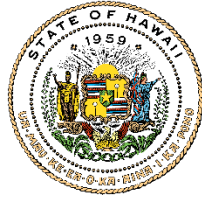
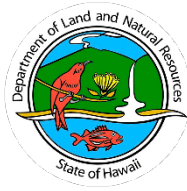


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

Testimony of
DAWN N. S. CHANG
Chairperson

Before the House Committee on
JUDICIARY & HAWAIIAN AFFAIRS

Friday, March 24, 2023
2:00 P.M.
State Capitol, Conference Room 325

In consideration of
SENATE BILL 67, SENATE DRAFT 1, HOUSE DRAFT 1
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES

Senate Bill 67, Senate Draft 1, House Draft 1 proposes to: 1) prohibit any person from presetting commercial beach equipment on beaches under the jurisdiction of the Department of Land and Natural Resources (Department) in certain counties unless the customer is physically present; 2) allow the Department to authorize exemptions through rule; and 3) set penalties for violations. **The Department supports this measure.**

The Department has worked to address the presetting of beach umbrellas and chairs on beaches. The Department's Division of Conservation and Resources Enforcement officers have issued citations to offenders, but courts have dismissed citations due to concessionaires stating that they were setting up umbrellas for customers with prior reservations.

The Department has received numerous complaints about equipment presetting on state beaches and has spent substantial time advising commercial operators what actions are considered violations. However, issues have continued to persist due to the lack of a clear definition of presetting. This measure will help the Department address the complaints and provide clarification on the definition.

Mahalo for the opportunity to provide testimony in support of this measure.

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
LAURA H.E. KAAKUA
FIRST DEPUTY
M. KALEO MANUEL
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



SB67 SD1 HD1
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES
House Committee on Judiciary & Hawaiian Affairs

March 24, 2023

2:00 PM

Room 325

The Administration of the Office of Hawaiian Affairs (OHA) will recommend to the Board of Trustees, **COMMENT** on SB67 SD1 HD1, which would prohibit any commercial vendor from presetting commercial beach equipment on any public beach under the jurisdiction of the Department of Land and Natural Resources. **OHA wishes to emphasize that it supported previous drafts of this measure and now offers comments because the measure’s application to all counties was removed. The meaningful balance between commercial, recreational, and cultural access to our beaches is necessary throughout every county in the State. The removal of Kaua’i and Hawai’i Counties will only stand to increase their vulnerabilities to the commercialization of our beaches that have diminished the quality of life for residents. OHA asks that the previous draft of this measure be restored.**

Established by our state’s Constitution,¹ OHA is a semi-autonomous agency of the State of Hawai’i mandated to better the conditions of Native Hawaiians. Guided by a board of nine publicly elected trustees, all of whom are currently Native Hawaiian, OHA fulfills its mandate through advocacy, research, community engagement, land management, and the funding of community programs. Hawai’i state law recognizes OHA as the principal public agency in the state responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians.² Furthermore, state law directs OHA to advocate on behalf of Native Hawaiians;³ to advise and inform federal officials about Native Hawaiian programs; and to coordinate federal activities relating to Native Hawaiians.⁴

Hawai’i’s beaches and shoreline areas provide numerous benefits to the Native Hawaiian community and the public that are critical to our cultural values and kama’āina way of life. Our beaches and shoreline areas provide a place to bond with ‘ohana and friends, help to foster positive youth development and an early appreciation for our natural resources, and provide for a variety of recreational activities, such as surfing and fishing, that have been staples of local life for generations. Moreover, access to the shoreline and the resources in the nearshore environment is critical to the perpetuation of Native Hawaiian culture and constitutionally protected traditional and customary gathering rights.

¹ HAW. CONST., art. XII, §5 (1978).

² Haw. Rev. Stat. § 10-3(3).

³ Haw. Rev. Stat. § 10-3(4).

⁴ Haw. Rev. Stat. § 10-6(a)(4).



SB67 SD1 HD1
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES
House Committee on Judiciary & Hawaiian Affairs

Accordingly, our laws have repeatedly recognized the public nature of our shoreline areas and the right of the public to access the shoreline.⁵ OHA has also always been a strong advocate for shoreline access in Hawai'i and has actively worked to address a range of potential threats to our beaches and shoreline areas.

OHA appreciates the opportunity to testify on this measure and **asks that the previous version of this measure be restored to apply these prohibitions against the rampant commercialization of our beaches across all counties within the State.** Mahalo nui loa for the opportunity to testify.

⁵ See In re Ashford, 440 P.2d 76 (1968) (recognizing that under tradition, custom, and usage, public lands extend to the highest wash of the waves during the season of the year when the waves are highest); County of Hawaii v. Sotomura, 517 P.2d 57, 62-63 (1973); Diamond v. State, 145 P.3d 704 (2006); see also HRS §§ 46-6.5, 115-4, -5, -9.



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Josh Green, M.D.
Governor

John De Fries
President and Chief Executive Officer

Statement of
JOHN DE FRIES
Hawai'i Tourism Authority
before the
COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Friday, March 24, 2023
2:00 p.m.
State Capitol Conference Room 325 & Videoconference

In consideration of
SENATE BILL NO. 67 SD1 HD1
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES

Aloha Chair Tarnas, Vice Chair Takayama, and members of the Committee on Judiciary & Hawaiian Affairs,

We appreciate the opportunity to provide these comments in support of the intent of SB67 SD1 HD1, which prohibits any commercial vendor from presetting commercial beach equipment on any public beach under the jurisdiction of the Department of Land and Natural Resources.

The Hawai'i Tourism Authority's Destination Management Action Plans, also known as DMAPs, were developed in collaboration with Hawai'i's communities. Contained within the six plans are hundreds of actions and sub-actions identified by kama'āina, many of which speak to the need to strike a balance between the visitor industry and our residents.

SB67 addresses the balance between our residents' ability to freely utilize our beaches and the visitor industry's desire to provide amenities to their guests. Our beaches are a shared resource that should be shared in a way that affords residents the opportunity to utilize these resources without having to compete against preset and unutilized beach amenities.

In supporting this measure, we would also like to recognize those businesses in the visitor industry who comply with existing regulations in the spirit of preserving public access to our beaches.

We appreciate the opportunity to offer these comments in support of the intent of SB67 SD1 HD1. Mahalo.

SB-67-HD-1

Submitted on: 3/22/2023 2:40:03 PM

Testimony for JHA on 3/24/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Leimomi Khan	Individual	Support	Written Testimony Only

Comments:

Support. Love this bill that would curtail abuse of our beaches by commercial vendors and enable residents to enjoy our beaches. Encourage DLNR to limit any exceptions.

Douglas Meller
2615 Aaliamanu Place
Honolulu, Hawaii 96813
dougasmeller@gmail.com

TESTIMONY SUPPORTING SB 67, HD1 RELATING TO COMMERCIAL ACTIVITIES ON BEACHES

Submitted to House Committee on Judiciary & Hawaiian Affairs Hearing
Friday, March 24, 2023, 2 pm, State Capitol Room 325 & Videoconference

SUGGESTED AMENDMENT OF SB 67, HD1

There is no defensible justification to limit this bill to beaches on Oahu and Maui and exclude beaches on Hawaii and Kauai. To ensure that this bill applies in all counties, and to ensure this bill does not exclude the DLNR easement over the publicly-constructed privately-owned part of Waikiki Beach between the Royal Hawaiian groin and the City's Kuhio Beach Park, I suggest amending §200- (d) to read as follows:

(d) This section shall apply to beaches under the jurisdiction of the department including private beaches in which the state has an easement or other property interest. This section shall not apply to private beaches in which the state has no property interest.

SB 67, HD1 IS NEEDED TO FACILITATE AND ENCOURAGE ENFORCEMENT

Legislation is needed to facilitate and encourage enforcement of a 1965 State beach widening agreement and State DLNR rules which prohibit commercial activity on a public easement over a privately-owned part of Waikiki Beach between the Royal Hawaiian groin and the City's Kuhio Beach Park. Item 9 of the 1965 SurfRider-Royal Hawaiian Sector Agreement requires that

The State will not conduct or permit any commercial activity of any kind on the public beach in the SurfRider-Royal Hawaiian Sector of Waikiki Beach, including ... the area ... subject to public easement.... The Owners [of the beach subject to public easement and abutting property] will not conduct or permit any commercial activity of any kind on the area ... subject to public easement....

Although abutting private property owners promised not to allow commercial use of the public easement:

- Every morning commercial beach chairs and umbrellas are moved from abutting hotel property and placed on the public beach easement.
- Most of the commercial equipment stored on the public beach easement can be rented from kiosks on hotel property. Some of the commercial equipment stored on the public

beach easement may be reserved for hotel guests who have paid a “resort fee” for use of various hotel amenities.

- Every night the commercial beach chairs and umbrellas are removed from the public beach easement and stored on abutting hotel property.

The following 8:20 am January 17, 2022 picture shows the scale of routine, daily placement of commercial beach chairs and umbrellas on the public easement makai of the Royal Hawaiian.



SB 67, HD1 authorizes administrative civil fines because criminal prosecution under §200-14(a), Hawaii Revised Statutes has not worked. According to March 28, 2016, DLNR testimony opposing SCR 53 during the 2016 session,

If money isn't changing hands, then it is difficult to argue in court that “business” (Hawaii Administrative Rules 13-255-5) is taking place on Waikiki Beach. Both of the Department’s Division of Boating and Ocean Recreation and the Division of Conservation and Resource Enforcement have had difficulty enforcing against pre-setting in court.

And according to March 15, 2022, DLNR testimony supporting SB 3377, SD1,

The Department’s Division of Conservation and Resources Enforcement officers have issued [criminal] citations to the commercial operators, but unfortunately the court dismissed the citations due to the fact that the concessionaire stated the customers had prior reservations and they were merely setting up the equipment in advance of them arriving.

Legislation also is needed to facilitate and encourage enforcement against unauthorized commercial activity on publicly owned beaches under DLNR jurisdiction. In many parts of the State, hotels (or their concessions) located next to State-owned beaches routinely place/store commercial equipment on the beach without DLNR authorization. Most of the commercial equipment stored on public beaches can be rented from kiosks on hotel property.

The following picture from the 2022 *Big Island Guide* illustrates the scale of routine, daily commercial activity on the public beach makai of the Mauna Kea Beach Hotel. The DLNR has not authorized this commercial activity. Like most beaches in Hawaii, Kauanaoa Beach is State-owned “public lands” and is not a public easement over private property.



VOLUNTARY SELF-REGULATION BY SCOFFLAWS DOES NOT WORK

SR 27, SD 1 (2016) requested the DLNR to “submit a report on its progress regarding the resolution of conflicts under the 1965 SurfRider Royal Hawaiian Sector Beach Agreement, including any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2017 and Regular Session of 2018....” In December 2016, following two years of consultation and negotiation with Waikiki hotels and their concessions, the DLNR submitted a report to the Legislature titled “Progress on the Resolution of Conflicts

Under the 1965 SurfRider-Royal Hawaiian Sector Beach Agreement”. This DLNR report alleged that Waikiki hotels and their beach concessions had agreed to self-regulate commercial activity on the public easement makai of the hotels.

In spring 2021, the DLNR substantially widened the beach makai of the Royal Hawaiian, Outrigger Waikiki, and Moana Surfrider hotels. I took the following pictures between 8 and 8:30 am on 7/21/21 to document that self-regulation of commercial activity does not work.





















THE 1965 STATE BEACH WIDENING AGREEMENT

The 1965 SurfRider-Royal Hawaiian Sector Beach Agreement includes exhibits which designate a “Line A” and a “Line B” over the beach between the Royal Hawaiian groin and Kuhio Beach Park. “Line A” is mauka of “Line B”. The 1965 Agreement provides that the beach mauka of “Line A” is privately owned and not subject to a public easement; the beach between “Line A” and “Line B” is privately owned and subject to a public easement for public recreational use; and any beach constructed or accreted makai of “Line B” is publicly owned. All of the previous pictures show the public easement makai of "Line A".

Under the 1965 Agreement, abutting property owners are allowed to install portable fences and signs to exclude the public from private property mauka of “Line A”. As shown in the two following 7/21/21 pictures, the Royal Hawaiian and Moana Surfrider Hotels have installed fences and signs to exclude the public from the beach mauka of “Line A”.





In exchange for allowing hotels to exclude the public from part of Waikiki Beach, Item 9 of the 1965 SurfRider-Royal Hawaiian Sector Agreement explicitly required that

The State will not conduct or permit any commercial activity of any kind on the public beach in the SurfRider-Royal Hawaiian Sector of Waikiki Beach, including ... the area ... subject to public easement.... The Owners [of the beach subject to public easement and abutting property] will not conduct or permit any commercial activity of any kind on the area ... subject to public easement....

Although abutting private property owners promised not to allow commercial use of the public easement:

- Every day kiosks on abutting hotel property are used to intermittently rent hundreds of commercial beach chairs and umbrellas placed/stored on the public beach easement.
- Every night the commercial beach chairs and umbrellas are removed from the public beach easement and stored on abutting hotel property.

DLNR RULES TO ENFORCE THE 1965 STATE BEACH WIDENING AGREEMENT

The following DLNR rules prohibit placement or storage of unrented commercial beach chairs and umbrellas on the public beach easement makai of the Royal Hawaiian, Outrigger Waikiki, and Moana Surfrider hotels.

HAWAII ADMINISTRATIVE RULES TITLE 13 SUBTITLE 11 PART III CHAPTER 255 WAIKIKI BEACH

§13-255-5 Definitions. As used in this part, unless the context clearly indicates otherwise:

“Business” means all activities engaged in or caused to be engaged in by any person or legal entity with the object of making a profit or obtaining an economic benefit either directly or indirectly. . . .

“Waikiki Beach” means any and all lands along the shores of the island of Oahu . . . seaward of line “A” as shown on exhibit “A” and described in exhibit “B”, dated July 13, 1965, and located at the end of this chapter, over which the State of Hawaii now has or hereafter acquires an easement for the use of the public as a bathing beach and for passing over and along by foot. . . .

§13-255-6 Waikiki Beach uses and activities; restrictions. . . .

(b) Business operations, soliciting prohibited. No person shall engage in, conduct, transact, or solicit business of any kind on or at Waikiki Beach.

(c) Storage, parking, and display prohibited. No person shall store, park, moor, place, or display any thing or personal property on or at Waikiki Beach for the purpose of engaging in, conducting, transacting, or soliciting business of any kind; provided that an outrigger canoe or sailing catamaran registered by the department pursuant to Hawaii ocean waters and shores rules may be placed, moored, or anchored below the mean high water mark. . . .

§13-255-8 Powers of arrest. Any law enforcement officer or any duly authorized employee, agent, or representative of the department who observes any violation by any person of these rules may forthwith arrest the person without a warrant.

§13-255-10 Attorney general. The attorney general may bring appropriate proceedings to enjoin the continuance of any act or omission in violation of these rules.