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KAIHOLAWE ISLAND RESERVE COMMISSION
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Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the House Committee on
WATER, LAND AND OCEAN RESOURCES

Friday, February 3, 2012
9:00 A.M.
State Capitol, Conference Room 325

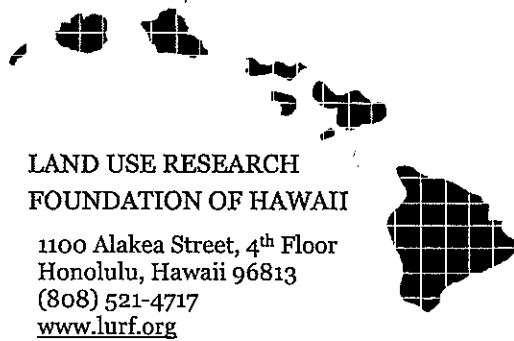
In consideration of
HOUSE BILL 2810
RELATING TO LAND USE

House Bill 2810 seeks to recognize valleys of historic and cultural significance in the State of Hawaii, and to ensure protection of these valleys' historic, cultural and visual value. While this is laudable, the Department of Land and Natural Resources (Department) opposes this legislation in its current form because the language is overly broad.

The bill proposes that any valley of historic and cultural significance shall be so designated through legislation. The Department believes that the restrictions on use and development of any valley should be addressed in the legislation specific to that valley as well.

This particular legislation designates Hanalei Valley on Kauai, and Waipio Valley on the Island of Hawaii as valleys of historic and cultural significance. However, the legislation does not say why these valleys' are historically or culturally significant. The Department believes that this language should be included in the legislation to expound on their significance, because it would indicate the specific types of resources in the valley to be preserved. For example, if Hanalei is being nominated for its significance as a taro growing area, then perhaps the waters of the valley should also be protected in the legislation.

In addition, the legislation does not note the boundaries of the valley. Thus, it is unclear how far restrictions on development may run.



February 1, 2012

Representative Jerry L. Chang, Chair
Representative Sharon E. Har, Vice Chair
House Committee on Water, Land & Ocean Resources

Opposition to HB 2810 Relating to Land Use (Authorizes the designation of a qualifying valley as a valley of historic and cultural significance. Designates Hanalei valley and Waipio valley as valleys of historic and cultural significance.)

Friday, February 3, 2012, 9:00 a.m., in House conference room 325.

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 appreciates the opportunity to submit testimony in **opposition to HB 2810** relating to land use, which would declare Waipio and Hanalei valleys to be valleys of historical and cultural significance, and impose severe and unprecedented restrictions on the use of by land owners of property within those valleys.

HB 2810. This bill authorizes the designation of qualifying valleys, specifically Waipio and Hanalei valleys, to be valleys of historical and cultural significance, and proposes restrictions on structures proposed to be constructed therein. Specifically, proposed section 6E-C would require that any structure be set back not less than 100 feet from the valley rim and not be visible from the valley floor. The limitations in proposed section 6E-C would have the practical effect of absolutely prohibiting construction of any structures on the valley floor and potentially severely limiting construction elsewhere in a designated valley.

LURF's Position. We respectfully believe that HB 2810 would effect an uncompensated taking, is unconstitutionally vague, and would usurp the respective counties' zoning powers.

A. HB 2810 Would Effect an Uncompensated Taking.

As noted, section 6E-C of H.B. No. 2810 would prohibit construction of any structures within the valley floor and potentially severely limiting construction elsewhere in a designated valley. The Fifth Amendment of the United States Constitution, as applied to the states via the Fourteenth Amendment, as well as Article I, Section 20, of the Hawaii constitution, prohibit the State from taking private property without the payment of just compensation.

Proposed section 6E-C would effect a categorical taking of property by denying affected landowners the ability to construct structure and therefore deprive them of economic use of their property without just compensation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982). Landowners of a parcel within one hundred feet of the valley rim or within visible range of “a person on the valley floor” (which would include any structures on the valley floor) would be prohibited from erecting any structure on their property, identical to the effect of the regulation in *Lucas*. Even if the bill restricts use of only part of the property, a partial regulatory taking occurs, requiring just compensation under the Hawaii and U.S. Constitutions. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

The takings problems in HB 2810 are compounded by the absence of any variance or waiver provisions, or providing for the grandfathering of the rights of property owners whose rights have vested.

B. HB 2810 is Both Arbitrary and Vague.

HB 2810 suffers from the further infirmities of being both arbitrary and vague. For example, proposed section 6E-C(b) defines the valley rim as the boundary of the valley wall that is “_____” feet above the lowest point of valley floor. There is no reason to believe that the rims of different valleys have the same height, and the proposed measurement is clearly an arbitrary and therefore unsupportable definition.

HB 2810 suffers from vagueness in that the term “valley floor” is not defined. This is a critical issue, as the restrictions in proposed section 6E-C are directly tied to the “valley floor.” The bill also is vague as to what constitute “Hanalei Valley” or “Waipio Valley.” Again, because the bill would deprive owners of the right to construct structures on their property, it is fatal that the terms used in the bill are not clearly defined.

C. HB 2810 Usurps the Respective Counties’ Zoning Powers.

Finally, HB 2810 usurps the various counties’ authority by taking on a zoning function via state law, violating the Zoning Enabling Act and article VII, section 2 of the Hawaii Constitution. Zoning and Special Management Area (SMA) administration are county functions, expressly authorized by law. See Haw. Rev. Stat. § 46-4. Counties have the authority to permit and regulate development within their jurisdiction, pursuant to the county general plan. The bill undermines the county’s authority by directly prohibiting or restricting development within the affected valleys. The blanket prohibition against further construction is unconstitutional and unnecessarily broad; rather land use determinations should be left to the counties where particularized land use decisions can be made – as intended.

For the foregoing reasons, we respectfully oppose HB 2810 and ask that the bill be held.

HISTORIC HAWAII FOUNDATION

To: Rep. Jerry L. Chang, Chair
Rep. Sharon E. Har, Vice Chair
Committee on Water, Land & Ocean Resources

From: Kiersten Faulkner
Executive Director, Historic Hawai'i Foundation

Committee Date: Friday, February 3, 2012
9:00 a.m.
Conference Room 325

Subject: **HB2810, Relating to Land Use**

On behalf of Historic Hawai'i Foundation (HHF), I am writing in opposition to HB2810, Relating to Land Use, as being overly-broad, overly-vague, and inconsistent with established practices and procedures for the designation of historic properties.

HB 2810 would establish a new policy and legislative process for the designation of "any valley that has significant historic, cultural and visual value to the State" and would so designate Waipi'o and Hanalei Valleys. Once designated, construction that is visible from the valley floor or within 100 feet of the valley rim would be prohibited.

Since 1974, Historic Hawai'i Foundation has been a statewide leader for historic preservation. HHF's 850 members and numerous additional supporters work to preserve Hawaii's unique architectural and cultural heritage and believe that historic preservation is an important element in the present and future quality of life, economic viability and environmental sustainability of the state.

Certain cultural and ethnographic landscapes are clearly significant parts of Hawaii's natural, cultural and historic legacy. HHF supports efforts to research, document, review and designate these and other historic properties. However, the proposed measure would employ a legislative process rather than utilize the professional standards and mechanisms that are established for evaluating and designating historic properties on the Hawai'i Register of Historic Places, established in HRS 6E. Designation via a political process undermines what is currently a matter of professional judgment, with checks and balances that safeguard due process and ensure that consistent standards and criteria are met.

While the State already has and uses the authority to assign historic designations to state-owned property (e.g. Iolani Palace, Diamond Head Monument, Mauna Ala), the proposed bill would expand that authority to non-state-owned property. The current designation procedures ensure due process for owners and interested parties so fundamental fairness is retained. The proposed

Historic Hawai'i Foundation

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Historic Hawai'i Foundation was established in 1974 to encourage the preservation of historic buildings, sites and communities on all the islands of Hawai'i. As the statewide leader for historic preservation, HHF works to preserve Hawai'i's unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic viability of the state.

language includes none of those notification or public hearing procedures, so there are significant due process issues with having the legislature make a determination on historic and cultural significance without any justification on boundaries or criteria.

HHF believes that existing planning and development processes and regulations may already be used to establish the most appropriate areas for preservation on both public and private property. We support these processes and advocate for their diligent and consistent application throughout the state. In addition, any member of the public can prepare and submit a nomination to designate a historic property, following the established procedures and standards. We would support efforts to evaluate the Hanalei and Waipi'o Valleys following professional standards and due process to determine an appropriate historic property boundary, if any.

HHF opposes HB2810 as being overly-broad, and inconsistent with best practices for identifying and designating historic properties.

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