LATE TESTIMONY

LAND USE RESEARCH
FOUNDATION OF HAWAII
700 Bishop Street, Ste. 1928
Honolulu, Hawaii 96813
Phone 521-4717
Fax 536-0132

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The Honorable Representative Maile S.L. Shimabukuro, Chair and Members
House Committee on Human Services and Housing
Hawaii State Capitol, Room 329
Honolulu, HI 96813 BY E-MAIL

Subject: Testimony in Opposition to House Bill No. H.B. 2242 Relating to Counties

Dear Chair Shimabukuro and Members:

My name is Dave Arakawa, 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 H.B. No. 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 issuance of a building permit.

H.B. No. 2242. The proposed bill includes the following:

- Applicable to buildings for a commercial, industrial, resort, or commercial-, industrial-, or resort-emphasis mixed use; or multi-family dwelling;
- 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;

- A county shall not impose any 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;
- Any affordable housing requirement imposed by a county upon an eligible subdivision or project shall have a rational nexus with the subdivision or project;
- The county shall 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;
- The county and subdivider or developer shall 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. LURF can support legislation and affordable housing exactions which comply with constitutional requirements, provide incentives and which do not amount to an unconstitutional taking. Under the circumstances, however, LURF must **oppose Bill 2242**, based on the following grounds:

- **"Changing the rules in the middle of the game" is unfair and unjust.** 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. Affordable housing requirements are never imposed at subdivision approval or upon issuance of a building permit. 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 and building permit applications are ministerial, and should not be subject to last-minute, potentially multi-million dollar affordable housing exactions.

- **Breach of 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 land owners 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.

- **Detrimental reliance and vested rights.** The proposed "second bite" law could constitute an unconstitutional taking from land owners and developers who have detrimentally relied on the entitlement process and the county's failure to impose affordable housing conditions at the time of zoning or subdivision, and thus have established "vested rights." In prior zoning and subdivision approvals, the Counties have either agreed that affordable housing requirements were not necessary, or the County has waived its 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. These landowners and developers have expended substantial funds on planning developments in reliance on County zoning and subdivision approvals which did not include affordable housing requirements. Under such circumstances, to impose such a requirement at this stage of the process would amount to an unconstitutional taking.

- **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).

- **Bill 2242 may result in the delay or abandonment of projects and affordable housing**. Some land owners 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 Bill 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.** Land owners and developers respond to incentives. Thus, to encourage land owners 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.

cc: Department of the Attorney General, State of Hawaii