LATE TESTIMONY

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

ON THE FOLLOWING MEASURE:
S.B. NO. 1154, S.D. 2, RELATING TO HISTORIC PRESERVATION.

BEFORE THE:
HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

DATE: Friday, March 18, 2011 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 325

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

Chair Chang 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 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 The bill is nearly identical to Act 59, Session Laws of Hawaii 2003, which was repealed at the end of 2007 under Act 215, Session Laws of Hawaii 2006, when the land exchange did not take place.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 6, 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.