



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

S.B. NO. 2065, S.D. 1, RELATING TO LANDOWNER LIABILITY FOR NATURAL CONDITIONS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Thursday, February 28, 2008 **TIME:** 10:00 AM

LOCATION: State Capitol, Room 016
Deliver to: Committee Clerk, Room 219, 1 Copy

TESTIFIER(S): WRITTEN TESTIMONY ONLY
(For further information, please contact Deputy Attorney General Caron Inagaki, at 586-1300)

Chair Taniguchi and Members of the Committee:

The Attorney General supports S.B. No. 2065, S.D. 1, with amendments.

The Attorney General opposed the original bill because the bill made a distinction between government and private landowners. S.D. 1 has removed that distinction and, therefore, we no longer have an objection to this bill. However, to address specific concerns that a landowner may be reluctant to undertake mitigation efforts or the removal of rocks and boulders for fear of losing the landowner's liability protection under this bill, we support the amendment suggested by Kamehameha Schools that adds an additional category to what acts may be taken by the landowner for maintenance and safety without materially altering the natural condition of the land.

The new wording would be inserted to add a third category under section 663-C, "the removal or securing of rocks or boulders undertaken to reduce the risk to downslope properties."

Thus, that section would be amended as follows:

"§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility

poles [~~7~~, ~~fences~~,] and signage; [~~or~~] (2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, rock, boulder, or tree removal[-]; or (3) the removal or securing of rocks or boulders undertaken to reduce risk to downslope properties."

We point out that "fences" has been moved from category (1) to category (2) to clarify that not necessarily all fences, but fences that are installed or maintained for the preservation or prudent management of the unimproved land would not be deemed to materially alter the natural condition of the land.

We believe that this amendment would encourage landowners to act prudently and responsibly to take efforts to reduce known risks of rockfalls to downslope properties by making clear that their actions would not be a material "improvement" that would take them out of the protections afforded under this bill.

Therefore, we request your support in passing S.B. No. 2065, S.D. 1 with amendments.

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
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AQUATIC RESOURCES
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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
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HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON
OF THE BOARD OF LAND AND NATURAL RESOURCES**

**on Senate Bill 2065, Senate Draft 1 – Relating To Landowner Liability For Natural
Conditions**

**BEFORE THE SENATE COMMITTEE ON
JUDICIARY AND LABOR**

February 28, 2008

Senate Bill 2065, Senate Draft 1 clarifies common law regarding non-liability of landowners regarding natural conditions on their land that cause damage outside the land. The Department of Land and Natural Resources (Department) supports this measure.

This is an issue that affects many private landowners that are protecting and managing public trust resources on their lands – and much of the public lands managed by the Department. The Department is responsible for managing the forest reserve the Natural Area Reserve Systems, which together comprise nearly 800,000 acres of land. The vast majority of these lands are unimproved according to the definition set forth in this measure. The Department also regulates development activities on lands in the Conservation District, comprising approximately two million acres of land, or roughly half of the lands in the State. The Department primarily tries to keep these lands in a natural state that provides the watershed, forests, native habitats and open space that support our cherished quality of life. In the last 10 years, new and productive public/private watershed partnerships have been created out of recognition of the need to manage these unimproved conservation lands at a landscape level – and maintain their conservation values. These unimproved conservation lands, both public and privately owned, continue to fulfill their purpose and serve the public interest.

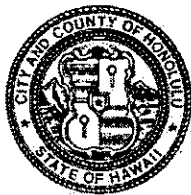
With increased population, urban and residential development continues to expand and build on any available parcel of developable land. Because of current or prior zoning decisions, many residential areas are adjacent to unimproved conservation lands. This has created a situation that may put some property owners and individuals at risk from rocks and landslides originating from these lands. A similar hazardous situation exists with the ocean, many live in close proximity to the ocean and that puts property owners and individuals at risk from storms and tsunamis. Many of our citizens have accepted these risks in exchange for the benefits of living near the mountains or by the ocean.

The current trend in the law is to hold landowners responsible for actions emanating off their land that affect their neighbor. Act 82, Session Laws of Hawaii 2003, was passed to provide the

State and Counties with protection from liability for damages caused by dangerous natural conditions in unimproved recreational areas within their lands. This bill provides limited liability to owners of unimproved lands from injuries outside the boundaries of their land caused by naturally occurring land failure originating on their unimproved land. This measure is wise public policy because it does not penalize the landowner of unimproved conservation lands for the results of acts of nature. It removes one of the major disincentives - the liability exposure for naturally occurring acts – from the private conservation landowner and encourages them to keep and maintain their conservation lands.

The Department recognizes the terrible personal tragedy that can result from natural catastrophes such as landslides, tsunamis, floods and hurricanes. Exposure to rockfall and landslide can be mitigated by restrictive zoning during the permitting process to prevent development in a potential rockfall zone and mitigated by using rockfall barrier fences, hillside settling ditches, protective netting, or selective removal of rocks. The Department believes that mitigation of these hazards should be built into the process and cost of developing property in hazardous areas, just as is done in tsunami, flood or hurricane zones and supported by appropriate insurance coverage with restrictive zoning and building limitations. Greater scrutiny needs to be applied during the permitting processes to prevent further development in hazardous areas.

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
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MUFI HANNEMANN
MAYOR

CARRIE K.S. OKINAGA
CORPORATION COUNSEL
DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

February 27, 2008

The Honorable Brian T. Taniguchi, Chair and
Members of the Committee on Judiciary and Labor
The Twenty-Fourth Legislature
State Capitol
Conference Room 016
Honolulu, Hawaii 96813

Re: S.B. 2065, S.D. 1 Relating to Landowner Liability for Natural Conditions on Land

Dear Chair Taniguchi and Committee Members:

The City and County of Honolulu supports in principal S.B. 2065, S.D.1, relating to landowner liability for natural conditions on land. However, the City offers the following comments.

When S.B. 2065 was introduced and first heard by the Senate Committee on Health, the City and County opposed the bill. The basis for the City's opposition was that a distinction was made between public and private landowners. It was the City's position that such a distinction was not warranted and that the distinction, in fact, reversed the common law.

S.B. 2065, S.D. 1 removes the distinction between public and private landowners and therefore, the City now supports this bill. While we appreciate the changes made by the S.D. 1, we note that for H.B. 2350, a companion bill, an H.D. 2 was submitted on February 25, 2008, with testimony by Kamehameha Schools. Upon review of H.B. 2350, H.D.2, we believe that the language contained in section 663-C¹ provides further clarification as to the actions that will not change the definition of "natural condition of the land" and will provide an incentive for landowners to take important remedial measures to make the land safe. For these reasons, we respectfully request that your committee consider amending S.B. 2065, S.D.1 to include the proposed language as stated above.

¹ This proposed language in H.B. 2350, H.D. 2 is as follows:

§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles and signage; (2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, rock, boulder, or tree removal; or (3) the removal or securing of rocks or boulders undertaken to reduce risk to downslope properties.

The Honorable Brian T. Taniguchi, Chair and
Members of the Committee on Judiciary and Labor
February 27, 2008
Page 2 of 2

Thank you for the opportunity to submit these comments and for your consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Carrie K.S. Okinaga".

CARRIE K.S. OKINAGA
Corporation Counsel

CKSO:mg



KAMEHAMEHA SCHOOLS

WRITTEN COMMENT TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

By

Kelly LaPorte, Outside Counsel for the Kamehameha Schools

Hearing Date: Thursday, February 28, 2008
10:00 a.m., Conference Room 016

Wednesday, February 27, 2008

TO: Senator Brian T. Taniguchi, Chair
Senator Clayton Hee, Vice Chair
Members of the Committee on Judiciary and Labor

SUBJECT: Support of S.B. No. 2065 S.D.1 – Relating to Landowner Liability for Natural Conditions.

My name is Kelly LaPorte, and I am outside counsel for the Kamehameha Schools. I am providing this testimony in support of S.B. No. 2065, S.D. 1 relating to landowner liability for natural conditions. This Bill codifies common law that protects State, County and private landowners who have not altered the natural condition of their land.

This Bill provides clarity with respect to liability from naturally occurring dangers, insulating up-slope landowners who have not altered the natural environment on their property, and is consistent with both common law and the Restatement of the Law of Torts. In two recent court cases involving a rockfall, Onishi v. Vaughan, and a massive mud and boulder slide, Makaha Valley Towers v. Board of Water Supply, after substantial litigation, the First Circuit Court in both instances acknowledged the applicability of this law when no artificial improvements have been constructed to create any additional risk. We've attached copies of the Hawaii Revised Statute section that adopts common law, the treatises that restate this law, and the order in the Onishi case.

By codifying common law, this Bill provides certainty in Hawaii law for natural conditions that exist on unaltered lands. Further, by expressly allowing minor improvements on land, it allows a reasonable use of natural land without triggering additional responsibilities. Expressly allowing minor improvements such as utility poles provides benefits to the community at large or, in the case of protective fences or warning signage, enhances safety. Importantly, the provision in this Bill that allows other, specified minor alterations of land, such as the *removal* of potentially dangerous natural conditions such as boulders or rocks, allows voluntary acts undertaken by either the landowner or owners of neighboring property without increasing the risk of liability.



KAMEHAMEHA SCHOOLS

Wednesday, February 27, 2008

Senator Brian T. Taniguchi, Chair
Senator Clayton Hee, Vice Chair
Members of the Committee on Judiciary and Labor

This is essentially a Good Samaritan provision that will encourage cooperation in voluntarily undertaking such measures intended to enhance safety. In the absence of this provision, a landowner may be reluctant to remove or alter any natural condition or allow others to come onto the land to do the same for fear of losing protection afforded by the common law.

By expressly allowing minor alterations of the land, such as allowing recreational visitors like day hikers on a hiking path, this similarly promotes the reasonable use and enjoyment of natural land, without losing the protection of this law. The Hawaii legislature has already deemed this an important public policy in its enactment of Chapter 520, which purpose is to “encourage owners of land to make land . . . available to the public for recreational purposes by limiting their liability towards person entering thereon for such purposes.” This Bill is consistent with this purpose.

In the absence of this Bill, landowners who, to date, have kept their land in a natural condition will possess a disincentive to keep the land in its unaltered state because of potential liabilities. Instead, these landowners possess an incentive to either develop the land or sell it to third parties for development. To the extent that the State, Counties, and Public Land Trusts acquire unaltered land for preservation, and conservation purposes, this Bill protects them. Passage of this Bill will promote sustainable communities by encouraging the retention of natural lands, while at the same time protecting consumers by fostering proper planning and consideration of appropriate safeguards.

After reviewing initial draft of this Bill with legislators, we received feedback that the provision to encourage voluntary acts to reduce or eliminate the threat of rockfalls should be more explicit. Consequently, we submit the attached proposed draft amendment to the bill. We also provide a table explaining the basis for each provision in the proposed draft, and its practical application. In sum, landowners – both private and government – should be insulated from liability of any damage as a result of the natural condition of the land as recognized by common law, and should be encouraged to allow limited, reasonable use of their natural lands without losing this protection. Kamehameha Schools respectfully requests that you pass this important Bill, as amended.

§ 1-1

GENERAL PROVISIONS

§ 1-1

§ 1-1. Common law of the State; exceptions.

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State. [L 1892, c 57, § 5; am L 1903, c 32, § 2; RL 1925, § 1; RL 1935, § 1; RL 1945, § 1; RL 1955, § 1-1; HRS § 1-1]

PROSSER AND KEETON
ON
THE LAW OF TORTS

Fifth Edition

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1984

be the misrepresentation as to the character of the property.³⁹

Natural Conditions

The one important limitation upon the responsibility of the possessor of land to those outside of his premises has been the traditional rule, of both the English and the American courts, that he is under no affirmative duty to remedy conditions of purely natural origin upon his land, although they may be highly dangerous or inconvenient to his neighbors.⁴⁰ The origin of this, in both countries, lay in an early day when much land, in fact most, was unsettled or uncultivated, and the burden of inspecting it and putting it in safe condition would have been not only unduly onerous, but out of all proportion to any harm likely to result. Thus it has been held that the landowner is not lia-

ble for the existence of a foul swamp,⁴¹ for falling rocks,⁴² for uncut weeds obstructing the view of motorists at an intersection,⁴³ for thistles growing on his land,⁴⁴ for harm done by indigenous animals,⁴⁵ or for the normal, natural flow of surface water.⁴⁶ Closely allied to this is the generally accepted holding that an abutting owner is under no duty to remove ice and snow which has fallen upon his own land or upon the highway.⁴⁷

On the other hand, if the occupier has himself altered the condition of the premises, as by erecting a structure which discharges water upon the sidewalk,⁴⁸ setting up a parking lot upon which water will collect,⁴⁹ weakening rocks by the construction of a highway,⁵⁰ damming a stream so that it forms a malarial pond,⁵¹ planting a row of trees next to the highway,⁵² digging out part of a hill,⁵³ or piling sand or plowing a field so that the

39. See *infra*, § 61.

40. Second Restatement of Torts, § 363. See Noel, *Nuisances from Land in its Natural Condition*, 1943, 56 *Harv.L.Rev.* 772; Goodhart, *Liability for Things Naturally on the Land*, 1930, 4 *Camb.L.J.* 13.

41. *Roberts v. Harrison*, 1897, 101 *Ga.* 773, 28 *S.E.* 995.

42. *Pontardawe R. D. C. v. Moore-Gwynn*, [1929] 1 *Ch.* 656. But see *Sprecher v. Adamson Companies*, 1981, 30 *Cal.3d* 358, 178 *Cal.Rptr.* 783, 636 *P.2d* 1121 (duty of due care to prevent landslide).

43. See *supra*, note 25.

44. *Giles v. Walker*, 1890, 24 *Q.B.D.* 656 (thistles); cf. *Salmon v. Delaware, L. & W. R. Co.*, 1875, 38 *N.J.L.* 5 (leaves); *Langer v. Goode*, 1911, 21 *N.D.* 462, 131 *N.W.* 258 (wild mustard).

45. *Brady v. Warren*, [1909] 2 *Ir.Rep.* 632; *Stearn v. Prentice Bros.*, [1919] 1 *K.B.* 394; *Seaboard Air Line Railroad Co. v. Richmond-Petersburg Turnpike Authority*, 1961, 202 *Va.* 1029, 121 *S.E.2d* 499 (pigeons); *Merriam v. McConnell*, 1961, 31 *Ill.App.2d* 241, 175 *N.E.2d* 293 (box elder bugs). Nor, perhaps, for horses kept by a tenant. *Blake v. Dunn Farms, Inc.*, 1980, ___ *Ind.* ___ 413 *N.E.2d* 560. Contra, perhaps, for horses kept by an employee. See *Misterek v. Washington Mineral Products, Inc.*, 1975, 85 *Wn.2d* 166, 531 *P.2d* 805. Cf. *Weber v. Madison*, *Iowa* 1977, 251 *N.W.2d* 523 (geese); *King v. Blue Mountain Forest Association*, 1956, 100 *N.H.* 212, 123 *A.2d* 151 (wild Prussian boar, fourth or fifth generation from original imports).

46. See *Keys v. Romley*, 1966, 64 *Cal.2d* 396, 50 *Cal.Rptr.* 273, 412 *P.2d* 529; *Mohr v. Gault*, 1860, 10 *Wis.* 513; *Livezey v. Schmidt*, 1895, 96 *Ky.* 441, 29 *S.W.* 25.

47. *Rockafellow v. Rockwell City*, *Iowa* 1974, 217 *N.W.2d* 246; *Bailey v. Blacker*, 1929, 267 *Mass.* 73, 165

N.E. 699; *Moore v. Gadsden*, 1881, 87 *N.Y.* 84. Ordinances requiring the property owner to remove snow and ice usually are construed to impose no duty to any private individual. See *supra*, § 38.

48. See *Leahan v. Cochran*, 1901, 178 *Mass.* 566, 60 *N.E.* 382; *Tremblay v. Harmony Mills*, 1902, 171 *N.Y.* 598, 64 *N.E.* 501; *Updegraff v. City of Ottumwa*, 1929, 210 *Iowa* 382, 226 *N.W.* 928. Note, 1937, 21 *Minn.L.Rev.* 703, 713; cf. *Harris v. Thompson*, *Ky.* 1973, 497 *S.W.2d* 422 (broken water pipe caused ice on road). But see *North Little Rock Transportation Co. v. Finkbeiner*, 1967, 243 *Ark.* 596, 420 *S.W.2d* 874 (Finky not liable for water in street from sprinkler system).

49. *Moore v. Standard Paint & Glass Co. of Pueblo*, 1960, 145 *Colo.* 151, 358 *P.2d* 33. But see *Williams v. United States*, *E.D.Pa.* 1981, 507 *F.Supp.* 121 (no liability, under "hills and ridges" doctrine, for slippery sheet of ice with no ridges or elevations in parking lot).

50. *McCarthy v. Ference*, 1948, 358 *Pa.* 485, 58 *A.2d* 49.

51. *Mills v. Hall*, *N.Y.* 1832, 9 *Wend.* 315; *Towaliga Falls Power Co. v. Sims*, 1909, 6 *Ga.App.* 749, 65 *S.E.* 844. Cf. *Andrews v. Andrews*, 1955, 242 *N.C.* 382, 88 *S.E.2d* 88 (artificial pond collecting wild geese, which destroyed plaintiff's crops).

52. *Coates v. Chinn*, 1958, 51 *Cal.2d* 304, 332 *P.2d* 289 (cultivated trees). Accord, *Wisher v. Fowler*, 1970, 7 *Cal.App.3d* 225, 86 *Cal.Rptr.* 582 (maintaining hedge). Cf. *Crowhurst v. Amersham Burial Board*, 1878, 4 *Exch.Div.* 5, 48 *L.J.Ex.* 109 (planting poisonous trees near boundary line). But there may be no liability for merely failing to cut weeds. See *supra*, note 25.

53. *Fabbri v. Regis Forcier, Inc.*, 1975, 114 *R.I.* 207, 330 *A.2d* 807.

RESTATEMENT OF THE LAW
Second

TORTS 2d

Volume 2
§§ 281-503

As Adopted and Promulgated

BY

THE AMERICAN LAW INSTITUTE

AT WASHINGTON, D. C.

May 25, 1963

and

May 22, 1964

ST. PAUL, MINN.

AMERICAN LAW INSTITUTE PUBLISHERS

1965

§ 363. Natural Conditions

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rule stated in Subsection (2) may not apply to the possessor of land in a rural area.

Comment:

a. The rule stated in Subsection (1) applies although the possessor, vendor, or lessor recognizes or should recognize that the natural condition involves a risk of physical harm to persons outside the land. Except under the circumstances in Subsection (2) of this Section, this is true although there is a strong probability that the natural condition will cause serious harm and the labor or expense necessary to make the condition reasonably safe is slight.

b. *Meaning of "natural condition of land."* "Natural condition of the land" is used to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor. It is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them. On the other hand, a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved, and changes in the surface by excavation or filling, irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces.

c. *Privilege of public authorities to remove danger.* The fact that a possessor of land is not subject to liability for natural

131 CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

PATRICK T. ONISHI, individually and as
Personal Representative of the Estate of Dora
Kei Onishi; GAIL A. ONISHI; BLAINE N.
ONISHI; and DRADREN T. ONISHI,

Plaintiffs,

vs.

VANCE N. VAUGHAN, INDIVIDUALLY,
AND AS SUCCESSOR TRUSTEE OF THE
VANCE VAUGHAN REVOCABLE TRUST;
HIROKO VAUGHAN, INDIVIDUALLY,
AND AS SUCCESSOR TRUSTEE OF THE
HIROKO VAUGHAN REVOCABLE
TRUST; KERRIE N. VAUGHAN; HAWAII
CASTLE CORPORATION, a California
corporation; CITY AND COUNTY OF
HONOLULU; JOHN DOES 1-10; JANE
DOES 1-10; and DOE ENTITIES
1-10,

Defendants.

Civil No. 03-1-0660-03 KSSA (S-17)
(Other Non-Vehicle Tort)
ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
VANCE N. VAUGHAN, SUCCESSOR
TRUSTEE OF THE VANCE VAUGHAN
REVOCABLE TRUST'S CROSS MOTION
FOR SUMMARY JUDGMENT FILED
ON JULY 26, 2005, AND VANCE N.
VAUGHAN AND KERRY N.
VAUGHAN'S SUBSTANTIVE JOINDER
FILED ON JULY 24, 2005

HEARING:

DATE: August 8, 2005
TIME: 10:00 a.m.
JUDGE: HONORABLE KAREN S.S. AIN
TRIAL DATE: July 31, 2006

DENYING IN PART DEFENDANT
TRUSTEE OF THE VANCE VAUGHAN
TRUST FOR SUMMARY JUDGMENT
OF VANCE N. VAUGHAN AND KERRY N.
VAUGHAN ON JULY 28, 2005

Vaughan, Successor Trustee of the Vance
Vaughan Trust, Plaintiff,
vs.
Vance N. Vaughan, Successor
Trustee of the Vance Vaughan
Revocable Trust, Defendant City and
County of Honolulu, Defendant
Kerrie N. Vaughan, Defendant
Hawaii Castle Corporation, Defendant
City and County of Honolulu,
John Does 1-10, Jane Does 1-10,
and Doe Entities 1-10, Defendants.

For Summary Judgment. Vance N.

filed a Substantive Joinder to the Cross

Motion. Said motion came on for hearing

on August 8, 2005 at 10:00 a.m. At that hearing,

Patrick T. Onishi, Esq., and Ann C. Kemp, Esq.,

Michael J. McGuigan, Esq., Defendant

City and County of Honolulu, and

Dradren T. Onishi, Esq., Defendants Vance N.

Vaughan, Esq., Defendants Vance N.

Vaughan and Kerry N. Vaughan, Esq.,

Trustee of the Vance Vaughan Revocable

Trust, Plaintiff, and the Court reviewed all memoranda

submitted by the parties and their counsel and took the motion under

advice. The Court reviewed all memoranda

submitted by Vance N. Vaughan's, Successor

Trustee of the Vance Vaughan Revocable

Trust, Plaintiff, and the Court reviewed all memoranda

submitted by the parties and their counsel and took the motion under

advice. The Court reviewed all memoranda

submitted by Vance N. Vaughan's, Successor

Trustee of the Vance Vaughan Revocable

Trust, Plaintiff, and the Court reviewed all memoranda

submitted by the parties and their counsel and took the motion under

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submitted by Vance N. Vaughan's, Successor

Trustee of the Vance Vaughan Revocable

Trust, Plaintiff, and the Court reviewed all memoranda

submitted by the parties and their counsel and took the motion under

to the existence or
of which

TITLED COURT

03-1-0660-03
Denying In Part
The Revocable
Trust of Vance N.
August 8, 2005

Under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts: 1) A real property owner owes no duty with respect to natural conditions on his property;

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT VANCE N. VAUGHAN, SUCCESSOR TRUSTEE OF THE VANCE VAUGHAN REVOCABLE TRUST'S CROSS MOTION FOR SUMMARY JUDGMENT FILED ON JULY 20, 2005, AND VANCE N. VAUGHAN AND KERRY N. VAUGHAN'S SUBSTANTIVE JOINDER FILED ON JULY 28, 2005

On July 20, 2005 Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust filed a Cross Motion For Summary Judgment. Vance N. Vaughan, Individually, and Kerry N. Vaughan filed a Substantive Joinder to the Cross Motion for Summary Judgment on July 28, 2005. Said motion came on for hearing before the Honorable Karen S.S. Ahn on August 8, 2005 at 10:00 a.m. At that hearing, Plaintiffs were represented by Wesley W. Ichida, Esq., and Ann C. Kerpp, Esq., Defendant Hiroko Vaughan was represented by Michael J. McGuiggan, Esq., Defendant Hawaii Castle Corporation was represented by Brad S. Petrus, Esq., Defendant City and County of Honolulu was represented by Derek Mayseshiro, Esq., Defendants Vance N. Vaughan, Individually, and Kerry Vaughan were represented by Steve K. Hisaka, Esq., and Defendant Vance N. Vaughan, Successor Trustee of the Vance Vaughan Revocable Trust, was represented by Amanda J. Weston, Esq. The Court reviewed all memoranda and affidavits submitted, heard the arguments of counsel and took the motion under advisement. Being fully advised in the matter,

IT IS HEREBY ORDERED that Defendant Vance N. Vaughan's, Successor Trustee of the Vance Vaughan Revocable Trust, Cross Motion For Summary Judgment filed on July 20, 2005, and Substantive Joinder is granted in part and denied in part as follows. The Court holds that under the common law as adopted in the State of Hawaii and as reflected in the Restatement 2d, Torts:

- 1) A real property owner owes no duty with respect to natural conditions on his property;

2) However, a real property owner owes a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.

2) However, a real property owner does owe a duty to exercise reasonable care with respect to non-natural or artificial conditions on his property.


The Court finds that a genuine issue of material fact exists as to the existence or nonexistence of an artificial condition which proximately caused the injuries of which Plaintiffs complain.


DATED: Honolulu, Hawaii, DEC 23 2005




JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:


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Report Title:

Unimproved Land; Liability

Description:

Codifies common law regarding non-liability of landowners regarding natural conditions on their land that cause damage outside the land.

A BILL FOR AN ACT

RELATING TO LANDOWNER LIABILITY FOR NATURAL CONDITIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that it is in the best interest of the public to provide certainty in the law with respect to the legal duties and obligations of landowners arising from the inherent risks of land failures caused by natural conditions to persons and property outside the boundaries of such land when these risks have not been created or increased by artificial improvements or alterations to the land.

The purpose of this Act is to codify the common law that currently exists in Hawaii with respect to the legal duties and obligations pertaining to damages and injuries caused by natural conditions to property and persons outside the land.

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

"PART . UNIMPROVED LAND LIABILITY

§663-A Definitions. As used in this part:

"Naturally occurring land failure" means any movement of land, including a landslide, debris flow, mudslide, creep, subsidence, rock fall, and any other gradual or rapid movement of land, that is not caused by alterations to, or improvements constructed upon, the land.

"Unimproved land" means any land upon which there is no improvement, construction of any structure, building, facility, or alteration of the land by grading, dredging, or mining that would cause a permanent change in the land area on which it occurs and that would change the basic natural condition that exists on the land.

§663-B Land failure on unimproved land caused by natural condition; liability. A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.

§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles and signage; (2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, rock, boulder, or tree removal; or (3) the removal

or securing of rocks or boulders undertaken to reduce risk to downslope properties."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 6. This Act shall take effect upon its approval.

INTRODUCED BY: _____

S.B. No. 2065-SD2

Relating to landowner liability for natural conditions.

Benefits of statute

Provides certainty in the law regarding obligations for natural conditions that exist on unaltered land:

- Expressly allows minor improvements on land such as erecting utility pole and signs without triggering additional obligations.
- Expressly provides exception for specific, minor alterations of land taken for preservation or prudent management of land.
- Avoids unnecessary litigation with respect to passive landowners who do not alter natural state of land.
- Protects consumers by fostering proper planning and consideration of safeguards in risk-creating activities outside the land.

Encourages sustainability of communities:

- Encourages retention of natural land within developed areas.
 - In the absence of statute, owners of natural land possess:
 - disincentive to retain land in natural state because of potential liabilities from naturally occurring land failures; and
 - incentive to either develop natural land or sell natural land to third parties for development.
- Allows modest recreational activities (walking, hiking) on natural land without creating additional obligations of landowner.

Encourages voluntary measures to reduce risks of naturally occurring land failures without triggering additional obligations.

Encourages prudent land management practices such as plantings and weed, brush, and tree removal without triggering liability.

Language	Basis for Provision	Practical Application
<p>§663-B Land failure on unimproved land caused by natural condition; liability.</p> <p>A landowner shall not be liable for any damage, injury, or harm to persons or property outside the boundaries of such land caused by any naturally occurring land failure originating on unimproved land.</p>	<p>This <i>codifies</i> common law, which is adopted in Hawaii under HRS § 1-1, and is consistent with the Restatement (Second) of Torts § 363 as to “natural conditions,” and expressly applies it to landowners.</p>	<p>Under this common law rule, if the landowner does not create any condition that creates a risk of harm to others outside the land caused by a naturally occurring land failure, the landowner has no affirmative duty to remedy conditions on the property of purely natural origin.</p> <p>The First Circuit Court recognized and applied this common law rule in 2005 in the <u>Onishi</u> lawsuit. This rule did not alter the outcome in that case, however, because the court held that the factual issue of whether artificial conditions (i.e., non-natural conditions created by upslope City roadway, drainage culvert, or privately owned driveway that diverted water) caused the rockfall would have to be determined by a jury. Given these substantial alterations of the land in <u>Onishi</u>, the proposed statute would not have provided immunity to landowners because the land was improved (not “unimproved”).</p> <p>This provision does <i>not</i> alter any obligations that a landowner may have to persons <i>on</i> that landowner’s property, such as the State’s duty to warn visitors to the Sacred Falls State Park that the First Circuit Court held was violated following the 1999 rockfall that killed and injured visitors to the public park.</p>

<p>§663-C Natural condition. For purposes of this part, the natural condition of land exists notwithstanding (1) minor improvements, such as the installation or maintenance of utility poles and signage;</p>	<p>This provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor improvements</i> placed on unimproved land that are not likely to increase the risk of naturally occurring land failures will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner of unimproved land may erect signage on the land that warns visitors of dangers that may exist <i>on</i> the land, or may provide easements to allow electrical or telephone companies to place utility poles that provide service to the public, without fear that doing so would trigger additional obligations to remediate any conditions unrelated to such improvements. In the absence of allowing for such minor improvements to be placed on natural land, landowners may refuse to install minor improvements that are intended to safeguard against dangers within the land. Further, this may restrict the availability of land needed by utilities to provide service to the public.</p>
<p>(2) minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of fences, trails, or pathways or maintenance activities, such as forest plantings and weed, brush, boulder, or tree removal; or</p>	<p>This similarly provides <i>clarity</i> and <i>certainty</i> in the application of the law by expressly providing that <i>minor alterations</i> undertaken on unimproved land for preservation or maintenance purposes will not trigger an affirmative duty upon landowners to remedy conditions on the property of purely natural origin.</p>	<p>An owner may make <i>minor</i> alterations to natural land, such as unpaved trails or paths or installing fences to protect a watershed area, that are used for management of the land, or allow visitors to traverse the land for recreational purposes such as hiking with minimal disturbance to the natural conditions, without losing protection of this law. This promotes the reasonable use of the land that is unlikely to create additional danger of land failures, and allows the visitation of natural land without creating additional liabilities.</p>

(3) the removal or securing of rocks or boulders undertaken to reduce risk to downslope properties.

An owner of unimproved land may also volunteer to remove rocks or boulders that may pose a danger to others outside the land without triggering a duty to remedy all *other* conditions of purely natural origin, or allow downslope residents to do the same without creating additional duties owed to downslope residents. Essentially, this encourages Good Samaritan acts without increasing liability. In the absence of this provision, a landowner may be reluctant to undertake *any* minor alterations that are intended to reduce risk because of a fear of losing immunity under the common law rule.



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February 28, 2008

The Honorable Brian Taniguchi, Chair and Members
 Committee on Judiciary and Labor
 Hawaii State Senate
 Hawaii State Capitol, Room 016
 Honolulu, HI 96813

VIA E-MAIL

Dear Chair Taniguchi and Members:

Subject: SB No. 2065, SD1 Relating to Landowner Liability for Natural Conditions

My name is David Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable and rational land use planning, legislation and regulation.

We appreciate the opportunity to provide our testimony **in support of S.B. No. 2065, SD1, and offer comments.**

S.B. No. 2065, SD1 proposes to amend Chapter 663 HRS by adding a new part which provides that public and private landowners of unimproved land shall not be liable for any damage, injury, or harm to persons or properties outside the boundaries of their land, caused by any naturally occurring land failure originating on the unimproved land. Unimproved land is defined as "any land upon which there is no improvement, construction of any structure, building, facility, or alteration of the land by grading, dredging, or mining that would change the basic natural condition that exists on the land."

This bill would also allow the landowners the limited reasonable use of their natural lands, without losing this protection. The bill defines "natural condition of land," as including the following: minor improvements such as the installation of maintenance or utility poles, fences and signage; or minor alterations undertaken for the preservation or prudent management of the unimproved land, such as the installation or maintenance of trails or pathways, or maintenance activities, such as forest plantings and weed, brush, rock, boulder or tree removal.

LURF supports S.B. 2065, which is intended to provide a level of protection to landowners from "acts of god" events. It would provide some legal certainty with respect

to the legal duties and obligations of landowners arising from the inherent risks of land failures caused by natural conditions on unimproved lands, where the landowner has not created or increased the risk of harm by artificial improvements or alterations to the land.

Thank you for the opportunity to express our views on this matter.