



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2170, S.D. 1, RELATING TO PUBLIC LAND.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 25, 2008 **TIME:** 4:05 PM

LOCATION: State Capitol, Room 325

Deliver to: State Capitol, Room 302, 5 Copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Caron M. Inagaki, Deputy Attorney General

Chair Waters and Members of the Committee:

The Attorney General supports this bill. The purpose of this bill is to clarify Act 82, Session Laws of Hawaii 2003, which excludes any public beach park falling within Act 190, Session Laws of Hawaii 1996, from its purview.

Act 82 established a process by which a legally adequate warning system for improved public lands could be developed that warned of dangerous natural conditions and provided the State and counties with protection for potentially unlimited liability arising out of recreational activities on public lands. Act 190 established a similar warning system and provided immunity from dangerous natural conditions in the ocean adjacent to State or county beach parks.

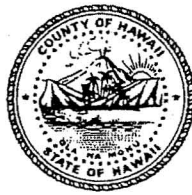
Act 82 currently defines "improved public lands" to exclude "any public beach park falling within Act 190, Session Laws of Hawaii 1996, as amended by Act 101, Session Laws of Hawaii 1999." Act 190 relates only to dangerous natural conditions in the ocean adjacent to public beach parks. Thus, the current language of Act 82 is confusing because it lends itself to different interpretations with regard to land-based natural hazards, such as falling rocks, on public beach parks. On the one hand, the exclusion could mean that since Act 190 only relates to hazards in the ocean, a land-based hazard would still be covered by Act 82 since it does not technically "fall within" Act 190. On the other

hand, the same language could be interpreted to mean that any land-based natural hazards such as falling rocks that occur on public beach parks would not be covered by either Act 190 or Act 82. This interpretation clearly would be contrary to the intent and purposes of Acts 82 and 190.

The process established by Acts 82 and 190 has allowed the State and counties to refine their signage and improve the quality of its warning signs for hazards both in the ocean and on designated public lands within the State and county park systems, benefiting public users and at the same time providing the State and counties with conditional protection from liability for the inherent risks that exist on public lands and in the ocean. There is no reason why a land-based natural hazard should be excluded simply because it occurs on a public beach park.

This bill would eliminate any confusion as to the interpretation of Act 82 and clarify the intent of Act 82 to cover all land-based natural conditions and Act 190 to cover natural conditions in the ocean. Therefore, we request your support in passing S.B. No. 2170, S.D. 1.

Harry Kim
Mayor



Dixie Kaetsu
Managing Director

Barbara J.
Kossow
Deputy Managing
Director

County of Hawaii

25 Aupuni Street, Room 215 • Hilo, Hawaii 96720-4252 • (808) 961-8211 • Fax (808) 961-6553
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March 24, 2008

Representative Tommy Waters
Chair, Judiciary Committee
415 South Beretania Street
Honolulu, HI 96813

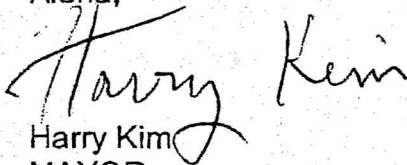
Dear Chair Waters and Committee Members:

Re: SB 2170, SD1

SB 2170, SD1 is an important measure to protect both the state and the counties from liability on improved public lands. I believe that prior legislation was intended to deal with this issue when the Legislature passed Act 190 in 1996 and Act 82 in 2003; apparently there is still ambiguity that we are hoping can be addressed.

I urge you to act favorably on SB 2170, SD1, changing the effective date to "upon approval."

Aloha,


Harry Kim
MAYOR

000076

To: Representative Tommy Waters, Chair
Representative Blake Oshiro, Vice Chair
COMMITTEE ON JUDICIARY

Hearing on March 25, 2008 at 4:05 p.m.

From: Ralph C. Boyea
Legislative Advocate, Hawai'i County Council

Subject: **Testimony in favor of SB2170, SD1 – RELATING TO PUBLIC LAND**

Chairperson Waters, Vice Chair Oshiro and Honorable Representatives,

On behalf of the Hawai'i County Council, I urge you to pass Senate Bill 2170, SD1. Senate Bill 2170, SD1 limits State and county liability for injuries caused by dangerous natural conditions on or near public beach parks.

The Hawai'i County Council and the Hawai'i State Association of Counties are supportive of this measure. We request that the effective date of SB 2170, SD1 be changed from July 1, 2050 to July 1, 2008.

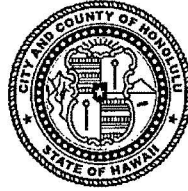
We humbly ask for your support by passing SB 2170.

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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

March 24, 2008

The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair
Committee on Judiciary
House of Representatives
Twenty-Fourth Legislature
State of Hawaii
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Waters, Vice Chair Oshiro and Committee Members:

Re: Senate Bill 2170, S.D. 1 Relating to Public Land

The City and County of Honolulu ("City") strongly supports S.B. 2170, S.D. 1 which seeks to amend Act 82, Session Laws of Hawaii 2003. The City requests that S.B. 2170, S.D. 1 be amended to state that the provisions of S.B. 2170, S.D.1 shall take effect upon approval, rather than on July 1, 2050.

The purpose of Act 82 was to establish a risk management procedure for the design and placement of signs that warn of dangerous natural conditions on improved public lands to protect the State and counties from liability for injuries resulting from those dangerous conditions. Act 82 defines "improved public lands":

...lands designated as part of the state park system, parks, and parkways under chapter 184, or as part of a county's park system, and lands which are part of the Hawaii statewide trail and access system under chapter 198D, excluding buildings and structures constructed upon such lands. *For purposes of this part, "improved public lands" excludes ocean and submerged lands, and further excludes any public beach park falling within Act 190, Session Laws of Hawaii 1996, as amended by Act 101, Session Laws of Hawaii 1999.*

000078

The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair
March 24, 2008
Page 2

Act 190, Session Laws 1996, provides immunity from liability arising from dangerous conditions in the oceans, *specifically of dangerous shorebreak or strong current in the ocean:*

...the purpose of this Act is to establish a process in which the State and counties can provide both meaningful and legally adequate warnings to the public regarding extremely dangerous natural conditions *in the ocean adjacent to public beach parks*. The legislature believes that this Act will provide a process by which a legally adequate warning system can be developed at public beach parks which will increase public safety, *reduce ocean-related accidents*, and *protect the State and counties from the unlimited liability they face with regards to activities in the ocean and at public beaches*.

Section 1, Act 190 (1996).

In testimony on S.B. No. 2170, the Consumer Lawyers of Hawaii say: "*The exclusion of public beach parks from Act 82 was a deliberate consideration of the extraordinary immunity provisions already granted to public beach parks earlier in Act 190.*" However, we believe that the exclusion of public beach parks was an inadvertent error because there are land-based hazards located within or abutting many of the public beach parks, including abutting mountain cliffs which create a potential for falling boulders. The legislative history of Act 82 confirms that the Legislature never intended to exclude dangerous natural conditions not arising in the oceans found on public beach parks. The Legislature's intent in enacting Act 82, Session Laws of Hawaii 2003, was:

...with regard to improved public lands, this measure creates a conclusive presumption that the government's **duty to warn the public of dangerous conditions on improved public lands is met if warning signs are posted.**

2003 Hse. Journal, at 1253, Stand. Comm. Rpt. 308 (emphasis added).

Your committee finds that many of Hawaii's improved and unimproved public lands pose risk of injury to users from dangerous natural conditions. Without some protection from State liability for injuries occurring on public lands, many recreational areas would have to be closed.

000079

The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair
March 24, 2008
Page 3

Your Committee further finds that many other states have established complete immunity for liability resulting from public recreational use on state lands. *This measure strikes an equitable balance between the personal responsibility of people engaged in recreational pursuits and the duty of government to take reasonable measures to protect the public from harm by providing adequate warning.*

2003 Sen. Journal, at 1548-1549, Stand. Com. Rep. 1231 (emphasis added).

The committee reports of the Senate Committee on Intergovernmental and Military Affairs and Committee on Judiciary and Labor hearing Senate Bill 2170 further endorse the Senate's understanding that dangerous natural conditions exists in public beach parks and that there is **no rational distinction between public beach parks and public parks:**

Your Committee finds that dangerous natural conditions exist in public beach parks as well as on inland parks. Some beach parks abut mountain cliffs that pose a potential for falling boulders. The intent of this measure is to extend to public beach parks the same protections with regard to dangerous natural conditions as apply to other improved public lands of the state park system and county park system. **Your Committee believes that there is no rational distinction between public beach parks and public parks insofar as responsibility for dangerous natural conditions is concerned.**

Stand. Com. Rep. No. 2338, S.B. No. 2170, Sen. Comm. on Intergovernmental and Military Affairs (emphasis added).

Your Committee finds that Act 82, Session Laws of Hawaii 2003, provided the State and the counties with the means to limit their liability for injuries that may be caused by dangerous natural conditions found on public lands.

Stand. Com. Rep. No. 2871, S.B. No. 2170, S.D.1, Sen. Comm. on Judiciary and Labor.

For these reasons, the City requests your support in passing Senate Bill 2170, S.D. 1, to be effective upon approval. The passage of Senate Bill 2170, S.D.1 will correct any ambiguities in the law and will ensure that the intent and

000080

The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair
March 24, 2008
Page 4

scope of Act 82 to address dangerous natural conditions in all State and county public beach parks is accomplished.

Thank you for the opportunity to provide our comments on this bill.

Very truly yours,



CARRIE K. S. OKINAGA
Corporation Counsel

CKSO:ey

SB2170 SD1

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Council Chair
G. Riki Hokama

Vice-Chair
Danny A. Mateo

Council Members
Michelle Anderson
Gladys C. Baisa
Jo Anne Johnson
Bill Kauakea Medeiros
Michael J. Molina
Joseph Pontanilla
Michael P. Victorino



Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
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March 24, 2008

TO: Honorable Tommy Waters, Chair
House Committee on Judiciary

FROM: Joseph Pontanilla, Treasurer *Joseph Pontanilla*
Hawaii State Association of Counties

SUBJECT: **HEARING OF MARCH 25, 2008; TESTIMONY IN SUPPORT OF SB 2170, SD1,
RELATING TO PUBLIC LAND**

Thank you for the opportunity to testify in support of this important measure. The purpose of this measure is to provide counties protection from liability as a result of natural conditions on or near public beach parks.

This measure is in the Hawaii State Association of Counties' (HSAC) Legislative Package; therefore, I offer this testimony as HSAC's Treasurer.

HSAC supports this measure for the following reasons:

1. The bill amends Act 82, Session Laws of Hawaii 2003, to remove the exclusion of public beach parks in the definition of improved public lands.
2. Public beach parks are an important part of the public park system and should not be singled out from other types of parks and trails within the State.
3. Deletion of the exclusion would provide the counties with additional immunity in its operation of county parks.

For the foregoing reasons, HSAC supports this measure.

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BRYAN J. BAPTISTE
Mayor



MATTHEW S. K. PYUN, JR.
County Attorney

OFFICE OF THE COUNTY ATTORNEY

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Deputies
Harrison K. Kawate, First Deputy
Rosa Flores
Margaret H. Sueoka
James K. Tagupa

March 24, 2008

TESTIMONY FROM THE OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUA'I TO THE HOUSE COMMITTEE ON JUDICIARY

HEARING ON SENATE BILL NO. 2170, SD 1

Date: Tuesday, March 25, 2008
Time: 4:05 p.m.
Place: Conference Room 325
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

House Committee on Judiciary
Honorable Tommy Waters, Chair
Honorable Blake K. Oshiro, Vice Chair
Committee members

Re: Testimony of the Office of the County Attorney,
County of Kaua'i, on Senate Bill No. 2170, SD 1
Relating to Public Land

My name is Harrison K. Kawate, First Deputy County Attorney, County of Kaua'i, testifying on behalf of the County of Kaua'i.

The County of Kaua'i strongly supports the intent of Senate Bill No. 2170, SD 1.

000083

Honorable Tommy Waters, Chair
Honorable Blake K. Oshiro, Vice Chair
Page 2 of 3
March 24, 2008

This office has previously submitted testimony and testified in favor of this bill at hearings before the Senate Committee on Intergovernmental and Military Affairs, Senate Committee on Judiciary, House Committee on Water, Land and Ocean Resources and Hawaiian Affairs.

The language in question in Act 82 is contained in the definition of "improved public lands" and states:

"Improved public lands" means lands designated as part of the state park system, parks, and parkways under chapter 184, or as part of a county's park system, and lands which are part of the Hawaii statewide trail and access system under chapter 198D, excluding buildings and structures constructed upon such lands. For purposes of this part, "improved public lands" excludes ocean and submerged lands, and further excludes any public beach park falling within Act 190, Session Laws of Hawaii 1996, as amended by Act 101, Session Laws of Hawaii 1999.

As discussed in our previous testimonies, the purpose of SB 2170 is to clarify any possible ambiguity included in the definition portion of Act 82 relating to "Improved public lands" by deleting the last phrase of the definition: ", and further excludes any public beach park falling within Act 190, Session Laws of Hawaii 1996, as amended by Act 101, Session Laws of Hawaii 1999."

The deletion of this last phrase will clear up any ambiguity between Acts 82 and 190 as they relate to public land liability for the counties.

There is no explanation as to why the definition of "improved public lands" in Act 82 contains an exclusion for public beach parks, even though Act 82 clearly and unambiguously was passed to give both State and counties protection on improved public lands as set out in the enacting language of Act 82:

The legislature finds that it is in the best interests of the public to provide the State and counties with a conditional protection from liability arising from the inherent risks on public lands under their jurisdiction, that strikes an equitable balance between the personal responsibility of individuals engaged in recreational pursuits on public lands, and government's duty to protect its citizens from harm. The legislature further finds that allowing the State and counties to manage their risks on public lands . . .

000084

Honorable Tommy Waters, Chair
Honorable Blake K. Oshiro, Vice Chair
Page 3 of 3
March 24, 2008

The purpose of this Act is to establish a process in which the State and counties are provided protection from liability on improved public lands when the requirements of this Act are met. (Emphasis added.)

It is submitted that it was the intent of the drafters of Act 190 to provide protection for both State and counties with regard to dangerous natural conditions in the ocean and it was the intent of the drafters of Act 82 to provide protection for both State and counties with regard to dangerous natural conditions on land.

SB 2170 seeks to remove any ambiguity that exists between the enacting language contained in Act 82, which seeks to provide State and counties protection from liability on improved public lands and the definition of "improved public lands" which excludes public beach parks.

If there are any questions with regard to the foregoing, I will be present to respond at the hearing of this bill.

Sincerely,



HARRISON K. KAWATE
First Deputy County Attorney

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**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE CONSUMER
LAWYERS OF HAWAII (CLH) IN OPPOSITION TO S.B. NO. 2170, SD 1 RELATING
TO PUBLIC LAND**

March 25, 2008

To: Chairman Tommy Waters and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Consumer Lawyers of Hawaii (CLH) in opposition to S.B. No. 2170, SD 1.

The purpose of this bill is to enlarge immunity for public beach parks. Public beach parks were granted immunity for dangerous natural conditions in the oceans and on their shores by Act 190 in 1996. Other public lands were afforded immunity from liability relating to natural conditions (other than public beach parks) by Act 82 in 2003. The exclusion of public beach parks from Act 82 was a deliberate consideration of the extraordinary immunity provisions already granted to public beach parks earlier in Act 190. The decision to exclude public beach parks from Act 82 struck a fair balance between protection of innocent citizens, limitation of liability for governmental entities and encouraging the safe maintenance and operation of public lands.

Immunity should always be considered a measure of last resort when less drastic measures cannot fairly balance the goals of safe parks for our communities, accountability for governmental failures to exercise reasonable care in the maintenance of our parks, redress for those injured through governmental negligence, and controlling governmental liability for its negligence within reasonable limits. Immunity should be granted only in extreme cases because it eliminates accountability on the part of government and encourages complacency on matters of public safety by removing financial penalties for governmental negligence, while at the same

000086

time arbitrarily depriving those citizens injured by governmental negligence from fair and reasonable redress.

The overwhelming source of liability related to public beach parks involves natural conditions of the ocean and shore which may be beyond human control. That is the reason that public beach parks were granted the extraordinary protection of immunity, regardless of whether government was otherwise negligent in the maintenance and promotion of public safety, for liability related to natural conditions in the ocean and on the shores of public beach parks. There is no crisis or other extraordinary reason for extending public beach park immunity beyond activities in and around the ocean and shore. Indeed, in combination with immunity for lifeguard operations, public beach parks currently enjoy the highest degree of immunity applicable to public or private lands. There simply is no present justification for increasing the immunities already enjoyed by public beach parks.

Thank you for this opportunity to testify in opposition to S.B. No. 2170, SD 1.