SB 1009

Report Title:
RELATING TO TORT LIABILITY

Description:
Repeals the sunset date and makes permanent the law shielding county lifeguards from liability

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013

ON THE FOLLOWING MEASURE:
S.B. NO. 1009, RELATING TO TORT LIABILITY.

BEFORE THE:

SENATE COMMITTEES ON PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY AFFAIRS AND ON JUDICIARY AND LABOR

DATE: Monday, February 11, 2013 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chairs Espero and Hee and Members of the Committee:

The Department of the Attorney General strongly supports this measure.

The purpose of this bill is to make permanent the liability protections for lifeguards, and the counties and the State providing lifeguard services on the beach or in the ocean. The exception from liability does not apply for gross negligence or wanton acts or omissions of the lifeguard. At present, the liability protections provided in Act 170, Session Laws of Hawaii (SLH) 2002, will sunset on June 30, 2014.

This limited liability protection was necessary because some counties would not provide lifeguard services at state beach parks, due to fear of potential liability that might arise from the public's use and enjoyment of the beach and ocean. Thus, Act 170 remedied this problem by protecting the state and counties, under certain circumstances, from liability, thereby allowing them to provide lifeguard services with less fear of liability.

Under Act 81, SLH 2007, the Legislature found that Act 170 created a climate in which lifeguard services could be provided without fear of liability, and was therefore a life-saving measure that should be extended.

Under Act 152, SLH 2007, the Legislature found that the limitations on state and county liability have proven to be beneficial to the state and county governments, as well as the public. The liability protections of Act 170, Act 82, SLH 2003 (recreational activities on public lands), and Act 190, SLH 1996 (public beach parks), as amended, have reduced the exposure of the state and county governments to substantial damages and, as a result, have allowed the state and

county governments to keep recreational areas and public beach parks with potentially dangerous natural conditions open to the public. The Legislature further found that state and county compliance with the statutorily required public warning of dangerous conditions at recreational areas and public beach parks have contributed to an improvement in public safety in these areas. This justified making the current liability exemptions that state and county governments enjoy under Act 82, Act 190, and Act 170 permanent, or extending their protections.

Act 152 also established a task force to examine the effectiveness of, collect data, and provide information to the Legislature on, Acts 170, 190, and 82. The report submitted by the task force to the 2009 Legislature found with near unanimity that Act 170 was effective and promotes and increases public safety. The task force, again, with near unanimity recommended that Act 170 be made permanent. The lone dissenter was the representative of Consumer Lawyers of Hawaii (now known as Hawaii Association for Justice), who believed that lifeguards had not been on the beaches, specifically on Kauai, long enough to determine the efficacy of Act 170. Lifeguards have been in place on Kauai since 2008.

Following the enactment of Act 170, there have been hundreds of lifeguard rescues every year on every state beach park on Oahu, Maui, Kauai and the island of Hawaii, rescues that would not have occurred if Act 170 had not been in effect and lifeguards had not been assigned to those beach parks.

This is a life-saving measure that deserves to be made permanent. We therefore respectfully request that the Committee pass this bill.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

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

ESTHER KIA'AINA
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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the Senate Committees on
PUBLIC SAFETY, INTERGOVERNMENTAL AND MILITARY AFFAIRS
and
JUDICIARY AND LABOR

Monday, February 11, 2013
10:00 AM
State Capitol, Conference Room 016

In consideration of
SENATE BILL 1009
RELATING TO TORT LIABILITY

Senate Bill 1009 proposes to make permanent, laws that provide the state and county governments and county lifeguards exception from liability while carrying out their duties and responsibilities. **The Department of Land and Natural Resources (Department) strongly supports this Administrative bill.**

Senate Bill 1009 amends Act 170, Session Laws of Hawaii (SLH) 2002 (Act 170), as amended by Act 152, SLH 2007, as amended by Act 81, SLH 2009, by repealing the June 30, 2014 sunset date. Act 170 provides liability immunity for counties and county lifeguards while providing rescue, resuscitative or other lifeguard services. The State does not have lifeguards and contracts with the counties for lifeguard services at its State Parks. Liability concerns had prevented some counties from participating. Act 170 cleared up these concerns and allowed the State to contract with all counties for lifeguard services at State Park beaches.

The benefit of having lifeguards cover selected State Parks beaches has been punctuated by an incident at Ke'e Beach, Kauai. On the morning of February 9, 2012, shortly after starting the hike to Hanakapi'ai, a Department employee suffered cardiac arrest and collapsed with no discernable heartbeat or respiration. Kauai County Ocean Safety lifeguards were able to revive him using Cardiopulmonary resuscitation (CPR), and their automated external defibrillator (AED) and breathing bag. He was flown to Honolulu for surgery and has made a recovery and is back at work. This helps point out that, although the focus of the lifeguards' attention is necessarily on ocean safety, they are first responders saving lives on land as well.

For the reasons stated in this testimony, the Department strongly supports Senate Bill 1009 in its objective to continue the partnership of the state and counties to enhance safety of public park users while promoting a greater understanding, respect, and enjoyment of the otherwise inviting ocean that we are blessed with. The sunset provisions in Act 170 need to be removed.

NEIL ABERCROMBIE
GOVERNOR

DWIGHT TAKAMINE
DIRECTOR

AUDREY HIDANO
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
830 PUNCHBOWL STREET, ROOM 321
HONOLULU, HAWAII 96813
www.hawaii.gov/labor
Phone: (808) 586-8842 / Fax: (808) 586-9099
Email: dlir.director@hawaii.gov

February 8, 2013

The Honorable Will Espero, Chair
Committee on Public Safety, Intergovernmental, and Military Affairs
The State Senate
State Capitol, Room 231
Honolulu, Hawaii 96813

The Honorable Clayton Hee, Chair
Committee on Judiciary and Labor
The State Senate
State Capitol, Room 407
Honolulu, Hawaii 96813

Dear Chairs Espero and Hee:

Subject: S.B. 1009 Relating to Liability

I am Robert Westerman, Vice Chair of the State Fire Council (SFC) and Fire Chief of the Kauai Fire Department (KFD). The SFC and the KFD support S.B. 1009, which proposes to delete the sunset provision for the liability exception for county lifeguards and damages caused by dangerous natural conditions when certain warning signs are posted.

Passage of S.B. 1009 would make our beaches accessible and safer by allowing counties to continue posting lifeguards at state beach parks without the threat of costly litigation for conditions or events that are outside the county's control. Act 170 protects lifeguards from liability when they provide rescue, resuscitative, or other lifeguard services. We support removal of the sunset date to ensure benefits of the act can continue.

The benefits of the act were documented in the findings of the Report of the Task Force Established by Act 152 (Task Force Report), which was submitted during the 2011 Legislative Session. The task force concluded that various programs developed under Acts 82, 170, and 190 have been effective in increasing public safety. The procedures

contained therein have been and continue to be implemented by the state. Where funding has been appropriated, counties have stationed lifeguards at certain state beach parks.

The report further discusses the benefits of posting signage to the public and the lives saved as a result of posting county lifeguards at state beach parks. The state and counties adopted and installed a uniform signage design that complies with the requirements of Act 82. Based upon its review of various county programs for the implementation of Acts 82 and 170, the task force recommended that the sunset dates of Acts 82 and 170 be repealed.

The SFC and the KFD urge your committee's support on the passage of S.B. 1009.

Should you have any questions, please contact SFC Administrator Socrates Bratakos at 723-7151 or sbratakos@honolulu.gov.

Sincerely,

Socrates Bratakos

for ROBERT WESTERMAN
Vice Chair

RW/LR

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 SOUTH KING STREET, ROOM 110 * HONOLULU, HAWAII 96813
PHONE: (808) 768-5193 * FAX: (808) 768-5105 * INTERNET: www.honolulu.gov

KIRK CALDWELL
MAYOR

DIANE T. KAWAUCHI
ACTING CORPORATION COUNSEL

February 8, 2013

The Honorable Will Espero, Chair
and Members of the Committee on Public Safety,
Intergovernmental and Military Affairs
The Honorable Clayton Hee, Chair
and Members of the Committee on Judiciary and Labor
State Senate
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Espero, Chair Hee, and Committee Members:

Subject: Senate Bill 1009, Relating to Tort Liability

The City and County of Honolulu strongly supports S.B. 1009 which repeals the sunset date of Act 170, Session Laws of Hawaii ("SLH") 2002.

Act 170, which has been in effect for the past ten years, limits the liability exposure of the government when providing lifeguards at our public beaches. Act 170 gives the counties limited liability protection needed in order for the counties to place county lifeguards at State-owned beaches. Act 170 specifically excludes from this liability protection, any gross negligence or wanton acts or omissions of the lifeguard when providing lifeguard services.

In 2007, a Task Force was established by Act 152, SLH 2007, to advise the Legislature concerning the effectiveness of, collect sufficient data relating to, and provide to the Legislature information on Act 190, SLH 1996, as amended; Act 170, SLH 2002; and Act 82, SLH 2003. All three Acts were adopted to strike a balance between protecting the safety of residents and visitors at public beach parks and providing government with protection from liability arising from dangerous natural conditions in the ocean and public recreational areas. Act 190, codified as Hawaii Revised Statutes § 663-1.56, became permanent law in 2007.

In its report to the 2009 Legislature, attached hereto, the Task Force, with the exception of the Consumer Lawyers of Hawaii ("CLH"), concluded that the program developed under Act 170, as being administered, was effective, and promoted and increased public safety. The Task Force acknowledged that it was undisputed that a guarded beach was safer than an unguarded beach. In addition, Act 170 has been estimated to have saved the State approximately $1,000,000 in liability insurance costs over the course of the first four contract periods since Act 170 became effective.

Representatives of the Hawaii Association for Justice fka CLH, may argue that the sunset provision should not be repealed to allow for further evaluation of Act 170 after sufficient experience has been obtained. However, in 2007, the House Committee on Water, Land, Ocean Resources and Hawaiian Affairs acknowledged that collection of such data would be difficult and possibly inaccurate and accordingly, deleted language in a bill which sought to amend Act 170 to require the establishment of a task force to evaluate the effectiveness of Acts 170, 82 and 190. The City has repeatedly testified in the past that the "effectiveness" of the statutes is not measurable without asking every single beach user whether the posted sign or the presence of a lifeguard at the beach park affected their behavior. Any reduction in the number of lawsuits, claims or deaths, may be unrelated to the effectiveness of the legislation. Rather the reduction could be the result of government's other efforts to educate the public through recreational safety education and public awareness programs.

Thus, the City and County of Honolulu supports passage of S.B. 1009 in its present form without any additional amendments. Passage of S.B. 1009 will give the State and the counties the liability protection, certainty and assurances needed to keep beach parks open for public use and would make beaches more accessible and safer by allowing the counties to place lifeguards at State-owned beaches without the threat of costly litigation for conditions or events that are outside the counties' control. Placing county lifeguards at State-owned beaches will help reduce the number of deaths and injuries at these beaches. Repealing the sunset provision would further encourage counties to expand recreational safety education and public awareness programs, rather than expending time and monies on defending costly litigation.

For these reasons, we respectfully request your support in passing S.B. 1009.

Thank you for the opportunity to provide our comments on this bill.

Very truly yours,

Diane T. Kawauchi

DIANE T. KAWAUCHI
Acting Corporation Counsel

DTK:ey

Enclosure

13-00846/270048

State of Hawaii

Department of the Attorney General

Report of the Task Force Established by Act 152, Session Laws of Hawaii 2007

Submitted to
The Twenty-Fifth State Legislature
Regular Session of 2009

311086_1.DOC

This report has been prepared for submission to the Twenty-Fifth Legislature, Regular Session of 2009, pursuant to Act 152, Session Laws of Hawaii (SLH) 2007, twenty days prior to the convening of the 2009 regular session.

I. BACKGROUND

Under Act 152 the Legislature found that that the limitations on state and county liability have proven to be beneficial to the state and county governments, as well as the public. The liability protections have reduced the exposure of the state and county governments to substantial damages and, as a result, have allowed the state and county governments to keep recreational areas and public beach parks with potentially dangerous natural conditions open to the public. The Legislature also found that state and county compliance with the statutorily required public warning of dangerous natural conditions at recreational areas and public beach parks has contributed to an improvement in public safety in these areas, which justifies making the current liability exemptions for state and county governments relating to recreational areas and public beach parks and actions of county lifeguards permanent or extending their protections.

Accordingly:

Act 152, SLH 2007, amended Act 82, SLH 2003, by extending its mandate through June 30, 2010.

Act 152, SLH 2007, amended Act 170, SLH 2002, by extending its mandate through June 30, 2010.

Act 152, SLH 2007, amended Act 190, SLH 1996, as amended by Act 101, SLH 1999, as amended by Act 170, SLH 2002, by making Act 190 permanent.

II. ACT 152 TASK FORCE CREATION

The Act 152 Task Force was convened after participants were solicited via their respective county mayors and formally appointed pursuant to Act 152. Other Task Force members were seated because of their knowledge and expertise in the subject areas covered by Acts 82, 170, and 190.

The Task Force members are:

(1) Caron M. Inagaki (Task Force Chairperson), Deputy Attorney General, as designee of the Attorney General;

(2) Jay Furfaro, designee of the President of the Hawaii State Association of Counties;

(3) Ralph Goto, Director, Ocean Safety & Lifeguard Services Division, Department of Emergency Services, designee of the

Mayor of the City and County of Honolulu;

(4) Tamara Horcajo, designee of the Mayor of the County of Maui (Act 82);

(5) Marian Feenstra, designee of the Mayor of the County of Maui (Acts 170/190)

(6) Clint Coloma, designee of the Mayor of the County of Hawaii;

(7) Kalani Vierra, designee of the Mayor of the County of Kauai (Acts 170/190)

(8) Lani Nakazawa, designee of the Mayor of the County of Kauai (Act 82)

(9) Robert S. Toyofuku, designee of Executive Director of the Consumer Lawyers of Hawaii

Also participating in the Task Force were:

Dan S. Quinn, Department of Land and Natural Resources (Acts 82/170/190)

Curt Cottrell, Department of Land and Natural Resources (Act 82)

William V. Brilhante, Deputy Corporation Counsel, County of Hawaii

Randolph R. Slaton, Deputy Attorney General (Acts 170/190)

Dawn Spurlin, Deputy Corporation Counsel, City and County of Honolulu

Jeffrey Ueoka, Deputy Corporation Counsel, County of Maui

Mary Kielty, County of Maui

III. SUMMARY OF TASK FORCE ACTIVITIES

The purpose of the Task Force is to advise the Legislature of the effectiveness of, collect sufficient data relating to, and provide to the Legislature information on Act 82, SLH 2003; Act 170, SLH 2002; and Act 190, SLH 1996, as amended. In this regard, the Act required the State and the counties to:

(1) Collect data on and examine the effectiveness of providing lifeguards conditional liability protection for lifeguard services at

state beach parks, except for gross negligence and wanton acts or omissions;

(2) Collect data on and examine the effectiveness and adequacy of warning signs at public beach parks in increasing public safety, reducing ocean-related accidents, and protecting the State and the counties from unlimited liability with regard to activities in the ocean and at public beaches; and

(3) Collect data on and examine the effectiveness and adequacy of warning signs at public recreational lands in increasing public safety, and protecting the State and the counties from unlimited liability arising out of recreational activities on public lands.

As the Task Force was not funded for any services, the members relied on available, reliable sources of data and information in an effort to review what steps already have been undertaken to implement the Acts under study; to gauge whether the steps seem to have been successful or undertaken in an appropriate process to provide greater safety for the public; and to obtain the opinions of the members of the Task Force with specific expertise about what additional steps, if any, could or should be undertaken in the future subject to the approval of and funding by the Legislature.

Specific steps undertaken in implementing Acts 82, 170, and 190 are contained in the reports that have been submitted to the Legislature in regard to each of those acts. In regard to Act 152, the Task Force made the following determinations.

A. Act 82

The members reviewed sources of data and their interpretation regarding the effectiveness and adequacy of warning signs at public recreational lands in increasing public safety, and protecting the State and the counties from unlimited liability arising out of recreational activities on public lands. Act 82 provides for a system of warning signs to increase public safety, in turn, protecting the State and the counties from unlimited liability arising out of recreational activities on public lands, in particular, trails. The general consensus was that the warning signs aid the recreational user in exercising caution, and that a reasonable recreational user will inquire further about conditions of the trails if not certain about the conditions or the user's own familiarity with the trails or skills that might be involved in using the trails. As the Legislature is aware, the design of various signs and their placement have been the ongoing responsibility of another task force, the Risk Assessment Working Group (RAWG), to which reference is made for specifics of the program.

Using the current American National Standards Institute (ANSI) guidelines, RAWG designed safety signs to address the following priority natural hazards: flash floods, falling rocks, hazardous cliffs, submerged hazards as well as ancillary uniform management signs (end of trail, end of road, area closed). In 2004, public input was solicited through statewide public informational meetings. Specific aspects related to sign design were revised as a result of comments received from the public.

That same year, as mandated by Act 82, SLH 2003, the Department of Land and Natural Resources (DLNR) completed the first draft of the proposed chapter 13-8 of the Hawaii Administrative Rules (HAR) for the Design and Placement of Warning Signs on Improved Public Lands.

In February of 2005, the Board of Land and Natural Resources (Board) approved the draft chapter 13-8, HAR, and the release of the draft document for public hearings. In May 2005, Governor Lingle approved the proposed chapter 13-8 for public hearing. A public hearing was conducted on August 23, 2005. Oral and written comments were received from the public and minor revisions were proposed. No substantive changes were requested.

On November 18, 2005, the Board approved the staff's revision based upon public hearing comments and recommended approval of the proposed chapter 13-8, HAR, to the Governor. On January 6, 2006, the Department of the Attorney General approved the draft chapter 13-8 as to form. On January 23, 2006, the Governor approved the proposed chapter 13-8, HAR, and the finalized rule was filed on February 4, 2006. There is now a consistent process for natural hazard evaluation and appurtenant sign designs. The administrative rules have eliminated the ambiguity about the design and placement of warning signs and state and county governments have institutionalized this process.

In 2007, the Board approved placement of signs at Manoa Falls Trail on Oahu, Kealakekua State Historical Park on the island of Hawaii, Makena Beach State Park on Maui, and at Diamond Head and Kuilei Cliffs County Beach Parks on Oahu.

In 2008, the Board approved warning signs for the Kauai County Bicycle Path and a variety of Division and Forestry Wildlife and Na Ala Hele Trails on the islands of Kauai (22), Maui (18) and Hawaii (11), for a total of 51 signs. Also in 2008, the Board approved various locations at Kalalau Beach and Opaekaa Falls on Kauai and Diamond Head, Pali Lookout, and Sacred Falls on Oahu.

A prime example of the efficacy of, and the necessity for, Act 82 is the wildfire that burned approximately 2,300 acres of public forest within Kula and Kahikinui Forest Reserves on Maui in 2007. This fire event resulted in scores of hazard trees having to be removed from along the access roads and trails, but thousand of mature trees, although damaged, were still left standing. This posed a potential hazard for any users who deviated from the access roads and trails. This hazardous situation would potentially require many years of constant mitigation for a vast area and a countless and unknown number of damaged trees. Both Kula and Kahikinui Forest Reserves contain Na Ala Hele trails, while Polipoli State Park lies completely within the boundaries of Kula Forest Reserve. To deal with this potential hazard, pursuant to Act 82, new warning signs were proposed, intended to warn of dangerous natural conditions related to hazard trees to members of the public who use these roads and trails to access these areas, and for public hunters who retrieve game from the interiors of the forest reserves. Following the solicitation of public comment, on May 23, 2008, the Board approved the design and placement of 23 new site specific hazard tree signs in the Kula and Kahikinui Forest Reserves. Without Act 82, the State would be faced with a long-term immitigable hazard with no viable means to protect the safety of public users within the Reserves.

The processes established by RAWG to create and place warning signs to warn of potential hazards has had an effect beyond just the previously identified natural hazards (flash floods, falling rocks, hazardous cliffs, submerged hazards). Earlier this year, the Department of Health (DOH) sought RAWG's assistance in creating a warning sign based on design guidelines developed by RAWG to revise the DOH's existing Leptospirosis signs. Leptospirosis is a clear bacteriological threat that can cause gastrointestinal problems, fever, and, in some severe cases, death. The existing warning signs contained a long narrative in English that would be ineffective for any non-English speakers. Following the Act 82 guidelines, a sign was designed with pictographs warning of the exposure and the potential consequences of exposure. Thus, without Act 82, this threat to the public's health and safety would not be effectively disseminated and understood by the maximum number of people.

The members of this Task Force considered that the program, as being administered, is effective and promotes and increases public safety. Additional steps that could be undertaken include further education efforts, both for residents as well as visitors, similar to that outlined in Senate Concurrent Resolution No. 166, offered on March 13, 2008, requesting the assistance of the Hawaii Tourism Authority and the Department of Health in providing safety information to visitors regarding potential hazards on hiking trails and other recreational areas. The counties, Kauai in particular, are looking for ways to address the problem with guidebooks, not sanctioned by the State, that may not contain sufficient information that fully or adequately warns tourists, or recreational users unfamiliar with the area, of existing dangers.

B. Act 170

The members reviewed sources of data and their interpretation regarding the effectiveness of providing conditional liability protection for lifeguard services at state beach parks while providing rescue, resuscitative, or other lifeguard services. As the Legislature is aware, the function of Act 170 has been the ongoing responsibility of another task force, to which reference is made for specifics of the program.

The primary data that the members reviewed for studies of drownings in Hawaii were prepared by Daniel J. Galanis, Ph.D., the state epidemiologist with the Department of Health, Injury and Prevention Control Program. Methods of estimating attendance at guarded beaches include estimated attendance from lifeguards (a method limited due to the fact that not all beaches are guarded, though new technology now provides the capacity for Oahu to undertake counts), and population figures. Lifeguards on Oahu, for example, maintain extensive logs for their stations, including data for attendance, contacts with the public, preventive actions, first aid, rescues, and drownings. These data could provide a valuable source for further study pending funding. There were some 700 drownings in Hawaii from 1993 through 2004, almost equally divided among residents and visitors, except for the period 2002-2004, when non-resident drownings exceeded resident drownings by almost fifty percent. During the period 2003-2007, an average of 67 drownings occurred annually. Not surprisingly, Dr. Galanis noted that some 81 percent of the victims drowned in the ocean.

While Dr. Galanis determined that there were no consistent trends in the annual number

of ocean drownings, whether considering all victims or stratifying by residence status, in absolute numbers, the drownings involving non-residents tended to go up and down, while the drownings involving residents trended downward, from 2.7 drownings per 100,000 population in 1993 to 1.8 drownings per 100,000 population in 2004. While statistical analysis might not consider the figures to be statistically significant, the lower numbers mean that people are not drowning and families are not suffering the loss or injury of loved ones. During the period 2003-2007, at least 713 "near-drownings" occurred, almost two-thirds involving non-residents.

The members of the Task Force, with the exception of the Consumer Lawyers of Hawaii (CLH), considered that the program, as being administered, is effective, and promotes and increases public safety. It cannot be disputed that a guarded beach is safer than an unguarded beach. Every rescue on a guarded beach is a life saved. Following the enactment of Act 170, there have been a total of 132 lifeguard rescues on Oahu's previous unguarded beaches, Keawaula Beach and Kaena Point State Park. In 2007-2008 alone, Kauai's water safety officers has saved an estimated 312 lives through 234 water rescues, 37 jet ski rescues and 41 assists. The concerns previously expressed by CLH in their legislative testimony have been addressed now that certain beaches on Maui and Kauai that were identified by CLH as being unguarded (Makena and Kee Beach) are now guarded or will soon be guarded. At Hapuna Beach State Park, the Big Island's only state beach park, approximately 267 individuals were rescued during the fiscal years of 2006-2007 and 2007-2008. (There were 549 rescues at the Big Island county beaches during that same time period.) Contrary to CLH's belief, the State of Hawaii has entered into contracts with the County of Maui and the County of Kauai for lifeguard services at previously unguarded state beach parks.

Additional steps that could be undertaken include further education efforts, both for residents as well as visitors, such as that outlined in Senate Concurrent Resolution No. 166, offered on March 13, 2008, requesting the assistance of the Hawaii Tourism Authority and the Department of Health in providing water safety information to visitors. As with recreational use lands, efforts are being made to address the problem of non-State-sanctioned guidebooks that may not contain information sufficient to warn visitors of risks associated with ocean conditions at particular beaches. While Act 170 provides the capacity for the State to contract with all counties for lifeguard services for state park beaches, funding remains a challenge and a limit on the overall effectiveness of the program.

While the majority of the members consider that the program works well currently, the members recognize that the difficulty of providing additional funding continues to place a limit on the program. In addition, Act 170 has been estimated to have saved the State approximately $1,000,000 in liability insurance costs over the course of the first four contract periods since Act 170 became effective.

C. Act 190

Act 190 provides meaningful warning to the general public of extremely dangerous natural conditions in ocean areas adjacent to public parks, and establishes legally adequate and defensible standards for those warnings. While the standardization of ocean hazard signs at public beach parks affords greater liability protection, it is even more valuable from the resident

or visitor beachgoer perspective, as the signs are meaningful, consistent, more and more recognizable, and, therefore, result in promoting greater understanding, respect, and enjoyment of the ocean environment. Signs developed through the Act 190 process have been used by other agencies throughout the country and are being considered for adoption by at least one international organization. In addition, the format of the Act 190 signs was used by RAWG as a template for signs to warn people of natural hazards under Act 82.

As the Legislature is aware, the design of various signs and their placement has been the ongoing responsibility of another task force, to which reference is made for specifics of the program. As Dr. Galanis noted earlier, many factors are involved in drownings and these factors "vary between individual drownings"; in addition, data "are of unknown quality or completely lacking." The general consensus was that the warning signs aid the recreational user in exercising caution, and that a reasonable recreational user will inquire further about conditions of the ocean if not certain about the conditions or the user's own familiarity with the ocean or skills that might be involved in enjoying the ocean. Warning sign work has been undertaken pursuant to Act 190 at beach parks statewide, including more recent signage on Kauai and the Big Island at Anahola, Kahaluu, Lehia, and Laaloa Beach Parks.

All members of the Task Force, except CLH, consider that the program, as being administered, is effective, and promotes and increases public safety. Additional steps that could be undertaken include further education efforts, both for residents as well as visitors, similar to that outlined in Senate Concurrent Resolution No. 166, offered on March 13, 2008, requesting the assistance of the Hawaii Tourism Authority and the Department of Health in providing water safety information to visitors. Hawaiian Airlines began a voluntary program earlier. A significant step forward in this process is providing information so that people can make educated, responsible decisions—the best example of this is the Hawaii Beach Safety website (http://oceansafety.soest.hawaii.edu), a project spearheaded earlier by member Ralph Goto, through the University of Hawaii. The site is easily accessible from anywhere, and can be used by those in the visitor industry, particularly hotel and lodging employees who are asked questions or for advice or directions by visitors. In addition, other efforts have been made to inform the general public of beach safety issues, such as the web site for Kauai, http://www.kauaiexplorer.com/guides/beach/beach_safety.php. A key factor is that education needs to focus on helping individuals increase their understanding of and respect for the various factors involved in using Hawaii's natural resources, rather than creating a sense of fear.

IV. RECOMMENDATION

The CLH has taken a dissenting position from the rest of the Task Force members. The CLH's position is stated below. The remainder of the Task Force members does not necessarily agree to the accuracy of, or concur with, any of the facts, representations, and statements made by CLH.

Despite the CLH's desire for additional data, the remainder of the Task Force members believes that it would not be possible to collect data to prove a negative; i.e. how many people were not injured or killed because they heeded a warning sign. Moreover, the remainder of the Task Force believes that without funding for the appropriate research, it would be difficult to

collect meaningful data of any kind to prove the effectiveness of preventive programs such as signage or guarded beaches. The CLH provides no suggestion on how such data can be obtained. The remainder of the Task Force members believes that the benefits of placing warning signs and having guarded beaches are self-evident. Aside from CLH, the Task Force members believe that the programs developed under Acts 82, 170, and 190 have been effective in increasing public safety. They strike a reasonable balance between the government's duty to warn of potentially hazardous natural conditions in the ocean and on public recreational lands, and the public's responsibility to make informed choices when accessing recreational use lands. All Task Force members, except CLH, would recommend that the 2010 sunset date on Acts 82 and 170 be repealed (as with Act 190 in 2007) and Acts 82 and 170 be codified into the Hawaii Revised Statutes as permanent law.

If Acts 82 and 170 are not made permanent during the 2009 legislative session and the Legislature determines that the Task Force should continue to gather additional data, the Task Force requests that the Legislature extend the sunset dates for Acts 82 and 170 and that sufficient funds be appropriated to allow the Task Force to perform to its optimal effectiveness.

V. DISSENTING POSITION OF THE CONSUMER LAWYERS OF HAWAII

As stated in the main body of this report, Act 170 is scheduled to sunset on June 30, 2010, and Act 82 is scheduled to sunset on June 30, 2010. CLH is opposed to having these two acts codified into the Hawaii Revised Statutes and recommends that the Legislature visit these acts during the 2010 session when sufficient data is available.

The sunset provisions in these Acts were included to give the task forces created by these Acts, as well as other parties, the opportunity to collect sufficient data to present to the Legislature so that the members could make a reasonable and informed decision as to whether the law they passed has worked and is still working in the way they intended.

These sunset dates were included with the knowledge of all of the parties concerned, including the State and the counties, for the same purpose; that is, to collect adequate data and information to determine the impact and effectiveness of this law. CLH's position has always been that before a policy decision is made on making any law permanent, the proponents of this bill should present adequate information to the Legislature on how these various laws have worked.

Regarding Act 170, the major reason for the bill proposed in 2002 was the fact that the County of Kauai did not want to place lifeguards on certain state beach parks for fear of liability. It was promised that county lifeguards would be stationed at certain state beach parks if Act 170 were passed. There has not been sufficient information presented as to when lifeguards were placed on those beaches, how many have been on guard and which beaches on Kauai, and whether a contract was entered into between the State and County of Kauai for lifeguard services. Further, there has been no reporting as to whether drownings have been reduced, especially on Kauai. Our understanding is that it was only in 2007 or 2008 that lifeguards have ever been placed on the beaches on Kauai, but the immunity from negligence applies to all lifeguards presently employed in the State. It has been over five years since Act 170 was first

passed and it has been only about a year since the intent of this was actually implemented on Kauai; that is, placing lifeguards on those dangerous beaches on Kauai. CLH is of the opinion that the Legislature needs more time to have proper data presented to it regarding the effectiveness of this law.

Act 82 passed in 2003 and is scheduled to sunset on June 30, 2010. The position of CLH is that it should not be made permanent, if at all, before that time. CLH's understanding is that the warning signs were only approved in February 2007 and were not placed until later in the year. This is almost five years after the act was passed. Similar to the comments made regarding Act 170, the same analysis applies to this law. The Legislature needs the time to review sufficient data in order to consider the effectiveness of the act. If the Legislature is to consider making the act permanent, it will have less than two years of information since the placement of the signs required by this act. CLH's opinion is that this act should be considered in the 2010 legislative session and not in the 2009 session.

VI. KAUAI COUNTY'S REBUTTAL TO CLH'S DISSENTING POSITION

The members of the Task Force from Kauai County submitted a rebuttal in response to CLH's position as follows.

Paragraph 4 of CLH's submittal states that "the major reason for the bill proposed in 2002 was the fact that the County of Kauai did not want to place lifeguards on certain state beach parks for fear of liability" and that "it was only in 2007 or 2008 that lifeguards have ever been placed on the beaches on Kauai, but the immunity from negligence applies to all lifeguards presently employed in the state." These statements are incorrect and misleading. The legislative history shows that Act 170 and other lifeguard immunity measures proposed by the Legislature addressed concerns regarding rising exposure to liability voiced by lifeguards in all jurisdictions, and by the State and the counties. In the conference committee report for Senate Bill No. 796, SD1 HD1 CD2 (Act 170), the legislature makes clear that immunity was granted to promote lifeguard presence on beaches throughout the State. "Testimony on this measure indicated that the prospect of large damage suits contributes to the costs of insurance and the reluctance to providing lifeguards. Your Committee on Conference believes that the lifeguards and the State or county must have immunity so that lifeguards can at least be provided on the beaches." (Conference Committee Report No. 66-02 re: SB No. 796, SD1 HD2 CD2).

CLH also states that "[i]t was promised that county lifeguards would be stationed at certain state beach parks if Act 170 were passed," and "[t]here has not been sufficient information presented as to when lifeguards were placed on those beaches, how many have been on guard and which beaches on Kauai, and whether a contract was entered into between state and county of Kauai for lifeguard services." CLH is aware that Kee Beach is the only State beach on Kauai that was identified for lifeguarding. The CLH is also aware that no State funding was provided for lifeguarding at Kee Beach until the 2007-2009 biennium. This funding was released in May 2008, and county lifeguarding services commenced at Kee Beach on July 1, 2008. Since July 1, 2008, county lifeguards at Kee Beach have performed 48 rescues and 2 assists, taken 4,989 preventive actions; and administered minor first aid in 282 instances. If lifeguards had not been present, the rescues, assists, and even some of the preventive actions

could have resulted in drownings. In addition, lifeguards at Kee Beach responded to 12,668 inquiries from 52,482 visitors to the beach. These are staggering figures for a period of less than five months, and illustrate the public safety benefits of a guarded beach.

CLH states that "there has been no reporting as to whether drownings have been reduced, especially on Kauai." This statement is incorrect. This report documents that in 2007-2008, an estimated 312 lives on Kauai were saved by lifeguards. In addition, the Kauai Fire Department statistics quoted in the previous paragraph evidence that 48 lifeguard rescues were performed at Kee Beach. These incidents would likely have resulted in drownings without lifeguard intervention.

Finally, CLH opposes extension of Acts 170 and 82 because it believes that the Legislature needs more time to have proper data presented to it regarding the effectiveness of these Acts. Yet, the CLH Task Force member admitted at the last Task Force meeting that there was no reasonable way to collect such data. That being the case, there is no reason to delay legislative action to continue the benefits of Act 152, SLH 2007.

HONOLULU EMERGENCY SERVICES DEPARTMENT
CITY AND COUNTY OF HONOLULU
3375 KOAPAKA STREET, SUITE H-450 • HONOLULU, HAWAII 96819-1869
Phone: (808) 723-7800 • Fax: (808) 833-3934

KIRK CALDWELL
MAYOR

MARK K. RIGG
DIRECTOR DESIGNATE

February 8, 2013

The Honorable Will Espero, Chair
Committee on Public Safety, Intergovernmental and Military Affairs
The Honorable Clayton Hee, Chair
Committee on Judiciary and Labor
State Senate
State of Hawaii
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 1009, Relating to Tort Liability

Dear Chair Espero, Chair Hee, and Committee Members:

The Honolulu Emergency Services Department, City and County of Honolulu, strongly supports the intent of SB 1009, and urges your favorable consideration and passage.

SB 1009 will make permanent certain liability protections provided in Act 170, Session Laws of Hawaii 2002.

As you know, the City & County of Honolulu provides lifeguard services at Oahu's most popular beaches, including Kaena Point State Park. Because the State does not have a lifeguard service, it contracts with the City and County of Honolulu to station lifeguards at Keawaula Beach in Kaena Point State Park. City lifeguards have protected this beach since 1992, and have performed hundreds of rescues and emergency medical responses and have saved hundreds of lives during this time.

Act 170 provides the necessary protection from liability for the lifeguards and the City and County of Honolulu, without which services could not be provided. We strongly support making Act 170 permanent and urge your favorable consideration of this bill.

Thank you for the opportunity to testify on this bill.

Sincerely,

Mark K. Rigg, Director Designate
Honolulu Emergency Services Department

ALAN M. ARAKAWA
MAYOR

JEFFREY A. MURRAY
CHIEF

ROBERT M. SHIMADA
DEPUTY CHIEF

COUNTY OF MAUI
DEPARTMENT OF FIRE AND PUBLIC SAFETY

200 DAIRY ROAD
KAHULUI, MAUI, HAWAII 96732
(808) 270-7561
FAX (808) 270-7919
EMAIL: fire.dept@mauicounty.gov

February 8, 2013

The Honorable Will Espero, Chair
Committee on Public Safety, Intergovernmental, and Military Affairs
The State Senate
State Capitol, Room 231
Honolulu, Hawaii 96813

The Honorable Clayton Hee, Chair
Committee on Judiciary and Labor
The State Senate
State Capitol, Room 407
Honolulu, Hawaii 96813

Dear Chairs Espero and Hee:

Subject: S.B. 1009 Relating to Liability

I am Jeffrey A. Murray, Fire Chief of the County of Maui, Department of Fire & Public Safety (MFD) and a member of the State Fire Council (SFC). The MFD and the SFC support S.B. 1009, which proposes to delete the sunset provision for the liability exception for county lifeguards and damages caused by dangerous natural conditions when certain warning signs are posted.

Passage of S.B. 1009 would make our beaches accessible and safer by allowing counties to continue posting lifeguards at state beach parks without the threat of costly litigation for conditions or events that are outside the county's control. Act 170 protects lifeguards from liability when they provide rescue, resuscitative, or other lifeguard services. We support removal of the sunset date to ensure benefits of the act can continue.

The benefits of the act were documented in the findings of the Report of the Task Force Established by Act 152 (Task Force Report), which was submitted during the 2011 Legislative Session. The task force concluded that various programs developed under Acts 82, 170, and 190 have been effective in increasing public safety. The procedures

contained therein have been and continue to be implemented by the state. Where funding has been appropriated, counties have stationed lifeguards at certain state beach parks.

The report further discusses the benefits of posting signage to the public and the lives saved as a result of posting county lifeguards at state beach parks. The state and counties adopted and installed a uniform signage design that complies with the requirements of Act 82. Based upon its review of various county programs for the implementation of Acts 82 and 170, the task force recommended that the sunset dates of Acts 82 and 170 be repealed.

The MFD and the SFC urge your committee's support on the passage of S.B. 1009.

Should you have any questions, please contact SFC Administrator Socrates Bratakos at 723-7151 or sbratakos@honolulu.gov.

Sincerely,

JEFFREY A. MURRAY
Fire Chief

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov/council

February 8, 2013

TO: The Honorable Will Espero, Chair
Senate Committee on Public Safety, Intergovernmental and Military Affairs

The Honorable Clayton Hee, Chair
Senate Committee on Judiciary and Labor

FROM: Gladys C. Baisa
Council Chair

SUBJECT: **HEARING OF FEBRUARY 11, 2013; TESTIMONY IN SUPPORT OF SB 1009, RELATING TO TORT LIABILITY**

Thank you for the opportunity to testify in support of this important measure. The purpose of this measure is to repeal the sunset date and make permanent the law shielding county lifeguards from liability.

Legislation with a similar purpose is included in the Hawaii State Association of Counties' ("HSAC") Legislative Package; however, the Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I support this measure for the following reasons:

1. Making permanent the liability protections afforded county lifeguards will enhance public safety by fostering a climate in which lifeguard services can be provided without fear of liability. The law has been in effect for the last decade, and since its first enactment in 2002, the Legislature has twice been convinced of the wisdom of extending such protection. Any need for a trial period has been exhausted, and the law should be made permanent. Passing this measure will help to protect counties in their efforts to save lives.

2. Included in the HSAC Legislative Package is HB 215, relating to liability, which contains the same measure to repeal the sunset date for Act 170 (2002), as amended. However, HB 215 also includes a provision to make permanent the liability protection for State and county governments regarding the duty to warn of dangers on improved public lands. To that end, I ask that the Legislature not only support SB 1009, but also the broader, and equally well-reasoned HB 215.

For the foregoing reasons, I support this measure.

ocs:proj:legis:13legis:13testimony:sb1009_paf13-059a_cmn

William P. Kenoi
Mayor

Darren J. Rosario
Fire Chief

Renwick J. Victorino
Deputy Fire Chief

County of Hawai'i
HAWAI'I FIRE DEPARTMENT
25 Aupuni Street • Suite 2501 • Hilo, Hawai'i 96720
(808) 932-2900 • Fax (808) 932-2928

February 8, 2013

The Honorable Will Espero, Chair
Committee on Public Safety, Intergovernmental, and Military Affairs
The State Senate
State Capitol, Room 231
Honolulu, Hawai'i 96813

The Honorable Clayton Hee, Chair
Committee on Judiciary and Labor
The State Senate
State Capitol, Room 407
Honolulu, Hawai'i 96813

Dear Chairs Espero and Hee:

Subject: S.B. 1009 Relating to Liability

I am Darren J. Rosario, Member of the State Fire Council (SFC) and Fire Chief of the Hawai'i Fire Department (HFD). The SFC and the HFD support S.B. 1009, which proposes to delete the sunset provision for the liability exception for county lifeguards and damages caused by dangerous natural conditions when certain warning signs are posted.

Passage of S.B. 1009 would make our beaches accessible and safer by allowing counties to continue posting lifeguards at state beach parks without the threat of costly litigation for conditions or events that are outside the county's control. Act 170 protects lifeguards from liability when they provide rescue, resuscitative or other lifeguard services. We support removal of the sunset date to ensure benefits of the act can continue.

The benefits of the act were documented in the findings of the Report of the Task Force Established by Act 152 (Task Force Report), which was submitted during the 2011 Legislative Session. The task force concluded that various programs developed under Acts 82, 170, and 190 have been effective in increasing public safety. The procedures contained therein have been and continue to be implemented by the state. Where funding has been appropriated, counties have stationed lifeguards at certain state beach parks.

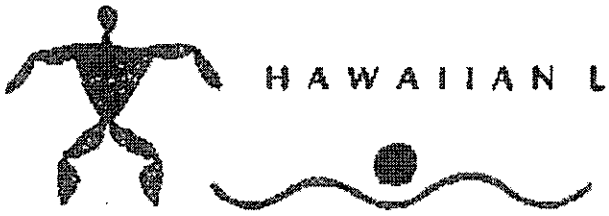
The report further discusses the benefits of posting signage to the public and the lives saved as a result of posting county lifeguards at state beach parks. The state and counties adopted and installed a uniform signage design that complies with the requirements of Act 82. Based upon its review of various county programs for the implementation of Acts 82 and 170, the task force recommended that the sunset dates of Acts 82 and 170 be repealed.

The SFC and the HFD urge your committee's support on the passage of S.B. 1009.

Should you have any questions, please contact SFC Administrator Socrates Bratakos at 723-7151 or sbratakos@honolulu.gov.

Sincerely,

DARREN J. ROSARIO
Fire Chief



HAWAIIAN LIFEGUARD ASSOCIATION

February 8, 2013

The Honorable Will Espero, Chair
Committee on Public Safety, Intergovernmental and Military Affairs
and
The Honorable Clayton Hee, Chair
Committee on Judiciary and Labor
The Senate
The Twenty Seventh Legislature
Regular Session of 2013
State Capitol
Honolulu, HI 96813

Dear Chair Espero, Chair Hee, and Members:

Re: HB 1009, Relating to Tort Liability

The Hawaiian Lifeguard Association (HLA) is the non-profit organization that represents the 400 professional ocean lifeguards in the State of Hawaii. The mission of the HLA is to promote the advancement of professional lifeguarding and to reduce drownings in the ocean surrounding our island state. The HLA attempts to accomplish this mission by supporting the efforts of Hawaii's lifeguards through fundraising and educational programs and by partnering with the government agencies in delivering the statewide Junior Lifeguard Program.

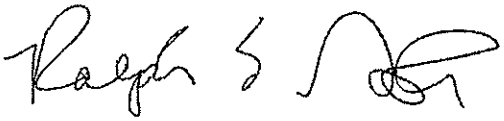
The HLA strongly supports SB 1009, which seeks to make permanent the protection from liability provided by Act 170 (2002). The protection in Act 170 is necessary for individual lifeguards as well as their employing counties to be able to provide services for the State of Hawaii at Kaena Point State Park on Oahu, Hapuna Beach on Hawaii Island, Makena Beach on Maui, and Ke'e Beach on Kauai. These four beaches are popularly used by the public and would be where drownings and serious injuries occur if lifeguard services were not provided.

The United States Lifesaving Association, the national organization of professional open water lifeguard agencies, has collected data over a twenty year period that shows that the chances of drowning at a lifeguarded beach in the United States is one in 18 million. According to the State Department of Health's Injury Prevention and Control Program, drownings that occur at unguarded beaches in the State of Hawaii far outnumber those at guarded beaches by at lease 10 to one.

The necessity of providing trained lifeguards at Hawaii's beaches is obvious, a "no brainer." We urge you to acknowledge this fact by moving to remove the sunset provision from Act 170 to make this important law permanent.

Thank you for the opportunity to present this testimony. I am available to answer any questions you may have. Aloha nui loa.

Sincerely,



Ralph S. Goto
For the Board of Directors