TESTIMONY
HB 951 HD1

TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:
H.B. NO. 951, H.D. 1, RELATING TO LANDOWNER LIABILITY.

BEFORE THE:
SENATE COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

DATE: Wednesday, March 25, 2009 **TIME:** 2:45 PM

LOCATION: State Capitol, Room 229
Deliver to: State Capitol, Room 228, 1 Copy

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

Chair Hee and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to provide limited liability to landowners of unimproved lands for injuries or damages that occur outside the landowner's property caused by naturally occurring land failures.

The State of Hawaii owns and manages millions of acres of public lands, many of which are unimproved conservation or forest reserve lands. The bill would allow the State to serve the public interest to keep these lands in their natural state without fear of liability for damages occurring outside the boundaries of its lands caused by unpredictable and naturally occurring land failures, such as landslides and rockfalls.

The bill makes clear that the natural condition would still exist despite minor alterations such as the installation or maintenance of utility poles, fences, and signage. The bill also allows for maintenance activities for prudent land management such as forest plantings or weed, brush, rock, boulder, and tree removal. We would suggest, however, that the word "minor" be inserted at the beginning of section 663-3(3) to make it clear that the natural condition would not

be maintained by substantial maintenance activities that significantly alter the condition of the land.

Thus, landowners who are protecting and managing public trust resources on unimproved lands are encouraged to act prudently and responsibly to maintain and manage these lands without fear that their actions to remove or mitigate potential hazards would be a material "improvement" that would take them out of the protections afforded under this bill.

We respectfully request that this bill be passed.

LINDA LINGLE
GOVERNOR OF HAWAII

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

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
LAURA H. THIELEN
Chairperson

Before the Senate Committee on
WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS

Wednesday, March 25, 2009
2:45 p.m.
State Capitol, Conference Room 229

In consideration of
HOUSE BILL 951, HOUSE DRAFT 1
RELATING TO LANDOWNER LIABILITY

House Bill 951, House Draft 1 relieves landowners of liability for any damages, injury, or harm to persons or property outside the boundaries of the landowner's land caused by naturally occurring land failure originating on unimproved land. This bill also adds a condition that any landowner covered under this provision shall remain liable for damages proximately caused by negligence or wanton acts of omissions committed in the course of any activities on the unimproved land. While the Department of Land and Natural Resources (Department) appreciates that this bill incorporates a portion of the intent of one of the Administration's proposals, House Bill 1140 (RELATING TO LAND FAILURE), the Department nonetheless prefers the language and approach in House Bill 1140.

This bill preserves the State's natural beauty for future generations by protecting and preserving large tracts of public and private lands in their original condition and natural state. Due to the vast amount of unimproved lands, and the state policies to maintain these lands in their natural state, dangerous natural conditions occur throughout the State that could expose landowners to liability. Urban sprawl and zoning approvals by county agencies have allowed urban and residential development to expand into and adjacent to many areas susceptible to land failure or rockfall hazards. The Department, other state and county agencies, and private landowners are increasingly being called upon to mitigate reported hazards occurring in natural conditions on their unimproved lands. The burden falls on the upslope landowner, when they typically had no say or ability to influence prior zoning and development decisions that allow development in harms way.

For private landowners, many of these lands are conservation lands - not appropriate for development – and continued exposure to lawsuit or requests to mitigate or compensate for harm or injury caused on unimproved lands from naturally occurring natural conditions may force many landowners to sell or develop these lands to cover liabilities, or sell or turn over lands to

the State or other government entities to avoid and shift liability to the general public. The typical cost for rockfall mitigation projects usually runs in the millions. By example, the current estimated costs for Komo Mai hillside and the Old Puunui Quarry projects are $2,100,000 and $1,760,000, respectively. If either case had involved an incident resulting in injury or death, the litigation and judgment costs alone would have far exceeded the mitigation costs and seriously impacted the State's fiscal health. Dwindling state resources cannot correct these hazards triggered by unwise urban sprawl.

A limited tort liability exemption for the State was created by Act 82, Session Laws of Hawaii 2003, for harm or injury caused on improved public lands (basically, state and county parks and the statewide trail and access system). The existing tort liability exemptions may not adequately address or apply to the scenario where a dangerous condition originating from public lands is the cause of damage, injury, or harm on adjacent or nearby properties. Act 82 does not cover liability on private property. This bill will protect owners of unimproved land from these liabilities, provided they have not contributed to the damages through negligence or wanton acts or omissions committed in the course of their activities, and will help to keep these lands in conservation in their natural state.

The Department notes however that House Bill 1140, like this bill provides conditional protection from liability for private and public landowners for land failures resulting from natural conditions on their lands that may cause damage outside or off of their lands. In addition, House Bill 1140 attempts to take a more comprehensive approach to dealing with the issues of land failures by, among other things: 1) requiring a developer to assess land failure risks in potentially hazardous areas and provide appropriate buffers or mitigation and notice of the risk before county approval processes; and 2) giving government agencies the authority to mitigate or require mitigation of land failure hazards on private property.

The Department supports providing conditional protection from liability for private and public landowners from land failures resulting from natural conditions on their lands that may cause damage outside or off of their lands as provided in House Bill 951. The Department also supports a more comprehensive approach and suggests that the Committee consider portions of House Bill 1140 for inclusion into this measure, to the extent that the title of this bill is broad enough to encompass those other provisions that offer a more comprehensive approach to this problem.

DEPARTMENT OF THE CORPORATION COUNSEL

CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110
HONOLULU, HAWAII 96813
Phone: (808) 768-5193 • Fax: (808) 768-5105 • Internet: www.co.honolulu.gov

MUFI HANNEMANN
MAYOR

CARRIE K.S. OKINAGA
CORPORATION COUNSEL

DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

March 24, 2009

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

Re: Support of House Bill No. 951, Relating to Landowner Liability

Dear Chair Hee:

Thank you for the opportunity to provide testimony regarding the HD1 amendment to House Bill No. 951. While the City and County of Honolulu supports the Legislature's intention to codify the common law by enactment of House Bill No. 951 regarding the liability of owners of unimproved lands for personal or property damage that occurs outside the land owner's property boundary that occurs due to naturally occurring events on the unimproved land, the City has concluded the amendment fatally undercuts the Bill's intent.

More specifically, the HD1 amendment includes numerous ambiguities which appear to gut the stated intent of HB951 to limit landowner liability for the inherent risks of land failures caused by natural conditions to persons and properties outside of the property. The City believes that the amendment serves to confuse, rather than add certainty, to HB951. For instance, the amendment specifically provides that a landowner shall remain liable for damages "proximately caused by negligence and wanton acts or omissions." This could arguably result in landowner liability for something a landowner "omitted" to do. As failure to make remediation on unimproved land could be found to constitute an "omission", such language appears to effectively limit the intended purpose of HB951.

Because House Bill No. 951 appears to accurately codify the presently existing common law, the City and County of Honolulu supports the measure without amendment.

Very truly yours,

MATTHEW S.K. PYUN, JR.
Chief of Litigation Division

MSKP:dsd

From: James Robello [robelloj@gmail.com]
Sent: Friday, March 20, 2009 8:51 PM
To: WTLTestimony
Subject: HB 951

Dear Chairpersons,

I support HB 951

Mahalo

James Robello

AINA HAINA COMMUNITY ASSOCIATION -1966-

Aina Haina Library
5246 Kalanianaole Highway
Honolulu, HI 96821

March 25, 2009

To: Senator Clayton Hee, Chair
Senator Jill Tokuda, Vice Chair and
Members of the Committee on Water, Land, Agriculture, and Hawaiian Affairs

From: Wayson Chow, President
Aina Haina Community Association

Re: HB 951 HD1 Relating to Landowner Liability
Hearing: March 25, 2009, 2:45 p.m., Room 229

Position: Opposed

The Aina Haina Community Association writes in opposition to HB 951 HD1 Relating to Landowner Liability. The purpose of the bill is to relieve public and private landowners from liability for any damage, injury, or harm to persons or property outside the boundaries of the landowners land caused by naturally occurring land failure originating on unimproved land.

This proposal gives specific exemptions from liability to landowners of unimproved land. Current laws give sufficient notice to landowners that they have a duty to protect neighbors from hazards occurring on their property. They should not be given immunity from conditions that can and should be remedied to avoid reasonably preventable damage to property and injury to persons.

Residents in Aina Haina are concerned about boulders which fall into their homes; many from unimproved lands:

- Residents in Palolo, Kalihi, and Aina Haina have had problems with falling rocks and boulders. In 2002, "fire officials said they hoped yesterday's freak accident will alert homeowners to the risks of living next to a hillside." (Honolulu Star-Bulletin, August 10, 2002.)
- July 1958: A boulder crashes into an Aina Haina yard, narrowly missing a mother and her three children.
- February 1961: A two-ton rock strikes an Aina Haina home.
- August 1962: Eight-year-old Lei Ushijima is killed by a boulder at her Aina Haina home.
- September 1962: a 6-ton boulder crashes through the wall of an Aina Haina home, causing a woman and her two daughters to run from the house.

AHCA asks the committee to hold this bill. Thank you for this opportunity to provide testimony.

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) / 537-7261 (w)
March 23, 2009

COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS
Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair

HB 951, HD1 RELATING TO LANDOWNER LIABILITY
Hearing: Wednesday, March 25, 2009 at 2:45 pm in Conf. Room 229

Aloha Chair Hee, Vice Chair Tokuda and Honorable Committee Members,

As Committee Chair of the **Kuli'ou'ou / Kalani Iki Neighborhood Board #2** Legislative Sub-Committee, it is my duty to inform you **Neighborhood Board #2** strongly opposes HB951 HD1 which relieves landowners of liability for any damage, injury, or harm to persons or property outside the boundaries of the landowner's land caused by naturally occurring land failure originating on unimproved land, except for harm arising from negligent or wanton acts by the owner of the unimproved land. **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.

The 'Āina Haina-Niu Valley-Kuli'ou'ou areas in our District have a long history of flooding, rockslides, boulders, slope instability:

- December 3, 1950: Landslide of rocks, tree stumps and mud came down a mountainside on Manauwea Street and a section of the roadway ripped off.
- November, 1956: A 1,000-pound boulder loosened by torrential rains smashes into a Niu Valley home, stopping short of a bed on which a woman is sitting.
- July, 1958: A boulder crashes into an 'Āina Haina yard, narrowly missing a mother and her three children.
- March 5, 1958: A large boulder fell on Hao Street, a landslide of mud and debris covered a section of Ahuwale Street, and tons of rock knocked down a retaining wall on Hind Iuka Drive.
- February, 1961: A 2-ton rock strikes an 'Āina Haina home.
- August, 1962: Eight-year-old Lei Ushijima is killed by a boulder at her 'Āina Haina home.
- September, 1962: A 6-ton boulder crashes through the wall of an 'Āina Haina home, causing a woman and her two daughters to run from the house.

- February 4, 1965: Rains washed rocks onto Kalaniana'ole Highway in 'Āina Haina.
- November 14, 1965: Landslide reported on Hao Street.
- December 18, 1967: Niu and Kuli'ou'ou Streams flood homes after becoming damned with rocks and other debris. Niu Stream was "chocked full with boulders, many piling up at Kalaniana'ole Highway bridge" per Honolulu Star Bulletin. A landslide was also reported in 'Āina Haina on Leighton Street.
- New Year's Eve 1987-1988: Debris flows containing large boulders, some the size of vehicle tires, directly impacted several homes in Kuli'ou'ou Valley and piling debris onto Kalaniana'ole Highway. Rain triggered a large landslide high in the Kūpaua Valley that sent tons of mud, rock, and other debris downstream into lower Niu Valley, obstructing drainage channels and flooding a number of homes and a shopping center and burying some vehicles in mud. A two foot thick layer of mud, rocks and debris crossed Kalaniana'ole Highway near 'Āina Haina.
- April 1, 1989: Landslides in the 300 block of 'Ānonia Street scar the mountainside.
- March 19-20, 1991: A landslide of rocks, some the size of basketballs, were reported at Hawai'i Loa Street in Niu Valley and blocking Kalaniana'ole Highway with two feet deep of rocks. Drainage along 'Anolani Street in Niu Valley was plugged with big rocks causing flooding. Landslides of mud and debris block Lani, Kahinu, and Aimoku Streets in Kuli'ou'ou Valley and Leighton, Manauwea and Olapa Streets in 'Āina Haina.
- October, 1992: A girl is injured when a boulder crashes through her family's Niu Valley home.
- August 4, 2004: A boulder the size of an armchair rolls down the mountain and is stopped by a fire hydrant on 'Anolani Street in Niu Valley.
- April, 2006: A family on 'Ānonia Street in Niu Valley has a landslide in their back yard.
- August, 2006: A 300 pound boulder knocked a hole through a cement wall of a Kuli'ou'ou home on Mo'omuku Place at about 3:30 am, sending cement pieces crashing to the ground just a few feet away from where two-year-old Saydee Kauila was sleeping.
- August 14, 2008: A 4-foot boulder rolled down Kulepiamoa Ridge, sideswiped a home at upper Haleola Street, crashed through a wooden fence and cinderblock wall and landed on the sidewalk.
- Sometime between August 14 and August 20, 2008, another 500-pound boulder rolled down Kulepiamoa Ridge onto the side yard at upper Haleola Street.

Although HB951 HD1 says its purpose is the codify the common law that currently exists in Hawai'i, but it extends a broad level of protection to landowners whose land has a history of rockfall and landslide hazards, even where the landowner knew of a specific risk,

had the opportunity to prevent the harm from occurring, and then never told anyone or warned about the danger before an injury occurred.

Your opposition to HB951 HD1 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
Rep. Lyla Berg
Rep. Barbara Marumoto
'Āina Haina Community Association
Niu Valley Community Association

Niu Valley Community Association

Jeannine Johnson, Secretary
5648 Pia Street, Honolulu, Hawai'i 96821
Phone: 373-2874 (h) / 537-7261 (w)
March 23, 2009

COMMITTEE ON WATER, LAND, AGRICULTURE, AND HAWAIIAN AFFAIRS
Senator Clayton Hee, Chair
Senator Jill N. Tokuda, Vice Chair

HB 951, HD1 RELATING TO LANDOWNER LIABILITY
Hearing: Wednesday, March 25, 2009 at 2:45 pm in Conf. Room 229

Aloha Chair Hee, Vice Chair Tokuda and Honorable Committee Members,

On behalf of the Niu Valley Community Association, we request your opposition to HB951 HD1 which relieves landowners of liability for any damage, injury, or harm to persons or property outside the boundaries of the landowners' land caused by naturally occurring land failure originating on unimproved land. Niu Valley is a close-knit community with over 700 families in Niu Valley proper and another 100 who reside in Niu Beach and Niu Peninsula.

As reported in the attached stories by the Honolulu Advertiser and Star Bulletin, a 4 foot boulder rolled down Kulepiamoa Ridge, which is unimproved land, on August 14, 2008, sideswiped a home at 6041 Haleola Street, crashed through a wooden fence and cinderblock wall and landed on the sidewalk. Then, according to the attached KHON story, another 500 pound boulder came crashing down the valley walls onto the side yard at 6033 Haleola Street. It was fortunate that no one was injured in these incidents; however, residents are especially worried about one even larger boulder perched on the Ridge which they call "Killer." Our requests to have the landowner remove this extremely hazardous and life-threatening boulder have been so far unsuccessful. This bill would absolve this landowner from any liability for injuries or even death of our residents even though there is a known risk of harm and this landowner chose to do nothing to abate the danger.

The Niu Valley Community Association respectfully requests your opposition to HB951 HD1. Mahalo for your consideration.

Sincerely,

Jeannine Johnson, Secretary

cc: Sen. Sam Slom
Rep. Lyla Berg
Rep. Barbara Marumoto
'Āina Haina Community Association

Measure: H.B. No. 951 HD1, Relating to Landowner Liability

Hearing Date & Time: March 25, 2009 - 2:45 PM, Conference Rm. 229

To: Honorable Senators Clayton Hee, Chair,
Jill Tokuda, Vice-Chair, and
Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs

From: Melora K. Purell, Coordinator, Kohala Watershed Partnership
P.O. Box 437182, Kamuela, HI 96743 Phone 808-333-0976

I strongly urge you to support this bill. The private land owners and public land managers on the 65,000 acres of forested watershed on Kohala Mountain formed the Kohala Watershed Partnership (KWP) in 2003, with the joint resolve to manage the watershed on a landscape scale, across property boundaries. The KWP management plan describes a number of conservation actions that will occur on unimproved land, as well as highlighting the commitment of land owners to work with the public to manage access to the mountain. The public land and hunting areas on Kohala are almost completely surrounded by privately owned land, and so the issues of access and liability are forefront in the minds of the private land owners in the KWP. The laws of the State of Hawaii, however, seem to make it very difficult for these land owners to work with the public on access, because they may be held liable for natural conditions beyond their control. H.B. 951 HD1 is a first step in updating our state's liability laws to allow landowners to become more amenable to public access and to preserving native habitats by trail improvements and fencing.

Unimproved lands are regularly accessed by the public for hiking, hunting and fishing. H.B. 951 HD1 provides reasonable liability protection for hazards that are unpredictable and beyond the landowners' control. It rightfully does not protect landowners who are negligent or malicious in perpetuating known hazards on their land. The minor improvements listed in H.B. 951 HD1 would encourage landowners to maintain safer conditions on their unimproved lands without fear of triggering a higher level of liability.

Unfortunately, H.B. 951 HD1's protection applies only to damage, injury or harm to persons or property <u>outside</u> the boundaries of the landowner's land. Similar liability protection is needed if damage, injury or harm occurs <u>within</u> the boundaries of public and private unimproved lands due to natural hazards that are beyond the landowners' control. I hope we will see legislation to update our landowner liability laws in the near future and thus facilitate better public access.

H.B. 951 HD1 is an important first step in creating liability protection for landowners that want to support public access and conservation actions like fencing and invasive species control.

Thank you very much for your support of this bill.

From: Deborah Chang [kulaiwi@hawaiiantel.net]
Sent: Monday, March 23, 2009 2:32 PM
To: WTLTestimony
Subject: Testimony on H.B. No. 951 HD1

Measure: H.B. No. 951 HD1, Relating to Landowner Liability

Hearing Date & Time: March 25, 2009 - 2:45 PM, Conference Rm. 229

To: Honorable Senators Clayton Hee, Chair,

Jill Tokuda, Vice-Chair, and

Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs

From: Deborah L. Chang - kulaiwi@hawaiiantel.net

I respectfully request that you support this bill. I have been an advocate of sensible, reasonable and safe public access for nearly 30 years. I am keenly aware of the many, complex issues involved when opening natural areas to public use. Topping the list of issues is liability. Fear of liability effectively keeps many areas closed to the public. H.B. No. 951 HD1 is a step in the right direction.

Unimproved lands are especially sought after by public access users and native Hawaiians, whether they are hunting or fishing using traditional access routes, or visitors, following directions given in guidebooks to "secret" beaches and waterfalls. It is unfair and unreasonable to hold public and private landowners liable for injuries resulting from naturally occurring hazards on lands that they are not managing for public use. H.B. 951 HD1 provides reasonable liability protection for hazards that are unpredictable and beyond the landowners' control. It rightfully does not protect landowners who are negligent or malicious in perpetuating known hazards on their land.

The minor improvements listed in H.B. 951 HD1 would encourage landowners to maintain safer conditions on their unimproved lands without fear of triggering a higher level of liability. Such basic improvements also serve the best interests of trail users, such as warning and directional signage, locatable trails and fences.

Unfortunately, H.B. 951 HD1's protection applies only to damage, injury or harm to persons or property outside the boundaries of the landowner's land. Similar liability protection is needed if damage, injury or harm occurs within the boundaries of public and private unimproved lands due to natural hazards that are beyond the landowners' control.

Again, H.B. 951 HD1 is a step in the right direction. Please help this bill to be passed.

Mahalo nui for considering my testimony!

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 951, HD 1

March 25, 2009

To: Chairman Clayton Hee and Members of the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in strong opposition to H.B. No. 951, HD 1.

It has long been the law in Hawaii that landowners must exercise reasonable care with regard to both natural and artificial conditions on their own property that they know pose a hazard to persons or property both inside and outside of their land. Section 1 of the bill states that "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." The measure then purports to codify a rule that landowners are immune from any liability for damages caused by a natural condition on their land that injures others or property outside of the land. This is not the law in Hawaii and does not reflect the modern development of the law in other states as well.

A fair and objective analysis of landowner liability to persons outside of the property involving natural conditions was recently published in the Hawaii Bar Journal. A copy is attached. The review of both Hawaii cases and recent cases throughout the nation confirm that the rule in Hawaii and the modern trend throughout the United States is to require landowners to exercise reasonable care to mitigate both natural and artificial hazards that pose unreasonable risks of danger to others on or off of the property.

The article points out that the ancient common law rule of non-liability for natural conditions was developed at a time when land was mostly unsettled and uncultivated. As society

has transitioned from primarily agricultural to urban conditions, the ancient common law rule has proved both out of place and inappropriate. Courts throughout America began to reject the common law rule as early as 1896 with the overwhelming majority of courts in recent years adopting the modern rule that landowners must exercise reasonable care to prevent injury or damage from both natural and artificial conditions on their land to persons on or off of the property. In its overview of Hawaii cases, the article observed:

> Like some other courts, the Hawaii Appellate Courts have addressed a possessor of land's liability to persons outside the premises for harm caused by falling trees. As in decisions from other jurisdictions, the reach of these Hawaii decisions do not appear to be limited to trees and should extend to other natural conditions. Moreover, the Hawaii Supreme Court has rejected traditional common law distinctions with respect to a possessor of land's duties of care owed to persons on the premises for reasons that should also support the rejection of the traditional common law distinctions between harm caused by artificial or natural conditions to persons outside the premises.

The article then reviewed the Hawaii Supreme Court cases of Medeiros, Pickard and Whitesell. The article notes that in the Medeiros cases decided in 1912 "the court held defendant liable even though the deterioration of the tree was the result of natural conditions." The article further noted that the Pickard decision in 1969 specifically stated "the common law has moved towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances." And it finally stated with respect to Whitesell: "although the Whitesell court addressed the issue of landowner liability based primarily on nuisance principles, it nonetheless favorably cited and confirmed the continuing validity of Medeiros, although Medeiros had been grounded on negligence." The article reasonably concludes that these Hawaii decisions taken together indicate that Hawaii has already rejected the ancient common law approach proposed by this bill because "to do otherwise would produce the anomalous result whereby a trespasser would be able to bring an action in negligence that would be denied a neighbor where both were standing

on either side of the possessor's boundary line and were both struck by the same falling rock or other debris."

Recent decisions by the Supreme Courts of other states similarly reject the immunity rule proposed by this bill. The Tennessee Supreme Court stated in its 2005 Hale decision:

> We refuse to recognize a rule that would relieve from liability a landowner who neglects his property. Distinguishing between natural and artificial conditions in an urban setting creates the anomalous situation of imposing liability on a landowner who improves and maintains his property while precluding liability of a neighboring landowner who allows the natural condition of his property to run wild.

As the California Supreme Court stated in its 1981 Sprecher decision, it is not whether an injury happens on or off the land, or whether one is injured by a natural or artificial condition.

> The proper test to be applied to the liability of the possessor of land is whether in the management of his property he has acted as a reasonable person in view of the probability of injury to others. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land and the possessor's degree of control over the risk-creating condition are among the factors to be considered.

This modern rule that a landowner must exercise reasonable care given the likelihood of injury, seriousness of injury, burden of reducing or avoiding the risk, location of the land and degree of control over the hazardous condition is the most reasonable rule that represents the best public policy. For example, if natural erosion uncovers a ten ton boulder in danger of rolling down a hillside into an elementary school, it would seem that all would agree that reasonable steps to eliminate or reduce the danger should be taken. Under the provisions of this bill, however, a landowner who is aware of the danger to the school children below can allow the

boulder to roll down into the school with impunity because this measure has given him complete immunity from any responsibility in the situation.

HAJ has always maintained that proponents of an immunity bill should at least provide the legislature with the data that clearly indicates the number and type of lawsuits that have been filed against public and private landowners of unimproved lands for personal injuries or property damage that have occurred on such unimproved land due to natural conditions, any resulting judgment against the landowner, and the circumstances under which the landowner was found to be negligent. The state already has substantial protection from liability in connection with natural conditions on unimproved lands under Act 82. We have always maintained that the legislature should have all of the facts and data before a major shift in public policy is made. This bill is not in the public interest and would be creating bad public policy.

Thank you for the opportunity to testify on this bill. HAJ respectfully requests that this bill be held in committee.

Hawaii Bar Journal
April, 2005

Feature

*4 LANDOWNER LIABILITY TO PERSONS OUTSIDE THE PREMISES: BEWARE OF FALLING

Lennes N. Omuro [FNa1]

Jennifer M. Young [FNaa1]

In recent years, a series of incidents have raised a heightened awareness across Hawai'i of the risk of rocks, boulders and other debris falling from neighboring property.

Numerous media reports have highlighted and closely documented this risk. [FN1] For example, in 2000, a rockslide caused twenty cubic yards of rock to crash onto Kamchameha Highway near Waimea Bay, mandating a three-month long road closure. [FN2]

In 2001, a twelve-foot boulder landed in the middle of Kalaniana'ole Highway by Queen's Beach. [FN3] In 2002, rockslides along Kalaniana'ole Highway near Makapu'u Beach resulted in road closures; [FN4] a rock fall at the Lalea residential development in Hawai'i Kai damaged two parked vehicles and resulted in the evacuation of two buildings until remedial work could be completed; [FN5] and most tragically, a five-ton boulder crashed into the Nuuanu home of Dara Rei Onishi while she slept, instantly killing her. [FN6]

In 2003, landslides onto Kalaniana'ole Highway near Castle Junction prompted the State to undergo a lengthy project to reshape the eroding hillside. [FN7] 2004 proved to be another eventful year when another boulder tumbled down the Nuuanu hillside and came to rest in the back yard of a home on the same street as the Onishi residence; [FN8] a boulder weighing ten tons rolled down a hillside and settled against a house in Nanakuli prompting the evacuation of residents, [FN9] the Navy announced plans to strap down a sixty-ton boulder in Moanalua Valley; [FN10] and two people were injured on the H-1 Freeway near Makakilo when a tumbling boulder collided with their sports utility vehicle. [FN11]

As recent as March 2005, a boulderemanating from an upper privately-owened property crashed into a palolo Valley Home (http:// starbuketin.com/2005/03/09/news/story10.html).

These incidents have not only raised questions about future development in or near hillside areas, but also issues surrounding who should bear responsibility for addressing the risk of falling rocks and boulders and/or for paying compensation for any resulting damages. This has become and will continue to be a major issue in Hawai'i as the islands continue to age. In fact, Professor Greg Moore of the University of Hawai'i's Department of Geology and Geophysics, in evaluating the risk posed to Hawai'i homeowners by falling rocks, speculated that

anywhere from 10,000 to 20,000 homes on Oahu may be "too close" to a valley wall. [FN12]

There should be little doubt that a possessor of land must exercise reasonable care for persons on its premises. [FN13] The *Sacred Falls* cases serve as a recent dramatic example of a trial court holding a landowner liable for harm to persons caused by falling rocks and debris. [FN14] However, there is a lack of uniformity among the jurisdictions as to whether a possessor of land should be held liable for harm caused to persons outside the premises, particularly when the claims are based on negligence or nuisance and when the harm is caused by a natural condition of the land. The modern trend is towards applying ordinary negligence principles when determining a possessor's liability to others outside the premises. Hawai'i decisions suggest that Hawai'i has essentially adopted or is likely to follow this modern approach.

Overview

As an initial matter, there should be little dispute that a possessor of land may be liable for harm caused to persons outside the premises under theories of *6 strict liability for abnormally dangerous activity, or trespass if there has been an intentional and unlawful invasion of another's property. The grounds for such causes of action are not common, however, and a claimant will more frequently assert causes of action based on negligence or nuisance law.

Under the traditional common law approach, a distinction was drawn between whether the harm caused to others outside of a possessor's land arose from artificial or natural conditions. [FN15] In particular, a possessor's liability to persons outside the premises was determined according to ordinary negligence principles if the harm arose out of non-natural or artificial conditions on the land. [FN16] On the other hand, the possessor of land was not subject to liability if the harm resulted from natural conditions. [FN17] This was true even if the condition was highly dangerous with a strong probability of causing serious harm and the labor or expense necessary to make the condition reasonably safe was slight. [FN18]

While some courts continue to adhere to the traditional common law rule, [FN19] the more recent trend of the law is to reject the common law distinctions between natural and artificial conditions and, instead, apply ordinary negligence principles to determine liability. [FN20] Some courts further distinguish between rural and urban environments and utilize the traditional rule of non-liability for natural conditions in rural settings while following the modern trend of applying ordinary negligence principles in urban settings. [FN21] Other courts ignore the urban and rural distinction, noting it is unjustified in light of the growth of suburbs and traffic in rural areas and/or because the location of the property should be only one of the factors considered in determining the reasonableness of a defendant's conduct. [FN22]

In general, however, it appears the modern trend is for courts to deviate from the traditional common law rule of nonliability for natural conditions and from the distinction between urban and rural classifications for injuries occurring outside the premises, and towards a single duty of reasonable care for all possessors of land. [FN23]

The Traditional Common Law Approach: Artificial vs. Natural Conditions on Land

Under a traditional common law approach, liability to persons outside the premises extended to a possessor of land for harm arising out of artificial conditions on the land. On the other hand, a possessor of land was not liable to persons outside the premises, if the harm derived from a natural condition of the land. The term "natural condition of the land" indicates the land has not been modified by any act of a human being, whether by the possessor, any of the predecessors in possession, or even by a third person dealing with the land with or without the consent of the then possessor of the property. [FN24] In contrast, a non-natural or artificial condition would include any structures erected on the land, any vegetation planted or preserved on the land, or any man-made changes to the property. [FN25] If a non-natural or artificial condition becomes harmful because of the subsequent operation of natural forces, it is still considered a non-natural or artificial condition for the purpose of determining whether a duty of care exists. [FN26]

The justification for this rule of non-liability for natural conditions was largely based on the traditional common law notion that there is no duty or obligation to take affirmative steps for the protection or aid of others. [FN27] The common law distinguished misfeasance, the infliction of harm, from nonfeasance, the failure to prevent harm. Ordinarily, liability for nonfeasance was imposed only where a special relationship between the plaintiff and defendant existed. [FN28]

In addition, the traditional rule of non-liability for natural conditions was developed at a time when land was mostly unsettled and uncultivated. [FN29] It was therefore deemed impractical for the landowner to account for and remedy all *7 recognize a distinction between rural and urban settings when determining a landowner's liability for harm arising out of natural conditions. [FN30] Apparently, a possessor of a premises was not deemed to have such a relationship with his or her neighbors or others who may happen to be near the owner's premises.

The traditional common law rule of non-liability for natural conditions, in effect, provided a complete defense to a claim of negligence. [FN31] This rule essentially immunized a possessor of land from liability to others outside the premises for any harm caused by a natural condition of the land. As noted in the Restatement of Torts, this rule applied "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." [FN32]

The Restatement's Adoption of Common Law Principles

The traditional common law distinction between artificial and natural conditions was adopted by the Restatement of Torts and the Restatement (Second) of Torts. In particular, the Restatement (Second) of Torts, § 364 provides, in part, that "a possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm ...." [FN33] Liability may exist not only for conditions created by the possessor but also for conditions created by a third person with the possessor's consent and even for conditions created by third persons without the possessor's consent if the possessor knew or should have known about the condition and failed to take reasonable steps to make the condition safe. [FN34]

On the other hand, Restatement (Second) of Torts, § 363(1), embodies the traditional common law approach that a possessor of land is not liable for physical harm caused to others outside of the land by a natural condition on the land. An exception to the common law rule *9 under the Restatement arises only where the possessor fails to take reasonable care to prevent an unreasonable risk of harm from the condition of trees in an urban area near a highway. [FN35] In such circumstances, a possessor of land is under a duty to prevent harm from occurring.

Similarly, with respect to a claim of nuisance, the Restatement takes the position that a possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land. [FN36] The exception to this rule under the Restatement is that if the possessor of land knows or has reason to know of the existence of a public nuisance caused by natural conditions near a public highway, then there is a duty to exercise reasonable care for the protection of persons using the highway. [FN37]

The Modern Trend: Eliminating the Distinction Between Harm Caused By Natural and Artificial Conditions on Land

Not surprisingly, there has been dissatisfaction with the traditional common law approach of non-liability to others outside the premises for harm arising out of natural conditions on the land, especially under circumstances where the dangerous condition was known and could have been reasonably addressed. At least one jurisdiction may have begun to deviate from the traditional common law rule as early as 1896. [FN38] More widespread dissatisfaction with the rule began to appear in law review articles and treatises in the 1940s. [FN39] One court found that, during the 1960s and 1970s, at least a dozen states had begun applying ordinary negligence principles when determining a possessor of land's liability for harm caused by natural conditions to persons outside the premises. [FN40]

Moreover, although essentially adopting the traditional common law approach, the Restatement (Second) of Torts itself actually began to reflect the growing trend towards rejecting the traditional rule in favor of a single duty of reasonable care in the maintenance of *10 traditional rule in favor of a single duty of reasonable care in the maintenance of property. In particular, Section 363(2), promulgated in 1963 to 1964, contained an exception to the rule of non-liability that was limited only to trees located near a public highway in urban areas.

By the time Section 840 concerning liability for nuisance was promulgated in 1977, the exception to the rule of non-liability under Section 840 had extended beyond trees to include potential liability for all natural conditions that created unreasonable risks of harm to persons using highways, regardless of whether in an urban or rural setting. The commentary to Section 840 indicates that the change in language reflected in this section from that of Section 363 was warranted by "authorities since that time." [FN41] Further, although the Restatement was not yet ready to take a position on such issues, the commentary acknowledged the emerging trend in the courts towards imposing liability for harm to adjoining landowners, not limited to trees or for the protection of persons using highways. Specifically, the Restatement indicated that "The authority at present, however, is not sufficient to express a position regarding other kinds of public nuisance than that of physical danger to travelers on the highway or private nuisance." [FN42]

The developing case law in the 1960s and 1970s largely arose based on incidents involving injury caused by fallen trees. [FN43] As acknowledged by the Restatement of Torts and courts that have reviewed these cases, however, the principles expressed in these cases were not so limited. [FN44] As remarked by the California Supreme Court,

> The courts are not simply creating an exception to the common law rule of nonliability for damage caused by trees and retaining the rule for other natural conditions of the land. Instead, the courts are moving toward jettisoning the common law rule in its entirety and replacing it with a single duty of reasonable care in the maintenance of property. [FN45]

The Urban vs. Rural Distinction

During this period, some courts recognized a distinction between a possessor's liability for harm to persons outside the premises arising from natural conditions of the land, depending on whether the land was urban or rural property. These courts generally adopted ordinary negligence principles for matters occurring in urban settings but continued to follow the traditional rule of non-liability for harm caused by natural conditions and/or refused to impose a duty of inspection on possessors of rural land. [FN46]

More recently, however, courts have astutely questioned the efficacy of a rural versus urban distinction in light of the growth of suburbs and traffic in rural areas. [FN47] Others indicated that the location of land simply becomes but one of the many factors to be considered when evaluating the reasonableness of a defendant's conduct. [FN48] Interestingly, the commentary to Section 840, Rest. (Second) of Torts also states that "an arbitrary distinction between urban and ***11** "rural" areas are extensively populated." [FN49]

The California Decision of *Sprecher v. Adamson Companies*

In 1981, the Supreme Court of California issued its ruling in *Sprecher v. Adamson Companies*. [FN50] Unlike previous cases, *Sprecher* did not involve falling trees. Rather, the issue in *Sprecher* arose from a substantial landslide triggered by heavy rains. The downhill landowner had built his property within the toe of a landslide that had been evident since the area was developed in the early 1900's. In addition, the landslide was classified as "active" because it exhibited periodic cycles of activity and dormancy. [FN51] The California Supreme Court held that the uphill landowner owed a duty of reasonable care to protect the downhill landowner from harm caused by natural conditions on or of the uphill landowner's property. [FN52]

In reaching its decision, the California Supreme Court noted the appearance of "a general trend toward rejecting the common law distinction between natural and artificial conditions." The court further noted that other "courts are increasingly using ordinary negligence principles to determine a possessor's liability for harm caused by a condition of the land." [FN53] In addition, the *Sprecher* Court reviewed the Restatement (Second) of Torts' provisions and commentary. After remarking that other courts have held a possessor of land liable for harm caused by natural conditions of the land to adjoining landowners, and especially in light of its earlier *Rowland v. Christian* [FN54] decision, it declared: "it is difficult to discern any reason

to restrict the possessor's duty to individuals using highways. To do so would create an unsatisfying anomaly: a possessor of land would have a duty of care toward strangers but not toward his neighbor." [FN55]

In the *Sprecher* decision, the California Supreme Court also recognized that the most frequently invoked reason for the rule of non-liability for natural conditions was that the rule was an embodiment of the traditionally held principle that one should not be obligated to undertake affirmative action to aid or protect others. [FN56] Nevertheless, regardless of what this rule may have once been, the court declared that the duty to exercise due care could indeed arise out of possession of the property alone. [FN57] For example, the court remarked on its prior decision of *Rowland v. Christian* [FN58] and other modern cases that have clearly rejected the common law distinction between the duties of care owed by a possessor of land to different classes of persons on the premises such as trespassers, licensees or invitees, in favor of a single duty to exercise reasonable care grounded on the possession of the premises and the attendant right to control and manage the premises. [FN59]

Finally, the court noted the inherent injustice of a rule that would allow a landowner to escape all liability for serious damage to his neighbors merely by allowing nature take its course. [FN60] The court explained: "A (person's) life or limb ***12** (or property) does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because that person has been injured by a natural, as opposed to an artificial condition." [FN61]

The court in *Sprecher* emphasized that the liability imposed was rooted in negligence principles. As such, the court focused on whether the possessor of land acted as a reasonable person under the totality of the circumstances. Relevant factors to be considered included the likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition. [FN62]

Considerations Under Hawai'i Law

Like some other courts, the Hawai'i appellate courts have addressed a possessor of land's liability to persons outside the premises for harm caused by falling trees. As in decisions from other jurisdictions, the reach of these Hawai'i decisions do not appear to be limited to trees and should extend to other natural conditions. Moreover, the Hawai'i Supreme Court has rejected traditional common law distinctions with respect to a possessor of land's duties of care owed to persons on the premises for reasons that should also support the rejection of the traditional common law distinctions between harm caused by artificial or natural conditions to persons outside the premises.

Medeiros v. Honomu Sugar Company: Negligence

In the early decision of *Medeiros v. Honomu Sugar Company*, the Hawai'i Supreme Court addressed a situation where a defective tree fell from defendant's property and caused serious bodily injury to the plaintiff, who was traveling on a public highway. [FN63] According to plaintiff's contentions, the tree, approximately 22 feet from the highway, was 40 to 50 feet tall

and was ***13** leaning towards the highway. Moreover, the tree was "kind of rotten" and some of its roots were exposed. [FN64] The jury found that there was sufficient evidence of negligence and issued a verdict in favor of plaintiff.

In affirming the verdict, the Hawai'i Supreme Court declared as follows:

> Although the defective and dangerous condition of the tree in question ... was the result of natural causes, still, if such defective and dangerous condition was known, or by the exercise of ordinary care, could have been known by defendant, then it became the duty of the defendant to exercise reasonable care and diligence to prevent the tree from falling and injuring those who might have the occasion to use the public highway; and the defendant failing to perform this duty and as a result of such failure the tree fell and injured the plaintiff, the defendant was chargeable with negligence and thereupon became liable to plaintiff in damages for the injuries so received. [FN65]

In rendering its decision, the Court held defendant liable even though the deterioration of the tree was the result of natural conditions. More fundamentally, the Court also stated that "all the essential elements of negligence are present: (1) the existence of a duty on the part of defendant to protect plaintiff from injury; (2) the failure of the defendant to perform that duty; and (3) injury to the plaintiff from such failure of duty on the part of defendant." [FN66]

Like the rulings of other courts in the tree cases of the 1960s and 1970s that deviated from the traditional common law approach of non-liability for natural conditions, the Hawai'i Supreme Court's decision in *Medeiros* does not appear to be grounded on a special rule concerning trees but, instead, arose out of the application of basic negligence principles. The Hawai'i Supreme Court even compared a landowner's liability for trees harming persons on a highway with the liability of an owner of a building or other structure. The Court stated as follows:

> The duty which the owner of a building or other structure abutting ***14** on a street, or other public highway, owes to the public and the duty of the owner of land on which he permits a tree to remain near the public highway, are the same in principle. The principle thus invoked by the plaintiff is a familiar one and of wide application in the law of negligence. [FN67]

Consideration of Hawai'i's Rejection of Common Law Classifications in Favor of a Single Duty of Reasonable Care as to Persons on the Premises

Subsequent to *Medeiros*, in its 1969 decision of *Pickard v. City and County of Honolulu*, [FN68] the Hawai'i Supreme Court rejected the traditional common law distinctions under which a landowner's duty of care to persons entering the premises was dependent upon the person's legal classification, such as trespasser, licensee or invitee. Finding that distinctions between classes of persons bore no logical relationship to the exercise of reasonable care for the safety of others, the court held that an occupier of land has a duty to use reasonable care for the safety of all persons anticipated to be upon the premises. [FN69] In reaching its decision, the court cited and quoted from the landmark case of *Rowland v. Christian*, [FN70] the same case referenced by the California Supreme Court in *Sprecher, supra*, when it rejected the traditional common law approach of distinguishing between artificial and natural conditions when determining a possessor's liability for harm to persons outside the premises. [FN71] The Hawai'i Supreme Court further explained that:

> the classifications and subclassifications bred by the common law have produced confusion and conflict. ... Through this semantic morass, the common law has moved ... towards imposing on owners and occupiers *a single duty of reasonable care in all the circumstances.* [FN72]

Like the Court in *Sprecher*, it would seem probable that the Hawai'i appellate courts would take the next step, if they have not already done so in *Medeiros, supra*, or in the *Whitesell* decision addressed below, and specifically reject the traditional common law approach of non-liability for harm to persons outside the premises caused by natural conditions. To do otherwise would produce the anomalous result whereby a trespasser would be able to bring an action in negligence that would be denied a neighbor where both were standing on either side of the possessor's boundary line and were both struck by the same falling rock or other debris. [FN73]

Whitesell v. Houlton: A Nuisance Case

Most recently, in *Whitesell v. Houlton*, the Hawai'i Intermediate Court of Appeals examined a possessor of land's duties with respect to an overhanging tree which encroached upon and damaged a neighbor's property. [FN74] The court found that the landowner of the property upon which the tree was located, was under an affirmative duty to prevent his tree from damaging his neighbor's property and was therefore liable for the damages caused. [FN75] In reaching its decision, the Court held, in part:

> That when overhanging branches or protruding roots actually caused, or there is imminent danger of them causing, sensible harm to property other than plant life, in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may require the owner of the tree to pay for the damages and to cut back the endangering branches or roots and, if such is not done within a reasonable time, the damaged or imminently endangered neighbor may cause the cutback to be done at the tree owner's expense. [FN76]

Although the *Whitesell* court addressed the issue of landowner liability based primarily on nuisance principles, it nonetheless favorably cited and confirmed the continuing validity of *Medeiros, supra*, although *Medeiros* had been grounded on negligence. Additionally, the *Whitesell* decision extended beyond the limited exceptions to non-liability under the Restatement by holding that the landowner may be liable to an adjoining landowner not just persons using highways.

Moreover, the principles reflected in *Whitesell* were not dependent upon the traditional common law distinctions between artificial and natural conditions. Rather, *Whitesell* reflected an application of nuisance principles to overhanging trees. As such, nuisance principles should likewise apply to other conditions, including natural conditions such as boulders or rocks, that may cause or create an imminent risk of harm to persons or property outside of the premises.

Conclusion

The Onishi incident in 2002 spurred unsuccessful efforts to enact legislation to "clarify" the duty of landowners to mitigate rock fall risks. [FN77] As can be expected, there are strong

competing interests between uphill and downhill owners. What is fair and reasonable may vary according to circumstance. Therefore, it remains to be seen whether the legislature will intervene or leave the matter for the courts to decide.

Until there is legislation and/or a Hawai'i appellate decision to the contrary, given current legal trends and Hawai'i case law, a possessor of land would be well advised to exercise reasonable care in the maintenance of its property for the safety of others, even though the risk of harm may arise from natural conditions of the land or the persons or property at risk may be outside the premises. This does not mean that the possessor is strictly liable or has a duty to eliminate all risks of rock fall under every circumstance, only to act reasonably.

A system in which a possessor has an obligation to take reasonable care may be preferable to one in which a possessor can safely ignore dangerous risks of serious harm to others and/or, in effect, take some or all of the value of his neighbor's property by reducing the neighbor's rights to use and enjoy his land.

[FNa1]. *Lennes Omuro is a partner at Goodsill Anderson Quinn & Stifel and a member of its litigation section practicing in the areas of premises liability, construction, real estate, insurance, and other general litigation matters.*

[FNaa1]. *Jennifer Young is an associate at Goodsill Anderson Quinn & Stifel practicing in the areas of public utilities, real estate, and land use litigation.*

[FN1]. *See* Mike Gordon and Robbie Dingeman, *Two Hurt When Boulder Hits SUV on Freeway*, Honolulu Advertiser, Dec. 13, 2004 at A1; Rod Antone, *Barreling Boulder Hits Nuuanu Home*, Honolulu Star-Bull., May 11, 2004.

[FN2]. Scott Ishikawa, *North Shore May Undergo Another Detour*, Honolulu Advertiser, July 8, 2000 at A1: Tanya Bricking, *Governor Tries to Speed Up Relief for North Shore*, Honolulu Advertiser, March 10, 2000 at A1.

[FN3]. Will Hoover, *Makapuu Rockfall Cleared*, Honolulu Advertiser, Dec. 30, 2001 at A25.

[FN4]. Gregg K. Kakesako & Craig Gima, Boulder Dash, Honolulu Star-Bull., Nov. 29, 2002, available at: http:// starbulletin.com/2002/11/29/news/story1.html.

[FN5]. Catherine Toth & Curtis Lum, *Rockfall Danger Forces Dozens From Homes*, Honolulu Advertiser, Dec. 7, 2002 at A1.

[FN6]. Leila Fujimori & Gregg Kakesako, *One Dead After Boulder Smashes Nuuanu Home*, Honolulu Star-Bull., Aug. 9, 2002, available at: http:// starbulletin.com/2002/08/09/news/story1.html.

[FN7]. Dingeman, *Boulder Hits SUV, supra* note 1.

[FN8]. Peter Boylan, *Boulder Smashes Into Nuuanu Home*, Honolulu Advertiser, May 11, 2004 at A1.

[FN9]. Dingeman, *Boulder Hits SUV, supra.*

[FN10]. James Gonser, *Navy to Secure Moanalua Boulder*, Oct. 27, 2004 at B1.

[FN11]. Peter Boylan & Mike Gordon, *Boulder on II-1 Causes Grash*, Dec. 14, 2004 at B1.

[FN12]. Mike Gordon, *Tumbling Rocks an Unpredictable Reality in Hawai'i*, Honolulu Advertiser, Aug. 10, 2002 at A2.

[FN13]. *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969).

[FN14]. *See In re: Sacred Falls Cases*, No. 00-1-0001SFC (DDD) (1st Circuit, filed September 24, 2002).

[FN15]. *Compare* RESTATEMENT (SECOND) OF TORTS, § 363 (1965) (precluding a cause of action for injuries occurring outside the land by a natural condition of the land) with RESTATEMENT (SECOND) OF TORTS, § 364 (1965) (recognizing a cause of action for injuries occurring outside a possessor's premises for harm caused outside the land by an artificial condition); *see also Sprecher v. Adamson Companies*, 636 P.2d 1121, 1122 23 (Cal. 1981).

[FN16]. *Id.*; RESTATEMENT (SECOND) OF TORTS, § 364 (1965).

[FN17]. *Sprecher*, 636 P.2d at 1122 23, RESTATEMENT (SECOND) OF TORTS, § 363 (1965).

[FN18]. RESTATEMENT (SECOND) OF TORTS, § 363.1 cmt. a (1965); Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 798 (1943); 62 Am.Jur.2d § 745 (1990).

[FN19]. *See, e.g., Price v. City of Seattle*, 24 P.3d 1098 (Wash. App. 2001). Washington is a jurisdiction that continues to follow traditional common law principles of landowner liability not just with respect to a possessor's liability to persons outside the premises, but also maintains the common law distinctions as to the duties of care that a possessor of land owes to different classes of persons found to be on the premises. *Id.* 636 P.2d at 1102. Unlike Washington, and as discussed herein, Hawai'i has eliminated distinctions between duties owed to trespassers, licensees, and invitees. *See Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969).

[FN20]. *Sprecher*, 636 P.2d at 1124.

[FN21]. *See e.g., Ford v. South Carolina Dept. of Transp.*, 492 S.E.2d 811 (S.C. 1997); *Mahurin v. Lockhart*, 399 N.E.2d 523 (Ill. App. 1979); *Barker v. Brown*, 340 A.2d 566, 569 (Pa. 1975); *see also infra note* 47 and accompanying text.

[FN22]. *Miles v. Christensen*, 724 N.E.2d 643, 646 (Ind. App. 2000); *see also Sprecher*, 636 P.2d at 1125.

[FN23]. *See Barker v. Brown*, 340 A.2d 566, 568 (Pa. 1975): Am. Jur. 2d Premises Liability § 746 (2004); *see also Dudley v. Meadowbrook*, 166 A.2d 743, 743-44 (D.C. App. 1961).

[FN24]. RESTATEMENT (SECOND) OF TORTS, § 363, cmt. a (1965).

[FN25]. *Id.*

[FN26]. *Id.*

[FN27]. Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 773 (1943).

[FN28]. RESTATEMENT (SECOND) OF TORTS, § 314, cmt. c (1965): *Sprecher*, 636 P.2d at 1125-26.

[FN29]. *Mahurin v. Lockhart*, 399 N.E.2d 523, 524 (Ill. App. 1979); 62A Am. Jur. 2d § 745 (1990).

[FN30]. *Mahurin*, 399 N.E.2d at 524; W. Page Keeton, ed., *Prosser & Keeton on Torts* § 57 (5th ed. 1984).

[FN31]. *Sprecher*, 636 P.2d at 1121; see RESTATEMENT (SECOND) OF TORTS, § 363 (1965).

[FN32]. RESTATEMENT (SECOND) OF TORTS, § 363, cmt. a (1965); *see also* Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 772 (1943).

[FN33]. RESTATEMENT (SECOND) OF TORTS, § 364 (1965). Under this rule, landowners may be liable for injuries occurring outside their premises, where they are responsible for creating, maintaining or failing to detect a harmful artificial condition of their land. Even where natural harms caused by artificial conditions or activity are at issue, courts have not besitated to impose liability on private landowners for the resulting harm to their neighbors. *See, e.g., Miller v. Montgomery Investments*, 387 S.E.2d 296, 300 (Va. 1989) (defendant could be liable where landslide was caused by artificial condition upon his property); *Brownsey v. General Printing Ink Corp.*, 510 193 Atl. 824 (N.J. 1937) (landowner who permits ice and sleet to collect upon rook which later slides off and injures another on an adjacent parcel is liable for such injuries); *Fitzpatrick v. Penfield*, 109 A. 653, 655 (Pa. 1920) (since "high winds" were expected three to four times a year, defendant landowner could have reasonably anticipated and provided against the occurrence of such natural even and thus was liable for damages caused when they occurred).

[FN34]. RESTATEMENT (SECOND) OF TORTS, § 364 (1965).

[FN35]. *See supra* § 363 (2).

[FN36]. RESTATEMENT (SECOND) OF TORTS § 840(1) (1979).

[FN37]. *See supra* § § 840(2).

[FN38]. *See Gibson v. Denton* 38 N.Y.S. 554 (4. A.D. 1896).

[FN39]. Dix W. Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. Rev., 772, 773 (1943) ("In recent years, however, there have been signs of discontent with the prevailing

view").

[FN40]. *Sprecher*, 636 P.2d at 1124.

[FN41]. RESTATEMENT (SECOND) OF TORTS, § 840, cmt. c (1979).

[FN42]. *Id.*

[FN43]. *Sprecher*, 636 P.2d at 1124.

[FN44]. RESTATEMENT (SECOND) OF TORTS § 840 cmt. c (1979); *Sprecher*, 636 P.2d at 1124.

[FN45]. *Sprecher*, 636 P.2d at 1124.

[FN46]. *Id.* at 1125; *see, e.g., Hensley v. Montgomery County*, 334 A.2d 542, 545-47 (1975); *Hay v. Norwalk Lodge*, 109 N.E.2d 481, 482 (1951); *Chandler v. Larsen*, 500 N.E.2d 584, 588 (Ill. App. 1986).

[FN47]. *Husovsky v. U.S.*, 590 F.2d 944, 950-51 (C.A.D.C. 1978); *Taylor v. Olsen*, 578 P.2d 779, 782 (Or. 1978); see also 54 A.L.R. 530 § 2(a) (2004); W. Page Keeton, ed., *Prosser & Keeton on Torts* § 57 (5th ed. 1984); Am. Jur. 2d *Premises Liability* § 746 (2004) (recognizing that "the trend for urban areas, where both the danger and its consequences are generally apparent, is to reject the distinction between natural and artificial conditions and the immunity from liability ... and to impose upon the landowner a duty of reasonable care to eliminate the dangers to adjoining property presented by natural conditions).

[FN48]. *Sprecher* at 1124-1125, *citing Taylor*, 578 P.2d at 782.

[FN49]. RESTATEMENT (SECOND) OF TORTS, § 840, cmt. c. (1979); *see also Valinet v. Eskew*, 574 N.E.2d 283 (Ind. 1991).

[FN50]. 636 P.2d 1121 (Cal. 1981).

[FN51]. *Id.* at 1122.

[FN52]. *Id.* at 1128 (reversed lower appellate court ruling affirming summary judgment in favor of uphill landowner and remanded for further proceedings).

[FN53]. *Id.* at 1124.

[FN54]. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

[FN55]. *Id.* at 1125.

[FN56]. *Id.*

[FN57]. *Id.* at 1126.

[FN58]. *Rowland*, 443 P.2d 561.

[FN59]. *Sprecher*, 636 P.2d at 1126.

[FN60]. *Id.* at 1125.

[FN61]. *Id.* at 1128, citing Rowland, 443 P.2d at 561.

[FN62]. *Id.* at 1128-29.

[FN63]. *Medeiros v. Honomu Sugar Company*, 21 Haw. 155 (1912). Although an early case, *Medeiros* should still serve as effective precedent.

[FN64]. *Id.* at 156.

[FN65]. *Id.* at 158-59.

[FN66]. *Id.* at 159.

[FN67]. *Id.* at 159.

[FN68]. *Pickard v. City and County of Honolulu*, 51 Haw. 134, 452 P.2d 445 (1969). Prior to *Pickard*, the law distinguished trespassers, licensees, and invitees in determining a landowner's duty of care. *See Pickard*, 51 Haw. at 136, 452 P.2d at 446 (1969).

[FN69]. *Id.* at 446.

[FN70]. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).

[FN71]. *Pickard*, 51 Haw. at 146, 452 P.2d at 446.

[FN72]. *See id. citing Kermarec v. Compangnie Generale*, 358 U.S. 625, 630-31 (1959) (emphasis added).

[FN73]. Cf. *Sprecher*, 636 P.2d at 1128.

[FN74]. *Whitesell v. Houlton*, 2 Haw. App. 635, 632 P.2d 1077 (1981). This decision was issued shortly before the California Supreme Court's ruling in *Sprecher, supra.*

[FN75]. *Id.* at 366.

[FN76]. *Id.* at 367 368.

[FN77]. *See, e.g.*, H.B. 1261, 22nd Leg. Reg. Sess. (2003); B. 80, 2002 City Council, 11th Sess. (Honolulu 2002): Will Hoover & James Gonser, *Rockfall Prevention Bills Failed*, Honolulu Advertiser, May 19, 2004 at A1; *but* cf. Res. 02-320, City Council, 11th Sess. (Honolulu 2002). In particular, H.B. 1261 was designed to "clarify the duty of the owner of privately held land to ensure that these [rock fall] risks are mitigated to a reasonable extent" and to "impose an actionable duty on private landowners of property, on which there is a potential danger of falling rocks, to inspect and remove those rocks or otherwise mitigate any unreasonable danger to persons or property." H.B. 1261, H.D. 2, 22nd Leg. Reg. Sess. (2003).

END OF DOCUMENT

Testimony of Bert Sakuda
In Opposition to H.B. No. 951, H.D. 1

Chair Clayton Hee and Members of the Senate Committee on Water, Land, Agriculture, and Hawaiian Affairs:

Thank you for the opportunity to testify in Opposition to H.B. No. 951, H.D. 1. We OPPOSE grants of immunity from the ordinary exercise of care and responsibility.

The grant of immunity to landowners is opposed because it is fundamentally unfair and poor public policy to shift the responsibility for a landowner's refusal or failure to exercise reasonable care in the safe ownership of land to the innocent victims of the landowner's negligence. The right to own land carries with it the obligation to manage it safely. The law places this obligation on the landowner for the simple reason that only the landowner has the right, ability and opportunity to discover and mitigate hazardous conditions on its land. Down slope owners or members of the public at large who are endangered by hazardous conditions have no right to enter private property to inspect and discover dangerous conditions on the land. They have no right to take preventive action to eliminate or reduce the hazardous risks. Only the landowner has those rights. That is why only the landowner has those obligations.

The proponents of this measure assert that people can take their own measures to eliminate risks of hazardous conditions. They are wrong. Down slope owners often do not even know that up slope hazards even exist because they have no right or opportunity to inspect for such hazards. At fence or wall at the bottom of a 500 foot hill is not going to stop a two-ton boulder once it has picked up speed and momentum. Drivers on a roadway adjacent to hillsides have no ability to eliminate or reduce rock fall hazards. Children playing at a school, park or yard near a hillside are completely unprotected and at the mercy of irresponsible landowners.

At its essence, the proponents of this bill argue that because it is so rich and owns so much land, it cannot possibly care for all of its land in a safe manner. Therefore it argues that it should be allowed to kill and injure ordinary folks or damage their property even though it is the only one who can legally inspect its land and the only one who can afford to mitigate hazards on its property.

Thank you very much for this opportunity to testify in opposition to H.B. 951, H.D.1.

TESTIMONY
HB 951 HD1
(END)