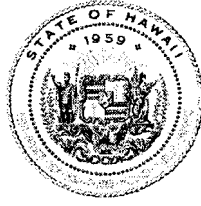
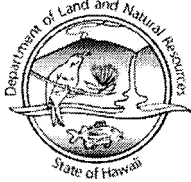


HB 324, HD2

EDT

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 Senate Committee on
WATER, LAND, AND HOUSING**

**Thursday, March 17, 2011
1:15 PM
State Capitol, Conference Room 225**

**In consideration of
HOUSE BILL 324, HOUSE DRAFT 2
RELATING TO HISTORIC PRESERVATION**

House Bill 324, House Draft 2 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 This Act however, was repealed in 2007 when the Kapua land acquisition did not take place.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 in 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 use at Manuka Beach along this portion of the coastline is not compatible with a designation as a Natural Area Reserve (NAR). 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 the House Draft 2 be amended to reflect the same language as is used in the companion Senate Bill 1154, Senate Draft 1, on Page 3, Lines 11, 12, 13 and 14:

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

WILLIAM J. AILA, JR.
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 LAND RESERVE COMMISSION
LAND
STATE PARKS

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

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

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

The Department supports the 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:

H.B. NO. 324, H.D. 2, RELATING TO HISTORIC PRESERVATION.

BEFORE THE:

SENATE COMMITTEES ON ECONOMIC DEVELOPMENT AND TECHNOLOGY AND ON
WATER, LAND, AND HOUSING

DATE: Wednesday, March 23, 2011 **TIME:** 1:15 p.m.

LOCATION: State Capitol, Room 016

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

Chairs Fukunaga and Dela Cruz and Members of the Committees:

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 Hawaii 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 private owned. Kapua consists of 7780 acres, which is zoned agriculture, with 1192 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 SENATE COMMITTEES ON ECONOMIC DEVELOPMENT AND
TECHNOLOGY AND WATER, LAND, & HOUSING**

**TWENTY SIXTH LEGISLATURE
Regular Session of 2011**

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

OPPOSING HB 324, HD2, Relating to Historic Preservation

Wednesday, March 23, 2011, 1:15PM -- Room 016

Aloha Chairs Fukunaga and Dela Cruz, Vice-Chairs Wakai and Solomon, and Members of the Committees,

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, HB 324, HD2 (§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.

HB 324, HD2:

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**; (3) **§6E-D Land acquisition**; and (4) **SECTION 4**, which establishes an effective date, but does NOT establish a sunset date, 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), upon the effective date of this measure.

As stated in the State Attorney General’s testimony on a previous draft (HB 324, HD1) dated March 2, 2011, before the House Committee on Finance, TRG believes that this provision of HB 324, HD1 would be considered **a regulatory taking**. TRG believes that the State should only act to redistrict Kapu‘a **AFTER** purchasing the lands.

HB 324, HD2 authorizes the State to purchase the lands of Kapu‘a, but until the closing these lands will remain in private ownership. TRG believes the down-zoning and subsequent devaluation of these lands is not a just 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 Agricultural Classification of 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 HB 324, HD2, 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 HB 324, HD2 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 HB324, HD2 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 a potential 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 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 HB324, HD2. 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 land exchanges were very controversial, in that there is a great deal of public sentiment and often complicated histories tied to public lands. **TRG would ask the state to authorize condemnation for cash as the only method for acquisition of the Lands of Kapu‘a.**

(4) **SECTION 4:** This section establishes an effective date for the Act. TRG believes that if the Legislature decides to pass this measure in spite of our opposition, **an automatic sunset date for a maximum of two years after the effective date should be added** 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 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).

TRG thanks the Committee for the opportunity to provide comments, and looks forward to partnering with the State on the sale and protection of these precious lands.



The Nature Conservancy of Hawai'i
923 Nu'uuanu Avenue
Honolulu, Hawai'i 96817

Tel (808) 537-4508
Fax (808) 545-2019

nature.org/hawaii

Testimony of The Nature Conservancy of Hawai'i
Commenting on H.B. 324 HD 2 Relating to Historic Preservation
Senate Committee on Water, Land, and Housing
Thursday, March 17, 2011, 1:15PM, Rm. 225

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy of Hawai'i submits the following comments on H.B. 324 HD 2:

The lands proposed under this bill to become the South Kona Wilderness Area include cultural resources as well native dry land forest cover, which is becoming increasingly rare throughout the state. The Nature Conservancy is available to continue to work with the State, the landowners, and other interested parties to help achieve appropriate protection for the resources in this land area.

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Testimony of The Nature Conservancy of Hawai'i
Commenting on H.B. 324 HD 2 Relating to Historic Preservation
Senate Committee on Economic Development and Technology
Senate Committee on Water, Land, and Housing
Wednesday, March 23, 2011, 1:15PM, Rm. 016

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

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