

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 14, 2011 10:21 PM  
**To:** JUDtestimony  
**Cc:** atg.legcoordinator@hawaii.gov  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM  
**Attachments:** HB0836 HD1\_ATG-02-15-11\_JUD.pdf

Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: Yes  
Submitted by: Joshua Wisch  
Organization: Department of the Attorney General  
Address:  
Phone:  
E-mail: [atg.legcoordinator@hawaii.gov](mailto:atg.legcoordinator@hawaii.gov)  
Submitted on: 2/14/2011

Comments:  
Fawn Yamada, Deputy Attorney General, will be present at the hearing to testify.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2011**

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ON THE FOLLOWING MEASURE:

H.B. NO. 836, H.D. 1, RELATING TO REAL PROPERTY.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 15, 2011 TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or  
Fawn Y. J. Yamada, Deputy Attorney General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General opposes this measure.

The purpose of this bill is to require the State, or one of its counties to initiate condemnation proceedings to acquire a privately owned highway, roadway or lane at the request of an adjacent private landowner. This is so that public funds may be used to repair and maintain the property and to cause the condemning authority to be liable for damages to the adjacent landowners' properties as a result of negligent maintenance.

Private property shall not be taken or damaged for public use without just compensation pursuant to the Fifth Amendment of the United States Constitution and Article I, Section 20 of the Hawaii State Constitution. Also, see, 43 Haw. 253 (Haw. Terr. 1959) (Implicit in the constitutional and statutory provision that private property may be taken for public use is the requirement that the taking shall be necessary for such use.) This bill does not indicate what population of the public would be using the highway, roadway, or lane or whether the purpose of the condemnation action would serve to benefit the public. An

action in condemnation is for the benefit of the public and not to serve a single private landowner.

The bill places the burden on the State to determine whether it will acquire the private property or whether one of the counties has more appropriate jurisdiction to condemn the property. It fails, however, to provide how this determination will be made when neither the State nor the counties have any interest in the private property.

The bill further proposes to fix compensation at \$10 when real property taxes have not been paid for ten years. This proposal violates the Federal and State Constitutions, which provide for just compensation. It also conflicts with section 101-24, Hawaii Revised Statutes, which provides that the right of compensation accrues from the date of summons and that the property's actual value at that date shall be the measure of valuation of all property to be condemned.

We therefore respectfully oppose the passage of this measure.

## JUDtestimony

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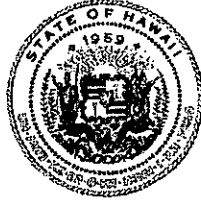
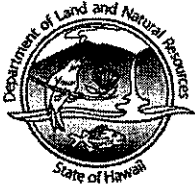
**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 14, 2011 10:57 AM  
**To:** JUDtestimony  
**Cc:** Tracy.S.Oshiro@hawaii.gov  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM  
**Attachments:** HB0836HD1\_LNR\_02-15-11\_JUD.pdf

Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: Yes  
Submitted by: Tracy Oshiro  
Organization: DLNR  
Address:  
Phone:  
E-mail: [Tracy.S.Oshiro@hawaii.gov](mailto:Tracy.S.Oshiro@hawaii.gov)  
Submitted on: 2/14/2011

Comments:

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
WILLIAM J. AILA, JR.  
Chairperson**

**Before the House Committee on  
JUDICIARY**

**Tuesday, February 15, 2011  
2:00 PM  
State Capitol, Conference Room 325**

**In consideration of  
HOUSE BILL 836, HOUSE DRAFT 1  
RELATING TO REAL PROPERTY**

The gist of House Bill 956, House Draft 1 is to require the State or Counties (in the event the State defers to the County) to condemn, at the request of an abutting property owner, privately owned highways, roadways, or lanes. The Department of Land and Natural Resources (Department) opposes this bill.

Liability and maintenance responsibility are the main concerns (i.e., exposing the State to additional claims for personal injury and property damage, and the additional costs to repair and maintain these highways, roadways, and lanes) In light of one of the worst economic downturns in the history of the State, governmental entities such as the State or Counties are simply unable to take on this added responsibility and liability.

The Department respectfully notes that although this bill may benefit a few private property owners who acquired their respective properties with actual or constructive notice of the abutting privately owned roads, if passed would be at the expense of the broader general public who ultimately will need to fund the additional costs of liability and maintenance noted above.

Additionally, the condition requiring that "ownership of the privately owned highway, roadway, or lane is not determinable through public searches at the bureau of conveyances, land court, or real property tax division of any county" creates an unworkable ambiguity in the bill. The bill seeks to address privately owned property, however, it also requires that ownership of the property must be undeterminable by a search of those public sources of ownership information that are the principal sources such information.

The Department respectfully asked that this bill be held.

WILLIAM J. AILA, JR.  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING

FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

## JUDtestimony

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**From:** David.J.Rodriguez@hawaii.gov  
**Sent:** Monday, February 14, 2011 4:13 PM  
**To:** JUDtestimony  
**Cc:** Michael.Ng@hawaii.gov  
**Subject:** JUD Tue Feb15  
**Attachments:** HB836 HD1TESTIMONY (eminent domain).doc

DOT submits (1) testimony for Tue Feb 15

Thank you for the opportunity to provide testimony.

David J. Rodriguez  
Department of Transportation  
869 Punchbowl Street, Suite 504  
Honolulu, Hawaii 96813  
(808) 587-2165



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

February 15, 2011

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 836, H.D. 1

COMMITTEE ON JUDICIARY

The Department of Transportation opposes House Bill 836, H.D. 1, which requires the State or, alternatively, the counties, to initiate eminent domain proceedings against private property owners upon request of an adjacent property owner. The best interests of the State are not served if it is required to condemn privately owned highways, roadways, or lanes, solely at the request of the adjacent property owner. This bill removes the discretion of the State to determine, on a case-by-case basis, the public purpose and merits of any condemnation. Furthermore, such condemnations, which provide for fair market value and damages, are very costly because it is determined by Constitution and appraisal, rather than a set price.

The power of eminent domain should be judiciously used and carefully evaluated. Therefore, the Department of Transportation opposes House Bill 836, H.D. 1.

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 14, 2011 10:45 AM  
**To:** JUDtestimony  
**Cc:** wbillingsley@honolulu.gov  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM  
**Attachments:** HB836\_HD1.PDF

Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Walter Billingsley  
Organization: City & County of Honolulu, Department of Design and Construction  
Address:  
Phone:  
E-mail: [wbillingsley@honolulu.gov](mailto:wbillingsley@honolulu.gov)  
Submitted on: 2/14/2011

Comments:



DEPARTMENT OF DESIGN AND CONSTRUCTION  
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 11<sup>TH</sup> FLOOR  
HONOLULU, HAWAII 96813

Phone: (808) 768-8480 • Fax: (808) 768-4567  
Web site: [www.honolulu.gov](http://www.honolulu.gov)

PETER B. CARLISLE  
MAYOR

COLLINS D LAM, P.E.  
DIRECTOR

LORI M. KAHIKINA, P.E.  
DEPUTY DIRECTOR



February 14, 2011

The Honorable Jerry L. Chang, Chair  
and Members  
Water, Land & Ocean Resources Committee  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Chang and Members:

Subject: House Bill (HB) No. 836 HD1, Relating to Real Property

The Department of Design and Construction (DDC) respectfully **opposes** HB836 HD1, although we understand and appreciate the efforts to assist private property owners in their pursuit to have government assume responsibility for roads fronting their property. The intent of the bill is not clear, but if maintenance of private roads is the issue, the City & County of Honolulu (City) already has an ordinance in place to maintain private roads, ROH 14-32.2. General qualifications include, but are not limited to: (1) The private road must serve six or more parcels, and at least six of those parcels must be owned by separate individuals or entities; (2) The road must also be open to serve and benefit the general public; (3) The road must not be part of a cluster housing development.

The City will perform limited maintenance on qualifying private roads, such as repairing potholes. Maintenance does not include installation or maintenance of curbs, gutters, shoulders, drainage facilities, or similar infrastructure.

We are not aware of a definite count but we are confident in saying that there are many private roads within the City, possibly numbering in the thousands. Private roads are generally in substandard condition, and the condemnation and repair costs, including costs to bring the non-standard private roads into compliance with City standards, would be prohibitive to the City.


We are also concerned that the bill allows a condemnation action to be initiated by a single private party. Condemnation is typically reserved for public agencies for the purpose of serving the greater public good. The intent of the condemnation by a private

The Honorable Jerry L. Chang, Chair  
and Members  
Water, Land & Ocean Resources Committee  
February 14, 2011  
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entity may serve only private interests rather than the greater good of the general public. Furthermore, other adjacent property owners may object to the condemnation action, but be unable or unwilling to take action to prevent it. For the reasons stated herein, DDC respectfully **opposes** HB836 HD1.

Thank you for the opportunity to testify.

Very truly yours,



Collins Lam, P.E.  
Director

CDL:WB:hm

## JUDtestimony

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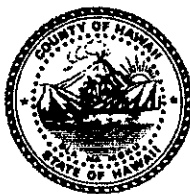
**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 14, 2011 11:14 AM  
**To:** JUDtestimony  
**Cc:** fcambra@co.hawaii.hi.us  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM  
**Attachments:** testimony in opposition of HB 836.pdf

Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Joseph Kamelamela  
Organization: Office of the Corporation Counsel, County of Hawaii  
Address:  
Phone:  
E-mail: [fcambra@co.hawaii.hi.us](mailto:fcambra@co.hawaii.hi.us)  
Submitted on: 2/14/2011

Comments:

William P. Kenoi  
Mayor



Lincoln S.T. Ashida  
Corporation Counsel

Katherine A. Garson  
Assistant Corporation  
Counsel

**COUNTY OF HAWAII**  
**OFFICE OF THE CORPORATION COUNSEL**

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

February 14, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair  
and Members  
Committee on Judiciary  
State Capitol  
415 South Beretania Street  
Honolulu, Hawai'i 96813

Dear Chair Keith-Agaran and Members of the Committee:

*Re: Testimony in Opposition to House Bill No. 836, HD1*  
*Hearing: Tuesday, February 15, 2011, 2:00 p.m., Conference Room 325*

The County of Hawai'i's Office of the Corporation Counsel ("County") opposes House Bill No. 836, HD1 because it fails to articulate the public purpose, it impermissibly delegates the governmental entities' condemnation powers to a private land owner, it violates Hawai'i Constitution, Article 8, Section 5, and it would burden the finances of our county government on the Island of Hawai'i.

The bill proposes to "require the State or, alternatively, the counties to exercise its power of eminent against private property owners upon the request of an adjacent owner of land." *House Stand. Com. Rep. No. 110 (2011)*. The bill defines "private property" to mean "a privately owned highway, roadway, or lane; provided that ownership of the privately owned highway, roadway, or lane is not determinable through public searches at the bureau of conveyances, land court, or real property tax division of any county." *Id.*

It is unclear from the language of the proposed bill as to the significant and vital public purpose being served in compelling the governmental entities to initiate condemnation proceedings. In addition, the report from the Committee on Water, Land and Ocean Resources does not provide references to any reports, studies or findings that would support a conclusion that there is a public purpose to be accomplished by passage of this bill.

Furthermore, a governmental entity cannot, and should not, delegate its condemnation powers to a private land owner. *City and County of Honolulu v. Sherman*, 110 Hawai'i 39, 70, 129 P.3d 542, 573 (2006); *Hsiung v. City and County of*

*Hawai'i County is an Equal Opportunity Employer and Provider*

The Honorable Gilbert S.C. Keith-Agaran, Chair  
and Members  
February 14, 2011  
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*Honolulu*, 378 F.Supp.2d 1258, 1266-67 (D.Hawai'i 2005); *Richardson v. City and County of Honolulu*, 76 Hawai'i 46, 58, 868 P.2d 1193, 1205 (1994). In his January 31, 2011, letter to the Committee on Water, Land, and Ocean Resources, Winston K. Q. Wong, Deputy Corporation Counsel, City and County of Honolulu, correctly stated:

By requiring the State or the City to condemn the property designated in the bill at the request of an adjacent landowner is in effect providing the power of eminent domain to the private landowner for a non-public purpose.

So, the proposed bill would be unconstitutional because it would allow delegation of the governmental entities' condemnation power to a private citizen.

The bill could also violate Hawai'i Constitution, Article 8, Section 5, that states that "[i]f any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost." The passage of the bill will create a new program and increase the level of service for the counties when the State declines to exercise its power of eminent domain; the counties are then compelled to initiate condemnation, and be responsible for repair and maintenance costs, without the State sharing in the cost. The proposed bill seemingly violates Article 8, Section 5 because under certain circumstances the State will not be sharing in the cost of repairs and maintenance with the counties.

The bill's intent, moreover, is not simply to initiate condemnation proceedings, its intent is to legally bind a governmental entity to condemn the private property, pay compensation (even if it is \$10), repair obvious defects within two years after condemnation, and eventually hold a governmental entity legally responsible for any damage to an adjacent landowner's property and any injury caused by negligent maintenance.

Our county government maintains 942 miles of roads, managing to pave only about 27 miles per year through our in-house paving program. Puna, our largest district of the nine (9) districts comprising the Island of Hawai'i, has 450 miles of private roads. The passage of the bill will add additional private roads for our county government to maintain that will unreasonably overtax our limited personnel and financial resources.


During this Great Recession, while maintaining our core services, our county government, through our Mayor and County Council, has realized reduced revenues and expenditures. With the expected increase of substantial expenditure of funds to repair the condemned roads, and the added risk of liability that would be created by the

The Honorable Gilbert S.C. Keith-Agaran, Chair  
and Members  
February 14, 2011  
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passage of this bill, we would further unnecessarily and unreasonably burden our county's ability to provide needed services to our citizens that are affordable.

Thank you for your consideration of our testimony.

Sincerely,



Feb 14 2011 9:49 AM

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, Planning Director  
Warren H.W. Lee, P.E., Director, Department of Public Works

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Friday, February 11, 2011 6:49 PM  
**To:** JUDtestimony  
**Cc:** jkamela@co.hawaii.hi.us  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM

Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Joseph K. Kamelamela  
Organization: County of Hawaii  
Address:  
Phone:  
E-mail: [jkamela@co.hawaii.hi.us](mailto:jkamela@co.hawaii.hi.us)  
Submitted on: 2/11/2011

Comments:

## JUDtestimony

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, February 14, 2011 2:04 PM  
**To:** JUDtestimony  
**Cc:** wkwong@honolulu.gov  
**Subject:** Testimony for HB836 on 2/15/2011 2:00:00 PM  
**Attachments:** img-214134303.pdf

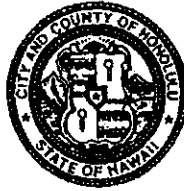
Testimony for JUD 2/15/2011 2:00:00 PM HB836

Conference room: 325  
Testifier position: oppose  
Testifier will be present: Yes  
Submitted by: WINSTON WONG  
Organization: CITY AND COUNTY OF HONOLULU DEPARTMENT OF CORPORATION COUNSEL  
Address:  
Phone:  
E-mail: [wkwong@honolulu.gov](mailto:wkwong@honolulu.gov)  
Submitted on: 2/14/2011

Comments:



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.honolulu.gov](http://www.honolulu.gov)



PETER B. CARLISLE  
MAYOR

CARRIE K.S. OKINAGA  
ACTING CORPORATION COUNSEL

KATHLEEN A. KELLY  
FIRST DEPUTY CORPORATION COUNSEL

February 14, 2011

The Honorable Gilbert S.C. Keith-Agaran, Chair,  
and Members  
Committee on Judiciary  
The House of Representatives  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

Re: Opposition to House Bill No. 836, HD1, Relating to Real Property

The City and County of Honolulu ("City") strongly opposes House Bill No. 836, HD1. The bill is set for hearing on February 15, 2011, at 2:00 p.m. in Conference Room 325.

The bill proposes to amend Chapter 101 of the Hawaii Revised Statutes (HRS) to add a new section which would require the State or alternatively, the City to condemn a privately owned highway, roadway, or lane at the request of an owner of land adjacent thereto; would fix the compensation to be paid in accordance with HRS Section 101-23, provided that if no real property taxes have been paid for the past ten years and the private owner can be located, the compensation would be \$10; would require the State or the City to repair obvious defects on the condemned property in not less than two years after condemnation; and would make the State or the City legally responsible for any damage to the adjacent landowner's property or any injury caused by negligent maintenance beginning two years after condemnation, provided that the failure of the State or the City to bring the condemned property into compliance with State laws or City ordinances regulating maintenance of property shall not constitute evidence of negligence in any subsequent civil action. The bill also provides that it applies to a privately owned highway, roadway, or lane for which the ownership is not determinable through public searches at the bureau of conveyances, land court or real property tax division of the City. In addition, the bill proposes to amend HRS Section 46-62 by adding a new subsection providing that if the State declines to file condemnation proceedings under the above

The Honorable Gilbert S.C. Keith-Agaran, Chair,  
and Members  
Committee on Judiciary  
February 14, 2011  
Page 2

proposed amendment to Chapter 101, then the City is required to file condemnation proceedings.

The proposed bill is highly irregular, and in the City's view, is unconstitutional and unlawful. The reason for this position is that under the United States and Hawaii Constitutions and State law, the State and the City have the power of eminent domain, which is the power to condemn private property for public use. It is within the sole discretion of the State or the City as to when to exercise that power, but no matter what, condemnation is only effected for public purposes. By requiring the State or the City to condemn the property designated in the bill at the request of an adjacent landowner is in effect providing the power of eminent domain to that private landowner for what could very well be a non-public purpose. On that basis, the City believes that the proposed bill is highly irregular, unconstitutional, and unlawful.

In addition, the proposed bill would require the State or the City to repair the property designated in the bill within two years after condemnation, and would make the State or the City liable for damage to the property of the adjacent landowner and any injury caused by negligent maintenance. Obviously, any such repair would require the substantial expenditure of funds by the City, when the City is facing substantial deficits in its budget and trying to fulfill its obligation to maintain its existing roads and other facilities. Moreover, the added risk of liability on the City proposed by the bill further exacerbates the City's budgetary deficits. Further, if the bill is passed and if there is a condemnation of the property as defined in the bill, it should be noted that there is a likelihood that portions of the land of the adjacent owner and neighboring owners may need to be acquired in order to bring such property up to City standards.

Thank you for the opportunity to present this testimony.

Very truly yours,



CARRIE K.S. OKINAGA  
Acting Corporation Counsel

CKSO:di

11-00806/164736

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair, the Honorable Karl Rhoads, Vice  
Chair and other Members of the Committee on Judiciary

DATE: Tuesday, February 15, 2011

2:00 p.m., Room 325

RE: HB 836 -- Relating to Real Property

POSITION: STRONG SUPPORT

My name is Fetu Kolio, and I am a resident of Mayor Wrights Homes. I also serve as a Neighborhood Board Member, and a Weed & Seed Resident participant in my community. My neighbors and I are testifying today in strong support of HB 836.

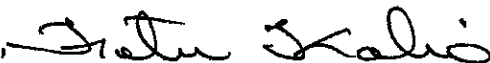
HB 836 would require the State or, alternatively, the counties, to initiate eminent domain proceedings against private property owners upon request of an adjacent property owner. These proceedings will lead to someone being held accountable for the bad conditions.

Some of the problems we have on nearby lanes include:

The lane has not been consistently maintained for a long time. There are pot-holes which residence in the area trip over while walking to and from work every day. Bulky trash items not being picked-up on a regular basis.

Thank you for hearing this bill and reading my testimony. I hope you will pass HB 836.

Fetu Kolio,  
Mayor Wright Homes  
1235 Pua Lane, 34-D  
Honolulu, HI 96817



The Honorable Gilbert S.C. Keith-Agaran

Chair, Committee on the Judiciary

House of Representatives

Re: In support of HB 836 HD1 (Relating to Real Property)

Dear Chair Keith-Agaran & Committee members,

I own property on Akepo Lane (between King Street and Dillingham Boulevard). The ownership of the lane is not known. The City & County occasionally does routine maintenance, like filling potholes, but anything major never gets done.

When it rains, water routinely drains off the lane under the house I own causing erosion problems and weakening the foundation of my house. Because no one knows who owns the lane, there is no one to hold responsible for any problems and the City departments use this lack of information to avoid doing anything they don't want to do.

HB 836 HD1 or something like it needs to pass to fix ownership with someone. To me it makes sense for the City & County to own the lane because they own all other side streets, but if the private owner can be found, that could be of help too. At least I would know who to hold responsible for problems caused by the lack of storms drains and other maintenance.

Mahalo for reading my testimony!

Aloha, Glenn Tomita