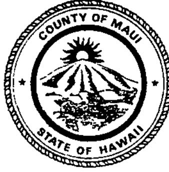
JAMES "KIMO" APANA
Mayor



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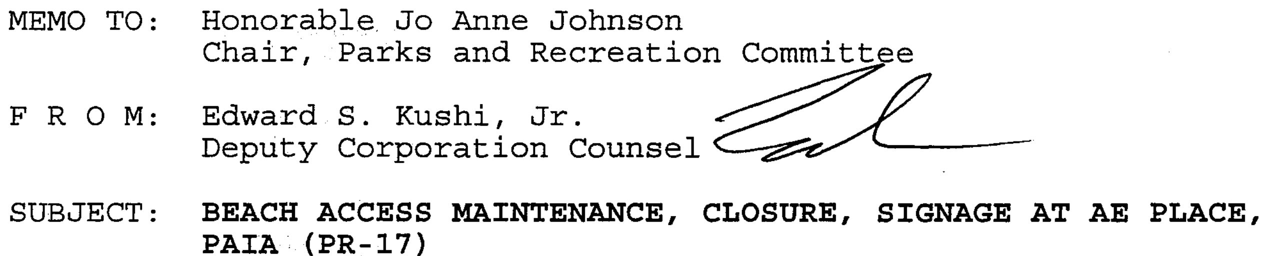

MEMO TO: Honorable Jo Anne Johnson
Chair, Parks and Recreation Committee

F R O M: Edward S. Kushi, Jr.
Deputy Corporation Counsel

SUBJECT: **BEACH ACCESS MAINTENANCE, CLOSURE, SIGNAGE AT AE PLACE, PAIA (PR-17)**

We respond to the questions posed in your request of August 20, 2001, as supplemented by your memo dated November 9, 2001, as follows.

1. **According to residents and community members, the beach access has been in existence since the 1920's. As a result, do the users of the access have prescriptive rights to continue to utilize the access in question?**

Possibly, depending on the facts established pursuant to a judicial review and determination.

For purposes of this response, we have assumed that the beach access area includes the internal roadway called Ae Place.

Historically, beach access easements may be established statutorily by dedication and acceptance, by implication, or by prescription.

STATUTORY DEDICATION AND ACCEPTANCE.

Examples of statutory easements are based on Section 46-6.5, Hawaii Revised Statutes ("HRS"), which in relevant part states:

> "(a) Each county shall adopt ordinances which shall require a subdivider or developer, as a condition precedent to final approval of a subdivision, in cases where public access is not already provided, to dedicate land for public access by right-of-way or easement for pedestrian travel from a public highway or public streets

to land below the high-water mark on any coastal shoreline, and ....

(b).......

(c).......

(d).......

(e).......

(f) This section shall apply to the plan of any subdivision or development which has not been approved by the respective counties prior to July 1, 1973."

Pursuant to this State mandate, Section 18.16.210 of the Maui County Code ("MCC") was enacted in 1974 to require, under certain circumstances, beach access dedications for all shoreline fronting subdivisions as a condition of approval.

In addition, pursuant to Section 264-1, HRS, privately built roads and alleys may be declared to be public highways or public trails if dedicated and accepted by the legislative body of a county. Section 264-1(c) states:

"(c) All roads, alleys, streets, ways, lanes, trails, bikeways, and bridges in the State, opened, laid out, or built by private parties and dedicated or surrendered to the public use, are declared to be public highways or public trails as follows:

(1) Dedication of public highways or trails shall be by deed of conveyance naming the State as grantee in the case of a state highway or trail and naming the county as grantee in the case of a county highway or trail. The deed of conveyance shall be delivered to and accepted by the director of transportation in the case of a state highway or the board of land and natural resources in the case of a state trail. In the case of a county highway or county trail, the deed shall be delivered to and accepted by the legislative body of a county.

(2) Surrender of public highways or trails shall be deemed to have taken place if no act of ownership by the owner of the road, alley, street, bikeway, way, lane, trail or bridge has been exercised for five years and when, in the case of a county highway, in addition thereto, the legislative body of the county has, thereafter, by a resolution, adopted the same as a county highway or trail.

..........." (emphasis added)

A roadway/highway does not become a county highway unless and until it is accepted or adopted as such by the county council. Maui Ranch Estates Owners Association v. County of Maui, et al, 6 Haw. App. 414, 724 P.2d 118 (1986), citing Santos v. Perreira, 2 Haw.

App. 387, 633 P.2d 1118 (1981). Even evidence that the County's employees maintained and repaired the subject road from 1919 to 1981 does not constitute acceptance, as "acts of County's employees are not evidence of the council's acceptance", and "A municipality's legislative body can only act officially through ordinance or resolution or by voting on a motion made at a council meeting." Maui Ranch Estates Owners Association v. County of Maui, et al, *supra*, at page 422, citing Life of the Land v. City and County of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980).

EASEMENTS BY IMPLICATION.

Easements may be implied from a landowner's use of part of his property for the benefit of another, however, such use does not constitute a true easement because a landowner cannot obtain an easement in his own land, and therefore such easements are considered and called "quasi-easements", which then ripen into true easements upon the landowner's transfer or severance of the dominant or servient portion of his property. A claimant must generally establish the following elements: 1) prior ownership of the dominant and servient estates; 2) the common owner's apparent and continuous use of part of the land to benefit another part; 3) the transfer or severance of one of the parcels; and 4) the necessity at severance for the preexisting use to continue. Bruce and Ely, The Law of Easements and Licenses in Land, 1995 ed., Section 4.03.

The implied dedication doctrine which results in an implied easement in favor of the dominant estate is generally applied and used in subdivision, roadway access cases, wherein without use of the private, internal roadway for access to the government road, lot owners may become landlocked. Easements in favor of such internal lot owners have been generally upheld. City and County of Honolulu v. Boulevard Properties, Inc., 55 Haw. 305, 517 P.2d 779 (1973); Territory v. Ala Moana Gardens, 39 Haw. 514 (1953).

In a case where the Land Court concluded that the general public had used accreted land for recreational purposes for at least 20 years with the acquiescence of the owner, and ruled that said land was impliedly dedicated to the general public and granted easements over said land to the State, our Supreme Court reversed said ruling in favor of the State, and in relevant part stated:

> "While continuous adverse use raises a presumption of implied dedication in Hawaii under The King v. Cornwell, 3 Haw. 154 (1869), it is not a conclusive presumption." In re Application of Banning, 73 Haw. 297, at page 307, 832 P.2d 724. The Court specifically rejected the theory of implied dedication adopted by the Land Court as set forth in the controversial California

case of Gion v. City of Santa Cruz, 84 Cal. Rptr. 162, 465 P.2d 50 (1970), wherein adverse public use of land without asking or receiving permission and without objection raised the conclusive presumption of the landowner's intent to dedicate the land to the public. Banning, *supra*, at pages 303 and 304.

Implied easements may be established based on a case-by-case review and analysis. "However, the basis of an implied easement is the presumption of grant arising from the circumstances of the case. Such presumption is one of fact, which may be rebutted." Tanaka v. Mitsunaga, 43 Haw. 119 (1959).

EASEMENTS BY PRESCRIPTION.

"The law which governs the elements necessary for acquisition of title by adverse possession is applicable to the establishment by prescription........Under this rule, the use and enjoyment must be adverse, under a claim of right, continuous and uninterrupted, open, notorious and exclusive, with knowledge and acquiescence of the owner of the servient tenement and must continue for the full prescriptive period." Tagami v. Meyer, 41 Haw. 484 (1956).

The party claiming the easement has the burden of proving the essential elements giving rise to the prescriptive right. The Nature Conservancy v. Nakila, et al, 4 Haw. App. 584, 671 P.2d 1025 (1983), at page 598, citing Tagami v. Meyer, *supra*.

The applicable prescriptive period is twenty (20) years. Campbell v. Hipawai Corporation, 3 Haw. App. 11, 639 P.2d 1119 (1982), citing Sections 657-31, and 669-1, HRS.

"Continued use by defendants would of course be inconsistent with the exclusivity of possession essential to plaintiff's claim of adverse possession." Nihoa v. Chow, 57 Haw. 172, 552 P.2d 77 (1976), at page 173.

Permissive use of the land at the inception of defendant's occupation carries with it the presumption that use continues permissive. Tagami v. Meyer, *supra*.

"A use is considered adverse if it is made under a claim of right when no such right exists..... A key requirement of adversity is the lack of permission..... An adverse use is considered open if there is no attempt to conceal the use..... A use is considered notorious if the owners had actual knowledge or at least a reasonable opportunity to learn of its existence." Lam, Beach Access: A Public Right ?, 23 Hawaii Bar Journal 65 (1991).

SUMMARY:

Based on the above discussion and our review of the County rights-of-way documents, we opine that neither statutory dedication nor surrender have occurred (note previous memo to Councilmember John Wayne Enriques from First Deputy Howard M. Fukushima dated October 3, 2000, indicating no record of acceptance or adoption by County). We further opine that the County may be presently precluded from taking over or accepting Ae Place and/or the 3-foot alley due to its sub-standard conditions, pursuant to Section 18.40.040, MCC, which states:

> "**18.40.040 Guidelines for acceptance.** The County shall not take over, receive by dedication, do any repair or construction work upon streets or pavements, water lines, street lighting systems, sewer lines or drainage system, or in any way accept as public highways any street, avenue or alley, in any subdivision hereafter opened or platted in the County, or any existing street, avenue or alley in the County, except upon full compliance with the provisions of this title....."(emphasis added)

Of course, the Council may wish to amend this Code section to provide an exception where increased beach access or other important public benefits are involved.

We believe that the owners of any "landlocked" parcel adjoining Ae Place could probably establish an easement over Ae Place by implication for access to and from Hana Highway. As to whether members of the general public have such rights by prescription, including use of the 3-foot alley to the beach, cannot be determined at this time. However, individual members of the public have been deemed to have standing to pursue such a determination in a class action suit. Akau v. Olohana Corporation, 65 Haw. 383, 652 P.2d 1130 (1982).

2. **Since this issue has been reviewed previously by the Council and has been brought to our attention again with the question of ownership unresolved:**

   a. **Does the County have the right to perform a title search or a quiet title action on Ae Place and the beach access to determine the ownership ?**

   b. **Which of the two aforementioned actions would you recommend for determining ownership of said locations, and what would be required to proceed with the above action(s) ?**

Subject to payment, anyone can retain the services of a title company to conduct a title search of properties the ownership records of which are recorded in the state Bureau of Conveyances or with the Land Court. Generally, the result would be a preliminary title report covering the subject property which would reveal the last conveyance document of record, as well as the full legal description of the property. In cases where title is not clear or there is a break in the "chain of title", some companies may be able to perform in-depth, search of records investigation and produce a title abstract showing the defects, and recommending appropriate actions to clear title. Preliminary title reports (with no liability assumed) range from $125 to $250 per lot/property. Costs and expense for title abstracts can be major due to the individual records/court searches involved, and usually begin no less than $1,500 per lot/property.

Quiet title actions are generally initiated by those claiming specific interests in property held by others, and/or by those attempting to divest recorded interests held by others through adverse possession. We opine that it would not be appropriate for the County, as a municipal entity, to file and/or take the lead in any quiet title action, since proof of some of the elements of adverse possession would be difficult to establish.

A more appropriate action would be to condemn the subject access and roadway pursuant to the County's power of eminent domain, and specifically, pursuant to Chapter 115, HRS, which directs the counties to use such powers to preserve beach access. However, the sub-standard condition of the road and alley may preclude the take over by the County pursuant to Section 18.40.040, MCC, above-mentioned.

The most efficient and least costly manner of acquiring the subject access and roadway would be for the Council to amend Section 18.40.040 and to then accept "surrender" of the roadway and trail pursuant to HRS Section 264-1(c)(2).

3. **In speaking with the residents of Ae Place, the issue of cleanliness is an underlying concern. Should the Council choose to keep the beach access open and maintain the area, must the County obtain ownership of the access or are we permitted to perform maintenance services without the need for ownership?**

Due to liability concerns, the County, through its departments, should as a general policy refrain from maintaining private property. In addition, as set forth in Section 18.40.040, MCC, above-mentioned, "The County shall not ....do any repair or construction work upon streets or pavements........,

except upon full compliance with the provisions of this title..."

An alternative would be for the County to grant funds to a private, non-governmental entity to maintain private property for a public purpose. Another alternative would be for the owner(s) of the property (if we can determine their present identities) to grant the County a formal easement over the subject property(ies), thereby obligating the County to maintain.

Implicit in the above question is the primary issue whether the County, without dedication, acceptance, surrender, and/or a court declaration that it possesses easement rights, has the right and/or authority to make such a decision "to keep the beach access open."

QUESTIONS FROM NOVEMBER 9, 2001 MEMO:

A. **Since a fence has been installed to block the beach access at Ae Place, does this action violate Maui County Code requirements for a Special Management Area permit?**

B. **If the installation of the fence is in violation of the Maui County Code, shall it be removed pending receipt of proper permits ? And if so, which County department is responsible for its removal ?**

C. **Is the closure of this beach access a violation of the goals and objectives set forth in the Coastal Zone Management Act as delineated in Section 205A-2, HRS ?**

We have reviewed the referenced August 27, 1990 opinion from the State Attorney General's Office (Opinion No. 90-3), and while we agree with the analysis and conclusion therein, said opinion was based on the premise that the subject "Old Pier Road" had been acquired by the Territory for access from the State highway to a wharf and was still being used as a beach access.

As noted in the subject AG opinion, the "...placement of a structure, fence, sign or post in order to physically close the beach access, assuming it is a beach access, would be a 'development'" requiring an SMA permit.... "This is not to say that access may not be closed but only to say that an SMA permit would be required before closure."

The initial determination as to whether closure of the privately owned road and 3-foot alley violates or is inconsistent with the goals and objectives of the Coastal Zone Management ("CZM") program relating to providing "adequate public access" to the shoreline would be made by the County's Planning department and could ultimately be decided by the Courts.

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Installation of the subject fence to block the beach access at Ae Place raises issues relating to violation of rules and regulations and statutes relating to special management area permits rather than violations of the Maui County Code. Pending resolution of these issues, the person(s) who erected the fence should be notified of the civil penalties proscribed under HRS 205A-32 and required to remove the obstruction.

Since the subject fence is on private property, we would advise against County personnel physically removing the structure without prior judicial authorization. Injunctive relief is provided for under HRS 205A-33.

Call if further discussion/clarification is needed.

APPROVED FOR TRANSMITTAL:

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