



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

ON THE FOLLOWING MEASURE:

S.B. NO. 1088, S.D. 1, RELATING TO PUBLIC ACCESS.

LATE

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Friday, February 27, 2009 TIME: 9:30 AM

LOCATION: State Capitol, Room 016

TESTIFIER(S): WRITTEN TESTIMONY ONLY
(For more information, call Deputy Attorney General
Bill Wynhoff at 587-2992.)

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General opposes this bill.

The bill provides that any "person aggrieved" by a violation of section 115-9, Hawaii Revised Statutes, has the right to bring a civil action for injunctive relief and the right to recover attorneys' fees and costs.

Chapter 115, Hawaii Revised Statutes, was originally enacted in 1974. It directed counties to purchase land for public access to the shoreline, the sea, and inland recreational areas under certain circumstances and confirmed the public's right of transit along the shorelines.

In 2004, the chapter was amended to make obstructing access a misdemeanor punishable by a fine.

We are concerned that the proposed private right of action is overly broad and vague. There is no standard for when a "physical, visual, or other impediment" in fact "prevents" a person from traversing a right of way, as opposed to merely making it more difficult to traverse. The term "public right of way" is defined to include roads, paths, and passages "established" by "dedication . . . customary use, or open and continuous public use." The question of whether such a right has come into existence is extremely complex. See

for example, section 520-7, Hawaii Revised Statutes, which provides: "No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes."

The bill may actually end up decreasing access because it subjects persons voluntarily providing access to an increased threat of suit. In this respect, the bill conflicts with chapter 520, Hawaii Revised Statutes, which limits liability of landowners who allow others to use their property for recreational use.

It is especially troublesome that any person "bringing" such an action is entitled to an award of attorneys' fees and costs. As worded the bill does not even require the person to prevail. Experience teaches that the possibility of receiving fees and costs is a powerful inducement to litigation. This inducement will doubtless be increased by the absence of a requirement to prevail and the absence of any provision allowing a successful defendant to recover his or her fees and costs.

And finally, we are concerned that the bill might be interpreted to authorize lawsuits against the State or its officials and employees. "Person" is defined in the bill to "mean[] a natural person or a legal entity." At a minimum, if the bill advances, this definition should be amended as follows:

"Person" means a natural person or a legal entity but does not include the State or any state agency or office and does not include any officer, official, employee, or agent of the state acting in that capacity.

We respectfully request that the Committee hold this bill.



Sierra Club Hawai'i Chapter

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LATE

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

February 27, 2009, 9:30 A.M.

(Testimony is 2 pages long)

TESTIMONY IN SUPPORT OF SB 1088 WITH SUGGESTED AMENDMENTS

The Sierra Club, Hawai'i Chapter, with 5500 dues paying members statewide, supports SB 1088, ensuring access to beaches and public areas is protected whenever intentional activities impinge on that access.

Hawai'i offers some of the most stunning hiking trails and beaches in the world, attracting residents and visitors alike for their beauty and challenge. Access to Hawaii's coast and mountain areas for recreational, cultural, or subsistence uses is a core value that residents have respected for generations. While we often take for granted our ability to enjoy and hike on our public land, some individuals try to assert ownership over the public areas by installing gates, intimidating signs, or intentionally growing vegetation into the public domain. Locking the public out of publicly owned lands threatens our essential rights as citizens.

Senate Bill 1088 would strengthen our existing access tradition by ensuring enforcement of our public right of way. Citizen suits have a long-standing tradition in environmental law. They give communities sorely needed tools necessary to commence enforcement when agencies lack resources or are unresponsive. Senate Bill 1088 is cleverly worded to ensure that needless litigation does not occur. It provides for notice to the violator and an opportunity to cure before litigation commences. The mere threat of litigation would help ensure safe access along the coastline and to public inland areas and prevent abuses of Hawaii's access laws.

Recognizing no public testimony will be allowed, we would like to briefly address the testimony submitted earlier by the Department of the Attorney General. We sincerely doubt this bill would limit public access by way of the recreational use provisions laid out in Haw. Rev. Stat. Chapter 520. To clarify this matter, however, we suggest amending the definition of "public right-of-way" to state:

"Public right-of-way" means any road, path, or passageway established by dedication, condemnation, customary use, or open and continuous public use but specifically excluding any privately owned land made available to the public by way of Chapter 520."

Further, to address the concerns regarding prevailing party status, we suggest amending section (a) to state:

Any person bringing such an action, if prevailing, shall also be entitled to recover the person's costs together with reasonable attorneys' fees.

By ensuring that communities have the right to enforce public access, SB 1088 helps protect Hawaii's proud public access tradition. Please move this measure forward.

Thank you for the opportunity to testify.

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 27, 2009 12:00 AM
To: JGO Testimony
Cc: vicky1211@hotmail.com
Subject: Testimony for SB1088 on 2/27/2009 9:30:00 AM

LATE

Testimony for JGO 2/27/2009 9:30:00 AM SB1088

Conference room: 016
Testifier position: support
Testifier will be present: No
Submitted by: Vicky
Organization: Individual
Address:
Phone:
E-mail: vicky1211@hotmail.com
Submitted on: 2/26/2009

Comments:

I support this bill because this is my island home & I support islander values.

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 27, 2009 12:40 AM
To: JGO Testimony
Cc: annmarie@hawaii.rr.com
Subject: Testimony for SB1088 on 2/27/2009 9:30:00 AM

LATE

Testimony for JGO 2/27/2009 9:30:00 AM SB1088

Conference room: 016
Testifier position: support
Testifier will be present: No
Submitted by: Ann Marie Kirk
Organization: Individual
Address: PO Box 25342 Honolulu, Hawaii 96825
Phone: 808-371-3072
E-mail: annmarie@hawaii.rr.com
Submitted on: 2/27/2009

Comments:
Senate JGO Committee

SB 1088 Relating to Public Access

Feb. 27, 2009 9am

Aloha,

My name is Ann Marie Kirk. I am writing in Strong Support of SB 1088 which amends definition of obstruction for access to public property which creates a private right of action for a person to enforce the prohibition of obstruction.

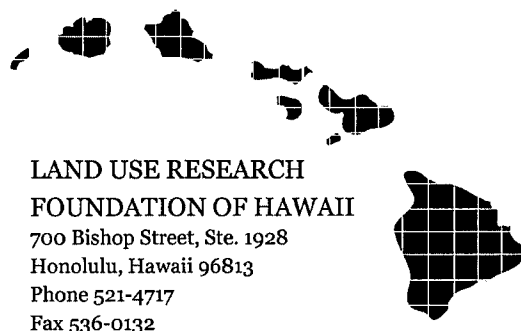
Obstruction to access to public property impacts ocean and hiking enthusiasts statewide. SB 1088 allows the public to become involved in the process to make sure public access ways are open for all people of Hawai'i.

I respectfully ask for your support of SB 1088.

Mahalo,
Ann Marie Kirk

PO Box 25342
Honolulu, HI 96825

808-371-3072



February 27, 2009

**Senate Committee on Judiciary and Government Operations
Hearing Date: February 27, 2009, at 9:30 a.m in CR 016**

**Testimony in Opposition to SB 1088: Relating to Public Access
(New definition of “obstruction” and private right of action)**

Honorable Chair Brian T. Taniguchi, Vice-Chair Dwight Y. Takamine,
and Members of the Judiciary and Government Operations Committee:

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF’s missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawai’i’s significant natural and cultural resources and public health and safety.

While LURF acknowledges and supports legal public access to areas that are managed by the state or counties for various recreational activities, or such areas that provide for traditional and cultural pursuits, LURF must respectfully **oppose SB 1088, SD1**, which amends the definition of “obstruction” for access to public property; and creates a private right of action for a person to enforce the prohibition of obstruction. All over the world, people are trying to avoid litigation and are trying to work things out together -- this bill will cause unnecessary litigation and costs for private parties and the government. **Instead of more litigation, we would support the establishment of a “working group” or “task force” to identify areas across the State where public access has been obstructed and to recommend solutions which would be legal and acceptable to all parties.**

LURF’s Position. LURF understands the situations and issues which gave rise to this legislation, however, we have the following serious concerns and objections to the current form of this bill, which include, but are not limited to, the following:

- **The bill is unnecessary, as the public already has the legal right to access the shoreline and other areas, and obstructing such access is already a misdemeanor crime.** As has been explained by the State

Department of the Attorney General, Chapter 115, Hawaii Revised Statutes, was originally enacted in 1974. It directed counties to purchase land for public access to the shoreline, the sea, and inland recreational areas under certain circumstances and confirmed the public's right of transit along the shorelines. In 2004, the chapter was amended to make obstructing access a misdemeanor crime punishable by a fine.

- **The bill is expected to result in a dramatic increase in frivolous or misguided litigation demanding access to areas which should not be accessible based on public safety or other reasons.** We share the concerns of the Department of Land and Natural Resources, who are concerned with any change in the law that may create the potential for a dramatic increase in frivolous or misguided civil actions related to unmaintained features that may not qualify legally as a "public transit area" or "public transit corridor" and that due to their condition may create public safety issues. We take this warning from DLNR very seriously, as DLNR would have the most experience in fielding inquiries, complaints and legal actions regarding public access. The expected litigation will also have a detrimental impact on the delivery of government services and operations, as the lawsuits will likely involve DLNR employees and possibly other county officials
- **The proposed private right of action is overly broad and vague and may not be legally enforceable.** The bill provides that any "person aggrieved" by a violation of section 115-9, Hawaii Revised Statutes, has the right to bring a civil action for injunctive relief and the right to recover attorneys' fees and costs. The Attorney General has expressed the following concerns: "There is no standard for when a 'physical, visual, or other impediment' in fact 'prevents' a person from traversing a right of way, as opposed to merely making it more difficult to traverse." Based on the vagueness and lack of clarity of the terms used in this bill, the resulting litigation will not be resolved easily, but probably will be very prolonged, expensive and may result in appeals.
- **There will be legal problems, because the bill expands and creates a new legal definition which expands the of "public right of way," which may cause an unconstitutional "taking" of private property.** In the proposed bill, the term "public right of way" is defined to include roads, paths, and passages "established" by "dedication, customary use, or open and continuous public use." As an example, the Attorney General has expressed their concern with the language in the bill, referring to section 520-7, Hawaii Revised Statutes, which provides: "No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes." Thus, the Attorney General has taken the position that with respect to the definition of "public right of way" in this bill, "the question of whether such a right has come into existence is extremely complex."
- **This bill may actually result in landowners withdrawing voluntary public access to their lands, because the bill would expose them to increased threats of litigation (based on the new definition of "public rights of way") .** The Attorney General has also observed that the bill may end up decreasing public access, because it subjects landowners who voluntarily provide access to increased threats of lawsuits by those who may try to claim a

new public right of way was created based on “customary use, or open and continuous public use.”

- **The bill is inconsistent with existing state law, which “encourages” landowners to provide public access by limiting the liability of landowners who provide access to their properties for recreational use.** The Attorney General has observed that with respect to the issue of landowner liability, the bill conflicts with chapter 520, Hawaii Revised Statutes, which limits liability of landowners who allow others to use their property for recreational use. Instead of subjecting landowners to lawsuits and liability and legal costs, we should be encouraging land owners to provide access to and along their lands by limiting their liability and providing other incentives!
- **The bill will spawn increased litigation because it provides for fees and costs to those who file lawsuits, regardless of whether they prevail or not.** We share the Attorney Generals concern regarding this issue:

“ It is especially troublesome that any person "bringing" such an action is entitled to an award of attorneys' fees and costs. As worded the bill does not even require the person to prevail. Experience teaches that the possibility of receiving fees and costs is a powerful inducement to litigation. This inducement will doubtless be increased by the absence of a requirement to prevail and the absence of any provision allowing a successful defendant to recover his or her fees and costs.”
- **Giving a “working group” a chance is much better than facilitating lawsuits.** Instead of encouraging litigation based on vague and complex legal definitions, we would support the establishment of a “working group” or “task force” to identify areas across the State where public access has been obstructed and to recommend solutions which would be legal and acceptable to all parties. LURF and its members would be willing to participate in this effort.

Based on the above, we respectfully request that **SB 1088, SD1 be held** in the Senate Committee on Judiciary and Government Operations.

Thank you for the opportunity to express our **opposition to SB 1088, Sd1.**