

**BIA-HAWAII****BUILDING INDUSTRY ASSOCIATION**

April 2, 2008

Committee on Water, Land, Ocean Resources and Hawaiian Affairs

11:30 a.m.

Room 312

**RE: SB3048, SD1, Proposed HD1**  
**"Relating to the Hawaiian Homes Commission Act"**

Chair Ito and Members of the Committee on Water, Land, Ocean Resources and Hawaiian Affairs:

I am Karen Nakamura, Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii is in strong support of SB 3048, Proposed HD1 "Relating to the Hawaiian Homes Commission Act" The Proposed HD1 would authorize the Department of Hawaiian Home Lands to enter into 99-year project developer agreements, including commercial leases, and extend the cap on existing agreements from 65 years to 99 years. Such terms would provide greater opportunities to the Hawaiian Homes Land trust and its beneficiaries. Extending the term of commercial leases will allow the Department to attract greater investment in commercial lease properties and to carry out its mission to provide home ownership opportunities to native Hawaiians..

BIA-Hawaii fully supports the efforts of the Department of Hawaiian Home Lands to realize long-term sustained economic growth to help their beneficiaries.

Thank you for the opportunity to share our views with you.

*Karen Y. Nakamura*

The Pacific Resource  
**PARTNERSHIP**



Kyle Chock  
Executive Director  
Pacific Resource Partnership

Committee on Water, Land and Ocean Resources and Hawaiian Affairs  
Ken Ito, Chair  
Jon Riki Karamatsu, Vice Chair

SB3048 SD1 HD1  
Wednesday, April 2, 2008  
11:30 a.m.  
Conference Room 312

Dear Chair Ito and Member of the Committee on Water, Land and Ocean Resources and Hawaiian Affairs:

Aloha, my name is Kyle Chock, Executive Director of the Pacific Resource Partnership (PRP), a labor management organization representing the Hawaii Carpenters Union and more than 220 signatory contractors.

PRP strongly supports SB 3048 SD1 HD1 which allows the Department of Hawaiian Home Lands to lease commercial property for a maximum of 99 years.

This is an important step in allowing the Department to be fiscally self-sufficient, as the Department will be able to build commercial projects that will provide a long stream of income to the Department.

Equally as important is the fact that this provision will provide not only the Department, but the State to realize long term sustained economic growth. Large commercial projects take time to develop. Current leases on commercial project start when a spade of dirt is turned. Construction time will use up time on a lease. During the construction period, the lease rent paid to the department is not fully realized. Full commercial rent is paid when the commercial development is completed and fully leased. The worldwide economy is slowing down. We believe that this measure will help sustain the construction industry until there can be some type of economic recovery.

We urge your support of SB 3048 SD1 HD1 and thank you for this opportunity to testify.

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The Honorable Ken Ito, Chair  
and Committee Members  
Committee on Water, Land and Ocean  
Resources and Hawaiian Affairs  
State Capitol, Rm. 312  
Honolulu, HI 96813

RE: SB 3048 Relating to the Hawaiian Homes Commission Act

Dear Chair Ito and Committee Members:

My name is Danton Wong and I am testifying in support of SB 3048 which allows the Department of Hawaiian Home Lands to lease commercial property for a maximum of 99 years.

This is an important step in promoting the Department's ability to become fiscally self-sufficient.

We would also suggest that changes be made to Section 171-36, Hawaii Revised Statutes to make the proposed language of SB 3048 stronger, as it applies to state leases. We suggest the following language:

“§171-36 Lease restrictions; generally. (a) Except as otherwise provided, the following restrictions shall apply to all leases:

(1) Options for renewal of terms are prohibited;

(2) No lease shall be for a term longer than sixty-five years, except in the case of a residential leasehold which may provide for an initial term of fifty-five years with the privilege of extension to meet the requirements of the Federal Housing Administration, Federal National Mortgage Association, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, or Veterans Administration requirements; provided that the aggregate of the initial term and extension shall in no event exceed seventy-five[;], and except in the case of commercial leases that are awarded through the Department of Hawaiian Home Lands; provided that the aggregate of the initial term and extension thereof, shall in no event exceed ninety-nine years.”

This provision will provide not only the Department of Hawaiian Home Lands, but the State to realize long term sustained economic growth. Large commercial projects take time to develop. Currently, the 55 year term of State and DHHL leases commence when the lease is

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We urge your support of SB 3048. Thank you for this opportunity to testify.

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## **The Obligation to Adequately Fund the Department of Hawaiian Home Lands**

The refusal of this State to adequately fund the programs of the Hawaiian Homes Commission Act has resulted in a chronically long list of thousands native Hawaiians waiting to receive homesteads they were promised by Congress in 1920. In recognition of the unconscionable pattern of neglect, in 1978, the voters of this state amended the State Constitution to mandate that the legislature provide sufficient funds for the Hawaiian Home Lands program. Haw. Const. art. XII, § 1. The Constitutional Convention delegates adopted this amendment specifically so that the Department of Hawaiian Home Lands would no longer need to lease its lands to generate income.

The Hawai'i State Constitution now provides:

The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3) rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

Haw. Const. art. XII, § 1 (emphasis added). In 1978, the state's voters amended this provision, substituting the words "shall make sufficient" for the term "may, from time to time, make additional." Stand. Comm Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 629 (1980). In passing this amendment to the State Constitution, the Committee on Hawaiian Affairs at the 1978 Constitutional Convention unequivocally declared, "Your committee proposal makes it expressly clear that the legislature is to fund DHHL for purposes which reflect the spirit and intent of the Act. Your Committee decided to no longer allow the legislature discretion in this area." Stand. Comm. Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 630 (1980) (emphasis added). The Standing Committee further declared:

DHHL cannot afford to lease more acreage to the general public for the purposes of generating income to accommodate a minimal employee level. It is clear to your Committee that the intent and spirit of the Act would be better served by releasing the department of its present burden to generate revenues through the general leasing of its lands. Your Committee decided that through legislative funding this dilemma would be resolved. In that manner more lands could be made available to the intended beneficiaries.

*Id.* at 632. The voters also adopted an amendment to Article XII, § 2 that specifically pledged that "that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out."

The Constitutional Convention's committee report for this amendment to the constitution declared:

Your committee proposal makes it expressly clear that the legislature is to fund DHHL for purposes which reflect the spirit and intent of the Act. Your Committee decided to no longer allow the legislature discretion in this area.

Stand. Comm Rep. No. 56 in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 630 (1980) (emphasis added). The framers of the Constitutional amendment were very clear as to the problem they were seeking to remedy: "The department was established by the Act to provide a means to rehabilitate its beneficiaries through a series of projects, and yet was given very little financial assistance to perfect its mandate. *Id.* at 631.

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The department was established by the Act to provide a means to rehabilitate its beneficiaries through a series of projects, and yet was given very little financial assistance to perfect its mandate. For example, the department must lease its lands in order to generate revenues to support its administrative and operating budget.

*Id.* at 631. Delegate Crozier observed:

The Department of Hawaiian Home Lands is currently obligated to fund its own administrative budget. It is the only department that has to pay its own way. Because of this, when an administrative budget is developed, it is not based on their needs in order to achieve their goal. It is based on the amount of money the department is to receive through its funding mechanisms. One of the major mechanisms is the revenues derived from general leasing. General leasing is the leasing of DHHL lands to the general public. General leasing is not used to rehabilitate Hawaiians; these revenues are used in the administration of the department. Homestead leases are reserved for Hawaiians. The DHHL has 200,000 acres of land, of which 170,000 are already encumbered through home stead leasing, general leasing and state agencies. . . . The reality is that the department cannot lease out any more land.

Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 415 (1980)(statement by Delegate Crozier) (emphasis added). Delegate De Soto noted: “DHHL is the only one of 17 state departments which must fund itself. Therefore, land of any value through the years has been generally leased for revenue purposes.” Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 411 (1980)(statement by Delegate De Soto).

In discussing this amendment, the delegates to the 1978 Constitutional Convention emphasized that the legislature must provide funding:

I would like to focus on the word “shall” in the phrase “shall make sufficient sums available: lines 3 and 4 , page 2 of Committee Proposal 11; “shall” mandates the legislature to fund the Department of Hawaiian Home Lands for purposes which reflect the spirit and intent of the Hawaiian Homes Commission Act of 1920.

Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 412-3 (1980)(statement by Delegate Hagino). Delegate De Soto explained:

Mr. President, I’m sorry, but what your Committee on Hawaiian Affairs has prepared for consideration by the public – and I have strong faith in the public – requests that the State assume their fiduciary responsibilities that they accepted as a condition of statehood. Many of the problems with our Hawaiian people have already been stated on this floor. Without money, without revamping of the system, the Hawaiian homes department and that program will fail miserably.

51<sup>st</sup> Day, 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 271 (1980)(statement by Delegate De Soto) (emphasis added). *See also*, Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 410 (1980)(statement by Delegate De Soto)(“It was apparent that the identifiable problem areas were – first, that the DHHL – the Department of Hawaiian Home Lands – which provides a land base, has a monumental and eternal dilemma in funding.”)

Supporters of the amendment were not the only ones to understand its ramifications. Speaking in opposition to the measure, opponents pointed out, “I don’t know whether this Convention realizes the extent to which it is mandating the State to guarantee funds.” *Id.* at 272 (Statement of Delegate DiBianco) “This proposal is specific legislation and specifically requires the appropriation of money.” *Id.* (Statement of Delegate Burgess).

The delegates elaborated on the how much funding would be sufficient:

Again, to the word “sufficient” – what does this really mean? It means funding to develop house lots for applicants on the waiting list or implied in the general plan. It also means money to provide loans to lessees to construct their homes, since the lessee cannot mortgage or encumber the land.

Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 414 (1980)(statement by Delegate Sutton). “The State must

not only insure there are funds to prepare sites but also insure that there is a way for the DHHL administration to be fully funded to get the evermounting paperwork done.” *Id.*

[T]he Hawaiian homes department and the act were and are the most neglected part of the State of Hawaii, the most neglected department. It was woefully lacking in funds at its inception, and for the past 50 years and even today, it lacks funds to run the department properly, lacks funds to construct homes and facilities necessary to service existing and future applicants.

*Id.* at 422 (statement by Delegate Ontai). Delegate Crozier observed:

The Department of Hawaiian Home Lands is currently obligated to fund its own administrative budget. It is the only department that has to pay its own way. Because of this, when an administrative budget is developed, it is not based on their needs in order to achieve their goal. It is based on the amount of money the department is to receive through its funding mechanisms.

Debates in Committee of the Whole on Hawaiian Affairs, in 2 Proceedings of the Constitutional Convention of Hawaii of 1978, at 415 (1980)(statement by Delegate Crozier) (emphasis added).

The intent of the delegates was to assure a steady stream of appropriations to the DHHL so it could accomplish its noble mission and fulfill the state’s solemn obligation to native Hawaiians to faithfully administer the Hawaiian homestead program as a condition of becoming a state of the union.<sup>2</sup> Nothing could be clearer about the priority assigned to the required funding.

There can be no question that intent of the 1978 amendment to the State Constitution was to require that the legislature provide sufficient funds to the DHHL. And that sufficient sums means funding to develop house lots for applicants on the waiting list or implied in the general plan; money to provide loans to lessees to construct their homes; funds for administrative purposes; and facilities to serve beneficiaries.

Moreover, by its very terms, constitutional provisions are the law of the land and may not even be disturbed by the acts of the Legislature, which can only propose amendments for ratification by the people at an election. Haw. Const., Art. III, § 1.<sup>3</sup> The Hawai’i Supreme Court

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<sup>2</sup> Haw. Const., Art. XII, § 2 states, in part:

The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

<sup>3</sup> Hawaii Constitution, article III, section 1 (emphasis added) reads:

The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation *not*

recently held that Article XVI, section 2 was intended “to ensure that the State and local governments would provide a sound retirement system for their employees, largely because of the Territory's past lapses in funding such benefits.” *Kaho'ohanohano*, 114 Hawai'i at 340, 162 P.3d at 734. If “the Proceedings of the 1950 Constitutional Convention of Hawai'i indicate that article XVI, section 2 was intended to ensure that the State and local governments provide a sound retirement system for their employees,” *Id.* at 310, 162 P.3d at 704, then the Proceedings of the 1978 Constitutional Convention of Hawai'i are abundantly clear that Article XII, section 1 was intended to ensure that the legislature would provide DHHL adequate funding and free it from leasing its lands to raise revenues.

Nevertheless, the Hawaiian Homes Commission, the Department of Hawaiian Home Lands and the State of Hawai'i have ignored this mandate. The State of Hawai'i has failed to provide sufficient funds to the Department of Hawaiian Home Lands to minimize the number and waiting time on its waiting lists for homesteads to a reasonable level. On July 14, 1982, the Secretary of Interior and the Governor of the State of Hawai'i jointly convened a Federal-State Task Force on the Hawaiian Homes Commission Act to make recommendations for improving the program. In August 1983, that Task Force issued a comprehensive report describing the nature and scope of problems facing the HHC and making positive recommendations for actions to correct these problems.

Amongst the plethora of problems highlighted, the Task Force found that the State had failed to fund and thereby comply with Haw. Const. Art. XII, § 1 and recognized that “substantial problems remain,” which would preclude the State from meeting all of its fiduciary obligations under the HHCA. Federal-State Task Force on the Hawaiian Homes Commission Act, Report to the United States Secretary of the Interior and the Governor of Hawai'i, Honolulu, Hawai'i (August 1983) (hereafter, “FSTF Report”) 22. For example, it noted that, as of May 31, 1983, 7,901 applicants were then waiting for homestead awards. *Id.* In recognition of these findings, the Task Force recommended:

- The State of Hawaii, through its executive and legislative branches, should implement the mandate of Article XII of the State Constitution to provide adequate funding for the administration and operation of the DHHL, as well as the described rehabilitation projects. (8)

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*inconsistent with this constitution* or the Constitution of the United States.

Haw. Const. art. VI, § 1 reads:

The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.

Hawaii Constitution, article V, section 1 reads in part:

The executive power of the State shall be vested in a governor.

*Id.* To this end, the Task Force urged the Governor to appoint within thirty days of the date of the report an Advisory Committee on Funding Sources to advise him on financing homestead award acceleration strategies. *Id.* at 29. It then recommended a series of ambitious steps to accelerate the pace of settling homesteaders on the land, estimating that it would take \$250 million to complete basic site improvements, exclusive of house construction costs for those then on the waiting lists. *Id.* at 30.

The governor never appointed such a committee and without explanation, DHHL assumed that function internally.<sup>4</sup> In spite of the constitutional mandate and the FSTF Report recommendations, the DHHL continued to suffer inadequate funding for decades, only receiving general fund appropriations for its operating budget for the first time in 1987-88. Despite years of the deliberate failure of the state to provide sufficient sums to effectively implement the programs of the DHHL, and its trust duty to native Hawaiians, the HHC failed to seek judicial enforcement of this constitutional obligation, deferring instead to the budgetary decisions of a succession of governors and their heads of the Department of Budget and Finance (“B&F”). B&F is charged with coordinating the preparation of the executive branch’s budget each state fiscal biennium.

From 1959-1988, various federal, state, and county agencies failed to fairly compensate DHHL for the illegal use of Hawaiian Home Lands. Through a variety of conveyances which were generally without legal authority, the county, state and federal governments made free, but illegal, uses of trust lands intended exclusively for Native Hawaiians.<sup>5</sup> These exploitive practices deprived Native Hawaiians of critical income and proceeds for programs under the HHCA.

Accordingly, the progress anticipated under these Task Force recommendations to accelerate homestead awards languished, as in the past. At the time of the 1978 Constitutional Convention, delegates acted affirmatively on the premise that there were 5,200 applicants on the DHHL waiting list. Five years later at the time of the FSTF Report, another 2,700 applicants joined them, a 52% increase in half a decade. Today, there are over 22,000 applicants on those same lists, a *quadrupling* of the applicants since 1978.

Instead of obtaining necessary funds from the Legislature, the Hawaiian Homes Commission and the Department of Hawaiian Home Lands have continued to offer commercial leases to non-Hawaiian entities in order to raise revenue, in directly contravention to the intent of convention delegates. The resulting removal of Hawaiian Home Lands from use by the intended beneficiaries of the Hawaiian Home Lands Trust, and the failure to seek sufficient funds are clear breaches of the State Constitution and the trust.

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<sup>4</sup> Recent Developments Relating to the Hawaiian Homes Commission Act, 1920, As Amended, Hearings Before the Hawai'i Advisory Committee to the United States Commission on Civil Rights, 100th Cong., 2d Sess. (Sep. 6, 1988) (testimony of I. Pi'ianaia, Chairperson, DHHL).

<sup>5</sup> Federal State Task Force Report on the Hawaiian Homes Commission Act, Appendix 15 (August, 1983) at 39, 41-51.