

JAN 26 2009

A BILL FOR AN ACT

RELATING TO LAND FAILURE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The State's natural beauty is preserved for
2 future generations by efforts to protect and preserve state
3 lands in its original condition, and also in significant part,
4 by the cooperation of private landowners who own and maintain
5 large tracks of pristine lands in its natural state. For
6 private landowners, many of these lands are conservation lands
7 and not appropriate for development. Continued exposure to
8 lawsuit or requests to mitigate or compensate for harm or injury
9 caused on unimproved lands may force many landowners to sell or
10 develop these lands to cover liabilities, or sell or turn over
11 lands to the State or other government entities to avoid and
12 shift liability to the general public.

13 Due to the vast amount of unimproved lands, and the state
14 policies to maintain these lands in their natural state,
15 dangerous natural conditions occur throughout the State that
16 could expose landowners to liability. Resources to conduct a
17 thorough assessment of the risk on all lands are not available.

1 Additionally, expansion of urban sprawl and zoning approvals by
2 county agencies have allowed urban and residential development
3 to expand into and adjacent to many areas susceptible to land
4 failure or rockfall hazards. Many of the valley walls adjacent
5 to established and proposed subdivisions in the State are
6 extremely steep and susceptible to land failure. As the State's
7 population grows and the pressure for development increases, the
8 lack of open areas will force development into areas with
9 natural hazards that threaten the safety of future homeowners
10 and the general public.

11 Unbudgeted expenditures to mitigate these types of hazards
12 can eventually cripple the State's operational budget by
13 diverting critical funds, needed to sustain its core functions,
14 to costly emergency mitigation projects. This fact is
15 exacerbated by the difficult downturn in the state and national
16 economy that threatens essential services and jobs. The typical
17 cost for rockfall mitigation projects usually runs in the
18 millions. By example, the current estimated costs for Komo Mai
19 hillside and the Old Puunui Quarry projects are \$2,100,000 and
20 \$1,760,000, respectively. If either case had involved an
21 incident resulting in injury or death, the litigation and

1 judgment costs alone would have far exceeded the mitigation
2 costs and seriously impacted the State's fiscal health.

3 Land failure hazards on private lands pose a unique public
4 safety issue for down slope landowners and the general public.
5 An owner of private property that is found to contain a land
6 failure hazard is likely to take no action in hopes that nothing
7 will happen during the owner's tenure of ownership. It is
8 unclear whether and how such owner can be compelled to address
9 the hazard and ensure the safety of the threatened nearby
10 property owners and the general public under existing laws.
11 Clarifying the authority of government agencies to intervene in
12 such situations and require action by the owner of the property
13 with the land failure hazard, or both, and providing for sharing
14 of the costs among affected property owners, establishes a
15 reasonable solution that will not bankrupt the State while
16 promoting public safety.

17 The legislature believes a more comprehensive and proactive
18 approach to managing risk of harm to the public from land
19 failure hazards is needed to address those concerns. The
20 legislature finds that those threats to public safety can and
21 should be controlled at the time of development or new
22 construction. The legislature also finds that it is in the

1 public's interest to promote the retention and preservation of
2 unimproved lands that enhance the natural beauty of the State by
3 limiting liability for harm from land failure hazards that occur
4 on unimproved lands. The legislature further finds that it is
5 also in the public's interest to allow government agencies to
6 mitigate or require the mitigation of land failure hazards on
7 private lands that are at risk of causing imminent harm or
8 damage to nearby properties or the general public, and to assess
9 the costs for such mitigation to those property owners
10 benefiting directly from such action on a pro rata basis.

11 The purposes of this Act are to:

- 12 (1) Provide a reasonable and affordable means to ensure
13 that future urban expansion and new construction will
14 not add to the ongoing problem of rockfall and
15 landslide hazards in populated areas;
- 16 (2) Alleviate the need for the landowners, and the
17 department of land and natural resources in
18 particular, to exhaust their funds and resources on
19 the task of mitigating risks associated with naturally
20 occurring hazardous conditions, and to allow the
21 department of land and natural resources to focus them

1 on its primary mission of managing state parks,
2 forests, and public lands effectively; and
3 (3) Provide government agencies the authority to mitigate
4 or remediate, or both, or require mitigation or
5 remediation, or both, of land failure hazards on
6 private property, and establish a procedure for
7 assessing the mitigation or remediation costs on the
8 property owners benefiting from such action, on a pro
9 rata basis.

10 SECTION 2. Chapter 46, Hawaii Revised Statutes, is amended
11 by adding a new section to be appropriately designated and to
12 read as follows:

13 **"§46- Development in hazardous areas. (a)**

14 Notwithstanding any law to the contrary, it shall be a condition
15 precedent to approval of any county subdivision, development
16 plan, or building permit, to require a subdivider, developer, or
17 builder of a new residential, commercial, or industrial
18 structure, to:

19 (1) Perform a study to determine the risks of rockfalls or
20 landslides if any portion of the subdivision or
21 development project includes hillsides or cliffs with
22 a slope grade of twenty per cent or greater that poses

1 or may pose a hazard to any to any person or structure
2 on or adjacent to the subdivision or development
3 project site;

4 (2) To perform a risk assessment to determine whether and
5 to what extent conditions on an adjacent property pose
6 a risk of harm to the proposed subdivision,
7 development, future homeowners, or persons in the
8 vicinity thereof, if the adjacent property includes
9 hillsides or cliffs with a slope grade of twenty per
10 cent or greater immediately upslope from the
11 subdivision or development project site;

12 (3) Create hazard buffer zones or implement other
13 appropriate mitigation measures in areas of the
14 subdivision or development site where a rockfall or
15 landslide hazard is determined or is suspected to
16 exist, that are sufficient to protect the health and
17 safety of future homeowners and persons in the
18 vicinity of the property, and provide a written
19 disclosure of those risks to all potential homeowners
20 that will run with the land; and

21 (4) For purposes of this section, any determination of the
22 existence of a hazard or risk of harm from hillsides

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1 or cliffs with a slope grade of twenty per cent or
2 greater shall be performed by a licensed geotechnical
3 professional.

4 (b) For the purposes of this section, "subdivision" means
5 any land that is divided or is proposed to be divided for the
6 purpose of disposition into two or more lots, parcels, units, or
7 interests and also includes any land whether contiguous or not,
8 if two or more lots are offered as part of a common promotional
9 plan of advertising and sale.

10 (c) This section shall apply to the plan of any
11 subdivision or development that has not been approved by the
12 respective counties prior to July 1, 2009."

13 SECTION 3. The Hawaii Revised Statutes is amended by
14 adding to title 10 a chapter to be appropriately designated and
15 to read as follows:

16 "CHAPTER
17 LAND FAILURE HAZARDS MITIGATION; PRIVATE PROPERTY

18 § -1 **Definitions.** For purposes of this chapter:
19 "Government entities" means the State and the several
20 counties;

1 "Land failure" means any movement of land, including a
2 landslide, debris flow, mudslide, creep, subsidence, rock fall,
3 and any other gradual or rapid movement of land;

4 "Owner" or "landowner" means any private entity or person
5 who has any right, title, or interest in or to property;

6 "Private property" means real property owned by persons or
7 entities other than the State, the several counties, or the
8 federal government.

9 **§ -2 Mitigation or remediation action.** Government
10 entities are authorized to undertake action to reduce the
11 potential for land failure from private property that imminently
12 threaten life or property or that otherwise is a public nuisance
13 by providing for the inspection and maintenance of hillsides
14 that present land failure hazards; by requiring private
15 landowners who are not subject to section 663-B to mitigate or
16 remediate land failure hazards on their property; and by
17 mitigating or remediating land failure hazards on private
18 property that constitute an imminent threat to life or that may
19 cause major economic loss or environmental damage; provided
20 that, to the extent any of the foregoing work is a private
21 responsibility, the responsibility may be enforced by the
22 government entity in lieu of the work being done at government

1 expense, and any private entity or person refusing to comply
2 with any order issued by the government entity shall be in
3 violation of this chapter and be liable for a civil penalty not
4 to exceed \$ for each day the violation continues.

5 **§ -3 Cost.** The cost of land failure hazard remediation
6 or mitigation on private property may also be financed by the
7 government entities by the following means:

8 (1) The State through the levying of special assessments
9 against owners of real property affected or
10 potentially affected by the land failure hazard. Real
11 property is affected or potentially affected where the
12 land failure hazard threatens injury to persons,
13 personal property, homes, or other structures that may
14 be located on that real property or threatens to cause
15 major economic loss or environmental damage to that
16 real property. The total amount of the special
17 assessments shall be limited to an amount reasonably
18 anticipated for the remediation or mitigation of the
19 land failure hazard. The owners of each affected or
20 potentially affected real property shall be assessed a
21 pro rata share of the total amount, which pro rata

1 share shall be based on the relative assessed value of
2 each affected or potentially affected real property.

3 (2) The counties through the levying of special taxes
4 pursuant to section 46-80.1.

5 **§ -4 Entry on private property.** In order to carry out
6 the provisions of this chapter, government officials are
7 authorized to enter upon private property as may be necessary in
8 making, at the owner's expense, any investigation, inspection,
9 maintenance, mitigation, or remediation authorized by this
10 chapter. Such entry shall not constitute a cause of action in
11 favor of the owner of the land.

12 **§ -5 No duty to act.** The government entities have no
13 duty to mitigate land failure hazards existing on private
14 property or to act under this chapter. No action or failure to
15 act under this chapter shall be construed to create any
16 liability in the government entities, or their respective
17 agencies, officers or employees, for the recovery of damages or
18 for any other relief. The State reserves sovereign immunity for
19 any action or failure to act under this chapter and nothing in
20 this chapter shall be construed to constitute a waiver of any
21 immunity of the State.

1 **§ -6 Property owner's continuing obligations.** Nothing
2 in this chapter and no order, action, or advice of the
3 government entities or their respective agencies or any
4 representative thereof shall be construed to relieve an owner of
5 property with a land failure hazard of the legal duties,
6 obligations, or liabilities incident to the ownership of the
7 property. The government entities shall have no ownership
8 obligations, responsibilities, or liability for any action taken
9 by said government entities under this chapter.

10 **§ -7 Rules.** The department of land and natural
11 resources may adopt rules pursuant to chapter 91 for purposes of
12 implementing this chapter."

13 SECTION 4. Chapter 663, Hawaii Revised Statutes, is
14 amended by adding a new part to be appropriately designated and
15 to read as follows:

16 **"PART . UNIMPROVED LAND LIABILITY**

17 **§663-A Definitions.** As used in this part:

18 "Naturally occurring land failure" means any movement of
19 land, including a landslide, debris flow, mudslide, creep,
20 subsidence, rock fall, and any other gradual or rapid movement
21 of land, that is not caused by alterations to, or improvements
22 constructed upon, the land.

1 "Unimproved land" means any land upon which there is no
2 improvement, construction of any structure, building, facility,
3 or alteration of the land by grading, dredging, or mining that
4 would cause a permanent change in the land area on which it
5 occurs and that would change the basic natural condition that
6 exists on the land.

7 **§663-B Land failure on unimproved land caused by natural**
8 **condition; liability.** A landowner shall not be liable for any
9 damage, injury, or harm to persons or property outside the
10 boundaries of the landowner's land caused by any naturally
11 occurring land failure originating on unimproved land.

12 **§663-C Natural condition.** For purposes of this part, the
13 natural condition of land exists notwithstanding minor
14 improvements, such as the installation or maintenance of utility
15 poles, fences, and signage; or minor alterations undertaken for
16 the preservation or prudent management of the unimproved land,
17 such as the installation or maintenance of trails or pathways or
18 maintenance activities, such as forest plantings and weed,
19 brush, rock, boulder, or tree removal."

20 SECTION 5. This Act does not affect rights and duties that
21 matured, penalties that were incurred, and proceedings that were
22 begun, before its effective date.

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1 SECTION 6. In codifying the new sections added by section
2 4 of this Act, the revisor of statutes shall substitute
3 appropriate section numbers for the letters used in designating
4 the new sections in this Act.

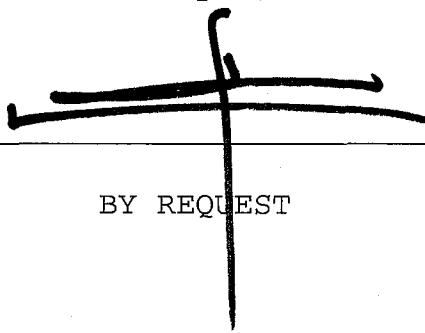
5 SECTION 7. New statutory material is underscored.

6 SECTION 8. This Act shall take effect on July 1, 2009.

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INTRODUCED BY: _____

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9

BY REQUEST

Report Title:

Land Failure; Liability; Private Property Mitigation

Description:

Requires precautionary actions imposed by the counties for development in potentially hazardous areas; removes the liability of landowners regarding natural conditions on their land that cause damage outside the land; and gives government agencies the authority to mitigate or require mitigation of land failure hazards on private property.

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO LAND FAILURE.

PURPOSE: To:

- (1) Require the counties to adopt ordinances that require a subdivider or developer of property or a builder of a new structure, that has or is subject to hazardous rockfall or landslide conditions, to conduct a slope study or risk assessment, or both create appropriate buffer zones or implement other appropriate mitigation measures, and to provide notice of the risk to future homeowners and persons in the vicinity of the property;
- (2) To create conditional protection from liability for private and public landowners when a land failure event as a result of natural conditions on unimproved lands causes damage, injury, or harm to persons or property on adjacent or nearby properties; and
- (3) To provide government agencies the authority to mitigate or require mitigation of land failure hazards on private property and provide for the mitigation or remediation costs to be assessed on the affected property owners on a pro rata basis.

MEANS: Add a new section to chapter 46, Hawaii Revised Statutes (HRS); add a new chapter to title 10, HRS, and add a new part to chapter 663, HRS.

JUSTIFICATION: The State's natural beauty is preserved for future generations by the Department's efforts to protect and preserve state lands in its original condition, and also in

significant part, by the cooperation of private landowners who own and maintain large tracks of pristine lands in their natural state. For private landowners, many of these lands are conservation lands and not appropriate for development. Continued exposure to lawsuit or requests to mitigate or compensate for harm or injury caused on unimproved lands 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.

In recent years, highly publicized incidents occurring at Sacred Falls, Nuuanu (Onishi), Makaha, Palolo, and Niu have created a heightened awareness of the risks of land failure events to life, limb, and property. Many of those incidents have resulted in substantial cost to the landowner in the form of judgments and mitigation expenses. The Department, other state and county agencies, and private landowners are increasingly being called upon to mitigate additional reported hazards occurring in natural conditions on their unimproved lands.

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. Resources to conduct a thorough assessment of the risk on all lands are not available.

Additionally, expansion of 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. Many of the valley walls adjacent to established and proposed subdivisions in the State are extremely steep and

susceptible to land failure. As the State's population grows and the pressure for development increases, the lack of open areas will force development into areas with natural hazards that threaten the safety of future homeowners and the general public.

Those threats to public safety can and should be controlled at the time of development or new construction. The Department is advocating a more proactive approach to managing risk of harm to the public from natural rockfall and landslide hazards.

Most of the scientific community is in agreement that the State's geologic conditions from volcanic origins combined with the abundance of rainfall ensures continued and increasing occurrence of land failure events throughout the State as our mountains and slopes naturally erode. Many of the valley walls adjacent to established subdivisions in the State are extremely steep and susceptible to land failure. Additionally, each island has its own particular problems and issues associated with its unique geologic characteristics. For example, the Island of Hawaii has a greater frequency of earthquakes that can trigger rockfall events.

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.

For the Department, unbudgeted expenditures to mitigate these types of hazards will

eventually cripple the Department's operational budget by diverting critical funds, needed to sustain its management responsibilities, to costly emergency mitigation projects. This fact is exacerbated by the difficult downturn in the state and national economy that threatens essential services and jobs. 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.

Land failure hazards on private lands pose a unique public safety issue for down slope landowners and the general public. An owner of private property that is found to contain a land failure hazard is likely to take no action in hopes that nothing will happen during the owner's tenure of ownership. It is unclear whether and how such owner can be compelled to address the hazard and ensure the safety of the threatened nearby property owners and the general public under existing laws. Clarifying the authority of government agencies to intervene in such situations or require action by the owner of the property with the land failure hazard, and providing for sharing of the costs among affected property owners, establishes a reasonable solution that will not bankrupt the State while promoting public safety.

This bill would:

- (1) Provide a reasonable and affordable means to ensure that future urban expansion and new construction will not add to the ongoing problem of rockfall and landslide hazards in populated areas;

- (2) Alleviate the need for the landowners, and the Department in particular, to exhaust their limited funds and resources on the task of mitigating risks associated with naturally occurring hazardous conditions, and allow the Department to focus them on its primary mission of managing state parks, forests, and public lands effectively; and
- (3) Provide government agencies the authority to mitigate or remediate, or both, or require mitigation or remediation, or both, of land failure hazards on private property, and establish a procedure for assessing the mitigation or remediation costs on the property owners benefiting from such action, on a pro rata basis.

Impact on the public: Would protect homeowners and occupants in future subdivisions and other development projects from rockfall and landslide hazards that may be in the vicinity of such projects. Would reduce the circumstances under which private landowners would, through no fault of their own, be placed in the position of being liable for and having to expend large sums of money to mitigate rockfall and landslide hazards on their lands that subject innocent persons on adjacent properties to harm, injury or worse as a result of imprudent, inappropriate or inadequate planning. Under most circumstances, the public will not be able to make claims or bring suit against a property owner for naturally occurring rockfall and other land failure events. This bill would protect private property owners from liability for land failure on private unimproved conservation lands. This bill would also allow government agencies to address land failure hazards on private lands and pass the cost

of such actions on to affected landowners who benefit from such action.

Impact on the department and other agencies:
Similarly with private landowners, would reduce the circumstances under which the Department and other state and county agencies may be liable for or would have to expend resources to mitigate rockfall and landslide hazards associated with public lands that happen to be situated adjacent to new developments. This bill would also protect the Department and other state and county agencies from liability for land failure on public lands as a result of natural conditions. This bill would alleviate the need for government agencies to exhaust their funds and resources on the task of mitigating risks associated with naturally occurring hazardous conditions, and focus them on their respective primary core missions. Elimination of such unanticipated cost items that can constitute a significant percentage of an agency's overall budget would greatly enhance the State's ability to plan its budget in a fiscally sound manner. This bill also provides government agencies the authority to address land failure hazards on private lands without depleting limited state resources to do so.

GENERAL FUND:

None.

OTHER FUNDS:

None.

PPBS PROGRAM

DESIGNATION:

LNR 101; LNR 402; LNR 809.

OTHER AFFECTED

AGENCIES:

Department of the Attorney General,
Department of the Accounting and General
Services, Department of Transportation,
Department of Hawaiian Home Lands, Office of
Hawaiian Affairs, counties.

EFFECTIVE DATE:

July 1, 2009.