

SCR33/SR13

Measure Title:

REQUESTING THE DEPARTMENT OF LAND AND NATURAL RESOURCE AND THE CITY AND COUNTY OF HONOLULU TO AGREE TO A FINAL DETERMINATION REGARDING THE OWNERSHIP AND JURISDICTION OF AN UNIMPROVED SECTION OF KAIMAKANI STREET

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 Senate Committees on
PUBLIC SAFETY, GOVERNMENT OPERATIONS AND MILITARY AFFAIRS
and
WATER, LAND AND HOUSING**

**Tuesday, March 22, 2011
2:45 PM
State Capitol, Conference Room 224**

**In consideration of
SENATE RESOLUTION 13/ SENATE CONCURRENT RESOLUTION 33
REQUESTING THE DEPARTMENT OF LAND AND NATURAL RESOURCES AND
THE CITY AND COUNTY OF HONOLULU TO AGREE TO A FINAL
DETERMINATION REGARDING THE OWNERSHIP AND JURISDICTION OF AN
UNIMPROVED SECTION OF KAIMAKANI STREET**

Senate Resolution 13/Senate Concurrent Resolution 33 urge both the Department of Land and Natural Resources ("Department") and the City and County of Honolulu ("City") to agree to a final determination regarding the ownership and jurisdiction of an unimproved section of Kaimakani Street, as well as reaching an agreement on the ongoing and continuing maintenance of Kaimakani Street, regardless of ownership. The resolutions also urge the Department and the City to consider the impact of Act 288, Session Laws of Hawaii 1993, and Resolution No. 93-287 of the City and County of Honolulu. Finally, the resolutions request the Department to report its findings and recommendations to the Legislature no later than thirty days prior to the convening of the Regular Session of 2012. The Department offers the following comments.

The Department does not believe further discussions between the Department and the City about responsibility and liability for Kaimakani Street would result in anything meaningful. As well noted in the resolution itself, the Department believes that Kaimakani Street is a county road under Chapter 264, Hawaii Revised Statutes (HRS), which is supported by a report from the State Abstractor, as well as the interpretation of Chapter 264, HRS, by Department staff and its assigned counsel. Furthermore, Department staff and its assigned counsel met face-to-face with the City and its counsel, but at the end of the day, the parties could only "agree to disagree." The Department's Administrator even proffered the idea of a friendly Declaratory Action before the Court to decide the issue once and for all, but the City was not interested. As a result, the

WILLIAM J. AILA, JR.
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
KAIHOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Department is not hopeful that further discussions with the City will result in anything meaningful.

Despite the City's reluctance to accept responsibility for Kaimakani Street, the Department has voluntarily proceeded to temporarily maintain the area, without admitting any liability or responsibility, nor committing to continue such maintenance in the future, but for the purpose of addressing health, safety and fire concerns of the neighborhood residents. However, due to the current fiscal climate, the Department cannot ensure that it will continue such maintenance efforts in the future. The Department continues to face severe budget cutbacks. The Department's general fund appropriations and special fund revenues have dropped significantly over the last several years, and the Department lost more than 10% of its positions over the past three years.

As a result, it is becoming increasingly difficult for the Department to voluntarily assume what the Department believes is the City's management responsibility over this area. Since the economic hardships felt by the Department is likely felt by the City as well, the Department suggests that perhaps the resolution could be amended to authorize the Department and the City to sell the fee simple interest in Kaimakani St. as a remnant to an abutting landowner under Section 171-52, HRS, and to the extent a sale of the entire Kaimakani St. as a remnant becomes impractical (due to no one willing to take the entire Kaimakani St) or impossible, that the City and the Department (as the case may be) is authorized to sell the fee to the highest bidder at a public auction.

**DEPARTMENT OF DESIGN AND CONSTRUCTION
CITY AND COUNTY OF HONOLULU**

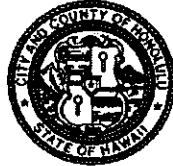
650 SOUTH KING STREET, 11TH FLOOR
HONOLULU, HAWAII 96813

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

PETER B. CARLISLE
MAYOR

COLLINS D LAM, P.E.
DIRECTOR

LORI M. KAHIKINA, P.E.
DEPUTY DIRECTOR



March 21, 2011

The Honorable Will Espero, Chair
and Members of the Committee on Public Safety, Government Operations,
and Military Affairs
The Honorable Donovan M. Dela Cruz, Chair
and Members of the Committee on Water, Land, and Housing
State Capitol
Honolulu, Hawaii 96813

Dear Chair Espero, Chair Dela Cruz and Members:

Re: Senate Resolution No. 13 and Senate Concurrent Resolution No. 33,
Requesting the Department of Land and Natural Resources and the
City and County of Honolulu to agree to a Final Determination Regarding the
Ownership and Jurisdiction of an Unimproved Section of Kaimakani Street

The City and County of Honolulu's Department of Design and Construction ("DDC") supports the intention of Senate Resolution ("SR") 13 and Senate Concurrent Resolution ("SCR") 33, which request that the State Department of Land and Natural Resources and the City and County of Honolulu (the "City") agree to final determination regarding the ownership and jurisdiction of an unimproved section of Kaimakani Street ("Kaimakani Street"). However, DDC opposes SR13/SCR33 in their present form, as they do not include the City's position regarding ownership of Kaimakani Street and information regarding correspondence and meetings between the City and the State on this matter.

Please note that, in response to a letter from the State Department of the Attorney General dated June 7, 2007, which set forth, among other things, the abstractor's findings and the State's argument that Kaimakani Street was under the City's jurisdiction, the City, by letter dated August 16, 2007 (the "August 2007 Letter"), explained in length and detail its position that Kaimakani Street remained under the State's jurisdiction. (A copy of the August 2007 Letter is attached for your information.)

As explained in pages 1-2 of the August 2007 Letter, with regards to the disputed roads that were transferred to the City, the City has maintained that paper roads—unimproved ways not open to the general public as roads—were not transferred to the City when ownership and jurisdiction of all disputed "public highways" within the City (as defined under HRS Section 264-

The Honorable Will Espero, Chair
and Members of the Committee on Public Safety, Government Operations,
and Military Affairs

The Honorable Donovan M. Dela Cruz, Chair
and Members of the Committee on Water, Land, and Housing

State Senate
March 21, 2011
Page 2

1) were conveyed to the City through Act 288, Session Laws of Hawaii 1993 ("Act 288"), and accepted by the City through City Council Resolution No. 93-287 ("Resolution No. 93-287"). At that time, the State, through the Department of the Attorney General ("AG") in AG Op. No. 63-54, had opined that a "public highway" did "not refer to a mere 'paper' road. (A copy of AG Op. No. 63-54 is attached to the August 2007 Letter.) As paper roads were not even considered "public highways" when Act 288 was enacted and Resolution No. 93-287 adopted, they would not have been included with the "disputed public highways" transferred to and accepted by the City.

The State has argued that Kaimakani Street was never a paper road based on the following: (1) that the Hawaiian Government Survey registered map no. 323 prepared by C.J. Lyons, Surveyor, dated January 29, 1874, along with survey notes dated 1873, showed the location on the ground of Kaimakani Street and referred to it as "Old Path"; and (2) that DLNR located testimony from the hearing of the Boundary Commissioner for the Island of Oahu to settle and confirm the boundaries to the Crown Land of Aiea, held on May 5, 1969, which identified the "Old Path" as an "alanui pii" or "ascending path/road".

However, no physical evidence remains today that the subject area was ever used as road, and even if the area was once, historically, described as a "path," the City does not believe that supports the conclusion that the area is therefore a "disputed public highway."

As explained in pages 2-3 of the August 2007 Letter, the fact that the subject area was once described on a 1874 map as a path, and was later identified as an "alanui pii" fails to prove that Kaimakani Street was ever, even historically, a "public highway". In fact, Section 264-1 specifically excludes trails and nonvehicular rights of way from the definition of public highway. There is no evidence that Kaimakani Street ever existed or was planned (for vehicular use), or that the "Old Path" that existed in 1874 was a vehicular right-of-way rather than a natural path or trail.¹ That the "Old Path" was identified as an "alanui pii" or "ascending path/road" is a matter of translation and does not establish that the "Old Path" was a vehicular right-of-way, distinct from a trail, and open to public use.

Furthermore, the City does not agree with the State's past contention that once an area is used as a path it can never be a paper road. As explained on page 3 of the August 2007

¹ Pursuant to HRS Section 264-1(b), "[a]ll trails, and other nonvehicular rights-of-way in the State declared to be public rights-of-ways by the highways act of 1892, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails. A public trail is under the jurisdiction of the state board of land and natural resources unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county."

The Honorable Will Espero, Chair
and Members of the Committee on Public Safety, Government Operations,
and Military Affairs

The Honorable Donovan M. Dela Cruz, Chair
and Members of the Committee on Water, Land, and Housing
State Senate

March 21, 2011

Page 3

Letter, when Act 288 and Resolution No. 93-287 were passed, the AG had described a "public highway" as "a road or street actually constructed and existing on the ground" and described a paper road as "an unimproved way not open to the general public as a road."² This definition did not depend upon the historical features of any property, only its current state. With regards to Kaimakani Street, when Act 288 was enacted and Resolution No. 93-287 adopted, Kaimakani Street was not physically an improved piece of property and did not actually exist on the ground. It would have, at that time, been considered a paper road and not in dispute by the City and the State.

Even the abstractor's findings in the March 24, 2005 memorandum, as set forth in SR13/SCR33, explain only how the subject area itself was transferred to the State and its contention that Act 288 and Resolution No. 93-287 transferred it to the City. However, to date, no evidence has been provided by the State that, at the time such transfer would have occurred, Kaimakani Street was physically an improved piece of property and actually existing on the ground and open to the general public.

Act 288 and Resolution No. 93-287 transferred only disputed public highways to the City. Any property not even considered a "public highway" by either the State or the City at the time Act 288 was enacted and Resolution 93-287 was adopted, would not have been a "disputed public highway" transferred to and accepted by the City.

Based on the foregoing, the City has maintained its position that Kaimakani Street was a paper road when Act 288 was enacted and Resolution No. 93-287 adopted and was not transferred to the City as a "disputed public highway."

² For the definition of "public highway," AG Op. No. 63-54 refers to HRS Section 142-1, which preceded HRS Section 264-1. Pursuant to HRS Section 142-1, "[a]ll roads, alleys, streets, ways, lanes, trails and bridges in the State, opened, laid out or built by the State or any political subdivision thereof, are declared to be public highways . . . All roads, alleys, streets, ways, lanes, trails and bridges in the State, opened, laid out or built by private parties and dedicated or surrendered to the public use, are declared to be public highways."

The Honorable Will Espero, Chair
and Members of the Committee on Public Safety, Government Operations,
and Military Affairs

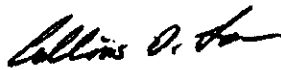
The Honorable Donovan M. Dela Cruz, Chair
and Members of the Committee on Water, Land, and Housing
State Senate

March 21, 2011

Page 4

We appreciate the opportunity to submit our written testimony on these resolutions. Although DDC supports a resolution of this issue, we would like the City's position to be clearly and fairly provided in SR13/SCR33.

Very Truly Yours,



Collins Lam
Director

CDL:WB:hm

Enclosure

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110 • HONOLULU, HAWAII 96813
TELEPHONE: (808) 523-4859 • FAX: (808) 523-4883 • INTERNET: www.honolulu.gov

MUFJ HANNEMANN
MAYOR



CARRIE K.S. OKINAGA
CORPORATION COUNSEL

DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

August 16, 2007

Pamela Matsukawa
Deputy Attorney General
State of Hawaii
Department of the Attorney General
Land/Transportation Division
Honolulu, Hawaii 96813

Dear Ms. Matsukawa:

Re: Ownership of Kaimakani Street

This is in response to your letter dated June 7, 2006, wherein you claimed that Kaimakani Street (TMK Nos. 9-9-005, -028, -029 and -068) ("Kaimakani Street") was never a paper road and that it was in existence when the City Council of the City and County of Honolulu (the "City") adopted Resolution No. 93-287 (acknowledging and accepting the City's ownership and jurisdiction of all disputed public highways within its limits) and was therefore accepted by the City as a "disputed public highway".

As you know, the City has taken the position that paper roads were not transferred to the City when ownership and jurisdiction of all disputed "public highways" within the City (as defined under HRS Section 264-1) were conveyed to the City through Act 288, Session Laws of Hawaii 1993, and accepted by Resolution No. 93-287, because the State, through the Department of the Attorney General ("AG"), had opined that a "public highway" did "not refer to a mere 'paper' road. See AG Op. No. 63-54, a copy of which is attached hereto. As paper roads were not even

Pamela Matsukawa
Page 2
August 16, 2007

considered "public highways" when Act 288 was enacted and Resolution No. 93-287 adopted, they would not have been included with the "disputed public highways" transferred to and accepted by the City.

Your argument that Kaimakani Street was never a paper road is based on the following: (1) that the Hawaiian Government Survey registered map no. 323 prepared by C.J. Lyons, Surveyor, dated January 29, 1874, along with survey notes dated 1873, showed the location on the ground of Kaimakani Street and referred to it as "Old Path"; and (2) that DLNR has located testimony from the hearing of the Boundary Commissioner for the Island of Oahu to settle and confirm the boundaries to the Crown Land of Aiea, held on May 5, 1969, which identified the "Old Path" as an "alanui pii" or "ascending path/road".

There is no physical evidence today that the subject area was ever used as road, and even if the area was once, historically, described as a "path," we do not believe that supports the conclusion that the area is therefore a "disputed public highway."

The fact that the subject area was once described on a 1874 map as a path, and was later identified as an "alanui pii" fails to prove that Kaimakani Street was ever, even historically, a "public highway". In fact, Section 264-1 specifically excludes trails and nonvehicular rights of way from the definition of public highway. There is no evidence that Kaimakani Street ever existed or was planned (for vehicular use), or that the "Old Path" that existed in 1874 was a vehicular right-of-way rather than a natural path or trail.¹ That the "Old Path" was

¹ Pursuant to HRS Section 264-1(b), "[a]ll trails, and other nonvehicular rights-of-way in the State declared to be public rights-of-ways by the highways act of 1892, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails. A public trail is

Pamela Matsukawa
Page 3
August 16, 2007

identified as an "alanui pii" or "ascending path/road" is a matter of translation and does not establish that the "Old Path" was a vehicular right-of-way, distinct from a trail, and open to public use.

Furthermore, we do not agree with your contention that once an area is used as a path it can never be a paper road. When Act 288 and Resolution No. 93-287 were passed, the AG had described a "public highway" as "a road or street actually constructed and existing on the ground" and described a paper road as "an unimproved way not open to the general public as a road."² This definition did not depend upon the historical features of any property, only its current state. With regards to Kaimakani Street, when Act 288 was enacted and Resolution No. 93-287 adopted, Kaimakani Street was not physically an improved piece of property and was not actually existing on the ground. It would have, at that time, been considered a paper road and not in dispute by the City and the State.

Based on the foregoing, we maintain our position that Kaimakani Street was a paper road when Act 288 was enacted and Resolution No. 93-287 adopted and was not transferred to the City as a "disputed public highway."

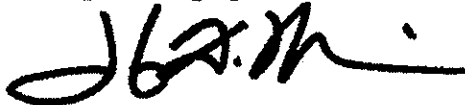
under the jurisdiction of the state board of land and natural resources unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county."

² See AG Op. No. 63-54. For the definition of "public highway," AG Op. No. 63-54 refers to HRS Section 142-1, which preceded HRS Section 264-1. Pursuant to HRS Section 142-1, "[a]ll roads, alleys, streets, ways, lanes, trails and bridges in the State, opened, laid out or built by the State or any political subdivision thereof, are declared to be public highways . . . All roads, alleys, streets, ways, lanes, trails and bridges in the State, opened, laid out or built by private parties and dedicated or surrendered to the public use, are declared to be public highways."

Pamela Matsukawa
Page 4
August 16, 2007

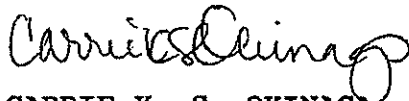
Thank you very much for your attention to this matter. Please do not hesitate to contact me at extension 4852 if you have any questions or concerns.

Very truly yours,



JENNIFER D. WAIHEE
Deputy Corporation Counsel

APPROVED:



CARRIE K. S. OKINAGA
Corporation Counsel

JDW:la

Attach.

cc: Laverne Higa
Director and Chief Engineer
Department of Facility Maintenance

SOH-KAIMAKANI.JDW

AWL:ru
lla

✓ Op. 63-54

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL

HONOLULU, HAWAII

November 26, 1963

Mr. Yoshito Tanaka
County Attorney
County of Hawaii
Hilo, Hawaii

Dear Mr. Tanaka:

Re: Status of Road Reserve
Ahualoa Homesteads

You have raised a question by letter dated October 30, 1963 as to whether a parcel of State land reserved for a road by the State, over which no road was ever constructed, may be sold by the County of Hawaii under Act 190, Session Laws of Hawaii 1963.

We reply in the negative.

The parcel in question is located between Grant 4170 and Grant 3683, being Lots 38 and 37 of the Ahualoa Homesteads, Hamakua, Hawaii.

A search of the records in the Land Department reveals that this parcel has not been granted out by the State and is still owned by the State of Hawaii. The descriptions of Grant 4170 and Grant 3683 describe the lots as being along a 30-foot roadway.

Act 190 provides in Section 4 as follows:

"The ownership of all county highways heretofore acquired by the counties by eminent domain, purchase, dedication or surrender is hereby transferred to and vested in the respective counties in which such county highways lie."

OP. 63-54

Standing Committee Report No. 1056 of the House Committee on County and Municipal Affairs accompanying S. B. No. 535 states that "Section 4 of the bill has been amended to make it clear that the county highways involved are only such highways acquired by the counties by eminent domain, purchase, dedication or surrender." Since the County of Hawaii has not acquired said road reserve by any of the means enumerated in Section 4, it is our conclusion that Act 190 is not applicable to this road reserve.

In addition, it should be noted that in Section 142-1, Revised Laws of Hawaii 1955, as amended, "public highways" are defined as follows:

"all roads. . . opened, laid out or built by the State or any political subdivision thereof are declared to be public highways."

Within the meaning of said Section, a "public highway" is a road or street actually constructed and existing on the ground. It does not refer to a mere "paper" road or an unimproved way not open to the general public as a road.

Based on the foregoing, it is our conclusion that the County of Hawaii has not been vested with fee simple title to the abovementioned road reserve and it may not therefore sell said road reserve.

Very truly yours,

/s/ Alana W. Lau

Alana W. Lau
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

Bert T. Kobayashi
Attorney General

INDEXING INSTRUCTIONS

OP. NO. 63-54

HIGHWAYS

Title to public lands reserved for a road remains in the State and have not been transferred to the respective counties by Act 190, S.L.H. 1963. Said Act 190 has transferred ownership of county highways to the respective counties only in cases where the lands thereto have been acquired by the counties by eminent domain, purchase, dedication or surrender.

COUNTIES

Same Syllabus.

PUBLIC LANDS

Same Syllabus.

SESSION LAWS OF HAWAII 1963

Act 190

Same Syllabus.