

Honolulu, Hawaii  
Feb 26, 2010

RE: H.B. No. 2849  
H.D. 1

Honorable Calvin K.Y. Say  
Speaker, House of Representatives  
Twenty-Fifth State Legislature  
Regular Session of 2010  
State of Hawaii

Sir:

Your Committees on Water, Land, & Ocean Resources and  
Housing, to which was referred H.B. No. 2849 entitled:

"A BILL FOR AN ACT RELATING TO KAKAAKO,"

beg leave to report as follows:

The purpose of this bill is to encourage the development of  
affordable residential housing units by statutorily imposing a  
reserved housing requirement for the Kakaako mauka area of the  
Kakaako Community Development District for planned developments  
that are more than 45 feet in height or have a floor area ratio  
greater than 1.5 on land areas of 20,000 square feet or more.

Hawaiian Dredging Construction Company, Marshall Realty,  
Inc., and several concerned individuals testified in support of  
this bill. The Hawaii Community Development Authority (HCDA);  
Land Use Research Foundation of Hawaii; General Growth Properties,  
Inc.; Servco Pacific Inc.; and U. Okada & Co., Ltd., opposed this  
measure. Kamehameha Schools and The Gas Company provided  
comments.

A concern was raised by the Attorney General (AG) that  
increasing the reserved housing requirement for developments  
within the Kakaako Community Development District to an amount  
beyond that required by HCDA's rules as of the effective date of  
the master plan approval could potentially expose the State of  
Hawaii to liability to the landowner under the vested rights and  
equitable estoppels doctrines, which protect developers from



government altering land use regulations once a developer has substantially relied on existing law.

The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project. *County of Kauai v. Pacific Standard Life Insurance Company*, 65 Haw. 318, at 327 (quoting *Life of the Land v. City Council*, 61 Haw. 390 (1980)).

The AG asserts that under this doctrine, the government would be estopped from changing the land use requirements after the final discretionary approval has been granted.

The difference between equitable estoppel and the vested rights doctrine is that estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct, where as vested rights focuses on whether the owner acquired real property rights which cannot be taken away by governmental regulation. *Allen v. City and County of Honolulu*, 58 Haw. 432, 435 (1977).

However, your Committees are of the view that approved master plan permits do not constitute official assurances or "final discretionary approvals," as set forth in *County of Kauai*, that can be relied upon by a landowner because a development agreement has not yet been executed between HCDA and a landowner. In fact, in a previously approved master plan and order, the petitioner was directed to enter into a development agreement with HCDA to provide the parties to the development agreement with assurances that, among other things, the development will not be restricted or prohibited by any statutes or rules enacted or promulgated by HCDA after the date of approval of the master plan permit. Similarly, a landowner could not reasonably rely on such a plan permit to confer upon it vested rights.

As one of the main centers of urban living in Honolulu, the vision of the Kakaako area, as originally envisioned in the Kakaako Community Development District Plan, in February 1982, projected the construction of 19,000 multi-family units, of which



75 percent were to be made available to Hawaii residents are affordable prices and rents. Of the 19,000 units, the following proportion was intended:

- (1) 12 percent for very low-income households (less than 50 percent of the median income);
- (2) 26 percent for low- and low-moderate income households (50 to 80 percent of median income);
- (3) 7 percent for "Hula Mae" or "gap group" households (80 to 120 percent of median income);
- (4) 30 percent for "unserved" households (greater than 80 percent of median income, but unable to afford to purchase a unit); and
- (5) 25 percent for "unassisted" households (those not needing assistance to purchase a unit).

As of 2009, however, 7,000 units have been newly constructed, and only about 2,000 units are affordable housing units. The remaining approximately 5,000 units are in the luxury range. Your Committees therefore believe that the passage of this bill is necessary to ensure the Kakaako area is developed according to its original vision.

Your Committees find that pursuant to the Hawaii Supreme Court's findings in *Allen*, at 438, even if a government entity were to be equitably stopped from enforcing the terms of a new ordinance the proper remedy is to invalidate the new legislation and allow the construction to continue, not an award of damages for costs. The consequences of damages in such a case would be to inhibit governmental experimentation in land use controls and negatively impact the community's control of the allocation of its resources.

Finally, the AG advised that legislation altering reserved housing requirements that apply to master plans already approved under existing law would apply retroactively only if the legislation is explicitly made retroactive, and clearly applies to already-approved master plans.



Accordingly, your Committees have amended this bill by:

- (1) Including the Legislature's findings regarding the Legislature's intent to retroactively apply the increased reserved housing requirements set forth in this bill to master plans previously approved by HCDA; and
- (2) Inserting language from House Bill No. 2846 giving developers the option to offset the reserved housing requirement by transferring land to another entity identified by and on terms approved by HCDA, as well as to HCDA.

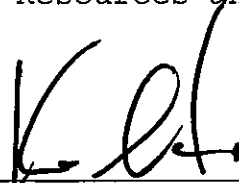
Technical, nonsubstantive amendments were also made for style, clarity, and consistency.

As affirmed by the records of votes of the members of your Committees on Water, Land, & Ocean Resources and Housing that are attached to this report, your Committees are in accord with the intent and purpose of H.B. No. 2849, as amended herein, and recommend that it pass Second Reading in the form attached hereto as H.B. No. 2849, H.D. 1, and be placed on the calendar for Third Reading.

Respectfully submitted on  
behalf of the members of the  
Committees on Water, Land, &  
Ocean Resources and Housing,



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RITA CABANILLA, Chair




\_\_\_\_\_  
KEN ITO, Chair



State of Hawaii  
House of Representatives  
The Twenty-fifth Legislature

Record of Votes of the Committee on Water, Land, & Ocean Resources

Bill/Resolution No.: <b>HB 2849</b>	Committee Referral: <b>WLO/HSG</b>	Date: <b>2/22/10</b>		
<input type="checkbox"/> The committee is reconsidering its previous decision on the measure.				
The recommendation is to: <input type="checkbox"/> Pass, unamended (as is) <input checked="" type="checkbox"/> Pass, with amendments (HD) <input type="checkbox"/> Hold <input type="checkbox"/> Pass short form bill with HD to recommit for future public hearing (recommit)				
WLO Members	Ayes	Ayes (WR)	Nays	Excused
1. ITO, Ken (C)	✓			
2. HAR, Sharon E. (VC)	✓			
3. CABANILLA, Rida	✓			
4. CHANG, Jerry L.		✓		
5. CHONG, Pono				✓
6. COFFMAN, Denny				✓
7. HERKES, Robert N.				✓
8. LEE, Chris		✓		
9. LUKE, Sylvia				✓
10. MORITA, Hermina M.				✓
11. SAGUM, Roland D., III		✓		
12. CHING, Corinne W.L.		✓		
13. THIELEN, Cynthia	✓			
<b>TOTAL (13)</b>	<b>4</b>	<b>4</b>		<b>5</b>
The recommendation is: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted If joint referral, _____ did not support recommendation. <small style="margin-left: 100px;">committee acronym(s)</small>				
Vice Chair's or designee's signature: _____ <div style="text-align:center; font-size: 2em; font-family: cursive;">  </div>				
<b>Distribution:</b> Original (White) – Committee    Duplicate (Yellow) – Chief Clerk's Office    Duplicate (Pink) – HMSO				

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Record of Votes of the Committee on Housing

Bill/Resolution No.: <b>HB 2849</b>	Committee Referral: <b>WLD/HSG</b>	Date: <b>2-22-2010</b>		
<input type="checkbox"/> The committee is reconsidering its previous decision on the measure.				
The recommendation is to: <input type="checkbox"/> Pass, unamended (as is) <input checked="" type="checkbox"/> Pass, with amendments (HD) <input type="checkbox"/> Hold <input type="checkbox"/> Pass short form bill with HD to recommit for future public hearing (recommit)				
HSG Members	Ayes	Ayes (WR)	Nays	Excused
1. CABANILLA, Rida (C)	✓			
2. CHONG, Pono (VC)				✓
3. CHANG, Jerry L.		✓		
4. COFFMAN, Denny				✓
5. HAR, Sharon E.	✓			
6. HERKES, Robert N.				✓
7. ITO, Ken	✓			
8. LEE, Chris		✓		
9. LUKE, Sylvia				✓
10. MORITA, Hermina M.				✓
11. SAGUM, Roland D., III		✓		
12. CHING, Corinne W.L.		✓		
13. THIELEN, Cynthia	✓			
<b>TOTAL (13)</b>	<b>4</b>	<b>4</b>		<b>5</b>
The recommendation is: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted If joint referral, _____ did not support recommendation. committee acronym(s)				
Vice Chair's or designee's signature: <i>Rida Cabanilla</i>				
Distribution: Original (White) – Committee    Duplicate (Yellow) – Chief Clerk's Office    Duplicate (Pink) – HMSO				