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LATE TESTIMONY

February 26, 2008

Via E-Mail

The Honorable Representative Kyle Yamashita, Chair, and Members
Committee on Economic Development & Business Concerns
State House of Representatives, Room 325
Honolulu, Hawaii 96813

Subject: Testimony in Opposition to HB 2242 Relating to Counties (Affordable housing conditions at subdivision approval and issuance of building permits)

Dear Chair Yamashita and Members:

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 and rational land use planning, legislation and regulations affecting common problems in Hawaii.

We appreciate the opportunity to provide our testimony **in opposition to HB 2242**, which would authorize each county to impose upon certain subdividers or developers an affordable housing requirement as a condition for approval of a subdivision or the issuance of a building permit.

HB 2242. The proposed bill will allow the county to exact affordable housing requirements though "inclusionary zoning" process, on any project which applies for county subdivision approval or issuance of a building permit. The proposed bill:

- Is applicable to buildings for a commercial, industrial, resort, or commercial-, industrial-, or resort-emphasis mixed use; or multi-family dwelling;
- Is also applicable to subdivisions or consolidations of land that will result in separate parcels zoned for residential, commercial, industrial, resort, or commercial-, industrial-, or resort-emphasis mixed use;
- Empowers each county to require a subdivision applicant to provide either a certain number of affordable housing units within or outside the subdivision as a condition of the issuance of the final subdivision approval, or may allow the subdivider to pay the county cash in lieu of providing the required number of affordable housing units;

- Empowers each county to require the developer of an eligible project to provide either a certain number of affordable housing units within or outside the project as a condition of the issuance of the first building permit for the project, or may allow the developer to pay the county cash in lieu of providing the required number of affordable housing units;
- Prohibits the counties from imposing any additional affordable housing requirement upon a developer or subdivider who previously has had imposed upon the developer or predecessor landowner an affordable housing exaction as a condition for reclassification, rezoning, or subdivision of the land upon which the project is situated;
- Requires any affordable housing requirement imposed by a county upon an eligible subdivision or project to have a rational nexus with the subdivision or project;
- Requires the county to establish a formula for determining the affordable housing requirement to be imposed upon different types or sizes of eligible subdivisions or projects. The formula shall be established by ordinance and shall be presumed valid in any administrative or judicial proceeding unless the preponderance of evidence shows that the county clearly abused its discretion in establishing the formula;
- Requires the county and subdivider or developer to enter into an agreement binding the subdivider or developer, as well as any successor, to comply with the affordable housing requirement. Said agreement is required before the issuance of the final subdivision approval or building permit, and shall be enforceable through appropriate judicial action.

LURF's position. The various housing studies over the past 20 years all conclude that the lack of affordable housing is due to the lack of overall supply of housing for all income levels. In Hawaii's housing market, this proposed legislation will not do anything to increase the overall supply of housing, but instead will create uncertainty and unpredictability in the housing market, financing problems and additional development costs, which will result in less homes being built. LURF can support legislation and affordable housing exactions which comply with constitutional requirements, which provide incentives, and which do not amount to an unconstitutional taking. Under the circumstances, however, LURF must **oppose HB 2242**, based on the following grounds:

- **"Changing the rules in the middle of the game" is unfair and unjust and will impose a substantial hardship on housing developers.** Under the current entitlement process in Hawaii, affordable housing requirements are imposed at the time of state land use commission reclassification or during the zoning approval process – this affords the developer with some predictability of the estimated costs of the development and allows them to secure financing for the projects. In Hawaii, affordable housing requirements have never been imposed as a condition of subdivision approval or upon issuance of a building permit, which occurs near the end of the development process and after the developer has secured their financing for the project. The proposed new law changes the long-established, customary entitlement procedure and practice of imposing affordable housing conditions at the time of state land use commission reclassification or at the time of rezoning. It is unfair and unjust for the State and counties to "change the rules" regarding the long-established and customary

entitlement procedures and practices relating to the imposition of affordable housing requirements.

- **Under the long-standing entitlement process, subdivision approval and issuance of building permits are "ministerial," and not discretionary**. Approval of subdivision applications and issuance of building permits are ministerial, and are meant to check building requirements relating to public health and safety. The ministerial subdivision and building permit processes should not be used to impose last-minute, discretionary, and potentially multi-million dollar affordable housing exactions.

- **HB 2242 will breach existing zoning agreements and subdivision approvals.** By retroactively imposing new affordable conditions on zoned or subdivided properties, the Counties will be breaching their prior zoning negotiations and agreements which did not include affordable housing conditions. Under the past and current entitlement process, landowners and developers negotiated various conditions and requirements relating to zoning and/or subdivision approvals. In several cases, the counties agreed that affordable housing requirements were not necessary. In numerous zoning negotiations, agreements and approvals over the past 30 years, the County has taken the position (and landowners have agreed) that affordable housing requirements were not necessary as conditions to a particular zoning or subdivision approval. The county zoning approval documents are evidence of such agreements between the county and landowners or developers. Thus, to impose such affordable housing exactions at this time would be a breach of such zoning agreements between the County and landowners or developers.

- **Some counties have "waived" imposing affordable housing conditions for over 30 years.** Having approved zoning and or granted subdivision approvals without affordable housing requirements, the counties have "waived" their opportunity to impose affordable housing requirements – in some cases for over 30 years.

- **HB 2242 violates the "vested rights" of landowner and developers who have detrimentally relied on existing land use approvals, zoning agreements and subdivision approvals**. Many parcels of land and projects which have development approvals do not have affordable housing requirements, because other terms and conditions were negotiated at the time of those government approvals. In prior land use, zoning and subdivision approvals, the Counties have either agreed that affordable housing requirements were not necessary, or the Counties have waived their opportunity to impose affordable housing requirements, by failing to make affordable housing requirements a condition for zoning – in some cases the waiver has been for over 30 years! During these long periods, many landowners and developers have relied on the zoning or subdivision conditions and requirements imposed by the state land use and County zoning process, have secured financial commitments to develop properties and have expended substantial funds on planning, design, analysis and even construction of early project phases. Through this bill, the State and Counties are attempting to take a "second bite" out of these projects and "retroactively" apply affordable housing requirements to properties whose owners who have already established "vested rights" by detrimentally relying on

the Counties' long-established and customary entitlement procedures and practices. This law, which proposes to allow government to take a "second bite" at imposing affordable housing requirements, could constitute an unconstitutional taking from landowners and developers who have spent substantial development funds in detrimental reliance on Hawaii's long-standing entitlement process and the county's failure to impose affordable housing conditions at the time of approvals for land use reclassification, zoning or subdivision, and thus have established "vested rights."

- **The bill is unconstitutional because it does not require the counties to satisfy the "Rough Proportionality" Test.** The proposed bill provides that the county establish an ordinance with a formula for determining the affordable housing requirement to be imposed upon different types or sizes of eligible subdivisions or projects. The proposed bill improperly states that the formula shall be "presumed valid in any administrative or judicial proceeding unless the preponderance of evidence shows that the county clearly abused its discretion in establishing the formula." In fact, under the U.S. Constitution, the County is required to satisfy a "Rough Proportionality Test" – which means that the Counties must make some sort of individualized determination that the degree (or proportion) of the affordable housing exaction is "reasonably related both in nature and extent to the impact of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

- **HB 2242 may result in the delay or abandonment of projects and affordable housing.** Some landowners and developers who intend to provide homes for a wide range of incomes and families within the various counties may not be able to proceed with their projects because of the additional costs associated with new affordable housing conditions which could be imposed by the Counties based on the authority granted by HB 2242. If these projects do not go forward, there will be less supply of homes on the market, which will drive prices up and out of the range of average working people in the State of Hawaii.

- **The State and Counties should provide incentives to encourage the development of affordable housing.** Landowners and developers respond to incentives. Thus, to encourage landowners and developers to build affordable housing, the State and Counties should provide meaningful incentives, including, but not limited to:
    - Density bonuses
    - Fast-track permit processing
    - Monetary subsidies
    - Fee waivers, fee reductions and fee deferrals
    - In-lieu payment alternatives
    - Off-site alternatives

LURF appreciates the opportunity to express our **opposition and comments** on this matter.