

COUNCIL OF THE COUNTY OF MAUI
POLICY COMMITTEE

December 7, 2012

**Committee
Report No.** _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Policy Committee, having met on November 20, 2012, makes reference to County Communication 12-226, from the Director of Public Works, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII FOR CONSTRUCTION OF THE KEAWE STREET EXTENSION PROJECT AND INTERSECTION IMPROVEMENTS LOCATED AT LAHAINA, MAUI, HAWAII".

The purpose of the proposed bill is to authorize the Mayor to enter into an intergovernmental agreement with the State Department of Transportation, Highways Division ("State"). The agreement would require the State to construct the Keawe Street extension project and improvements at the intersection of Keawe Street and Honoapiilani Highway, Lahaina, Maui ("Keawe Street extension"). In exchange, the County would pay the State \$1,500,000.

The Director of Public Works noted that the Keawe Street extension as well as the first phase of the Lahaina bypass project are near completion. According to the Director, the County received \$1,500,000 from a developer for the construction of the Keawe Street extension.

A Deputy Corporation Counsel informed your Committee that the \$1,500,000 the County received was in fulfillment of a condition of approval for a Special Management Area permit. If the agreement is approved, the County would transfer the \$1,500,000 to the State.

At the request of the Chair of your Committee, the Department of the Corporation Counsel transmitted a revised proposed bill, approved as to form and legality, incorporating nonsubstantive revisions.

The Director of Public Works noted that the Keawe Street extension was initially a County project. When the State began work on the Lahaina bypass project, the County

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recognized that it would be more cost-effective to incorporate the Keawe Street extension into the Lahaina bypass project.

Charlene Shibuya, Assistant District Engineer, Maui District, Highways Division, State Department of Transportation, noted that the Keawe Street extension was an example of a good partnership between the State and the County that represented a historic milestone in completing the first phase of the Lahaina bypass project.

Your Committee voted 5-0 to recommend passage of the revised proposed bill on first reading and filing of the communication. Committee Chair Hokama and members Baisa, Couch, Mateo, and White voted "aye". Vice-Chair Carroll and members Cochran, Pontanilla, and Victorino were excused.

Your Policy Committee RECOMMENDS the following:

1. That Bill _____ (2012), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL AGREEMENT WITH THE STATE OF HAWAII FOR CONSTRUCTION OF THE KEAWE STREET EXTENSION PROJECT AND INTERSECTION IMPROVEMENTS LOCATED AT LAHAINA, MAUI, HAWAII"; and
2. That County Communication 12-226 be FILED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.



G. RIKI HOKAMA, Chair

ORDINANCE NO. _____

BILL NO. _____ (2012)

A BILL FOR AN ORDINANCE AUTHORIZING THE MAYOR OF THE
COUNTY OF MAUI TO ENTER INTO AN INTERGOVERNMENTAL
AGREEMENT WITH THE STATE OF HAWAII FOR CONSTRUCTION OF THE KEAWE
STREET EXTENSION PROJECT AND INTERSECTION IMPROVEMENTS LOCATED
AT LAHAINA, MAUI, HAWAII

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Purpose. The County of Maui ("County") wishes to enter into an Intergovernmental Agreement with the State of Hawaii, Department of Transportation, Highways Division ("State") for the construction of the Keawe Street Extension Project and Intersection Improvements ("Keawe Street Extension"), such agreement being attached hereto as Exhibit "1". Under the agreement, the State shall be responsible for the permanent construction of the Keawe Street Extension Project and certain intersection improvements and is required to dedicate the project to the County, as set forth in the agreement, subject to Council approval. The County shall provide the State with \$1,500,000 in cash within thirty days of the execution of the Intergovernmental Agreement.

SECTION 2. Council Authorization. Pursuant to Section 2.20.020 of the Maui County Code, the Council hereby authorizes the Mayor to execute the Intergovernmental Agreement and all other documents related to the construction of the Keawe Street Extension.

SECTION 3. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

A handwritten signature in black ink, appearing to read 'M. Hopper', written over a horizontal line.

Michael J. Hopper
Deputy Corporation Counsel
County of Maui

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INTERGOVERNMENTAL AGREEMENT BETWEEN THE COUNTY OF MAUI
AND THE STATE OF HAWAII DEPARTMENT OF
TRANSPORTATION, HIGHWAYS DIVISION, FOR THE KEAWE STREET EXTENSION
PROJECT AND INTERSECTION IMPROVEMENTS AS PART OF THE HONOAPIILANI
HIGHWAY REALIGNMENT PHASE 1A, FEDERAL-AID PROJECT NO.: NH-030-
1(35)R, DISTRICT OF LAHAINA, ISLAND OF MAUI

This Agreement is between the COUNTY OF MAUI, a municipal corporation of the State of Hawaii ("COUNTY"), the principal place of business and mailing address of which is Kalana O Maui Building, 200 South High Street, Wailuku, Hawaii 96793, and the STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION ("STATE"), the principal place of business and mailing address of which is 869 Punchbowl Street, Honolulu, Hawaii 96813, and is intended to reimburse the STATE for construction of the Keawe Street extension project and improvements at the intersection of the existing Keawe Street and Honoapiilani Highway as described below.

R E C I T A L S

1. Due to the discovery of archaeological sites, considered an inadvertent find, within the project area during field surveys, the project needed to comply with the regulatory requirements of Section 4(f) of the U.S. Department of Transportation Act and Section 106 of the National Historic Preservation Act.

2. Through the Section 4(f) process, the STATE has evaluated 15 alternative alignments with respect to avoidance of the known archaeological sites, feasibility, and prudence, resulting in only two viable alignments - the Ikena Avenue Alignment with Modified Makai Extension and the Original Ikena Avenue Alignment. All other alternatives were eliminated from further consideration.

3. The Original Ikena Avenue alignment currently meets feasibility and prudence criteria, but does not avoid the known archaeological sites. Therefore, this alignment was revisited, with considerations to minimizing disturbance of the known archaeological sites and mitigating any potential disturbance, and the studies indicate the modified makai extension alignment is the feasible and prudent alternative.

4. The STATE evaluated the Ikena Avenue alignment with a Modified Makai Extension that will avoid the known archaeological sites. The preliminary engineering work required for this alignment - including environmental, cultural, and archaeological studies, and consultation with interested parties and stakeholders - is complete. All is documented in "Final Environmental Assessment / Finding of No Significant Impact, Lahaina Bypass Modified Alignment, Kahoma Stream to Keawe Street Extension, March 2009".

5. Because the alternative alignment significantly affects the configuration of the original Keawe Street Extension design, the STATE has included the anticipated Keawe Street realignment area in the studies.

6. The accepted preferred alignment, Ikena Avenue alignment with the Modified Makai Extension significantly reduces the length and alters the design of the COUNTY's Keawe Street Extension project. Therefore, the STATE has included the Keawe Street Extension project in Phase 1A of the Lahaina Bypass project.

IN CONSIDERATION of the mutual obligations stated below, the COUNTY and STATE agree as follows:

1. The COUNTY shall provide the STATE with ONE MILLION FIVE HUNDRED THOUSAND NO/100 DOLLARS (\$1,500,000.00) in cash within thirty (30) calendar days of the execution of this Agreement for the construction and construction administration costs of the Keawe Street extension and improvements at the intersection of the existing Keawe Street and Honoapiilani Highway. (See map attached hereto as Exhibit "A").

2. The STATE shall be responsible for the permanent construction of Keawe Street extension, which will include, but not be limited to the following: asphalt concrete or concrete pavement travel ways and shoulder lanes, bases and sub bases, grassed shoulders, median, landscaping, drainage and fill slopes.

3. The STATE shall be responsible for the permanent construction of the improvements at the intersection of the existing Keawe Street and Honoapiilani Highway, which will include, but not be limited to the following: traffic signals, pedestrian push buttons, electrical conduits, loop detectors, and pavement markings.

4. The work by the STATE shall also include acquiring Right-of-Way and acquiring permanent parcels as required for the improvements.

5. Upon completion of the Keawe Street Extension, the roadway will be dedicated to the COUNTY, subject to approval by the Maui County Council, through passage of a resolution accepting such dedication.

6. Within ninety (90) calendar days after execution of this Agreement, the STATE shall provide the COUNTY with an implementation schedule identifying the timeframe and expenditures required to complete the construction of the Keawe Street extension.

7. As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other party in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation within sixty (60) days after the receipt of said written notice, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to both parties. The parties shall each pay fifty (50) percent of any costs for the services provided by such qualified third party as such costs are incurred. Such costs shall not be included in the cost of developing and completing the drainage improvements. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

8. The COUNTY and STATE act in independent capacities in the performance of their respective rights and obligations under this Agreement, and neither is to be considered the officer, agent, or employee of the other.

9. This Agreement shall terminate when the Keawe Street extension is dedicated to the County pursuant to paragraphs 2 through 5 of this Agreement, or upon termination of this Agreement by mutual written consent of the parties pursuant to paragraph 10.S. hereof, whichever occurs first. Upon termination of this Agreement, the STATE shall, within thirty (30) calendar days thereof, return to the COUNTY any remaining portion of those funds provided to the STATE, pursuant to this Agreement, which have not been expended by the STATE for actual construction and construction

administration costs as of the date of the termination. Upon termination of this Agreement, the STATE shall, if requested to do so by the COUNTY, provide the COUNTY with a full and accurate accounting of any work performed by the STATE for the Keawe Street Extension and improvements at the intersection of the existing Keawe Street and Honoapiilani Highway, and the cost thereof.

10. Miscellaneous Provisions.

A. Amendment. The provisions of this instrument may be amended only by both parties executing a subsequent written instrument which sets forth each amended provision.

B. Assignment. Neither the entire agreement which is stated in this instrument nor any interest in it may be assigned by any party for any purpose without the prior written consent of the other party.

C. Applicable Law. The provisions of this instrument shall be interpreted in accordance with the laws of the State of Hawaii as that law is construed and amended from time to time.

D. Authorization. Each party warrants to the other party that the individuals executing this instrument are authorized to do so.

E. Binding Effect. Upon its execution by both parties, this instrument shall become binding and enforceable according to its provisions. If more than one party is obligated to perform an act by any provisions stated in this instrument, those parties shall be jointly liable and obligated for the performance of those acts. The rights and obligations of each party named in this instrument shall bind and inure to the benefit of each party, respectively, and their respective heirs, personal representatives, successors, and assigns.

F. Consent; Subsequent Agreement. If a subsequent consent required of any party by the provisions of this instrument is requested by a party, said consent shall not be unreasonably withheld by the party to whom the request is made.

G. Construction. Each party named in this instrument acknowledges and agrees that (i) each party is of equal bargaining strength; (ii) each party has actively participated in the

negotiation and preparation of this instrument; (iii) each party has consulted with its respective legal counsel and other professional advisors as each party has deemed appropriate; (iv) each party and the party's legal counsel and advisors have reviewed this instrument; and (v) each party has agreed to be bound by the terms stated in this instrument following its review and obtaining advice.

H. Counterparts. This instrument may be executed by the parties in counterparts. The counterparts executed by the parties named in this instrument and properly acknowledged, if necessary, taken together, shall constitute a single instrument.

I. Dates. If any dates stated in this instrument fall on a Saturday, Sunday, or legal holiday, such date shall be the next following business day.

J. Defined Terms. Certain terms where they initially are used in this instrument are set off by quotation marks enclosed in parentheses and are subsequently capitalized. Those designated terms shall have the same meaning throughout this instrument, unless otherwise specifically stated or clearly inappropriate in the context.

K. Force Majeure. If any party is prevented from performing its obligations stated in this instrument by any event not within the reasonable control of that party, including, but not limited to, an act of God, public enemy, or war, fire, unavailability of materials, or actions by or against labor unions, it shall not be in default in the performance of its obligations stated in this instrument. PROVIDED, HOWEVER, any party delayed by such an event shall request an extension of time to perform its obligations stated in this instrument by notifying the party to which it is obligated within ten (10) days following the event. If the notified party agrees that the event was the cause of the delay, the time to perform the obligations stated in this instrument shall be extended by the number of days of delay caused by the event. If the required notice is not given by the delayed party, no time extension shall be granted.

L. Gender; Number. In this instrument, the use of any gender shall include all genders and the use of any number in reference to nouns and pronouns shall include the singular or plural, as the context dictates.

M. Integration. This instrument contains all of the provisions of the agreement between the parties pertaining to the subject matter stated in this instrument. Each party acknowledges that no person or entity made any oral or written representation on which a party has relied as a basis to enter into the agreement stated in this instrument which is not included as a provision in it.

N. Memorandum. If required by the provisions of this instrument or requested by any party, a memorandum of this instrument shall be executed by the parties, the signatures properly acknowledged by a Notary Public, and recorded in the Bureau of Conveyances, State of Hawaii.

O. No Drafter. No party shall be deemed to have drafted this instrument. No provision stated in this instrument shall be construed against any party as its drafter.

P. Notice. Any notice required or permitted by the provisions of this instrument to be given by a party to the other party shall be written and either shall be delivered personally or mailed, postage paid, by certified mail, return receipt requested, to the other party at the address and to the person designated by each party stated below. No other method of notice shall be effective.

(1) COUNTY OF MAUI
DEPARTMENT OF PUBLIC WORKS
200 South High Street, 4th Floor
Wailuku, Hawaii 96793

Attention: Director

(2) STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
HIGHWAYS DIVISION
869 Punchbowl Street
Honolulu, Hawaii 96813

Attention: Director

Q. Paragraph Titles. The titles of provisions stated in this instrument are included only for the convenience of the parties. They shall not be considered in the construction of the

provisions stated in this instrument.

R. Required Actions by the Parties. Each party named in this instrument agrees to execute the instruments and to diligently undertake the acts necessary to consummate the transaction contemplated by this Agreement. Each party shall use its best efforts to consummate the transaction contemplated by this instrument.

S. Termination. This Agreement may only be terminated by mutual written consent of both parties.

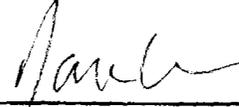
T. Severability. If any provision stated in this instrument subsequently is determined to be invalid, illegal, or unenforceable, that determination shall not affect the validity, legality, or enforceability of the remaining provisions stated in this instrument unless that effect is made impossible by the absence of the omitted provision.

U. Survival. Any representation and warranty stated in this instrument made by a party shall survive the termination of the Agreement stated in this instrument, unless otherwise specifically stated.

THE COUNTY OF MAUI AND THE STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION, have executed this instrument on _____, 2012.

APPROVAL RECOMMENDED:

COUNTY OF MAUI



Director of Public Works
County of Maui

By _____
Its Mayor

APPROVED AS TO FORM
AND LEGALITY:



MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

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APPROVED AS TO FORM
AND LEGALITY

Stella M L Kam
Deputy Attorney General

STATE OF HAWAII, DEPARTMENT
OF TRANSPORTATION, HIGHWAYS
DIVISION

By Adrian Was
Its Director

Date NOV 16 2012

