



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 WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS

DATE: Friday, March 14, 2008 **TIME:** 10:00 AM

LOCATION: State Capitol, Room 312
Deliver to: Committee Clerk, Room 427, 3 Copies

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

Chair Ito 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.

Hawai'i State Association of Counties

Counties of Kaua'i, Maui and Hawai'i, City & County of Honolulu



Testimony of Council Vice Chair Mel Rapozo
President, Hawai'i State Association of Counties

on

SB 2170, SD 1 Relating to Public Land

House Committee on Water, Land and Ocean Resources and Hawaiian Affairs

March 14, 2008

10 a.m.

Conference Room 312

Dear Chair Ito and Members:

Thank you for the opportunity to submit testimony in support of SB 2170, SD1 which is an important measure of concern to the counties.

This measure has been approved as part of the Hawai'i State Association of Counties' (HSAC's) Legislative Package which is comprised of members from each County Council and the Mayors of each county as ex-officio members.

HSAC supports this measure for the following reasons:

1. The bill amends Act 82, Session Laws of Hawai'i 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 the 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.

I humbly request your favorable consideration for passage of SB 2170, SD1 Relating to Public Land.

Sincerely,

A handwritten signature in black ink that reads 'Mel Rapozo' with a stylized flourish at the end.

MEL RAPOZO
HSAC President



CHARMAINE TAVARES
MAYOR



200 South High Street
Wailuku, Hawaii 96793-2155
Telephone (808) 270-7855
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E-mail: mayors.office@mauicounty.gov

OFFICE OF THE MAYOR
County of Maui

March 13, 2008

The Honorable Ken Ito, Chair
and Members of the House Committee on
Water, Land, Ocean Resources & Hawaiian Affairs
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

RE: SB 2170, SD 1 – RELATING TO PUBLIC LAND

Dear Chair Ito and Members:

Thank you for the opportunity to provide testimony on SB 2170, SD 1, which amends Act 82, Session Laws of Hawaii 2003, to protect counties from liability arising from natural conditions in county public beach parks. The County of Maui strongly supports this proposed measure.

Act 82 (2003) provides for the design and placement of signs warning of natural hazards on improved public lands, but excludes public beach parks. This exclusion is apparently based on a misapprehension of the applicability of Act 190 (1996), which deals with warnings about dangerous shore break and undertow.

A Status Report prepared by the Department of Land and Natural Resources describes Act 190 as follows:

Act 190 SLH 1996, establishes a process for the State and Counties to provide both meaningful and legally adequate warnings to the general public of extremely dangerous natural conditions in ocean areas adjacent to their respective public beach parks. The Act recognizes a duty to warn specifically of dangerous shore break or strong current in the ocean fronting a beach park, if either condition exists, is extremely dangerous, is typical for that beach park, and poses a risk of serious injury or death.

Act 190 does not address liabilities posed by natural conditions such as rock cliff faces and the like. This is the purpose of Act 82 and it should not refer to Act 190 as a basis for excluding public beach parks. SB 2170, SD 1 is necessary and prudent. It will protect members of the public who use beach parks by providing approved warnings.

The Honorable Ken Ito, Chair
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Maui County has many ocean parks that should be included in the immunity provided to "improved public lands". One example is the world-renowned Hookipa Beach Park that is partially surrounded by rocky cliffs. Another example is Keanae Park, where the natural shoreline is beautiful but rough and rocky. An additional popular ocean park, Honomanu Park, is also in a fairly remote and natural area.

Again, thank you for the opportunity to provide these comments and your favorable consideration of SB 2170, SD 1.

Sincerely,

A handwritten signature in black ink that reads "Charmaine Tavares". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

CHARMAINE TAVARES
Mayor, County of Maui

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

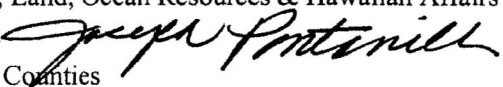


Director of Council Services
Ken Fukuoka

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

March 12, 2008

TO: Honorable Ken Ito, Chair
House Committee on Water, Land, Ocean Resources & Hawaiian Affairs

FROM: Joseph Pontanilla, Treasurer 
Hawaii State Association of Counties

SUBJECT: **HEARING OF MARCH 14, 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.

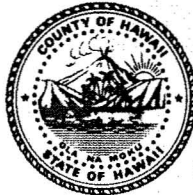
BOB JACOBSON

Councilmember

Chair, Environmental Management Committee

Vice-Chair, Finance Committee

Vice-President Hawai'i State Association of Counties



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HAWAI'I COUNTY COUNCIL

County of Hawai'i

March 12, 2008

Committee on Water, Land, Ocean Resources and Hawaiian Affairs

Rep. Ken Ito, Chair

Rep. Jon Riki Karamatusu, Vice Chair

And, Members

Hearing Friday, March 14, 2008, 10:00 a.m.

Conference Room 312

State Capitol

I strongly support Senate Bill 2170 Relating to Public Lands. This Senate bill protects counties from liability as a result of natural conditions on or near a public beach park. This Bill has the full support of the Hawaii Association of Counties (HSAC) and would give the counties the same protection that the State currently has relating to public beach parks. The public beach parks are an important part of the public park system and should not single out as different from other park and trail venues.

I humbly ask for your support of House Bill 2170.

Aloha,

Bob Jacobson

*District 6 ~ Upper Puna, Ka'ū, and South Kona
Hawai'i County Is An Equal Opportunity Provider And Employer*

To: Representative Ken Ito, Chair
Representative Jon Karamatsu, Vice Chair
COMMITTEE ON WATER, LAND, OCEAN RESOURCES & HAWAIIAN AFFAIRS

Hearing on March 14, 2008 at 10:00 a.m.

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

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

Chairperson Ito, Vice Chair Karamatsu and Honorable Representatives,

On behalf of the Hawai'i County Council, I urge you to pass Senate Bill 2170. Senate Bill 2170 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 be changed from July 1, 2050 to July 1, 2008.

We humbly ask for your support by passing SB 2170.

BRYAN J. BAPTISTE
Mayor



MATTHEW S. K. PYUN, JR.
County Attorney

OFFICE OF THE COUNTY ATTORNEY

COUNTY OF KAUA'I, STATE OF HAWAII
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Deputies
Harrison K. Kawate, First Deputy
Rosa Flores
Margaret H. Sueoka
James K. Tagupa

March 12, 2008

**TESTIMONY FROM THE OFFICE OF THE COUNTY ATTORNEY
COUNTY OF KAUA'I TO THE HOUSE COMMITTEE ON WATER,
LAND, OCEAN RESOURCES AND HAWAIIAN AFFAIRS**

HEARING ON SENATE BILL NO. 2170, SD 1

Date: Friday, March 14, 2008
Time: 10:00 a.m.
Place: Conference Room 312
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

House Committee on Water, Land, Ocean Resources,
and Hawaiian Affairs
Honorable Ken Ito, Chair
Honorable Jon Riki Karamatsu, 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.

Honorable Ken Ito, Chair
Honorable Jon Riki Karamatsu, Vice Chair
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The purpose of this bill 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.

In order to provide some clarity to this issue, a brief overview of Acts 190 and 82 are set forth below.

Act 190

Act 190 was passed in 1996. This Act provided both State and counties limited protection with regard to ocean based natural dangerous conditions if the State and counties complied with certain procedures.

Under the terms of Act 190, the State or county, operating a public beach park, presumptively meets its duty to warn the public of specific dangerous shorebreak or strong currents in oceans adjacent to the public beach park if the State or county posts signs warning of these dangerous conditions and these signs are approved by the chairperson of the board of land and natural resources.

Act 82

Act 82 was passed in 2003. The enacting language of Act 82 states in pertinent part that:

There is an increasing public demand for outdoor recreation on public lands. Many of these lands are inherently dangerous and contain many potential risks, especially for those who are unprepared, participate in hazardous recreational activities, or choose to ignore warning signs. . . . Uncertainty regarding the standard of care that must be exercised by the State or counties to prevent costly lawsuits may result in public recreational assets being closed.

To provide a remedy for this problem, a state risk assessment working group could be established to identify methods to mitigate potential risks.

. . .

Honorable Ken Ito, Chair
Honorable Jon Riki Karamatsu, Vice Chair
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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 . . .

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.)

The language of Act 82 clearly and unambiguously includes both State and counties in providing the limited protection contained in Act 82, and the process through which both State and counties must go through in order to afford themselves of this protection.

Despite the enacting language of Act 82 to clearly encompass both State and counties in providing protection from land based liabilities, the definition contained in Act 82 relating to "Improved public lands" 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.

Act 190 does not define either "improved public lands" or "public beach parks," however, Act 190 uses the phrase "public beach park" in relation to both State and counties.

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.

Honorable Ken Ito, Chair
Honorable Jon Riki Karamatsu, Vice Chair
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The instant bill seeks to remove any ambiguity that may exist in light of the language of Acts 82 and 190, and the intent of the drafters of Acts 82 and 190, by removing the last phrase of the definition portion of "Improved public lands" contained in Act 82.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Harrison K. Kawate", written in a cursive style.

HARRISON K. KAWATE
First Deputy County Attorney

**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 14, 2008

To: Chairman Ken Ito and Members of the House Committee on Water, Land, Ocean
Resources & Hawaiian Affairs:

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

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.