

# LATE TESTIMONY



LAND USE RESEARCH  
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Representative Marcus R. Oshiro, Chair and Representative Marilyn B. Lee, Vice Chair  
House Committee on Finance

**Opposition to Current Form of SB 1154 SD 2 HD 1 Relating to Historic Preservation.** (Unconstitutional “Taking” of Private Lands in South Kona Wilderness Area on the island of Hawaii)

**Wednesday, April 6, 2011 at 5:00 p.m. in CR 308**

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 believes that SB 1154, SD2, HD1 was well-meant and LURF **supports its stated intent:** “for the preservation of the visual, cultural, biological and historical aspects” of the South Kona Wilderness Area (“SKWA”), and we further support cooperation between the Department of Land and Natural Resources (DLNR), landowners and the community toward that end. Unfortunately, however, LURF has serious concerns and regrettably **must oppose the current form of SB 1154, HD2, SD1 and respectfully requests that your Committee hold this bill.** LURF also respectfully recommends that the proponents of the bill, DLNR, the affected landowners, and legislators should work together to identify and mutually agree to specific sites which should be recommended for preservation; develop a comprehensive management plan; and obtain a state budget appropriation for DLNR to acquire those sites and implement a comprehensive management plan. **LURF’s opposition** is based on, among other things, the following:

- The Department of the Attorney General (Attorney General) opposes this bill, because it may constitute a “regulatory taking” under the United States and Hawaii Constitutions.
- The Attorney General recommended the removing all private lands from this bill in their entirety, or in the alternative, that the bill be held. Despite the advice from the Attorney General, the bill still includes over 7,000 acres of private lands.

- The bill requires DLNR to administer the SKWA; however, DLNR does not support the bill, based on concerns about cost, legal implications, and expectations generated by this proposal.
- DLNR cannot implement the SKWA, unless specific important concerns and issues are addressed – and this bill does not address the specific important concerns and issues which would allow DLNR to implement the SKWA.
- The fatal flaw of this bill is the lack of an appropriation for additional funding required for DLNR to administer the preservation of the SKWA.
- Violates the laws and rules relating to the Land Use Commission (LUC) reclassification of lands and violates the due process rights of private landowners.
- Creates an unconstitutional and unfair advantage for the State by passing an unconstitutional law which drastically reduces the value of private property, and also provides that the State can acquire the lands after the value is reduced.
- The bill is inconsistent and irrational – It inexplicably repeals the SKWA only two years after designating the SKWA “to preserve the culturally and historically rich area of south Kona.”

**Background.** In 1983, the Legislature appropriated funds, and the Department of Land and Natural Resources (DLNR) conducted a park feasibility study & surveys were performed on the botanical, aquatic, wildlife and archaeological resources. However, no decision was made by DLNR on the suitability of establishing a wilderness park at the SKWA. Twenty years later, in 2003, the SKWA was initially established under Act 59, Session Laws of Hawaii (2003). In 2007, four years later, Act 59 was repealed, when the state did not acquire the Kapua lands within the SKWA. DLNR has also confirmed that Act 59 (2003) is identical to SB 1154 (2011) and its companion bill, HB 324 (2011). See *Testimony of William J. Aila, Jr., Chairperson, Department of Land and Natural Resources, In consideration of Senate Bill 1154 Relating to Historic Preservation*, dated February 12, 2011 (*DLNR Testimony re SB 1154, dated February 12, 2011*).

**SB 1154, SD 2, HD 1.** This bill appears to be a well-meaning, but majorly flawed attempt to resurrect Act 59 (2003). The stated purpose of this bill is to temporarily establish, for two years, a SKWA on the island of Hawaii, provide a mechanism for the creation of a plan for management of the SKWA, and provide a framework for management of the SKWA. **Without due process, legal notice to the land owners, the opportunity to be heard, or the right to appeal**, the bill does the following:

- **Establishment of SKWA.** Designates specific state and private lands to be included in the SKWA “for the preservation of the visual, cultural, biological, and historical aspects of the lands covered in this part”;
- **Changes state land use district designation of private property from “Agriculture” to “Conservation” without regard to applicable State**

**LUC law, rules and procedures.** Changes the current “Agricultural” land use classification of private property to the “Conservation” District, without any of the required LUC requirements and without compliance with the Hawaii Revised Statutes (HRS) requirements relating to land use reclassification;

- **Changes state land use district designation of private property from “Agriculture” to “Conservation” without legal notice, due process, or the opportunity for private land owners to object.** Without approval or authorization of the affected private landowners and without legal notice, due process, or the opportunity for private land owners to object, this bill reduces the value of private property by designating those properties as the SKWA and changes the current “Agricultural” land use classification of private property to the “Conservation” District;
- **Prohibits construction on private property.** Reduces the value of private property within the SKWA by prohibiting construction of new homes or other structures on private property within certain areas, with limited exceptions;
- **Prohibits subdivision, consolidation and resubdivision of private property.** Severely restricts the use and reduces the value of private property within the SKWA by prohibiting subdivision of private property within the SKWA and prohibiting consolidation and resubdivision of lots if it would increase the number of buildable lots;
- **State acquisition of private property after passing laws reducing the value of the private property.** After substantially reducing the value of private lands through this State action, the bill authorizes the DLNR to acquire those same private lands in the SKWA by donation or by a dollar-for-dollar exchange, provided that the costs of any appraisals shall be borne by the private land owner, but does not provide any process for a dollar-for-dollar exchange, and does not identify any possible State lands for such an exchange;
- **Repeal of SKWA designation and prohibitions in only two years (2013).** The HD 1 version provides that the Act shall be repealed on June 30, 2013;
- **Elimination of requirement that DLNR develop any comprehensive management plan for SKWA.** The SD 1 version eliminated the original provision regarding DLNR’s duty to create a management plan for the SKWA, even though the stated purpose of the bill is to “provide a mechanism for the creation of a plan for management of the wilderness area, and provide a framework for management of the wilderness area”; and
- **There is no provision for additional DLNR funding for the SKWA.** The bill requires that the SKWA be administered by DLNR for the preservation of the visual, cultural, biological, and historical aspects of the SKWA. However, there is no provision in SB 1154, SD 2, HD 1 to provide additional funding for DLNR to administer the preservation of the SKWA.

**LURF's Position.** LURF supports the intent of SB 1154, SD 2, HD 1; however, LURF has comments and serious concerns and regrettably **must oppose the current form of HB 324, HD2, SD1**, based on, among other things, the following:

- **The Department of the Attorney General opposes this bill, because it may constitute a “regulatory taking” under the United States and Hawaii Constitutions.** U.S. Const., amend. V; Haw. Const. art. 1, §20. See *Testimony of the Department of the Attorney General on S.B. No. 1154, S.D. 2 Relating to Historic Preservation, dated March 18, 2011* (“Attorney General Testimony, dated March 18, 2011”).
- **The Attorney General recommended the removing all private lands from the bill in their entirety, or in the alternative, that the bill be held.** Based on their opinion that HB 324 would result in an “unconstitutional taking,” the Attorney General recommended that the bill be amended to remove the privately-owned Kapua lands and all other privately owned lands within Honomalino and Okoe in their entirety from the bill, or in the alternative, hold the bill. See the *Attorney General Testimony, dated March 18, 2011*.
- **DLNR does not support the bill, based on concerns about cost, expectations generated by this proposal and legal implications.** DLNR’s testimony relating to the companion bill SB 324, HD 2, SD 1, DLNR stated that it did not support this bill, and expressly stated that it is “concerned about cost implications and expectations generated by this proposal, and does not support this bill.” DLNR further “..... notes that there may be legal implications associated with this designation and the portion of the proposed SKWA that is private land.” See, *Testimony of William J. Aila, Jr., Chairperson, Department of Land and Natural Resources, In consideration of House Bill 324, House Draft 2, Senate Draft 1, Relating to Historic Preservation, dated March 30, 2011* (DLNR Testimony re HB 324, dated March 30, 2011).
- **DLNR cannot implement the SKWA, unless important concerns and issues are addressed – and the bill does not address those concerns and issues.** These important concerns include, but are not limited to the following:
  - ❖ Current limited access;
  - ❖ Lack of fresh water;
  - ❖ DLNR’s lack of capability to manage and protect the shoreline resources in balance with public visitation and the need for and additional funding for managed public recreational use of the area;
  - ❖ Need for and state funding of development of alternative access
  - ❖ Potential need for and state funding for adding recreational infrastructure and facilities
  - ❖ Wildfire fire management;
  - ❖ Control of visitation patterns to those areas where sensitivity and significance of the resources require greater resource management;
  - ❖ The need for formal planning to address these concerns; and

- ❖ Compliance with various permitting processes; and if additional management and public access is the public's future expectation of the SKWA, DLNR must also consider methods by which the designation and acquisition of lands could generate funds in order to provide the enhanced access, recreation and preservation.

See, *DLNR Testimony re SB 1154, dated February 12, 2011.*

- **DLNR is unable to assume responsibility for the additional SKWA lands at this time without additional funding resources.** In its February 12, 2011 testimony, DLNR cautioned, "without additional resources as indicated above, we are unable to assume responsibility for additional lands at this time." See *DLNR Testimony re SB 1154, dated February 12, 2011.* In its testimony relating to companion bill SB 324, DLNR has stated that it "is concerned about cost implications and expectations generated by this proposal, and does not support this bill." See *Testimony of William J. Aila, Jr., Chairperson, Department of Land and Natural Resources, In consideration of House Bill 324, House Draft 2, Senate Draft 1 Relating to Historic Properties, dated March 30, 2011 ("DLNR Testimony re HB 324, dated March 30, 2011").*
- **The fatal flaw of this bill is the lack of an appropriation for additional funding required for DLNR to administer the preservation of the SKWA.** If the bill specifically requires DLNR to administer the preservation of important and valuable aspects of the SKWA, and DLNR has stated that it would be unable to administer the preservation of the SKWA area, nor develop and implement a comprehensive management plan for the protection of the historic sites and native species and to address recreational issues in the SKWA. See *DLNR Testimony re HB 324, dated March 30, 2011.* However, this bill does not provide additional funding to DLNR to administer the preservation of the SKWA. If the State does not have the funding, then the bill should be held until the State has the funding.
- **Violates the laws relating to the Land Use Commission reclassification of lands and violates of due process of private landowners.** This bill violates the due process rights of private landowners in South Kona by "down-classifying" and reducing the value of their lands, without the public hearings required for land use reclassifications before the LUC.
- **Creates an unconstitutional and unfair advantage for the State by passing a law which drastically reduces the value of private property, and providing that after the value is reduced, that the State can acquire the lands.** It appears that this bill has the unfair effect of drastically reducing the value of private property in South Kona through down-classifying private property in to the "Conservation" District; imposing onerous prohibitions relating to construction, subdivision and buildings; while also providing that the State may acquire those de-valued lands by donation or a value-for-value exchange of other state lands and requiring that the costs of any appraisals shall be borne by the private land owner. The Attorney General warns:

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.

See the *Attorney General Testimony, dated March 18, 2011.*

- **The bill is inconsistent and irrational – It inexplicably repeals the SKWA only two years after designating the SKWA “to preserve the culturally and historically rich area of south Kona.”** If the true “purpose of this bill is to preserve the culturally and historically rich area of south Kona on the island of Hawaii,” then the legislature should fully explain the justification for repealing this bill after only two years? There is no explanation why the designation and prohibitions will be repealed in only two years, or what will happen during the two years, or what happens after the two years. This just doesn't make any sense. If the true intent of this bill is to preserve – then this bill should make the SKWA permanent!

**Conclusion.** Based on the opposition of the Attorney General, DLNR, and LURF's serious concerns stated above, LURF **opposes the current form of SB 1154, SD2, HD1 and respectfully requests that your Committee hold this bill.** LURF also respectfully recommends that the proponents of the bill, the affected landowners, responsible state agencies and legislators work together to identify and mutually agree to specific sites which should be recommended for preservation; develop a comprehensive management plan; and obtain a state budget appropriation for DLNR to acquire those sites and implement the plan.

We appreciate the opportunity to present testimony regarding this matter.