

November 20, 1995

The Honorable Norman Mizuguchi  
President of the Senate  
The Eighteenth Legislature  
State of Hawaii  
State Capitol, Room 507  
Honolulu, Hawaii 96813

The Honorable Joseph M. Souki  
Speaker of the House of Representatives  
The Eighteenth Legislature  
State of Hawaii  
State Capitol, Room 904  
Honolulu, Hawaii 96813

Gentlemen:

Re: Whether Divorcement Constitutes a "Taking" of Private Property for Public Use

You have asked us for an opinion as to whether HRS § 486H-10, which prohibits manufacturers<sup>1</sup> and jobbers<sup>2</sup> of petroleum products<sup>3</sup> from operating a retail service station<sup>4</sup> for the retail<sup>5</sup> sale<sup>6</sup> of petroleum products, is a taking of private property for public use in violation of the eminent domain clauses of the constitutions of Hawaii and of the United States.<sup>7</sup>

Our opinion is that HRS §486H-10 is not an unconstitutional taking.

HRS §486H-10 does not deprive manufacturers and jobbers who own retail service stations of all economically viable use of their property.<sup>8</sup> The statute does not prohibit an oil company from leasing its property to independent dealers. Nor does the statute prohibit an oil company from owning retail service stations or from making arrangements for them to be operated as retail outlets for the oil company's products. The statute only prohibits an oil company or its subsidiaries, employees, or agents<sup>9</sup> from operating the station.

The Maryland Court of Appeals upheld a nearly identical statute from attack under the eminent domain clause of the Maryland and federal constitutions in *Governor of Maryland v. Exxon Corp.*, 370 A.2d 1102, recon. denied, 372 A.2d 237 (Md. 1977), *aff'd.* on other grounds, 437 U.S. 117 (1978).<sup>10</sup> The Maryland Court of Appeals said,

For government restriction upon the use of property to constitute a taking in the constitutional sense, so that compensation must be paid, the restriction must be such that it essentially deprives the owner of all beneficial uses of this property. As this Court stated in *Baltimore City v. Borinsky*, 239 Md. 611, 622, 212 A.2d 508, 514 (1965):

"The legal principles whose application determines whether or not the restrictions imposed . . . on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconsti-tutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the . . . action results in substantial loss or hardship."

*Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); *Bureau of Mines v. George's Creek*, 272 Md. 143, 165, 321 A.2d 748 (1974); *Rockville v. Stone*, 271 Md. 655, 663-664, 319 A.2d 536 (1974). ([top](#))

The Maryland Act, in prohibiting producers and refiners from directly operating retail service stations, clearly does not constitute a "taking" in the constitutional sense. The divestiture provisions of the Act do not deprive producers and refiners owning retail service stations of all beneficial uses of their property, or even of the existing and presumably most profitable use of their property. As previously discussed, the majority of retail service stations are now operated by dealers and not employees. Thus the Act will have less impact, for example, than the zoning provisions upheld in *Goldblatt v. Hempstead*, supra, or *Baltimore City v. Borinsky*, supra, which deprived the owners of the most profitable use of the property. The relatively few service stations directly operated by producers and refiners may continue to be used as service stations, as producers and refiners may lease the property to dealers. The Maryland Act does not prohibit an oil company from owning a retail service station or having the station operated as a retail outlet for that company's products. It merely requires that the station be operated by a retail dealer rather than by company employees. ([top](#))

Moreover, allowance for the temporary operation by refiners and producers, as well as reasonable exceptions to the divestiture dates, as provided by the Act in Paragraphs G and H, will also lessen the impact of the divestiture provisions on producers and refiners.

In sum, the restrictions imposed by the divestiture provisions of the Act on the manner in which oil companies may continue to use their property for retail service station purposes, i.e., using retail dealers instead of employees, does not amount to a "taking" of private property in violation of the federal or state constitutions. ([top](#))

Takings cases in the Supreme Court of the United States since the Exxon case give no indication that the Supreme Court of the United States would deal with HRS §486H-10 differently than the Maryland Court of Appeals dealt with its divorcement statute. E.g. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992) (a zoning statute that deprived a property owner of all economically viable use of land would be a regulatory taking requiring compensation); *Yee v. City of Escondido*, 503 U.S. 519 (1992) (rent control ordinance did not amount to a physical taking requiring compensation); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (holding premature, in the absence of actual facts, the question whether a rent control ordinance was an unconstitutional taking in allowing consideration of tenant hardship in the approval of a rent increase).

For these reasons, we do not think that HRS §486H-10 violates the eminent domain clause of the federal constitution. ([top](#))

The eminent domain clause of the Hawaii constitution differs from the eminent domain clause of the federal constitution. It prohibits not only "taking" but also "damaging" private property for public use without compensation.<sup>11</sup> We do not think HRS §486H-10 raises a serious question under the prohibition against "damaging" private property.<sup>12</sup> Nothing in the statute requires the conclusion that compliance will cause an oil company to suffer any damage at all. Leasing to independent dealers might well be the most profitable use of the property.

Accordingly, we do not think that HRS §486H-10 violates the eminent domain clause of the Hawaii constitution.

Very truly yours,

Ted Gamble Cleuse  
Deputy Attorney General

APPROVED

Margery S. Bronster  
Attorney General

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<sup>1</sup>"Manufacturer' means every producer or refiner of petroleum products on January 1, 1992, or any subsidiary of that producer or refiner." HRS § 486H-1. [BACK TO DOCUMENT](#) ([top](#))

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<sup>2</sup>"Jobber' means every wholesaler of petroleum products." HRS § 486H-1. [BACK TO DOCUMENT](#) ([top](#))

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<sup>3</sup>"Petroleum products' includes motor vehicle fuel, residual oils number 4, 5, and 6, and all grades of jet (turbo) fuel." HRS § 486H-1. [BACK TO DOCUMENT](#) ([top](#))

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<sup>4</sup>"Retail service station' means a place of business where motor vehicle fuel is sold and delivered into the tanks of motor vehicles." HRS § 486H-1.

"Company operated retail service station' means a retail service station owned and operated by a manufacturer or jobber." HRS § 486H-1, as amended by 1995 Haw. Sess. Laws c. 238. ([top](#))

"Dealer operated retail service station' means a retail service station owned by a manufacturer or jobber and operated by a qualified gasoline dealer." HRS § 486H-1, as amended by 1995 Haw. Sess. Laws c. 238. [BACK TO DOCUMENT](#)

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<sup>5</sup>"Retail' means the sale of a product for purposes other than resale." HRS § 486H-1. [BACK TO DOCUMENT](#)

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<sup>6</sup>"Sale' means any exchange, gift, or other disposition." HRS § 486H-1. [BACK TO DOCUMENT](#) ([top](#))

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<sup>7</sup>The eminent domain clause of the fifth amendment of the federal constitution provides, "nor shall private property be taken for public use, without just compensation." The eminent domain clause has been incorporated into the fourteenth amendment of the federal constitution, and is, therefore, a limit on state government power. *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897).

The eminent domain clause of the Hawaii constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Hawai'i Const. art. I, § 20. [BACK TO DOCUMENT](#)

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<sup>8</sup>The statute provides, "From July 31, 1993 to August 1, 1997, no manufacturer or jobber shall operate a major brand, secondary brand, or unbranded retail service station in Hawaii to sell its petroleum products, . . ." HRS §486H-10(a), as amended by 1995 Sess. Laws C. 238. [BACK TO DOCUMENT](#) ([top](#))

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<sup>9</sup>"For the purposes of this section, the term 'to operate' means to engage in the business of selling motor vehicle fuel at a retail service station through any employee, commissioned agent, subsidiary company, or person managing a retail service station under a contract and on a fee arrangement with the manufacturer or jobber." HRS §486H-10(b). [BACK TO DOCUMENT](#)

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<sup>10</sup>Chapter 854 of the Laws of Maryland of 1974, as amended by Chapter 608 of the Laws of 1975, codified as Art. 56, § 157E of the Maryland Code (1957, 1972 Repl. Vol., 1976 Cum. Supp.) provides:

(B) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(C) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer. [BACK TO DOCUMENT](#) ([top](#))

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<sup>11</sup>In *City and County of Honolulu v. Market Place, Limited*, 55 Haw. 226, 517 P.2d 7 (1973) (holding that in the condemnation of a beach lot in Waikiki for a park, it was erroneous to award damages for out-of-pocket expenses to a lessee-developer of a condominium in the planning stage at the time of condemnation), the Supreme Court of Hawaii said,

Prior to the amendment, only the owner of physically "taken" property was entitled to compensation in Hawaii, and those whose property was merely consequentially "damaged" by the primary taking were without recourse. See, e.g., *Widemann v. Thurston*, 7 Haw. 470 (1888). The chief purpose in adding the "or damaged" clause to the Constitution was to remedy this situation. Accordingly, courts would continue to compensate individuals for condemnatory "takings" of their property under traditional measures thereof, but would add to the class of those entitled to indemnification individuals whose property, although not technically "taken," is nonetheless injured by a government use elsewhere in a way that society as a whole and not the individual property owner, ought to bear to costs. . . .

55 Haw. at 231, 517 P.2d 13 (citing Committee of the Whole Report No. 15, 1 Proceedings of the Constitutional Convention of Hawaii of 1968 at 357 (1973) (" . . . The amendment is intended to apply to certain of those damages resulting from an undertaking for a public use and not those types of damages normally recoverable in tort actions. . . .") (hereinafter, "Committee Report 15")). [BACK TO DOCUMENT](#)

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<sup>12</sup>Committee Report 15, relied on by the Hawaii Supreme Court in *City & County of Honolulu v. Market Place, Limited*, also stated,

The amendment is neither intended to affect governmental bodies in their lawful and proper exercise of police powers to protect public health, safety, and welfare, nor apply to instances of zoning or planning, which fall within the proper exercise of such police powers.

Committee Report 15 at 357. The Supreme Court of the United States held that the Maryland divorce statute did not violate the substantive due process clause of the fourteenth amendment of the federal constitution. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124 (1978) (questions concerning the "economic wisdom of the statute . . . cannot override the State's authority 'to legislate against what are found to be injurious practices in their internal commercial and business affairs . . . .'"). [BACK TO DOCUMENT](#)

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