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**LATE**

TESTIMONY OF SANDRA LEE KUNIMOTO  
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE SENATE COMMITTEE ON  
JUDICIARY AND GOVERNMENT OPERATIONS  
FRIDAY, FEBRUARY 27, 2009  
9:30 a.m.  
Room 016

SENATE BILL NO. 1152  
RELATING TO AGRICULTURAL LANDS

Chairperson Taniguchi and Members of the Committee:

Thank you for the opportunity to testify on Senate Bill No. 1152 which seeks to establish a 100-year moratorium on the construction of buildings or development projects on Agricultural District lands in the 22<sup>nd</sup> and 23<sup>rd</sup> Senate Districts for which State or City permit applications have not been submitted for processing and visible construction has not commenced. The Department of Agriculture does not believe this measure significantly protects agricultural lands or promotes agricultural uses and activities. We recommend the Committee adopt provisions of Senate Bill No. 826 in lieu of this bill.

This measure appears to prevent non-agricultural development on agricultural lands with Land Study Bureau "A" and "B" ratings. However, the moratorium does not stop or prohibit petitions to reclassify agricultural lands from being submitted to State and county agencies for processing, thus the intent of this measure is unclear.

Of serious concern to us are subdivisions of Agricultural District land into lots of a few acres with farm dwellings but with little if any agricultural use or activity. Agricultural subdivisions are permissible on all agricultural lands on Oahu but without enforcement

of meaningful agricultural activity, they have the same negative effect as any other non-agricultural development or activity on agricultural lands. We are particularly concerned about the enormously damaging effect non-agricultural development and activities can have on the identification and designation process for Important Agricultural Lands. Senate Bill No. 1152 will not correct this problem. As an amendment, the Committee may want to consider incorporating within this measure, the text of Senate Bill No. 826 that will prevent future development of "fake farms" or "gentlemen estates" on Hawaii's best agricultural lands, whether or not they are designated as IAL. Senate Bill No. 826 will provide the counties with clearer statutory guidance to ensure that farm dwellings are built and used in direct connection with specified agricultural uses and require applications for subdivisions of Hawaii's best agricultural lands to include demonstrable evidence that meaningful agriculture will be the primary activity undertaken on the land.



Via Capitol Website

February 27, 2009

**Senate Committee on Judiciary and Government Operations  
Hearing Date: Friday, February 27, 2009 at 9:30 a.m. in CR 016**

**Testimony in Opposition to SB1152. Relating to Agricultural Lands.  
(100Year Moratorium on the development of agricultural lands)**

Honorable Chair Brian T. Taniguchi and Vice-Chair Dwight Y. Takamine  
and members of the Judiciary and Government Operations Committee:

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.

We appreciate the opportunity to voice our support for the intent of preserving viable and important agricultural land for agricultural production uses, however, we must also provide our comments to the Committee **in strong opposition to SB 1152**, which establishes a 100 year moratorium on the development of agricultural lands located in the area bounded by Wahiawa, Ka'ena Point, Kahuku, and Kane'ohe on the north shore and windward coast of O'ahu for which general planning has not commenced.

**SB 1152.** SB 1152 sets restrictions on the development of agricultural lands with the following provisions:

- (1) The moratorium on building or development projects on agricultural lands shall be limited to any building or development project for which general planning has not commenced;
- (2) The building or development project is intended to affect parcels of agricultural land with an overall (master) productivity rating of class A or B, and designated as an agricultural district;
- (3) The building or development project is intended to affect parcels of agricultural land located in the State of Hawaii, and designated as an agricultural district; and

(4) The building or development project is not a permissible use within an agricultural district under section 205-4.5, Hawaii Revised Statutes.

(b) The moratorium shall be lifted on June 30, 2109.

(c) For purposes of this section, "general planning" means projects for which a permit application has been submitted to the appropriate state or county agency for processing and visible construction has already commenced.

**LURF's Position.** LURF is writing in **opposition** to SB 1152 because it essentially attempts to control the use of private property, which will take away from any landowner's right to use their property the way they choose. While LURF supports the intent of protecting agricultural properties, we are concerned about the language of this bill which puts a moratorium on the "building or development projects on agricultural lands." This language could be interpreted to also include necessary farm dwellings for farmers, additional storage space for agricultural equipment and other buildings that may be deemed essential to operate a farm.

**Background.** Over the past few years, LURF has joined the Hawaii Farm Bureau Federation (Farm Bureau) in support of the appropriate use of agricultural lands for viable agricultural production, the process for designation of Important Agricultural Lands ("IAL") in perpetuity and the establishment of IAL incentives to encourage the designation of IAL. LURF worked with the Farm Bureau and a consensus-based coalition other agricultural stake holders toward the successful passage of Act 183 by the State legislature in 2005. In 2008, LURF again worked with the Farm Bureau to recommend that the legislature pass a bill implementing the IAL incentives at the state level through the passage of Act 245 (2008).

We also understand and sympathize with what appears to be the underlying basis for the resolutions – fears that housing projects will threaten agricultural lands in Mokule'ia and Kahuku. However, we strongly believe that the proposed moratorium bill is legally flawed, and the proposed moratorium is not the most effective way to address what appear to be the Senate's concerns. In fact, the proposed moratorium will have unintended consequences which may actually result in delays and increased costs for farmers and land owners who intend to subdivide their properties for agricultural uses.

We strongly urge this Committee not to pass the proposed moratorium bill, however, we are willing to work with the Legislature, the Farm Bureau and other agricultural stakeholders to revise the applicable ordinances and definitions to address the issue of non-agricultural uses on agricultural lands.

**The proposed moratorium bill is legally flawed.** LURF's primary objections to this proposal are that the Legislature does not have any statutory authority to impose the moratorium where there is no nexus; it is overbroad, no end in sight; . If the Legislature is concerned that certain permitted residential uses in the Agricultural District are unacceptable, or that the process for reclassification of agricultural lands to urban is too easy, the Legislature should seek to change the applicable laws and definitions of "agricultural use," or the permitting process and criteria, instead of imposing a moratorium on the development of agricultural lands.

The proposed moratorium bill would impose a temporary (100 years) development moratorium which would prohibit development. We believe that the proposed moratorium bill is legally flawed, based on, among other things, the following:

- **Statutory Authority: none cited in the proposed bill.** The bill does not provide the specific authority, provided in state law, which would allow the state to impose a moratorium on lands within the state-created agricultural districts.
- **There is no factual basis for the moratorium - - the reduction of agricultural lands under cultivation was due to the failure of the sugar and pineapple industries from 1982 to 2005 – not solely due to housing projects.** The bill alleges problems caused by development of agricultural lands by the use of self-serving statements which are not supported by any data or studies which would show the main reason why land under cultivation decreased from 1982 to 2005 – the failure of the sugar and pineapple industries. Under certain circumstances, such as this one, where there is no factual basis - - a moratorium can be legally viewed as a “constitutional taking.” In order to so severely restrict private property rights, the Legislature must show much more than mere allegations of harm.
- **No legal nexus for the moratorium.** The bill is legally flawed, because it does not establish any legal nexus for the 100-year moratorium.
  - What does the law seek to accomplish in the next 100 years?
  - After 100 years, can those agricultural lands become urban?
  - Is there any justification of its inherent inconsistency of prohibiting agricultural development agricultural lands with an overall (master) productivity rating of class A or B, yet allowing housing developments in the same areas on C, D or E lands?
- **The moratorium is legally flawed and unconstitutional, because a 100 year moratorium is tantamount to a permanent restriction and taking of the use of private land.** The 100year duration of the moratorium is unreasonable and is clearly meant to limit and restrict the use of private lands.
- **Lack of a Variance process.** The proposed moratorium bill is also legally flawed because it does not allow for a variance process which is similar to the process allowed for zoning or other variances.

**Unintended consequences.** As stated earlier, LURF supports the IAL and the preservation and use of viable and important agricultural lands, however, LURF’s **strongly objects** to the proposed moratorium, based on, among other things, the following comments:

- **The moratorium ignores comprehensive planning and market-driven solutions, and is not the appropriate mechanism for addressing the complex issue of the conversion of agricultural land to non-agricultural uses.** As stated in the February 11, 2009 testimony of the State Office of Planning:
  - “...we do not believe this is the appropriate mechanism for addressing this complex issue....
  - “Rather, OP recommends comprehensive planning and market driven solutions to the issue of non-agricultural uses in the State Agricultural District such as establishing agricultural tax incentives to promote agricultural investment and measures to offset the risks and costs of agricultural operations. Agricultural incentives are critical to the viability of the agricultural industry and farmers, and are key to initiating the process of designating important agricultural lands. Promoting agricultural businesses

and protecting agricultural water systems are essential to maintaining the Wahiawa, Kaena Point, Kahuku and Kaneohe lands for agricultural purposes.....

- “Also, revisions to the State Agricultural and rural District allowable uses and densities would more effectively limit development pressure on agricultural lands, while encouraging for more effective planning processes.....
- **The Agricultural landowners and farmers who wish to subdivide agricultural lands for lease or sale to other farmers or agricultural producers will also suffer unnecessary delays and increased costs.** If a moratorium is imposed, it will have the unintended consequence of harming those landowners and farmers who wish to subdivide in order to lease or sublease to a farmer or an agricultural producer who may want to build farm dwellings or employee housing on their lots.
- **The proposed process and requirements may prohibit providing critically needed Agricultural Workforce Housing.** The moratorium may have the unintended effect of prohibiting a landowner or farmer from subdividing or otherwise using their land to provide worker housing.
- **The Legislators should work with the stakeholders toward a comprehensive change in the jurisdiction over agricultural lands.** Instead of the “band-aid” solutions proposed in the moratorium, the Legislature should work on a comprehensive way to address the issues relating to agricultural subdivisions which may include luxury residential homes with little or no agricultural production. The Legislature should support the major changes in the system, which LURF has been suggesting to the various counties and Legislature for the past few years:
  - **Designation of IAL and Rural Lands.** The Agricultural District should be reassessed into IAL which are viable for agricultural production and also into all existing and potential “Rural” uses. Large open-space residential lots could be reclassified into the Rural District and put under the jurisdiction of the counties.
  - **Oversight of Agriculture and agricultural uses by one government agency.**
    - The Counties could transfer its jurisdiction over the uses and enforcement in the Agricultural Districts to the State and the Department of Agriculture (“DOA”), which has the agricultural and enforcement expertise. DOA, its staff and experts can then manage and enforce the regulations in the Agricultural Districts, similar to how DLNR manages lands and natural resources within the Conservation District, or
    - The State could transfer its DOA functions to the counties and county agencies could be created to manage and enforce the uses in the Agricultural Districts.

LURF appreciates the opportunity to express our position on the proposed moratorium and we are willing to work with the Legislature and the other stakeholders to address agricultural issues which may be of concern.

Based on the above, we respectfully request that **SB 1152 be held** in the Committee on Judiciary and Government Operations.

Thank you for the opportunity to express our **opposition to SB 1152.**