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TO: A. Frenchie DeSoto, Chair, Office of Hawaiian Affairs

FROM: Jon M. Van Dyke

SUBJECT: Legal and Constitutional Issues Raised by H.B. 2351, "Relating to Traditional and Customary Rights"

Representative Ed Case has introduced H.B. No. 2351, which purports to "fashion a good faith, balanced, and expeditious resolution" of the "issues related to article XII, section 7 [of the Hawaii Constitution] that have greatest potential for protracted uncertainty and litigation." Representative Case apparently felt that the need to resolve these disputes arose from the decision of the Hawaii Supreme Court in Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425 (1995), commonly referred to as the PASH decision.

During the previous Legislative session, several bills were introduced to address these issues, but none were enacted into law. In the interim period, the Office of Planning in the Department of Business, Economic Development and Tourism has conducted a study on the issues raised by the PASH decision, in response to H.R. No. 197, H.D. 1 (1997), and is now distributing a report to the Legislature describing its conclusions. H.B. No. 2351 was prepared without the benefit of the analysis and recommendations of the Office of Planning. This report

analyzes the "Findings" and substantive portions of H.B. 2351 and identifies the legal and constitutional issues that would be raised by passage of this Bill.

The Findings (Section 1): Many of the observations in the 17 paragraphs of these "Findings" are unremarkable, but certain observations need to be made. Paragraph 5 [page 2, lines 7-13, hereinafter cited as 2:7-13] asserts that the "western concepts of land ownership" include "the right of a landowner to exclude others from the landowner's land." Such a right of exclusion is not in fact absolute in "western" law, and the U.S. Supreme Court has recently ruled that the right to exclude must give way to the exercise of constitutionally protected rights such as the right of free expression, at least in certain circumstances. See PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), where the U.S. Supreme Court ruled that privately-owned shopping centers in California were required to allow persons disseminating information to do so on their private property.

Paragraph 7 [3:3-16] states that Article XII, Section 7 of Hawaii's Constitution, which says that the State "reaffirms and shall protect" all customary and traditional rights, "did not create any new rights." The substantive portion of the bill would then limit the exercise of traditional and customary rights to those that were exercised as of November 25, 1892, the date on which the predecessor to H.R.S. section 7-1 was originally enacted. Nothing in the legislative history of the 1978 Constitutional Convention supports that result. The language of Article XII, Section 7 refers simply to "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians...." This language is open-ended and cannot be read to exclude or obliterate traditions and customs that have been practiced since 1892.

The Substantive Provisions (Section 2): H.B. No. 2351 would completely obliterate the right to exercise traditional and customary rights on any "legally subdivided parcel of land" (a) that has any structure valued at $10,000 or more, or that has received the necessary governmental permits to construct such a structure, (b) that has an area of ten acres or less, (c) that is in an urban land use district, (d) that is in an area zoned residential, or (e) that has had 75% of its area cultivated agriculturally between 1928 and 1978. [10:1-18] It would limit the customary and traditional rights to those that were exercised prior to November 25, 1892, thus eliminating any evolution or modernization of traditional practices. [11:11-21] It would require any person seeking to exercise traditional or customary rights on any land parcel to give notice to the landowner at least 48 hours in advance of the planned activity. [10:20-21] It would limit the right to exercise traditional and customary practices to persons of Hawaiian ancestry, except for non-Hawaiians who are participating in an activity as part of an organization, such as a hula halau, a majority of whose members are Hawaiian. [10:22-11:7] It would immunize all landowners from liability for any injury suffered by a person exercising traditional and customary rights. [12:14-19] And it would require any person seeking to resolve a dispute regarding the exercise of traditional and customary rights to proceed "through alternative dispute resolution," such as submission to an "Aha Council" of experts on traditional and customary rights, before filing a claim in court. [12:20-24]

Legal and Constitutional Issues Raised by H.B. 2351

Traditional and Customary Rights Must Be Permitted to Evolve. It is in the nature of traditional and customary practices that are incapable of codification and must be permitted to evolve over time. A codification of these practices would serve to limit them. Traditional and

customary practices are frequently unique to specific locations, and may vary dramatically from island to island. Unless a culture is to be trapped by its history--a museum piece of natural history for others to observe--it must be permitted to deal with new problems in culturally appropriate ways and to adapt to changes in its environment. In Hawaiian forests, for instance, feral European pigs have been introduced, along with Axis deer, and other flora and fauna that are now important components of the subsistence diet of many Native Hawaiians. It would be bizarre and totally inappropriate to limit Native Hawaiian hunters and gatherers to only those species that inhabited the islands in 1892.

The Areas Excluded from the Exercise of Traditional and Customary Practices Are Much Too Expansive. H.B. 2351 defines "[d]eveloped lot" aggressively to exclude many areas where traditional and customary rights can be exercised without interfering with other activities. A resort development may contain large open areas where religious ceremonies can take place and some gathering may be appropriate. Although gathering should not occur in areas where crops are being cultivated or lands are improved for pasturage, an agricultural area may have some acreage appropriate for the exercise of traditional practices. Large lots even in urban districts can frequently accommodate traditional and customary practices. Practices such as religious ceremonies are generally nonintrusive and should be permitted in or near developed areas. Access rights to natural and cultural resources are important for persons exercising traditional and customary rights, but are not addressed in this Bill

All Persons Who Are Native Hawaiians, Members of a Native Hawaiian `Ohana or Halau, or Descendants of Citizens of the Kingdom of Hawaii, and Who Have a Historic Stewardship Relationship with an Area or Its Resources, Should Be Able to Exercise Traditional

and Customary Practices in That Area. The Hawaii Supreme Court recognized in its PASH decision that the category of traditional practitioners should not be narrowly confined, and it is inappropriate to do so in legislation.

The Notice Requirements Are Too Onerous. H.B. 2351 would require each practitioner to give a 48-hour notice before exercising traditional and customary rights on private lands. In the past, practitioners have entered into informal understandings with landowners that have worked well, and this notice requirement seems unnecessarily formalistic and onerous. In most cases, a blanket notice would be appropriate to cover an annual cycle of the exercise of traditional and customary rights. If some new location were to be used, or a special form of access were needed, it might well be appropriate to discuss the issue with the landowner, but a blanket 48-hour notice requirement is unnecessary and inconsistent with the spirit and content of these rights.

The Elimination of Landowner Liability Is Too Absolute. Landowners need some protection from liability, but the absolute immunity in H.B. 2351 is unnecessary and inappropriate. No Hawaiian practitioner has ever sued a landowner for liability. The language on limiting liability in 12:14-19 should be changed to allow landowners to be sued if they willfully create a hazardous condition that harms a Native Hawaiian practitioner.

No Legislation Is Necessary. The Supreme Court's PASH decision provides clear guidelines if properly understood. Native Hawaiian practitioners should have an opportunity to operate within this framework. No legislation is need to clarify a decision that is already clear. Although dialogue and education may be appropriate, no legislative enactment is warranted. Legislation that curtails rights recognized under Article XII, Section 7 of Hawaii's Constitution,

as interpreted by the Hawaii Supreme Court, would be unconstitutional.