

240 North Judd Street - Honolulu, HI 96817
Home Phone: 531-7995 Office Phone: 521-2533

October 7, 1991

Mr. Norman Hayashi, Director
Planning Department
County of Hawaii
25 Aupuni Street, Suite 109
Hilo, Hawaii 96720

RECEIVED
OCT 9 AM 11:51

PLANNING DEPT.
COUNTY OF HAWAII

RE: Consolidation/Subdivision Application No. 90-20,
TMK 3:8-1-009-003 and Consolidation/Subdivision
Application No. 90-39, TMK 3:8-1-009-027 &
TMK 3:8-1-010-02

Dear Mr. Hayashi,

My lawyer, Thomas Yeh, informs me that my last letter has disturbed you. He said that you felt that I was accusing you and the Planning Department of some wrong doing. It is not my intent to accuse or blame anyone in the Planning Department, and I apologize to you and anyone in department who has been offended by anything I have written.

What I have been trying to do for several months is establish a record on the reasons and justifications for the requirements recommended in our Consolidation/Subdivision Application No. 90-20 and for the requirements recommended & accepted in what we feel are comparable applications - Applications #86-42, #90-39 & #90-48. The Department of Public Works has written us that we have been treated fairly and that the record is clear that County rules & standards have been applied fairly and equally in all cases. The Smiths have doubts about the clarity and completeness of that record. The only way we can erase those doubts is to make inquiries regarding that record and obtain information that clearly demonstrates that County decisions were consistent and reasonably justified in each case.

Without answers to what we believe are relevant questions, we are left in the dark with no means to assess what we believe are conflicting County positions and decisions. We have sent repeated inquiries to several County officials and received no response, or received an inadequate response. I have sent Corporation Counsel Michael Matsukawa two letters in the past six weeks regarding the status of Kaawaloa Road, and have received no response. In the same period I have also sent Mr. Matsukawa two letters regarding the status of Hienaloli-Kahului Road, and have received no response.

Mr. Yeh and I have sent queries to Department of Public Works Division Chief Robert K. Yanabu on four occasions - 12/28/90, 4/25/91, 5/8/91 & 10/3/91 - requesting that we be provided copies of documents that would confirm that Hienaloli-Kahului Road is owned by the County. To date we have received no

Mr. Norman Hayashi
Consolidation/Subdivision Application No. 90-20
October 7, 1991
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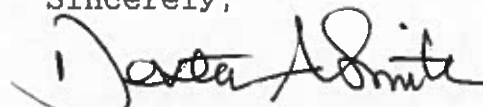
documents from the Department of Public Works. Mr. Yanabu did reply on April 29, 1991 that the department had copies of deeds conferring portions of Hienaloli-Kahului Road to the Territory of Hawaii. However, he did not send us copies of those deeds, and he did not reveal which portions of the Road were conferred to the Territory. This answer erased few of our doubts and raised further questions regarding the status of Hienaloli-Kahului Road.

I have written Department of Public Works Chief Engineer Bruce C. McClure on three occasions - 7/3/91, 8/6/91 & 10/3/91 - regarding departmental policy for adopting new rules or standards for Section 23-7 Consolidation/Subdivision applications. I have received no reply from Chief Engineer McClure.

I enclose copies of all the above mentioned correspondence for your files.

Our application has been deferred for eighteen months. We have made these repeated inquiries regarding County standards and decisions and have not received answers to our questions. When a citizen is trying to bring about a resolution to his/her problem, it is very frustrating when it appears that no action is being taken, or it appears that no effort is being made to address his/her concerns. If my frustration has affected the tone of my letters and this has offended you, again I apologize. When the Smiths are asking to be treated with the same courtesy and fairness that other applicants received, it is inconsiderate to be discourteous to you. I have written to Planning Department because I believe that the department actually makes an effort to find answers to my questions. I know that Mr. Cheplic has made repeated efforts to obtain the opinion that the Office of Corporation Council is supposed to be writing. I know that you immediately sent out my September 3rd letter to DPW for an explanation, because my neighbor, Christopher Norrie, had a copy of it and was calling me about it the next week. I know the Planning Department has not sent me a reply because other departments have not completed their replies. But I feel that the Planning Dept. is trying to get those replies.

Sincerely,



Dexter A. Smith

enclosures

cc: Thomas L. H. Yeh, Esq.

240 North Judd Street, Honolulu HI 96818 - Phone 531-7995

August 22, 1991

Michael Matsukawa, Esq.
Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

RECEIVED
1991 OCT 9 AM 11 51
PLANNING DEPT.
COUNTY OF HAWAII

Re: County Control/Ownership of Roads As It Relates to
Consolidation/Subdivision Application #90-20

Dear Mr. Matsukawa,

At our July 17, 1991 meeting you advised us not to argue the County's weak points, but to argue our strengths - namely that the Mayor was on record as favoring granting special relief to family subdivisions as opposed to commercial subdivisions. At the end of that meeting you stated that you would discuss our application with the Planning Dept. at the end of July 1991. In the month since our meeting neither the Planning Dept. nor the Dept. of Public Works has notified us of any willingness to discuss modifying their requirement for access improvements. As all action on our application remains deferred and its determination continues to be in doubt, for the record, I am compelled to write regarding the legal status of Kaawaloa Road and other government roads that existed prior to 1892.

The Dept. of Public Works current recommendation regarding access improvements for the Smiths' Application #90-20 requires the Smiths to build a 20' wide Agricultural standard paved road in a 50' wide right-of-way to provide safe public access to all 8 lots in TMK 3:8/1/009/003. The Smiths have presented documents to the County that prove that their present legal access, Kaawaloa Road, existed more than five years prior to 1892. According the Highways Act of 1892 and In re Application of Kelly, 50 Haw. 567 (1968), Kaawaloa Road is presently a government owned public highway. The government division that is responsible for Kaawaloa Road bears the responsibility of maintaining the road for safe vehicular use. The Smiths argue that as private citizens they should not be required to assume what court decisions and current statutes have mandated to be government responsibilities & liabilities.

The Dept. of Public Works admits that Kaawaloa Road is a government owned road, but denies having any responsibility for maintaining the road; the DPW states that the road is under the "jurisdiction" of the State Dept. of Land and Natural Resources. In your letter regarding the status of Kaawaloa Road dated March 4, 1991 you stated that the County does not own or accept responsibility for old government roads such as Kaawaloa Road

Michael Matsukawa, Esq.
Subd. Application #90-20
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that existed prior to 1892 and that were never formally granted or deeded to Hawaii County by the Territory or State. However, you also wrote that the Smiths could establish the validity of our argument if we could provide you with a legal citation that demonstrated that fee title for government roads could be transferred by legislative declaration.

I have recently obtained copies of court documents that demonstrate that fee title to a government road in Hawaii County was transferred from the State to the County by operation of law.

In a consent decree filed by the First Circuit Court on August 7, 1991 (Civil Case #88-2505, Punaluu Preservation & Cultural Committee vs. BLNR), State Court Judge Simeon Acoba ruled that the State Board of Natural Resources had no power to sell off a .7 mile coastal segment of the government beach road fronting the hotel resort at Punaluu. The decree invalidated a 1986 State Board of Land & Natural Resources sale of a section of the Punaluu Beach Road to C. Brewer Corporation. The plaintiffs were able to produce old maps to prove that a .7 mile coastal road segment of Punaluu Beach Road had existed 5+ years prior to 1892; therefore, it became a government owned public highway in 1892. The plaintiffs also introduced an affidavit by Hawaii County Dept. of Public Works Chief Engineer Bruce C. McClure that indicated that this segment of Punaluu Beach Road was listed as part of the County Street & Road Inventory. The consent decree ruling declared that the 1986 BLNR sale was invalid because the State did not own that public highway segment in 1986. Fee title to the public highway segment was declared to have been transferred to from the State to the County by "operation of law" (Act 221 of the 1965 State Legislature). Judge Acoba ruled that fee title to this segment of Punaluu Beach Road continues to be vested in the County of Hawaii.

The evidence presented to the court and the resultant consent decree ruling in Civil Case #88-2505 directly contradict DPW and Corporation Counsel's denials of County responsibility for public highways that existed prior to 1892. In your March 4, 1991 opinion regarding the status of Kaawaloa Road you implied that historically the County of Hawaii only accepted responsibility for old government roads, such as the Keauhou Wagon Road, because the Territory forced the duty to maintain all such roads on the Counties. The affidavits of Chief Engineer McClure, James Wong Yuen, John Makuakane & Patrick M. Cummins and their accompanying exhibits clearly demonstrate that the County of Hawaii continued to maintain and list the pre-1892 coastal segment of the Punaluu Beach Road on its inventory of county owned & maintained roads after 1965 when there was no forced duty to accept responsibility for such roads. James Wong Yuen states

Michael Matsukawa, Esq.
Subd. Application #90-20
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that "prior to the construction of the Alanui Road and Hotel Access Road in 1973-1974...the Government Road and Punaluu Beach Road were one continuous road and the only road to Punaluu Beach and Ninole Cove from the Hawaii Belt Road." John Makuakane states that he was told in 1976 by James Wong Yuen & Albert Nakano that the county had maintained Punaluu Beach Road "from the Hawaiian Belt Road to the Ninole Cove..." Approximately ten to twelve years ago Mr. Makuakane confirmed the existence and 1.7 mile length of Punaluu Beach Road for the DPW. Mr. Patrick Cummins, a registered surveyor & expert witness, also confirmed that the length of the road from the the Hawaiian Belt Road to Ninole Cove shown on map exhibits was 1.7 miles. As of November 1, 1990, Punaluu Beach Road (including the .7 mile coastal road segment) was on the current Street & Road Inventory maintained by the Hawaii County Dept. of Finance.

The County of Hawaii has no evidence of any Territorial or State deed conveying fee title of this section to the County. Dept. of Public Works Division Chief Robert K. Yanabu has written to us, regarding another road, that roads listed on the County's road maintenance inventory are county highways and are the maintenance responsibility of the DPW. Therefore Hawaii County has demonstrated control of a road segment and accepted responsibility for a road segment that existed prior to 1892, the fee title to which could only have been transferred to the County by Act 221 of the 1965 Hawaii State Legislature.

Judge Simeon Acoba's recent ruling in Punaluu Preservation & Cultural Committee vs. DLNR establishes that the transfer of fee title of roads to the counties by operation of law is legally valid. As this means of transfer has been shown to be valid, the Smiths now ask the County of Hawaii to recognize their claim that legal title to Kaawaloa Road was similarly transferred to Hawaii County in 1965.

The Hawaii County Planning Dept. and DPW have stated that DLNR has jurisdiction over Kaawaloa Road. Judge Acoba's decision challenges the validity of that claim. Does the County of Hawaii possess any evidence that legally proves that Kaawaloa Road is under DLNR jurisdiction?

State Court Judge Simeon Acoba has ruled that affidavits and evidence provided by Dept. of Public Works engineers and employees demonstrated Hawaii County control over and responsibility for a segment of road that the County never officially accepted. How can DPW officials then refuse to legally acknowledge responsibility for another road with the same legal history of title because the department says it has no record

Michael Matsukawa, Esq.
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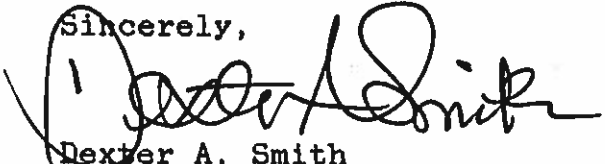
that the County accepted the second road?

As it has been legally determined that Hawaii County presently owns in fee another public highway that existed prior to 1892, how can the Dept. of Public Works legally set a different standard for Kaawaloa Road and require the Smiths to assume responsibility for improving this public highway?

I would like to stress that the Smiths are not presently asking the Dept. of Public Works to maintain Kaawaloa Road. What the Smiths have been trying to establish for a year and a half is that in light of previous DPW actions & decisions the access improvement requirements for Consolidation/Subdivision Application #90-20 are not legally justified nor fair.

The Smiths seek a favorable approval of our present application. If a satisfactory alternative resolution can be arranged in the next week without addressing the legal questions raised above, we are willing to consider it. However, if the Planning Dept. and DPW will not reconsider their access improvement requirements for Consolidation/Subdivision Application #90-20, we believe the legal issues & questions outlined above need to be addressed directly.

The Smiths would appreciate a prompt response to the issues discussed above.

Sincerely,

Dexter A. Smith

enclosures
DAS: tths

240 North Judd Street, Honolulu HI 96818 - Phone 531-7995

October 2, 1991

Michael Matsukawa, Esq.
Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Re: County Control/Ownership of Old Government Roads As It
Relates to Consolidation/Subdivision Application #90-20

Dear Mr. Matsukawa,

I am writing to follow-up on my letter to you dated August 22, 1991 regarding the "Punaluu Beach Road Case" and the status of Kaawaloa Road. I have not received any response to the legal questions raised in that letter. I have made a good faith effort to respond to your letter of March 4, 1991. You requested that the Smiths, or their counsel, provide you with a citation that stated that ownership of old government roads could be transferred from the State to the County by a legislative act. As soon as I learned that such a decision had been declared in Civil Case No. 88-2505-08 I sent that information to your office. This decision and the affidavits of the DPW's Chief Engineer and employees that led Judge Simeon Acoba to reach that decision have a direct bearing on determining the status of Kaawaloa Road, and that legal determination will directly affect our Consolidation/Subdivision application that has been deferred by the County Planning Department for 18 months.

The court documents that I mailed you clearly show that Hawaii County has legally demonstrated ownership of a section of old government beach road that existed prior to 1892. A Hawaii State Circuit Court Judge has decreed that the legal title to this section of public highway is vested in the County of Hawaii & was transferred to the County by "operation of law". The decree in Civil Case No. 88-2505-08 validates my family's claim that fee title to Kaawaloa Road has been transferred to the County of Hawaii by operation of law. I once more request that you reappraise your opinion of March 4, 1991 in light of this evidence.

Sincerely,


Dexter A. Smith

cc: Planning Director Norman Hayashi (with copy of August 22,
1991 letter)
Thomas L. H. Yeh, Esq.

Lorraine R. Inouye
Mayor

Michael J. Matsukawa
Corporation Counsel

Steven Christensen
Assistant Corporation Counsel



Office of the Corporation Counsel

Hilo Lagoon Centre • 101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720 • (808) 961-8251

March 4, 1991

Mr. Thomas Yeh
Menezes, Tsukazaki, Yeh & Moore
Attorneys at Law
100 Pauahi Street, Suite 204
Hilo, Hawaii 96720

COPY

Re: Consolidation/Resubdivision
Smith Parcel, Kaawaloa, South Kona

Dear Mr. Yeh:

I am familiar not only with the land but also the parties and roadway in question. Please note preliminarily that it has always been my opinion that Kaawaloa Road is a state road. I do not believe that the state officers have any power to determine what is and what is not a public road where the road in question was a pre-1892 road. Once the 1892 Act took effect, the Hawaiian government acquired ownership of the road. During annexation, and under the Organic Act, that road passed to the Republic of Hawaii and thereafter to the Territory of Hawaii.

The 1892 Act remained in its form until 1947, when the legislature declared that there were now to be two forms of public roads - territorial roads and county roads. The former were those which the legislature declared were in the territorial system and the latter were all other roads. No deeds or other conveyances were made to that effect.

In Re American Sugar Co., 29 Haw. 820 (1927) clearly supports the conclusion that pre-1892 roads were territorial roads. The 1947 declaration of the legislature could not "convey" the roads into county ownership or any other ownership. The subsequent decision of the Intermediate Court of Appeals, Santos v. Perreira, 2 Haw. App. 387 (1981), does not even discuss the issues raised and simply mimics the statute.

If you can cite me any authority which says that a legislature can convey a road by legislative declaration to a county, I would appreciate reading the same. Unless I can

be convinced otherwise, I fail to see how a state officer's affidavit has any meaning. Assume for argument that a person claims to own a road in an ahupua'a which was shown to exist on the original survey map of the land agent in 1854. A good example is Maihi, Kuamoo in North Kona, where the old Keauhou Wagon Road went from the main road to Keauhou Bay when the land grants were originally issued. The grant maps also show the road running over the lands.

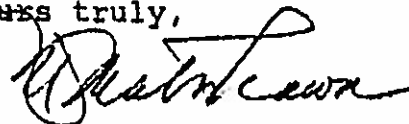
This road became a public way in 1892 by virtue of the 1892 Act. The road then passed into territorial ownership by the annexation legislation. Can the highway director sign a directive making the road a county road? What difference does it make that the county maintained portions of the road -- the territory required or forced the county in the past to maintain the road. Can that act of maintenance now be construed to constitute a conveyance, an act of dedication or abandonment? I answer "no" to both questions.

As to the other issues raised in your letter, please note that I am reluctant to be the sounding board to air any differences which your clients may have with the engineers at the Department of Public Works. They are charged with their duties. If you wish to discuss specific issues, please identify the issues which are legal and which are engineering issues.

My most recent meeting under similar circumstances was quite awkward in that it seemed that the applicant was trying to make me tell the engineers, in the presence of the applicants' attorneys, that they should change their position. I wish to avoid that by having advance definition of the specific issues for discussion. If those issues turn on control and ownership of the Kaawaloa Road, you know my position.

If possible, can you define the issues (with a map) for our review before Friday? Thank you very much.

Yours truly,



Michael J. Matsukawa

cc: Bruce McClure
Robert Yanabu

240 North Judd Street, Honolulu HI 96818 - Phone 531-7995

August 27, 1991

Michael J. Matsukawa, Esq.
Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

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PLANNING DEPT.
COUNTY OF HAWAII

Re: County Ownership of Roads As It Relates to
Consolidation/Subdivision Application #90-20

Dear Mr. Matsukawa,

As the approval of my family's consolidation/subdivision continues to be in doubt, for the record, I am compelled to write you regarding the legal status of the Hienaloli-Kahului Road and the standards that determine the county ownership of roads created after 1892.

In your March 4, 1991 letter to attorney Thomas Yeh regarding the Smith's consolidation/subdivision at Kaawaloa, South Kona you stated that you would be willing to address specific legal issues that were related to the Smith's application.

One of the legal issues the Smiths have asked you to address is the legal status of Hienaloli-Kahului Road. Mr. Yeh has pointed out the relevance of this question to our application in his "Outline Of Legal Issues for Discussion - Smith's Application For Consolidation/Resubdivision - March 12, 1991" (item II, E) and in his June 12, 1991 letter to you (item 3, b). In our personal meetings with you on March 12, 1991 and July 17, 1991 we informed you that the Department of Public Works was unable to provide us with any documentation to substantiate the claim that the road was a county highway. The applicant in Consolidation/Subdivision Application #90-48 was not required to improve Hienaloli-Kahului Road, a substandard road. We asked you, "If the DPW can not prove that Hienaloli-Kahului Road is a county road, how can the DPW require other applicants to make road improvements on other abutting roads?" or words to that effect. Todate we have not received a specific response from you regarding this question.

As Hawaii County Corporation Counsel at this particular time, you are acutely aware that Hawaiian roads created after 1892 must be officially accepted by the government to be government owned roads. All Hawaii territorial and state statutes since 1925 and before have specifically required that the county councils or governing boards vote to accept or adopt a road before it can become a "county highway." The State Supreme Court has upheld these statutes (for roads created after 1892) in

Michael J. Matsukawa, Esq.
Subd. Application #90-20
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Santos vs. Perriera, 2 Haw. App. 387 (1981). In Maui Ranch Estate Owner Assn. vs. County of Maui, 6 Haw. App. 414 (1986) the State Supreme Court held that in cases where a county has maintained a disputed road the mere history of maintenance does not confer ownership or future maintenance responsibility on the county. Hawaii Corporation Counsel Ronald Ibarra's April 11, 1985 memorandum to the DPW confirms that Hawaii County has supported these legal standards. Writing regarding the legal status of Mana-Keanakolu Road Mr. Ibarra stated "if there is no evidence that Mana Road has been accepted or adopted by the County Council it is not a county highway..."

Mr. Yeh has asked the Department of Public Works on three separate occasions (12/28/90, 4/25/91 & 5/8/91) to send us copies of deeds for Hienaloli-Kahului Road and documents showing that the Hawaii County Board of Supervisors voted to accept or adopt that road. The DPW has not sent us one document that can legally prove county ownership of Hienaloli-Kahului Road, and the department has had eight months to locate that documentation. In a April 29, 1991 letter, Engineering Division Chief Robert K. Yanabu admits that there is no "specific documentation" to establish why the road is on the road maintenance inventory or even "...when the County initiated maintenance or the circumstances thereof." The only deed that Mr. Yanabu refers to is a 1934 deed to the Territory of Hawaii. Given Mr. Ibarra's past statements that county roads are only those roads that have been granted or deeded to the County, the only conclusion that may be drawn from the DPW's file is that portions of Hienaloli-Kahului Road belong to the State.

The determination of the legal status of Hienaloli-Kahului Road is directly related to the Smith's questions regarding consistency in the application of county standards, be they standards for county highways or DPW standards for subdivision applications that fall under Section 23-7 of the county subdivision code.

When the Smiths claimed that Kaawaloa Road was a county highway we were told by DPW and the County Corporation Counsel that the County had never accepted the road, that it was not on the County road maintenance inventory and that there was no evidence that the State had legally transferred title for the road to the County. We were told that in order to conclusively prove our claim we would have to produce a mountain of historical documents and legal citations. The Smiths have asked that Department of Public Works to produce the same legal documents and justifications for Hienaloli-Kahului Road and the DPW's response has been indifference and inaction.

Michael J. Matsukawa, Esq.
Subd. Application #90-20
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The Punaluu Beach Road case has demonstrated that county employee indifference to standards for county road status can have adverse legal consequences for the County of Hawaii, for private citizens and corporations. Mr. Yanabu's statements regarding the status of Hienaloli-Kahului Road clearly redefine several County legal positions regarding county highways:

- A] Mr. Yanabu states that Hienaloli-Kahului Road is a "county road" and can only cite as evidence "deeds conferring ownership to the Territory." He has produced no evidence that the Territory or the State granted fee title of "portions" of the road to the County. Therefore the only way that the County could have obtained title to this road is by legislative declaration - Act 221, 1965 State legislature. I now cite you Mr. Yanabu's statements regarding the status of Hienaloli-Kahului Road as evidence that County employees acknowledge that such transfer of title by operation of law is valid. Do you support Mr. Yanabu's redefinition of County legal policy? If you do, I again ask you to acknowledge that fee title to Kaawaloa Road was similarly transferred to the County in 1965.
- B] Mr. Yanabu can produce no evidence that the County Board of Supervisors or County Council ever voted to accept Hienaloli-Kahului Road and yet he defines it to be a "county road." It is evident from Mr. Yanabu's statements regarding the road that the DPW does not require that a deed be officially accepted by the County Council for the department to classify the road as a county highway. Does the Office of Corporation Counsel now support this DPW re-interpretation of County policy and deny the validity of HRS Section 264-1 (c), Santos vs. Perriera, Maui Ranch Estate Owner Assn. vs. County of Maui, and Mr. Ibarra's 1985 opinion? If so anyone might create a county road by deeding a road to the County and recording it.
- C] Mr. Yanabu admits the DPW has deeds for only portions of the road & has produced no deeds that grant the County (or the Territory) that section of Hienaloli-Kahului Road that abuts Subdivision #5929 (Application #90-48). The road right-of-way was not created until after 1892 and without acceptance of a deed or surrender/adoption by the Council that road section can not be a government owned road, State or County. Yet Mr. Yanabu has stated that the county accepts maintenance responsibility for this non-county road section. Mr. Yanabu's statements confirm that

Michael J. Matsukawa, Esq.
Subd. Application #90-20
August 27, 1991
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the DPW does not require that a road be owned by the County to be a County maintenance responsibility. Does the Office of Corporation Council support this new policy. This policy is discriminatory. The County says it will maintain this section of Hienaloli-Kahului Road which it does not own, yet asks other consolidation/subdivision applicants to improve another road because the DPW says the applicants can not prove that the County owns the road.

This isn't a matter of interpreting some unpublished set of "criteria"; this is a case of whether County employees are bound to follow published statutes and written opinions regarding the what standards must be met and what official actions must occur before a road becomes a county highway. The evidence is just not there to support a DPW claim that Hienaloli-Kahului Road is a county highway. As Corporation Counsel responsible for presenting a consistent defensible statement of the County of Hawaii's legal position regarding ownership and "control" of public highways before the State Supreme Court, I would think that you would be concerned about the legal implications of DPW's actions in Consolidation/Resubdivision Application #90-48 (Subdivision #5929) and about Mr. Yanabu's statements regarding Hienaloli-Kahului Road. Those actions and statements certainly are not consistent with anything you have told us regarding county highways and they are not consistent with Mr. Ronald Ibarra's April 11, 1985 opinion.

The Smiths would appreciate a prompt response to the legal issues discussed above.

Sincerely,

Dexter A. Smith

enclosures
DAS: tths

240 North Judd Street, Honolulu HI 96818 - Phone 531-7995

October 3, 1991

Michael J. Matsukawa, Esq.
Corporation Counsel
County of Hawaii
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Re: County Ownership of Roads As It Relates to
Consolidation/Subdivision Application #90-20

Dear Mr. Matsukawa,

I am writing to follow-up on my letter to you dated August 27, 1991 regarding the legal status of Hienaloli-Kahului Road and the standards that determine the county ownership of roads created after 1892.

I have received no response to issues and questions raised in that letter. Clarification of the status of Hienaloli-Kahului Road will help determine whether the Department of Public Works consistently and competently interprets State law and County standards regarding county ownership & maintenance of highways. It also will help determine whether the Division Chief of the Department of Public Works Engineering Division has applied consistent access improvement standards in all Section 23-7 Consolidation/Subdivision applications he has reviewed.

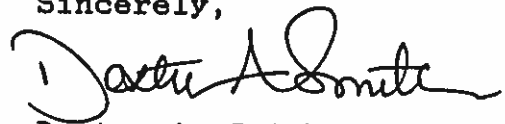
Will you please clarify Hawaii County's legal position on Hienaloli-Kahului Road:

- 1) Does the County have any evidence that the County Council or Board of Supervisors ever voted to accept or adopt any portion of Hienaloli-Kahului Road?
- 2) The only deeds that County possesses for Hienaloli-Kahului Road grant fee title for a portion of the road to the Territory of Hawaii. Was the fee title for this portion ever formally transferred from the Territory or State to the County?
- 3) If the County owns portions of Hienaloli-Kahului Road, by what legal means was legal title to those deeded portions transferred to the County?
- 4) Does the County own any portion of Hienaloli-Kahului Road that has not been deeded to the County or adopted by the County Council/Board of Supervisors?

Michael J. Matsukawa, Esq.
Subd. Application #90-20 & Hienaloli-Kahului Road
October 3, 1991
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The Smiths would appreciate a prompt response to the legal questions raised above.

Sincerely,

A handwritten signature in cursive script that reads "Dexter A. Smith". The signature is written in dark ink and is positioned above the printed name.

Dexter A. Smith

cc: Planning Director Norman Hayashi (along with copy of letter dated August 27, 1991)
Thomas L. H. Yeh, Esq.

DAS: tths

Menezes Tsukazaki Yeh & Moore
ATTORNEYS AT LAW

100 Pauahi Street Suite 204 Hilo, Hawaii 96720
Telephone: (808) 961-0055 FAX (808) 969-1531

STEPHEN J. MENEZES
R. BEN TSUKAZAKI
THOMAS L. H. YEH
MICHAEL W. MOORE

December 28, 1990

Robert K. Yanabu, Division Chief
Engineering Division
Dept. of Public Works
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Re: Consolidation/Subdivision Application No. 90-20;
TMK No. 8-1-09:03

Dear Mr. Yanabu:

On October 18, 1990, I submitted information supporting our request for your review of the issue of the County's jurisdiction of Kaawaloa Road. I subsequently spoke with you on November 29, 1990, at which time you indicated you had not yet reviewed our submittal but would do so in a couple of weeks. Since then, I have left several messages for you to call me.

This letter serves as a request that you review our submittal without further delay in order that the consolidation/resubdivision application may be further processed.

Finally, we are also requesting some further information concerning your department's position on the ownership/jurisdiction of Hienaloli-Kahului Road. In your September 8, 1990 letter, you indicated that it was maintained by the County. If so, we would appreciate the basis for your position and copies of any documents that would indicate how the County obtained jurisdiction over the portions of the road leading to the property which was the subject of Subdivision No. 90-48 (#75229).

We would appreciate your review of this matter as soon as possible.

Very truly yours,

MENEZES TSUKAZAKI YEH & MOORE

By


THOMAS L. H. YEH

cc: Dexter Smith, et al.
TLHY:db

RECEIVED

DEC 9 11 51

PLANNING DEPT.
COUNTY OF HAWAII

Menezes Tsukazaki Yeh & Moore
ATTORNEYS AT LAW

STEPHEN J. MENEZES
R. BEN TSUKAZAKI
THOMAS L. H. YEH
MICHAEL W. MOORE

100 Pauahi Street Suite 204 Hilo, Hawaii 96720
Telephone: (808) 961-0055 FAX (808) 969-1531

April 25, 1991

Robert K. Yanabu, Division Chief
Engineering Division -
Dept. of Public Works
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Re: Consolidation/Subdivision Application No. 90-20;
TMK No. 8-1-09:03


Dear Mr. Yanabu:

On December 28, 1990, we requested information from your office on the ownership and jurisdiction of Hienaloli-Kahului Road. This serves as a reminder that we are still anxious to find out whether the County has title to the road and, if not, the circumstances under which it can maintain the road.

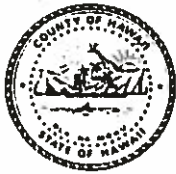
Thank you for any information you may provide in this matter.

Very truly yours,

MENEZES TSUKAZAKI YEH & MOORE

By 
THOMAS L. H. YEH

cc: Dexter Smith, et al.
TLHY:db



Lorraine R. Inouye
Mayor
Bruce C. McClure
Chief Engineer
Laurence E. Capellas
Deputy Chief Engineer

Department of Public Works

25 Aupuni Street, Room 202 • Hilo, Hawaii 96720 • (808) 961-8321 • Fax (808) 969-7138

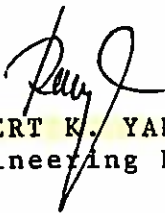
April 29, 1991

THOMAS L H YEH
MENEZES TSUKAZAKI YEH & MOORE
100 PAUHI STREET SUITE 204
HILO HI 96720

SUBJECT: Consolidation/Subdivision Application No. 90-20
- TMK: 8-1-09:03 -

Dear Mr. Yeh:

1. The Hienaloli-Kahului Road is listed on the County's road maintenance inventory.
2. The County does maintain the Hienaloli-Kahului Road from the Hualalai Road junction northward to the Honuaula Ahupua'a, more or less.
3. The County does possess deeds conferring road ownership to the Territory, some as early as 1934, for portions of the Road, but not in its entirety.
4. Due to absence of specific documentation, we're unable to establish when County initiated road maintenance and circumstances thereof.


ROBERT K. YANABU, Division Chief
Engineering Division

RKY:st

cc: Planning Director
Corporation Counsel

RECEIVED
MAY - 1 1991

Menezes Tsukazaki Yeh & Moore
ATTORNEYS AT LAW

100 Pauahi Street Suite 204 Hilo, Hawaii 96720
Telephone: (808) 961-0055 FAX (808) 969-1531

STEPHEN J. MENEZES
R. BEN TSUKAZAKI
THOMAS L. YEH
MICHAEL W. MOORE

May 8, 1991

Robert K. Yanabu, Division Chief
Engineering Division
Dept. of Public Works
County of Hawaii
25 Aupuni Street
Hilo, Hawaii 96720

Re: Consolidation/Subdivision Application No. 90-20;
TMK No. 8-1-09:03

Dear Mr. Yanabu:

This letter is in response to your recent correspondence regarding ownership and jurisdiction of Hienaloli-Kahului Road. At this time, I am requesting that you provide me with copies of the following documents:

1. The deed(s) that describe the entire section of Hienaloli-Kahului Road that abuts Subdivision #5929; and
2. Records establishing that the Hawaii County Board of Supervisors accepted or adopted that specific section of Hienaloli-Kahului Road and the date of such acceptance or adoption.

Your earliest response to the above is greatly appreciated.

Very truly yours,

MENEZES TSUKAZAKI YEH & MOORE

By 
THOMAS L. H. YEH

cc: Dexter Smith, et al.
TLHY:db

240 North Judd Street, Honolulu HI 96818 - Phone 531-7995

October 3, 1991

Mr. Robert K. Yanabu
Division Chief, Engineering Division
Department of Public Works
County of Hawaii
25 Aupuni Street,
Hilo, Hawaii 96720

Re: County Control/Ownership of Roads As It Relates to
Consolidation/Subdivision Application #90-20

Dear Sir,

As the approval of my family's consolidation/subdivision continues to be in doubt, for the record, I am compelled to write you regarding the legal status of the Hienaloli-Kahului Road and the standards that determine the county ownership of roads created after 1892.

On three separate occasions - 12/28/90, 4/25/91 & 5/8/91 - Mr. Thomas Yeh has requested that the Department of Public Works send us copies of deeds for Hienaloli-Kahului Road and documents showing that the Hawaii County Board of Supervisors voted to accept or adopt that road. To date the DPW has not sent us any document that can legally prove County ownership of Hienaloli-Kahului Road.

In your only response to Mr Yeh's inquiries, dated April 29, 1991, you state that there is no "specific documentation" to establish why the road is on the road maintenance inventory or even "...when the County initiated maintenance or the circumstances thereof." The only deed referred to is a 1934 deed to the Territory of Hawaii.

Regardless of whether Hienaloli-Kahului Road is or isn't on any inventory prepared by the Department of Public Works, all Hawaii territorial and state statutes since 1925 have specifically required that the county councils or governing boards vote to accept or adopt a road before it can become "county highway." This requirement applies to all public highways created after 1892. The Hienaloli-Kahului railroad right-of-way was created after 1900, and the deed in your file dates from 1934. To be a legal "county highway" all of Hienaloli-Kahului Road must have been accepted or adopted by the Hawaii County Board of Supervisors or the County Council.

In a Department of Public Works memorandum dated February 12, 1986, Chief Engineer Hugh Y. Ono wrote that the "Hawaii County Code is specific as to the maintenance responsibility of the County--dedicated roads and those under County ownership."

Division Chief Robert K. Yanabu
Subd. Application #90-20 & Hienaloli-Kahului Road
October 3, 1991
Page 2

[The Smiths do not agree that this policy is legally correct for roads that existed before 1892.] The Department of Public Works possesses no deeds for that section of Hienaloli-Kahului Road that abuts Consolidation/Subdivision Application #90-48 (Planning Dept Subd. #5929, DPW File #75229). Therefore the County of Hawaii does not own or have any maintenance responsibility for that section of road. Furthermore the deed that the Department of Public Works possesses does not dedicate ownership to the County; ownership is conferred to the Territory of Hawaii. According to Chief Engineer Ono's memorandum the "Hawaii County is not in a position to assume the liability and operational responsibility" for maintaining roads such as Hienaloli-Kahului Road that "are deeded in favor of Territory..."

In a letter to Samuel B.K. Chang dated July 21, 1989, Hawaii County Assistant Corporation Counsel Steven Christensen states that "no street or highway may be deemed a County road until such time as the street or highway has been formally accepted by, or surrendered to, the County, or has been officially transferred by the State to the County via executive order." [Once again the Smiths stress that roads that existed before 1892 do not need to be formally accepted by the County to legally become County roads. Hawaii Civil Case No. 88-2505-08 decreed that such roads can be transferred by "operation of law". However Hienaloli-Kahului Road was created after 1892.]

The Department of Public Works has no documents that show that Hienaloli-Kahului Road was formally transferred to the County by the Territory or the State. And the department has not sent us any document that demonstrates that the County has accepted or adopted the road. Will you please send us copies of any documents that can legally prove that the County Council or Board of Supervisors voted to formally accept or adopt any portion Hienaloli-Kahului Road. Will you also send us copies of all deeds (or citations of their recording - Book & Page) for Hienaloli-Kahului Road that the department possesses.

Your statement (9/28/90) that Hienaloli-Kahului Road is a "County Road" conflicts with County policy as previously stated by the Department of Public Works and the Office of Corporation Council. As the determination of the legal status of Hienaloli-Kahului Road is a legal question will you please send the following questions over to the Office of Corporation Council for official comment:

- 1) If the Hawaii County Council or Board of Supervisors has never voted to formally accept or adopt Hienaloli-Kahului Road, is it legally a "County highway"?

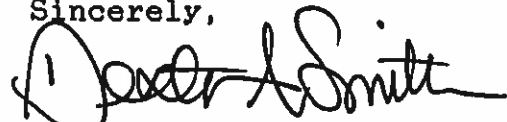
Division Chief Robert K. Yanabu
Subd. Application #90-20 & Hienaloli-Kahului Road
October 3, 1991
Page 3

- 2) If the Territory of Hawaii or State of Hawaii never formally transferred any portion of Hienaloli-Kahului Road to the County, is it legally a "County highway"?
- 3) If the County owns the deeded portions of Hienaloli-Kahului Road, by what legal means was fee title to those deeded portions transferred to the County?
- 4) Does the County own any portion of Hienaloli-Kahului Road that has not been deeded to the government if the County Council or Board of Supervisors did not vote to formally adopt that non-deeded portion?

The determination of the legal status of Hienaloli-Kahului Road is directly related to the Smith's questions regarding consistency in the application of County standards in Consolidation/Subdivision Application #90-20, be they standards for County ownership of highways or DPW standards for applications that fall under Section 23-7 of the County subdivision code. If Hienaloli-Kahului Road is not a County road, then the sole access to one 5 acre lot in Consolidation/Subdivision Application #90-48 was a sub-standard dirt road, and the DPW did not require any road improvements for this type of non-County road.

The Smiths would appreciate a prompt response to this request as it is directly related to finding a solution to our long deferred Consolidation/Subdivision Application #90-20.

Sincerely,



Dexter A. Smith

enclosures

cc: Michael J. Matsukawa, Corporation Counsel
Norman Hayashi, Director, Planning Dept.
Thomas L. H. Yeh, Esq.

DAS: tths

DEPARTMENT OF PUBLIC WORKS
COUNTY OF HAWAII
HILO, HAWAII

DATE February 12, 1986

Memorandum

TO : MEMO FOR THE RECORD

FROM : Hugh Y. Ono, Chief Engineer

SUBJECT: MAINTENANCE OF CERTAIN PUBLIC ROADS

Statement of the Problem

There are certain roads accessible for public use on which the responsibility for the maintenance is unclear.

Citizens requesting maintenance have been denied by both State and County for various reasons.

Facts

- Those certain roads consist of old government roads, paper roads, and jeep trails. They are not part of the State transportation network nor the County road system.
- These roads are deeded in favor of the Territory or the State of Hawaii.
- On the island of Hawaii, there are approximately 100 miles of such roads, which sometimes provide access to remote residences.
- There are legal opinions by both the State and the County. The State's opinion says the County is responsible. The County's opinion says the State is responsible.
- The Hawaii County Code is specific as to the maintenance responsibility of the County--dedicated roads and those under County ownership.
- Hawaii County is not in a position to assume the liability and operational responsibility for such maintenance. Such work would have to be performed at the expense of higher-priority urban highway maintenance.
- Examples:
 - Mana-Keanukolu Road - 40 miles around Mauna Kea
 - Honolulu Landing Road - 15 miles from Kapoho to Hilo
 - Haao Springs Road - 9 miles from Wa'iohino to Springs
mostly w/i private property

- Reference Materials: HRS 264, HCC Section 22-23 and many legal opinions.
- Santos vs. Perreira 2 H. App. 387

Alternatives

1. County provide maintenance with appropriations from State and liability contingencies.
2. State assume maintenance.
3. No maintenance responsibility by the State or County.

Recommendation

Recommend legislation be enacted to relieve both the State and County of responsibility.

These certain roads are normally used by special interest groups - recreational, hunters, ranchers, fishermen, squatters, and a few residents. The residents are those who chose to live under those conditions.

The enacted law should include provisions for individuals or groups to perform their own maintenance without liability contingencies.

Distribution:

✓ Chief Engineer
Representative Dwight Takamine - as requested.

Bernard K. Akana
Mayor

Richard I. Miyamoto
Corporation Counsel

Steven Christensen
Assistant Corporation Counsel



Office of the Corporation Counsel

Hilo Lagoon Centre • 101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720 • (808) 961-8251

July 21, 1989

Mr. Samuel B. K. Chang
Director
Legislative Reference Bureau
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Mr. Chang:

Re: Public Highway Jurisdiction

This is in response to your inquiries relating to the above-referenced subject. Specifically, you have asked our office, as well as a number of other State and County agencies, to comment upon the jurisdictional problems surrounding public highways within the State of Hawaii.

The focal point of this County's concern with respect to the matter is centered upon the ownership of old government roads, paper roads, jeep trails, and other similar types of substandard roadways. The cause of such concerns, we feel, is directly attributable to the language contained in section 264-1, Hawaii Revised Statutes. In essence, that section provides that all public highways, of which such substandard roads would be included, which are not within the State highway system are necessarily County highways. In refuting the ownership of several such substandard roads on the Big Island, the County of Hawaii has consistently questioned the provisions of section 264-1. This county has taken the position that, irrespective of the literal context of the section, no street or highway may be deemed a County road until such time as the street or highway has been formally accepted by, or surrendered to, the County, or has been officially transferred by the State to the County via executive order. We have enclosed for your perusal, a copy of a testimony booklet prepared in 1987 by Chief Engineer Hugh Ono which sets forth the various contentions of the County. The reason for the County taking such a stance on

Mr. Samuel B. K. Chang

Page 2

July 21, 1989

the subject relates in part to the high maintenance costs and great potential for liability which would result by virtue of the County's ownership in such roads. In addition, this County finds objectionable the fact that section 264-1 makes no provision for the transfer of documents evincing the County's ownership in those highways.

In an effort to help resolve, or at the very least alleviate, some of the problems relating to public road ownership within the State of Hawaii, we offer the following suggestions:

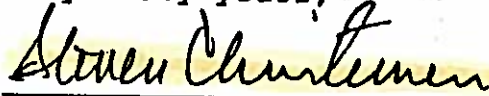
1. If it is the intent of the legislature to have such non-state public roads fall under the jurisdiction of the respective counties, then a legislative mechanism should be developed which would allow the counties to receive a formal document from the State evincing the transfer of those highways, rather than by merely requiring the counties to acquire ownership of such properties through the operation of law;

2. Inasmuch as added costs would be incurred by the counties as a result of their assuming responsibilities which, if not for the provisions of section 264-1, would not otherwise be theirs, a provision should be included in chapter 264 which would allow the counties to be reimbursed by the State for those added costs attributable to their carrying out of the state mandate; and

3. A meeting of all of the agencies and departments listed in House Resolution No. 38 (1989) be convened for the purpose of facilitating a full discussion of the problems, issues and recommended solutions incident to the subject.

If you have any further questions regarding this matter, please feel free to contact our office at 961-8251.

Very truly yours,

for


RICHARD I. MIYAMOTO
Corporation Counsel

RIM:jk
Enclosure

240 North Judd Street - Honolulu, HI 96817
Home Phone: 531-7995 Office Phone: 531-2533
Fax Number: 1-531-3124

July 3, 1991

Mr. Bruce C. McClure, Chief Engineer
County of Hawaii
Department of Public Works
25 Aupuni Street, Room 202
Hilo, Hawaii 96720

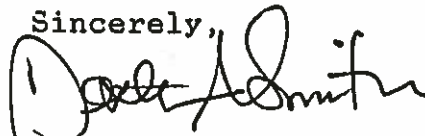
Dear Sir,

My family has a Consolidation/Resubdivision Application, No. 90-20, pending before the Hawaii County Planning Dept. A decision on our application is presently being deferred while we ask the County Department of Public Works Engineering Division to review their comments regarding the necessity of road improvements and other matters.

Our application falls under the guidelines of Section 23-7 of the Hawaii County subdivision control code. As such my family takes interest the Department of Public Works' interpretation and implementation of any standards or criteria connected with Section 23-7.

If the Department of Public Works has legally proposed, published public notice of, reviewed public comments regarding, and received mayoral approval for any departmental policy changes regarding Section 23-7 criteria since July 26, 1986, will you please send me printed copies of same. Also if the Department of Public Works should institute any changes in Section 23-7 criteria, presently or in the future, the Smiths would like to be considered interested public citizens. As such we request that the Dept. Of Public Works notify us of any proposed changes so that we can make comments during the legally required public review process.

Sincerely,



Dexter A. Smith

240 North Judd Street - Honolulu, HI 96817
Home Phone: 531-7995 Office Phone: 531-2533
Fax Number: 1-531-3124

August 6, 1991

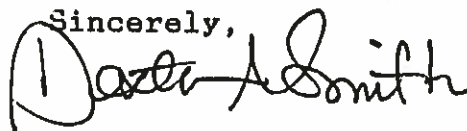
Mr. Bruce C. McClure, Chief Engineer
County of Hawaii
Department of Public Works
25 Aupuni Street, Room 202
Hilo, Hawaii 96720

Dear Sir,

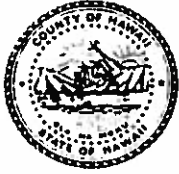
On July 5, 1991 I wrote you concerning current Department of Public Works' standards or criteria used to review Consolidation/Resubdivision applications that fall under the guidelines of Section 23-7 of the subdivision control code. I requested a printed copy of the Department of Public Works' criteria for such Section 23-7 subdivisions. To date I have not received a response to my request.

In a letter dated September 28, 1990, Mr. Robert K. Yanabu, Division Chief, Engineering Division, implied that my family's Consolidation/Resubdivision Application #90-20 was reviewed using "current criteria", which differ from the rules or standards for Section 23-7 subdivisions that were in effect in July 1986. As these rules directly affect any conditions imposed my family's Application #90-20 by the Department of Public Works, I would like to have a copy of same for reference and guidance.

Will you please send me a printed copy of the Department of Public Works' "current criteria" referred to in Mr. Robert K. Yanabu's September 29, 1990 letter as soon as is reasonably possible.

Sincerely,

Dexter A. Smith

enclosure
DAS: tths



Department of Public Works

25 Aupuni Street, Rm. 202 • Hilo, Hawaii 96720 • (808) 961-8321 • Fax (808) 969-7138

Larry S. Tanimoto
Mayor

Bruce C. McClure
Chief Engineer

Richard H. Nishimura
Deputy Chief Engineer

September 28, 1990

MR THOMAS YEH ESQ
100 PAUAHI STREET SUITE 204
HILO HI 96720

SUBJECT: SUBDIVISION APPLICATION #90-20 (81127)
TMK: 8-1-9: 03

Your September 20, 1990 letter cites three instances of favorable treatment of others as compared to your clients applications.

Subdivision #86-42 (#81110)

This application was reviewed/approved prior to the current criteria. It would not be approved today.

Subdivision #90-39 (#81128)

Lot 1 encompassing 70.0 acres will be consolidated with adjoining Lot 8-A to form a golf course at which time it will have direct access to Napoopoo Road.

Subdivision #90-48 (#75229)

All three lots directly access to a County Road, which can be improved by the County if need be.

Hienaloli-Kahului Road, which serves as access to Lot 3, is a 40 foot wide right-of-way with a relatively mild grade.

With regard to the road pavement width, the Department is amenable to 12 foot wide pavement, provided its width is approved by the Fire Inspector in writing.

With the exception of the pavement width, we fail to appreciate your contention that the Department has been unfair or unreasonable to your client.


ROBERT K. YANABU, Division Chief
Engineering Division

RKY:jjs

cc: Planning Director
Chief Engineer

RECEIVED
OCT - 2 1990

240 North Judd Street - Honolulu, HI 96817
Home Phone: 531-7995 Office Phone: 531-2533
Fax Number: 1-531-3124

October 3, 1991

Mr. Bruce C. McClure, Chief Engineer
County of Hawaii
Department of Public Works
25 Aupuni Street, Room 202
Hilo, Hawaii 96720

Re: Engineering Division Rule Changes for Section 23-7 applications as they relate to Consolidation/Subdivision Application 90-20

Dear Sir,

I am writing to follow-up on my letters of July 3, 1991 and August 6, 1991 regarding the change of Department of Public Works rules and standards for Consolidation/Subdivision applications that fall under the guidelines of Section 23-7 of the Hawaii County subdivision control code. To date I have not received any response to my requests.

Division Chief Robert K. Yanabu has implied that departmental rules and standards used to assess subdivision applications that fall under Section 23-7 have been changed. Please send me a printed copy of these changed rules and standards, or inform me when & where I may inspect same. I am willing to pay the cost of a copy.

Section 91-2 of the Hawaii Administrative Procedure Act states that each government agency, State and County, "shall make available for public inspection all rules and written statements of policy or interpretation formulated, adopted, or used by the agency in the discharge of its functions."

HAPA Section 91-2 further states that "no agency rule, order, or opinion shall be effective against any person or party, nor may it be invoked by the agency for any purpose until it has been published or made available for public inspection..."

If the Department of Public Works has adopted valid rule changes for assessing Section 23-7 subdivision applications it has followed the procedures for adoption required by the Hawaii Administrative Procedure Act and it has published those rule and standard changes. Either revised rules and standards are printed and available to the public inspection, or they are not effective against any person or party.

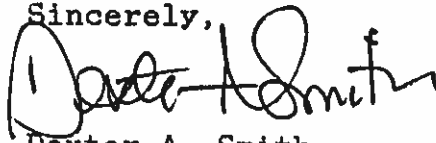
Will you please provide me with the following information:

- 1) Does the Department of Public Works have an established policy for the adoption of new rules and standards?
When was this policy established?

Mr. Bruce C. McClure, Chief Engineer
October 3, 1991
Page 2

- 2) When was the departmental rule/standard change for Section 23-7 applications instituted? Please give an exact date - Month/Day/Year.
- 3) Did this rule/standard change follow the departmental policy for adopting new rules and standards?
- 4) Which person/persons approved this departmental rule change? What documentary evidence does the department possess that the departmental rule/standard change was authorized?
- 5) How were departmental employees given notice of this rule/standard change? What printed memorandum notified these employees of the departmental rule/standard change?
- 6) How does the department pass these new rules/standards down to each engineer to insure that they are applied consistently.

Sincerely,



Dexter A. Smith

DAS: tths