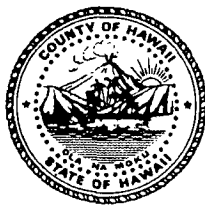


Harry Kim
Mayor



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COUNTY OF HAWAI'I
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May 22, 2008
(via email)

Honorable Dominic Yagong
Councilmember, District 1
Hawai'i County Council
333 Kilauea Avenue, 2nd Floor
Hilo, Hawai'i 96720

Re: Old Laupahoehoe Access Road, Possible Warning Signs or Releases of Claims

Dear Mr. Yagong:

County of Hawai'i Corporation Counsel Lincoln Ashida has assigned me to respond to your letter to him, dated May 14, 2008. In that letter, you noted that the County has recently begun blocking access to the Old Laupahoehoe Access Road ("OLAR") due to a study that indicated that rockfall mitigation work should be done before the road is opened for public use. You also stated that residents interested in continuing to walk the OLAR wanted to know if: (1) warning signs might prevent County liability for injuries due to use of the road; and (2) waivers of liability by users also might prevent such County liability.

Since this is a matter which your constituents are asking you, we will try to provide a general legal response which you may share, which does not involve attorney-client privileged opinions regarding any specific fact situations or claims. This should not be relied upon as a legal opinion for action or forbearance by any person or entity. Of course any private persons or entities should consult their own private counsel.

I. WARNING SIGNS

In Hawai'i, the occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be on the land, regardless of the legal status of the individual. This duty may include maintaining the premises in a safe condition and warning of known defects. *Pickard v. City and County of Honolulu*, 51 Hawai'i 134 (1969). Failure to carry out this duty may result in liability for injuries caused.

Regarding natural conditions, the County may have a duty to warn or protect from "extremely dangerous conditions" which are not readily apparent to persons of ordinary

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intelligence, but are known to the County, if the County has “impliedly invited” people to enter the land for known activities. *Birmingham v. Fodor’s Travel Publications*, 73 Hawai‘i 359 (1992).

In this case, we assume that the County is aware of existing rockfall hazards. We also assume, for discussion only, that the County would have a duty to warn users of the OLAR about the rockfall hazard, if the road were opened for recreational walking.

Such situations inevitably invite comparison to the tragic Sacred Falls State Park rockfall of Mother’s Day 1999. On that date, some 30 cubic yards of rock and debris fell where a crowd of hikers were enjoying the park. Eight people were killed, and fifty others injured among the tons of boulders and debris. The State was sued, and was found liable at trial, despite nine (9) warning signs at the trailhead.

In news release No. 2002-54, October 20, 2002, then State Attorney General Earl Anzai, announcing that they would appeal, said:

. . . the signs specifically warned of the danger of falling rocks, warned that falling rocks had caused death and injuries in the past, and warned that if the public were to proceed past the signs, they should do so only at their own risk, and they should use extreme caution.

At the gated entrance the sign warned “The upper end of the trail and the falls area are bordered by rocky cliffs and are subject to FALLING ROCKS and ROCK SLIDES. Use trail at your own risk.” Another sign posted near the pedestrian gate warned: “FALLING ROCKS ARE DANGEROUS. THEY HAVE RESULTED IN DEATH AND INJURIES HERE. ROCKS FALL AT UNPREDICTABLE TIMES AND WITH LITTLE OR NO WARNING.” Along with the other seven signs the public was adequately warned of the dangers of falling rock at the park, and the State therefore should not be liable for the deaths and injuries that resulted from the rock fall tragedy.

Ultimately the State settled for \$8.56 million.

The trial court had noted poor maintenance, ineffective warnings, and no program to inspect, review or evaluate adequacy of warning signs. Said the court:

In the exercise of due care, the state should have posted more specific warnings in the area of greatest risk and in a manner that would adequately impress visitors with the extent of the risk involved . . . The signs did not warn with the intensity and urgency demanded of the falling-rock hazard in the waterfall area at Sacred Falls.” See <http://starbulletin.com/2002/09/25/news/story1.html>

Current State Attorney General Mark Bennett has acknowledged that no sign would completely protect the State from lawsuits. “There will always be somebody who says, ‘That sign wasn’t enough.’” <http://sierraactivist.org/article.php?sid=25392>

One of the plaintiffs’ attorneys, Art Park, said “the new signs probably will protect against lawsuits, but the state still has a moral obligation to stop people from going to the falls when it knows of the dangers.” <http://the.honoluluadvertiser.com/article/2004/May/09/ln/ln08a.html>

There are further issues regarding the sufficiency of warning signage regarding children, international tourists, and others who may have difficulty with reading or understanding English, or lack capacity to make informed choices. Pictorial signs may be used, but again their effectiveness may be open to question.

In general, we agree with Attorney General Bennett that while warning signage carefully done could, in theory, prevent liability, the reality in court cannot be guaranteed. Each case will be treated on its own unique facts by any court. As Attorney General Bennett said, there will always be someone who says, “that sign wasn’t enough.” And, as in the Sacred Falls case, there may be issues of maintenance and monitoring the effectiveness of the signage.

Beyond that, we also agree with Arthur Park: If the County is informed of substantial danger of rockfalls or slides, the County has a moral responsibility not to allow people to venture into such danger zones, even if legal liability can be minimized.

II. WAIVERS OF LIABILITY

Courts have tended to limit waivers of liability, finding that they may relieve from negligence liability, but not from gross negligence. An agreement to relieve someone of gross negligence is considered against public policy and void. *Wheelock v. Sport Kites, Inc.*, 839 F.Supp. 730, 736 (D.Haw.1993). An “attempt to escape liability for more than ordinary negligence renders the release clause invalid.” *Farina v. Mt. Bachelor, Inc.*, 66 F.3d 233, 235 (9th Cir. 1995). The Restatement of Contracts, section 574, indicates that a waiver may not be effective against reckless conduct.

Plaintiffs’ attorney Arthur Park has been quoted, regarding Sacred Falls: “It’s reckless to let people go in there, but if the state is going to let people go in, it has to make sure they really understand the dangers,” he said. He believes that if hikers are allowed in, they should have to sign waivers that outline the dangers, deaths, and injuries that have occurred there. (*See Honolulu Advertiser* article referenced above.)

Mr. Park’s comments signal two things: (1) Plaintiffs’ attorneys will regard any allowance of hikers into known rockfall areas as “reckless” or worse than mere negligence (making waivers questionable); and (2) Plaintiffs’ attorneys will view general waivers as inadequate and will challenge whether waivers are sufficiently specific and detailed.

The courts have also tended to throw out the entire waiver agreement, if it purports to release from more than negligence liability. *In re Pacific Adventures, Inc.*, 27 F. Supp.2d 1223, 1225 (D.Haw. 1998).

So, waivers also are not easy solutions to rockfall liability. Moreover, administration of waivers would require controlled access to the area, probably requiring rangers or other monitors. And of course there remains the problem of minors and others who may not understand English or be of questionable legal capacity.

III. CONCLUSION

In theory, both signage and waivers may help reduce County liability for rockfall injuries. However, they cannot be viewed as reliable in every case. And beyond liability, when dealing with such destructive and deadly forces as rockfalls, we would respectfully urge erring on the side of caution in restricting access until best efforts can be made to minimize the risks.

Sincerely,



Ivan M. Torigoe
Deputy Corporation Counsel

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