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March 31, 2009

House Committee on Judiciary
Hearing Date: Tuesday, March 31, 2009 at 4:00 p.m. in CR 325

Testimony in Opposition to SB 1152 HD1. Relating to Agricultural Lands. (100Year Moratorium on the development of agricultural lands)

Honorable Chair Jon Riki Karamatsu, Vice Chair Ken Ito, and House Members of the Judiciary Committee:

My name is Dave Arakawa, and 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, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF supports the intent of preserving viable and important agricultural lands for agricultural production uses, however, we must **strongly oppose SB 1152 HD1,** which would establish a 100-year moratorium on the development of agricultural lands located in the area bounded by Wahiawa, Ka'ena Point, Kahuku, and Kane'ohe on the north shore and windward coast of O'ahu for which general planning has not commenced. LURF's opposition is based on, among other things, the following:

- Legally flawed taking of private property:
  - it lacks a factual basis;
  - it lacks a legal nexus;
  - the duration of the 100-year prohibition is especially suspect, and tantamount to a permanent prohibition;
  - it lacks "good faith" as government will impose a 100-year moratorium without taking any steps to improve the land use process to address the alleged problems which gave rise to this bill;
  - many of the agricultural landowners may have investment-backed expectations relating to the affected lands; and
  - it lacks a variance process.
- Ignores the existing comprehensive planning processes of the State Department of Agriculture, Office of Planning and City and County of Honolulu Department of Planning and Permitting, who unanimously oppose the bill.
- Fails to address or utilize the new Important Agricultural Lands (IAL) laws relating to the designation process to preserve agricultural lands;

- Fails to address or utilize IAL incentives to support viable agricultural operations.
- Fails to address infrastructure improvements necessary to support viable agricultural operations, particularly, the availability of water;
- May prohibit subdividing of agricultural lots for the use of farmers or other agricultural operations;
- Unintended negative consequences for farmers may prohibit affordable housing for agricultural workers on the lands they work on; and
- Fails to seek comprehensive changes to support the agricultural industry and the purported intent to preserve agricultural lands for agricultural use.

SB 1152 HD1. SB 1152 HD1 proposes to establish a 100-year moratorium on the development of agricultural lands with the following provisions:

> (1) The moratorium on building or development projects on agricultural lands shall be limited to any building or development project for which general planning has not commenced;
> (2) The building or development project is intended to affect parcels of agricultural land with an overall (master) productivity rating of class A or B, and designated as an agricultural district;
> (3) The building or development project is intended to affect parcels of agricultural land located in the State of Hawaii, and designated as an agricultural district; and
> (4) The building or development project is not a permissible use within an agricultural district under section 205-4.5, Hawaii Revised Statutes.
> (5) The moratorium shall be lifted on June 30, 2109.
> (6) For purposes of this section, "general planning" means projects for which a permit application has been submitted to the appropriate state or county agency for processing and visible construction has already commenced.
> (7) The effective date of this measure will take effect on July 1, 2109.

Amendments in HD1. The House Committees on Agriculture and Water, Land and Ocean Resources amended this bill by changing its effective date to July 1, 2109 because of a number of concerns raised by those offering testimony against this bill, and making other technical, nonsubstantive amendments for style, clarity, and consistency. House Standing Committee Report No. 1268 noted several significant issues raised regarding this bill including:

- The long duration of the moratorium which may be perceived as a permanent restriction on private land;
- The lack of legal or factual justification for the moratorium;
- The lack of a variance process, and potential for litigation;
- Whether the provisions of this bill are sufficient to carry out the intent of preserving agricultural lands for agricultural use;
- The bill's silence on whether a landowner faced with the moratorium may simply petition to reclassify lands out of the agricultural district;
- The measure also does not address some of the critical needs of many agricultural operations, including the need to access reliable and stable sources of water; and
- The measure may also have unintended consequence of hampering efforts by landowners and farmers to subdivide their property to build employee housing and farm dwellings.

Background. Over the past few years, LURF has joined the Hawaii Farm Bureau Federation (Farm Bureau) in support of the appropriate use of agricultural lands for viable agricultural production, the process for designation and preservation of Important Agricultural Lands and the establishment of IAL incentives to encourage the designation of IAL. LURF worked with the Farm Bureau and a consensus-based coalition other agricultural stake holders toward the successful passage of Act 183 by the State legislature in 2005. In 2008, LURF again worked with the Farm Bureau and the same stakeholders to recommend that the legislature pass a bill implementing the IAL incentives at the state level through the passage of Act 245 (2008). This legislation did not involve the agricultural stakeholders who worked on the IAL legislation, and is not based on a consensus of agricultural stakeholders.

LURF's Position. LURF is writing in **strong opposition** to SB 1152 HD1 because it essentially attempts to control the use of private property, which will violate landowners' property rights. While LURF supports the intent of protecting agricultural properties, we are concerned about the language of this bill which puts a moratorium on the "building or development projects on agricultural lands." This could be interpreted to also include necessary farm dwellings for farmers, additional storage space for agricultural equipment and other buildings that may be deemed essential to operate a farm.

We also understand and sympathize with what appears to be the underlying basis for the resolutions – fears that housing projects will threaten agricultural lands in Mokule'ia and Kahuku. However, we strongly believe that the proposed moratorium bill is legally flawed, and the proposed moratorium is not the most effective way to address what appear to be the Senate's concerns. In fact, the proposed moratorium will have unintended negative consequences for farmers, which may actually result in delays and increased costs for farmers and land owners who intend to subdivide their properties for agricultural uses.

We strongly urge this Committee to hold the proposed moratorium bill, however, we are willing to work with the Legislature, the Farm Bureau and other agricultural stakeholders to revise the applicable ordinances and definitions to address the issue of non-agricultural uses on agricultural lands.

The proposed moratorium bill is legally flawed. LURF's primary objections to this proposal are that the Legislature does not have any statutory authority to impose the moratorium where there is no nexus; it is overbroad, and the 100-Year duration is tantamount to a permanent prohibition. If the Legislature is concerned that certain permitted residential uses in the Agricultural District are unacceptable, or that the process for reclassification of agricultural lands to urban is too easy, the Legislature should seek to change the applicable laws and definitions of "agricultural use," or the permitting process and criteria, instead of imposing a moratorium on the development of agricultural lands.

Legal standard for review of moratorium legislation. In Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency 122 S. Ct. 1465 (2002), the United States Supreme Court acknowledged that a regulation, which is so restrictive it temporarily denies a landowner economically beneficial use of the property could be held to be an "unconstitutional taking." The Court stated that any analysis of whether a temporary taking has occurred must focus on "the parcel as a whole," not some discrete

portion of it and that other factors must be weighed when determining whether a temporary or "partial" regulatory taking has occurred.

The Court stated that the test set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which requires examining "all of the relevant circumstances in particular cases," applies to any "taking" claim short of a permanent taking of the parcel as a whole. Penn Central is a three-factor test applied to partial takings claims. Factors considered include:

- the character of the government's action,
- the nature and extent of the interference with the landowner's property rights, and
- the landowner's investment-backed expectations

In the Tahoe case, there were two consecutive moratoria lasting a total of 32 months, one lasting two years, the other lasting eight months. The purpose of the moratoria was to enable the planning agency for a two-state region that included Lake Tahoe to enact appropriate development restrictions that would not adversely impact the water quality of Lake Tahoe. The Court relied on a lower court finding that the 32-month moratorium was not unreasonable given the task at hand, but it said "the duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." Although the Court declined to adopt a rule setting a limit on the duration of development moratoria, it said, "It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism."

The proposed moratorium bill is legally flawed. LURF's position is based on, among other things, the following:

- **There is no factual basis for the moratorium - - the reduction of agricultural lands under cultivation was due to the failure of the sugar and pineapple industries from 1982 to 2005 – not solely due to housing projects.** The bill alleges problems caused by development of agricultural lands by the use of self-serving statements which are not supported by any data or studies which would show the main reason why land under cultivation decreased from 1982 to 2005 – the failure of the sugar and pineapple industries. Under certain circumstances, such as this one, where there is no factual basis - - a moratorium can be legally viewed as a "constitutional taking." In order to so severely restrict private property rights, the Legislature must show much more than mere allegations of harm.
- **No legal nexus for the moratorium.** The bill is legally flawed, because it does not establish any legal nexus for the 100-year moratorium.
    - What does the law seek to accomplish in the next 100 years?
    - Moratoriums are usually justified by the need for further development of issues relating to a community's comprehensive plan and/or its current land use regulations – and the fact that time is needed for government officials to comprehensively address such land use issues, without having to allow further development during that time. This proposed moratorium does not include any such justification; and in any case the 100-year duration would be deemed unreasonable.
    - After 100 years, can those agricultural lands become urban?
    - Is there any justification of its inherent inconsistency of prohibiting agricultural development agricultural lands with an overall (master)

productivity rating of class A or B, yet allowing housing developments in the same areas on agricultural lands with ratings of C, D or E?

- **The moratorium is legally flawed and unconstitutional, because a 100 year moratorium is tantamount to a permanent restriction and taking of the use of private land.** The 100 year duration of the moratorium is unreasonable and is clearly meant to limit and restrict the use of private lands.
- **The moratorium is vague and ambiguous, as it does not clearly define the activities affected, and the manner in which those activities are affected.** Does the moratorium affect actions by other Boards or Commissions within the City and County? May project reviews continue, or must they be stopped?
- **Lack of a Variance process.** The proposed moratorium bill is also legally flawed because it does not allow for a variance process which is similar to the process allowed for zoning or other variances. Moratorium legislation should include a mechanism allowing affected landowners to apply to a Board for relief from the moratorium, or it should contain a clear reference to the fact that an owner may make use of the existing variance procedure under the current land use or zoning regulations.

Unintended negative consequences for farmers and other agricultural operators. As stated earlier, LURF supports the IAL and the preservation and use of viable and important agricultural lands, however, LURF's **strongly objects** to the proposed moratorium, based on, among other things, the following:

- **The moratorium ignores comprehensive planning and market-driven solutions, and is not the appropriate mechanism for addressing the complex issue of the conversion of agricultural land to non-agricultural uses.** As stated in the February 11, 2009 testimony of the State Office of Planning:
  - "...we do not believe this is the appropriate mechanism for addressing this complex issue....
  - "Rather, OP recommends comprehensive planning and market driven solutions.....such as establishing agricultural tax incentives to promote agricultural investment and measures to offset the risks and costs of agricultural operations. Agricultural incentives are critical to the viability of the agricultural industry and farmers, and are key to initiating the process of designating important agricultural lands. Promoting agricultural businesses and protecting agricultural water systems are essential to maintaining the Wahiawa, Kaena Point, Kahuku and Kaneohe lands for agricultural purposes.....
  - "Also, revisions to the State Agricultural and rural District allowable uses and densities would more effectively limit development pressure on agricultural lands, while encouraging for more effective planning processes.....
- **The Agricultural landowners and farmers who wish to subdivide agricultural lands for lease or sale to other farmers or agricultural producers will also suffer unnecessary delays and increased costs.** If a moratorium is imposed, it will have the unintended consequence of harming those landowners and farmers who wish to subdivide in order to lease or sublease to a farmer or an agricultural producer who may want to build farm dwellings or employee housing on their lots.
- **The proposed process and requirements may prohibit providing critically needed Agricultural Workforce Housing.** The moratorium may

have the unintended effect of prohibiting a landowner or farmer from subdividing or otherwise using their land to provide worker housing.

- **Landowners have "investment-backed expectations" in their properties and their existing land use processes**. This bill is unreasonable in terms of necessity, and limits the use of agricultural lands, which may depreciate the value of those properties and may not allow landowners the ability to realize an economic return on their investments. In some cases, this diminution in value may be tantamount to a confiscation of the property, especially if the landowner has undertaken substantial construction and made substantial expenditures prior to the effective date of this bill in reliance on the prior law, policies, and practices.
- **The Legislators should work with the stakeholders toward a comprehensive change in the jurisdiction over agricultural lands.** Instead of the "band-aid" solutions proposed in the moratorium, the Legislature should work on a comprehensive way to address the issues relating to agricultural subdivisions which may include luxury residential homes with little or no agricultural production. The Legislature should support the major changes in the system, which LURF has been suggesting to the various counties and Legislature for the past few years:
  - **Designation of IAL and Rural Lands.** The Agricultural District should be reassessed into IAL which are viable for agricultural production and also into all existing and potential "Rural" uses. Large open-space residential lots could be reclassified into the Rural District and put under the jurisdiction of the counties.
  - **Oversight of Agriculture and agricultural uses by one government agency.**
    - The Counties could transfer its jurisdiction over the uses and enforcement in the Agricultural Districts to the State and the Department of Agriculture ("DOA"), which has the agricultural and enforcement expertise. DOA, its staff and experts can then manage and enforce the regulations in the Agricultural Districts, similar to how DLNR manages lands and natural resources within the Conservation District, or
    - The State could transfer its DOA functions to the counties and county agencies could be created to manage and enforce the uses in the Agricultural Districts.

Based on the above, we respectfully request that **SB 1152 HD1 be held** in this Committee.

LURF appreciates the opportunity to express our **opposition to SB 1152 HD1**.