LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011

ON THE FOLLOWING MEASURE:
H.B. NO. 324, H.D. 1, RELATING TO HISTORIC PRESERVATION.

BEFORE THE:
HOUSE COMMITTEE ON FINANCE

DATE: Wednesday, March 2, 2011 **TIME:** 11:00 a.m.

LOCATION: State Capitol, Room 308

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

Chair Oshiro and Members of the Committee:

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 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 The bill is nearly identical to Act 59, Session Laws of Hawaii, 2003, which was repealed at the end of 2006 when the land exchange did not take place.

The real property identified in the bill consists of the shoreline portion of five ahupuaa. We have been informed by DLNR staff that Honomalino, Okoe, Kaulanamauna, and Manuka are mostly public lands with private inholdings in Honomalino. Kapua is mostly private property. The land, 7780+ acres, is zoned agriculture with 1192+ acres in the conservation district resource subzone.

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 Hawai`i 425, 452, 903 P.2d 1246, 1273 (1995).

The bill does not state how much of the SKWA land is privately owned and how much is public lands. The bill is also unclear regarding land classification. The bill states that a portion of the land at Kapu`a is within the conservation district. The bill does not identify the classification for the remaining portion of Kapu`a or the four other lands, Honomalino, Okoe, Kaulanamauna, and Manuka, within the SKWA. Depending on the ownership status and current classification of the SKWA land, section 6E-E may constitute a regulatory taking if the new classification makes any private property "economically idle" without providing just compensation to the landowner.

Section 6E-D also raises a taking 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.

We respectfully ask the Committee to hold this bill.