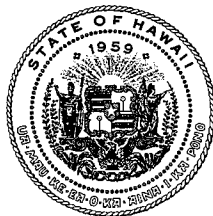
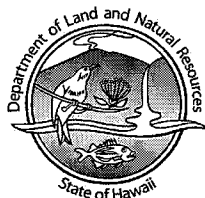


TESTIMONY

HB 2872

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAIHOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**TESTIMONY OF THE CHAIRPERSON
OF THE BOARD OF LAND AND NATURAL RESOURCES**

on House Bill 2872 – Relating To Public Lands

**BEFORE THE SENATE COMMITTEE ON
WATER AND LAND**

March 12, 2008

House Bill 2872 would require the Department of Land and Natural Resources (Department) to enter into five-year leases with the current leaseholders of recreation-residences at Kōke'e and Waimea Canyon State Parks, Kaua'i. These leases expired on December 31, 2006 and current lessees are on month-to-month revocable permits until a public auction, authorized by the Board of Land and Natural Resources (Land Board), is conducted for the long-term disposition of these leases. Under the proposed measure, the five-year leases would be issued at an unspecified per cent increase over the current rate. The Department opposes House Bill 2872 because a five-year delay in finalizing these lease dispositions is unnecessary and is likely to prolong, if not exacerbate, the problems this measure intends to address. The Department is also concerned with the constitutionality of this "special legislation". As such, the Department would defer to the Department of the Attorney General on the legality of this measure.

The primary reason given for the proposed five-year leases is concern over the condition of the recreation-residences, many of which are historic properties and contribute to the historic character of these two state parks. Lessees are tending to defer the sometimes costly repair and maintenance actions needed to maintain the recreation-residences because their tenancy is uncertain. They do not know when their current permits may be revoked or if they will prevail at public auction.

This measure is unnecessary for several reasons. The Department intends to hold the auction for twenty year leases authorized by the Land Board within the year. This will end the period of uncertainty and limit the duration of delayed repair and maintenance actions. In many cases, a five-year period would not be sufficient anyway to justify the level of investment needed make some of the major, pending repairs. Delaying the auction for five years could actually prolong the deferral of repairs and the structures could fall into even greater disrepair.



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

H.B. NO. 2872, RELATING TO PUBLIC LANDS.

BEFORE THE:

SENATE COMMITTEE ON WATER AND LAND

DATE: Wednesday, March 12, 2008 **TIME:** 2:45 PM

LOCATION: State Capitol Room 414

TESTIFIER(S): Mark J. Bennett, Attorney General
or William J. Wynhoff, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of Attorney General opposes this bill and believes it would be unconstitutional if enacted.

This bill requires the Department of Land and Natural Resources to "extend" for five years recreational-residential leases of property in Koke'e and Waimea State Parks on Kauai.

Background

The State owns lots in Koke'e State Park and Waimea State Park. More than 100 of these lots are subject to recreational-residential cabin leases. All of these leases expired on December 31, 2006.

The situation at Koke'e dates back to the early twentieth century. Beginning in the early 1900s, before creation of the state parks, the Territory and the County of Kauai issued permits authorizing use of the lots. See Board of Land and Natural Resources ("BLNR") report to Senate dated March 10, 1965. Permittees constructed recreational cabins at various times over the years. In 1965, the Legislature passed Act 239, section 38, 1965 Hawaii Session Laws 412 (now codified as section 171-44, Hawaii Revised Statutes), allowing the BLNR to issue twenty-year leases in such areas by direct negotiation.

When those leases expired in 1985, the BLNR declined to issue new leases by direct negotiation. Instead it auctioned new twenty-year leases. At that time, due to ambiguity in the 1965 leases, the successful bidders were required to purchase the site improvements from existing lessees. This requirement decreased the auction price.

All of the permits issued over the years and all of the 1965 and 1985 leases: (1) required the permittees and lessees to build and maintain a "cabin" on the property and (2) provided that if the permittees and lessees did not remove any improvements or structures (including the cabin) at the end of the permit, then the State, Territory, or County would own the improvements and structures.

This agreement that the State owned the cabins if not removed reflected the common law of the State of Hawaii. As the Hawaii Supreme Court explained in Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 119, 736 P.2d 55, 60 (1987):

The law of Hawaii in 1953, when the lease was executed, was that a house built upon premises owned by another became a fixture and part of the realty (*Ahoi v. Pacheco*, 22 Haw. 257 (1914)), and a tenant's right to remove such a house if provided for in the lease, had to be exercised in accordance with the terms of the lease. *Akiona v. Kohala Sugar Co.*, 5 Haw. 359 (1885). The lease in question, when executed, provided exactly what the law of Hawaii, as pronounced by this court, recognized.

Despite this history, law, and the plain meaning of the leases, some (but not all) of the lessees filed lawsuits claiming that the State was "taking" the cabins and was required to pay "just compensation." One of these lawsuits has already gone to trial. In Civil No. 06-1-0049 (Fifth Circuit), the

Honorable Kathleen Watanabe wholly rejected lessees' claims and ruled the leases mean what they say.

The State intends to proceed with issuing new leases in the relatively near future. Consideration is being given to restricting disposition of some or all of the new leases to residents of Kauai. In the meantime, most of the cabins are occupied by the former lessees by way of revocable permit issued pursuant to section 171-55, Hawaii Revised Statutes. Each of the permittees agreed to:

At Permittee's own expense, keep, repair, and maintain all buildings and improvements now existing or hereafter constructed or installed on the Premises in good order, condition, and repair, reasonable wear and tear excepted, including free from termite infestation.

Problems with the bill

First, the stated purpose of the bill is to provide "lessees" with the "long-term assurance that they need to invest in maintenance and repair of the properties." But each permittee has already agreed to maintain and repair the cabins. The State has no reason to believe they will not honor that agreement. As to any permittee who does not, we believe the appropriate remedy is to terminate the permit and, perhaps, re-issue to someone who will honor contractual obligations.

To the extent the bill is addressing major repairs or major changes, five years is likely too short a period to encourage any major investment. Moreover, we expect that new, twenty-year leases will be issued in the relatively near future. The new lessees will have a greater incentive to upgrade the cabins.

Second, the end of each of the preceding leases has involved litigation. We do not believe it would be in the best interests of the State to "extend" leases with existing

permittees. Doing so will simply postpone final resolution of the disputed issues.

Third, the existing leases have already expired. It is, therefore, not possible to "extend" the now expired leases.

Fourth, to the extent the bill is modified to require new leases to former tenants, it would run afoul of article XI, section 5 of the Hawaii Constitution, which provides:

The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

No Hawaii case deals with article XI, section 5. One formal opinion from this department addresses it. In our Opinion No. 61-38, at page 2 (footnote omitted), we said:

[I]t is clear that once land was "owned by the State or under its control," the framers of the Constitution intended that it be distributed by means of general laws and to prohibit its dissipation "through private, or special laws". (Vol. 1, Proceedings of the Constitutional Convention of Hawaii, pp. 233, 336.)

The impetus for adoption of article XI, section 5 appears to have been "special land exchange deals or things of that nature which as we know in the past have definitely caused a considerable loss to the Territory." 2 Proceedings of the Constitutional Convention of Hawaii of 1950, at 631 (1961). The committee report refers to "dissipation of assets by land exchanges under private laws or by homestead laws governing a particular tract of land." Stand. Comm. Rep. No. 78, 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 233 (1960). Although land exchange deals and homestead laws

governing particular tracts of land appear to have been foremost in the minds of the delegates to the 1950 Constitutional Convention, the constitutional proposal they agreed to was not limited to those transactions. The committee report instead states "in administering and disposing of the natural resources the legislature must do so by general law." Id.

Intergovernmental transfers were the only exceptions provided. Id.

H.B. No. 2872 is (plainly) the product of the exercise of legislative power and involves land owned by the State. The bill does not fall within the exception clause of article XI, section 5, because it does not involve an intergovernmental transfer.

H.B. No. 2872 is not a general law because the bill singles out one parcel of land in a specific locale. It is an exercise of legislative power over the lands owned by the State by special, not general, law and is, therefore, unconstitutional. Note, by way of contrast, the care taken by the 1965 legislature to cast Act 239, 1965 Hawaii Session Laws 412, in general terms.

The Department of Attorney General requests that this bill be held.

testimony

From: Keone Kealoha [keone@malamakauai.org]
Sent: Tuesday, March 11, 2008 3:16 AM
To: testimony
Subject: HB2872 - WTL Committee, 3/12, 2:45 PM

**Testimony of Executive Director of Malama Kaua'i
Twenty-Fourth Legislature, 2008**

In relation to:
HB 2872, Relating to Public Lands

Before the:
House Committee on Water and Land
State Capitol, 415 South Beretania Street, Conference Room 414

Dated:
March 12, 2008, 2:45 PM

Chair Hee, Vice-Chair Kokubun and Members of the Committee:

I support this bill.

The DLNR is currently in the process of finalizing a master plan for Koke'e State Park. It would be premature to allow the DLNR to enact 20-year lease auctions prior to the final master plan being completed. Part of the master planning process included a public testimony component and those comments will be considered by the consultancy preparing the plan.

It is also uncertain as to whether the proposed auction would even be necessary since the master plan may identify other means by which the DLNR can adequately fund the park's management and related DLNR requirements.

Additionally, the master plan may offer alternative auction recommendations not considered by the DLNR prior to the consultant's work being completed.

Please support this bill by allowing a period in which the master plan will be completed and the public comments will have been considered, especially as they relate to the leasehold properties in the park.

For the record, I am not a leaseholder of any property or dwelling located in Koke'e.

Mahalo,
Keone Kealoha, Executive Director
Malama Kaua'i

Keone Kealoha
Director

Malama Kaua'i

3/11/2008

testimony

From: James Torio [jktorio@hawaiiink.net]
Sent: Tuesday, March 11, 2008 7:49 AM
To: testimony
Subject: HB 2872

Aloha Honorable Legislators:

I am respectfully submitting my support "in favor" of HB 2872. Given the nature of how the DLNR have treated Kauai crown jewel, they in fact turned our beautiful mountainscape into a large garden of weeds.

One need only to ride the back roads to see how deplorable the area had become. In the early years I joined with the community to halt efforts by the DLNR under then Peter Young who inspired to change Kokee into a mecca for gaining wealth over the wish of the people. The fact that DLNR have not listened nor worked closer with leaders of the community which was a bad step in the wrong direction.

Kauai island residents are well aware of the DLNR intentions to forge ahead with their development plans regardless how our community feel. Here locally our residence feel they have been betrayed and lied too many times and the "trust factor" is diminished. We have a poor representative in Ron Agor as Kauai Representative for the Land Use Commission, a person who has demonstrated "no guts" on any issue that beface the Commission as it involves Kauai and again this is a sad thing.

Supporting and extension for 5-years may not be the fair thing to do given the rules states 20-year lease agreements. However given the large amount of demolition permits (49 +), we can all assume many of these historic cabins will be either torn down, removed from the property, or sold off and taken down hill. Many former lessee 20- years ago did the same.

I am suggesting that this 5-year extension be considered the "time- out" necessary to bring focus to Kokee. We need a cohesive combined management plan that is inclusive rather then sole owner attitude like the DLNR is displaying. Here locally one is confronted by State personnel with improper attitude against residence and tourist alike. Workers are seen un-caring to their daily duty. Really! What are their duties one may ask?

DLNR should pay immediate attention and demonstrate to this State what is their implementing plan to deal with abandon cabins and vacant lands first. They should be challenged to show cause on their intent to these concerns before they forge into the existing cabins because its operable and the DLNR wants to raise fees immediately. No! They (DLNR) have proven time and again they are incapable of handling any form of management to our State parks.

Its time the State allow non-profit organizations the opportunity to bid for the management of the mountain.

aloha

James K. Torio
Kauai

testimony

From: jonathan jay [jonathan@dakauai.com]
Sent: Tuesday, March 11, 2008 10:12 AM
To: testimony
Subject: re: HB 2872 Creating Five Year Extension to Existing Koke`e and Waimea Canyon leaseholders

Please support this legislation.
We need to see more of the big picture
before disrupting existing stakeholders.

The DLNR has a responsibility to come up with something that conforms to local concerns
before moving forward.

This 5yr. extension should provide that.

Mahalo for your support,

jonathan jay
5424 Kuapapa Street
Kapa`a, HI 96746

testimony

From: Donn Carswell [curly@aloha.net]
Sent: Tuesday, March 11, 2008 1:24 PM
To: testimony
Subject: HB 2872--HSCR 866-08

HEARING TO BE HELD IN ROOM 414 ON 3/12/08 AT 2:45 P.M.—WTL; WAM COMMITTEES

MR CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I submitted written testimony on this bill to the House Finance Committee--- I would like to add to this testimony: An extension of the current Revocable Permits is warranted, because of the pending Appeal on the constitutionality of the State taking private cabins without compensation. This appeal has just been filed and it may take two to three years to get a decision from the Supreme Court.

Recently the State has acquired three more cabins by default. The State now has 17 cabins and at least 21 lots that could be made accessible to the public by drawing or auction. This would: 1) meet Public demand for "a cabin in Koke'e" and 2) increase revenues to the Koke'e and Waimea Canyon Parks by \$150,000. Mr Quinn has testified and Wayne Souza maintains that only seven of the lots are buildable, because many of the lots are in the well head protection area, or 1,000 feet from a well. EPA standards prohibit cesspools in the well head protection area.. However septic systems with aerobic tanks will produce effluent acceptable to the EPA. They are basically cone shaped tanks with one quarter horse power compressors circulating air through the effluent and digesting it. The tanks can be run by solar power.

Referring to the testimony of the Attorney General submitted at the finance committee meeting

On Feb 6th, 2008, at the bottom of page 3 he says: "Second, the end of each of the preceding leases has involved

litigation. We do not believe that it would be in the best interests of the State to enter new leases with existing Tenants. Doing so will simply postpone final resolution of the disputed issues." I TAKE GREAT EXCEPTION TO THIS

STATEMENT AS AN INCUMBENT LESSEE. FIRST OFF, THERE ARE ONLY 29 OUT OF 96 CABIN OWNERS WHO ARE IN

3/11/2008

LITIGATION, AND THE A.G. WANTS TO PENALIZE ALL LEASEHOLDERS BECAUSE 29 LESSEES ARE TRYING TO PROTECT

THEIR CONSTITUTIONAL RIGHTS. THIS IS A HIGHLY DISCRIMINATORY STATEMENT. I CANNOT SEE ANY "POSTPONE-

MENT OF THE FINAL RESOLUTION OF THE DISPUTED ISSUES" BY NOT EXTENDING THE REVOCABLE PERMITS. THE

APPEAL HAS BEEN FILED AND WILL BE HEARD BY THE INTERMEDIATE COURT OF APPEALS OR THE SUPREME COURT

ON A NORMAL OR ACCELERATED SCHEDULE. THE DISPUTED ISSUES WILL BE FINALLY RESOLVED WHETHER THERE IS

AN EXTENSION OR NOT. IF THE STATE DECIDES TO AUCTION ALL THE CABINS BEFORE THE SUPREME COURT DEC-

ISION AND THE STATE LOSES THE APPEAL, THE STATE WILL HAVE TO COMPENSATE THE PRESENT PLAINTIFFS FOR

THEIR CABINS. THIS COULD RUN BETWEEN THREE AND FOUR MILLION DOLLARS!!! THIS WOULD BE A LARGE GAMBLE ON THE PART OF THE STATE!!!

THANK YOU,

DONN A CARSWELL
P.O. BOX 24
HANAIEI, 96714
KOKE'E CAMP LOT 61

Frank O. Hay

TESTIMONY regarding House Bill 2872 – Relating to Public Lands, before the Hawaii State Senate Committee on Water and Land, Senator Clayton Hee, Chair, and Senator Russell S. Kokubun, Vice Chair, Meeting at Honolulu, Oahu, Hawaii on 12 March 2008

Ladies and Gentlemen,

This House Bill would essentially give our historic community some “breathing room” from a Department of Land and Natural Resources plan to conduct an auction for almost ninety recreation residence cabins and lots within the Koke’e and Waimea Canyon State Parks. It would establish a community advisory group to work with DLNR on an acceptable plan and would very likely avoid a historic preservation tragedy.

Mr. William Wynhoff, the Deputy Attorney General, has testified before this Senate Committee (of the 2006 Legislature) and more recently before the Land Board that direct negotiations for Koke’e cabins and lots are allowed under both HRS §171-36.2 and HRS §171-44. Mr. Wynhoff also testified before the Land Board that the decision to go to auction in 1985 – the first ever in Koke’e history – was based on an erroneous DAG opinion.

We have Senator Kokubun and the 2002 Legislature to thank for striking the word “Urban” from HRS §171-36.2, now titled Public lands for historic preservation and restoration, and enabling DLNR to negotiate leases for “public lands in the State for use in historic preservation and restoration projects: (1) Through negotiations; and (2) For a price which shall be determined by the board.” That law now provides one avenue for direct negotiations.

The former DLNR Chairperson, Peter Young, confirmed that the cabins and the surrounding areas “... were determined to be a significant historic district through the governmental review process ...” and “... for all intents and purposes, is in the ‘Hawaii Inventory of Historic Places’.”

The other avenue allowing direct negotiations is HRS §171-44, which allows the Board to “lease, by direct negotiation and without recourse to public auction, lands within a state park or forest reserve ... for recreation-residence use ...”

Despite these two clear provisions in the law, DLNR remains committed to an auction, which could only repeat the historic preservation tragedy of 1985, when our community lost NINETEEN historic homes – one-sixth of our community was relocated, disassembled, or demolished.

I close with one last thought: At a public meeting in June 2006, one Kaua‘i native quoted a poetic Hawaiian proverb “*I ka wa ma mua, i ka wa ma hope (time before time after) ka wa ma mua, ka wa ma hope (one learns from the past [history], to go forward [future]).*” Then she sadly said, “Nothing has been learned from the mistakes made in 1985.”

I urge you to learn from those mistakes and pass this bill, to send a clear message to the Department of land and Natural Resources to preserve one of Hawaii’s last remaining board and batten communities. Thank you very much.

PO Box 9, Kekaha, Kauai, Hawaii 96752-0009
(808) 639-7704

testimony

From: Linda F. Collins [lfc@kikiaola.com]
Sent: Tuesday, March 11, 2008 2:44 PM
To: testimony
Subject: HB2872

Aloha,

I support bill HB2872.

Linda Faye Collins

TESTIMONY

HB 2872

(END)