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

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**Testimony of
SUZANNE D. CASE
Chairperson**

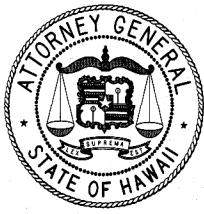
**Before the Senate Committees on
WAYS AND MEANS**

**Tuesday, March 01, 2016
1:30 PM
State Capitol, Conference Room 211**

**In consideration of
SENATE BILL 2620, SENATE DRAFT 1
RELATING TO PUBLIC LAND LIABILITY**

Senate Bill 2620, Senate Draft 1 proposes to extend the conclusive presumption of signage as legally adequate warning of dangerous conditions to "non-natural" conditions on unimproved public land. **The Department of Land and Natural Resources supports efforts to limit public entity liability in actions based upon duty to warn of certain conditions.**

Thank for the opportunity to provide testimony on this measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

S.B. NO. 2620, S.D. 1, RELATING TO PUBLIC LAND LIABILITY.

BEFORE THE:

SENATE COMMITTEES ON WAYS AND MEANS

DATE: Tuesday, March 1, 2016 **TIME:** 1:30 p.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN COMMENTS ONLY. For more information, call
Robin Kishi, Deputy Attorney General or
Caron Inagaki, Deputy Attorney General at 586-1300

Chair Tokuda and Members of the Committee:

The Department of the Attorney General supports this bill.

Hawaii continues to be a destination for visitors seeking outdoor activities, some of which may be risky. Our islands have some of the most beautiful natural conditions, unmatched anywhere else in the world. However, some of those conditions and the paths leading to those areas are hazardous. As a result of the proliferation of commercial guidebooks and the unmonitored websites that have identified many of those areas, visitors have and will continue to gain access to those unimproved public lands. Thus, the identification and evaluation of dangerous natural conditions on unimproved public lands has and will continue to become more important.

The State's mission is to balance the interest in the safety of its visitors and residents while keeping as much of those public lands open as possible. We believe that this bill will help the State to achieve this mission.

Section 1 of the bill will ultimately result in a comprehensive hazard identification and risk assessment process, and uniform design and placement of warning signs, devices and systems by encouraging the State and counties to seek the guidance of and consult with the risk assessment working group.

Through the eventual elimination of island specific and idiosyncratic signage and placement, which still exists today, a more comprehensive and uniform warning system will emerge to better ensure the safety of visitors and residents statewide.

The current Hawaii Revised Statutes section 663-52 does not provide a legal presumption that the State and counties have provided adequate warnings, even when and where the government has posted warning signs on unimproved public lands. Section 2 of the bill addresses that issue.

The wording in section 2 will ensure that if, after consultation by the risk assessment working group, the State and counties decide to provide warnings, such approved warning signs, devices, and systems are accorded the same presumption that the current statute gives to warning signs, devices, and systems on improved public lands.

In order to further encourage hazard identification and risk assessment of dangerous natural conditions on unimproved public lands, the wording in this section makes it clear that no duty to warn is created by the posting of approved warning signs, devices, and systems on unimproved public lands.

The amendments to the current statutory provisions that are contained in this bill will assist the State to better achieve its mission to keep the islands enjoyable, yet safe, for visitors and residents.

For the foregoing reasons, we respectfully recommend that this bill be passed.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2620, S.D. 1

Date: Tuesday, March 1, 2016
Time: 1:30 pm
Room: 211

To: Chair Jill Tokuda and Members of the Senate Committee on Ways & Means:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 2620, S.D. 1, relating to Public Land Liability.

Government was provided immunity for dangerous **natural** conditions on **improved** public lands, through the use of warning signs, as promulgated in Act 82 (2003) and codified in HRS sections 663-51 and 663-52, following the tragic Sacred Falls incident where eight people were killed and about many others were injured. Act 82 gave government immunity for dangerous **natural** conditions on **unimproved** public lands without the need for warning signs. So no signage was needed for immunity on **unimproved** land, while signage was needed on **improved** lands, but only for **natural** conditions.

This measure seeks to extend immunity to **non-natural** conditions, that is, conditions created, built or installed by people, so long as a warning sign is posted at the dangerous man-made condition. Act 82 limited immunity only to **natural** conditions for good reasons and those reasons remain valid today.

Warnings are not a substitute for safety. Government's first responsibility is to provide reasonably safe conditions for the public in order to prevent unnecessary injury or death. Only when it is impossible or impractical to maintain safe conditions is it

sufficient for government to warn of dangers instead of fixing the condition to make it safe. This is why Act 82 provided immunity only for natural conditions – because many natural conditions are out the control of the government and too costly to remove or fix. On the other hand, man-made conditions are within government’s control to regulate where they are placed, minimum standards for construction and maintenance, and protection for both government and the public through the use of insurance. That is why Act 82, in HRS section 663-51, specifically excluded man-made structures: “excluding buildings and structures constructed upon such lands.”

The DLNR has a permit process for those who wish to conduct activities on state lands. It is currently used for jet ski, parasailing, and concessions and we understood was being implemented for such recreational activities like rock climbing. The permit process is preferable because of the following reasons:

Protection of Important Cultural and Environmental Sites. The permit process ensures that an activity does not damage ancient Hawaiian cultural sites. Without oversight, someone could build a zipline, rock climbing, motocross or other non-natural facility in or on culturally significant sites. Someone could build a motocross course next to bird nesting sites; or damage areas with endangered flora or fauna. The permit process prevents that by regulating where these activities can occur or limit the number of people or times of operation.

Ensure Safe Construction and Maintenance. The permit process can require compliance with minimum safety standards to protect the public. As well as require continuing maintenance and inspection. This will provide safe recreational activities that will remain safe over many years of use. It is more than fair to require anyone who

wishes to construct a non-natural condition on public property to build and maintain it safely. After all, this is being done on public property not their own private property.

Insurance to Protect the State and Public. The current DLNR permit process requires insurance in amounts appropriate for the activity to protect the State and members of the public. Permit holders must obtain insurance which names the State as an additional insured to protect and indemnify the State under current DLNR rules, thus protecting the State and making immunity unnecessary.

The Law Applies to Everyone. While certain groups may be able to use good judgment in selecting appropriate sites, know and meet proper safety standards for building and maintaining non-natural conditions, and have the resources to adequately supervise these dangerous activities, it must be kept in mind that the law will apply to everyone. Not just legitimate organizations or groups but also to individuals who may have no idea whether their activities are impacting sensitive cultural or environmental sites, have no knowledge of safe construction basics, are not capable of maintaining the facilities, or could care less about conducting their activities responsibly or for the safety of others. They will simply build what they want where they want and then abandon them to become permanent hazards when they lose interest. That is why the permit process is preferable to uncontrolled immunity for dangerous non-natural conditions.

It is simply better public policy to require that man-made “non-natural” structures or conditions be properly designed, built and maintained to prevent unnecessary injury to the public, than to sanction unsafe man-made structures and conditions by giving immunity through the placement of a sign warning that those structures are dangerous or unsafe.

The current law strikes a fair balance between public safety, accessibility to recreational activities, regulation of non-natural conditions through the permit process and protection of the State and public through insurance. We ask that this measure be held.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please feel free to contact me should you have any questions or desire additional information.