

DAVID Y. IGE  
GOVERNOR OF  
HAWAII



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

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**Testimony of  
SUZANNE D. CASE  
Chairperson**

**Before the House Committee on  
WATER AND LAND**

**Wednesday, February 14, 2018  
10:30 A.M  
State Capitol, Conference Room 325**

**In consideration of  
HOUSE BILL 2468, HOUSE DRAFT 1  
RELATING TO ENVIRONMENTAL PROTECTION**

House Bill 2468, House Draft 1 (HD1) proposes to amend Chapter 171 Hawaii Revised Statutes (HRS), to establish a beach preservation special fund to purchase lands threatened by sea level rise or beach erosion, and to carry-out other forms of managed retreat for the protection of public beaches. This measure also proposes to establish a working group within the Hawaii Climate Change Mitigation and Adaptation Commission to identify effective funding mechanisms for the Hawaii Beach Preservation Special Fund. **The Department of Land and Natural Resources (Department) acknowledges the intent of this measure and offers the following comments.**

The Department of the Attorney General (AG) recently issued a legal opinion noting that when private property erodes, land title automatically reverts to the State. Thus, purchasing private property that is simultaneously becoming submerged public land could be counter to the State's interest (opinion attached). Moreover, it is unrealistic to suggest that the State will have the resources to purchase any significant amount of coastal lands undergoing submersion or erosion.

In addition, the Board of Land and Natural Resources must approve any acquisition pursuant to Section 171-30, HRS. The AG must also approve acquisitions pursuant to Sections 26-7 and 107-10, HRS.

In some instances, private land that is acquired under the auspices of this measure could also be managed by an agency other than the Department.

**SUZANNE D. CASE**  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**ROBERT K. MASUDA**  
FIRST DEPUTY

**JEFFREY T. PEARSON, P.E.**  
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

The Department recommends that any property that is being considered for acquisition must undergo a “public purpose” test and that the State not be expected to acquire property just to compensate landowners for losses related to sea level rise.

With these concerns in mind, the Department recommends that language in SECTION 2(b) be amended (highlighted in gray) as follows:

(b) Subject to legislative appropriation, the department of land and natural resources may expend moneys from the fund to ~~purchase~~ acquire from landowners ~~any~~ lands ~~threatened by~~ needed to ensure the perpetuation of sandy beaches for the public by facilitating landward retreat where those beaches are undergoing submersion and erosion due to sea level rise ~~or beach erosion~~, and to carry out other forms of managed retreat for the protection of public beaches. Lands acquired pursuant to this section shall be managed by the department or by an agency other than the department.

Language in SECTION 5 of the measure should also be amended to be consistent with SECTION (b) language. The Department also recommends striking the last sentence of the first paragraph on page 2, which states “Additionally, acquiring adjacent property will create a buffer zone between the shoreline and developed areas to protect the state from potential natural disasters.” The reason for striking this sentence is that if the State is contemplating acquiring private property under the auspices of this measure it should do so only to preserve beaches for public benefit, not to create storm buffers for private benefit. Such language is too broad and may establish unrealistic expectations that the state would purchase any such properties.

This measure should make clear that the fund will not be used as a vehicle to acquire climate distressed property for private benefit, but will serve as a tool to support the Department’s mission to protect and perpetuate the State’s beach systems in the face of climate change.

Thank you for the opportunity to comment on this measure.

DAVID Y. IGE  
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December 11, 2017

The Honorable Suzanne D. Case  
Chairperson, Board of Land and Natural Resources  
State of Hawai'i  
1151 Punchbowl Street, Room 130  
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

#### **INTRODUCTION**

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

#### **QUESTIONS AND SUMMARY ANSWERS<sup>1</sup>**

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

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<sup>1</sup> The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).<sup>2</sup>

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.<sup>3</sup>

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evinced an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

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<sup>2</sup> The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

<sup>3</sup> The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

## **DISCUSSION**

### **1. What is the dividing line between public and private property with respect to oceanfront property?**

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust<sup>4</sup> for the people of the State.<sup>5</sup>

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<sup>4</sup> The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai'i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai'i the public trust is also recognized in the Constitution, article XI, section 1.

<sup>5</sup> The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co.*, see *supra* note 4,

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. See, e.g., *Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); cf. *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

*Purdie* rightly identifies Hawai'i as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register landtitle in the land court:

Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

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concerned sale of land filled land reclaimed from Lake Michigan. Freshwater shorelines present some extraneous complications and are not further considered in this letter.

The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina<sup>6</sup> testimony -- is further mauka, specifically: '

along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). See *Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

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<sup>6</sup> "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

*Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), as amended (Feb. 28, 2006).

over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See *Sanborn*, 57 Haw. at 182, 562 P.2d at 773 (1977):

The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

**2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?**

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

*Sotomura* is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawai'i.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise



location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).<sup>7</sup>

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<sup>7</sup> *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). See *Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

*Sotomura* also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

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appeal was untimely. See *Sotomura v. Hawaii County*, 679 F.2d 152 (9th Cir. 1982).

This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

[T]he holdings in *Sotomura* and *Zimring*<sup>8</sup> require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

*Napeahi v. Paty*, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

**3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?**

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.<sup>9</sup>

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<sup>8</sup> *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

<sup>9</sup> Section 26-7, HRS provides in relevant part:

The department [of the attorney general] shall . . .  
. approve as to legality and form all documents  
relating to the acquisition of any land or interest in  
lands by the State

Section 107-10, HRS, provides in relevant part:

No real property or any right, title, or interest therein shall be acquired by agreement, purchase, gift, devise, eminent domain, or otherwise, for any purpose, by the State or any department, agency, board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

*State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

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prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

(a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

- (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.
- (2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.

The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

*Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to

conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), cert. denied, 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-existing right. See generally Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Envtl. L.J. 51, 87 (2011).

**4. Does this result violate private owners' due process rights or constitute a "taking" of private property?**

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for



public use without just compensation and also, by allegedly denying *res judicata* to the 1951 decree, would be a violation of due process *per se*.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in *McCandless, supra*, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

*Id.* This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also *Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Cf. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

*Sotomura*, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

- 5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?**

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford*, *Sotomura*, *Sanborn*, and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. See *Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

**6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?**

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. See, e.g., section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

**CONCLUSION**

For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating to the acquisition of real property, that the Attorney General

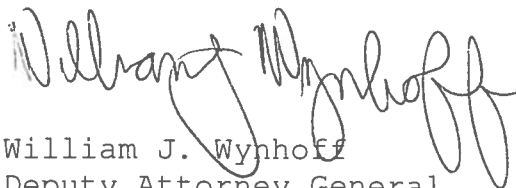
The Honorable Suzanne D. Case

December 11, 2017

Page 18

does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,

A handwritten signature in black ink, appearing to read "William J. Wynhoff". The signature is fluid and cursive, with the first name being more prominent.

William J. Wynhoff  
Deputy Attorney General

APPROVED:

A handwritten signature in black ink, appearing to read "Douglas S. Chin". The signature is cursive and somewhat stylized.

Douglas S. Chin  
Attorney General

WJW:w

DAVID Y. IGE  
GOVERNOR



LAUREL A. JOHNSTON  
ACTING DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM  
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND  
OFFICE OF THE PUBLIC DEFENDER

**STATE OF HAWAII**  
**DEPARTMENT OF BUDGET AND FINANCE**  
P.O. BOX 150  
HONOLULU, HAWAII 96810-0150

ADMINISTRATIVE AND RESEARCH OFFICE  
BUDGET, PROGRAM PLANNING AND  
MANAGEMENT DIVISION  
FINANCIAL ADMINISTRATION DIVISION  
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

**WRITTEN ONLY**  
TESTIMONY BY LAUREL A. JOHNSTON  
ACTING DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE  
TO THE HOUSE COMMITTEE ON WATER AND LAND  
ON  
HOUSE BILL NO. 2468, H.D. 1

**February 14, 2018**  
**10:30 a.m.**  
**Room 325**

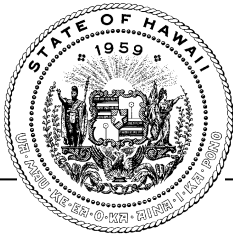
RELATING TO ENVIRONMENTAL PROTECTION

House Bill No. 2468, H.D. 1, establishes the Hawaii Beach Preservation Special Fund (HBPSF); appropriates an unspecified amount of general funds in FY 19 for deposit into the HBPSF; appropriates an unspecified amount from the HBPSF in FY 19 for the Department of Land and Natural Resources to purchase property from landowners threatened by sea level rise or beach erosion and manage the purchased lands; and creates a working group within the Hawaii Climate Change Mitigation and Adaptation Commission to determine appropriate funding mechanisms for the HBPSF. The bill also establishes the North Shore Oahu Pilot Program to explore managed retreat options for the beach preservation, and appropriates an unspecified sum of general funds in FY 19 for the pilot program.

While the Department of Budget and Finance takes no position on beach preservation, as a matter of general policy, the department does not support the creation of any special fund which does not meet the requirements of Section 37-52.3, HRS. Special funds should: 1) serve a need as demonstrated by the purpose, scope of work and an explanation why the program cannot be implemented successfully under

the general fund appropriation process; 2) reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries or a clear link between the program and the sources of revenue; 3) provide an appropriate means of financing for the program or activity; and 4) demonstrate the capacity to be financially self-sustaining. In regards to House Bill No. 2468, H.D. 1, it is difficult to determine whether the proposed special fund would be self-sustaining.

Thank you for your consideration of our comments.



# OFFICE OF PLANNING STATE OF HAWAII

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DAVID Y. IGE  
GOVERNOR

LEO R. ASUNCION  
DIRECTOR  
OFFICE OF PLANNING

Statement of  
**LEO R. ASUNCION**  
Director, Office of Planning  
before the  
**HOUSE COMMITTEE ON WATER AND LAND**  
Tuesday, February 14, 2018  
10:30 AM  
State Capitol, Conference Room 325

in consideration of  
**HB 2468, HD1**  
**RELATING TO ENVIRONMENTAL PROTECTION.**

Chair Yamane, Vice Chair Todd, and Members of the House Committee on Water and Land.

HB 2468, HD1 proposes to establish a Hawaii beach preservation special fund and authorizes the Department of Land and Natural Resources (DLNR) to expend moneys from this special fund to purchase lands threatened by sea level rise or beach erosion. HB 2468, HD1 requires the DLNR to manage the purchased lands, and creates a working group within the Hawaii Climate Change Mitigation and Adaptation Commission to determine appropriate funding mechanisms for the Hawaii beach preservation special fund. HB 2468, HD1 establishes a North Shore Oahu Pilot Program under DLNR to explore managed retreat options.

The Office of Planning (OP) supports the intent of HB 2468, HD1, provided that its passage does not replace or adversely impact priorities indicated in our Executive Budget.

The OP respectfully offers the following comments on this measure:

1. The term "Hawaii beach preservation special fund" may be misleading, as the activities proposed in this measure describe buy-out activities. As presently described, there may be potential misunderstanding that this special fund is established for beach restoration or renourishment activities or other common methods performed for beach preservation.
2. The State is not automatically the sole land manager for property. The State and the counties may need to work cooperatively to assess the private lands and building structures that are threatened by coastal hazards including beach erosion for purchase and for land use management. Depending upon the land that is purchased, the County Planning Departments and/or Departments of Parks and Recreation may have a role in land use management after a purchase.

3. The DLNR may have concerns about managing a special fund and making land purchases, specifically, property on urban lands that are outside of the DLNR's jurisdiction.
4. Sequentially, OP recommends establishment of a north shore Oahu pilot program, prior to the statutory establishment of a Hawaii beach preservation special fund, and to inform the adoption of administrative rules in accordance with chapter 91 to effectuate the purpose of the subject special fund.

The OP appreciates the intent of the proposed measure and feels that it warrants further discussion. Thank you for the opportunity to offer comments on this measure.



**HB-2468-HD-1**

Submitted on: 2/12/2018 5:15:12 PM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Doug Fetterly	Individual	Support	No

Comments:

We can no longer (we never could) afford to put up sea walls. You know that the beaches, including one's neighbor's, disappear if a sea wall is installed. Managed retreat, along with possible buyouts of the property (perhaps a conservation easement) is the logical choice when sea level rise and being too close to the beach are claiming the property. Please do the right thing and vote yes.

**HB-2468-HD-1**

Submitted on: 2/12/2018 7:38:17 PM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Nancy Davlantes	Individual	Support	No

Comments:

**HB-2468-HD-1**

Submitted on: 2/12/2018 11:45:37 PM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Don Aweau	Individual	Support	No

Comments:

COMMITTEE ON WATER AND LAND  
WEDNESDAY, FEBRUARY 14, 10:30 AM, ROOM 325  
HB2468 HD1: RELATING TO ENVIRONMENTAL PROTECTION

TESTIMONY

Submitted by Bepie Shapiro, testifying as an individual

CHAIR YAMANE, VICE CHAIR TODD, AND MEMBERS OF THE COMMITTEE:

I offer comments on HB2468 HD1 which establishes a special beach preservation fund to buy land or pursue other beach retreat management options for public beaches threatened by sea level rise and erosion, and the land adjacent to them; creates a working group within the Hawaii climate change mitigation and adaptation commission to determine appropriate funding mechanisms for the Hawaii beach preservation special fund; and creates a North Shore Pilot project to explore managed retreat options.

The past two years have given residents of Hawaii, Maui and Oahu islands dramatic evidence of what rising seas have been predicted to do: threaten and erode beaches and beachfront property. To date there has been no state or county policy for how to react to emergency or threatening erosion and beach deterioration, except for adding sand and building walls extending into the sea to try to redirect waves and protect sand beaches. The result has been horrendous for individuals who own property fronting the beach, as they must resort to individual court actions to discover exactly what their liability is and how they can retain use of their property, if that's possible.

Clearly a state policy is needed to address this chaos and I applaud the bill drafters and legislators, including this committee, for addressing this urgent need.

HB2468 HD1 is much stronger than the original version and reflects the excellent testimony submitted by state agencies and environmental organizations.

My comments are:

- 1) I believe the working group within the Hawaii Climate Change Mitigation and Adaptation Commission should have a broader mandate: rather than just deciding on funding sources, this group should study the most urgent areas for managing beach erosion and retreat - probably Waikiki, roadways already threatened, and the North Shore beaches on Oahu at least - and recommend management strategies, including land purchase and relocation assistance, which will effectively use state resources when applied to new urgent situations.
- 2) The North Shore pilot project should develop management strategies which reflect the need for equity and for affordable, effective strategies to be replicated throughout the islands in the next decade. If purchasing private land is considered,

priority should be given to resident homeowners and owners who provide affordable rentals on their beachfront land; and as funding allows to other property owners.

Thank you for the opportunity to provide testimony.



SIERRA CLUB OF HAWAII  
MĀLAMA I KA HONUA. *Cherish the Earth.*

**HOUSE COMMITTEE ON WATER AND LAND**

Wednesday, February 14, 2018 10:30AM Conference Room 325

**In SUPPORT of HB 2468 HD1** Relating to environmental protection

---

Aloha Chair Yamane, Vice Chair Todd, and members of the Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawai'i, a member of the Common Good Coalition, **supports HB 2468 HD1** and *urges its passage*.

The Sierra Club of Hawai'i has participated in the workshops held by the Intergovernmental Climate Adaptation Committee and its successor, the Hawai'i Climate Change Mitigation and Adaptation Commission (Climate Commission) which culminated in the adoption and release of the Hawai'i Sea Level Rise Vulnerability and Adaptation Report<sup>1</sup>. This report includes recommendations, many of which require legislation to implement, for adaptation to sea level rise and other climate hazards. These recommendations were three years in the making, and the urgency for implementing them grows daily. We welcome the opportunity this bill offers to make progress in the 2018 legislative session. It will help implement the Climate Commission's **Recommendation 4: Enable legacy beaches to persist with sea level rise**, by establishing a Hawai'i beach preservation special fund, creating a working group within the Commission to determine appropriate funding mechanisms for the fund, and establishing a North Shore O'ahu pilot project to explore managed retreat options to address current emergency beach conditions and investigate managed retreat options that may be replicated elsewhere in the State.

The bill authorizes the Department of Land and Natural Resources (DLNR) to purchase lands threatened by sea level rise or beach erosion and to carry out other forms of

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<sup>1</sup> [https://climateadaptation.hawaii.gov/wp-content/uploads/2017/12/SLR-Report\\_Dec2017.pdf](https://climateadaptation.hawaii.gov/wp-content/uploads/2017/12/SLR-Report_Dec2017.pdf)

managed retreat for the protection of public beaches. Previous DLNR testimony on HB 2468 referred to the recent legal opinion by the Office of the Attorney General noting that when private property erodes, land title automatically reverts to the State, and stated other concerns about the use of the fund for land purchases. Thus, exploration of other managed retreat options is an important feature of HB 2468 HD1. What form those options take will depend on the site-specific features of the beaches to be protected.

The situation at Sunset Beach and elsewhere on the North Shore of O‘ahu, where recent, and repeated, severe erosion has occurred *demand action*, but at present a No Action option seems to be in effect by default. We are not aware of any coordinated efforts now underway to address the problems there. The North Shore O‘ahu Pilot Project authorized by this bill provides a vehicle for taking such urgently needed actions.

Recommendation 4 offers a good vision of an approach to be taken:

***The State and Counties should also work hand in hand to identify “Legacy Beaches” where special adaptation measures, such as preservation of undeveloped lands, managed retreat, and prohibition of coastal armoring, should be implemented in earnest. The tools identified in this Report are integrated with an overall vision of community sustainability, so that the beaches that are vital to our island culture and vital to protected wildlife species, are protected along with our coastal communities and vital infrastructure.***

Thank you very much for this opportunity to provide testimony on this important issue.

Dave Raney  
Climate Change Volunteer Leader  
Capitol Watch



O'ahu  
Chapter

[Surfrider Foundation O'ahu Chapter](#)

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HB 2468

In Support w/comments

Hearing Date: February 6<sup>th</sup> 2018; 9:45 AM

House OMH Committee

Aloha Chair Yamane and Members of the WAL Committee,

I am writing to you today on behalf of the Surfrider Foundation O'ahu Chapter in support of HB 2468: Establishing a Hawai'i Beach Preservation Special Fund. Sea level rise is an immediate, real, and tangible threat to the State of Hawai'i and we are best served to begin taking mitigating action now. Our beaches and shorelines are a vital part of the public trust, a foundation to our way of life, an engine to our economy, and a natural resource that must be protected. The conversation has already begun in regard to a planned and well executed retreat from the shorelines that returns built lands to public trust resources that buffer our community from the impacts of higher seas and allow for the shorelines to remain intact.

HB 2468 is the beginning steps to moving the above topics forward in a meaningful way. Hawai'i's beaches have become increasingly threatened by coastal erosion. According to the United States Geological Service (USGS) National Assessment of Shoreline Change for the Hawaiian Islands, 70% of Hawaii's beaches are eroding and 13 miles of beach have been lost over the last century. It is widely known that methods of armoring that include sea walls and other stop-gap measures to protect property only exacerbate the problems, often times accelerating erosion and causing damage to adjacent properties. Using these methods often times reduces or eliminates shorelines over time as the natural ebb and flow of sand is constricted (Stanford 2015). Even where seawalls do not exist, the history of waterfront building has created hardened shorelines already and thus the need to consider the removal of these structures and move away from the ocean.

As stated by the researchers and outreach specialists at Hawai'i Seagrant, "Managed retreat strategies, are among some of the most effective long-term coastal policy tools. Managed retreat can employ a range of tools including, but not limited to, purchase of conservation easements, assistance with relocation of current property owners, and other means for allowing the coastline to migrate inland over time." Surfrider highly encourages the State to begin an action plan with these methods included. As we migrate mauka over time it will also be necessary to return the coastlines to a state that resembles a functioning ecosystem service, where dune plants hold sand in place and wetlands buffer from storm surge.





Our comments and suggestions on this bill are listed in the bullet points below:

- A funding mechanism should be generated from the visitors coming to the islands, who's large increase in numbers are greatly challenging the resources that we have. As we surge towards 10 million visitors each year, the State should consider a \$10 airport fee for all visitors to fill the beach preservation special fund. This type of annual generation will provide huge relief to the residents of Hawai'i who are bearing the impact of increased use from the tourist industry. Visitors can be informed on their flights of the necessity of this fund for protecting the shorelines and infrastructure that they are coming to enjoy and that without it our beaches will be lost.
- While Surfrider believes that buyouts and restructuring state land is an important piece to the managed retreat strategy, it is also imperative to have the beach preservation fund be used dynamically. Of dire importance are immediate infrastructure upgrades – specifically roads being moved out of harm's way in places like Laniakea, Ka'awa, and Kualoa, where water, sand, and debris already washes over the road during high tide and large wave events. If this is not addressed immediately the State Department of Transportation will have to deal with a crisis of lost connections to major sections of the islands.
- Surfrider also agrees with Hawai'i Seagrant that the Climate Commission or Legacy Land Commission should be used as existing mechanisms for convening the working group and that non-profit stakeholders and citizen science groups be considered as vital stakeholders in such a group. Within this group the funding mechanism discussion is of great importance, however it should also include an immediate conversation of a diversified and dynamic action plan for retreat that moves beyond just buyouts.

Surfrider is grateful that this conversation is underway at our State Capitol, but cannot stress enough the necessity for immediate action. The projections that once seemed to be into a distant future are upon us now. Please look over the next section of picture from O'ahu's North Shore and understand that there is no time to waste in taking action on this topic.



O'ahu  
Chapter

[Surfrider Foundation O'ahu Chapter](http://www.surfrider.org)

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Contact: [rbergstrom@surfrider.org](mailto:rbergstrom@surfrider.org)

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*Figure 1: Sunset Beach Bike path Erosion*



*Figure 2: North Shore O'ahu Shoreline. Residents are already in violation of encroaching on the public trust*





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*Figure 3: Eroded and destroyed beach access points on North Shore O'ahu*



*Figure 4: Sand & debris crossing Kamehameha Highway near Rock Piles on North Shore O'ahu*



**O'ahu  
Chapter**

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Mail: P.O. BOX 283092 Honolulu, HI, 96828

Mahalo for your time and consideration,

Rafael Bergstrom, Surfrider Foundation O'ahu Chapter Coordinator

**HB-2468-HD-1**

Submitted on: 2/13/2018 10:25:35 AM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	OCC Legislative Priorities Committee	Support	No

Comments:



NORTH SHORE  
COMMUNITY  
LAND TRUST

**NORTH SHORE COMMUNITY LAND TRUST'S TESTIMONY  
IN SUPPORT OF HB 2468 HD1  
House Committee on Water & Land  
Wednesday, February 14, 2018, 10:30 a.m., Room 325**

North Shore Community Land Trust (NSCLT) supports HB 2468 HD1, which will provide DLNR with much needed funding, tools and guidance to preserve Hawai'i's priceless shorelines for the benefit of the public. Residents of our State enjoy a very high quality of life despite being burdened with one of the highest costs of living in the world. This is largely due to the abundance of natural beauty and recreational opportunities that are available to all to enjoy. Visitors continue to come to Hawai'i at record levels year after year to enjoy these same natural resources and this fuels our economy. Our beaches and our access to the ocean is paramount to the high quality of life we enjoy and the visitor based economy that we have come to depend on. Houses, bikeways, lifeguard towers, and more are literally falling into the ocean on the North Shore of O'ahu, which is one of the States most important recreational and economic resources. We currently have no plans or funding in place to help respond to these occurrences. We owe it to all to provide DLNR with the resources, tools, and guidance it needs to preserve our coastlines and our access to the same for current and future generations.

Mahalo for this opportunity to testify –

A handwritten signature in black ink, appearing to read 'Doug Cole'. The signature is fluid and cursive, with the first name 'Doug' being more prominent than the last name 'Cole'.

Doug Cole  
NSCLT, Executive Director



Feb. 13, 2018

**Support for HB2468 HD1: Relating to Environmental Protection (Beach Preservation)  
Committee: Water and Land (WAL)  
Hearing: Feb. 14, 2018, 10:30am, Rm. 325**

Dear Chair Yamane, Vice Chair Todd and Members of the WAL Committee,

As the Hawaii Manager of the Surfrider Foundation, I am writing in strong support of HB2468, HD1. We are committed to helping Hawaii protect our shorelines from the threats of storm surges, erosion and sea level rise, and this bill would allow the state to develop ways to purchase inundated lands and develop a pilot project on the North Shore, where we have seen massive erosion this year.

The Surfrider Foundation took part in the workshop held by the Hawai'i Climate Change Mitigation and Adaptation Commission (Climate Commission), which culminated in the adoption and release of the Hawaii Sea Level Rise Vulnerability and Adaptation Report. This report includes recommendations, many of which require legislation to implement, for adaptation to sea level rise and other climate hazards. These recommendations were three years in the making, and the urgency for implementing them grows daily.

We welcome the opportunity this bill offers to make progress in the 2018 legislative session. It will help implement the Climate Commission's ***Recommendation 4: Enable legacy beaches to persist with sea level rise***, by establishing a Hawaii beach preservation special fund, creating a working group within the Hawaii climate change mitigation and adaptation commission to determine appropriate funding mechanisms for the fund, and establishing a North Shore Oahu pilot project to explore managed retreat options to address current emergency beach conditions and investigate managed retreat options that may be replicated elsewhere in the State.

The bill authorizes the Department of Land and Natural Resources (DLNR) to purchase lands threatened by sea level rise or beach erosion and to carry out other forms of managed retreat for the protection of public beaches. Previous DLNR testimony on HB 2468 referred to the recent legal opinion by the Office of the Attorney General noting that when private property erodes, land title automatically reverts to the State, and stated other concerns about the use of the fund for land purchases. Thus, exploration of other managed retreat options is an important feature of HB 2468 HD1. What form those options take will depend on the site-specific features of the beaches to be protected.

The situation at Sunset Beach and elsewhere on the North Shore of O'ahu, where recent, and repeated, severe erosion has occurred demands action. We are not aware of any coordinated efforts now underway to address the problems there. The North Shore Oahu Pilot Project authorized by this bill provides a vehicle for taking such urgently needed actions. Mahalo for your consideration.

Aloha,

**Stuart Coleman**

Stuart H. Coleman, Hawaii Manager

**HB-2468-HD-1**

Submitted on: 2/13/2018 2:38:51 PM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Laura Gray	Individual	Support	No

Comments:



**LATE**

**HB-2468-HD-1**

Submitted on: 2/13/2018 4:27:47 PM

Testimony for WAL on 2/14/2018 10:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Natalie Wohner	Individual	Support	No

Comments: