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

ON THE FOLLOWING MEASURE:
H.B. NO. 1037, RELATING TO CIVIL ACTIONS.
BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 10, 2009 **TIME:** 2:00 PM
LOCATION: State Capitol, Room 325
Deliver to: State Capitol, *Room* 403, 5 *Copy*

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

Chair Karamatsu 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.

BERNARD P. CARVALHO, JR.
Mayor

DARREN M. SUZUKI
Acting County Attorney

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February 9, 2009

TESTIMONY FROM THE OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUA'I TO THE HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY

HEARING ON HOUSE BILL NO. 1037

Date: Tuesday February 10, 2009
Time: 2:00 p. m.
Place: Conference Room 325
State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

House of Representatives Committee on Judiciary
Honorable Jon Riki Karamatsu, Chair
Honorable Ken Ito, Vice Chair
Committee Members

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

My name is Darren M. Suzuki, Acting 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.

The purpose of HB 1037 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 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 KAUA'I

Darren M. Suzuki

DARREN M. SUZUKI

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Mayor

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February 9, 2009

The Honorable Jon Riki Karamatsu, Chair,
and Members
Committee on Judiciary
State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Chair Karamatsu and Members of the Committee:

Re: Testimony in Support to House Bill 1037
Hearing: Tuesday, February 10, 2009, at 2:00 p.m.,
Conference Room 325

The County of Hawai'i ("County") supports House Bill 1037 that clarifies that government entities are only liable in certain cases for the percentage share of the damages they actually caused. Government should not be the deep pocket that pays for the fault or negligence of inattentive drivers, or other tortfeasors. The following cases 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 Hawai'i 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 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 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. The Quiocho Case.

In the consolidated case of *Eleanor Quiocho vs. County of Hawai'i* (Civil No. 02-1-306), *Paulyn Estioko, et al. vs. County of Hawai'i* (Civil No. 02-1-0307), *Margaret Parong vs. County of Hawai'i* (Civil No. 02-1-0308), *Sherman Wassman vs. County of Hawai'i* (Civil No. 02-1-0310), the County was able to reasonable settle this case.

This is a wrongful death case that occurred on September 7, 2000, involving a police pursuit, that was not high speed and police vehicles at least a half a block away from vehicle being pursued, wherein the vehicle being followed by the police (Defendant Richard "Rosario") struck another vehicle killing the passenger (Ellison Sweezey) in that second vehicle. Rosario was on "ice." Ms. Sweezey left behind four orphaned children who were being cared for by a sister of decedent Ms. Sweezey.

The matter went to trial in Hilo and the jury returned a verdict in favor of the Plaintiffs in the sum of $5,630,370.00. The County was determined to be 34% liable which placed a judgment against the County in the sum of $1,914,325.80.

After April of 2005, and prior to the *Kienker* decision, we settled the case for $1,400,000.00 and our insurance carrier provided their policy limit of $100,000.00 for a total of $1,500,000.00. Payment would be in equal installments over a period of three years.

If the *Quiocho* verdict had occurred today, the County would not have been able to settle this case for $1,500,000.00. The County would have appealed the jury verdict which would have delayed any payments to the plaintiffs. And the case might have to be retried again. Otherwise, the County would have been responsible for over $5,000,000.00 because a drug addict failed to stop when the police used their blue lights.

C. 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, Deputy Director of Environmental Management

HB 1037

RELATING TO CIVIL ACTIONS

KEN HIRAKI
VICE PRESIDENT - GOVERNMENT & COMMUNITY AFFAIRS
HAWAIIAN TELCOM

FEBRUARY 10, 2009

Chair Karamatsu and Members of the House Judiciary Committee:

I am Ken Hiraki, Vice President of Government Relations, testifying on behalf of Hawaiian Telcom in opposition to HB 1037, "RELATING TO CIVIL ACTIONS."

Hawaiian Telcom cannot support this bill unless it is amended to clarify that public utilities are also exempt from joint and several liability. As currently drafted, this measure unfairly exempts the state and county government from joint and several liability in tort cases involving a public road or rights of way, without providing a similar exemption for public utilities. Without an exemption, this bill discriminates against public utilities by unfairly exposing utilities to assume greater risk and legal liability in tort lawsuits than what was originally intended under current law.

By way of background, Hawaiian Telcom utilizes the state and county roads and rights of way to provide telecommunication services to the public. In tort cases involving an accident involving a utility pole along the public roads and highways, utilities (joint owners of the pole—telephone, electric, cable) such as Hawaiian Telcom, are often sued together with the state or county government responsible for the highway. Should the state or county government become exempt from joint and several liability, by default plaintiffs will then target the only parties remaining such as utilities. As a practical matter, this disparate shift in liability means that a utility will end up paying more than its assigned share of liability despite the fact that it is usually the government

entity that determines where and under what conditions a utility pole may be placed along a road or highway.

The passage of this bill in this form will inevitably lead to increased lawsuits and expenses for utilities such as Hawaiian Telcom. As a matter of fairness, we request that HB 1037 be amended to include a public utility exemption from joint and several liability as follows :

> "**§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability.** [~~Notwithstanding~~] 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 [~~section~~] 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. 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 shall include its vicarious liability for the acts or omissions of its officers and employees."

Based on the aforementioned, unless the bill is amended to provide the same exemption from joint and several liability as provided to state and county governments, Hawaiian Telcom is opposed to the passage of HB 1037 .

Thank you for the opportunity to testify.

Hawaii Chapter
AMERICAN PUBLIC WORKS ASSOCIATION

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

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

February 10, 2009

FAX: 586-8494

Hearing Date: Tuesday, February 10, 2:00 p.m., Conference Room 325 (JUD Committee)

Honorable Representative Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Committee on Judiciary

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

Honorable Chair Karamatsu, Vice Chair Ito, 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, Relating to Civil Actions... UNLESS the list of "governmental entities" is amended to include the government's contracted design professional engineering, architectural, survey and field survey consultants, as recommended by the American Council of Engineering Companies of Hawaii (ACECH) in their testimony.**

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 which results in all of the initial risk unfairly shifted to the Design Professionals and the Contractors. It is reasonable that protection from joint and several liability granted to the Government is extended to the consultants designing these projects on behalf of the Government.

We feel that Joint and Several liability should be eliminated and that everyone should be limited to their percentage share responsibility for all legal actions. Therefore we ask you to OPPOSE this bill unless elimination of Joint and Several liability is totally eliminated.

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

ACEC
American Council of Engineering Companies
of Hawaii

February 9, 2009

EMAILED TESTIMONY TO: JUDtestimony@Capitol.hawaii.gov

Hearing Date: Tuesday, February 10, 2:00 p.m., Conference Room 325 (JUD Committee)

Honorable Representatives Jon Riki Karamatsu, Chair, Ken Ito, Vice Chair, and Members of the House Committee on Judiciary

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

Dear Chair Karamatsu, Vice Chair Ito, and Committee Members,

The American Council of Engineering Companies of Hawaii (ACECH), representing 70 firms consulting engineering firms, **opposes HB 1037**, Relating to Civil Actions, **UNLESS the list of "governmental entities" is amended to include the government's contracted design professionals.**

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 design consultants, it is reasonable that protection from joint and several liability granted to the Government is extended to the government's contracted design consultants. Otherwise risk is unfairly shifted to these consultants, who only have a small role in these public works for a limited time period.

Since paragraph 2 of the bill defines "governmental entity" for the purposes of this section only, the State's design professionals 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 consultant licensed pursuant to Chapter 464 and contracted, either directly or as a sub-contractor, 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

Janice C. Marsters, Ph.D.
National Director

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

February 10, 2009

To: Chairman Jon Riki Karamatsu and Members of the House Committee on Judiciary:

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

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.

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