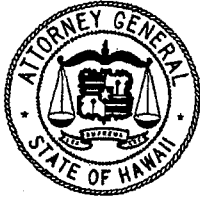


HB 865,

HD1

Testimony



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

H.B. NO. 865, PROPOSED S.D. 1, RELATING TO TRANSPORTATION.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, March 23, 2010 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): Mark J. Bennett, Attorney General, or
Wayne A. Matsuura, Deputy Attorney General

Chair Kim and Members of the Committee:

The Department of Attorney General provides the following comments regarding a legal problem with this bill.

The purpose of the bill is to establish a pilot project to provide for the transfer of all state highway maintenance functions on Maui, Molokai, and Lanai to the county of Maui, and to transfer applicable funding for maintenance of state highways on Maui, Molokai, and Lanai from the State to Maui County.

We believe the bill as presently written violates article VIII, section 1 of the State Constitution because it confers powers to one specific county under special laws. This constitutional section provides:

The legislature shall create counties and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws. [Emphasis added].

The term "general laws" denotes laws that apply uniformly throughout all political subdivisions of the State. Bulgo v. County of Maui, 50 Haw. 51, 58, 430 P.2d 321, 326 (1967). Although a general law may apply to less than all of the political subdivisions if it applies uniformly to a class of

political subdivisions, we do not believe the bill as presently written meets this latter requirement because the bill confers powers to only one specific county.

We note that some bills are written so that they apply only to counties that have certain characteristics - for example, to counties whose population is larger or smaller than a stated number.

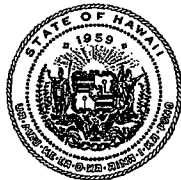
TESTIMONY BY GEORGINA K. KAWAMURA
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON
HOUSE BILL NO. 865,H .D. 1, PROPOSED S.D. 1

March 23, 2010

RELATING TO TRANSPORTATION

House Bill No. 865,H .D. 1, Proposed S.D. 1, creates a pilot project to transfer maintenance functions of State highways in Maui County from the State Department of Transportation to the Maui Department of Public Works; and creates a State and Maui County transportation working group to create a plan of implementation.

We have concerns with this bill. The proposed transfer of transportation maintenance functions from the State Department of Transportation to the counties has been discussed and reviewed in previous years; however, issues and concerns regarding the financial impact of the allocation and distribution of highway funds have not been resolved. It appears to be premature to propose actually transferring functions and personnel until the allocation issue has been resolved.



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

March 23, 2010

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 865 PROPOSED SD 1

COMMITTEE ON WAYS AND MEANS

The Department of Transportation (DOT) supports this bill in concept, but requests the following amendments.

- Section 1 should be deleted as it states that counties are more economically efficient at providing highway maintenance or Section 1 should be amended to reflect the fact that state highway facilities are actually in far better condition and maintained at a higher level than county facilities. Counties have historically not provided maintenance resources for their roadways commensurate with the levels that the DOT has, especially in recent years.
- The definition of "highway maintenance functions" in Section 3 should be amended to read: *"Highway maintenance functions" means those functions specified in a memorandum of agreement between the department of transportation and the Maui county department of public works concerning maintenance of state highways located in Maui county.*
- The definition of "memorandum of agreement" in Section 3 should be amended to read: *"Memorandum of agreement" means a written agreement, acceptable to the Maui Council, under which the Maui county department of public works agrees to assume responsibility and liability for specified highway maintenance functions for state highways in Maui county and the department of transportation agrees to transfer or delegate specified state facilities, resources, personnel, and funding to the department of public works for the duration of the pilot project under this Act.* The county should also adopt the maintenance practices of the DOT by moving towards preventative maintenance programs consistent with Federal Highway Administration (FHWA) guidelines. Preventative maintenance provides for more frequent, low-cost treatments to pavements prior to signs of distress and failure to extend pavement life. Once a State preventative maintenance program is fully implemented under the proposed DOT Highways Modernization Plan, preventive maintenance is estimated to ultimately save the DOT up to \$30 million annually in statewide road maintenance costs while significantly improving pavement conditions.

- Section 9 should be amended by deleting paragraph (b) because DOT does not use and will not "transfer" federal funds to Maui County for routine highway maintenance. Federal funds are programmed for statewide highway CIP through the federally mandated STIP process and federal-aid for Maui highway CIP must compete with other high priority CIP projects across the state.
- Section 11 should be amended to provide that county rules shall only supersede state rules when county rules are more stringent than state rules and standards relating to highway maintenance. Because compliance with federal standards for maintenance of federal-aid facilities is a prerequisite for DOT receipt of federal aid, inadequate maintenance of federal-aid facilities will result in FHWA withholding federal funds.

The proposed memorandum of agreement between DOT and the County Department of Public Works will need to clearly define County responsibilities, potential County liability, and how much funding DOT will delegate for County expenditure to maintain DOT highways. In order to ensure compliance with federal requirements for adequate maintenance, the MOA will need to contain provisions that require the County to give priority to maintenance of federal-aid highways and restrict the County from using State resources to subsidize "catch-up" with deferred maintenance of County facilities. In general, the DOT will also need to retain operational control and regulatory authority over highway access and permitted work within the State highway right-of-way.

It is our understanding that the proposed pilot project would include routine maintenance including preventive maintenance but would not include major capital improvements such as highway reconstruction or bridge replacement. It also is our understanding that DOT would fund the proposed pilot project by delegating a pro rata share of State highway operating and maintenance appropriations and that the pilot project will not utilize federal funds since DOT does not use federal funds for routine highway maintenance. To ensure that other counties are treated fairly and that DOT can meet its statewide responsibilities, we do not believe that there can be direct appropriations of the State highway fund or highway revenue bonds for expenditure by Maui County as part of this pilot program.

CHARMAINE TAVARES
Mayor

MILTON M. ARAKAWA, A.I.C.P.
Director

MICHAEL M. MIYAMOTO
Deputy Director

Telephone: (808) 270-7845
Fax: (808) 270-7955



RALPH NAGAMINE, L.S., P.E.
Development Services Administration

CARY YAMASHITA, P.E.
Engineering Division

BRIAN HASHIRO, P.E.
Highways Division

COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS
200 SOUTH HIGH STREET, ROOM NO. 434
WAILUKU, MAUI, HAWAII 96793

March 23, 2010

Honorable Donna Kim, Chair
and Members of the Senate Ways and Means Committee
Hawaii State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Kim and Committee Members:

RE: HB NO. 865, H.D. 1, S.D. 1 RELATING TO TRANSPORTATION

The County of Maui is encouraged by the modifications in the proposed SD1 from earlier concepts of this pilot project offered in other bills (i.e., HB2301 HD2 and SB2954 SD2). We believe it prudent to allow the County and the State to provide a report to the 2011 Legislature on a potential implementation plan for this pilot project to temporarily transfer maintenance of State roadways in the County of Maui to the County Department of Public Works. The County is already aware of, and has identified, a number of issues that would need to be addressed - or, consequences which the Legislature should be aware of - before transferring these responsibilities. As such, allowing the following six to eight months to identify the issues and provide a recommendation to the 2011 Legislature is appropriate and prudent. The County of Maui would like to provide the following as a summary of its concerns regarding the proposed bill's concept for a pilot project.

The proposed bill desires an eventual pilot project to transfer jurisdiction of the maintenance of State highways in the County of Maui from the State Department of Transportation to the County of Maui Department of Public Works.

We do have questions regarding the overall purpose and perceived goal(s) of the bill which states that highway maintenance functions are duplicative or overlapping. The State Department of Transportation maintains arterial high speed, high volume roadways. The County maintains collector and local roadways which are lower speed, lower volume roadways. Each maintains roads under their respective jurisdictions.

Honorable Donna Kim, Chair
and Members of the Senate Ways
and Means Committee
March 23, 2010
Page 2

The County of Maui believes that the transfer of State personnel and funding to the County would not result in additional efficiencies in the delivery of services. The only difference would be in who is managing the maintenance.

The County of Maui does not have the resources to properly construct and maintain its own roadways much less be burdened with the responsibility to ensure that State roadways are properly maintained. The County must depend on State resources, as well as Federal funding, to leverage limited County resources. Even with these additional resources, the County of Maui has a difficult time providing an adequate level of maintenance on County roads.

Although the bill proposes to transfer all applicable employees, records and appropriations for the duration of the pilot project, these details need to be fairly and equitably discussed and agreed to between the State Department of Transportation and the County of Maui. There are many issues and complexities involved in effectuating such a transfer and these should be more thoroughly examined before any pilot project is implemented.

There are other unresolved questions. If the State owns and is responsible for construction of State roadways, but the County will be responsible for maintenance, who is responsible for potential liability? If the County is now responsible for maintenance, there is a significant concern about how this would affect the amount of Federally- and State-funded capital improvement projects and funding for the County of Maui. Also, would State, as well as County employees, be able to perform maintenance functions on State highways located on ceded lands?

Regarding the proposed transfer of State personnel to the County, it is unclear whether State employees are now going to be considered County employees for the duration of the pilot project. It is not clear whether the extent of appropriation dollars to be transferred includes salaries, fringe benefits, and social security. State and County employees are on different pay systems and pay schedules, so how would this issue be equitably handled? Should vacancies occur, would these be handled by the State or County recruitment office? If retirements occur, would the County incur any liability? Would complaints, grievances, and appeals be handled through a State or County process?

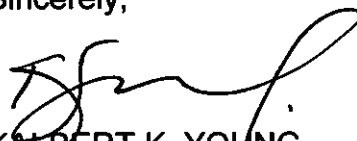
We believe that the foregoing questions and issues should be resolved before any implementation of a pilot project. Section 15 of the bill establishes a State and County working group which can discuss many of the foregoing issues. These should be discussed and agreed upon by the State Department of Transportation, as well as

Honorable Donna Kim, Chair
and Members of the Senate Ways
and Means Committee
March 23, 2010
Page 3


the County of Maui Mayor and County Council. The County of Maui wants to cooperate with the State Legislature, but we would like to proceed prudently. We are interested in working with the State Department of Transportation to identify issues, problems, challenges, and benefits with such a transfer and could be prepared to report back to the next Legislature. However, we would respectfully request that members of the working group be able to agree upon the numerous details of implementation to ensure that such a pilot project can be satisfactorily done.

Thank you for the opportunity to provide testimony on this matter.

Sincerely,



KALBERT K. YOUNG
Director of Finance



MILTON M. ARAKAWA
Director of Public Works

MMA:jso
s:\milton\dkim_testimony on hb 865 transfer of state highways

J. B. Pacheco
47-876 Kamehameha
Highway
Kaneohe, Hawaii 96744

MARCH 23, 2010

TESTIMONY TO THE SENATE COMMITTEE ON WAYS AND MEANS
OPPOSING HB 865, HD1, PROPOSED SD 1

The proposed SD 1 claims that the State DOT and Maui Department of Public Works have overlapping uncoordinated maintenance responsibilities. This is false. The State DOT does not maintain county roads in Maui. The Maui Department of Public Works does not maintain State roads in Maui.

The proposed SD 1 also claims that "... Counties are more economically efficient at providing highway maintenance [than the State DOT]...." Again this is false. The January 2010 Report of the Task Force on Reinventing Government says that the departments which maintain county roads on the Neighbor Islands do not have desirable "economies of scale". This amounts to a politically correct way of recognizing that the Neighbor Island counties are less economically efficient at highway maintenance than the State DOT.

There is absolutely no reason to believe that passing this bill will improve maintenance of State highways on Maui or reduce DOT costs for highway maintenance. Instead, the real agenda of the proposed SD 1 is to improve maintenance of County roads by giving DOT personnel, the State highway fund, and FHWA funds to Maui DPW. This simply is unfair and irresponsible.

Oahu taxpayers are already being treated unfairly by the State DOT. If you ask, the State DOT can confirm that taxes paid by Oahu drivers are subsidizing maintenance of State highways on the Neighbor Islands. And if you ask, the State DOT can also confirm that for years and years the State highways on Maui have been consistently better maintained than State highways on Oahu. Why should Oahu taxpayers also be asked to subsidize maintenance of Maui county roads?

TESTIMONY ON HB 865 PROPOSED SD 1

BY MICHAEL WONG

TO THE SENATE COMMITTEE ON WAYS AND MEANS

For almost half a century the counties had jurisdiction over all public highways in the Territory of Hawaii. While the counties had jurisdiction over all public highways, there were many roads which the counties were unwilling to maintain. In 1947, in large part because the counties were unwilling to adequately fund highway maintenance, jurisdiction for selected public highways (primarily federal-aid highways) was transferred to territorial agencies. These territorial highways evolved into highways under the jurisdiction of the DOT.

There is no conceivable way that county maintenance of DOT highways as proposed in HB 865, SD 1 will reduce DOT highway maintenance costs, improve DOT highway maintenance, eliminate "redundant" DOT personnel, or improve coordination between CIP and maintenance projects on DOT highways. Moreover, the proposed pilot project will not provide a fair test of whether any county can efficiently maintain DOT highways. Because DOT has aggressively funded preventive maintenance on DOT highways on Maui, Molokai, and Lanai, these highways will take longer to fall apart if Maui DPW mismanages or cockroaches DOT resources.

There is a significant risk that politicians will use the proposed HB 865, SD 1 to justify an unfair rip-off of State resources for the benefit of Maui County. Moreover, the proposed pilot project may violate the State Constitution, could jeopardize federal-aid highway funding, and would not result in any public agency accepting jurisdiction for Maui "roads in limbo" because:

- A law which assigns new functions explicitly to Maui County is not a "general" law under Article VIII, Section 1 of the State Constitution.
- There is no guarantee that a future Legislature will appropriate or a future Governor will allot funding required under Article VIII, Section 5 of the State Constitution.
- If Maui DPW fails to maintain any federal-aid DOT highway to FHWA standards, FHWA potentially could deny future federal-aid to the entire State.
- Under Sections 264-1 and 265-1, Hawaii Revised Statutes, counties are already responsible to maintain all public highways which are not under DOT jurisdiction. Notwithstanding these laws, there are many public highways under Maui County jurisdiction which are not being adequately maintained.
- Private roads used by the public, for which no public agency asserts jurisdiction, are not public highways.

DOT already has authority to contract for county maintenance of DOT highways under Section 264-44, Hawaii Revised Statutes. The Legislature could encourage greater DOT flexibility and efficiency by enacting statutory authorization for county-State highway contracts to include the administrative assignment of resources and/or personnel between DOT and an affected county under agreement. In contrast, the fact-free, top-down approach proposed in HB 865, SD 1 will never benefit the state highway system.