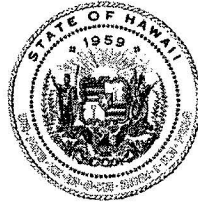


NEIL ABERCROMBIE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the House Committee on
WATER, LAND & OCEAN RESOURCES**

**Friday, March 18, 2011
8:30 AM
State Capitol, Conference Room 325**

**In consideration of
SENATE BILL 1481, SENATE DRAFT 1
RELATING TO PUBLIC ACCESS**

Senate Bill 1481, Senate Draft 1 would amend the offense of obstruction for access to public property and creates a private right of action for persons to enforce the prohibition of obstruction. The Department of Land and Natural Resources (Department) recognizes and supports authorized public access to areas that are managed for various recreational activities and that provide traditional and cultural pursuits, and the need to further public access opportunities.

However, the Department has concerns with a 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 corridor" and that due to their condition may create public safety issues.

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING

FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

S.B. NO. 1481, S.D. 1, RELATING TO PUBLIC ACCESS.

BEFORE THE:

HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

DATE: Friday, March 18, 2011 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
William J. Wynhoff, Deputy Attorney General

Chair Chang and Members of the Committee:

The Department of the Attorney General opposes this bill.

The bill provides on page 2, lines 7-12, 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. The "prevailing party" is entitled to an award of 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. The nature of the "injunctive relief" that may be sought is not specified, nor is a standard provided as to whether such relief should be entered. There is no standard for when a "physical, visual, or other impediment," as provided in section 3 of the bill on page 3, lines 13-14, 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 in section 3 of the bill on page 5, lines 1-3, to include roads, paths, and passageways "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.

It is particularly troubling that the bill authorizes lawsuits against the State and its officials and employees. The State itself might or might not have sovereign immunity - the bill unfortunately complicates that issue. Certainly state officials, however, are "persons" who can be sued under this bill. Coupled with the vague definition of public right of way, the bill might be construed to allow lawsuits that would overturn public policy decisions. For just one example, the trail to Sacred Falls has been closed since the Mothers' Day tragedy in 1999. Arguably, the trail to Sacred Falls is a "public right of way" to an "inland recreational area." State officials might therefore be intentionally preventing the public from traversing the trail. A court taking the bill literally might order "injunctive relief" to re-open the trail.

At a minimum, if the bill advances, the definition of "person" in section 115-9(e), Hawaii Revised Statutes, on page 4, line 18, 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.

Even with this change, 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.

We respectfully request that the Committee to hold this bill.



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March 16, 2011

The Honorable Jerry Chang, Chair
House Committee on Water, Land, and Ocean Resources
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: S.B. 1481, S.D.1, Relating to Public Access

HEARING: Friday, March 18, 2011, at 8:30 a.m.

Aloha Chair Chang, Vice Chair Har 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 **opposes Section 2 of S.B. 1481, S.D.1**, which creates a private right of action for an aggrieved party to enforce the prohibition of obstruction.

HAR believes in the public's access to beaches and the shoreline. However, HAR is concerned that the measure allows a private right of action for any person aggrieved by an obstruction of access to public property under HRS 115-9, which is a misdemeanor. HAR believes that allowing for litigation should be a last resort, and supports the Land Use Research Foundation's proposal to allow interested parties to form a Working Group to find a reasonable and amicable solution to the problem this measure attempts to address.

Moreover, if the Committee is inclined to pass this measure, HAR would respectfully request that the definition of public right-of-way remove the term "customary use, or open and continuous public use." As noted by the Department of the Attorney General, the measure may potentially subject landowners, who voluntarily provide access, to increased threats of lawsuits and additional liability.

Mahalo for the opportunity to testify.

