



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

S.B. NO. 2372, S.D. 1, RELATING TO PRIVATE ROADS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR and
SENATE COMMITTEE ON WAYS AND MEANS

DATE: Wednesday, February 24, 2016 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call
William J. Wynhoff, Deputy Attorney General (587-2992)

Chairs Keith-Agaran and Tokuda and Members of the Committees:

The Department of Attorney General appreciates the intent of this bill, but opposes it as written.

The bill addresses the problem of privately owned roads. Often it is unclear who owns a privately owned road. Frequently, even if the owner is identified, the owner is not repairing the road. The road is not owned by either the county or the State, so no government entity will repair the road. This bill facilitates the surrender of a privately owned road to the counties.

Section 264-1(c), Hawaii Revised Statutes (HRS), already provides that privately owned roads may be dedicated or surrendered to a county. But the law provides that dedication or surrender will not be effective unless and until the legislative body of the county accepts the road.

This bill removes that proviso as to surrender and instead provides that a county shall accept the surrender “without exercise of discretion.”

The bill as written, however, may be challenged as constituting an unfunded mandate to the counties. Article VIII, section 5, of the Hawai‘i State Constitution provides:

If 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 bill seeks to mitigate the impact of road ownership by providing that the county is not required to repair or maintain surrendered roads and is not liable for injuries on surrendered

roads. The extent of the immunity or exemption from liability provided by the bill is unclear. For example, the bill provides on page 7, lines 7-13 that the State or county is immune from liability for two years after fixing the road. We are unclear if this means that the State or county is not liable at all, unless and until it performs some repairs. As provided by the bill on page 7, lines 13-17, the county or state are also not liable for negligent acts of others “that the county did not already benefit from.” We are not clear what this means and cannot predict how it might be interpreted by a court.

To the extent that a county is required to repair and maintain – or be liable for injuries on – newly surrendered roads, that arguably constitutes a “new program or increase in the level of service under an existing program.” To the extent that a county need not repair or maintain a newly “surrendered” road, the unfunded mandate issue is alleviated. But by so doing, the bill may not accomplish its intent.

We respectfully request that the Committee defer the bill.

DEPARTMENT OF FACILITY MAINTENANCE

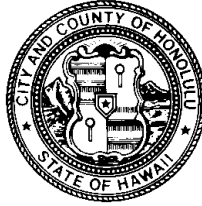
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR



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

EDUARDO P. MANGLALLAN
DEPUTY DIRECTOR

IN REPLY REFER TO:

February 23, 2016

The Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary and Labor
Hawaii State Capitol
415 South Beretania Street, Room 221
Honolulu, Hawaii 96813

The Honorable Jill N. Tokuda, Chair
and Members of the Committee on Ways and Means
Hawaii State Capitol
415 South Beretania Street, Room 207
Honolulu, Hawaii 96813

Dear Chairs Keith-Agaran and Tokuda and Members of the Committees:

Subject: Relating to Private Roads

On behalf of the City and County of Honolulu, the Department of Facility Maintenance submits this testimony in opposition to SB 2372, SD 1, Relating to Private Roads (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 Honorable Gilbert S.C. Keith-Agaran, Chair
and Members of the Committee on Judiciary and Labor
The Honorable Jill N. Tokuda, Chair
and Members of the Committee on Ways and Means

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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 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:

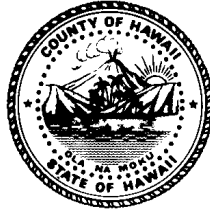
1. Allocation of the roadways between the State and the City.
2. Phasing of the transfer over a period of time, such as 20 years.
3. The mechanism to effect such transfer, especially when the ownership of the private roadway is unclear.
4. The funding for not only the transfer of ownership, but also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

William P. Kenoi
Mayor



Warren H. W. Lee
Director

Brandon A. K. Gonzalez
Deputy Director

County of Hawai'i
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Date: February 24, 2016
Time: 10:00 am
Place: Conference Room 211 State Capitol
415 South Beretania Street

S.B. 2372
Relating to Private Roads

Senate Committee on Judiciary and Labor
and
Committee on Ways and Means

The Department of Public Works for the County of Hawaii (“DPW”) respectfully submits testimony opposing S.B. 2372. This amendment to HRS § 264-1 would inequitably require the counties to accept all “surrendered” private roads, in any condition, without any discretion. The present version of HRS § 264-1 does not put the counties in such a disadvantageous position that would unfairly require them to bear substantial costs.

Some roads were never properly developed. Requiring the counties to accept such roads that were not properly developed exposes the counties to substantial costs for improving such substandard roads and potential liability for a road that was never developed or approved by a county. The County of Hawaii presently requires that any roads being dedicated to it meet the standards for dedicable roads laid out in the Hawaii County Code, but the proposed amendment would eviscerate those standards, deprive the County of any discretion in deciding whether to accept such roads, decrease a developer’s incentive to construct new roads to dedicable standards, and require the counties to repair, improve and/or reconstruct roads that were not properly planned or developed to avoid potential liability for these substandard roads.

Furthermore, the proposal also unfairly shifts the burden of, and liability for, maintaining roads from private owners who have not been performing their duties to maintain such roads to the counties. The preamble to this measure admits that some of these private roads are in disrepair. Such conditions may be due to disputes in land ownership between

private property owners, lack of maintenance due to insufficient funding, and/or the inability of private property owners to agree via subdivision covenants, road maintenance associations, or other agreements to effectuate repair work. The roads at issue are to be deemed surrendered if the owner has not exercised “ownership” for five years. Subsection (c)(2) of the proposed amendment states that driving on a road does not constitute “ownership”, so the amendment logically means that surrendered roads are those on which owners may be driving, but have not maintained for five or more years. This measure would allow the owners of such roads that they have failed to maintain to shift the burden of, and liability for, repairing and/or maintaining their neglected roads to the counties.

DPW also opposes the counties having to establish proof of ownership and the short length of time (six months from notice) provided in the proposal for counties to establish proof of ownership for a road that an occupant or owner of abutting land believes qualifies for surrender. Having to establish proof of ownership will create an unfair burden of time and expense for the counties, as they may need to devote resources away from other necessities to research ownership or to commission title reports, which can add up in expense. Furthermore, it is reasonable to anticipate that this amendment would result in the counties being deluged with such notices and six months may not be sufficient time to research ownership.

For the foregoing reasons DPW respectfully opposes S.B. No. 2372.

LATE TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2372, S.D. 1

DATE: Wednesday, February 24, 2016

TIME: 10:00 am

To: Chairs Gilbert Keith-Agaran and Jill Tokuda, and Members of the Senate

Committees on Judiciary and Labor, and Ways and Means:

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 S.B. No. 2372, S.D. 1, relating to Private Roads.

The single biggest issue and over-riding factor, by far, is funding. Many of the roads affected by this measure have not been adequately maintained for decades. Because these roads have been allowed to deteriorate for so long, there certainly are liability concerns related to them. However, because they are in such bad shape the cost to rebuild them to meet current standards is enormous and any type of comprehensive resolution will have to address funding. Immunity is not the issue and will not solve the problem.

If government does not have sufficient funds to repair or maintain these roads, then a reasonable grace period, such as four years, should be extended for planning, budgeting and construction. Immunity 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 indefinitely because government is exempted from requirements to timely maintain these roads. This encourages government to do nothing.

Design professionals, contractors and suppliers for capital improvement projects are all required to provide insurance against design and construction defects. The immunity for improvements performed on surrendered private roads should exclude liability covered by such insurance. The following language is suggested, on page 7, at the end of the sentence on lines 7-13:

“The State or county shall be immune from liability for personal injury, death, or property damage in any accident arising out of the use of a surrendered highway, road, alley, street, way, lane, bikeway, bridge, or trail for a period of two years following performance of construction, reconstruction, preservation, resurfacing, restoration, or rehabilitation[-]; provided that there shall be no immunity up to the limits of applicable insurance; and provided further that such immunity shall not extend to design professionals, contractors, consultants, suppliers and non-governmental employees.

The governmental immunity from the acts of others that happened before surrender of the property can be more clearly stated. 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 [~~benefit from~~] have before the

surrender of the highway, road, alley, street, way, lane, bikeway, bridge,
or trail, solely by reason of the surrender.” Page 7, lines 13-17.

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 (e) be added or 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.



TESTIMONY TO THE JOINT COMMITTEES ON TRANSPORTATION AND ENERGY AND PUBLIC SAFETY

Wednesday, February 24, 2016, 10 a.m.

State Capitol, Conference Room 211

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Maile S.L. Shimabukuro, Vice Chair
Members of the Committee on Judiciary and Labor

The Honorable Jill N. Tokuda, Chair
The Honorable Donovan M. Dela Cruz, Vice Chair
Members of the Committee on Ways and Means

TESTIMONY IN SUPPORT OF SB2372 SD1 RELATING TO PRIVATE ROADS

I am Stafford Kiguchi with Bank of Hawaii testifying in support of SB2372 SD1 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 in cases where there has been an absence of any act of private ownership over the road for five years. It also exempts the state and counties from performing any maintenance on a surrendered road and from liability arising from use of the road until the state or county performs maintenance work on the road. It deems a highway, road, alley, street, way, lane, bikeway, bridge or trail that has been commonly used by residents of a particular area for emergency access purposes or for health and safety reasons to be publicly accessible for those reasons, without regard to actual ownership or responsibility for maintenance.

Bank of Hawaii is on title to a number of roads that were acquired when it purchased Hawaiian Trust and Bishop Trust companies back in 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.

SB2372 SD 1 Bank of Hawaii Testimony in Support

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.

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.

Thank you for the opportunity to testify.

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