

#### HCR129/HR111 CONVENING A WORKING GROUP TO DISCUSS THE FUTURE DEVELOPMENT PLANS IN KAKA'AKO MAKAI

Ke Kōmike Hale o ka Hoʻokolokolo a me ke Kuleana Hawaiʻi House Committee on Judiciary & Hawaiian Affairs

Malaki 29, 2021 2:00 p.m. Lumi 3
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The Office of Hawaiian Affairs (OHA) <u>STRONGLY OPPOSES</u> HCR129/HR111, which convenes a working group to discuss the future development plans in Kaka'ako Makai and to identify public lands of comparable value suitable to OHA for a possible land exchange for some or all of its parcels in Kaka'ako Makai. This resolution represents an intrusion by the Legislature into the OHA Board of Trustees' exclusive authority under the state Constitution to manage the Native Hawaiian people's share of the Public Land Trust; a unilateral attempt to undo a major settlement between Native Hawaiians and the State of Hawai'i over the State's use of our people's ancestral lands; and an attack on the Native Hawaiian people's indigenous right of self-determination. OHA cannot support the proposed working group or its contemplated functions, and has no intention of participating on the working group should this resolution pass.

#### If Passed, HCR129 and HR111 Would Represent A Legislative Intrusion into the OHA Board of Trustees Exclusive Authority Over Native Hawaiian Trust Assets

OHA's Kaka'ako Makai lands are Native Hawaiian trust lands. These lands are <u>not</u> public lands. The state Legislature cannot interfere with the OHA Board's exclusive authority under the state Constitution to manage these lands.

The trust character of OHA's Kaka'ako Makai lands are sourced in the state Constitution and Act 15, which transferred the lands to OHA. Article XII, Section 5, of the state Constitution makes clear that all real property conveyed to OHA "shall be held in trust for native Hawaiians and Hawaiians," and Section 6 of that Article further states that "the board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer . . . all income and proceeds from that portion of the [Public Land Trust] referred to in section 4 of this article for native Hawaiians." Section 6 of Act 15 specifies that OHA Kaka'ako properties are "deemed income and proceeds from the public land trust, <u>as if the Properties had been paid out</u> of the income and proceeds from the public land trust pursuant to article XII, section 6 of the State Constitution" (emphasis added).<sup>1</sup> Further, Section 2 of the Act states that OHA "shall administer the Properties in accordance with its duties under the Hawaii Constitution and as provided by law."

In 2003, the state Attorney General opined that the state Constitution "makes the elected trustees of OHA, not the Legislature, responsible for determining how the native Hawaiians' portion of ceded land receipts are spent [...]." The Attorney General went on to write that "the native Hawaiians' share of ceded land receipts <u>does not belong to the State</u>, and thus is not 'public money'" (emphasis added).<sup>2</sup> If Native Hawaiian's share of Public Land Trust revenues are not "public money," then Kaka'ako Makai, which Act 15 deemed to be Public Land Trust revenues, are certainly not public lands, and are instead part of the trust corpus that the Constitution places squarely within the prerogative of the OHA Board of Trustees.

The proposed working group to discuss the "development plans" for Kaka'ako Makai would allow the Legislature and other organizations to intrude into the OHA Board of Trustee's exclusive authority and responsibility to manage its trust corpus for the sole benefit of its beneficiaries. The inclusion of the Kaka'ako Makai Community Planning Advisory Council in the working group is also particularly offensive. It is wholly inappropriate for the Legislature, much less a community organization with no connection to the Native Hawaiian community, to determine how OHA's Board of Trustees should administer its trust corpus.

OHA opposes this legislative overreach and if passed, this measure would represent a significant and constitutionally problematic legislative intrusion into the OHA Board of Trustee's fiduciary prerogatives.

#### HCR129 Represents a Unilateral Attempt to Undo a Major Settlement Between Native Hawaiians and the State of Hawaii

For decades, OHA and the State have debated at the Capitol and in the courts to resolve a longstanding dispute regarding the debt owed to Native Hawaiians as required under the Public Land Trust, itself embodied within the Admission Act and the state Constitution. In 2008, the Executive Branch and OHA reached a historic agreement that the debt owed to Native Hawaiians at that time was valued at \$200 million. However, for four consecutive sessions, the state Legislature rejected every proposed deal to resolve this debt, including combinations of various land transfers and dollar amounts totaling \$200 million.

Finally, the state Legislature was presented with a proposal in 2012 to transfer to OHA 30 acres of land in Kaka'ako Makai. Some legislators raised concerns about the fairness of the proposed agreement, because of a law that prohibited residential

<sup>&</sup>lt;sup>1</sup> Act 15 (Reg. Sess. 2012).

<sup>&</sup>lt;sup>2</sup> Attorney General Op. No. 03-04.

development on these lands. A clear message was sent to OHA, however, that the Legislature would not approve a proposed settlement bill that included residential entitlements. Ultimately, while Act 15 was passed into law, the residential restriction on the parcels conveyed to OHA were not lifted. However, the Committee Report from the Committees on Judiciary and Labor and Ways and Means did express "concerns about the fairness of this proposed settlement" and recognize that "**property values [of the Kaka'ako Makai parcels] could be enhanced by certain entitlements that, while not specifically provided for in this measure, could be obtained at a future date"** (emphasis added).<sup>3</sup> Therefore, OHA accepted these lands, promising to return to the Legislature after completing its initial planning and financial analysis.

After decades of fighting and expending resources to settle this dispute, and after years of expending trust resources to manage our Kaka'ako Makai lands, OHA is now being told that the Legislature wants to unilaterally renegotiate the entire 2012 settlement. This is patently unfair and calls into the question whether the State can ever be trusted to deliver on its legal obligations to Native Hawaiians.

Should the 2012 settlement be re-opened under HCR129, it would mean that two significant legislative agreements between OHA and the State regarding the state's legal obligations to Native Hawaiians would have unraveled without being fully implemented. The other legislative agreement was Act 304, which finally established a formula for the Native Hawaiian people's share of Public Land Trust revenues in 1990. The Hawai'i Supreme Court invalidated Act 304 in 2001.

OHA notes that the inclusion of the Kaka'ako Makai Community Planning Advisory Council, which has no connection to the Native Hawaiian community, in a renegotiation of Act 15 is also, again, particularly offensive.

HCR129 ignores the years of negotiations between OHA and the state into both the value of the debt owed and identifying lands that both sides could agree to including in a settlement. The Legislature itself rejected numerous land proposals. OHA does not see the benefit in returning to the table.

#### HCR129 Represents an Attack on the Native Hawaiian People's Indigenous Right of Self-Determination

In 2012, the Legislature transferred these Kaka'ako Makai lands for OHA to manage for its beneficiaries in furtherance of the State's commitment to support Native Hawaiian self-determination. The delegates to the Constitutional Convention in 1978 created OHA to be a vehicle for Native Hawaiian self-determination. The idea was to place Native Hawaiian resources into Native Hawaiian hands because Native Hawaiians understood where those resources would best go to meet our people's needs.

<sup>&</sup>lt;sup>3</sup> Stand. Comm. Rpt. No. 2710 (Reg. Sess. 2012), *available at* <u>https://www.capitol.hawaii.gov/session2012/commreports/SB2783\_SSCR2710\_.PDF</u>.

In 2012, lawmakers envisioned that these Kaka'ako Makai lands would become an economic engine to help Native Hawaiians statewide. The Committee Report from the Committees on Judiciary and Labor and Ways and Means on Act 15 specifically states:

The lands identified in this measure will provide a revenue stream to fund the Office of Hawaiian Affairs' services to its beneficiaries, while creating jobs and <u>funding valuable programs in every corner of the State.</u>

(emphasis added).<sup>4</sup> These lands were not to serve only the immediate Kaka'ako community but to provide funds for Native Hawaiian communities throughout the entire State. As such, OHA has a fiduciary duty to seek the highest and best uses at Kaka'ako Makai to enable serving Native Hawaiians across the Pae'āina, from Ka'ū on Hawai'i Island to Kekaha on Kaua'i and all island communities in between.

We understand that the residential prohibition established by the Legislature in 2006 was intended to further protect certain public interest purposes, including the protection of open space and ocean views for the broader public. We also understand that the Kaka'ako community included these public interest considerations in plans for the area.

However, the Legislature specifically pivoted on its policy for Kaka'ako Makai when it transferred these lands to OHA, which, again, divested them of their public character. Nowhere in the legislative history of Act 15 is any mention that these Native Hawaiian trust lands should continue to be used to protect the ocean views of and open space for area residents or users. In fact, the opposite is true: the Committee Report for Act 15 specifically states that OHA's Kaka'ako Makai lands are virtually contiguous, suited for master planning, and located in an area of Honolulu that is already experiencing significant redevelopment.<sup>5</sup> HCR129 correctly notes that Act 15 keeps these parcels under the jurisdiction and authority of the Hawai'i Community Development Authority (HCDA). OHA notes, however, that HCDA rules zone all but one of OHA's parcels as either MUZ or WC, which otherwise identify residential uses as an allowable use; the residential prohibition was a law that superseded HCDA's rules.

The Legislature did not transfer these Kaka'ako Makai lands for OHA to protect the broader public's interests in the area. The Legislature specifically transferred these lands to OHA to settle its obligation to the Native Hawaiian people, with the necessary understanding that OHA would be able to exercise its rights and obligations consistent with the self-determination constitutionally envisioned for OHA and its Native Hawaiian beneficiaries.

<sup>&</sup>lt;sup>4</sup> Id.

<sup>&</sup>lt;sup>5</sup> See id.

If the Legislature won't allow Native Hawaiians to build housing on a former landfill in the middle of a portion of urban Honolulu experiencing massive commercial and residential redevelopment, where will the state allow Native Hawaiians to exercise self-determination over our ancestral lands? At most, this resolution only proposes to push Native Hawaiians to the outside of the urban core, where another community could oppose proposed land uses intended to benefit our people.

OHA's intent moving forward is to finish our planning efforts. We have no intention of participating on a unilaterally imposed working group that will only interfere with our ongoing work in Kaka'ako Makai. We hope that our progress over the next year will demonstrate that a Native Hawaiian vision for Kaka'ako Makai is something that the entire State should support.

In light of the above, OHA strongly urges the Committee to <u>HOLD</u> HCR129/HR111.

Mahalo for the opportunity to testify on this important matter.

# "IT'S LIKE DEJA VU ALL OVER AGAIN!"

# **STOP HCR 129 / HR 111!**

## HCR 129/ HR 111 is another attempt to again

### steal stolen Native Hawaiian lands and to

## again attack Native Hawaiian self-determination!

Testimony of Kūpuna for the Moʻopuna – HCR 129 / HR 111 STRONG OPPOSITION

Judiciary & Hawaiian Affairs – Chair Nakashima & Vice Chair Matayoshi – 3/29/21 @ 2pm



Ua mau ke ea o ka 'āina i ka pono!

#### TESTIMONY IN OPPOSITION OF HCR129/HR111 CONVENING A WORKING GROUP TO DISCUSS THE FUTURE DEVELOPMENT PLANS IN KAKA'AKO MAKAI Hearing: Committee on Judiciary & Hawaiian Affairs March 29, 2021

#### Aloha,

I am a resident of Kaka'ako and a Native Hawaiian and thus have a vested interest in this bill for more reasons than one. Earlier, I submitted testimony in support with amendments, but none of the amendments offered were adopted.

Accordingly, I now oppose this resolution for the following reasons:

- The title of the resolution is, "Convening a Working Group to Discuss the Future Development Plans in Kaka'ako Makai", yet its provisions are focused on the proposed development of the Office of Hawaiian Affairs and calling on the committee to identify public lands of comparable value suitable to OHA for a possible land exchange for some or all of its nine parcels in Kaka'ako Makai. This latter task intrudes on the management of the properties owned by OHA, thus, recommend its removal from the resolution.
- The composition of the working group is severely unbalanced, and participation of HCDA may compromise its future role in acting on any application for development by OHA. Currently, the committee consists of two government organizations (HCDA and BLNR), two legislative representatives (likely our Senate and House representatives for Kaka'ako, one of whom has already expressed opposition to OHA's development), two Kaka'ako community groups; and OHA. If this resolution proceeds, I propose amendment to remove HCDA; and to add a representative from two or more of the following organizations: 1) Native Hawaiian Legal Corporation; or 2) Native Hawaiian Bar Association, and 3) DHHL; or 4) the Native Hawaiian Chamber of Commerce. This would bring some balance to the group.
- The OHA Kaka'ako Makai Proposed Development Plan is not the only issue for the Kaka'ako Neighborhood as surrounding homeowners are concerned about other high rises and the seemingly endless approval of exemptions to height restrictions that allow for 400' buildings. Thus, the working group, as the title of the bill indicates, should be discussing not only the OHA development proposal, but all other development proposals impacting on the Ala Moana/Kaka'ako Neighborhood. If this proceeds accordingly, would recommend Section 3d also be amended to include a representative of the Ala Moana/Kaka'ako Neighborhood Board and a representative of the Kamehameha Schools and/or other developers to the working group for the following reasons:

Oahu's Neighborhood Board System was created in 1973 to assure community participation in the decision-making process of government. The system applies the

concept of participatory democracy, involving communities in the decisions that affect them. It establishes an island-wide network of elected neighborhood boards as communication channels, expanding and facilitating opportunities for community and government interaction. As developments in their neighborhood impact directly on the lives of residents, a representative of the Neighborhood Board should have a voice in the working group.

Kamehameha Schools is a large landowner proposing several developments in Kaka'ako. Similarly, there are other developers proposing developments in the Kaka'ako area. Their voices should likewise be heard in the working group.

Mahalo for your consideration of my comments and proposed amendments to HCR 129/HR111.

Respectfully,

Leimomi Khan

#### HR-111 Submitted on: 3/28/2021 1:40:28 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
colin kippen	Individual	Oppose	No

#### Comments:

I STRONGLY OPPOSE HCR129/HR111, which convenes a working group to discuss the future development plans in Kakaako Makai and to identify public lands of comparable value suitable to OHA for a possible land exchange for some or all of its parcels in Kakaako Makai.

This is nothing short of a cynical intrusion by the House into the OHA Board of Trustees' exclusive authority under the State Constitution to manage OHA's Native Hawaiian beneficiaries' share of the Public Land Trust.

It is also a unilateral attempt by the House to undo a major settlement between Native Hawaiians and the State of Hawaii over the State's use of our people's ancestral lands and a direct attack on the Native Hawaiian people's indigenous right of selfdetermination. After a thirty years of litigation and failed negotiations between OHA and the State, the legislature transferred land to OHA in 2012 in lieu of the \$200 million in cash due and owing to Native Hawaiians for Hawaiian's share of the public land trust. Now the House wants to convene a working group to tell OHA how to develop the property the state deeded to it in that settlement, or, in the alternative, to have OHA and the state re-start conversations for yet another settlement to replace the settlement it made with Hawaiians and the Office of Hawaiian Affairs in 2012.

Hawaiians should see these House resolutions for what they are: "a heads I win, tails you lose" proposition to Hawaiians to undo promises made by the legislature to Hawaiians in 2012. "Trust me" the House is saying, "we will create a task force to overwhelm and control you, we will insert ourselves into your present Kakaako planning processes, we are here to help you, are here to guide you, because, in the end, although this is your property to serve your mission to "better the conditions of Hawaiians", we believe you Hawaiians are not competent to make these decisions for yourselves. But do not be afraid Hawaiians! Pay no never mind to the fact that five entities in our proposed resolution are non Hawaiian against the singular and only Office of Hawaiian Affairs! You must trust that we will come up with what is best for the Office of Hawaiian Affairs to do on your Kakaako lands! We know best what is good for you Hawaiians and you should and must trust us!

The House is also attempting to replace the promises they made to Hawaiians in 2012 with a new set of promises. Their intent is obvious and may be easily predicted and

scripted. "Another settlement to replace the current Kakaako settlement is good for you Hawaiians! You can trust us! We would NEVER mislead you, NEVER marginalize you, and NEVER break our word to you! If only you will trust us, we have a better deal awaiting you outside the urban core; away from the heart of Honolulu; away from a Kakaako that is best suited for modern working Hawaiian and local families to live, to work, to play, and to raise their families; away from a Kakaako that is centrally located to transportation, to jobs, to commerce, to medical facilities, and to education. Hawaiians! A pot of gold awaits you at the end of the rainbow if you would just come and play in the sandbox our resolution will create!

Let's recall the history of this place we call Kakaako. Contrary to what the view plane protectors are saying who live on the mauka side of Ala Moana Boulevard, in their 400 foot towers, located across Ala Moana Boulevard from where Hawaiians want to build housing for Hawaiians and the rest of our local community, Hawaiians lived in Kakaako for hundreds of years in a fishing village adjacent to fish ponds, until they were decimated by a pandemic, until they had their lands used as a staging point and treatment center for those infected with leprosy, until they returned to Kakaako to live in shanties after they were displaced and moved out of other areas of Honolulu, until they had their homes razed and burned and were forced to move out again, only to have their fishponds and wetlands filled with dredge from Honolulu Harbor and the ash and refuse from a garbage dump and incinerator which continued into modern times.

It is time for Hawaiians to return to Kakaako and for Hawaiians to build the Hawaiian and local community they envision that will provide access to housing, to jobs, to commerce, to transportation, to education, to the parks and the outdoors, and to the ocean for individuals, families, and the broader community. OHA has plans to build a Hawaiian sense of place that provides for all of these things. While that end may not occur overnight, I have no doubt that it eventually will occur and that the Office of Hawaiian Affairs is up to the task.

These resolutions must be seen for what they are and for what those who are now proffering them think of Hawaiians and the Office of Hawaiian Affairs. I respectfully ask that these resolutions be held.

#### HR-111 Submitted on: 3/28/2021 1:52:48 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Namaka	Individual	Oppose	No

Comments:

Aloha

I oppose. HR111 imposes on the authority of the OHA Trustees to manage their trust lands.

Mahalo!

Submitted on: 3/28/2021 2:05:06 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted B	y Organization	Testifier Position	Present at Hearing
pulama louis	s Individual	Oppose	No

Comments:

On the 23rd day of March 2021, I, Pulama Louis strongly oppose HCR129 and HR111. I oppose a legislative intrusion on OHA Board of Trustees Exclusive Authority Over Native Hawaiian Trust Assets; and other legislation that would push Native Hawaiians and the people out of the decision making process on our Native Hawaiian Lands. Furthermore, the community and Native Hawaiians should not be pushed aside and forgotten. These lands are significant and sacred, a community organization with no ties to Native Hawaiian culture, land, and people should not be responsible and have the Kuleana of deciding how OHA's board of trustees should administer its trust corpus and how land portions are spent.

Mahalo,

LATE \*Testimony submitted late may not be considered by the Committee for decision making purposes.

#### <u>HR-111</u>

Submitted on: 3/28/2021 2:54:18 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Oppose	No

Comments:

HCR129/HR111: CONVENING A WORKING GROUP TO DISCUSS THE FUTURE DEVELOPMENT PLANS IN KAKA'AKO MAKAI

Ke Kol, mike Hale o ka Wai a me ka 'Al, ina House Committee on Water & Land

As a native Hawaiian condominium owner in Kaka'ako, I STRONGLY OPPOSE HCR129/HR111, which convenes a working group to discuss the future development plans in Kaka'ako Makai and to identify public lands of comparable value suitable to OHA for a possible land exchange for some or all of its parcels in Kaka'ako Makai.

If Passed, HCR129 and HR111 Would Represent A Legislative Intrusion into the OHA Board of Trustees Exclusive Authority Over Native Hawaiian Trust Assets. HCR129 Represents a Unilateral Attempt to Undo a Major Settlement Between Native Hawaiians and the State of Hawaii.

Please HOLD HCR129/HR111.

Mahalo for the opportunity to provide testimony.

Aloha 'Ä€ina,

Benton Kealii Pang, Ph.D.

Kaka'ako, O'ahu

Submitted on: 3/28/2021 8:58:09 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	<b>Testifier Position</b>	Present at Hearing
Patrick L. Kahawaiolaa	Individual	Comments	No

#### Comments:

Aloha e esteemed members of the Hawaii State Legislature who are soon to vote on whether to convene a working group to discuss the future development plans in Kakaako Makai the very same lands that was exchanged for the State's ILLEGAL USES OF Public Trust land during the Territory and into Statehood.. I am Patrick L Kahawaiolaa a native Hawaiian as defined pursuant to the HHCA, 1920 as amended July 9, 1922 and also a beneficiaries of the Office of Hawaiian Affairs (OHA) which in part states "... to better the conditions of the native Hawaiians as defined by said Act..." I need CLARIFICATION before rendering Support or Opposition to this measure because the make up of the working group does nothing to include native Hawaiians who are beneficiaries of OHA. Admission Act Article XII (Pub.L. 86-3) (73 stat.4) enacted March 19, 1959.

HCR129 Represents a Unilateral Attempt to Undo a Major Settlement Between Native Hawaiians and the State of Hawaii. If Passed, HCR129 and HR111 Would Represent A Legislative Intrusion into the OHA Board of Trustees Exclusive Authority Over Native Hawaiian Trust Assets HCR129 and Represents an Attack on the Native Hawaiian People's Indigenous Right of Self-Determination.. Please do not allow this travesty of Justice to continue even when there is another Vote in HCR 112/HR 90 to Declare Racism as Public Health issue... for without a representative involvement of *native Hawaiians* in the make up of this working group should mean that *systemic and overt Racial Discrimination against the host culture not only not being addressed but continues to permeate all faucets of Local, State & Federal government.* E hana pono...mai pono hana ( Do what is Right... Do not just do it) I can be reached at 937-8217 'Owau me ka ha'aha'a Patrick L Kahawaiolaa Testimony on House Resolution 111 From: Mike McCormack, MORE of Hawaii McCormack-Ong Real Estate I oppose the resolution and its interference in the OHA Process of administering their Kakaako makai lands

Submitted on: 3/29/2021 12:07:26 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Nahonilaanela Chaul	Individual	Oppose	No

Comments:

Aloha,

I am in opposition of Bill HR111 because I do not believe that we need more committees outside of OHA determining how native Hawaiian lands should be used. OHA serves that purpose and I believe it should stay that way. This Bill can't and won't guarantee benefits to the Native Hawaiian Communities only more detriment.

Mahalo.

Submitted on: 3/29/2021 12:33:05 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
King Van Nostrand	Individual	Oppose	No

Comments:

### Why the Backtracking on Kaka'ako Settlement??

### We honored Prince Kuhio on his 150th birthday for his love and efforts to preserve and strengthen the Hawaiian people. HCR129 weakens Native Hawaiians and their rights.

By undoing a major settlement between Native Hawaiians and the State of Hawaii regarding back-due public land trust payments, our legislature is undermining the Native Hawaiian people's right of self-determination on rightfully claimed Hawaiian land.

SB1334 that would have lifted an outdated prohibition on residential development and allowed OHA to build housing in Kaka'ako.

Changing a boat mid-stream is often foolish, unfair and intrudes on the exclusive trust responsibility of OHA to manage trust assets for Native Hawaiian beneficiaries.

As a volunteer non-profit that supports our local community, Na Hoaloha-Maui Interfaith Volunteer Caregivers opposes HCR129 / HR 111.

Mahalo for the opportunity to testify on this important matter.

Submitted on: 3/29/2021 1:14:02 PM Testimony for JHA on 3/29/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mahina Hanakeawe	Individual	Oppose	No

Comments:

I oppose any future development in Kakaako Makai.