

# S.B. NO. 986

JAN 25 2017

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## A BILL FOR AN ACT

RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1.   In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517  
2   P.2d 57 (1973), the Hawaii supreme court held that "land below the  
3   high water mark, like flowing water, is a natural resource owned  
4   by the state subject to, but in some sense in trust for, the  
5   enjoyment of certain public rights." As a result of this  
6   ruling, any structures located seaward of the shoreline location  
7   as determined by the department of land and natural resources  
8   (department) would be considered encroachments upon public land.

9           When an encroachment is discovered, it may be resolved by  
10   either removal or obtaining an easement from the department.  
11   Generally, an easement must be obtained from the department for  
12   a structure within the shoreline area even if the structure was  
13   located within the record boundary of the landward property at  
14   the time of construction.

15           The department has been named as a party in claims  
16   regarding structures, improvements, and debris in the shoreline  
17   area that was once private property.

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1 Pursuant to sections 171-13 and 171-17(b), Hawaii Revised  
2 Statutes, easements granted by the board of land and natural  
3 resources (board) under the circumstances described above  
4 require compensation at fair market value.

5 The purpose of this Act is to provide the board the  
6 discretion to grant easements for less than fair market value in  
7 regards to encroaching structures that were authorized by an  
8 appropriate regulatory agency and originally constructed  
9 landward of the shoreline and within the record boundary of an  
10 oceanfront property but are now located within the shoreline  
11 area, due to the dynamic nature of the location of the  
12 shoreline.

13 SECTION 2. Chapter 171, Hawaii Revised Statutes, is  
14 amended by adding a new section to be designated and to read as  
15 follows:

16 "§171-13.5 Special shoreline encroachment easements. (a)  
17 The term "special shoreline encroachment" means a structure that  
18 was authorized by a governmental authority and located landward  
19 of the shoreline (as defined in chapter 205A) within the record  
20 boundary of the property at the time of construction, but is now  
21 located seaward of the shoreline on public land.

1        (b) Such special shoreline encroachments described and  
2 defined in subsection (a) may be granted easements for a value  
3 determined by the board notwithstanding section 171-17. The  
4 granting of an easement in accordance with this section shall  
5 not be construed as state ownership of the shoreline  
6 encroachments.

7        (c) Easements granted in accordance with this section  
8 shall not require the prior approval of the governor or prior  
9 authorization of the legislature pursuant to section 171-53.

10       (d) Easements granted in accordance with this section  
11 shall take into account the public policies of protection and  
12 preservation of the natural shoreline and public pedestrian  
13 access along the shoreline and the long-term risks to life and  
14 property from coastal hazards."

15       SECTION 3. Section 171-53, Hawaii Revised Statutes, is  
16 amended by amending subsection (c) to read as follows:

17       "(c) The board, with the prior approval of the governor  
18 and the prior authorization of the legislature by concurrent  
19 resolution, may lease state submerged lands and lands beneath  
20 tidal waters under the terms, conditions, and restrictions  
21 provided in this chapter; provided that the authorization of the  
22 legislature shall not be required for leases issued under

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1 chapter 190D; and provided further that the approval of the  
2 governor and authorization of the legislature shall not be  
3 required for any grant of easement or lease of state submerged  
4 lands or lands beneath tidal waters used for moorings, cables,  
5 [~~or~~] pipelines[~~+~~], or any special shoreline encroachment as  
6 described and defined in section 171-13.5; provided further that  
7 this exemption shall not apply to easements for cables used for  
8 interisland electrical transmission or slurry pipelines used for  
9 transportive materials, mined at sea, or waste products from the  
10 processing of the same.

11 The lease shall provide that the lands shall be reclaimed  
12 at the expense of the lessee. Title to the reclaimed lands  
13 shall remain in the State."

14 SECTION 4. Statutory material to be repealed is bracketed  
15 and stricken. New statutory material is underscored.

16 SECTION 5. This Act, upon its approval, shall take effect  
17 retroactive to July 1, 2012.

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INTRODUCED BY:



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BY REQUEST

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**Report Title:**

Special Shoreline Encroachment Easements

**Description:**

Provides the Board of Land and Natural Resources discretion to grant easements for less than fair market value for structures that were authorized by a governmental authority and located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the valid certified shoreline on public land.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

## JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

PURPOSE: To provide the Board of Land and Natural Resources (Board) the discretion to determine the value at which to grant shoreline encroachment easements for structures that were previously authorized by a governmental agency and originally located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the shoreline on public land; and to exempt easements granted under these circumstances from prior approval of the Governor and prior authorization of the Legislature pursuant to section 171-53(c), Hawaii Revised Statutes (HRS).<sup>1</sup>

MEANS: Add a new section to chapter 171, HRS, and amend section 171-53(c), HRS.

JUSTIFICATION: In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), the Hawaii Supreme Court held that "land below the high water mark, like flowing water, is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." As a result of the ruling, any structures located seaward of the shoreline location would be considered encroachments upon public land.

When an encroachment is discovered, it may be resolved by either removal or obtaining an easement. Generally, an easement must be obtained from the Department for a structure located below the shoreline even if the structure was located within the record boundary of the property at the time of construction.

This legislative proposal seeks to address a situation of inherent unfairness when structures that were authorized by a governmental authority and originally located landward of the shoreline within the record boundary of the property at the time of construction, but are now located seaward of the shoreline on public land, and easements to legitimize such encroachments require compensation to the State at fair market value under section 171-17, HRS. The purpose of requiring an easement under these circumstances is to resolve issues of liability and indemnity and not revenue generation, and as such, this measure seeks to grant the Board the flexibility to determine the value of such easements.

Considering that the structures were originally built on private property, an exemption from section 171-53(c), HRS, likely would not compromise the State's fiduciary obligations. In addition, given the volume of easements that are expected to be processed, this exemption would greatly expedite the disposition process.

Allowing the Board to determine the value at which the easements are granted via a streamlined process<sup>2</sup> would assist in encouraging compliance from shoreline landowners by having these landowners enter into easements with the State.

Impact on the public: By resolving the liability and indemnity issues, taxpayers will have greater protection from potential legal and financial liability against the State with regard to these structures.

Impact on the department and other agencies: By facilitating compliance from landowners, this bill will reduce the burden on staff resources from having to pursue enforcement actions.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: LNR 101.

OTHER AFFECTED  
AGENCIES: None.

EFFECTIVE DATE: Retroactive to July 1, 2012, upon its approval.<sup>3</sup>

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<sup>1</sup> Only easements for moorings, cables, and pipelines on submerged lands are currently exempt from the requirement of prior approval of the Governor and prior authorization of the Legislature.

<sup>2</sup> The appraisal process under section 171-17, HRS, can sometimes be expensive and time consuming.

<sup>3</sup> The Department is seeking an effective date retroactive to July 1, 2012, to accommodate certain shoreline easements that were previously approved by the Board, subject to the enactment of a statute that authorizes the Board to grant such easements for less than fair market value, that may meet the stringent requirements for below market value compensation stated in this legislative proposal. Past practice was that easements were required only for encroachments located outside of a property's record boundary. In 2011, the Board began to require easements for encroachment located seaward of the shoreline as well, necessitating this measure. The retroactive date would cover those easements approved by the Board that meet the criteria established in this measure.