LINDA LINGLE
GOVERNOR

BRENNON T. MORIOKA
INTERIM DIRECTOR

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

IN REPLY REFER TO:

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

February 2, 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1037

COMMITTEE ON TRANSPORTATION

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 put 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.

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 TRANSPORTATION

DATE: Monday, February 2, 2009 **TIME:** 9:00 AM
LOCATION: State Capitol, Room 433
Deliver to: State Capitol, *Room* 403, 5 *Copy*

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

Chair Souki 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 contrary to the original intent of section 663-10.5 and is an inappropriate use of government resources.

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.

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.co.honolulu.gov

MUFI HANNEMANN
MAYOR

CARRIE K.S. OKINAGA
CORPORATION COUNSEL

DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

January 30, 2009

The Honorable Joseph M. Souki, Chair
and Members of the Committee on
House Transportation
House of Representatives
State Capitol
Honolulu, Hawaii 96813

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

Dear Chair Souki:

Thank you for the opportunity to provide testimony in support of House Bill No. 1037. The City and County of Honolulu supports the Legislature's intention to modify Hawai'i Revised Statutes, sections 633-10.5 and 663-10.9, which further limits governmental entities exposure to joint and several liability in lawsuits involving allegations of negligent roadway design, construction and maintenance. While the City and County of Honolulu would prefer a total abolition of joint and several liability in such roadway cases, it fully supports House Bill No. 1037's substantial elimination of the exceptions to joint and several liability.

Very truly yours,

for 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

January 31, 2009

The Hon. Joseph M. Souki
Chair, House Transportation Committee
State Capitol
415 South Beretania Street
Honolulu, HI 96813

Re: H.B. 1037 Relating to Civil Actions
Hearing Date: Monday, February 2, 2009
Time: 9:00 a.m.
Place: Conference Room 309

Dear Chair Souki and Members:

On behalf of the County of Maui and the Department of the Corporation Counsel, I testify in support of H.B. 1037 relating to civil actions and government tort liability.

H.B. 1037 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. 1037 will not relieve government from paying for damages caused by government. It prevents taxpayers from paying for the negligence of other tortfeasors. H.B. 1037 will help ensure fairness and equity for government entities who, because of their perceived "deep pockets", may be otherwise required to pay more than their fair share in traffic accident lawsuits.

Thank you for your consideration.

Sincerely yours,

Brian T. Moto
Corporation Counsel

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 HAWAI'I
OFFICE OF THE CORPORATION COUNSEL
101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622

January 30, 2009

The Honorable Joseph Souki, Chair,
and Members
Committee on Transportation
State Capitol
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Chair Souki and Members of the Committee:

Re: Testimony in Support to House Bill 1037
Hearing: Monday, February 2, 2009, at 9:00 a.m., Conference Room 309

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. <u>The Quiocho Case</u>.

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. <u>Conclusion</u>.

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

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 2, 2009

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.

ACEC

American Council of Engineering Companies of Hawaii

January 30, 2009

FAXED TESTIMONY TO:

House Sgt.-at-Arms Fax No. 586-8469 (5 copies)
Hearing Date: Monday, February 2, 9:00 a.m., Conference Room 309 (TRN Committee)

Honorable Representatives Joseph M. Souki, Chair, Karen Leinani Awana, Vice Chair, and Members of the House Committee on Transportation

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

Dear Chair Souki, Vice Chair Awana, 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

J. C. Matsler / National Director

for Norman Kawachika, P.E.
President

Hawaii Chapter
AMERICAN PUBLIC WORKS ASSOCIATION

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

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

February 1, 2009

EMAILED TESTIMONY TO: TRNtestimony@capitol.hawaii.gov
(5 copies requested)

Hearing Date: Monday, February 2, 9:00 a.m., Conference Room 309 (TRN Committee)

Honorable Representatives Joseph M. Souki, Chair, Karen Leinani Awana, Vice Chair, and Members of the House Committee on Transportation

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

Honorable Chair Souki, Vice Chair Awana, 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

TESTIMONY BEFORE
HOUSE COMMITTEE ON TRANSPORTATION

By Joseph P. Viola
Associate General Counsel
Hawaiian Electric Company, Inc.

9:00 a.m., February 2, 2009

House Bill 1037
Relating to Civil Actions

Chair Souki, Vice Chair Awana, and members of the Committee on Transportation:

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 cannot support HB 1037 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 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

---

[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)).

slip and fall cases involving pull boxes or other utility facilities in the public sidewalks. However, under HB 1037, the State and counties could never be held jointly and 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 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 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).

ENGINEERING SOLUTIONS, INC.
Our Name, Our Mission for a Sustainable Environment

98-1268 Kaahumanu St., Suite C-7 • Pearl City, HI 96782 • P: (808) 488-0477 • F: (808) 488-3776 • E: engineering@engrsol.com

January 30, 2009

EMAILED TESTIMONY TO: TRNtestimony@capitol.hawaii.gov
(5 copies requested)

Hearing Date: Monday, February 2, 9:00 a.m., Conference Room 309 (TRN Committee)

Honorable Representatives Joseph M. Souki, Chair, Karen Leinani Awana, Vice Chair, and Members of the House Committee on Transportation

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

Testimony: **Strongly oppose unless revised**

Dear Chair Souki, Vice Chair Awana, and Committee Members,

Engineering Solutions, Inc., a Hawaii-based, woman-owned 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 consultants, as recommended by the American Council of Engineering Companies of Hawaii (ACECH) in their testimony**.

Engineering Solutions, Inc. often participates with other small firms providing design for State and County infrastructure projects. Our profits on these projects are very small, and the Government and the public derive far greater benefit from these public works than do our firms. In the current litigation climate, the risks far outweigh the rewards, and this bill would result in more of the risk unfairly shifted to the consultants. 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.

The American Council of Engineering Companies has recommended that paragraph 2 of the bill be revised to include "contracted professional consultants" among the parties defined as "governmental entity" for the purposes of this section only, and we support that change.

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

Sincerely,
Engineering Solutions, Inc.

Janice C. Marsters

Janice C. Marsters, Ph.D.
Principal