



LAND USE RESEARCH
FOUNDATION OF HAWAII

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Representative Rida Cabanilla, Chair,
Representative Pono Chong, Vice Chair
House Committee on Housing

Opposition to Senate Concurrent Resolution No. 52, S.D. 1, Urging Grove Farm Company, Inc. ("Grove Farm") to Place an Immediate Stay of Eviction and Engage in Meaningful Formal Discussions with Tenants of the Koloa Plantation Camp Regarding Future Plans for the Plantation Property and the Development of Alternative Solutions.

Wednesday, March 21, 2012, at 9:00 a.m. in 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 **strongly opposes SCR 52, S.D. 1**, and respectfully requests that this Committee either: **hold the Resolution**, based on the legal issues raised below, or **amend the Resolution** to include the following: relevant and objective background information; encouragement to Grove Farm to continue with their development of the property and their work with the tenants to relocate and prioritize them to purchase in the new development; affirmation of the legal parameters arising from Grove Farm's vested rights as landowner and landlord with regard to Koloa Camp; and the deletion of the portions of the resolution which could be interpreted as contract interference or *coercion* which could result in unnecessary legal issues and challenges for the State.

While it appears that this Resolution may have been well-intended, the measure unfortunately **sets dangerous legal precedent by allowing the Legislature to use its powers to influence, intervene and interfere with private contracts** between private parties, and attempting to influence those private parties and actions, as well as the future development of a private project, through "*urgings*" and recommendations which could be interpreted as *coercions* which will cause substantial increases in costs and delays for a private housing development. Such action on the part

of the Legislature raises serious legal concerns as it in effect, threatens to deprive private property owners of their rights, the unobstructed and legal use of said property, of vested rights afforded to them by zoning and other governmental permits and approvals, and the alteration of significant terms and conditions which were agreed to in freely negotiated, private instruments, all without any compensation.

Thus, if this Committee decides to pass SCR 52, S.D. 1, LURF would also respectfully recommend **that this Resolution be referred to the State Attorney General for legal review and advice** regarding, among other things:

(1) Whether the Legislature can legally **take an official position through a Concurrent Resolution regarding a private property contract matter by taking the side of tenants and “requesting” that a landowner immediately stay pending evictions and alter existing legal plans for the property;**

(2) Whether SCR 52, S.D. 1 will **set a precedent for the Legislature to take sides in private property contract matters;**

(3) Whether it is legal for the Legislature, under the existing laws relating to requests for proposals or other laws, **to “request” that a private landowner seek the assistance of, and cooperate with, one specifically named developer/real estate professional identified by the tenants to develop a revised plan for the Koloa Camp site;**

(4) Whether the contents of the Resolution (including, but not limited what could be interpreted as the Legislature’s attempt to influence Grove Farm to hire a housing developer specifically named by the Legislature, resulting in increased costs and time delays, and perhaps more so if the landowner elects not to comply with the Legislature’s “requests” and wishes), **is a violation of Grove Farm’s vested Constitutional private property rights, especially considering Grove Farm’s need to secure pending and future governmental approvals;** and

(5) Whether the current form of the Resolution could subject the Legislature to a **lawsuit and damages for interference with contractual rights, increased costs or delays, and attorneys’ fees and costs of litigation.**

SCR 52, S.D. 1. The Resolution “urges” Grove Farm to place an immediate stay of eviction to allow the Koloa Camp tenants to remain in Camp homes until an “alternative solution is developed.” It also includes what could be interpreted as “*urgings*” intended to influence or coerce Grove Farm into engaging in meaningful formal discussions with the Camp tenants regarding future plans for the plantation property and the development of alternative solutions, including working cooperatively with a housing developer specifically named by the Legislature.

While the Legislature recognizes the support and contributions of Grove Farm to the Kauai community in the Resolution, it also includes disparaging “impressions” about the company related by third parties, based on hearsay. The Resolution also includes unilateral plans and proposals made by the tenants for the development of the Camp

site, inferring the possible need to re-visit Grove Farm's existing development plans despite the fact the property is currently zoned residential, and Grove Farm's plans do not require rezoning, or other permits. The language of SCR 52, S.D. 1, while "*urging*" Grove Farm to place a stay of eviction and engage in meaningful formal discussions with the Camp tenants, is therefore intimidating, to say the least, and virtually threatens Grove Farm's ability to continue development of the property should it elect not to comply with the Legislature's point of view or recommendations.

Background Facts. As noted in the Resolution, "Grove Farm has a history of being a good corporate neighbor by being proactive, sensitive, and responsive to community needs." LURF is thus concerned about the other provisions of the Resolution, which appear to be one-sided, slanted and fail to provide an unbiased and objective description of the actual circumstances. LURF understands that some members of the Legislature may have misconceptions about Grove Farm's efforts relating to the project, and would like to set the record straight by providing information about Grove Farm and the Koloa Camp project, including the information set forth below. We believe that if the following facts and circumstances are known, this Committee could justify either holding the Resolution, or substantially amending it to include such information.

Background of Grove Farm

- Grove Farm, through its affiliate Haupu Land Company, is the owner of the property referred to as "Koloa Camp";
- Grove Farm has historically provided affordable housing opportunities to the employees of Grove Farm Plantation; and
- Grove Farm has provided housing to all of the Koloa Camp tenants for many years at well below market rates;
- Before the County of Kauai required affordable housing, Grove Farm, of its own accord, developed the Waikomo and Wailaau subdivisions in Koloa, which included houses and lots;
- Grove Farm gave first priority to Grove Farm Plantation employees to purchase houses and lots in these subdivisions, some of which were sold at or below the cost to construct the houses;
- Grove Farm has built more than 600 affordable housing units in the Puhi area;
- After satisfying its Lihue-Puhi master plan affordable housing requirements, Grove Farm sold land at far below its market value to the Self Help Housing Corporation of Hawai'i that allowed the construction of another 41 affordable homes for first-time low income home buyers;

Grove Farm's Assistance to Current Tenants

- There is but one remaining spouse of a Grove Farm Plantation worker who rents in Koloa Camp. Grove Farm has rented five other camp homes, a former school building and cottage to other tenants;

- The Koloa Camp residential tenants have been afforded a first right to purchase, and Grove Farm has arranged for a community services specialist to assist them to become homebuyer ready;
- Grove Farm continues to communicate with the tenants and, in close coordination with the Mayor and County Housing Agency, has been assisting the residential tenants to find alternative housing accommodations;
- One tenant couple has already moved out and two other tenant households have alternative accommodation plans;
- Grove Farm has offered to donate existing homes to multiple tenants, offered one of its Lihue rentals to tenants, and has paid up to \$3,000 in moving expenses;
- In addition to meeting with the tenants individually, Grove Farm has attended a tenant group meeting, has held a community-wide meeting, and has presented information at a Koloa Community Association meeting;
- Grove Farm provided the tenants with 120-day termination notices and granted a 30-day stay of enforcement of the termination notices;

Grove Farm's Plan to Build New Residential Homes in Koloa

- Grove Farm's planned development is consistent with the Kauai County General Plan and zoning ordinances, and does not require a re-zoning, a Class IV zoning permit, environmental impact statement (EIS), or a public hearing;
- Grove Farm intends to develop and sell up to 50 single-family homes and will provide workforce housing in accordance with the County Housing Policy which will start as low as \$220,000;
- The Hawaii Housing Planning Study, 2011, indicates a great demand of 841 residents that prefer their next housing unit to be located in Koloa;
- Grove Farm's new development will upgrade the infrastructure in Koloa Camp by addressing flood issues, constructing septic systems to replace the existing cesspools, and construct an interior roadway in place of dirt and gravel roads; and
- Grove Farm's new development will create many job opportunities for Kauai's workforce.

Discussion of Legal Issues.

- **SCR 52, S.D. 1 May Violate the Contract Clause and Deprive Grove Farm of Significant Vested Rights.**

LURF believes that it would likely be a violation of the Contract Clause of the U.S. Constitution for legislative bodies to take the side of tenants in private

contractual matters, and use its powers for what amounts to coercion by “urging” landowners into staying what are otherwise lawful evictions of tenants, and amending permitted development plans, which will increase costs, cause delays, and affect the landowner’s selection of its own housing developer. The courts have closely examined and have found against legislative bodies that have passed laws which favor tenants in private lease contract matters and impose terms that are favorable to the tenant (See, e.g., HRPT Properties Trust v. Lingle, 715 F. Supp.2d. 1115 (2010) and Anthony v. Kualoa Ranch, 69 Hawaii 112 (1987)).

While SCR 52, S.D. 1 is not a law, as in the above-referenced cases, it has the added feature of including “*urgings*,” which we believe a court may find would constitute *coercion* against Grove Farm. Although Grove Farm has vested its development rights by obtaining its government approvals and expending substantial sums on its the housing project, the Resolution includes “*urgings*” which would increase costs and cause delays, and which are meant to affect the landowner’s selection of its own housing developer by urging the retention of one specifically named in the Resolution.

LURF believes that a court would consider the terms of SCR 52, S.D. 1 to be an attempt to violate Grove Farm’s vested rights, based on the favoring of one side in a private contractual matter, and would find that the Legislature’s “*urgings*” could be interpreted as a form of *coercion* by sending the message to Grove Farm to comply with the Legislature’s requests,” or else potentially face additional costs and delays, and possible termination of a development project despite vested rights.

- **Legal Precedent of Taking a Side in Private Contractual Matters.** SCR 52, S.D. 1 will set a dangerous precedent which may require the Legislature to pass future resolutions taking one side in matters involving private contracts.
- **Possibility of a Lawsuit Against the State Similar to the Manoa Neighborhood Board Lawsuit.** As noted above, it appears that the purpose and intent of this measure is in effect, to mandate Grove Farm to accommodate existing tenants by staying lawful eviction notices issued to them, as well as including the tenants in Grove Farm’s plans to develop the Koloa Camp property in order that all tenants will be able to continue living on the property. No legal justification or support has been provided for such action being taken on the part of the State.

As Corporation Counsel for the City and County of Honolulu (“City”), I was involved in the aftermath of a lawsuit which involved similar circumstances. The matter involved the Manoa Neighborhood Board, an elected City advisory body, interfering with a private lease. The interference by the Manoa Neighborhood Board, however, was not as egregious as the current form of this Resolution, which is especially offensive due to its coercive nature.

The 1992 passage of a resolution by the elected City Manoa Neighborhood Board sparked the filing, and eventual settlement of a lawsuit, and a City Corporation Counsel policy that the Corporation Counsel would not defend or indemnify any City elected or appointed official, or employee against any lawsuits or other legal

action if it arose from that City individual acting “outside the scope” of their employment or position, by taking an official City position in favor of one private party in a private contract matter.

As reported in the attached Star-Bulletin article, the landlord in that case, Ukumaruku Corporation (“Ukumaruku”), decided not to renew its lease with its tenant, the Manoa Art Gallery (“Art Gallery”), and ordered the Art Gallery to vacate. Ukumaruku then began negotiations with the Bank of Hawaii (the “Bank”) to lease the space. The Manoa Neighborhood Board passed a resolution endorsing the tenant Art Gallery, and urging the parties to come to a reasonable settlement. The Chair of the Neighborhood Board then reportedly called a Bank official requesting that a Bank representative appear at a community meeting on the issue, and informed the Bank that the community did not need another financial institution. The Bank then terminated discussions with Ukumaruku, which filed a lawsuit against the City (Ukumaruku Corp. et al. v. Worrall, et al.). Ukumaruku reportedly sought \$600,000 in damages, plus attorneys’ fees and costs at the time of settlement. Based on recollection only, **the settlement judge proposed a settlement order which would have required each of the several attorneys who were members of the Manoa Neighborhood Board to pay \$10,000 apiece toward the settlement, did not require payment from the non-attorney members of the Manoa Neighborhood Board, and required the City to pay twice the total amount imposed on the attorney members of the Neighborhood Board.** The specific details of the settlement cannot be confirmed at this time.

It is very important to note that the Manoa Neighborhood Board lawsuit and settlement arose from a **resolution by County elected officials, taking the side of a tenant in an eviction matter, and urging the parties to come to a reasonable settlement.** The Manoa Neighborhood Board case is less legally egregious than the current Resolution, which includes “*urgings*” which could be interpreted as *coercion*, forcing Grove Farm to comply with the Legislature’s recommended course of action, or face additional costs, delays and possible termination of a project with vested rights.

Based on the above, LURF **strongly opposes** this Committee’s consideration of SCR 52, S.D. 1, and respectfully requests that the Legislature **seek legal advice from the Attorney General**; and either **hold the Resolution**, based on the legal issues raised, or **amend the Resolution** to include relevant and objective background information; encouragement to Grove Farm to continue with their development of the property and continue their work with the tenants to relocate and prioritize them to purchase in the new development; affirmation of the legal parameters arising from Grove Farm’s vested rights as landowner and landlord with regard to Koloa Camp; and the deletion of the portions of the resolution which could be interpreted as contract interference or “*coercion*” and result in unnecessary legal issues and challenges against the State.

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