall highway design choice that is "reasonable", reflects sound and accepted engineering practices, provides a consistent driving experience, and includes reasonable notice to highway users;
- (3) Recognize the variety of conditions that different projects may present;
- (4) Require documentation of the process and reasoning leading to the flexible design decision, including the circumstances of each project, the choices available, and the considerations reviewed, as well as a complete explanation for the decision itself; and
- (5) Incorporate qualitative and safety studies where advisable.

The legislature expressly finds that flexible designs are not themselves less safe than earlier engineering practices. Rather, flexible design is simply part of the ongoing evolution within engineering that takes a broader range of considerations into account than may have been done in the past. Flexible design is not inherently less safe than some different or prior design; flexible design is a different and broader combination of factors to be considered in being safe.

To this end, the legislature determines as a matter of policy that when the government chooses to use flexibility in highway design, no legal claims or causes of action should be made against the State, DOT, the counties, and officers, employees, or agents of the State, DOT, the counties, or a public utility regulated under chapter 269 that places its facilities within the highway right of way, for the decision to select or apply flexible highway design.

The legislature further finds that community organizations, including the Alliance for the Heritage of East Maui, the Hanalei Road Committee on Kauai, and the Hamakua-Honokaa Heritage Corridor on the Big Island have been working on and support scenic byway or heritage corridor programs. The upper Kona road on the Big Island and Ka Iwi coastal highway on Oahu are also under review as important scenic and historic corridors. These groups support flexible design in highway construction to meet their community's desire to protect and preserve natural, cultural, historic, and scenic values and resources.

This Act also provides for a limitation of liability for government entities by providing immunity for the decision whether to use flexible alternatives when a flexible alternative design guideline is selected in accordance with this Act and does not extend to subsequent improper design, construction, maintenance, or improvements.

Public utilities are also protected against liability for the decision to apply flexibility in highway design. For example, if the decision to utilize a specific alternative standard requires the use of a particular type of utility pole and precludes the use of another type, the utility would not be liable for use of the required pole.

This immunity similarly applies only to the selection or application of a flexible highway design and does not relieve the utility from its subsequent responsibility of safe design, construction, and maintenance.

The purpose of this Act is to encourage flexibility in highway design that ensures that road and bridge projects adequately meet the State's transportation needs, exist in harmony with their surroundings, are safe and cost-effective, and add value to the communities they serve.

SECTION 2. Chapter 264, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§264- 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, the following parties shall be immune from liability for personal injury, death, or property damage in any accident arising out of the decision to elect 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:

- (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 immunity from 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).”

SECTION 3. (a) Before June 30, 2006, the director of transportation shall establish flexible highway design guidelines to govern new construction, reconstruction, preservation, resurfacing (except for maintenance surfacing), restoration, or rehabilitation of bridges, principal and minor arterial roads, collector and local

roads, and streets. The guidelines shall include and address the considerations set forth in section 2 of this Act.

The guidelines shall also provide for documentation of the facts, circumstances, and considerations involved in the flexible design decision, including an explanation of the process and the reasoning that led to the decision.

(b) The director shall establish a process to allow flexible highway design to be considered when designing improvements on the following highways:

- (1) Hana highway, east Maui;
- (2) Hanalei road, north Kauai;
- (3) Hamakua-Honokaa heritage corridor, island of Hawaii;
- (4) Upper Kona road, island of Hawaii; and
- (5) Ka Iwi coastal highway, eastern Oahu.

(c) In establishing the guidelines described under this section, the director shall solicit and consider the views of organizations and elected officials, including but not limited to:

- (1) Those with expertise in:
 - (A) Environmental protection;
 - (B) Historic preservation;
 - (C) Scenic conservation; and
 - (D) Bicycle and pedestrian transportation;
- (2) Community planning organizations;
- (3) The State historic preservation office of the department of land and natural resources; and
- (4) The Federal Highway Administration.

SECTION 4. New statutory material is underscored.¹

SECTION 5. This Act shall take effect on July 1, 2005.

(Approved July 1, 2005.)

Note

1. Edited pursuant to HRS §23G-16.5.