



LAND USE RESEARCH
FOUNDATION OF HAWAII

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February 21, 2012

Representative Robert N. Herkes, Chair
Representative Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection and Commerce

Opposition to HB 518, Relating to Access to Real Property (Requires seller to disclose in writing to buyer the existence of any legal or traditional access that burdens the residential or agricultural real property.)

Wednesday, February 22, 2012, 2:00 p.m., in CR 325

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 Hawaii's significant natural and cultural resources and public health and safety.

LURF strongly opposes HB 518, HD1.

HB 518, HD1. This bill requires a seller to disclose in writing to a buyer the existence, if any, of legal or traditional public access through residential or agricultural real property being sold by the general public that has been established through "continuous, open, actual, and hostile use for a period of not less than twenty years."

The proposed requirement to disclose "*continuous, open, actual and hostile use for a period of not less than twenty years*" actually restates the facts and legal requirements to prove *adverse possession* and *prescriptive access easements* in Hawaii. Under Hawaii law, and those facts and legal requirements must **be proven in court by the hostile users who must bring quiet title lawsuit against the property owner to prove their prescriptive access easement rights.**

LURF's Position. LURF opposes this measure, based on, among other things, the following:

1. **HB 518 lacks a "purpose clause," thus; there is no purpose or reason to justify the proposed state-wide law.** If there is no stated purpose and no stated reason for this bill, it should be held.
2. **This bill is duplicative and unnecessary for the sale of residential real property, as Hawaii Revised Statutes ("HRS) §508D-1 and §508D-4 already address the disclosure of a "material fact" such as legal access.** HRS already requires that the seller of residential property must prepare or cause

to be prepared, a written disclosure statement which would fully and accurately disclose all material facts (including legal access rights) relating to the residential real property being offered for sale that are within the knowledge or control of the seller; can be observed from visible, accessible areas; or are required to be disclosed under sections 508D-4.5 and 508D-15

§508D-1 Definitions. As used in this chapter, unless the context requires otherwise:

"Disclosure statement" means a written statement prepared by the seller, or at the seller's direction, that purports to fully and accurately disclose all material facts relating to the residential real property being offered for sale that:

- (1) Are within the knowledge or control of the seller;
- (2) Can be observed from visible, accessible areas; or
- (3) Are required to be disclosed under sections ... 508D-15...

"Material fact" means any fact, defect, or condition, past or present that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale. The disclosure statement shall not be construed as a substitute for any expert inspection, professional advice, or warranty that the buyer may wish to obtain.

3. **This bill is duplicative and unnecessary, because under HRS, the seller, or seller's agent has the legal duty and responsibility to prepare the disclosure statement in "good faith" and "due care."**

§508D-9 Good faith and due care in preparing the disclosure statement. (a) A seller or the seller's agent shall prepare the disclosure statement in good faith and with due care. A buyer shall have no cause of action against a seller or seller's agent for, arising out of, or relating to the providing of a disclosure statement when the disclosure statement is prepared in good faith and with due care. For purposes of this section, "**in good faith and with due care**" includes honesty in fact in the investigation, research, and preparation of the disclosure statement and may include information on the following:

- (1) Facts based on only the seller's personal knowledge;
- (2) Facts provided to the seller by governmental agencies and departments;
- (3) Existing reports prepared for the seller by third-party consultants, including without limitation a:
 - (A) Licensed engineer;
 - (B) Land surveyor;...

4. **This bill is duplicative and unnecessary, because under HRS, the seller's agent has the legal duty and responsibility to disclose to the buyer any material facts (such as legal access rights) which are inconsistent with or contradictory to the disclosure statement or the inspection report provided by the seller.**

§508D-7 Seller's agent's duties and responsibilities for disclosure.

...
(c) If the seller's agent is or becomes aware of any material facts inconsistent with or contradictory to the disclosure statement or the inspection report of a third party provided by the seller, the seller's agent shall disclose these facts to the seller, the buyer, and the buyer's agent. Nothing in this chapter precludes all other obligations of the seller's or the buyer's agent under Hawaii law.

5. This bill is **duplicative and unnecessary, because the HRS already provides for legal remedies for failure to disclose a material fact such as legal access rights.**

§508D-6 Later discovered inaccurate information. Prior to closing the real estate purchase contract, a buyer who receives a disclosure statement that fails to disclose a material fact or contains an inaccurate assertion that directly, substantially, and adversely affects the value of the residential real property, and who was not aware of the foregoing failure or inaccuracy, may elect in writing to rescind the real estate purchase contract within fifteen calendar days of the earlier to occur of:

- (1) The discovery of the failure or inaccuracy; or
- (2) The receipt of an amended disclosure statement correcting the failure or inaccuracy, in the manner provided by section 508D-5(b) or (c).

The buyer's right to rescind the real estate purchase contract under this section shall not apply if the sale of the residential real property has been recorded; provided that the buyer may pursue all additional remedies provided by law.

...

§508D-13 Later material facts. Information in a disclosure statement that has not been disclosed or becomes inaccurate regarding a material fact as a result of an act, agreement, or occurrence (or otherwise becomes known to seller) after the statement is provided to the buyer does not violate this chapter. However, if such information directly, substantially, and adversely affects the value of the residential real property, the seller shall provide an amended disclosure statement to the buyer disclosing the material fact within ten calendar days after the seller's discovery of such information if the seller discovers such information prior to the recorded sale of the residential real property, and in any event, no later than twelve noon of the last business day prior to the recorded sale of the real property. The buyer shall have fifteen calendar days to examine the amended disclosure statement and, if the buyer was not already aware of such information, to rescind the real estate purchase contract in accordance with section 508D-5(b) or (c). The buyer's right to rescind the real estate purchase contract under this section shall not apply if the sale of the residential real property has been recorded; provided that the buyer may pursue all additional remedies provided by law.

...

§508D-16 Remedies; voidable contracts. (a) A buyer may elect to complete the purchase of residential real property even if the seller fails to comply with the requirements of this chapter. After recordation of the sale of residential real property, a buyer shall have no right under this chapter to rescind the real estate purchase contract despite the seller's failure to comply with the requirements of this chapter.

(b) When the buyer is provided a disclosure statement prepared and delivered in accordance with this chapter and the buyer decides to rescind the real estate

purchase contract, the buyer shall not be entitled to any damages but shall be entitled to the immediate return of all deposits.

(c) In addition to the rights of rescission granted to the buyer under this chapter, when the seller negligently fails to provide the disclosure statement required by this chapter, the seller shall be liable to the buyer for the amount of the actual damages, if any, suffered as a result of the seller's negligence.

(d) In addition to the remedies allowed under subsection (b) or (c), a court may also award the prevailing party attorney's fees, court costs, and administrative fees.

6. **This bill is unnecessary, because the buyer can order their own title search, which will disclose all legal access rights and easements.** As part of the due diligence process prior to the closing of the sale, the buyer has the option of ordering a title search, which will confirm all legal access rights.
7. **This bill is the wrong vehicle to attempt to secure traditional public access rights - the proper legal process for securing a legal prescriptive access easement is for the hostile users to bring a quiet title lawsuit against the property owner.** The requirements to prove a *prescriptive access easement* under Hawaii law are the same for proving *adverse possession*. Hostile users and claimants must prove that their use of the land over which the access easement is claimed has been adverse, continuous, and uninterrupted for the statutory prescriptive period of 20 years.

For the reasons stated above, LURF is in **strong opposition to HB 518, HD1**, and respectfully urges the this measure be **held** by this Committee.

Thank you for the opportunity to present testimony regarding this matter.

Testimony for HB518 on 2/22/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Wednesday, February 22, 2012 2:01 AM

To: CPCtestimony

Cc: kathyh@kathyhancock.com

Testimony for CPC 2/22/2012 2:00:00 PM HB518

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Kathleen Hancock

Organization: Individual

E-mail: kathyh@kathyhancock.com

Submitted on: 2/22/2012

Comments:

I support this measure. It seems to me this benefits both the buyer and those who use public or traditional access.

From: Elizabeth Kahikili Logsdon
Post Office Box 171
Honomu, Hawaii 96728

To:

COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

Rep. Robert N. Herkes, Chair

Rep. Ryan I. Yamane, Vice Chair

Committee Members

Regarding
House Bill 518

Being heard on
February 22, 2012 at 2 P.M.

Aloha Chair Herkes, Vice Chair Yamane and Committee Members,

I am writing in support of HB518. This is a bill about communication. The intention of this bill is to provide information for Real Estate buyers and to help them make an **informed** decision on their property purchase. If the property has known traditional or common access, that information will now be disclosed and then the buyer can choose to purchase or not purchase a certain parcel. Currently this information is not specifically required and lack of said information can create ill will in our communities among new land owners and the community, most especially with large agricultural lands. It is really very simple.
I urge your support and passage of HB518.

Mahalo for your consideration,
Elizabeth Kahikili Logsdon
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February 22, 2012

The Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 518, H.D 1, Relating to Access to Real Property

HEARING: Wednesday, February 22, 2012, at 2:00 p.m.

Aloha Chair Herkes, Vice-Chair Yamane, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR supports H.B. 518, H.D. 1, which requires a seller to disclose in writing to a buyer the existence, if any, of legal or traditional public access that burdens the residential or agricultural real property being sold.

Pursuant to HRS Chapter 508D, a seller of residential real property is obligated to fully and accurately disclose in writing to a buyer all "material facts" concerning the property. Material facts are defined under HRS 508D-1 as "any fact, defect, or condition, past or present, that would be expected to measurably affect the value to a reasonable person of the residential real property being offered for sale." HAR believes that the proposal in H.B. 518 to require disclosure of known public access ways is consistent with the existing requirement to disclose all material facts, as part of the mandatory seller disclosures.

Mahalo for the opportunity to testify.

