LATE TESTIMONY

Hawaii's Thousand Friends

COMMITTEE ON WATER, LAND & OCEAN RESOURCES
Rep. Ken Ito, Chair
Rep. Sharon Har, Vice Chair

COMMITTEE ON AGRICULTURE
Rep. Clift Tsuji, Chair
Rep. Jessica Wooley, Vice Chair

HB 1008 RELATING TO LAND USE

Committee Chairs and members;

Hawaii's Thousand Friends, a statewide land and water use organization, opposes HB 1008 that purports to "protect and promote proper use of Hawaii's best agricultural lands.

Instead HB 1008 is counter to Act 233, passed in 2008, that states:

> "**§205-45.5 Important agricultural land; farm dwellings and employee housing.** A landowner whose agricultural lands are designated as important agricultural lands may develop, construct, and maintain farm dwellings and employee housing for farmers, employees, and their immediate family members on these lands; provided that:
>
> (1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members who actively and currently farm on important agricultural land upon which the dwelling is situated; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land;
>
> (2) Employee housing units shall be used exclusively by employees and their immediate family members who actively and currently work on important agricultural land upon which the housing unit is situated; provided further that the immediate family members of the employee shall not live in separate housing units and shall live with the employee;
>
> (3) The total land area upon which the farm dwellings and employee housing units and all appurtenances are situated shall not occupy more than five per cent of the total important agricultural land area controlled by the farmer or the employee's employer or fifty acres, whichever is less;
>
> (4) The farm dwellings and employee housing units shall meet all applicable building code requirements;

(5) Notwithstanding section 205-4.5(a)(12), the landowner shall not plan or develop a residential subdivision on the important agricultural land; (Emphasis added)

(6) Consideration may be given to the cluster development of farm dwellings and employee housing units to maximize the land area available for agricultural production; and

(7) The plans for farm dwellings and employee housing units shall be supported by agricultural plans that are approved by the department of agriculture."

HB 1008 introduces several development oriented provisions 1) the county controlled 15-acre exemption from the LUC process, 2) "family subdivision" which is an end run around the definition of "farm dwelling," 3) ability to sell, subdivide, lease, consolidate or re-subdivide agricultural land and transfer land titles under county regulations, and 4) the use of HRS 514 Condominium Property Regime which will double housing density.

In reality HB 1008 is not a bill to "preserve and promote the proper use" of agricultural land but an attempt to allow non-agricultural related development on Hawaii's agricultural land and must be held in committee.

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LATE TESTIMONY

HOUSE COMMITTEE ON WATER, LAND, & OCEAN RESOURCES
HOUSE COMMITTEE ON AGRICULTURE
February 23, 2009, 9:00 A.M.

(Testimony is 2 pages long)

TESTIMONY IN SUPPORT OF HB 1008

Aloha Chair Ito, Chair Tsuji, and Members of the Committees:

The Sierra Club, Hawai`i Chapter, with over 5500 dues paying members statewide, supports the intent of HB 1008, providing clarity on the allowable types of farm dwellings on agricultural lands. We believe, however, that this clarification needs to be applied to all farmlands, not just those of a particular soil classification.

The proposed changes in HB 1008—should they be applied to all lands in the state agriculture district—will help protect true agricultural enterprises, prevent "fake" farm developments, and uphold the constitutional mandate to protect agricultural land by clarifying that the county must adhere to the guidelines of the state land use law when permitting agricultural developments. Regrettably, the Constitution and the Legislature's intent to protect agricultural lands have been frustrated. Adoption of the proposed bill would help to better protect agricultural land, natural beauty, and natural resources.

House Bill 1008 is the appropriate land use policy change to help prevent future debacles like the recent "Hokulia" issue. While we believe existing statutes and rules—and case law—make it fairly clear what is an allowed use in the state agricultural district, HB 1008 further strengthens protection of Hawaii's farmlands while providing certainty to developers and those who seek to engage in certain activities on farmland. By providing clear direction to the counties on what constitutes an agribusiness operation or subsistence farming, luxury, non-farm estates like those proposed at the Hokulia development and others will be explicitly prohibited.

Hawaii's Land Use Law protects agriculturally designated land for more than agricultural values; it also serves to protect natural beauty and natural resources, to prevent scattered and premature development, to limit land speculation of urban areas. (1961 House Journal 855; 1961 Sess. Laws 299; See also, HRS § 226-104). As the Hawai`i Supreme Court noted:

> *In sum, the overarching purpose of the state land use law is to "protect and conserve" natural resources and foster "intelligent," "effective," and "orderly" land allocation and development. See 1961 Haw. Sess. L. Act 187 § 1 at 299 ("[I]n order to preserve, protect and encourage the development of lands in the State for those uses to which they are best suited for the public welfare . . . , the power to zone should be exercised by the State.") See also Pearl Ridge Estates Community Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 144 n.9, 648 P.2d 702, 709 n.9 (Nakamura, J., concurring)("Thus, conservation lands must be reserved if practicable, agricultural lands should be protected, and urban lands should be developed in orderly fashion.")*

> Curtis v. Board of Appeals, County of Hawai`i, 90 Haw. 384, 396 (1999), 978 P. 2d 822, 834.

The Hawai`i Supreme Court has long observed that the emphasis of the Land Use Law is on controlling growth and protecting resources:

> *By enacting HRS ch. 205 in 1961, the legislature intended, inter alia, to "[s]tage the allocation of land for development in an orderly plan," H.Stand.Comm.Rep. No. 395, 1st Haw.Leg., 2d Sess., reprinted House Journal 855-56, and to redress the problem of "inadequate controls [which] have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in long-term loss to the income and growth potential of our economy. Act 187, 1961 Haw.Sess. Laws 299.*
> Neighborhood Board v. State Land Use Commission, 64 Haw. 265, 272-3, 639 P.2d 1097 (1982).

Hawaii's Land Use Law was enacted in an effort to manage growth on islands of limited resources:

> *Scattered subdivisions with expensive, yet reduced public services; the shifting of prime agricultural lands into non-revenue producing residential uses when other lands are available that could serve adequately urban needs . . . these are evidences of the need for public concern and action.*
> Act 187, 1961 Haw Sess. Laws 299.

When developers circumvent the Land Use Law with urban type residential communities in the guise of agricultural subdivisions, the Land Use Commission is unable to fulfill its constitutional obligations or further the objectives of the Land Use Law. Fake-farm development projects on agricultural lands avoid LUC review of the projects' impacts on native Hawaiian gathering rights, historic sites, burials and constitutionally protected natural resources. Fake-farm developments:

- undermine the integrity, affordability and productivity of agricultural land;
- frustrate the ability of government to foster "intelligent," "effective," and "orderly" land allocation, protect open space and prevent scattered premature development; and
- jeopardize constitutionally protected native Hawaiian rights, natural beauty, and natural resources.

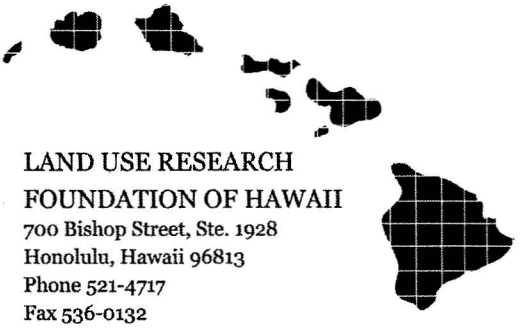
In addition to making the farm dwelling requirements in HB 1008 applicable to all agricultural lands, we respectfully ask the committees to amend HB 1008 to include an additional farmland protection. Specifically, we should amend Haw. Rev. Stat. § 46-4 to make clear that the counties cannot allow developments that are violate Hawaii's Land Use Law:

> *(g) Anything to the contrary notwithstanding, no county, by ordinance or private agreement, may permit any use in the agricultural district, as described in section 205-2, other than a permissible use pursuant to section 205-4.5."*

This amendments would help achieve the original intent of Hawaii's Land Use Law. This would help protect Hawaii's agricultural lands and decrease in real estate speculation on farmlands.

Thank you for the opportunity to testify.

LATE TESTIMONY



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Via Capitol Website

February 23, 2009

House Committee on Water, Land and Ocean Resources and Committee on Agriculture
Hearing Date: February 23, 2009, at9:00 AM in CR 325

Testimony in Opposition to HB 1008: Relating to Land Use (New Subdivision Requirements for Real Farms)

Honorable Chair Ken Ito, Vice Chair Sharon E. Har, and House Water Land and Ocean Resources Committee Members, and Honorable Chair Clift Tsuji, Vice-Chair Jessica Wooley, and House Agriculture Committee Members:

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.

This measure appears well-intended, however, LURF **respectfully opposes HB 1008,** which would mandate new requirements for agricultural subdivisions and building permits for farm dwellings. Our opposition is based on the following:

- The proposed law creates new terms and requirements relating to "agribusiness feasibility," "established and substantial agribusiness activity," and "family subdivisions," which are vague, ambiguous and subjective, making the requirements subject to different interpretations and hard to enforce;
- Burdensome bureaucratic requirements will cause expenses and delays for farmers and agricultural land owners;
- Counties lack the training and expertise to evaluate and enforce new "agribusiness" requirements;
- Unnecessary regulation and infringement on Counties' "home rule;" and
- HB 1008 also creates an unenforceable "unfunded mandate."

If the Legislature is serious about encouraging and supporting meaningful agricultural operations, it should not pass laws like HB 1008, which mandate more regulation, red tape and expenses for farmers. Instead, it should concentrate on improving the operations of the Agribusiness Development Corporation (ABC); assure irrigation water, infrastructure and processing facilities for agricultural operations; and provide more incentives for farmers. LURF is willing to work with the Department of Agriculture

(DOA) and other agricultural stakeholders on the issues and concerns which gave rise to this legislation.

HB 1008. The proposed bill will create new requirements and conditions for each application for county subdivision and county building permits for farm dwellings on lands in the agricultural land use district, with an overall master productivity rating of class A and B. Depending on the circumstances, the law may or may not apply to "family subdivisions." A summary of the new subdivision and building department requirements and conditions are as follows:

- **New "Agribusiness Feasibility" Requirements for County subdivisions.** For any subdivision application which includes a farm dwelling, the County shall require that the applicant demonstrate the feasibility of "agribusiness" as the primary activity undertaken on the land. Evidence of feasibility shall include consideration of:
  - Sufficiency of irrigation water, in quantity, storage, and distribution of irrigation water for each proposed lot to meet anticipated maximum demand;
  - Adequacy of infrastructure, such as internal roadways, utilities, and areas for the common use of lot owners;
  - Proposed agribusiness uses and
  - Agronomic suitability for the area,
  - Cost of production,
  - Potential income, and
  - market outlook; and
  - Form of organization of lot owners and
  - How the organization of lot owners will optimize agribusiness uses.
- **New Building Permit requirement to show "Established and Substantial Agribusiness Activity."** For any building permit for a farm dwelling, the county shall require that the applicant for the building permit demonstrate an "established and substantial agribusiness activity." Evidence of an established and substantial agribusiness activity shall include
  - Annual income from agribusiness;
  - Capital expenditures for agribusiness; and
  - A Farm Plan demonstrating substantial progress in achieving a successful agribusiness activity.
- **New deed restrictions or covenants.** The bill mandates new deed restrictions or covenants requiring that the lot owner or lessee to use the lot "primarily for agribusiness" as long as the land is classified in the agricultural land use district, and such deed restriction or covenants shall be in conformance with the intent and purpose of chapter 165 and section 205- 4.6 , and such agribusiness restrictions or covenants shall run with the land;
- **Recordation of deed restrictions and covenants.** Upon receipt of subdivision approval, or building department approval, the applicant shall record with the bureau of conveyances or land court, the deed restrictions or covenants; and
- **Enforcement of deed restrictions and covenants by counties.** HB 1008 also requires the appropriate county authority to enforce the deed restrictions or covenants.

LURF's Position. HB 1008 appears to be an attempt by the DOA to micromanage the counties' policies and processes for Agricultural subdivisions and building permits. We oppose HB 1008, based on, among other thing, the following:

- **Vague, ambiguous and subjective terms and conditions.** The new state requirements create new terms and requirements relating to the evaluation and finding of "agribusiness feasibility, "established and substantial agribusiness activity," and "family subdivisions." Such terms will be hard to enforce, because they are subject to interpretation and could be determined differently between the various counties, and even between officials within the same county;
- **Burdensome bureaucratic requirements will cause expenses and delays.** The onerous requirements of this bill will require farmers and agricultural land owners, to go thru a lot of red tape and additional expenses for the preparation of required studies and documentation relating to irrigation water, agronomy, production costs, potential income stream, market outlook, the form of lot owner organization, capital expenditures. The additional time-consuming preparation and review of such studies and reports will also delay permit processing;
- **Lack of County expertise to evaluate and enforce new agribusiness requirements.** At the present time, the Counties do not have the training or expertise to evaluate and enforce the new subdivision and building permit requirements;
- **Unnecessary regulation and infringement on Counties' "home rule."** This measure is unnecessary, as each county has its own unique rules and regulations which govern agricultural subdivisions and building permits on agricultural lands. In fact, the process at the City and County of Honolulu (City) includes Department of Agriculture review and approval prior to approval of any agricultural subdivision. The City is also considering other zoning requirements to address dwelling units on agricultural lands; and
- **HB 1008 also creates an unenforceable "<u>unfunded mandate.</u>"** This bill would create an "unfunded mandate," because this new state law creates major new requirements for county review, evaluation and enforcement, which will cause increased county administrative costs - - costs which will not be funded or reimbursed by the State. Such a state law, which requires the counties to establish and enforce rules, based on a state initiative, policy or law - - without state funding - - would be an "unfunded mandate," which the counties could refuse to implement, and thus, is unenforceable.

It appears that this measure was well-intentioned, however, if the Legislature is serious about encouraging and supporting meaningful agricultural operations, it should <u>not</u> pass laws like HB 1008, which mandate more regulation, red tape and expenses for farmers. Instead, it should concentrate on improving the operations of the Agribusiness Development Corporation; assure irrigation water, infrastructure and processing facilities for agricultural operations; and provide more incentives for farmers. LURF is willing to work with the DOA and other agricultural stakeholders on the issues and concerns which gave rise to this legislation.

Based on the above, we respectfully request that **HB 1008 be <u>held</u> in your Committees.**

Thank you for the opportunity to express our **<u>opposition</u> to HB 1008.**