April 22, 1999

OPINION NO. 99-2

Aaron S. Y. Chung, Council Member
Hawaii County Council
25 Aupuni Street
Hilo, Hawaii 96720

RE: **LIABILITY FOR SIDEWALK MAINTENANCE**

Dear Mr. Chung:

In your letter of April 12, 1999, you asked for an opinion on the legality of Section 22-58(b) of the Hawaii County Code which provides that:

> After the grade of any street has been established, as prescribed by law, all owners of land abutting on and adjoining such street shall, at their own expense, maintain their sidewalk in good repair and keep their sidewalks free of all weeds, noxious growth, or other vegetable matter, provided that, should the owners have grass growing on or adjacent to the sidewalk, they shall keep the grass cut so that the grass shall not be a nuisance or inconvenience to the public passing thereon.

Such ordinances as this are quite common and most of the attacks against them occurred in the early part of the century. Many of these attacks were fueled by the ruling in *Village of Norwood v. Baker*, 172 US 269, 19 Sup. Ct. 187, 43 L. Ed. 443 (1898). In that case, a particularly harsh assessment in which ground for a street was condemned through Baker's property, and the amount of the damages, plus costs, were assessed back on his remaining property was challenged. Affirming the enjoinment of the assessment, the Court recognized the principle that "special burdens may be imposed for special or peculiar benefits accruing from public improvements", *Ibid at 172 US at 278,* but found that an exaction for the cost of improvements in substantial excess of the special benefits accrued, was the taking of private property without compensation.

Three years later, however, in *French v. Barker Asphalt Paving Co, 181 US 325, 21 Sup. Ct. 625, 45 L. Ed. 879, (1901),* the Court made clear that the *Village of Norwood* case did not stand for the proposition that all such assessments were unconstitutional, but only these which were confiscatory or abuses of the law. This point was reiterated in *Wight v. Davidson*, *181 US 371, 21 Sup Ct 616, 45 L. Ed. 900 (1901), Tonawanda v. Lyon 181 US 389, 21 Sup Ct 609, 45 L. Ed 908 (1901); Webster v. Fargo, 181 US 394, 21 Sup Ct. 623, 45 L. Ed. 917 (1901); Cass Farm Co v. City of Detroit, 181 US 396, 21 Sup. Ct. 644, 45 L. Ed. 914, Detroit V. Parker, 181 US 399, 21 Sup. Ct. 624, 45 L. Ed. 917 (1901)* and *Shumate v. Heman, 181 US 402, 21 Sup. Ct. 645, 45 L. Ed. 922 (1901);* all decided on the same day, and all the results of erroneous interpretations of the Village of Norwood case.

In the years immediately following these decisions numerous challenges were brought against ordinances similar to HCC 22-58(b) were unsuccessfully brought. In *Job v. City of Alton, 59 NE 622 (Ill 1901),* an ordinance requiring lot owners to construct sidewalks in front of their homes was held to be constitutional. In *City of Lincoln v. Janesch, 63 NW 707 (Neb 1902),* a statute imposing a duty upon lot owners to repair sidewalks adjacent to their premises was held to be a legitimate exercise of the police power. In *Anderson v. City of Ocala, 64 So. 775 (Fla. 1914)* charter provision authorizing assessments for the cost of constructing and repairing sidewalks was upheld. Only in *City of Port Huron v. Jenkenison, 43 NW 923 (Mich 1889)* was a provision imposing a duty of abutting occupants to maintain sidewalks struck down, but this was done because criminal penalties were imposed which might have resulted in poor people being incarcerated for not doing what they were financially unable to do.

With the constitutionality of these provisions firmly established, more recent cases are rare. In *City of Philadelphia v. Philadelphia Authority for ID*, 326 A 2d. 502 (Pa Super 1975), the court found "ample authority" that the city could require landowners to make sidewalk repairs when necessary. *City of Bridegeport v. United Illuminating Co, 40 A 2d. 272 (Conn 1945)* upheld such requirements, so long as they were reasonable and not arbitrary. *City of Woodburn v. Delrabi Inc., 531 P 2d. 913 (Or. App. 1975)* affirmed a city order that a shopping mall construct a sidewalk along an adjoining highway, although without much discussion of the rationale for the decision.

Occasionally, however, courts have found that while, as in the *Village of Norwood* case, supra, the requirements of a maintenance statute were legal, the application was unjust.

In *Golden v. City of Philadelphia, 57 A 2d. 429 (Pa. Super 1948),* the city was barred from enforcing its ordinance when city road work had established a new grade. In *Stewart v. Bay Village, 59) NE 2d, 1305 (Ohio. App. 1990),* juris issue overruled *568 NE 2d. 1279 (1991),* an owner who lived in an apparently historic home, was granted an injunction against the village when he showed that a sidewalk might actually decrease the value of his property, rather than benefit it.

To summarize, ordinances such as HCC §22-58 have, with the few exceptions noted, been generally upheld. I note, however, that while our ordinance, by reference to §22-5, purports to provide for a penalty of a $100 per day fine, there is no procedure established for the imposition of such a fine, nor a procedure for the citizen to raise any defense of hardship or special circumstances that he or she might have. I recommend, therefore, that the enforcement provisions of the ordinance be reviewed, and consideration given to either establishing an administrative enforcement mechanism, such as is found in the Zoning Code, or by a provision allowing for maintenance by the County and assessment of costs on the landowner, similar to the flood control ordinance, HCC Sec. 27-38.

Sincerely yours,

RICHARD D. WURDEMAN
Corporation Counsel

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CHUNG-Sidewalk Maint.Liab.