

TESTIMONY

SB 2835

testimony

From: Sharonmurray228@aol.com
Sent: Wednesday, February 13, 2008 6:45 AM
To: testimony
Subject: relating to public access

Please submit this testimony to:
COMMITTEE ON WATER AND LAND
Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair

SB 2835

On:
DATE: Friday, February 15, 2008
TIME: 2:45 p.m.
PLACE: Conference Room 414
State Capitol, 415 South Beretania Street

Dear Sirs,

I support Senator Hooser's bill requiring every permitting agency to ensure that sufficient access to beaches and public recreational areas exists before issuing building permits-even renovation permits-to owners. I am originally from New Jersey, where access to beaches can be a nightmare. I have seen and experienced the frustration of simply trying to "get" to the beach to enjoy a family day. One of the things I loved about Hawaii was that all people had free access to the beaches and a healthy, outdoor lifestyle was both easy and encouraged. We do not need to repeat the grave mistakes made on the mainland. Protecting the rights of free and easy access to the beaches should be a clear and unwavering priority.

Sharon Murray
Koloa, Hawaii

The year's hottest artists on the red carpet at the Grammy Awards. [AOL Music takes you there.](#)

testimony

From: matt esecson [matt@ateamcollaborative.com]
Sent: Wednesday, February 13, 2008 7:57 AM
To: testimony
Subject: COMMITTEE ON WATER AND LAND- SB 2835

DATE: Friday, February 15, 2008
TIME: 2:45 p.m.
PLACE: Conference Room 414

As a citizen of Hawaii, it is imperative that public right of way and access take it's rightful place as a top priority in any commercial development.

Please pass legislation to ensure all Hawaiian's have complete access to all waterfront .

Mahalo

Matt Esecson
590 kawaihoa Rd
kailua, HI

testimony

From: Jeannine Johnson [jeannine@hawaii.rr.com]
Sent: Tuesday, February 12, 2008 10:01 PM
To: testimony
Subject: Testimony in strong support of SB2835 (public rights of way)
Attachments: image001.jpg

Jeannine Johnson, Legislative Sub-Committee Chair
Kuli'ou'ou / Kalani Iki Neighborhood Board #2

5648 Pia Street, Honolulu, Hawai'i 96821

Phone: 373-2874 (h) / 523-5030 (w)

February 12, 2008

Via email to testimony@capitol.hawaii.gov

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair

Senator Russell S. Kokubun, Vice Chair

Re: SB 2835 - RELATING TO PUBLIC ACCESS

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

Dear Chair Hee and Vice Chair Kokubun,

As Committee Chair of the **Kuli'ou'ou / Kalani Iki Neighborhood Board #2** Legislative Sub-Committee, I am pleased to inform you **Neighborhood Board #2** strongly supports SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of **any development project**, subdivision, or zoning change, and modifies definitions of "public recreational area." **Neighborhood Board #2** represents over 6,000 households, with a population of almost 20,000 people (State of Hawaii Data Book 2002) in East Honolulu.

At its October 5, 2006 meeting, residents from the East Honolulu communities of 'Āina Haina, Niu Valley and Portlock expressed their concerns about beachfront landowners along the shoreline from Portlock Road to Kāhala denying the public access to the beach with a planned gated subdivision, locked gates and/or walls. Therefore, **Neighborhood Board #2** voted unanimously to **strongly** oppose any development which would gate off the access to our beaches that has been traditionally used by our residents, fisherman and/or surfers and recommended the City place blue public right of way signs at public rights of way along our shoreline from Portlock Road and continuing west along Kalaniana'ole Highway to Kāhala.

Ensuring the public's access to the shorelines throughout the State prior to the approval of **any development project** will promote the rights of the public to access the shoreline and mountain areas for recreational and cultural purposes. Therefore, your support of SB2835 is respectfully requested.

Mahalo,



Legislative Sub-Committee Chair

Kuli'ou'ou / Kalani Iki Neighborhood Board #2

cc via email: Chair Robert Chuck
Sen. Sam Slom
Sen. Fred Hemmings
Rep. Lyla Berg
Rep. Barbara Marumoto
Rep. Gene Ward

testimony

From: Jenna Ishii [jenna.ishii@gmail.com]
Sent: Wednesday, February 13, 2008 7:19 AM
To: testimony
Subject: Hawai'i Beach Access

Aloha Chair Hee, Vice Chair Kokubun, and Committee members,

I strongly support SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of any development project, subdivision, or zoning change, and modifies definitions of "public recreational area." If possible, I would even suggest that adding language that would assure "adequate access" would be beneficial, in hoping to avoid areas we have allowed like Ko Olina or a large part of Waikiki, where parking areas can only allow access for a few.

Hawai'i Revised Statutes (HRS) Chapter 46-6.5 mandates "developers to dedicate land for public access to the shoreline, where such access is not already provided, as a condition precedent to subdivision approval." HRS Chapter 115 also guarantees shoreline access and states, "...the absence of public access to Hawaii's shorelines and inland recreational areas constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas." We need to uphold this promise, protect this right, and allow our citizens adequate means to reach the shoreline for their recreational and cultural needs.

On Saturday, February 2, 2008, 250 to 300 people stood in the rain and wind with signs and banners in a state-wide protest for more beach access. The message was clear. We've been losing our shoreline access all around our islands and we need to take action to improve access in areas where it is hard to reach the beach. All over Hawaii, gates, fences, and walls have been put up, tiny parking lots are built, No Parking signs are posted, parking fees are imposed, and no one seems to be working to acquire right of ways.

I also support SB2836 which modifies definitions of "public recreational area" and the offense of obstructing access to public property; defines "public right-of-way."

However, I strongly oppose SB3189's requirement that owners of privately owned shoreline access paths keep access to the shoreline open to the public only, at minimum, from 7:00 am to 6:00 pm. Surfers may want to ride waves early in the morning or late at night; fishermen may want to fish late at night; we cannot rely on a locked gate that someone will need to unlock for access. Public shoreline access is a right that is infringed with locked

gates. Access should be open regardless of time. HRS provides "for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit" and city and state government should actively seek acquisition, especially in areas where access is extremely limited.

Mahalo,

Jenna Ishii

testimony

From: Scott Werny [clearwater@hawaii.rr.com]
Sent: Wednesday, February 13, 2008 6:35 AM
To: testimony
Subject: ~~WTL Testimony in strong support of SB2835, support of SB2836, and opposing SB3189~~
(public access)

COMMITTEE ON WATER AND LAND

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair

Re: Support SB 2835 - RELATING TO PUBLIC ACCESS
~~Support SB 2836~~ - RELATING TO PUBLIC ACCESS
~~Oppose SB 3189~~ - RELATING TO PUBLIC ACCESS

Aloha Chair Hee, Vice Chair Kokubun, and Committee members,

I strongly support SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of any development project, subdivision, or zoning change, and modifies definitions of "public recreational area." If possible, I would even suggest that adding language that would assure "adequate access" would be beneficial, in hoping to avoid areas we have allowed like Ko Olina or a large part of Waikiki, where parking areas can only allow access for a few.

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Thank you for your leadership in this area.

Mahalo,

Scott Werny
Co-Chair, Surfrider Foundation Oahu Chapter

testimony

From: travish321@aol.com
Sent: Wednesday, February 13, 2008 6:48 AM
To: testimony
Subject: ~~WTL: Testimony in strong support of SB2835, support of SB2836, and opposing SB3189 (public access)~~

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair

Senator Russell S. Kokubun, Vice Chair

Re: Support SB 2835 - RELATING TO PUBLIC ACCESS
~~Support SB 2836 - RELATING TO PUBLIC ACCESS~~
~~Oppose SB 3189 - RELATING TO PUBLIC ACCESS~~

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

Aloha Chair Hee, Vice Chair Kokubun, and Committee members,

I strongly support SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of any development project, subdivision, or zoning change, and modifies definitions of "public recreational area." If possible, I would even suggest that adding language that would assure "adequate access" would be beneficial, in hoping to avoid areas we have allowed like Ko Olina or a large part of Waikiki, where parking areas can only allow access for a few.

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Mahalo,
Travis Hylton
PO Box 218
Kaaawa, HI 96730

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2/13/2008

testimony

From: mmckay@hula.net
Sent: Tuesday, February 12, 2008 10:43 PM
To: testimony
Subject: ~~WTL: Testimony in strong support of SB2835, support of SB2836, and opposing SB3189 (public access)~~

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair

Re: Support SB 2835 - RELATING TO PUBLIC ACCESS
~~Support SB 2836 - RELATING TO PUBLIC ACCESS~~
~~Oppose SB 3189 - RELATING TO PUBLIC ACCESS~~

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

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fish late at night; we cannot rely on a locked gate that someone will need to unlock for access. Public shoreline access is a right that is infringed with locked gates. Access should be open regardless of time. HRS provides "for the acquisition of land for the purchase and maintenance of public rights-of-way and public transit" and city and state government should actively seek acquisition, especially in areas where access is extremely limited.

Mahalo,

Michele McKay

Honolulu, HI

testimony

From: val loh [vallohfoto@yahoo.com]
Sent: Wednesday, February 13, 2008 7:36 PM
To: testimony
Subject: On Bills RELATING TO PUBLIC ACCESS

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair
Senator Russell S. Kokubun, Vice Chair

Re: Support SB 2835 - RELATING TO PUBLIC ACCESS
~~Support SB 2836 - RELATING TO PUBLIC ACCESS~~
~~Oppose SB 3189 - RELATING TO PUBLIC ACCESS~~

Aloha Chair Hee, Vice Chair Kokubun, and Committee members,

I strongly support SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of any development project, subdivision, or zoning change, and modifies definitions of "public recreational area." If possible, I would even suggest that adding language that would assure "adequate access" would be beneficial, in hoping to avoid areas we have allowed like Ko Olina or a large part of Waikiki, where parking areas can only allow access for a few.

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Mahalo and best wishes,
~ Valerie Loh
2552 Peter St.
Honolulu, HI 96816

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testimony

From: Joan Levy [joanlevy@hawaii.rr.com]
Sent: Thursday, February 14, 2008 12:04 AM
To: testimony
Subject: SB 2835 Relating To Public Access Testimony

Re: SB 2835 Relating To Public Access has been set for hearing by the WTL committee at 2:45p on Friday, February 15 in Room 414

Dear Senate WTL Committee:

I am asking that you vote in favor of SB 2835. Public access to our beaches keeps dwindling down. This is an important bill to help protect our beaches and public rec areas from being lost to development.

Thank you!

Joan Levy
POB 160, Kapaa, HI 96746

.....
"If you can't be a good example, then you'll just have to be a horrible warning!" Catherine Aird

"You can tell a lot about a person by the way he/she handles these three things: a rainy day, lost luggage, and tangled Christmas tree lights." Maya Angelou

JOAN LEVY, MSW, LSW, LCSW, ACSW
BodyMind & Breath Center
POB 160 Kapaa, Kauai, HI 96746 (808) 822-5488

Joan's Websites:

PsychoSpiritual Intensives: <<http://www.lauhala.com/joan>>
Fits and Fancies...Along the Evolutionary Path: Joan's web column in "The Kauaian"
<http://www.kauaistyle.com/life/joan_levy/index.php>

For Holistic Health Practitioner Info on Kauai:

Kauai Healing Arts Directory: <http://www.kauaihealing.org> € Lightline directory:
http://GoKauai.com/garden/health_wellness.html
Hawaii Health Guide: <http://www.hawaiihealthguide.com/> € Inspiration Journal:
<http://www.inspirationjournal.com/contact.html>

testimony

From: Claire Mortimer [clairebearcfm@gmail.com]
Sent: Thursday, February 14, 2008 1:10 AM
To: testimony
Subject: SB 2835 - STRONG SUPPORT

SB 2835 Regarding Public Access to Beaches

Hearing by the WTL Committee
February 15
2:45pm
Room 414

I strongly support SB 2835, introduced by Senator Gary Hooser.

I live on the North Shore of Kauai, and over the years I have seen a deterioration of access rights for residents and visitors. The Kilauea Neighborhood Center Association has identified this problem for many years.

Hawaii state law regarding access is not enforced, and our rights to access our beaches and shoreline areas are being violated every day.

SB 2835 is a step in the right direction to restoring those rights.

For the sake of the 'aina, please pass this bill out of committee, and make it the law of the land.

Sincerely,

Claire Mortimer
4173 Waipua Street
Kilauea, Hawaii 96754

808-828-9853

testimony

From: Rich Figel [figeli001@hawaii.rr.com]
Sent: Wednesday, February 13, 2008 10:46 PM
To: testimony
Subject: Testimony in support of SB2835, SB2836 and SB3189

COMMITTEE ON WATER AND LAND

Senator Clayton Hee, Chair

Senator Russell S. Kokubun, Vice Chair

Re: Support SB 2835 - RELATING TO PUBLIC ACCESS

~~Support SB 2836 - RELATING TO PUBLIC ACCESS~~

~~Support SB 3189 - RELATING TO PUBLIC ACCESS~~

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

Aloha Chair Hee and Vice Chair Kokubun,

As cofounder of Beach Access Hawaii, a group that has over 300 members, I strongly support SB2835 which requires state and county agencies to ensure that a public right-of-way is available prior to the approval of any development project, subdivision, or zoning change, and modifies definitions of "public recreational area."

On Saturday, February 2, 2008, hundreds of residents on Oahu, Maui, Kauai and the Big Island took part in our Groundhog Day Beach Access Rally to urge the state and counties to take action on the problem of diminishing access to our shoreline. Over 20 different groups came together for this event. We believe it's time our state and county government officials did the same, and work together to protect public access for future generations.

We also support SB2836 which modifies definitions of "public recreational area" and the offense of obstructing access to public property. As I read this bill, it would require public streets near our beaches to be free of barriers that would prevent the public from reaching the beach. In Kailua, there are at least two public streets (Kailuana Loop and Namala Place) that are deeded to the city, and yet residents have erected locked gates on the rights of way. These gates should be removed, and the beach paths should be reopened to the public.

I support SB3189 with reservations. Many of us in Kailua would be happy if privately owned shoreline access paths that have locked gates were required to keep them open, at minimum, from 7:00 am to 6:00 pm. There are over a dozen such gates currently. However, in reading the bill it is not clear to us that this would apply to existing gates on private lanes. If this bill only applies to new developments, we would oppose this bill as it would set a bad precedent for the future. Ideally, there should be no gates on public or private beachside lanes.

Beach Access Hawaii believes locked gates pose a serious threat to public safety. First responders have told the Kailua Neighborhood Board that delays caused by these gates could endanger lives.

Also, where there are private lane gates, there are in effect, private beach areas -- and in Hawaii, the law states that our beaches belong to all the people, not just those who can afford to live next to the beach.

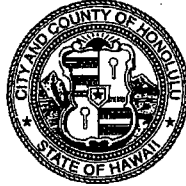
Mahalo,

Rich Figel
Cofounder, Beach Access Hawaii
801 Kainui Drive
Kailua, HI 96734

Phone: 808-262-5073

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8000 • FAX: (808) 527-6743
INTERNET: www.honolulu.gov • DEPT. WEB SITE: www.honoluluodpp.org



MUFI HANNEMANN
MAYOR

HENRY ENG, FAICP
DIRECTOR

DAVID K. TANOUE
DEPUTY DIRECTOR

February 15, 2008

The Honorable Clayton Hee, Chair
and Members of the Committee on Water and Land
Senate
State Capitol
Honolulu, Hawaii 96813

Dear Chair Hee and Members:

**Subject: SENATE BILL 2835
Relating to Public Access**

While the Department of Planning and Permitting strongly supports the provision of public access to coastal and inland recreational areas, we must **oppose** Senate Bill 2835 in its present form.

The purpose of the bill is to require that state and county agencies to ensure that a public right-of-way is available before the approval of any development project, subdivision, or zone change. In order to achieve this purpose, the bill contains all encompassing definitions so that any and all new construction is affected.

The fact that this bill specifically targets building permits as a means for obtaining additional public access could result in unlawful taking of land from property owners. If private land is to be acquired by government entities, private property owners should be fairly compensated. Senate Bill 2835 would take away that equitable balance. The City has specific land condemnation procedures in place to make certain that an equitable transition from private to public ownership takes place. The building permit process is not the appropriate venue for this type of land acquisition, since the building permit process is ministerial, limited to life safety and code compliance, and is not intended to secure land as a condition of approval.

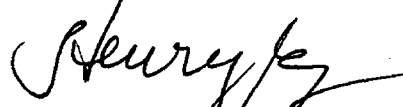
We are deeply concerned that the bill would trigger a public access requirement for small single-family remodeling or repair projects needing simple building permits. To require a property owner to dedicate a public access right-of-way prior to building permit approval would significantly slow the permit processing for new single-family homeowner construction along the shoreline and adversely affect the appeal for a single-family homeowner to make routine improvements to their dwelling.

The Honorable Clayton Hee, Chair
and Members of the Committee on Water and Land
Senate
Re: Senate Bill 2835
February 15, 2008
Page 2

Finally, several laws already exist at the state and county levels to adequately ensure public access to coastal and inland recreational areas are provided. Hawaii's Coastal Zone Management Act, Chapter 205A, Hawaii Revised Statutes is just one example of the types of laws on the books that require state and county agencies to provide for public access with new development.

Please file Senate Bill 2835. Thank you for this opportunity to comment.

Very truly yours,

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

Henry Eng, FAICP, Director
Department of Planning and Permitting

HE: jmf
Sb2835-ah.doc

testimony

From: Nola Conn [nolaconn@hotmail.com]
Sent: Thursday, February 14, 2008 9:55 AM
To: testimony
Subject: SB 2835

Relating To Public Access. Set for hearing by the WTL committee at 2:45p on Friday, February 15 in Room 414.

Please support Sen. Hooser's bill requiring every permitting agency to ensure that sufficient access to beaches and public recreational areas exists before issuing building permits--even renovation permits--to owners.

Thank you very much for ensuring that our island belongs to all of the people.

Aloha,
Nola A. Conn
Anahola
635-0698

Shed those extra pounds with MSN and The Biggest Loser!
<http://biggestloser.msn.com/>

testimony

From: Rich Figel [figeli001@hawaii.rr.com]
Sent: Thursday, February 14, 2008 10:20 AM
To: testimony
Subject: In support of SB2835 and ~~SB2836~~; opposing ~~SB3189~~

THE SENATE COMMITTEE ON WATER AND LAND

TWENTY-FOURTH LEGISLATURE
 REGULAR SESSION, 2008
 Senator Clayton Hee, Chair
 Senator Russell S. Kokubun
 SB 2835 and ~~SB 2836~~ – Support
~~SB 2409 – Oppose~~

Hearing: Friday, February 15, 2008, at 2:45 pm in Conference Room 414

Aloha Chairman Hee and Vice Chairman Kokubun,

Mahalo for the opportunity to provide testimony in support of SB 2835 requiring that state and county agencies ensure that a public right-of-way to the beach is available prior to the approval of any development project, subdivision, or zoning change, and modifies the definition of "public recreational area."

As more development along Hawaii's shorelines takes place, our citizens are finding less access to beaches, in essence, fostering an island lifestyle in which beaches are only for tourists and the wealthy. On February 2, 2008, many of Hawaii's citizens participated in a statewide protest calling for the abolition of private beaches, a reinstatement of previously open beach accesses, calling attention to the proliferation of gated, private beaches, and calling attention to the vandalism and/or the obscuring of "Public Right of Way to Beach" signs, effectively privatizing the access. Many roads that used to provide access to beaches have, over the years, seen locked gates installed and no trespassing signs posted, creating hostility and bad blood among neighbors.

This issue reminds of the seawalls quietly built in Lanikai over many years. Many of the seawalls were not legal. Eventually, the beach eroded and there was simply no beach left in those areas. When it was finally brought to the attention of those able to do something about it, the seawalls were left standing. Now, deep water pushes up against privately owned seawalls. The beach I frequented as youth no longer exists. I hope beach access in Hawaii does not go the way of the beach in Lanikai.

I also support SB2836 having to do with similar beach access issues.

I oppose SB 3189 requiring that owners of privately owned access paths keep them open to the public from 7:00 am to 6:00 pm. While this appears to be a reasonable compromise, there are practical problems associated with implementation, enforcement, and the lifestyles of citizens who may wish to use the beach before 7:00 am and after 6:00 pm. I believe beach access should be an unconditional right of all of Hawaii's citizens.

If I may answer any questions, please do not hesitate to contact me at 690-4708.

Sincerely,
 Jackie Graessle
 47-149 Iuiu Street
 Kailua, HI 96734

(Forwarded via email by Rich Figel at figeli001@hawaii.rr.com)

2/14/2008



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February 14, 2008

The Honorable Clayton Hee, Chair
Senate Committee on Water and Land
State Capitol, Room 414
Honolulu, Hawaii 96813

RE: S.B. 2835 Relating to Public Access
Hearing Date: February 15, 2008 @ 2:45 p.m., Room 414

On behalf of our 10,000 members in Hawaii, the Hawaii Association of REALTORS® (HAR) opposes S.B. 2835.

S.B. 2835 requires the State and County to ensure that a public right of way is available prior to the approval of any development project, subdivision, or zoning change. This condition would apply to the building of a dwelling unit, house, lodging unit, and rooming unit. Property owners who own a beach lot or upland parcel bordering the ocean or public recreation areas would be subject to providing rights-of-way for public use before they could build a simple lodging unit.

With regard to major developments, it is highly likely that property owners would readily agree to providing public access upon final approval of their projects. However, this bill requires a right-of-way before the approval of any development. It is not practical to impose a requirement for public access prior to the final approval on entitlements.

Mahalo for the opportunity to testify.

testimony

From: Karen.A.Goo@hawaii.gov
Sent: Thursday, February 14, 2008 1:41 PM
To: testimony
Cc: Deirdre.Marie-Iha@hawaii.gov
Subject: Attorney General's Testimony re SB 2835 - Senate Committee on Water and Land Hearing: Friday, February 15, 2008 at 2:45 p.m.
Attachments: SB.2835.PDF

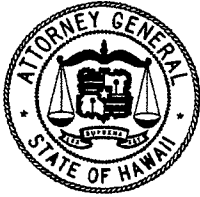
Dear Sir/Madam:

Attached please find a pdf copy of the Attorney General's testimony re SB 2835. The bill will be heard by the SENATE COMMITTEE ON WATER AND LAND on Friday, February 15, 2008 at 2:45 p.m.

If you have any questions or problems with this e-mail or the attachment, please contact us at 586-1360.

Thank you.

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

ON THE FOLLOWING MEASURE:

S.B. NO. 2835, RELATING TO PUBLIC ACCESS.

BEFORE THE:

SENATE COMMITTEE ON WATER AND LAND

DATE: Friday, February 15, 2008 **TIME:** 2:45 PM

LOCATION: State Capitol, Room 414
Deliver to: Committee Clerk, Room 228, 1 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Deirdre Marie-Iha, Deputy Attorney General

Chair Hee and Members of the Committee:

The Attorney General believes that this bill presents highly significant constitutional concerns under "takings" provisions of the Fifth and Fourteenth Amendments. If the bill is amended as explained below, these concerns may be lessened. Given the complexity of takings law, the United States Supreme Court's Nollan v. Calif. Coastal Comm'n, 483 U.S. 825 (1987), decision, and the application of these principles in the context of land use conditions, however, any attempt to require public rights-of-way as a condition of permitting or other development approvals raises the possibility of a court challenge.

In general, the government may not "take" private land for public use without just compensation. The United States Supreme Court has consistently held that placing conditions on the issuance of land use permits can raise a potential takings problem. Nollan. In order to avoid an unconstitutional taking, there must first be an "essential nexus," between the government interests the permitting process seeks to address and the conditions that would be imposed. Id. See also Dolan v. City of Tigard, 512 U.S. 374 (1994). In addition, the Supreme Court has held that land use conditions on development will not pass constitutional muster unless there is a "rough proportionality" between the conditions imposed and the individual development approval being sought. Id.

It is an open question whether conditions, such as the ones proposed by the bill, can be constitutionally required before a development, zoning, or subdivision permit or other agency approval will issue. The constitutional concerns may be lessened (but not entirely avoided) by:

1. Clearly articulating, in a purpose section, the government interests that this proposal seeks to address. These interests should be concrete, and closely related to both the harms the bill seeks to address and the government interests that underlie the permitting and approval processes included within the bill.

2. Amending the circumstances in which public rights-of-way may be required to when public access has been **significantly impaired or prevented**, rather than just "affected," as the bill currently reads. In addition, the bill should avoid requiring new rights-of-way over private land if there are other existing rights-of-way in the vicinity. The paragraph following subsection (3) (page 2, lines 7 to 11) could be amended to read: "that may ~~affect~~ significantly impair or prevent access to the sea, the shoreline, or any coastal or inland public recreational area, the relevant agency shall ensure that a public right-of-way is available in the vicinity to access any and all public recreational areas, including beaches, shores, parks, and trails." This change is important because an attempt to condition development permits on providing public rights-of-way, without showing that access is actually impaired by the proposed development, would face serious constitutional problems under Nollan.

3. Adding a section requiring the agencies involved to issue regulations to guide the exercise of discretion under this provision. These regulations should require that the agencies ensure that (1) if a private landowner is required to provide a public right-of-way across the landowner's land, the impact of that right-of-way on the landowner's property interests must be "roughly proportionate" to the impairment of public access the proposed development would cause, and (2) one particular landowner is not made to bear a substantially

greater burden in providing public access than other landowners in the vicinity.

Given the complexity of this area of law, a constitutional challenge to this measure remains possible, even with the changes suggested above.

testimony

From: Joan Conrow [joanconrow@hawaiiantel.net]
Sent: Thursday, February 14, 2008 2:24 PM
To: testimony
Subject: SB 2835 testimony

Dear Sen. Hee and Committee Members:

I am writing to urge your support of SB 2835 related to public access.

We have already seen many easements and access ways disappear in Hawaii. As growth continues both mauka and makai, especially on the Neighbor Islands, it's important that we the people do not see any further restrictions on our ability to reach public recreation areas.

Please vote yes on this bill.

Sincerely,
Joan Conrow
PO Box 525
Anahola, HI 96703

TESTIMONY

SB 2835

(END)