



Via E-Mail: DLNR.Intake.SHPD@hawaii.gov

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and Members of the Hawaii Historic Places Review Board
State Historic Preservation Division
Hawaii Department of Land and Natural Resources
Kakuhihewa Building
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Comments Regarding the Nomination of Pali Lanes, 120 Hekili Street, Kailua, Hawaii (TMK (1) 4-2-038:020; LOG NO: 2018.00288) for Inclusion on the Hawaii Register of Historic Places, and Registration in the National Register of Historic Places (Item C. on the Review Board's Agenda).

Friday, October 5, 2018, 9:30 a.m. – 4:30 p.m., at State of Hawaii Laboratories Division Auditorium, 2725 Waimano Home Road, Pearl City, Hawaii 96782

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission 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.

For consideration before the Hawaii Historic Places Review Board ("Board"), is a request to include the above-referenced property on the Hawaii Register of Historic Places and to nominate said property to the National Register of Historic Places.

Background. LURF understands that the nomination request was prepared and submitted by an individual on behalf of an organization unrelated to the owner of the property and unauthorized to act on the owner's behalf, and that the fee owner of the property (ABP Windward LLC) has not consented to, and in fact, objects to the subject nomination.

LURF's Position. While LURF certainly supports the protection of structures of potential historic, architectural and cultural significance, and efforts made to respect and preserve such sites, it must take the position that requirements and procedures applicable to the listing of such places on State and National Registers must be properly followed and satisfied with respect to such designations, particularly since the deprivation of constitutional and vested rights of private landowners may be at stake. For this reason, LURF believes that it is critically necessary that the fee owner's concurrence be secured prior to the Board's consideration of any request for the listing of private property on the Registers.

A. The National Historic Preservation Act ("NHPA") Provides that the Owner of a Historic Property Must Not Object to Inclusion of the Property on the National Register of Historic Places.

The federal government passed the NHPA¹ in 1966 recognizing the importance of the historic and cultural foundations of the United States as reflected in historic properties. The statute was amended by Congress in 1980 to specifically provide that if the owner of a historic property objects to its inclusion on the National Register of Historic Places, the government will not designate the property as such unless the objection is withdrawn.² Similar provisions exist in enabling legislation of, and similar practice is followed by various states.

1. In Hawaii, the Practice of this Board is Likewise Not to List Places in the State Register of Historic Places Over the Property Owner's Objections.

LURF understands that in keeping with the requirements of the NHPA, it has long been the practice of the Board not to list places on the Hawaii Register of Historic Places where the property owner objects to the listing.³

¹ 16 U.S.C. Sections 470 to 470w (1982).

² 16 U.S.C. Section 470a(6) (1980).

³ See, e.g., Testimony of Suzanne B. Case, Chairperson of the State Board of Land and Natural Resources in consideration of SR 58/SCR 99 (2018), confirming the long practice of the Board not to list places in the Hawaii Register of Historic Places over the owner's objections, and referencing the Federal Regulations governing the National Register of Historic Places which prohibit listing unless objection of the owner is withdrawn.

2. The “Takings” and Government Overreaching Issues.

Such policy and practice are prudent given that the requested designation of private property as “historic,” and assertion of control over the same by the government raises the issue of **regulatory takings claims** by landowners. State or local governments electing to impose historic preservation designations potentially face several constitutional challenges by nonconsenting property owners arguing that the designation is an invalid and overreaching exercise of police power; or invalid on due process grounds. Alternatively, an objecting landowner may allege that the designation constitutes a taking of property without compensation in violation of the Fifth and Fourteenth amendments of the U.S. Constitution and supporting case law decisions rendered by the U.S. Supreme Court.⁴

Such challenges are based upon and embody the general principle **that any enactment affecting private property rights must bear a substantial relation to the public health, safety, or general welfare.**

In the event a land use regulation operates to deprive the owner of beneficial economic use of the property, there exists an issue as to whether that owner may be entitled to monetary compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution. And U.S. courts have even considered land use controls such as historic preservation, to amount to a deprivation of beneficial use in the property (i.e., a “taking”), potentially entitling landowners to compensation.⁵

Mandatory or affirmative maintenance obligations imposed in connection with historic preservation designations are other critical issues which may trigger taking clause challenges from objecting landowners.

B. The Requested Historic Designation is Not Necessary.

1. Protection of Structures of Potential Historic Significance is Presently Addressed in Hawaii Revised Statutes (HRS) Section 6E-42.

LURF understands that structures of potential historical significance are already afforded protection pursuant to HRS Section 6E-42, which requires projects involving a permit, license, certificate, land use change, subdivision, or other entitlement for use which may affect historic properties (including structures over 50 years old) to allow the State Historic Preservation Division an opportunity to review and comment as to the effect of the proposed project on

⁴ See, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978),

⁵ See, *Id.*

historic properties. This statutory section excludes privately owned single family detached dwelling units that are over 50 years old and are not listed or nominated to be listed on the National or Hawaii Registers or located in a historic district.

2. The Fee Owner of the Subject Property is Already Conducting Analysis of the Available Options for the Community Relating to Pali Lanes and the Surrounding Commercial Area.

It is LURF's understanding that the fee owner of the property has already committed to put its development plans for the area, including the Pali Lanes property, on hold in order to gather input and conduct analysis on issues important to the community. As part of this affirmative effort, the landowner has held meetings with residents and business owners, as well as conducted interviews with stakeholders, and continues to work to collect the community's perspectives on issues for Kailua Town and the subject property.

Conclusion

LURF respectfully takes the position that any government action taken to regulate land (including designations for historic preservation) which may potentially divest members of the public of their rights and private property, must not be made injudiciously, particularly where the bases offered to justify such action may be subjective, speculative, and unconsented to by the landowner, and when current and future consequences to the private property owner and the public could be economically destructive. For that very reason, designation requests for the listing of private property on the National Register of Historic Places are required by Federal law to be unopposed by the owner of the property. And even when championed by the property owner, LURF believes approval of any designation request must be clearly defensible, with measurable benefits resulting therefrom that would sufficiently outweigh potential detriment to said property owner, as well as to affected business operators, community members and other stakeholders.

LURF is concerned that the Board possibly taking designation action in the absence of the property owner's consent would result in a poor example being set, and bad precedent being laid, demonstrating the ease with which the government may so easily utilize its influence to overregulate private property without following proper procedure, and without valid purpose, justification, or due process. The resulting real and greater danger is that such government overreaching may then be potentially interpreted and utilized by self-interest groups as precedent and support for further advancing improper efforts to regulate use of private property in their own favor.

Based on the concerns articulated above, LURF believes it would be inappropriate and unreasonable for this Board to support this request for

designation without the consent of the property owner, and therefore respectfully recommends that Pali Lanes not be listed on the Hawaii or National Registers of Historic Places.

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