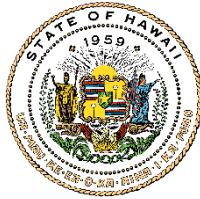


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



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

P.O. BOX 621
HONOLULU, HAWAII 96809

Testimony of
DAWN N. S. CHANG
Chairperson

Before the Senate Committees on
WATER AND LAND
and
COMMERCE AND CONSUMER PROTECTION

Tuesday, January 31, 2023
9:00 A.M.
State Capitol, Conference Room 229

In consideration of
SENATE BILL 67
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES

Senate Bill 67 proposes to prohibit any person from presetting commercial beach equipment on beaches under the jurisdiction of the Department of Land and Natural Resources (Department) unless the customer is physically present; allows the Department to authorize exemptions through rule; and sets penalties for violations. **The Department supports this measure and offers recommendations.**

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 umbrella 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.

Currently, administrative fines for violations under Chapter 200, Hawaii Revised Statutes, are: \$5,000 for first offenses, \$10,000 for second offenses, and \$15,000 for third and subsequent offenses. Therefore, to align with the existing fine amounts and deter violations, the Department recommends that the fines proposed by this measure be increased to mirror the existing administrative fine amounts.

Thank you for the opportunity to testify on this measure.

DAWN N. S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H. E. KAAKUA
DEPUTY DIRECTOR – LAND

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



Hawai'i Convention Center
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815
kelepona tel 808 973 2255
kelepa'i fax 808 973 2253
kahua pa'a web hawaii-tourism-authority.org

David Y. Ige
Governor

John De Fries
President and Chief Executive Officer

Statement of
JOHN DE FRIES
Hawai'i Tourism Authority
before the
**COMMITTEES ON WATER AND LAND and
COMMERCE AND CONSUMER PROTECTION**

January 31, 2023
9:00 a.m.
State Capitol Conference Room 229 & Videoconference

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

Aloha Chairs Inouye and Keohokalole, Vice Chairs Elefante and Fukunaga, and members of the Committees on Water and Land and Commerce and Consumer Protection,

We appreciate the opportunity to provide testimony in **support** of SB67, 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 SB67. Mahalo.



SB67
RELATING TO COMMERCIAL ACTIVITIES ON BEACHES
Senate Committee on Water and Land,
Senate Committee on Commerce and Consumer Protection

January 31, 2023

9:00 AM

Room 229

The Administration of the Office of Hawaiian Affairs (OHA) will recommend to the Board of Trustees the position to **SUPPORT** SB67, 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.

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).

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.

This measure would provide the needed protection to prevent commercial vendors from blocking our beaches by presetting equipment on the beach before their customers have arrived. Accordingly, OHA urges the Committees to **PASS** SB67. 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.

SB-67

Submitted on: 1/27/2023 5:51:48 PM

Testimony for WTL on 1/31/2023 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Mike Kelley	Testifying for Aqualani Beach and Ocean Recreation	Comments	Written Testimony Only

Comments:

I've been a professional beach and pool services operator for 46 years exclusively through resort hotels on Ka'anapali and also Waikiki Beach. We've followed guidelines already in place requiring no pre-setting of chairs and removal once vacated. This takes dedicated manpower which we staff and train to conduct these on and off services without any pre-set. This condition is already in the statutes for operating and monitored by DOBOR. I've always agreed with not pre-setting the beach as it is public space however a resort guest or local has just as much right to rent and enjoy an umbrella on the beach provided from a hotel as they do to buy one at ABC store and place it wherever and whenever they like. My comment and request would be that a reasonable amount of time closer to perhaps 90 minutes makes sense before an umbrella or chairs needs to be removed. It takes an hour to have lunch so to pull up one of our visitors or locals or guests personal belongings and equipment rented for use on the beach in a time any less than 90 minutes would not make any sense. Also, the umbrellas and chairs purchased or rented from ABC stores are pre-set and are left for hours on end so any restrictions need to be fair and inclusive which then leads to the unmanageable task of staffing and monitoring. Finally, as noted above, this condition and statute is already part of mandatory operations and is controlled and patrolled by DOBOR and DLNR so I'm confused as to the need to have this resubmitted.

Thank you,

Mike Kelley

SB-67

Submitted on: 1/27/2023 2:25:13 PM

Testimony for WTL on 1/31/2023 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
John Bickel	Individual	Support	Written Testimony Only

Comments:

As a Waikiki resident, I see the companies that rent umbrellas setting them out early in the morning essentially claiming part of the beach for their product. I see this as them making a profit off of a public resource. That is just wrong. So I support this bill.

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

Testimony Supporting SB 67 Relating to Commercial Activities on Beaches

Submitted to Senate Committee on Water and Land and
Senate Committee on Commerce and Consumer Protection
Tuesday, 9 am, January 31, 2023, State Capitol Room 229 & Videoconference Hearing

SUGGESTED AMENDMENTS OF SB 67

The bill's current definition of "commercial beach equipment" might not apply when hotel guests pay a multi-purpose "resort fee" rather than "rent" to use the equipment. To ensure there is no regulatory "loophole", I suggest amending the definition of "commercial beach equipment" to read as follows:

"Commercial beach equipment" means recreational equipment, including but not limited to chairs, umbrellas, surfboards, paddleboards, kayaks, and other non-motorized watercraft, which can be rented or reserved for use by payment of a fee or charge.

Parts of Waikiki Beach are privately owned. The DLNR has jurisdiction for a public easement over a publicly-constructed privately-owned part of Waikiki Beach between the Royal Hawaiian groin and the City's Kuhio Beach Park. Parts of Waikiki Beach are under county jurisdiction. The City has jurisdiction over the beach makai of Kuhio Beach Park and most of Kapiolani Park. To ensure that SB 67 applies to the public easement over Waikiki Beach under DLNR jurisdiction and does not apply to parts of Waikiki Beach under county jurisdiction, I suggest amending §200- (c) to read as follows:

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

SB 67 IS NEEDED TO FACILITATE AND ENCOURAGE ENFORCEMENT

Legislation is needed to facilitate and encourage DLNR 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 Kuhio Beach Park. (This is most of the beach makai of the Royal Hawaiian, Outrigger Waikiki, and Moana Surfrider hotels.) Item 9 of the 1965 SurfRider-Royal Hawaiian Sector Agreement explicitly 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.

SB 67 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.

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



Legislation also is needed to facilitate and encourage DLNR 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 a public beach without DLNR authorization. Most of the commercial equipment stored on public beaches can be rented from kiosks on hotel property. Some of the commercial equipment stored on public beaches may be reserved for hotel guests who have paid a “resort fee” for use of various hotel amenities. The commercial beach equipment usually is removed from public beaches for overnight storage on hotel property. Sometimes the commercial beach equipment is stored overnight on public beaches.

The following 11 am October 16, 2021 picture illustrates the scale of routine, daily commercial activity by the Hale Koa Hotel beach concession on the public beach makai of Fort DeRussy. The DLNR has not authorized this commercial activity. Like most beaches in Hawaii, Ft. DeRussy 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. However, unregulated commercial activity resumed within a few months and the DLNR did not report this to the Legislature.

COMPLAINING TO THE BLNR IS NOT SUFFICIENT

For you information, and possibly your amusement, the remainder of this testimony consists of my July 28, 2021 email complaint to the BLNR. Enforcement obviously has been a problem.

from: **Douglas Meller** <douglasmeller@gmail.com>
to: BLNR.testimony@hawaii.gov
cc: "Deborah L. Ward" <dlnr@hawaii.gov>
bcc: Chad Blair <cblair@civilbeat.com>, Sophie Cocke <scocke@staradvertiser.com>, Dolan Eversole <eversole@hawaii.edu>
date: Jul 28, 2021, 11:38 AM
subject: please forward this email to all members of the Board of Land and Natural Resources
mailed- gmail.com
by:

If you oppose unauthorized commercial use of Hawaii's beaches, please ask Suzanne Case to enforce a 1965 State beach widening agreement and State DLNR rules which prohibit placement/storage of unrented commercial beach chairs and umbrellas on a public easement over Waikiki Beach between the Royal Hawaiian groin and Kuhio Beach Park.

It has never been legal to place commercial beach chairs on the Waikiki public beach easement before they are rented. It has never been legal to store commercial beach chairs and umbrellas on the Waikiki public beach easement after completion of a rental contract. Self-regulation by commercial scofflaws does not work. The DLNR has not seriously tried to enforce commercial restrictions over the Waikiki public beach easement since Laura Thielen was the DLNR Director.

In spring 2021 the DLNR substantially widened the beach makai of the Royal Hawaiian, Outrigger Waikiki, and Moana Surfrider hotels. Look what happened next. I took the following pictures between 8 and 8:30 am on 7/21/21.























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

Several DLNR reports to the Legislature acknowledge that 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. . . .

§13-255-7 Penalties. Any person who is guilty of violating these rules shall be fined not more than \$10,000 as provided in section 200-14, Hawaii Revised Statutes.

§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.

§13-255-9 Taking legal custody of property. As incident to a lawful arrest, the arresting authority may take legal custody of any personal property which is the subject of or related to any violation of these rules. The property may be released only upon approval by the court which has jurisdiction of the case.

§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.