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STATE OF HAWAII
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TESTIMONY OF THE CHAIRPERSON OF THE BOARD OF LAND AND NATURAL RESOURCES

On Senate Bill 3, Senate Draft 1 – RELATING TO KAHANA VALLEY STATE PARK

BEFORE THE HOUSE COMMITTEE ON WATER, LAND, OCEAN RESOURCES AND HAWAIIAN AFFAIRS

March 17, 2008

Senate Bill 3, Senate Draft 1 provides for additional families to reside in Kahana Valley State Park by lease agreement, and establishes an advisory committee to, among other things, monitor compliance with the agreements. The Department of Land and Natural Resources (Department) opposes this bill because of the cost implications generated by this proposal and the negative impact on the primary park purpose of Kahana Valley (Kahana), which is to provide public access to parks – not private restricted uses.

The State acquired 5,228 acres encompassing the entirety of the Kahana ahupua'a in 1969 to preserve the natural setting of the ahupua'a and to provide public recreational opportunities. The "Living Cultural Park" concept was proposed in 1972 as a way for the people living in Kahana at the time of the State's acquisition to continue to live in Kahana and provide cultural interpretive programs for park visitors. Act 5, Session Laws of Hawaii (SLH) 1987, authorized the Department to enter into 65-year residential leases with families living in Kahana on permit. To qualify for a lease under this Act, one must have lived continuously in Kahana since before 1970 until 1987. The census conducted in 1987 determined that 31 families qualified for leases. Act 238, SLH 1988, provided state funds for mortgages to construct new houses in the Park. The appropriation was sufficient for 26 lessees to receive $50,000 mortgages each. In lieu of lease rent, each lessee is required to perform 25 hours of interpretive service each month. The 31 residential leases were executed in 1993.

Many Kahana lessees began construction of their houses by 1995, and most have completed construction or renovated their house. A few houses remain uncompleted or have not been started. Between 2003 and 2005, the Department for non-compliance with the lease conditions forfeited three (3) leases, and one lease was assigned to a new lessee through foreclosure.

The bill does not provide a cap on the number of leases for Kahana, which could be problematic. If the number of leases is not limited, the natural setting of the Park may be jeopardized and there are cost implications with the infrastructure needed for these new residences. The Department understands that families grow with each generation, but it was not envisioned that

the park would provide housing for all the children of the original lessees. Expanded housing will not necessarily benefit the goals of the Park, which are public recreation and preservation of the natural setting.

The Department believes that 31 leases are adequate for the implementation of an interpretive cultural park program. Currently, about half of the lessees are in default on the performance of their interpretive hours. While public interest in interpretive programs has grown, the park program has been limited to one or two school groups a month based on the availability of residents to participate in these programs.

The State has spent over $1 million in capitol improvement program funds to develop the infrastructure for the two residential areas in the park, including paved roads, graded 10,000 sq. foot lots, leach fields, and utilities. There is one full-time staff position in the Department's Division of State Parks overseeing lease compliance and interpretive programs at Kahana. All this cost comes at the expense of the public parks and public access.

The establishment of a Kahana advisory committee appears to duplicate many of the tasks of the interpretive advisory committee and Kokua Committee, two entities already established in compliance with the lease. It may be more beneficial to expand the function of these two groups, rather than establish another entity with overlapping purposes.

The bill calls for leases not to exceed 65 years to conform with previously issued leases at Kahana under Act 5, SLH 1987. However, in considering any issuance of new leases, the Department would recommend that the bill be amended to have all residential leases terminate in 2058, which is 65 years from 1993 when the 31 original leases were signed.

The Department does not support additional leases at Ahupua'a 'O Kahana State Park because it will require an appropriation of state funds for infrastructure and mortgages. Additional residents do not necessarily mean a better interpretive program, and the management of more leases will be a burden on the existing park staff assigned to Kahana. Continuing efforts to develop a viable interpretive program with the existing lessees is the preferred course of action, not more leases.

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

ON THE FOLLOWING MEASURE:
S.B. NO. 3, S.D. 1 RELATING TO KAHANA VALLEY STATE PARK.

BEFORE THE:
HOUSE COMMITTEE ON WATER AND LAND

DATE: Monday, March 17, 2008 **TIME:** 9:00 A.M.
LOCATION: State Capitol Room 312
Deliver to: Clerk, Room 427, 3 copies

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

Chair Ito and Members of the Committee:

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

This bill would authorize issuance of long-term leases on additional parcels of land within Kahana Valley.

Article XI, section 5 of the Hawaii Constitution 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 (fn. 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.

S.B. No. 3 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.

S.B. No. 3 is not a general law because the bill singles out one parcel of land in a specific locale. We believe that S.B. No. 3 is an exercise of legislative power over the lands owned by the State by special, not general, law and is, therefore, unconstitutional. We opposed a similar bill, H.B. No. 1664, in 2006 for similar reasons.

It does not appear that this problem can be solved by amendment, because the title to the bill requires that it relate to Kahana Valley.

Aside from the problems with the constitutionality of the measure, the bill describes qualified lessees as "persons who reside and have continually lived in the state park since before 1987 in a culturally and appropriate manner and have served as caretakers of the state park." We know from past experience that this definition will be difficult to interpret and apply. What evidence could prove or disprove that a person has "continually" lived in the park since 1986? What about, for example, persons who lived elsewhere during time spent in military service or in college?

In addition, the phrases "culturally and appropriate manner" and "served as a caretaker of the state park" are inherently ambiguous. If these phrases are intended to impose additional qualifications beyond living in the park since 1986, they should be defined or clarified. During what part of the time must the person have been a caretaker of the park? How would the phrases apply to a person in his or her twenties who was a child during most of the relevant time?

The Department of Attorney General believes that this bill should be held.