

SB 68

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February 26, 2009

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HONORABLE DONNA MERCADO KIM

Chair

Committee On Ways And Means

14th Senatorial District

Room 210, Hawaii State Capitol

415 So. Beretania Street

Honolulu, Hawaii 96813

Re:

SB 68, S.D. 1

Committee On Ways And Means

Public Decision Making: 2/2709

Time: 9:00 a.m.

Room 211

Dear Senator Kim:

I submit this testimony in *opposition* to SB 68, S.D. 1. My concerns with SB 68 S.D. 1 are two fold. First, this measure superfluous because it does not grant the Department of Land & Natural Resources, Division of Boating & Ocean Recreation ("DOBOR") any additional regulatory powers beyond what they already have. Second, it appears the underlying intent of this measure is to mandate DOBOR regulate the number of commercial businesses that operate out of private marinas in a manner that would be unlawful.

By way of background, I have been licensed to practice law in Hawaii since 1985. In that 24 year period, I have specialized in admiralty and maritime matters. I have represented various clients that have started new, as well as, purchased and sold existing commercial boats and businesses that operate out of state owned small boat harbors, Kewalo Basin and private marinas. Through these transactions I have become very familiar with the provisions of Hawaii Revised Statutes Chapter 200 and DOBOR's Administrative Rules.

SB 68 S.D. IS SUPERFLUOUS

SB 68 purports to authorize the Department of Land & Natural Resources ("DLNR") to regulate the commercial use of state waters and marine resources, including companies that operate out of private marinas. This measure, as well as, its companion SB 90, is a complete waste of your time and energy because the DLNR is already authorized and responsible to, "regulate and control recreational and commercial use of . . . the ocean waters and navigable streams of the State", under Hawaii Revised Statute §200-4(5) (Emphasis added). Moreover, because the current law gives DLNR broad jurisdiction to regulate and control the commercial use of all ocean waters of the State, the commercial activities of vessels that operate out of private marinas are already within the scope of the DLNR's authority.

A MECHANISM ALREADY EXISTS FOR INCREASED/IMPROVED MONITORING OF ALL COMMERCIAL ACTIVITY BY DOBOR

If it is the intent of this Legislature to have DLNR restrict the number of commercial operators that use the ocean waters and marine resources on an area by area basis, a mechanism to accomplish that goal is already in place. As noted in DLNR Chair, Laura H. Thielens, written testimony in opposition to SB 90, the DLNR has established ten Ocean Recreation Management Areas ("ORMA") around the State for purposes of protecting marine resources, as well as, reducing conflicts between recreational and commercial users. DLNR has exclusive jurisdiction through the Administrative Rule making process to regulate the type and number of commercial activities that can operate in any one ORMA. Commercial permits for parasailing, jetski, water sledging and high speed boating are specific examples of activities where DLNR, after a thorough environmental impact study and public comment, decided that concerns regarding user conflict, public safety, protection of marine resources and the ecosystem mandated that the number of commercial permits issued be limited on an area by area basis. There is no reason why this process cannot be applied to other types of commercial activities.

ANY ATTEMPT BY DLNR TO REGULATE COMMERCIAL OPERATIONS THAT OCCUR WITHIN A PRIVATE MARINA EXCEEDS DLNR'S JURISDICTION AND WOULD BE UNLAWFUL

If it is the intent of the Legislature to have DLNR exercise control over the operations of private marinas and dictate the number of commercial tenants they can accommodate, such a measure exceeds their authority and would be struck down as unlawful when challenged in a court of law.

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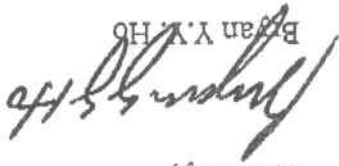
Based on the written/verbal testimony submitted regarding SB 68 at the February 18, 2009 public hearing before the Committees for: 1) Economic Development & Technology; and 2) Water, Land Agriculture & Hawaiian Affairs, it seems clear the intent of this measure is to address concerns regarding user conflicts that are occurring on the West Coast of Oahu between commercial fishers and commercial tour boats. Although the environmental process to study and establish the boundaries of an ORMA, as well as, an ORMA plan for the west side was conducted last year, it was never finalized and/or implemented. Based on testimony provided, coastal residents want the Legislature to regulate commercial activity without establishing a formal ORMA and/or implementing a plan for that ORMA. Clearly, this cannot be done without running afoul of the law.

Perhaps the prudent course of action is to obtain a legal opinion from the Attorney General on the following issues:

1. Can DOBOR regulate commercial activities that occur within private marinas; and
2. Can DOBOR restrict the number of permitted commercial activities that operate in the ocean waters fronting the West Coast of Oahu without first establishing an ORMA for that area and implementing an ORMA plan.

If the answers to both questions is no, then it obviates the need for this Legislature to debate this matter any further. If you have any questions, please do not hesitate to contact me.

Sincerely,



Brian Y. V. Ho

cc: Hon. Shan S. Tsutsui (Vice Chair)
Hon. Suzanne Chun Oakland
Hon. J. Kalani English
Hon. Carol Fukunaga
Hon. Brickwood Galuteria
Hon. Clayton Hee
Hon. Gary L. Hooser
Hon. Michelle Kidani
Hon. Russell S. Kokubun
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