

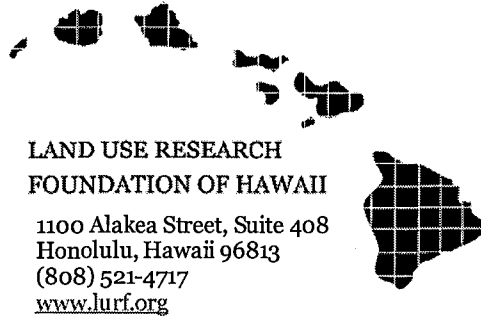
HB 324

HD2, SD1

management plan for protection of the historic sites, native species and to address recreational uses of the proposed Wilderness Area. The Department is not unable to develop such a plan without additional funding. In addition, management plans typically call for sustained actions for implimentation. Again, the Department would not be able to take on an additional 22,000 acres for sustained management, but supports the intent to simply protect the area from further development for future generations.

PART II of this measure creates a new West Oahu historical district. The Department's current staffing and budget limitations would preclude any meaningful interaction with the community to determine how to implement this new proposal. In addition, this action would potentially create an additional layer of historical designation and substantially conflicts with the original intention to establish perpetual protection of a very significant, virtually undeveloped portion of land that has been previously identified as worthy of this designation for some time by the community on Hawaii.

Due to the expressed concerns about cost implications overall, and creating expectations and possible confusion if PART II is enacted, the Department does not support this measure and prefers Senate Bill 1154, Senate Draft 2, House Draft 1 – with amendments to the boundaries of the proposed Wilderness Area as currently worded in House Bill 324, House Draft 2, Senate Draft 1.



March 30, 2011

Senator David Y. Ige, Chair and Senator Michelle N. Kidani, Vice Chair
Senate Committee on Ways and Means

Opposition to Current Form of HB 324, HD2, SD1 Relating to Historic Preservation. (Unconstitutional “Taking” of Private Lands in South Kona Wilderness Area on the island of Hawaii and West Oahu Historical District)

Wednesday, March 30, 2011 at 9:30 a.m. in CR 211 (public decision-making)

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 HB 324, HD2, SD1 was well-meant and LURF **supports the intent** of HB 324, HD2, SD1; the preservation of the important historic, cultural, scenic, environmental and biological resources of the South Kona Wilderness Area (“SKWA”) and the West Oahu Historical District (WOHD”); and cooperation between the State, landowners and the community toward that end. However, LURF has serious concerns and regrettably **must oppose the current form of HB 324, HD2, SD1 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.

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 (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*”).

HB 324, HD2, SD1. This bill has two distinct parts, and the key provisions are summarized as follows:

- **Part I South Kona Wilderness Area (SKWA).** This appears to be a well-meaning, but majorly flawed attempt to resurrect Act 59, Session Laws of Hawaii 2003. The purpose of Part I of this bill is to establish a SKWA on the island of Hawaii, provide a mechanism for the creation of a plan by the DLNR for management of the SKWA, and provides a framework for management of the wilderness area. **Without any legal notice to the land owners, the opportunity to be heard, due process or the right to appeal, the bill does the following:**
- Designates specific state and private lands to be included in the SKWA for “preservation of the visual, cultural, biological, and historical aspects of the lands covered in this part” (implies no further use by the landowner which would change those “aspects”);
 - Changes the current “Agricultural” land use classification of private property to the “Conservation” District, without any of the required Land use Commission (LUC) proceedings and in violation of Hawaii Revised Statutes (HRS) requirements relating to land use reclassification;
 - Without approval or authorization of the affected private landowners, 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,
 - 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;
 - 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;
 - After reducing the value of private lands by State action, 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;
 - Does not provide any process for a dollar-for-dollar exchange, and does not identify any possible State lands for such an exchange;
 - Requires the DLNR to develop a comprehensive management plan for protection of the historic sites and native species and to address recreational issues in the SKWA, in cooperation with appropriate county, state, and federal agencies, the Aha Kiole Advisory Committee, established pursuant to Act 212, Session Laws of Hawaii 2007; and Paa Pono Milolii, a Hawaii nonprofit corporation to develop a comprehensive management plan;
 - DLNR is required to prepare its comprehensive management plan for the SKWA with outside groups, but without requiring any consultation, collaboration, or cooperation with the owners of private lands in the SKWA;
 - There is no provision for additional DLNR funding in HB 324, HD2, SD1. Without additional funding, DLNR would be unable to 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 *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*”).

- **PART II West Oahu Historical District.** This also appears to be a well-meaning, but majorly flawed attempt to preserve certain specific sites in West Oahu which are significant in Hawaii’s culture and history. The purpose of Part II is to establish a historical district designation to recognize the historical and cultural significance of certain areas of the state and to establish the WOHD as one such district. Given the intent of Part II to require “preservation” of those private lands and structures in their current state, this bill could detrimentally affect the use, value and title of private property in West Oahu by authorizing the State to impose a “Historic District” designation on, and “preservation” of any and all private property in West Oahu.
- Part II discusses various historical sites in West Oahu and confirms its intent to “preserve” historic sites on private property by providing that, “These and other areas from the Ewa Coastline sweeping up to the Waianae range and Kunia are historical markers in Hawaii’s history and should be preserved where possible.”
 - Authorizes the legislature to designate a contiguous geographical area in the State as a historical district;
 - Without any legal public notice to private landowners and the opportunity to be heard, designates the WOHD to include the entire Ewa Plain in West Oahu, generally referring to the area from Kapolei to Waipahu and including Ko Olina, Kalaeloa, and the Ewa Marina; and
 - Provides that DLNR may collaborate with “interested parties” to preserve historic property within a historical district, but does not require any consultation, collaboration or cooperation with the owners of private property in the WOHD;
 - Part II would create (unrealistic) expectations, as DLNR’s current staffing and budget limitations would preclude any meaningful interaction with the community to implement the WOHD. See *DLNR Testimony, dated March 30, 2011;*
 - In addition, the WOHD designation would also potentially create an additional layer of historical designation and confusion. See *DLNR Testimony, dated March 30, 2011;* and
 - DLNR does not support **HB 324, HD2, SD1**, based on concerns that if Part II is enacted, there will be overall cost implications, the creation of (unrealistic) expectations and possible confusion. See *DLNR Testimony, dated March 30, 2011*

LURF’s Position. LURF supports the intent of HB 324, HD2, SD1; the preservation of the important historic, cultural, scenic, environmental and biological resources of the SKWAs and WOHD; and cooperation between the State, landowners and the community toward that end. 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:

➤ **Part I South Kona Wilderness Area – LURF Objections**

- The Department of the Attorney General opposes Part I of 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 H.B. No. 324, H.D. 2 Relating to Historic Preservation, dated March 23, 2011 (“Attorney General Testimony, dated March 23, 2011”)*;
- 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 23, 2011*;
- DLNR cannot implement the SKWA, unless some concerns and issues are addressed, including, but not limited to:
 - ❖ 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 resources. See *DLNR Testimony re SB 1154, dated February 12, 2011*;
- 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 unfair advantage for the State interests, by using this bill to drastically reduce the value of private lands in South Kona through down-classifying private property in the SKWA 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.

➤ **Part II West Oahu Historical District – LURF Objections**

- The wide-ranging designation of the WOHD to include the entire Ewa Plain in West Oahu, generally referring to the area from Kapolei to Waipahu and including Ko Olina, Kalaeloa, and the Ewa Marina, with the intent to require “preservation” of private property in its current state would be an “unconstitutional taking” which is not reasonably tailored to address a legitimate public purpose.
- Given the fact that the text of the bill lists numerous historical sites in the West Oahu area, it is unreasonable and irresponsible to impose “preservation” on all private property in the entire Ewa Plain in West Oahu. It would have been more appropriate for the bill to list specific historical sites which it proposes to preserve;
- The stated intent to require “preservation” of private property in its present state will result in unintended negative consequences of creating uncertainty regarding the current and future uses of the lands in West Oahu and a cloud over the titles of those lands, including those lands which already have land use entitlements. Such uncertainty and clouds over the title of private property could create obstacles to obtaining financing for large projects in West Oahu, delay or stop projects and stall job creation and efforts to improve the economy.
- DLNR does not support Part II of HB 324, HD2, SD1, based on concerns that if Part II is enacted, will create (unrealistic) expectations; there will be overall cost implications, because this measure does not include any additional funding for implementation of Part II; and DLNR’s current staffing and budget limitations would preclude any meaningful interaction with the community to implement the WOHD. In addition, the WOHD designation would also potentially create an additional layer of historical designation and confusion. See *DLNR Testimony, dated March 30, 2011*.

Conclusion. As stated above, LURF believes that HB 324, HD2, SD1 was well-meant and and LURF **supports the intent** of HB 324, HD2, SD1; the preservation of the important historic, cultural, scenic, environmental and biological resources of the SKWA and the WOHD; and cooperation between the State, landowners and the community toward that end. However, LURF has serious concerns and regrettably **must oppose the current form of HB 324, HD2, SD1 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.

Thank you for the opportunity to present testimony regarding this matter.