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October 21, 1991

Thomas Yeh, Esq.
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Attorneys at Law
100 Pauahi Street, Suite 204
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Dear Mr. Yeh:

Re: Smith Consolidation and Resubdivision

I am replying to your numerous concerns on this matter. It is important to clarify numerous questions raised:

1. The April 11, 1985 Corporation Counsel Opinion on roads and trails did not fully comprehend the issues. This is the subject of a stipulated law action with the state. I regret that this subject was not seriously addressed before since it affects private landowners very significantly. Lack of experience is no excuse. We could have done better.

2. The Punalu'u Road Case is the product of a "screwed-up" procedure to which the County was not joined. The action was deliberately left in the First Circuit Court (instead of Hilo where it belonged) and the County was not joined. The case was between the State and the NHLC. Judge Acoba further proceeded to a ruling which has no effect on the County.

3. 1991 Position on Roads. Until 1991, the County did not have a clear legal basis for roads and trails. It now does as per my memorandum and the issue is now before the State Supreme Court.

4. Subdivision 86-42 (Ethel v. Paris Estate), TMK: 8-1-09:2 and 14. No comment.

5. Subdivision 90-39 (Christopher Norrie), TMK: 8-1-09:27 and 8-1-10:02 allowed deed covenants in lieu of Comment No. 1.

Comment No. 1, in my opinion, is wrong in regard to Section 23-34 inasmuch as Kaawaloa Road is a public road. Width and other issues, however, are beyond my comment. Kaawaloa Road is a state road. As mentioned earlier, we filed a law action to clarify this issue.

6. Subdivision 90-48 (Maryl Development), TMK: 7-5-10:52 and 62. "Hienaloli Road" is the old West Hawaii Railroad track right-of-way. Our office views the right-of-way as a public way in North Kona. Hours of research fail to reveal the location of company records after T. Konno went bankrupt. Under existing law of the 1800's, railroads usually had special legislation from the Hawaiian government to enable them to obtain rights of way. We have not yet found the enabling statute or grant documents for the West Hawaii railway. But, if the way was on the ground and public in 1892, it became a public way under the Highways Act of 1892. Ownership of the way is probably disputed and its use is probably disputed as well.

7. Roads and Trails. The mere fact that the County may maintain a road does not make it a County road. State and territorial roads under the Highways Act of 1892 may be maintained by the County if the County chooses. See Section 265A-1, Hawaii Revised Statutes. In previous years before "home rule" emerged, the territory, state and the county were one and the same. However, confusion continues, unfortunately, among those who fail to understand the issues.

8. September 20, 1990 Letter of Tom Yeh. Mr. Yeh's letter directly questions the Department's exercise of its police powers under Section 23-7 of the code, alleging inconsistent application of the code (particularly with reference to Subdivision 90-39 adjoining the Smith property).

9. Use of Police Power to Impose Road Widening Setbacks and Road Improvements Under Section 23-7. Mr. Smith's letter of February 21, 1991, questions the use of Section 23-7 to impose conditions which the County, viewed in light of land use decisions in the State and United States courts, normally would not be allowed to impose. His letter also questions whether Section 23-7 was intended to give the County power to impose conditions affecting the use of land as and when the County find such conditions to be appropriate. These questions are the subject of numerous discussions in reported court decisions which "come down all over the place."

The questions can be given greater clarity if there is an articulated policy or philosophy against which all actions are to be measured. For example, if the department is to have a ministerial role, then ambiguities or shortcomings in the code would be a legislative concern. Thus, the department would lack authority to "fill in" the void or to create new standards in order to meet changing circumstances. It very well may be that the department "filled the void" or "established previously undescribed standards" because of legislative direction and intent, rather than legislative oversight or resignation.

The balance of power between the legislative and executive branches is clearly at risk in this instance. While good legislation should address rule making requirements, publication requirements, administrative review and ombudsman procedures, that does not exist in this case. As a result, the public is often confused and the danger of unbridled use of police power could be present.

10. Solutions. Our meetings and correspondence point in the same direction. However, as attorney for the department, I must support the department if there is a legal basis for its action. I can point to numerous cases which state that administrative interpretation of regulatory statutes, while not conclusive, may be used as evidence that the legislative body agrees with the same (suggesting that the Council would have amended the ordinance otherwise). I can also point to other cases which find the department's use of its power, including its implied powers to use Section 23-7 as a vehicle to introduce new standards, as proper. I can also direct you to cases which hold the opposite.

The judicial forum is the only place to obtain a definitive answer to these questions. Our office is obligated to represent our clients zealously within the bounds of law. Should we find any client advancing an action which is illegal or unjust, we so inform them and take all measures necessary as counsel if the client fails to recant. If there is a basis to support our client, however, we will do so even if we disagree with the client's position. Thus, I feel that this case may end up in court for decision. A mandamus or declaratory action will put the County to the test unless the department changes its current position.

11. Punalu'u Case. Mr. Smith's reference to Judge Acoba is misdirected. Judge Acoba, who has no experience in Big Island land cases, held that the County owns the Punalu'u Beach

Trail but did not join the County as a party to the case (the County was not served and did not appear and the judgment did not bind the County). Further, under our statutes, Big Island land cases must be tried in the Third Circuit, not Honolulu. Also, in 1990, the Supreme Court upheld Judge Kubota's decision in the Kona Bay trail case that the old beach road and trail in Lanihau was not owned by the County.

12. Summary. I find it difficult to make policy decisions entrusted to another department. We will advise the department and have done so to wit: That good administrative principles and the requirements of some state and federal courts demand better code formulation, better code review, better code execution and better administration. What we do is to advise departments on the limits and boundaries of executive power and the risks presented thereby. The decision on policy is for the client to ultimately decide. As I mentioned at the bar association meeting, all counsel have a duty to check improper administrative action.

In closing, the matter is for the department to decide. Legally, the department has a basis or authority to support its action. Obviously, you question that authority or the alleged abuse thereof due to inconsistent application or unstated policies. Perhaps a final meeting with the department can bring us to a resolution.

Thank you.

Sincerely,

MICHAEL J. MATSUKAWA
Corporation Counsel

MJM:at
cc: Mayor Lorraine R. Inouye
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