

# LATE TESTIMONY



Via Capitol Website

**March 23, 2009**

**House Committee on Water, Land and Ocean Resources  
Hearing Date: March 23, 2009, at 9:30 am in CR 325**

**Testimony in Opposition to SB 1088: Relating to Public Access  
(New definition of “obstruction” and private right of action)**

Honorable Chair Ken Ito, Vice-Chair Sharon E. Har,  
and Members of the House Committee on Water, land and Ocean Resources:

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF’s missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii’s significant natural and cultural resources and public health and safety.

While LURF acknowledges and supports legal public access to areas that are managed by the state or counties for various recreational activities, or such areas that provide for traditional and cultural pursuits, LURF must respectfully **oppose SB 1088, SD2**, which amends the definition of “obstruction” for access to public property; and creates a private right of action for a person to enforce the prohibition of obstruction. This measure also amends the offense of obstructing access to public property to include installing visual and other impediments to intentionally prevent a member of the public from accessing the sea, the shoreline, or an inland public recreational area.

All over the world, people are trying to avoid litigation and are trying to work things out together - - this bill will cause unnecessary litigation and costs for private parties and the government. **Instead of more litigation, we would support the establishment of a “working group” or “task force” to identify areas across the State where public access has been obstructed and to recommend solutions which would be legal and acceptable to all parties.**

**LURF’s Position.** LURF understands the situations and issues which gave rise to this legislation, however, we have the following serious concerns and objections to the current form of this bill, which include, but are not limited to, the following:

- **The bill is unnecessary, as the public already has the legal right to access the shoreline and other areas, and obstructing such access is already a misdemeanor crime.** As has been explained by the State Department of the Attorney General, Chapter 115, Hawaii Revised Statutes, was originally enacted in 1974. It directed counties to purchase land for public access to the shoreline, the sea, and inland recreational areas under certain circumstances and confirmed the public's right of transit along the shorelines. In 2004, the chapter was amended to make obstructing access a misdemeanor crime punishable by a fine.
- **The bill is expected to result in a dramatic increase in frivolous or misguided litigation demanding access to areas which should not be accessible based on public safety or other reasons.** We share the concerns of the Department of Land and Natural Resources, who are concerned with any change in the law that may create the potential for a dramatic increase in frivolous or misguided civil actions related to unmaintained features that may not qualify legally as a "public transit area" or "public transit corridor" and that due to their condition may create public safety issues. We take this warning from DLNR very seriously, as DLNR would have the most experience in fielding inquiries, complaints and legal actions regarding public access. The expected litigation will also have a detrimental impact on the delivery of government services and operations, as the lawsuits will likely involve DLNR employees and possibly other county officials
- **The proposed private right of action is overly broad and vague and may not be legally enforceable.** The bill provides that any "person aggrieved" by a violation of section 115-9, Hawaii Revised Statutes, has the right to bring a civil action for injunctive relief and the right to recover attorneys' fees and costs. The Attorney General has expressed the following concerns: "There is no standard for when a 'physical, visual, or other impediment' in fact 'prevents' a person from traversing a right of way, as opposed to merely making it more difficult to traverse. " Based on the vagueness and lack of clarity of the terms used in this bill, the resulting litigation will not be resolved easily, but probably will be very prolonged , expensive and may result in appeals.
- **There will be legal problems, because the bill expands and creates a new legal definition which expands the "public right of way," which may cause an unconstitutional "taking" of private property.** In the proposed bill, the term "public right of way" is defined to include roads, paths, and passages "established" by "dedication, customary use, or open and continuous public use." As an example, the Attorney General has expressed their concern with the language in the bill, referring to section 520-7, Hawaii Revised Statutes, which provides: "No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes." Thus, the Attorney General has taken the position that with respect to the definition of "public right of way" in this bill, "the question of whether such a right has come into existence is extremely complex."
- **This bill may actually result in landowners withdrawing voluntary public access to their lands, because the bill would expose them to**

**increased threats of litigation (based on the new definition of “public rights of way”)** . The Attorney General has also observed that the bill may end up decreasing public access, because it subjects landowners who voluntarily provide access to increased threats of lawsuits by those who may try to claim a new public right of way was created based on “customary use, or open and continuous public use.”

➤ **The bill is inconsistent with existing state law, which “encourages” landowners to provide public access by limiting the liability of landowners who provide access to their properties for recreational use.** The Attorney General has observed that with respect to the issue of landowner liability, the bill conflicts with chapter 520, Hawaii Revised Statutes, which limits liability of landowners who allow others to use their property for recreational use. Instead of subjecting landowners to lawsuits and liability and legal costs, we should be encouraging land owners to provide access to and along their lands by limiting their liability and providing other incentives!

➤ **The bill will spawn increased litigation because it provides for fees and costs to those who file lawsuits, regardless of whether they prevail or not.** We share the Attorney General’s concern regarding this issue:

“ It is especially troublesome that any person "bringing" such an action is entitled to an award of attorneys' fees and costs. As worded the bill does not even require the person to prevail. Experience teaches that the possibility of receiving fees and costs is a powerful inducement to litigation. This inducement will doubtless be increased by the absence of a requirement to prevail and the absence of any provision allowing a successful defendant to recover his or her fees and costs.”

➤ **Giving a “working group” a chance is much better than facilitating lawsuits.** Instead of encouraging litigation based on vague and complex legal definitions, we would support the establishment of a “working group” or “task force” to identify areas across the State where public access has been obstructed and to recommend solutions which would be legal and acceptable to all parties. LURF and its members would be willing to participate in this effort.

Based on the above, we respectfully request that **SB 1088, SD2 be held** in the House Committee on Water land and Ocean Resources.

Thank you for the opportunity to express our opposition to SB 1088, Sd2.

**Strong support for SB 1088 -- Public Beach Access**

Heather Gardner [REDACTED]

**Sent:** Sunday, March 22, 2009 5:54 PM

**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony

**LATE TESTIMONY**

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Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Heather Gardner  
[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because we need to protect the public access and use of beaches. Beach access should be free to all people in Hawaii, not just people who can afford to live on the beach. People visit Hawaii to get a taste of island living, not resort living - we need an environment that is socially inclusive to ensure this sense of island living for all.

[REDACTED]

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**From:** on behalf of WLOtestimony  
**To:** Stuart Coleman  
**Subject:** RE: Strong support for SB 1088 -- Public Beach Access

## LATE TESTIMONY

-----Original Message-----

**From:** Stuart Coleman [REDACTED]  
**Sent:** Sunday, March 22, 2009 4:09 PM  
**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony  
**Subject:** Strong support for SB 1088 -- Public Beach Access

Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Stuart Coleman  
[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

As the new Hawaii Coordinator for the Surfrider Foundation, I speak for more than 1500 members who strongly support this bill. We support SB1088 because it ensures beach access, which is one of our top priorities.

I have already written a longer, more detailed letter about this bill, but I want to add that the measure will allow Hawaiians, surfers, fishermen and ocean recreational users to make sure that access is not denied. The bill will not produce frivolous lawsuits, as some would claim, but instead it will just help ensure that wealthy land owners don't fence off beach access with impunity.

Beach access is a right that has been trampled on in places like Kailua and Hawaii Kai, and we hope that this bill will begin to rectify the situation and make access more available like it is on the North Shore. Thanks for your consideration, and I look forward to testifying tomorrow.

Aloha, Stuart

Stuart H. Coleman  
Hawaiian Islands Field Coordinator  
The Surfrider Foundation  
[REDACTED]

[REDACTED]

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**From:** Darin Hayakawa [REDACTED]  
**Sent:** Sunday, March 22, 2009 3:50 PM  
**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony  
**Subject:** Strong support for SB 1088 -- Public Beach Access

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

## LATE TESTIMONY

Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Darin Hayakawa  
[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because beach access should be free to all people in Hawaii, not just people who can afford to live on the beach. Beach access is good for everyone, not just the wealthy elite. Good public beach access is good for the economy because it creates an environment that is socially inclusive. We want beaches modeled after the North Shore, not Hawaii Kai. Please protect public rights of way to beaches.

**Strong support for SB 1088 -- Public Beach Access**

val loh [REDACTED]

**Sent:** Sunday, March 22, 2009 10:45 PM

**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony

**LATE TESTIMONY**

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Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

val loh  
[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because ocean accessibility is an ancient tradition of these islands that recognizes our inherent need to connect with nature, and keeps us sane, which is always important, and especially crucial in tough economic times like these.

## Strong support for SB 1088 -- Public Beach Access

Andrew Benson 

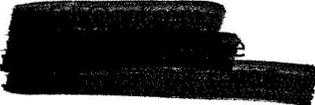
**Sent:** Monday, March 23, 2009 5:28 AM

**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony

**LATE TESTIMONY**

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Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Andrew Benson  


Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because public beach access is a natural resource that all persons living and visiting Hawaii must be allowed to enjoy. Beach going is not only a very important cultural activity, but also a key attraction for people who visit and move to Hawaii. Hawaii is the Aloha State for the USA and the world. Aloha and beach access is not for sale or determined by wealth and exclusion.

Mahalo

**Testimony for SB1088 on 3/23/2009 9:30:00 AM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, March 22, 2009 8:02 PM

**To:** WLOtestimony

**Cc:** [REDACTED]

**LATE TESTIMONY**

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Testimony for WLO 3/23/2009 9:30:00 AM SB1088

Conference room: 325  
Testifier position: support  
Testifier will be present: No  
Submitted by: Carl Imparato  
Organization: Individual  
Address: [REDACTED]  
Phone: [REDACTED]  
E-mail: [REDACTED]  
Submitted on: 3/22/2009

**Comments:**

Aloha Committee Members,

I urge you to pass S.B. 1088 SD 2, as currently written.

Increasing and unceasing development - including illegal plantings, gates and fences - is undermining the public's right to access the shoreline. Yet our public enforcement officials have inadequate resources to deal with this problem.

Empowering citizens to sue to end violations of the public access provisions of Hawaii's laws and regulations would be a tremendous step forward in protecting the public's rights to access our beaches and other public lands.

Therefore, I ask that you vote to pass SB 1088 SD2.

Mahalo,

Carl Imparato

**Strong support for SB 1088 -- Public Beach Access**

Rhiannon Carrasco [REDACTED]

**Sent:** Monday, March 23, 2009 8:48 AM

**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony

**LATE TESTIMONY**

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Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Rhiannon Carrasco

[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because everyone should have access to beautiful beaches because they are common property resources!

**HB 1088**

freeoceanaxs@yahoo.com [REDACTED]

**Sent:** Monday, March 23, 2009 8:57 AM**To:** WLOtestimony**Cc:** repbrower@capitol.hawaii.com**LATE TESTIMONY**

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Noa Napoleon  
1750 Kalakaua Ave Apt. 103  
Hon, HI 96826

Testimony in **Support** of SB 1088

House Committee on Water, Land, and Ocean Resources

User capacity studies done in 2006 suggests that conflicts between commercial companies and the general public are increasing as commercial operators learn to exploit loop holes in the law. The CSV consultant study authorized by the state legislature in 2005 concludes by calling for revamping regulations on Blue Cards and the so-called beach vendors who on a daily basis saturate Waikiki beach with commercial equipment in contradiction of the Administrative rule restricting commercialism on Waikiki beach.

#### The Waikiki Problem

The 1928 Waikiki Beach Agreement is a land deed agreement between the State and the shoreline hotels in Waikiki. This agreement contains specific restrictions about commercialism on Waikiki beach. DLNR Administrators like to say the law is obsolete and or unenforceable because ..."DLNR has allowed it in other areas. Meaning that because they exempted certain hotels in Waikiki from having to apply for commercial permits, the Administrative rule regarding commercial restrictions cannot be enforced. This has created loop holes in the rules that are now being exploited by roving companies who misuse our beaches with impunity. On Waikiki beach for example the no obstruction, no commercialism rule is simply not enforced by DLNR because of a contention that the beach is open to all on first come fist serve basis. If the commercial companies can get their equipment on the beach before anyone arrives on the beach, since they "use the beach in the same manner as everyone else does," they are not breaking the law according to DLNR staff.

If Kailua home owner's who live along the shoreline wanted to rent out say 100 lounge chairs and umbrellas for a profit, does the so-called Waikiki exemption makes this legal for Kailua as well? My bet is that if a Kailua beach homeowner decided to rent out lounge chairs on the beach DLNR would say its illegal, that one needs a permit from DLNR for this etc. If Waikiki hotels are allowed to violate the law in this manner DLNR will have great difficulty in requiring permitting and or enforcing the no obstruction rule on anyone desiring to rent out beach equipment. I call on legislators to examine the Waikiki situation to see for themselves how

DLNR has used faulty logic to refused to enforce the law on beach commercialism, and how this has created the statewide problem regarding enforcement of the restrictions. The situation in Waikiki is what DLNR officials are calling the prototype for the rest of the state. DLNR Chairperson Peter Young, in an attempt to answer the Kailua Neighborhood Board on the problems related to the roving commercialism and misuse of our public beaches, has said that the Waikiki rules regarding beach commercialism are not enforceable. This logic is passed from one administration to the next making it appear as if the exception has now become the rule.

#### A Legislative fix is needed for preventing beach obstructions

Division Administrators in DOBOR and DOCARE are responsible for enforcing commercial prohibitions on a state beach, but because they have said they feel this rule should not be enforced in all cases, the rule is ignored everywhere (across the board). In areas for example where public access corridors are being used as staging areas for commercial kayak, wind surf, and kite schools, the public has no recourse with DLNR. I would request that Senators attempt to amend SB 1088 to specifically underline the current rules which already restrict commercialism on a public beach. I realize that the Admin Rules already requires permitting for commercialism on a public beach but since DLNR has not enforced this law with any consistency, I feel state Legislators should get involved to help them close the loop holes that (in their minds) make the rules unenforceable. This sort of inconsistency is responsible for the problems we are trying to address. Last year BLNR approved a rule change proposal that essentially put the responsibility on the public for filing civil resource complaints with BLNR, further removing the enforcement responsibility from DOCARE and DOBOR in my view. This was a December 12, 2008 submittal (H-CO-submittal H1). Re: "Amending Civil Resource Violation System." Hawaii Administrative Rules regarding commercial restrictions on public beaches are 13-255-1 and 13-255-6. DLNR could control the vending through s regulatory process but they refuse to do this. They are in essence saying to the legislature "make me enforce this" otherwise I'm not going to be the bad guy and "put these people out of business."

Mahalo, Noa Napoleon

## Strong support for SB 1088 -- Public Beach Access

Lauren Valentino [REDACTED]

**Sent:** Monday, March 23, 2009 12:45 PM

**To:** Rep. Ken Ito; Rep. Sharon Har; WLOtestimony

**LATE TESTIMONY**

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Ken Ito  
Sharon E. Har  
Committee on Water, Land & Ocean Resources

Lauren Valentino  
[REDACTED]

Monday, March 23, 2009 09:30 AM

Strong support for SB 1088 -- Public Beach Access

I strongly support this bill because...most of the private ocean front homes are not even used as permanent residence. Whether you are someone who lives in Hawaii full-time or a visitor for a week, it is a basic right to be able to access the ocean from multiple sites. These public areas are decreasing and private beach homes are even posting signage that falsely states the privacy of their property. Not only should this bill be passed without question, but there should also be an increase in coastal management and regulation of the private beach front properties that already exist.

**Testimony for SB1088 on 3/23/2009 9:30:00 AM**

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

**Sent:** Sunday, March 22, 2009 7:05 PM

**To:** WLOtestimony

**Cc:** [REDACTED]

**LATE TESTIMONY**

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Testimony for WLO 3/23/2009 9:30:00 AM SB1088

Conference room: 325

Testifier position: support

Testifier will be present: No

Submitted by: Andrea Brower and Keone Kealoha

Organization: [REDACTED]

Address: [REDACTED]

Phone: [REDACTED]

E-mail: [REDACTED]

Submitted on: 3/22/2009

**Comments:**

Public access ways to historically, culturally, and environmentally significant places is highly important to preserve. Kaua`i, like the rest of the islands, has faced significant challenges enforcing community access rights in the past decade, especially as coastlines are developed. It is vitally important that we clarify in law the rights of our communities to maintain access to the places they live, work, and play. A legal clarification will also assist private landowners in judging what is and what is not consistent with the law, preventing divisiveness in our communities.