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DEPARTMENT OF THE ATTORNEY GENERAL
LAND TRANSPORTATION DIVISION

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June 10, 1986

Mr. Wayne Matsuo
Acting Ombudsman
Kekuanao'a Bldg., 4th Floor
465 South King Street
Honolulu, Hawaii 96813

Dear Mr. Matsuo:

Re: Maintenance of Certain Public Streets and
Highways (Ref.: 85-1705(4); 85-1945(5);
85-2076(I); 85-2568(I))

This responds to your request of March 5, 1985, for assistance in resolving the dispute between the State and the City and County of Honolulu concerning the responsibility for maintenance of streets, the paper title to which is reposed in the State.

At the outset, we believe it is important to point out that the statutes clearly place responsibility on the counties for the maintenance of public highways not under the jurisdiction of the Department of Transportation. By Act 4, 1981 Hawaii Sess. Laws 24, the legislature enacted chapter 265A, Hawaii Revised Statutes, which consists of only one section. At the same time, Act 4 repealed chapter 265, Hawaii Revised Statutes. Both section 265A-1, Hawaii Revised Statutes, and its repealed predecessor section 265-1 place the duty of maintenance and repair of county highways on the counties. Section 265A-1 reads in pertinent part:

§265A-1 County authority. The several councils or other governing bodies of the several political subdivisions of the State shall have . . . the duty to maintain and repair, all county highways. . . .

Mr. Wayne Matsuo
June 10, 1986
Page 2

In point of fact, the county's duty to maintain public highways (section 265A-1) can be traced back to Act 142, 1947 Hawaii Sess. Laws 251. Section 1(b) of Act 142 amended section 6113, Revised Laws of Hawaii 1945, to read in pertinent part:

Sec. 6113. In charge of the supervisors. The several boards of supervisors or other governing bodies of the several political subdivisions of the Territory shall have . . . the duty to maintain and repair, all county highways. . . .

Since the duty of the counties to maintain county highways predates the requirement of section 5 of article VIII of the Hawaii State Constitution that the State participate in costs of programs mandated to the counties, there is no requirement thereunder that the State share in the costs. Section 5 of article VIII of the Hawaii State Constitution reads:

Section 5. 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.

We submit that section 265A-1 imposed the same duty as that imposed by section 265-1 and, since section 265-1 pre-existed the constitutional amendment of 1978, the State need not share in the cost of maintaining county highways. Section 265A-1 merely clarifies the duty of the various counties to maintain county highways inasmuch as the ownership of county highways is vested in the respective counties as more fully discussed hereinafter.

With respect to the question of ownership, section 264-1, Hawaii Revised Statutes, provides that "[p]ublic highways are of two types: (1) State or federal-aid highways which are all those under the jurisdiction of the department of transportation, and (2) County highways, which are all other public highways."

Section 264-2, Hawaii Revised Statutes, then provides that "[t]he ownership of all county highways is transferred to and vested in the respective counties in which the county highways lie." This language was enacted by Act 221, 1965 Hawaii Sess. Laws 338.

Mr. Wayne Matsuo
June 10, 1986
Page 3

The history of section 264-2 goes back to the Highways Act of 1892, chapter 47, 1892 Hawaii Sess. Laws 68, which declared "[a]ll roads, alleys, streets . . . built by the Government or by private parties, and dedicated or abandoned to the public as a public highway . . . to be public highways." In the case of In re Application of Kelley, 50 Hawaii 567, 579, 445 P.2d 538, 546 (1968), that law was construed to mean that highways built by private parties prior to 1892 did not require a formal act of acceptance by government to become public highways but that a formal act of acceptance was required after the enactment of the statute.

The Highways Act of 1892 initially provided further that the ownership of all public highways shall be in the Hawaiian Government in fee simple. As a result, even properties acquired by the counties for highway purposes, whether by eminent domain, purchase, dedication, or surrender were acquired in the name of the Territory and, subsequently, in the name of the State. Even Act 142, 1947 Hawaii Sess. Laws 251, required that dedications of private roads were to name "the Territory as Grantee," although the deed was to be delivered to and accepted by the board of supervisors of the county. It was not until the passage of Act 190, 1963 Hawaii Sess. Laws 235, that section 142-2, Revised Laws of Hawaii 1955 (now section 264-2, Hawaii Revised Statutes), was amended and the ownership of these county highways was transferred to and vested in the respective counties as a matter of law and dedications to the various counties were authorized. House Standing Committee Report No. 964, reprinted in Hawaii House Journal 849-50 (1963), pertaining to Senate Bill No. 585 (Act 190), states clearly that the purpose of the act is to allow the counties to use or dispose of any abandoned public road and to retain the proceeds therefrom, inasmuch as the counties were required to maintain such public highways and to use their own funds in the purchase of these highways.

Act 221, 1965 Hawaii Sess. Laws 338 (amending section 142-2, Revised Laws of Hawaii 1955), went even further by transferring and vesting the ownership of all county highways in the respective counties, without reference to whether the highways were acquired by the counties by eminent domain, purchase, or otherwise. House Standing Committee Report No. 84, reprinted in Hawaii House Journal 541-42 (1965), reflected the intent to transfer the ownership of all county highways to the counties because it was inequitable to have the State retain ownership of those county highways.

Mr. Wayne Matsuo
June 10, 1986
Page 4

The foregoing clearly indicates that the counties are the owners of the county highways within their boundaries. These are defined, in section 264-1, to be all public highways other than state or federal-aid highways under the jurisdiction of the Department of Transportation or designated for inclusion in the State Highway System under section 264-41, Hawaii Revised Statutes. Section 264-1 was interpreted in Santos v. Pereira, 2 Hawaii App. 387, 390, 633 P.2d 1118, 1122 (1981), to mean that public highways are not state highways unless they are included in the State Highway System under section 264-41, Hawaii Revised Statutes, and that all other public highways are county highways.

Notwithstanding the foregoing, the counties are apparently resisting their responsibility under the law to maintain public highways which they claim to be owned by the State. On the basis of the foregoing analysis, we opine that the maintenance of Wahinepee Street, Alaiki Street, Laumilo Street, and Hinalea Street is the responsibility of the City and County of Honolulu.

Wahinepee Street was built by a private party prior to 1892 and became a public highway under the Highways Act of 1892. The portion of Wahinepee Street, widened in 1935 by using Territorial lands, is a public highway. Since it is not under the jurisdiction of the Department of Transportation (DOT), it is a county highway under section 264-1 and is owned by the City under section 264-2.

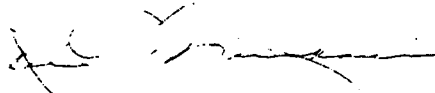
With respect to the portions of Alaiki and Laumilo Streets, on government lands, they are public highways which are not under the jurisdiction of the Department of Transportation and are thereby county highways pursuant to section 264-1, ownership and maintenance of which are the City's responsibilities pursuant to sections 264-2 and 265A-1. As to the portions on Hawaiian Home Lands, we are of the opinion these are still county highways under section 264-1, but title is not transferred to the county by section 264-2, because Hawaiian Home Lands are not transferable by state legislation, pursuant to sections 2 and 3 of article XII (designated as article XI in 1965) of the Hawaii State Constitution. They are nevertheless to be maintained by the City and County of Honolulu.

If Hinalea Street is similar to Alaiki and Laumilo Streets our conclusions would be similar.

Mr. Wayne Matsuo
June 10, 1986
Page 5

To summarize we submit that the streets referred to above are all county highways under section 264-1, and Santos v. Perreira, 2 Hawaii App. 387, 390, 633 P.2d 1118, 1122 (1981). They are, therefore, maintainable by the City under section 265A-1. In addition, title to those public highways, except those portions on Hawaiian Home Lands, is in the City and the City is thus responsible for maintenance by virtue of its ownership as well as section 265A-1.

Very truly yours,



Arthur T. Murakami
Deputy Attorney General

ATM:jn

APPROVED:

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