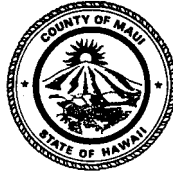


JAMES "KIMO" APANA  
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September 20, 2002

Honorable Michael J. Molina, Chair  
Public Works and Transportation Committee  
County Council  
County of Maui  
200 S. High Street  
Wailuku, Maui, Hawaii 96793

Subject: Traffic Calming Elements (PWT-3)

Dear Chair Molina:

This letter is sent in response to your request for clarification dated September 18, 2002 in which you asked us to answer the following questions:

- 1. Is the County's duty to care for, design, construct, and maintain its roadways in a reasonably safe manner identical to the State's responsibility, as indicated in your opinion?**

Although the source of the State and County's duty to care for, design, construct, and maintain roadways is different, the duty is the same. Pursuant to H.R.S. §264-43, the State is required to maintain all state highways.<sup>1</sup> The State, under the State Tort Liability Act<sup>2</sup>, waived its sovereign immunity and accepted liability in tort for breach of its duties. Under a similar statute, H.R.S. §265A-1, the County is required to maintain and repair all county highways.<sup>3</sup> A comparison of the following roadway maintenance and design cases indicates that the duty, or standard of care, of the State and County is the same:

Taylor-Rice v. State, 91 Haw. 60, 70, 979 P.2d 1086, 1096 (1999), "The duty of the State is to design and construct its highways in such a manner as to make them reasonably safe for their intended uses, and thereafter to maintain them in a reasonably safe condition." [action against State of Hawaii.]

Breed v. Shaner, 57 Haw. 656, 664, 562 P.2d 436, 441 (1977), The State has "a general duty to keep its highways in reasonably safe condition" and "this includes the duty to design the highway

Chair Michael J. Molina  
Public Works and Transportation Committee  
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to be safe for travel by people exercising ordinary care." [action against both State and County of Hawaii.]

Anders v. State, 60 Haw. 381, 387 590 P.2d 564, 567 (1979), "We are of the opinion that HRS §264-43 imposes a duty upon the State not only to exercise ordinary care in maintaining the roadway or highway in a reasonably safe condition but also to keep the shoulders thereof in a reasonably safe condition for the people who exercise ordinary care in traveling over the roadway or highway." [action against State of Hawaii.]

Terranella v. City & County, 52 Haw. 490, 493, 479 P.2d 210, 213 (1971), "The law which imposes a duty on the City and County to maintain and repair the county highways is found in HRS §265-1 [now, §265A-1] . . . we think the present statute contemplates a duty on the part of the proper county authorities to exercise ordinary care to keep safe not only the part of the road or highway customarily used by the traveling public, but also the part contiguous to the traveled part . . ." [action against City and County of Honolulu.]

McKenna v. Volkswagenwerk Aktiengesellschaft, 57 Haw. 460, 464, 558 P.2d 1018, 1022 (1977), "the duty imposed upon county authorities by HRS §265-1 [now, §265A-1], to maintain and repair all county highways includes the duty to also maintain and repair the shoulders of those highways." [action against City and County of Honolulu.]

**2. Would a breach of this responsibility create legal liability for the County?**

The breach of the County's responsibility to design, construct, repair or maintain its roadways or devices placed by the County thereon, has the potential to create legal liability for the County. However, showing the breach of a duty owed (that is, demonstrating negligence) is only part of the plaintiff's burden to establish liability in a tort action. The plaintiff must also show that he has suffered an injury and that his injury was caused by the breach of the duty owed to him.

If you have any questions, do not hesitate to call us.

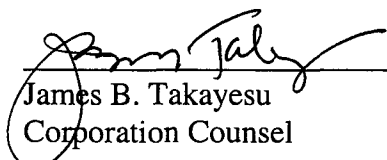
Very truly yours,

  
Gregory J. Carneau  
Deputy Corporation Counsel

GJG:ko  
cc: David Goode, Director of Public Works  
and Waste Management

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Approved for transmittal:

  
James B. Takayesu  
Corporation Counsel

**ENDNOTES**

1.

**§264-43 Responsibility.** The department of transportation shall construct, maintain, and administer all highways comprising the state highway system. [L 1965, c 159, pt of §1; Supp, §111-53; HRS §264-43]

2.

**§662-2 Waiver and liability of State.** The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. [L 1957, c 312, pt of §1; Supp, §245A-2; HRS §662-2; am L 1972, c 164, §2(a)]

3.

**§265A-1 County authority.** The several councils or other governing bodies of the several political subdivisions of the State shall have the general supervision, charge, and control of, and the duty to maintain and repair, all county highways, bikeways, and sidewalks and shall have the power to determine the terms under which irrigation or drainage ditches, flumes, railroads, including plantation railroads and similar structures, telephone, electric light and power lines and pipes and other conduits may be maintained upon, under, over, and across the same, and the councils or other governing bodies may make all regulations needful for the public convenience and safety in all cases where permission has been or may be granted to maintain the ditches, railroads, pipes, or other structures across, under, over, and upon all county highways. Any other law to the contrary notwithstanding, the several counties by ordinance may take over, or receive by dedication or otherwise, any private street or way or may improve, grade, repair, or do any construction work upon private streets, ways, pavement, water lines, street lighting systems, or sewer repairs. [L 1981, c 4, §2; am L 1988, c 263, §9]