

DAVID Y. IGE
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
JUDICIARY**

**Thursday, February 18, 2016
2:00 PM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 2049, HOUSE DRAFT 1
RELATING TO TRANSPORTATION**

House Bill 2049, House Draft 1 proposes to require the counties to accept the surrender of a private road if there has been no act of any private ownership over the road for five years or condemnation proceedings have been initiated. The measure also proposes to exempt the State and counties from maintaining surrendered roads and from liability for lack of maintenance or for maintenance performed prior to assuming ownership. **With respect, the Department of Land and Natural Resources (“Department”) opposes the measure.**

This measure serves to alleviate the liability of a private party and transfer that liability to the public. The bill is particularly precarious as it prohibits the Counties from exercising any discretion whether to accept a substandard road. Combined with the provision stating that the actual use of the road does not constitute an act of ownership, in effect, the bill will result in relieving a private developer of the requirement to build roads to the appropriate County or government standards, and subsequently abandon such substandard roads to the Counties.

Furthermore, the immunity terminates once a government entity performs remedial or maintenance work on the damaged private road. This would serve as a disincentive for the Counties (or State if it so elects) to perform emergency or necessary repairs on a poorly maintained and substandard road. The Counties (and State if it so elects) will be placed in a precarious position where responsibility for a surrendered road, built by a private developer which may not conform to County or other government standards, is imposed upon them and any action taken to repair or maintain the road (furthering the purpose of the measure), would trigger the loss of immunity and impose unlimited liability upon the government entity performing the

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
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

remedial work. Ultimately, the Counties (and State if it so elects) will be held liable for flaws in the surrendered substandard roads that were caused by the original private developer.

Thank you for your consideration of this testimony.

DAVID Y. IGE
GOVERNOR



Testimony by:
FORD N. FUCHIGAMI
DIRECTOR

Deputy Directors
JADE T. BUTAY
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

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

February 18, 2016
2:00 p.m.
State Capitol, Room 325

H.B. 2049, H.D. 1
RELATING TO TRANSPORTATION

House Committee on Judiciary

The Department of Transportation respectfully wishes to express concerns regarding the surrender of private roads to the state or counties. Ownership is often unclear and it may be complicated and time consuming to determine. This bill proposes that surrender shall be accepted without exercise of discretion unless proof of other ownership can be determined within 6 months of receipt of notification that a property may qualify under the proposed provisions.

Title determination of this type may prove problematic and may require more than 6 months. Acceptance of roads that do not meet the standards of the accepting agency would require the agency to expend funds on what may have been a private entity's responsibility. As this measure may result in a large number of properties surrendered in this manner, there may be resource and funding issues created for government agencies.

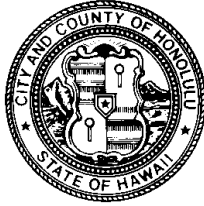
Thank you for the opportunity to provide comments.

DEPARTMENT OF FACILITY MAINTENANCE
CITY AND COUNTY OF HONOLULU

1000 Ulu'ohia Street, Suite 215, Kapolei, Hawaii 96707
Phone: (808) 768-3343 • Fax: (808) 768-3381
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LATE

KIRK CALDWELL
MAYOR



ROSS S. SASAMURA, P.E.
DIRECTOR AND CHIEF ENGINEER

EDUARDO P. MANGLALLAN
DEPUTY DIRECTOR

IN REPLY REFER TO:
16-041

February 17, 2016

The Honorable Karl Rhoads, Chair
and Members of the Committee on Judiciary
Hawaii State Capitol
415 South Beretania Street, Room 302
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members of the Committee:

Subject: Relating to Transportation

On behalf of the City and County of Honolulu, the Department of Facility Maintenance submits this testimony in opposition to HB 2049, HD 1, Relating to Transportation (the "Bill").

The Bill proposes that the applicable county shall be deemed the owner of a private roadway within the county on certain conditions.

The City believes that the State legislature cannot determine the ownership of privately-owned property without a court judgment in an eminent domain action or without the consent of all owners of real estate interests in the subject lands.

The Territory of Hawaii, in *In The Matter of the Petition of The Hawaiian Trust Co., Ltd., for a Registered Title*, 17 Haw. 523, 1906 WL 1331 (Hawai'i Terr. 1906), sought to uphold a decree of the court of land registration that the fee in a roadway, which had been used over the petitioner's land since 1893 as a public highway, although not expressly dedicated or condemned for the purpose, remained in the owner subject to an easement for a public highway. The court held:

The Territory cannot acquire the fee in a public highway by a mere legislative enactment. The fee is acquired either by compulsory process of condemnation or by the owner's consent, express or implied. The consent is implied, by force of the statute, when the owner exercises no ownership within five years, but no inference can be made in the absence of evidence that an owner does not exercise ownership over his land. This is a fact which must be shown in order to

The Honorable Karl Rhoads, Chair
and Members of the Committee on Judiciary
February 17, 2016
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sustain the claim of the Territory that it has acquired the fee on the strength of it. The only presumption of fact which would be proper would be that the owner did exercise his legal rights as owner of the fee, a thing which in this case he could have done in full recognition of the public easement to use his land for a highway.

Furthermore, should the State decide to condemn certain private roadways in order to improve them, and if the State wishes to turn the ownership of those roadways over to the City, the City will not accept such ownership unless the applicable roadway has been brought up to current standards or provides the City with sufficient funds in order to bring the roadways up to those standards.

The City acknowledges the various challenges raised by this Bill and similar bills. It is a difficult issue with far-ranging consequences. The City would embrace a State and counties commission that is staffed by the State and that is tasked with developing a recommendation to the 2018 State legislature that addresses how to accomplish the transfer of ownership of private roadways to the State and/or applicable county in order for the applicable roadway to be improved and maintained. This Commission may also serve over a long term to implement the findings and decisions of the State Legislature, the Governor and the City. Subtasks might include the following:

1. Allocation of the roadways between the State and the City.
2. Phasing of the transfer over a period of time, such as 20 years.
3. The mechanism to effect such transfer, especially when the ownership of the private roadway is unclear.
4. The funding for not only the transfer of ownership, but also for the improvements and ongoing maintenance.

While the City opposes the Bill, we look forward to working cooperatively with the State to reach a workable solution to this issue.

Sincerely,

/s/ Ross S. Sasamura, P.E.
Director and Chief Engineer

ALAN M. ARAKAWA
Mayor

DAVID C. GOODE
Director

ROWENA M. DAGDAG-ANDAYA
Deputy Director

Telephone: (808) 270-7845
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COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS

200 SOUTH HIGH STREET, ROOM NO. 434
WAILUKU, MAUI, HAWAII 96793

February 17, 2016

GLEN A. UENO, P.E., P.L.S.
Development Services Administration

CARY YAMASHITA, P.E.
Engineering Division

Highways Division

LATE

Honorable Karl Rhoads, Chair
Committee on Judiciary
House of Representatives
State Capitol, Room No. 302
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads:

**SUBJECT: HOUSE BILL NO. 2049, HD1, RELATING TO
TRANSPORTATION**

Thank you for the opportunity to comment on this bill. The Department of Public Works (DPW) is AGAINST the bill.

We understand the concerns of some of the bill's proponents, one of which owns several roads as the result of acquiring the assets of another entity. Surely, when one acquires assets, due diligence is done to fully understand the responsibilities that come with the acquisition. To pawn off those responsibilities to the local government at the expense of taxpayers is disingenuous at best.

We agree with the Attorney General's (AG) testimony that this creates an unfunded mandate and would possibly give rise to claims by the County against the State based on the constitutional citation in the AG's testimony. The Counties could simply reference the AG's letter and have a basis for a claim--a statement from the State's own legal counsel.

It also seems that *any member of the public* would be able to send a request to the County to accept any road, and shift the burden to the County to accept any road, unless the County can show "proof of ownership" within six months of the notice by that member of the public. The language says "resident or abutting landowner", so if the requester is a resident, but not abutting, the provision still applies. This will make DPW have to scramble to prove ownership of any random road called out by any member of

Honorable Karl Rhoads, Chair
February 17, 2016
Page 2

the public within six months or be deemed to have accepted the road. And it is uncertain what proof is required and what providing such proof would do. This does not sound like it is just private roads, but any road where nobody claims ownership within five years. That language would seem to include "roads in limbo", which your Committee is no doubt familiar with.

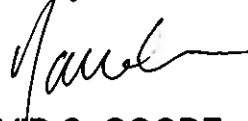
In addition, stating that the County is not liable for negligent acts before the surrender of course does nothing to affect the liability of the County for negligent acts after the (involuntary) acceptance of the road. The County could (and would) be sued for negligence every time there is an accident on the road after it is a County road.

There is immunity from liability for injuries until the County performs maintenance work. This would create a strong disincentive for the County to ever maintain any road it gets, because as soon as it does, it becomes liable. The safest course would be to never maintain the road. It is also unclear whether the immunity for "negligent or wrongful acts or omissions" before, but not after ownership language would allow for claims against the County after the (involuntary) acceptance of the road for failure to maintain, which could be negligence. In our opinion, there should not be any liability for the County under any circumstances.

Much as the drafters may deny, I believe that this would result in the County being forced to take over dozens of roads in limbo and come up with the money to maintain them. It is very hard to believe that the County could own these roads forever, never maintain them, and still have no liability.

While we are AGAINST the bill, we are *for* a solution to the issue, but one that involves all parties coming to the table with meaningful contributions.

Sincerely,



DAVID C. GOODE
Director of Public Works

DCG:jso

xc: Alan M. Arakawa, Mayor
Corporation Counsel

s:\david2\testimony_karl rhoads_hb 2049, hd1 re transportation

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 13, 2016 3:50 AM
To: JUDtestimony
Cc: NuWayveUnl@gmail.com
Subject: *Submitted testimony for HB2049 on Feb 18, 2016 14:00PM*

HB2049

Submitted on: 2/13/2016

Testimony for JUD on Feb 18, 2016 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
James Terrell Trice	NuWayve Unlimited	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Chamber of Commerce HAWAII

The Voice of Business

**Testimony to the House Committee on Judiciary
Thursday, February 18, 2016 at 2:00 P.M.
Conference Room 325, State Capitol**

RE: HOUSE BILL 2049 HD 1 RELATING TO TRANSPORTATION

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **strongly supports** HB 2049 HD 1, which requires the counties to accept the surrender of a private road if there has been no act of private ownership for five years. Also exempts the State and counties from maintaining surrendered roads and from liability for lack of maintenance or for maintenance performed prior to assuming ownership.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber strongly supports HB 2049 HD 1 as a solution to an ongoing problem. There are many private roads or public roads with private parcels that are both in use by the public that are in disrepair and require maintenance. However, in many of these cases, the private owners cannot be found or are sometimes unknown. In these situations, the roads have remained in disrepair for many years, often stuck in a limbo wherein the public contacts the counties with requests to repair but the counties are unable to act on these requests as they are privately owned. HB 2049 HD 1 provides a solution to these roads in limbo – by surrendering ownership to the counties and allowing them to proceed with necessary repairs and reconstruction to maintain these roads for public use.

We understand that this is a work in progress and look forward to working with the various stakeholders. Thank you for the opportunity to testify.

February 18, 2016

The Honorable Karl Rhoads, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 2049, H.D.1, Relating to Transportation

HEARING: Thursday, February 18, 2016 at 2:00 p.m.

Aloha Chair Rhoads, Vice Chair San Buenaventura and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its 8,800 members. HAR **supports** H.B. 2049, H.D.1 which:

1. Requires the counties to accept the surrender of a private road if there has been no act of private ownership for five years or condemnation proceedings have been initiated; and
2. Exempts the State and counties from maintaining surrendered roads and from liability for lack of maintenance or for maintenance performed prior to assuming ownership.

There are many private roads or even parts of roads that have been inadvertently evolved. H.B. 2049, H.D.1 would require counties to accept the surrender of a private road in cases where there has been an absence of any act of private ownership over the road for five years. It exempts the State and counties from maintaining surrendered roads and from liability for lack of maintenance or for maintenance performed prior to assuming ownership.

It is believed that decades ago when the homes adjacent to these roads were developed and deeded to the homeowners, these roads, by right, should have been dedicated to the city. However, for unknown reasons, that transfer never occurred and legal title appears to have remained in the trust companies.

Over the decades, the roads have remained open to the public with unrestricted access for cars, buses, refuse trucks, and emergency vehicles, etc. Many of these roads are termed “remnants” and abut or are sandwiched between sections of city-owned roads or streets. As a result, in many cases, the city currently provides maintenance services for these roads.

HAR believes that maintenance and ownership of such roads best belongs within the jurisdiction of the city and county. The city is best equipped with the knowledge and equipment to conduct any necessary planning, road repair and maintenance work.

For these reasons, HAR believes it makes most practical sense for the city to own and maintain these types of roads. It would provide the public a single point of contact to address its needs, and would also provide both clarity and consistency for the residents and homeowners.

Mahalo for the opportunity to testify.



TESTIMONY TO THE COMMITTEE ON JUDICIARY

Thursday, February 18, 2016, 2 p.m.

State Capitol, Conference Room 325

TO: The Honorable Karl Rhoads, Chair
The Honorable Joy A. San Buenaventura, Vice Chair
Members of the Committee on Judiciary

TESTIMONY IN SUPPORT OF HB2049 HD1 RELATING TO TRANSPORTATION

I am Stafford Kiguchi with Bank of Hawaii testifying in support of HB2049 HD1 dealing with private roads. We appreciate and support the committee's initiative and efforts in addressing this long-standing issue and public concern.

This bill would require counties to accept the surrender of a private road if there has been no act of private ownership for five years or condemnation proceedings have been initiated. It exempts the State and counties from maintaining surrendered roads and from liability for lack of maintenance or for maintenance performed prior to assuming ownership.

Bank of Hawaii is on title to a number of roads that were acquired when it purchased Hawaiian Trust and Bishop Trust companies back to the 1980s. It is believed that decades ago when the homes adjacent to these roads were developed and deeded to the homeowners by the trust companies as agent for the developers, these roads, by right, should have been dedicated to the city. However, for unknown reasons, that transfer never occurred and legal title appears to have remained in the trust companies and subsequently with Bank of Hawaii as successor in interest.

Over the decades, the roads have remained open to the public with unrestricted access for cars, buses, refuse trucks, and emergency vehicles, etc. Many of these roads are termed "remnants" and abut or are sandwiched between sections of city-owned roads or streets. As a result, we know that in many cases the city currently provides maintenance services for these roads.

Despite its "ownership," the bank does not enjoy the normal rights and privileges associated with ownership. We would not build on the roads nor would we deny homeowners access to their homes that front these roads. At the same time, there is no acceptable mechanism to assess any fees that could be applied toward road maintenance. As a result, the situation exists where Bank of Hawaii may have obligations but no rights.

-More-

We also recognize that there is the issue of some older roads or streets not conforming to current codes. There are no remedies available to a non-government owner to address this dilemma. If there is a desire to bring such roads up to modern standards, there would potentially need to be an exercise of eminent domain of which only a government entity could do.

As noted in the bill, people seeking help when a road or street is in need of repair may face frustration and confusion when attempting to identify the proper authority to have repairs or maintenance issues addressed.

We believe that maintenance and ownership of such roads best belongs within the jurisdiction of the city and county. The city is best equipped with the knowledge and equipment to conduct any necessary planning, road repair and maintenance work. For these reasons, we believe it makes most practical sense for the city to own and maintain these types of roads. It would provide the public a single point of contact to address its needs, and would also provide both clarity and consistency for the residents and homeowners.

However, we also recognize that this is a complex issue and are willing to work in cooperation with the appropriate city and state government entities to develop a “pilot process” to gradually transfer ownership of certain pre-designated roads or streets that would accommodate a mutually agreed upon schedule and conditions.

We appreciate the Committee’s interest and willingness to continue to examine solutions for this important issue and respectfully encourage the committee to pass this bill.

Thank you for the opportunity to testify.

Stafford Kiguchi
Executive Vice President, Bank of Hawaii
694-8580

LATE

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2049 H.D. 1**

DATE: Thursday, February 18, 2016

TIME: 2:00 pm

To: Chairman Karl Rhoads and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to the immunity provisions of H.B. No. 2049, H.D. 1, relating to Transportation.

This measure provides immunity for government if it does not perform needed repairs or remediation ordinarily required of an owner. While it may be understandable that immediate repairs may be difficult, if government does not have sufficient funds to repair or maintain these roads, a reasonable grace period, such as four years, should be extended for planning, budgeting and construction. Temporary immunity for failure to provide immediate repairs should sunset in four years. Government can ask for extensions of the sunset date if justified. This procedure at least assures that there is an incentive for government to repair the most dangerous roads as quickly as feasible and provides legislative oversight to re-evaluate the situation in light of the progress made. If adequate progress is being made, then the sunset date can be extended, if not, then a shorter extension, repeal, or some other solution can be explored. Some oversight is required to make sure needed repairs are done otherwise this problem will be here another hundred years in the future. Complete immunity to do nothing ultimately encourages government to do nothing.

Government immunity from all acts that happened before surrender of the property is overly broad. For many of these roads, there may already be government

liability for its own acts. Therefore, any limitation of responsibility should be limited to those of others. The following language is suggested: “The state or county shall not acquire any liability for the negligent acts or omissions of others that it did not already have before surrender of the highway, road, alley, street, way, lane, bikeway, bridge, or trail, solely by reason of the surrender.” Page 7, line 15 to page 8, line 4.

For these reasons, HAJ opposes the immunity provisions of this measure and asks that this bill be amended as suggested and a sunset for subsection (d) be added, or that the measure be held.

Thank you for the opportunity to testify on this measure. Please feel free to contact me should there be any questions.