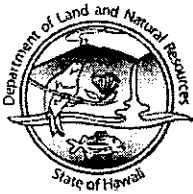


NEIL ABERCROMBIE
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
WILLIAM J. AILA, JR.
Chairperson**

**Before the House Committee on
FINANCE**

**Wednesday, April 06, 2011
5:00 PM
State Capitol, Conference Room 308**

**In consideration of
SENATE BILL 1154, SENATE DRAFT 2, HOUSE DRAFT 1
RELATING TO HISTORIC PRESERVATION**

Senate Bill 1154, Senate Draft 2, House Draft 1 establishes the South Kona Wilderness Area, a primitive, wilderness area from Honomalino to Manuka, a concept that was initially proposed in 1971 by the Association of Hawaiian Civic Clubs with the support of the Bishop Museum. The Department of Land and Natural Resources (Department) supports the intent of this bill but asks that it be amended further.

The South Kona Wilderness Area was established under Act 59, of the 2003 Legislature. This Act, however, was repealed in 2007 when the Kapua land acquisition did not take place.

Under this measure, approximately 22,000 acres are proposed for designation as a wilderness area, including portions of the shoreline consisting of five ahupua'a: Honomalino, Okoe, Kaulanamauna, Kapu'a, and Manukā. Except for the privately-owned lands in Kapu'a, and several holdings in Honomalino, most of the other lands are owned by the State. The Department notes that there may be legal implications associated with this designation and the portion of the proposed wilderness area that is private land.

The current magnitude of public recreational use at Manuka Beach along this portion of the coastline is not compatible with a designation as a Natural Area Reserve (NAR). For example, the recreational use for overnight camping conflicts with the policy and management of the Manuka NAR and as such, would not be permitted. The Department requests that Senate Bill 1154 Senate Draft 2, House Draft 1 be amended on Page 3, Lines 14-17 as follows:

(4) Kaulanamauna: [~~The Manuka natural area reserve boundary extended to the shoreline~~], change to:

WILLIAM J. AILA, JR.
INTERIM CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
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
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

(4) Kaulanamauna: All lands from the shoreline to the Manuka natural area reserve boundary .

(5) Manuka: [~~The Manuka natural area reserve boundary extended to the shoreline~~], change to:

(5) Manuka: All lands from the shoreline to the Manuka natural area reserve boundary.

The Department supports this measure, with the requested amendments, to preserve a 13 mile long coastline from urban/resort development and preserve the area's important historic, cultural, scenic, environmental and biological resources. Thank you for the opportunity to provide written testimony.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

S.B. NO. 1154, S.D. 2, H.D. 1, RELATING TO HISTORIC
PRESERVATION.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Wednesday, April 6, 2011 **TIME:** 5:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): David M. Louie, Attorney General, or
Julie China, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Department of the Attorney General opposes this bill.

This bill establishes the South Kona wilderness area (SKWA) to be administered by the Department of Land and Natural Resources (DLNR). The bill reclassifies all of the land within the SKWA as conservation land. Land within the SKWA cannot be subdivided and with a few noted exceptions, no new homes or other structures can be constructed within one thousand feet of the shoreline. The bill further allows the State to acquire the re-classified land by donation or on a value-for value exchange. The bill is nearly identical to Act 59, Session Laws of Hawaii 2003, which was repealed at the end of 2007 under Act 215, Session Laws of Hawaii 2006, when the land exchange did not take place.

The bill may constitute a regulatory taking under the United States and Hawaii Constitutions. U.S. Const. amend. V; Haw. Const. art. 1, § 20. Both constitutions provide that private property shall not be taken for public use without just compensation. Although the classic taking is a transfer of property to the State or to another private party by eminent

domain, the Takings Clause applies to other state actions that achieve the same result. The doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." Lingle v. Chevron U.S.A. Inc., 554 U.S. 528, 539 (2005). Thus, it is a taking when a law deprives a landowner of all economically beneficial use of his property, i.e., the property is "economically idle," without providing compensation. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). See also, Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 452, 903 P.2d 1246, 1273 (1995).

The real property identified in the bill consists of the shoreline portion of five ahupuaa. The bill does not state how much of the SKWA land is privately owned and how much is public lands. Aside from stating that a portion of the land at Kapua is within the conservation district, the bill is also unclear regarding present land classification for the remaining portion of Kapua or the four other lands within the SKWA, Honomalino, Okoe, Kaulanamauna, and Manuka.

We have been informed by DLNR staff that Honomalino, Okoe, Kaulanamauna, and Manuka are mostly public lands with private inholdings in Honomalino and Okoe. Although we initially thought that most of Kapua was privately owned, in fact, Kapua is entirely privately owned. Kapua consists of 7780 acres, which is zoned agriculture, with 1,192 acres in the conservation district resource subzone. Section 6E-E of the new part being added to chapter 6E, Hawaii Revised Statutes, by section 2 of the bill may constitute a regulatory taking if the new classification makes privately owned lands in Kapua, Honomalino, and Okoe "economically idle" without providing just compensation to the landowner.

Section 6E-D of the new part also raises a takings concern because the State's acquisition of SKWA land from private landowners will be based on the value of the land as reclassified conservation land. Depending on the current land classification, the State could be acquiring the land for less than fair market value on the day before the passage of the bill.

The takings concern can be remedied by removing Kapua and all privately owned land within Honomalino and Okoe in their entirety from the bill.

We respectfully ask the Committee to make the recommended amendments or hold this bill.

THE RESORT GROUP

TO THE HOUSE COMMITTEE ON FINANCE

**TWENTY SIXTH LEGISLATURE
Regular Session of 2011**

**Testimony of Abbey S. Mayer, Vice President, Government Relations
THE RESORT GROUP**

OPPOSING SB 1154, SD2, HD1, Relating to Historic Preservation

Wednesday, April 6, 2011, 5:00 PM -- Room 308

Aloha Chair Oshiro, Vice-Chair Lee, and Members of the Committee,

The Honolulu-based The Resort Group (TRG) acquires, master develops, repositions and markets domestic and international mixed use and master-planned resort communities. Led by Jeffrey R. Stone, TRG's resort development projects are carefully designed to balance resident, visitor and employee needs with community interests, local cultural values and adjacent land use requirements. Current projects include Ko Olina Resort & Marina and Makaha Valley Country Club on O'ahu, Princeville at Hanalei (Kaua'i), Lands of Kapu'a (Big Island), the Newport Beach Hotel in California and Cape Eleuthera, Bahamas.

BACKGROUND

In 2003, Act 59 Session Laws established a South Kona Wilderness Area and provided for the creation of a management plan for the area. Act 59 was subsequently repealed in 2007 by Act 215, Session Laws of 2006.

Named in both Act 59 and this current proposal, SB 1154, SD2 (§6E-B(a)), are the lands of Kapu'a, approximately 7,780 total acres, including four TMK's that are designated as Lots D-2-1, 2, 3 & 4 (TMK's 8-9-06-03, 19, 28 & 35). Approximately 902 acres in Lot D-2-1 are currently in the State Conservation District, while the remaining 6,878 acres are in the State Agricultural District.

Approximately 70% of the interest in the Kapu'a parcels noted above are owned by TRG-controlled companies. The remaining 30% are owned by other partners.

SB 1154, SD2, HD1:

TRG has long supported, and continues to support the inclusion of the lands of Kapu‘a in the South Kona Wilderness Area. We will work cooperatively with the State and other interested partners in the sale of these lands.

TRG opposes several aspects of this proposal, including: (1) **§6E-E Designation of Lands within the Conservation District**; (2) **§6E-C Construction prohibited**; and (3) **§6E-D Land acquisition**; and TRG offers comments on (4) **SECTION 4**, which establishes an effective date and two-year repeal date for the Act, as follows:

(1) **§6E-E Designation of Lands within the Conservation District**: Section §6E-E proposes to reclassify all lands described in §6E-B(a), including the lands of Kapu‘a, automatically and immediately into the State Conservation District, without any proceedings before the State Land Use Commission (LUC).

As stated in the State Attorney General’s testimony in previous hearings held on February 12, 2011, and March 18, 2011, before the Senate Committees on Water, Land, & Housing and Hawaiian Affairs and House Committee on Water, Land, and Ocean Resources (respectively), TRG believes that this provision of SB 1154, SD2, HD1 would be considered a **regulatory taking**. TRG believes that the State should only act to redistrict Kapu‘a *AFTER* purchasing the lands.

SB 1154, SD2, HD1 authorizes the State to purchase the lands of Kapu‘a, but until title closing these lands will remain in private ownership. TRG believes the down-zoning and subsequent devaluation of these lands is not a just or equitable manner in which to open negotiations, and through a takings claim, **could increase the ultimate cost of this measure to the State**. TRG believes that retaining the Agricultural Classification on the approximately 6,878 acres of Kapu‘a will not adversely impact the State’s ability to acquire these lands for preservation. **TRG humbly requests that the Committee delete §6E-E of SB 1154, SD2, HD1 especially inasmuch as it applies to the Kapu‘a parcels.**

TRG would also like to note that Hawaii Revised Statutes, Chapter 205, gives sole authority for the redistricting of parcels greater than 15 acres in size to the State Land Use Commission (LUC), whose Administrative Rules provides a system of due process for all land owners seeking redistricting of their lands. This process allows for a comprehensive and holistic consideration of multiple, complex and often competing interests prior to deciding the appropriate disposition of the State Land Use Classification. Section §6E-E of SB 1154, SD2, HD1 would deprive private land owners, immediate neighbors, other affected parties and the general public of the due process rights afforded by the LUC and its procedures.

(2) **§6E-C Construction prohibited**: §6E-C of SB 1154, SD2, HD1 bans the construction of new homes or other structures (with a few very limited exceptions) within 1,000 feet of the shoreline. This section also prohibits subdivision (and subdivision and reconsolidation) of the lands within 1,000 feet of the shoreline. This aspect of the bill also represents another potential **regulatory taking** by making private property “economically idle” without compensation. **TRG requests that the Lands of Kapu‘a be exempted from this Section of the bill.**

(3) **§6E-D Land acquisition:** This section authorizes the DLNR to acquire the private lands named in the bill by donation or by a value-for-value exchange of other state lands, with the costs of appraisals being borne by the private landowners (or other funds or grants). While TRG is cognizant and understanding of the present difficulties the state is grappling with in respect to its budget shortfalls, we nevertheless are compelled to object to this provision of SB 1154, SD2, HD1. TRG notes that during the effective period of Act 59, several ideas for state lands exchange were explored. In all of these cases, regardless of valuation issues, TRG found that potential land exchanges were very controversial, in that there is a great deal of public sentiment and often complicated legal histories tied to state public lands. **TRG would ask the state to authorize condemnation or sale for cash as the only method for acquisition of the Lands of Kapu‘a.**

(4) **SECTION 4:** This section establishes an effective date and two-year repeal date for the Act. TRG believes that if the Legislature decides to pass this measure in spite of our opposition, **an automatic sunset date of a maximum of two years after the effective date** is appropriate for several reasons. A short timeframe of efficacy would motivate the State, TRG and other private landowners to negotiate and conclude a transaction in the near-term. Also, an automatic sunset would limit some of the deleterious effects that this Act would have on the value of the private lands listed in the bill. At the same time, the automatic sunset would relieve the Legislature and all affected parties from having to pass another future Act to repeal this one, in the way the 2003 Act 59 was repealed in 2007 by Act 215 (Session Laws of 2006).

Attached are proposed draft changes to the bill that would address our concerns regarding regulatory takings.

TRG thanks the Committee for the opportunity to provide comments.

A BILL FOR AN ACT

RELATING TO HISTORIC PRESERVATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that the concept of a
2 wilderness area in the culturally and historically rich south
3 Kona area on the island of Hawaii has been discussed for more
4 than thirty years. This area has significant archaeological
5 sites that warrant protection and preservation. Act 59, Session
6 Laws of Hawaii 2003, established the south Kona wilderness area
7 and provided for the development of a comprehensive management
8 plan for the area; however, Act 59 was subsequently repealed on
9 December 31, 2007, pursuant to Act 215, Session Laws of Hawaii
10 2006.

11 The purpose of this Act is to temporarily establish, for
12 two years, a south Kona wilderness area on the island of Hawaii,
13 provide a mechanism for the creation of a plan for management of
14 the wilderness area, and provide a framework for management of
15 the wilderness area.

1 SECTION 2. Chapter 6E, Hawaii Revised Statutes, is amended
2 by adding a new part to be appropriately designated and to read
3 as follows:

4 "PART . SOUTH KONA WILDERNESS AREA

5 §6E-A South Kona wilderness area; establishment. There is
6 established the south Kona wilderness area on the island of
7 Hawaii in the area described in section 6E-B to be administered
8 by the department of land and natural resources for the
9 preservation of the visual, cultural, biological, and historical
10 aspects of the lands covered in this part and to:

- 11 (1) Preserve the extensive archaeological sites in the
12 area, including ancient homesites, a holua slide, a
13 heiau, and burial caves;
- 14 (2) Preserve and protect native Hawaiian plants and
15 animals currently in the area;
- 16 (3) Provide for a wilderness area with minimal man-made
17 structures;
- 18 (4) Permit limited non-vehicular access for recreational
19 purposes, such as fishing, swimming, and exploration;
20 and
- 21 (5) Prevent additional development in the area.

1 **§6E-B Lands included.** (a) Except as provided in
2 subsection (b), the following lands shall be included in the
3 south Kona wilderness area:

- 4 (1) Honomalino: All lands from the shoreline to six
5 thousand feet inland;
- 6 (2) Okoe: All lands from the shoreline to six thousand
7 feet inland. The Honomalino and Okoe sections include
8 approximately one thousand four hundred fifty-eight
9 acres;
- 10 (3) Kapu'a: All lands from the shoreline and going mauka,
11 designated as lots D-2-1 to D-2-4 in the county of
12 Hawaii, planning department, final subdivision
13 approval number 7625, a portion of which is currently
14 included within the conservation district, which lands
15 include approximately seven thousand seven hundred
16 eighty acres;
- 17 (4) Kaulanamauna: The Manuka natural area reserve
18 boundary extended to the shoreline; and
- 19 (5) Manuka: The Manuka natural area reserve boundary
20 extended to the shoreline.

1 (b) Any parcel of land included in subsection (a) upon
2 which there is a dwelling house as of July 1, 2011, together
3 with any outbuildings forming a part of the residential complex,
4 shall be excluded from the south Kona wilderness area.

5 **§6E-C Construction prohibited.** (A) No new homes or other
6 structures shall be constructed within one thousand feet of the
7 shoreline within the publicly-owned lands in south Kona
8 wilderness area, except as follows:

9 (1) Structures built by the department for the purpose of
10 managing the area;

11 (2) Repairs to existing structures pursuant to rules
12 adopted by the department under chapter 91; and

13 (3) Construction of one dwelling with a footprint no
14 larger than one thousand square feet by a private
15 landowner if the existing rules permit the
16 construction;

17 provided that no land shall be subdivided within the area;

18 provided further that no owner shall be permitted to consolidate
19 and resubdivide lots within the area if this subdivision would
20 increase the number of buildable lots.

1 (B) All privately-owned lands described in Section 6E-B(a)
2 in the South Kona Wilderness area are exempt from this Section.

3 **§6E-D Land acquisition.** The department may acquire any
4 private lands included in the lands described in section 6E-B(a)
5 [~~by donation or by a value for value exchange of other state~~
6 ~~lands]~~ for cash through condemnation ; provided that,
7 notwithstanding section 171-50, the costs associated with any
8 appraisal, including that of the public land, shall be borne by
9 the [~~owner of the private land in the exchange transaction]~~
10 state or by private funds, grants, or contributions.

11 **§6E-E Designation of lands within the conservation**
12 **district.** All publicly-owned lands described in section 6E-B(a)
13 shall be classified as lands within the conservation district as
14 described in section 205-2 without the necessity of any
15 proceedings before the land use commission." All privately-
16 owned lands described in Section 6E-B(a) are exempt from this
17 Section.

18 SECTION 3. In codifying the new sections added by section
19 2 of this Act, the revisor of statutes shall substitute
20 appropriate section numbers for the letters used in designating
21 the new sections in this Act.

1 SECTION 4. This Act shall take effect on July 1, 2050 and
2 shall be repealed on June 30, 2013.

Report Title:

South Kona Wilderness Area

Description:

Establishes the south Kona wilderness area on the island of Hawaii for a period of two years to preserve vulnerable visual, natural, biological, and historical aspects of South Kona. Effective July 1, 2050. Repealed on June 30, 2013. (Proposed SB1154, SD2, HD1)

TESTIMONY OF JAMES H. CASE, ESQ.
COMMITTEE ON FINANCE
THE STATE HOUSE OF REPRESENTATIVES
ON
S.B. NO. 1154 RELATING TO HISTORIC PRESERVATION
APRIL 6, 2011

Mr. Chairman and Members of the Committee:

My name is James H. Case. I am a partner in the Hawaii law firm of Carlsmith Ball LLP, although I am testifying as a private individual on this bill. I joined the Carlsmith firm in Hilo in 1951. At that time, Mr. Merrill L. Carlsmith, one of the two senior partners in the firm, owned a beach house at Honomalino Bay, South Kona, which is encompassed in this bill. Later, I helped my client, W. Dudley Child, buy a house site at Kapua Bay and build a house there. Kapua is two bays south of Honomalino and is encompassed in this bill. Both owners loaned me their houses on numerous occasions throughout the years from 1951 to this date. One of my hobbies is free dive spearfishing using the Hawaiian sling. In the course of these years I have become intimately familiar with the entire coastline from the village of Milolii down to Manuka Park. I am very pleased to present testimony in favor of S.B. No. 1154.

The area covered by this bill contains within it some of the best preserved remnants of Hawaiian history. For example, there is a Holua slide which is quite well preserved, probably the best example in all Hawaii. The old "King's Highway" courses through the entire area. The smooth stones are well preserved and in many places the highway is still the best way to travel over the raw lava. There are many foundations of ancient Hawaiian house sites. An ancient well still exists. Ancient Hawaiian communities existed at Honomalino Bay, Okoe Bay, Kapua Bay, and Manuka. The Reverend William Ellis circled the island of Hawaii in 1824 and wrote about these communities in his book about his trip on foot around the island. This bill would preserve "one of the few" remaining examples of ancient Hawaiian culture.

In addition, we in Hawaii need the opportunity to get away from the high rises and crowded city streets into a wilderness area and breathe a breath of fresh air every once in a while.

I am familiar with the law governing regulatory taking, sometimes called "reverse condemnation" or "inverse condemnation". Testimony in one of the earlier Senate hearings suggested that this bill might constitute a "regulatory taking". The testimony stated "that it is a taking when the law deprives a landowner of ALL economically beneficial use of the property, i.e. the property is 'economically idle', without providing compensation." I capitalized the word "ALL" because it is the key word.

I participated in a case many years ago entitled (approximately) Oahu Railroad & Land Company (or "Dillingham Corporation") v. the City and County of Honolulu. OR&L owned a railroad right of way between downtown Honolulu and Pearl Harbor, but closed down the railroad after World War 2. What to do with the right of way, which was about 50 feet wide? The land on both sides was industrial or commercial. The plan was to build fast food restaurants

or other small commercial stores. People could drive in from the street, park, buy food, and leave.

Somebody in the City came up with the brilliant idea of stopping any development without paying for it. Rezone it "Residential". Then apply setbacks from the street. Thus, there was nothing which the owner could do with the land. The Supreme Court decided that this was a "reverse condemnation" because the City had taken away all possible uses of the land.

Such is not the case with S.B. No. 1154. The land within 2000 ft. of the ocean is now classified "Conservation". The law permits one residential lot per conservation lot of a size decided upon by the Department of Land and Natural Resources. This bill does not take away this right, although it does prescribe that a house cannot exceed 1,000 sq. ft. in size. None of the existing houses in the area exceed that size. Thus, this bill does not constitute a regulatory taking because it does not take away "all" uses of the land.

This bill is now before the Finance Committee. The bill does not propose any funding. The purpose of the bill is to freeze the area in time so that the history of the area can be preserved. Entry will be allowed for fishing and camping, but it is not intended to be a city-like park full of meeting centers, etc.

I therefore respectfully urge your favorable action on S.B. No. 1154. It is a step toward preservation of our ancient Hawaiian culture and the protection of wilderness areas for the recreation of our people now and in the future.

Thank you very much for the opportunity to present this testimony to your Committee.

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