

Harry Kim  
Mayor



Lincoln S.T. Ashida  
Corporation Counsel

Gerald Takase  
Assistant Corporation Counsel

**COUNTY OF HAWAII**  
**OFFICE OF THE CORPORATION COUNSEL**

101 Aupuni Street, Suite 325 · Hilo, Hawai'i 96720-4262 · (808) 961-8251 · Fax (808) 961-8622

July 26, 2007

Naomi U. Kuwaye, Esq.  
Jesse K. Souki, Esq.  
Imanaka Kudo & Fujimoto  
TOPA Financial Center  
745 Fort Street, 17<sup>th</sup> Floor  
Honolulu, HI 96813

**Re: County Ownership of Homestead Road, North Kona, Hawai'i**  
**TMK Nos. (3) 7-3-007:038, 039 and (3) 7-3-009:007**

Dear Ms. Kuwaye and Mr. Souki:

This is in response to your letter dated May 10, 2007 to Corporation Counsel Lincoln S.T. Ashida. In that letter, you asked, on behalf of your client The Shopoff Group, L.P., (hereinafter, "Shopoff"), for confirmation of County ownership of a "homestead road" which is represented on homestead maps of the subject property owned by Shopoff. We understand you are seeking this information as requested by the State of Hawai'i Land Use Commission (hereinafter, "LUC"), in context of a petition before the LUC to redistrict 127.94 acres of land from the State Land Use Agricultural district to the Urban district, for a residential development. We also understand that your client may in the future seek rights to use the homestead road area in conjunction with the proposed development.

Your letter posits a belief that the County is the fee owner of the homestead road. This is based upon the evidence in early maps and land grants that the homestead road was "laid out" on paper by the Hawaiian "government" (not the County) in creating the homestead subdivision. Our County surveyors generally agree with this historical background.

However, we understand that there is no actual homestead road constructed, but only a rough trail that traverses the general area. Hence, we must regard this not as an actual road for highway use, but no more than a "paper" road, not in actual existence.

We understand the legal analysis explained in your letter, by which you suggest that this paper road might be opined to be County property. However, Hawai'i Revised Statutes (hereinafter, "HRS"), § 264-1 states that "All roads" (not "proposed" roads or road reserves) laid out by the government are public highways.

None of the cases cited governs here, where there is no actual useable highway in existence, only a "paper" road. Neither does the cited attorney general's opinion deal with this scenario. The cited cases deal with private roads which are sometimes held impliedly dedicated to public use via platting and lot sales. Even in those cases, the dedication is not held to be a fee,

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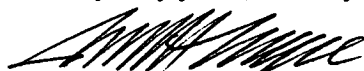
but an easement, subject to the County's judgment as to when it will be opened as a public road. *See, Territory of Hawaii v. Ala Moana Gardens*, 39 Haw. 514 (1952). There, the Court held that recording of maps showing streets, and sale of lots, "constitute a dedication" of a road easement for public use, "nor need the streets dedicated by such plat for sale be opened immediately but may be opened by the proper local authorities at such time as the public interest may require, and of this the local authorities are the judges." On rehearing, the court clarified: "The holding is not that there was a statutory dedication and acceptance . . . so as to give title to the Territory and obligation by the supervisors to maintain a public street" but that "maps and plans duly recorded and the sale of lots by the former owners based upon these plans constitute a dedication." 39 Haw. at 655.

The Hawai'i Appellate Courts thus exercise restraint in declaring that impliedly dedicated roads transfer the fee to the County. The judiciary seems to respect the County executive and legislative authorities' discretion in accepting and opening County roads, even when they are actually in existence and in use as highways.

Here, it seems fair to say that the Hawaiian government's actions in laying out these homestead roads on paper at least created a reservation of a road right-of-way for a public highway, in the nature of an easement. It remains unclear whether the County or the State owns the rights to such a right-of-way in an inchoate road. It may be that both the State, as the creator of the subdivision on what would now be state land, and the County, as the entity responsible for county roads, may have a concurrent interest. It is impossible to predict whether the State might have an interest in taking control of a given road, once built. Due diligence would probably dictate that whoever wishes to make use of the road area obtain entitlements or releases from both the State and the County.

Please contact the undersigned should you have further questions. Thank you.

Very truly yours,



IVAN M. TORIGOE  
Deputy Corporation Counsel

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cc: Lincoln S.T. Ashida, Esq., Corporation Counsel  
Gerald Takase, Esq., Assistant Corporation Counsel  
Bruce McClure, Director of Department of Public Works  
Norman Hayashi, Hawai'i County Planning Department

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