

February 26, 2009

Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair
Committee on Judiciary and Government Operations

Hearing: Friday,, March 2, 2009
10:30 am; Room 016

Position: Oppose **SB56, SD1** "Relating to Enforcement of the Smoking Prohibition"

The City and County of Honolulu Liquor Commission opposes SB56, SD1 for the following reasons:

Constitutionality:

This bill would provide that the liquor commissions will take action based upon "a **verified complaint** filed against the licensee...", which would prevent the licensee from keeping its license. Thus, there appears to be no due process before a liquor license is stopped from being renewed under these circumstances. For example, a competitor who wants to get rid of another liquor licensee could just file a complaint of smoking and have the license be withheld without a hearing, evidence or a defense. Or in another situation, a disgruntled employee or customer could file a smoking complaint and stop a restaurant from retaining their liquor license.

Many of the licensees have thousands and maybe millions of dollars invested into their businesses and under this legislation their license can be taken away without any due process requirements. Just a verified complaint would form the basis of stopping a renewal. This process would appear to be unconstitutional under either the Hawaii or US Constitution. The taking of a license would appear to require a "contested case" where the "legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS section 91-1 and E&J Operating vs Liquor Commission of Honolulu Liquor Commission, Hawaii Supreme Court 2008.

Expense:

Under SB 56, SD1, the fines are increased, but the money would not go to the Liquor Commission, but it would go to the State of Hawaii District Court. This would **create an unfunded mandate on the Liquor Commission** as it would cost a tremendous amount to enforce with no monies to pay to cover the costs. In the two years, since the passage of the Smoking Bill, the Department of Health

has not done the enforcement required. Thus, it is not a stretch that under this bill, it would be the Liquor Commission investigators, who would be doing the enforcement without any funding provided.

If the Honolulu Liquor Commission were mandated to enforce the smoking prohibition in the 1400 licensee premises the cost would be high. In our experience with giving violations and testifying in District Court for underage drinking, the cases are often continued 3-4 times before our investigators, who appear, can testify. The agency pays them overtime for two hours for each appearance. In addition, if the appearance in court does not leave enough time between their weekly shifts, the agency must pay the investigators overtime for the entire following shift.

Failure for our investigators to appear would allow the case to be dismissed, which will eliminate the deterrent affect of giving out violations. We do not see any funding provisions for this legislation which would have to be significant.

It is for the foregoing reasons that the Honolulu Liquor Commission opposes SB56, SD1.



February 28, 2009

Committee on Judiciary and Government Operations
Senator Brian Taniguchi, Chair
Senator Dwight Takamine, Vice Chair

Hearing:

10:30 A.M., Monday, March 2, 2009
Hawaii State Capitol, Room 016

RE: SB56.SD1, Relating to Enforcement of the Smoking Prohibition

Testimony in Strong Support

Chair Taniguchi, Vice Chair Takamine, and members of the Committee on Judiciary and Government Operations. My name is George Massengale and I am here on behalf of the American Cancer Society, Hawaii Pacific, Inc. Thank you for the opportunity to offer strong testimony on SB56,SD1, which would make compliance with our secondhand smoking law (HRS Chapter 328J), a condition for renewal of a liquor license. It will authorize the county liquor commissions to enforce the law current with the Department of Health.

The American Cancer Society Hawaii Pacific Inc., was founded in 1948, and is a community-based, voluntary health organization dedicated to eliminating cancer as a major health problem by preventing cancer, saving lives, and diminishing suffering from cancer, through research, education, advocacy, and service. **This mission includes advocating for effective tobacco control measures and meaningful enforcement of our no-smoking law.**

As this committee knows, in 2006, the American Cancer Society advocated tirelessly for passage of our secondhand smoking law. Once passed we leverage our resources with State of Hawaii, and the Coalition for a Tobacco-Free Hawaii, to promote a public education campaign on the provisions of the law. Tobacco-Free Hawaii even drafted the first administrative rules to expedite the formation of the administrative regulations needed for enforcement by the Department of Health. Last week before the health and transportation committees and we reported to them **that in 30 months since our smoking law went into effect there are still no regulations or any enforcement plan in place.**

In crafting our smoke-free law, much consideration was given as to what types of businesses would be covered and would there be exemptions. In the end the decision was made to include most all businesses and to keep exemptions to a minimum (such as retail tobacco stores, outdoor areas of employment, film productions, and by request, state correctional facilities. [§328J-7].

The primary consideration was to ensure that there was a level playing field, that all businesses would be impacted equally by the provisions of the law. **Since the law went into effect, a small but steady growing numbers of recalcitrant businesses, mostly bars and nightclubs, have continued to allow smoking in violations of the provisions of Chapter 328J.** A review of gross liquor sales reports for the City and County of Honolulu show that certain bars have had increased liquor sales as a result of their flagrant disregard of our secondhand smoking law.

It is reported that customers who complain about smoking are either refused service or asked to leave, and employees who have complained have been threatened with termination. Both actions are in clear violation of the “Nonretaliation and nonwaiver of rights provisions” of Chapter 328J.

We would point out that other states have promulgated administrative rules within weeks to a few months after passage of their secondhand smoking law. **We strongly believe that 30 months is entirely too long to wait for administrative rules for enforcement by the Department of Health.**

We believe that the provisions of SB56,SD1, that create a nexus to smoking compliance to liquor license renewals is well thought-out and should be an effective method to ensure our bar and nightclub workers are protected from the hazards of secondhand smoke. **Also because liquor license renewal is tied to smoking compliance, we believe that reports of incidents of employee and customer retaliation will also be stopped.**

We would ask that this committee pass SB56,SD1 for third reading by the Senate.

Mahalo for giving me the opportunity to provide testimony here today.

Sincerely,



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Director of Government Relations

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Improving Life

One Breath at a Time

Founded in 1904, the
American Lung Association
includes affiliated associations
throughout the U.S.



**TO: Senate Committee on Judiciary and Government
Operations**

**FOR: Hearing Scheduled for 10:30 am on Monday, March 2,
2009**

**RE: TESTIMONY IN SUPPORT OF SB 56, SD1 RELATING
TO THE ENFORCEMENT OF THE SMOKING
PROHIBITION**

Chairs Taniguchi, Vice Chair Takamine and Committee
Members:

The American Lung Association in Hawaii supports any measure that will enforce the smoking ban in public places. Our mission is to prevent lung disease and promote lung health through research, education and advocacy. We are dedicated to fighting for clean air both indoors and outside. Everyone has a right to breathe clean air no matter where they work, dine or are entertained.

When State legislators enacted the 2006 public places smoking ban, they did so knowing there is no risk-free level of exposure to secondhand smoke. While that law took effect in November 2006, to date, the enforcement rules have yet to be adopted. We are pleased that most nightclubs voluntarily comply with the ban. However a few continue to blatantly ignore the law without any worry of sanction, thus putting at risk, not only the health of their customers, but also that of their employees.

As a society, we strive to improve working conditions and eliminate threats to health and safety. The no-smoking law must be enforced. This measure will do that.

Respectively Submitted,

Jean Evans, MPH, Executive Director
American Lung Association in Hawaii



To: Senator Brian T. Taniguchi, Chair, Judiciary and Government Operations Committee
Senator Dwight Y. Takamine, V. Chair, Judiciary & Government Operations Committee
Members, Senate Judiciary and Government Operations Committee
From: Trisha Y. Nakamura, Policy and Advocacy Director
Date: February 28, 2009
DM: Senate Judiciary and Government Operations Committee; March 2, 2009 at 10:30 p.m.
Re: **Support for SB 56 SD 1, Relating to Enforcement of the Smoking Prohibition**

Thank you for the opportunity to provide comment in support of SB 56 SD 1 which increases penalties for violations of the Smoke-Free Law passed in 2006, makes compliance with HRS Chapter 328J a condition of liquor-license renewal, and provides shared jurisdiction of enforcing HRS Chapter 328J to the Department of Health and the liquor commission.

The Coalition for a Tobacco Free Hawaii (Coalition) is the only independent organization in Hawaii whose sole mission is to reduce tobacco use through education, policy and advocacy. The Coalition provides leadership for the tobacco control community, develops networks, helps coordinate tobacco control programs and builds community awareness. The Coalition, many partner organizations, and the public advocated for the passage of the Smoke-Free Law in 2006.

I. Legislature Intended the Smoke-Free Law to Be Enforced to Protect the Public Health

The Smoke-Free Law passed in 2006 by an overwhelming majority: with 22 ayes in the Senate and 47 in the House. The Legislature noted its purpose was to “protect the public health and welfare by prohibiting smoking in places open to the public and places of employment to ensure a consistent level of basic protections statewide from exposure to secondhand smoke.” (S.B. 3262 S.D. 1 H.D. 1 C.D. 1, 23rd Leg., Reg. Sess. (Haw. 2006)). The Smoke-Free Law continues to be favored by the public—over 85% of Hawaii residents favor the law. In addition, there is no evidence that the Smoke-Free Law has caused adverse economic outcomes to the tourism and hospitality industries. (See Andrew Hyland, Ph.D. et. al., *One Year After the Hawaii Smokefree Law: Tourism and Hospitality Economic Indicators Appear Unaffected*, Jan. 2008).

After two years, the State has not seen its Smoke-Free Law enforced. Most businesses are voluntarily complying. However, some businesses are still choosing to violate the Law and have faced no penalties. The Coalition is concerned that the longer the Smoke-Free Law goes unenforced, the greater the likelihood that other businesses will choose to violate the law. By moving legislation forward that provides jurisdiction to the liquor commission, the Legislature restores an implied promise to the public to ensure partially enclosed and enclosed areas open to the public are free of dangerous second-hand smoke.

II. SB 56 SD 1 Is Clear; Violations of the Smoke-Free Law Will Not Be Tolerated

SB 56 SD 1 enhances the penalties for violations of the Smoke-Free Law. The penalties demonstrate the importance of the public's health. Businesses which have the privilege to sell liquor in our State should honor all the law and not engage in business at the expense of workers and the public's health. This measure will ensure that workers are safe from secondhand smoke and all can go to restaurants and bars without fear of health concerns.

This measure seeks to ensure that the promise the 23rd Legislature made to the public to ensure that all workplaces are safe and healthy. We ask that you pass this measure out of Committee. Thank you for the opportunity to offer comment on this matter.

Testimony on SB56

I submit testimony in opposition to Senate bill 56 that would put Smoking Ban enforcement in the hands of the county liquor commissions.

I am strongly opposed and I am willing to appear.

1/ The Health Department has passed a smoking ban in direct opposition to 60+ years of existing liquor laws. Their ban threatens your license by putting your customers on the streets and sidewalks where litter, noise, fights and other violations are beyond your legal control. Prior laws put your patrons inside your establishment where they were under your legal control. When outside your legal supervision these violations threaten your license.

2/ The Health Department as a State Agency introduced this bill and was empowered to enforce the bill. However despite their wealth of tobacco money they have failed to fund their enforcement and now are asking a city agency to do their job for them.

3/ To date they have not passed any administrative rules to enforce the law upon businesses. They do have the power to enforce against individuals yet there is only one citation in 2+ years of this law. It is clear that they are not interested in stopping smoking as much as they are interested in punishing our industry.

4/ The severity of the punishment is well beyond the infraction. Do we need to close businesses to help the employees? Clearly there is malice here that is not sympathetic to the employees financial health. If an individual smokes they are fined \$75.00. If a business

is fined three times they lose their livelihood for someone else's actions. The business didn't smoke an individual did. Where are the fair expectations of law?

5/ Currently if we call the police on a smoker in the establishment we are calling the police on ourselves. The Health Dept does not differentiate who calls in a violation it remains a violation against the licensee. There is only self-indictment when you enforce the law.

6/ Is there any due process in their proposal? There was none in their ban and none in their proposed administrative rules.

7/ Is there a legal standard here being followed? Why are they asking a Liquor Agency to enforce tobacco laws or public health laws? Is it not their own responsibility?

8/ The health committee has introduced a number of laws to benefit themselves financially at the cost of liquor and tobacco related sales. Why can't they fund themselves out of the proposed increases? They are asking us to fund their pet projects and yet they will not allow the legislature to hear our modest request for exemptions. The Liquor Commissions operate on fees we as licensees pay. The law is that they have to operate within those budgets. Should we be forced to pay for their enforcement?

9/ They have passed the strictest law in the nation without any enforcement. If they can't enforce their law then most likely the law is not rational and they should allow for realistic exemptions for bars.

10/ They have taken the economic incentive out of operating within our industry without our consent or our concerns. They do not consider the economic aspects on our employees, ourselves and the overall economy. They remain single minded to a bigotted purpose. No business can survive catering to their non customers yet this law demands we cater to phantom customers. With no sins there are no sin taxes.

11/ They ignore the fact the majority of our employees and customers smoke. They demand a tyranny of the majority yet that majority is not in the bars.

12/ The Liquor Commissions are currently opposed to the passing of this law.

A bad law need not be forced upon our customers, employees, businesses or tourists. The ban can and perhaps should remain but there should be realistic exemptions and enforcement by the Department that instituted it.

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