

TO: REP. KEN ITO, CHAIR
REP. JON RIKI KARAMATSU, VICE CHAIR

HOUSE COMMITTEE ON WATER, LAND, OCEAN
RESOURCES & HAWAIIAN AFFAIRS

FROM: KEVIN SHOWE

RE: **HB 2247, RELATING TO HISTORIC PRESERVATION**

HEARING DATE: WEDNESDAY, FEBRUARY 6, 2008. 8:30 A.M.
CONFERENCE ROOM 312

I am testifying in opposition to H.B. 2247.

Not very long ago, I had the good fortune to acquire an undivided fifty per cent fee simple interest in the land that is the subject of this bill. Without any specific plans, I envisioned a future very low density, very high luxury development on a small portion of the land, leaving most of it in its present undeveloped state.

However, prior to any kind of detailed planning for the development of the land, other persons sharing the love and attraction that I felt for this land moved the Legislature to enact Act 59, Session Laws of Hawaii 2003. Act 59 established the land as the South Kona Wilderness Area, providing for the preservation of the visual, cultural, and historic aspects of the lands. Act 59 prohibited any subdivision of the subject land and any construction of new structures within the shoreline areas of the land. It further directed the Department of Land and Natural Resources to:

- (1) Develop a management plan for the preservation and protection of historic sites, native species, and recreational uses within the area; and
- (2) To acquire the subject land through a "value-for value exchange of other state lands".

Act 59 was to be repealed on December 31, 2006, if the exchange transaction to acquire the lands was not consummated by that date; however Act 215, Session Laws of Hawaii 2006, extended the repeal date to December 31, 2007. With no action taken by December 31, 2007, four and one half years after its enactment, Act 59 was repealed. This measure now attempts to revive Act 59 by extending the repeal date by an additional two years to December 31, 2009.

To this date and after the passage of four and a half years, the Department of Land and Natural Resources has not completed the management plan mandated by Act 59. Further,

to my knowledge, it has not initiated any proposal of any "value-for-value" land exchange for the lands.

Case law through out the land has found measures such as this, prohibiting a landowner the enjoyments of the private ownership of land, a "taking", albeit a temporary taking, under the United States Constitution, requiring the payment of just compensation to the private landowner. Any further extension of the prohibitions contained in this legislation would extend the temporary taking requiring further just compensation.

However, of even more relevance to this matter at this time is the just issued Hawaii Supreme Court ruling in *Office of Hawaii Affairs et al. v. Housing and Community Development Corporation of Hawaii, Linda Lingle, in her capacity as Governor of the State of Hawaii et al.*, No. 25570, January 31, 2008. This case arose out of the efforts of the defendants in the mid-1990s to transfer certain parcels of ceded lands in Lahaina, Maui, and Kona, Hawaii, to private entrepreneurs for the purpose of residential development. The plaintiffs brought action for an injunction against the State enjoining it from transferring to third parties the specific lands that were the subject of the action and any other ceded lands from the public land trust. The lower court found for the defendants; however, the Supreme Court sided with the plaintiffs and remanded the action to the lower court with instructions to issue an order granting the plaintiffs' request for an injunction against the defendants from selling or otherwise transferring to third parties the parcels subject to the action and "any other ceded lands from the public land trust until the claims of native Hawaiians to the ceded lands have been resolved."

With this Supreme Court decision in place and due to the fact that the public lands available for any kind of value-for-value exchange called for by Act 59 are overwhelmingly ceded lands, it may be years before the State may entertain any kind of land exchange or transfer for the lands that are the subject of Act 59, thereby continuing the "taking" of those lands into the indefinite future.

Accordingly, I urge this Committee to not pass out this bill, thereby extending a temporary taking into an indefinite taking.

HAWAII CAPITAL PARTNERS, LLP
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Representative Ken Ito, Chair
Representative Jon Riki Karamatsu, Vice Chair
Committee on Water, Land, Ocean Resources & Hawaiian Affairs
Wednesday, February 6, 2008, 8:30 A.M.

Request to Defer HB 2247, Re. Historic Preservation (South Kona wilderness area)

Hawaii Capital Partners, LLP, a Hawaii limited liability partnership (“HCP”), and its affiliate, South Kona LLC, a Hawaii limited liability company (“SK”), own certain lands or interests therein located in Kapua, South Kona, on the Island of Hawaii (“Kapua Property”). Such Kapua Property is, in part, the subject of Act 059, Session Laws of Hawaii 2003 (“Act 59”), which was promulgated on July 1, 2003.

The purpose of Act 59 was to establish the “South Kona wilderness area” on the Big Island and the act authorized the Department of Land and Natural Resources (“DLNR”) to acquire any private lands included in the South Kona wilderness area, including HCP and SK’s Kapua Property, by a “value-for-value exchange of other state lands.” Act 59 stated that it would be repealed on December 31, 2006, if the exchange transactions to acquire the South Kona wilderness area lands were not consummated prior to that date.

By Act 215, Session Laws of Hawaii 2006 (“Act 215”), Act 59 was amended to extend the date of repeal to December 31, 2007, if the lands were not acquired prior to that new date. As of December 31, 2007, the DLNR had failed to acquire the Kapua Property.

H.B. 2247 of the current legislative session proposes to further amend Act 59 to extend the repeal date to December 31, 2009.

Although HCP and SK generally support the reasonable efforts being made by the State, counties and private organizations to preserve important historic and cultural lands, HCP and SK are concerned about the manner in which its Kapua Property would be unfairly affected by H.B. 2247. HCP and SK believe they have worked in good faith with the DLNR and the State to come up with a mutually agreeable exchange for the Kapua Property, but after the nearly 5 years since Act 59 became effective there has been no satisfactory resolution. It appears at this time that the State has no comparable exchange property for the Kapua Lands, nor is there any indication that the DLNR will be able or willing to carry out the acquisition of the Kapua Property by December 31, 2009. Aside from the fact that the repeal date has already passed, it would be unfair to further tie up the Kapua Property as provided by H.B. 2247. Consequently, HCP and SK respectfully request that the committee defer decision making on H.B. 2247 in order to consider alternative means to ensure the preservation of the Lands of Kapua .

As an alternative, HCP and SK have already initiated discussions with The Trust for Public Land (“TPL”) to pursue other options to ensure preservation of the property with fair compensation to the private landowners, SK and HCP. We ask for the Legislature’s support in our efforts to facilitate the acquisition process. Thank you for this opportunity to testify.