

OFFICE OF THE MAYOR
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 300 * HONOLULU, HAWAII 96813
PHONE: (808) 768-4141 * FAX: (808) 768-4242 * INTERNET: www.honolulu.gov



KIRK CALDWELL
MAYOR

EMBER LEE SHINN
MANAGING DIRECTOR

GEORGETTE T. DEEMER
DEPUTY MANAGING DIRECTOR

July 17, 2014

SENT VIA EMAIL AND FACSIMILE

The Honorable Mazie K. Hirono
United States Senate
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Room 3-106
Honolulu, Hawaii 96850

Dear Senator Hirono:

I very much appreciate your email offering assistance in dealing with the blatant disrespect of the City and County of Honolulu's law prohibiting the aerial towing of banners, including signs.

Aerial Banners, Inc. and its affiliate Aerial Banners North Incorporated (Aerial Banners) is an aerial advertiser specializing in flying banners and messages behind its airplanes. Aerial Banners has recently begun banner towing operations over the City and County of Honolulu (City), which is in violation of Revised Ordinances of Honolulu 1990 ("ROH") Section 40-6.1, which prohibits aerial advertising. The Honolulu Police Department has cited the pilot for the violation and the Honolulu Prosecuting Attorney's Office is in the process of processing and serving a penal summons against Aerial Banners.

Aerial Banners claims that the Certificate of Waiver or Authorization For Banner Tow Operations (Certificate of Waiver) issued by the U.S. Department of Transportation Federal Aviation Administration (FAA) preempts the ROH. We believe that two Federal Ninth Circuit Court cases, Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006) and Skysign International, Inc. v. City and County of Honolulu, 276 F.3d 1109 (9th Cir. 2002) do not support Aerial Banners' claim; both courts recognized the FAA's specific notation that the Certificate of Waiver did not constitute a waiver of compliance with any State law or local ordinance. Aerial Banner's claim is based on grammatical changes to the FAA's rules pertaining to the Certificates

of Waiver that were made after the Center for Bio-Ethical Reform case was decided. Those changes are not substantive, and thus the claim is spurious.

On July 31, 2003, the FAA issued a letter to the late Senator Daniel K. Inouye, a copy of which is enclosed for your information. In that letter, FAA Chief Counsel James W. Whitlow, Esq., recognized that the City, via ROH Section 40-6.1, "is attempting to address advertising, a traditional area of local regulation, rather than regulate navigable airspace," and that the FAA would not consider ROH Section 40-6.1 to be preempted.

On July 2, 2014, Mr. Ian Gregor, Public Affairs Officer, of the FAA is quoted in our local media as stating that the FAA issued a waiver to Aerial Banners to conduct banner towing operations and that under federal law, the FAA has sole jurisdiction over all civilian air space in the country. The statement attributed to Mr. Gregor contradicts the current provisions of the FAA regulations that require all holders of a Certificate of Waiver to know "state and local ordinances that may prohibit or restrict banner towing operations". FAA Order 8900.1 Federal Safety Information Management System (FSIMS), Volume 3, Chapter 3, 3-65B.2.

On July 3, 2014, I asked Mr. Gregor, as the spokesperson for the FAA, to clarify and retract his statement and to revoke the Certificate of Waiver issued to Aerial Banners in light of its blatant disregard of the ROH. A copy that letter is enclosed for your information. Concurrently with my request, which was emailed to him, a reporter for the Honolulu Star Advertiser asked for the same clarification, and rather than responding to my request, Mr. Gregor responded to the media. Upon a follow up request from the City's Corporation Counsel, Mr. Gregor stated that my letter had been referred to the FAA's legal counsel; neither the Corporation Counsel nor I have received a response to date.

We also asked the FAA, pursuant to the Freedom of Information Act, for a copy of the Certificate of Waiver as it appears Aerial Banners North Incorporated may be using its name and corporate entity to obtain a Certificate of Waiver so that Aerial Banners, Inc., whose Certificate of Waiver was revoked by the FAA in 2008 due to numerous safety and other violations of the FAA regulations (which revocation was upheld by the Federal 11th Circuit Court of Appeals in Aerial Banners, Inc. v. FAA, No. 08-10042 (11th Cir. 2008) can continue its aerial banner towing operations. To date, we have not received a response.

We have also learned that the State of Hawaii Department of Transportation (HDOT) issued a parking permit for its airplane to Aerial Banners, Inc. The HDOT did not require Aerial Banners, Inc. to provide an FAA Certificate of Waiver.

The Honorable Mazie K. Hirono
July 17, 2014
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On behalf of the City, we kindly ask for your assistance in obtaining responses from the FAA and in ending Aerial Banner's disrespect of the purposes of the ROH, which were described by the 9th Circuit Court of Appeals in the Bio-Ethical Reform case:

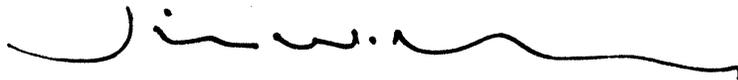
Honolulu's aerial advertising Ordinance is part of a long-standing scheme aimed at regulating outdoor advertising in order to protect the critical visual landscape that has made the area famous. The linkage between the scenic viewscapes and the economic well-being of Honolulu, including its tourist industry, is not disputed. As one witness aptly stated, "looking out to sea from Waikiki Beach without commercial or promotional interruption is as crucial to the Hawaii visitor's and resident's experience as is the uninterrupted viewing of the canyon for travelers to the Grand Canyon....[F]ew things can damage the distinctive character of a scenic view faster than a large moving sign pulled through the center of the field of vision.

Given the importance of preserving the area's coastal and scenic visual beauty, and in an effort to prevent potentially dangerous aerial distractions for its coastal vehicle traffic, Honolulu enacted the Ordinance, which, with few exceptions, prohibits aerial advertising.

Center for Bio-Ethical Reform, at 915.

Thank you for your kind attention to this matter. Please call me if you have any questions.

Sincerely,

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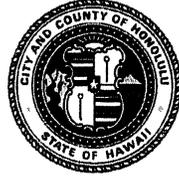
Kirk Caldwell
Mayor

Enclosures

cc: Betsy Lin, Chief of Staff
Office of Senator Mazie Hirono
Alan Yamamoto, State Director
Office of Senator Mazie Hirono
Donna Y. L. Leong, Corporation Counsel

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July 17, 2014

SENT VIA EMAIL AND FACSIMILE

The Honorable Brian E. Schatz
United States Senate
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Room 7-212
Honolulu, Hawaii 96850

Dear Senator Schatz:

We would appreciate your assistance in dealing with the blatant disrespect of the City and County of Honolulu's law prohibiting the aerial towing of banners, including signs.

Aerial Banners, Inc. and its affiliate Aerial Banners North Incorporated (Aerial Banners) is an aerial advertiser specializing in flying banners and messages behind its airplanes. Aerial Banners has recently begun banner towing operations over the City and County of Honolulu (City), which is in violation of Revised Ordinances of Hawaii (ROH) Section 40-6.1, which prohibits aerial advertising. The Honolulu Police Department has cited the pilot for the violation and the Honolulu Prosecuting Attorney's Office is in the process of processing and serving a penal summons against Aerial Banners.

Aerial Banners claims that the Certificate of Waiver or Authorization For Banner Tow Operations (Certificate of Waiver) issued by the U.S. Department of Transportation Federal Aviation Administration (FAA) preempts the ROH. We believe that two Federal Ninth Circuit Court cases, Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006) and Skysign International, Inc. v. City and County of Honolulu, 276 F.3d 1109 (9th Cir. 2002) do not support Aerial Banners' claim; both courts recognized the FAA's specific notation that the Certificate of Waiver did not constitute a waiver of compliance with any State law or local ordinance. Aerial Banner's claim is based on grammatical changes to the FAA's rules pertaining to the Certificates

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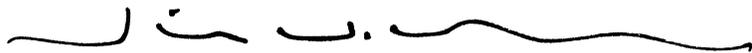
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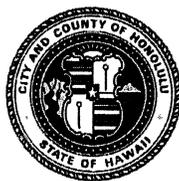
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Enclosures

cc: Andrew S. Winer, Chief of Staff
Office of Senator Brian Schatz
Donna Y. L. Leong, Corporation Counsel

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July 17, 2014

SENT VIA EMAIL AND FACSIMILE

The Honorable Colleen Hanabusa
U.S. House of Representatives
Prince Kuhio Federal Building
300 Ala Moana Boulevard, Room 4-104
Honolulu, Hawaii 96850

Dear Congresswoman Hanabusa:

We would appreciate your assistance in dealing with the blatant disrespect of the City and County of Honolulu's law prohibiting the aerial towing of banners, including signs.

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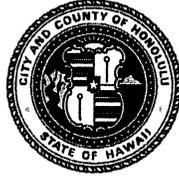
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cc: Rod Tanonaka, Chief of Staff
Office of Congresswoman Colleen Hanabusa
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The Honorable Tulsi Gabbard
July 17, 2014
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Enclosures

cc: Walt Kaneakua, Chief of Staff
Office of Congresswoman Tulsi Gabbard
Donna Y. L. Leong, Corporation Counsel



U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

JUL 31 2003

The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

Administrator Blakey has asked me to respond to your July 7 letter concerning a recent notice issued by the Federal Aviation Administration (FAA) relating to banner towing operations. You inquired whether the notice preempts a local Honolulu ordinance relating to aerial advertising.

On October 7, 2002, the FAA issued a notice concerning "Procedures for Completion of Authorizations for Banner Towing Operations" to amend the current General Aviation Operations Inspector's Handbook (FAA Order 8700.1). As you know, the Notice deleted two provisions from the Handbook. The first stated that "[t]he operator is responsible for acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations. FSDO [Flight Standards District Office] knowledge of such State and local ordinances is helpful in assisting applicants." The second indicated that the FAA's permission to tow a banner "do[es] not supersede any local, State or city ordinance(s) prohibiting aerial advertising." The notice also required that "[a]ny other variations of the language [relating to State and local ordinances] inserted by inspectors should be removed."

The FAA does not interpret these changes (contained in the "Background" section of the October 7 Notice) to preempt § 40-6.1 of the Revised Ordinances of Honolulu, "Aerial Advertising Prohibition." We realize that the City and County of Honolulu is attempting to address advertising, a traditional area of local regulation, rather than regulate the navigable airspace. One important factor is that Honolulu has enacted comprehensive land use regulations, directed to many forms of signage and advertising. For example, in addition to § 40-6.1, Honolulu regulates signage generally under § 21-7.30 and prohibits vehicular advertising under § 41-14.2. We would have a concern if a State or local government singled out aerial advertising for prohibition while permitting similar ground-based advertising since this could be interpreted as an attempt to control the navigable airspace.

Section § 40-6.1 would not be considered preempted because it would not constitute a State or local law that dictates or interferes with aircraft flight paths and operations, imposes restrictions on aircraft equipment, or impacts in any other way the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace. We also do not consider § 40-6.1 to have the purpose or the effect of regulating FAA-authorized banner towing and aerial advertising in a

manner that would directly or indirectly affect airspace management or aircraft flight and operations, or that would otherwise impede Federal policies or regulations.

However, State or local regulations purporting to govern banner towing or aerial advertising with respect to flight path, altitude, or aircraft equipment would be preempted. State or local regulations that have the effect of totally banning or unreasonably restricting banner towing would also be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized under Individual Certificates of Waiver or Authorization issued by the FAA.

Please be advised that representatives from the FAA are currently in the process of drafting revised language to clarify the "Background" section of the October 7 Notice.

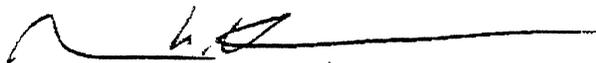
You are no doubt aware of *Skysign International, Inc. v. City and County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002), in which the court held that the application of Honolulu's ordinances (§ 40-6.1 and § 21-7.30) did not impede Federal policy or purpose in issuing Skysign's banner towing waiver authorization. At the request of the court, the United States Government filed an *amicus curiae* brief expressing the view that the Honolulu ordinances are not preempted. As the Government stated in its brief, one of the reasons why §§ 21-7.30 and 40-6.1 of the Revised Ordinances of Honolulu are not preempted is the "unique and isolated geographic setting involved [*i.e.*, "[t]he County of Honolulu comprises the City of Honolulu and all of Oahu"], where similar laws of other jurisdictions are unlikely to apply to the activity at issue." A copy of the brief is enclosed for your information.

Finally, the FAA does not regulate the content or messages displayed on banners towed by aircraft, and State and local regulations that address the content of banners therefore are not preempted so long as such regulations are not so pervasive that, as a practical matter, they impede the implementation of Federal aviation policies or regulations.

We expect to issue the revised notice shortly.

If you have any further questions, please do not hesitate to contact myself at (202) 267-3222 or Jonathan Cross of my staff at (202) 267-7173.

Sincerely,



James W. Whitlow
Deputy Chief Counsel

Enclosure

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July 3, 2014

SENT VIA EMAIL AND FACSIMILE - (310) 725-6845

Mr. Ian Gregor
United States Department of Transportation
Federal Aviation Administration
Western-Pacific Region
15000 Aviation Boulevard
Hawthorne, California 90261

Dear Mr. Gregor:

We have been informed of statements attributed to you regarding recent actions by Aerial Banners North, Inc. ("ABN"), which is conducting aerial advertising in violation of the City and County of Honolulu, Revised Ordinances of Honolulu ("ROH"), Section 40-6.1. You were quoted as stating:

"The FAA issued a waiver for the company to conduct banner towing operations. Under federal law, the FAA has sole jurisdiction over all the civilian airspace in the country" –
Ian Gregor, Federal Aviation Administration."

As you may be aware, the City was involved in two protracted litigation cases that clearly determined that the Federal Aviation Administration's ("FAA") regulations do not prohibit nor preempt the provisions of ROH Section 40-6.1, the City's Aerial Advertising prohibition. We refer you to the following cases; Skysign International, Inc. v. City and County of Honolulu, 276 F.3d 1109 (9th Cir. 2002) and Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006). In addition, as part of the Center for Bio-Ethical Reform, Inc case, your office clearly stated that FAA does not preempt the provisions of ROH Section 40-6.1; please see the attached letter dated July 31, 2003. Our review of your current guidelines for issuance of a certificate of waiver or authorization for aircraft banner tow operations indicates that such guidelines have not changed since the court decisions on this issue.

Mr. Ian Gregor
July 3, 2014
Page 2

In light of the above, the City asks that the FAA revoke the certificate of waiver issued to ABN, based upon attestations made to the City by ABN's counsel of "open and notorious" banner towing and upon the finding of the FAA that ABN has not complied with the terms of ABN's certificate issued by the FAA.

The City looks forward to your clarification of the above-quoted statement of preemption of local laws.

Aloha,

A handwritten signature in black ink, appearing to read "Kirk Caldwell", with a long horizontal flourish extending to the right.

Kirk Caldwell
Mayor

Attachment

cc: The Honorable Florence T. Nakakuni, U.S. Attorney
Louis M. Kealoha, Chief of Police
Keith M. Kaneshiro, Prosecuting Attorney
Donna Y. L. Leong, Corporation Counsel