

HB 899



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:

H.B. NO. 899, H.D. 1, S.D. 1, RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, April 2, 2009 **TIME:** 9:30 AM

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN TESTIMONY ONLY
(For more information, call Russell Suzuki,
Deputy Attorney General, at 586-0618.)

Chair Kim and Members of the Committee:

The Department of the Attorney General has legal concerns regarding this bill.

This bill seeks to clarify and strengthen the bond authority of the Office of Hawaiian Affairs (OHA) by amending various statutes in chapter 10 of the Hawaii Revised Statutes (HRS). Among the changes are amendments that authorize or empower the OHA Board of Trustees ("OHA board") to: (1) issue and authorize revenue bonds without further legislative authorization and approval; and (2) allocate and use OHA revenues, including appropriations, to pay interest and principal of revenue bonds and secure such bonds.

First, article VII, section 12, of the Hawaii Constitution provides that the State Legislature, by majority vote of the members to which each house is entitled, shall authorize the issuance of all revenue bonds issued by or on behalf of the State. The language on page 2, line 19 to page 3, line 2, and the proposed amendments to sections 10-4 and 10-22, HRS, at page 6, lines 6-8, and page 8, lines 1-2, of the bill are inconsistent with this constitutional requirement as they state that the OHA board of trustees can issue revenue bonds

without any other law or further authorization or approval, delete the current statutory requirement of legislative authorization, and empower the OHA board to issue revenue bonds "[w]ithout further authorization or approval" The only entities that may issue revenue bonds without further authorization or approval of the State Legislature are political subdivisions that the Legislature has authorized by general law to issue such bonds. The constitutional history of article VII, section 2, shows that such political subdivisions are limited to the counties. In the 1950 Constitutional Convention, the word "political subdivision" was substituted for the word "county" in order to prevent the County of Kalawao, which was not a true county, from issuing general obligation and revenue bonds. The discussion of the delegates showed that they intended only the four counties to be able to issue general obligation and revenue bonds. See Proceedings of the Constitutional Convention of Hawaii 1950, Volume II, page 462 (discussion of Delegates Tavares, Heen, and White). In the 1978 Constitutional Convention, the delegates took wording out of a proposal that would have allowed the State Legislature by general law to authorize boards or agencies of political subdivisions to issue revenue bonds without further legislative approval. The discussion of the delegates showed that they did not want to open the gate for all kinds of boards and agencies to issue bonds, but to keep the then current simple debt structure that included general obligation and revenue bonds being issued just by the State and the four political subdivisions. See Proceedings of the Constitutional Convention 1978, Volume I, pages 321-322 (discussion of Delegates Izu, Lewis, and Ishikawa).

Second, article VII, sections 12 and 13, of the Hawaii Constitution and their history show that revenue bonds are not to be supported by general appropriations of the State Legislature, but rather are meant to be supported solely by the rates, revenues, charges, or user taxes of the public undertaking, improvement, system, or loan program financed by such bonds. See Proceedings of the

Constitutional Convention 1968, Volume II, pages 383-384 and 386 (Delegate Hitch noting that the only security for a revenue bond is the fees and tariffs of that undertaking and that, by definition, revenue bonds stand on their own feet in terms of being supported by the revenues of that undertaking.) Article VII, section 12, defines revenue bonds as bonds "payable from the revenues, or user taxes, or any combination of both, of a public undertaking, improvement, system or loan program" Article VII, section 13, of the Hawaii Constitution ("article VII, section 13") provides that for a revenue bond to be excludable from the State's debt limit, the issuer must be obligated by law to impose rates, rentals, and charges for the use and services of the public undertaking, improvement, or system or the benefits of the loan program, or user taxes, or a combination of both, sufficient to pay: (a) the cost of the public undertaking, improvement, system, or loan program; and (b) the principal and interest of all revenue bonds issued for the public undertaking, improvement, system, or loan program.

The amendments to section 10-31, HRS, at page 16, line 18 to page 17, line 1, and to section 10-30, HRS, at page 15, line 20 and page 16, lines 8-9, of the bill appear to be inconsistent with the foregoing definitions and restrictions applicable to revenue bonds. The amendments do away with wording requiring office projects financed by revenue bonds to be self-supporting through rates, rents, fees, and charges. Compare HRS § 49-11 (undertakings and loan programs under county revenue bonds to be self-sustaining). The amendments to section 10-31 also provide that "revenues of the office" may be used to pay the costs of office projects and all bonds and interest thereon. There is no definition in HRS chapter 10 of "revenues of the office." Revenues of the office could, therefore, include general fund appropriations as well as other funds that may not constitute the types of funds that may be used under article VII, sections 12 and 13, of the Hawaii Constitution to pay and secure revenue bonds, i.e., rates, rentals, charges or user taxes. Compare HRS § 304A-2680 (no holder of a revenue

bond issued by the University of Hawaii may compel the making of any appropriation to pay revenue bonds or interest thereon) and HRS § 304A-2688 (nothing in University of Hawaii revenue bond statutes shall be construed to authorize board of regents to incur any indebtedness contrary to the State Constitution or that would be required to be included in the calculation of the State's indebtedness).

The Department of the Attorney General has proposed the following amendments to this bill to OHA and its counsel, which seek to address the foregoing concerns.

First, the language on page 2, line 16 to page 3, line 8, of the bill should be replaced with the following language:

The purpose of this Act is to clarify and strengthen OHA's bond authority. The Act contains, among other things, provisions clarifying the ability of OHA to meet the requirement that an office project be self-supporting by utilizing OHA revenues that constitute rates, rents, fees, and charges for the use and service of a public undertaking, improvement, system, or user taxes.

The foregoing language does not assert that the OHA board can issue revenue bonds without any further law or without further authorization or approval.

Second, the language on page 8, lines 1-6, of the bill should be replaced with the following language:

(2) Issue revenue bonds under this chapter in such principal amounts as may be authorized by the legislature from time to time to finance in whole or in part the cost of construction or maintenance, or both, of any office project[+], including reserves therefor;

The foregoing language is similar to language that appears in the statutes authorizing the University of Hawaii and state departments to issue revenue bonds. See HRS §§ 304A-2672(6) and 39-53(3).

Third, the language on page 15, line 19 to page 16, line 12, of the bill should be replaced with the following language:

Revenue bonds issued under this part shall be payable [~~solely~~] from and secured solely by the revenues of the office project or projects or revenues of the office pledged to the payment thereof, or both, and such revenues shall be applied to such payment in accordance with the provisions of this part and the resolution or resolutions authorizing the issuance of the revenue bonds. No holder or holders of any revenue bonds issued under this part shall have the right to compel any exercise of the taxing power of the State or the making of any appropriation to pay such bonds, or interest thereon. Each revenue bond shall recite in substance that the revenue bond, including any interest thereon, is payable [~~solely~~] from and secured solely by the revenue pledged to the payment thereof, and that the bond does not constitute [~~an~~] a general or moral obligation or indebtedness of the State within the meaning of any [~~limitation of~~] law.

The foregoing language is similar to the language in other revenue bond statutes. See HRS § 304A-2680.

Fourth, the language on page 16, line 16 to page 17, line 2, of the bill should be replaced with the following:

The board shall impose and collect rates, rents, fees, and charges for the use or enjoyment and services of the facilities of each office project, and shall revise such rates, rents, fees, and charges from time to time whenever necessary, or direct all or any portion of the revenues of the office, so that [~~all office projects shall be self-supporting. The rates, rents, fees, and charges prescribed~~] in the aggregate, the revenue of the office project and the revenues of the office shall be such as will produce revenue at least sufficient to:

The foregoing language is similar to language in other revenue bond statutes. See HRS §§ 304A-2681(a), 39-61(a), and 49-10.

Fifth, a new section should be added to this bill, amending section 10-21, HRS, to add the following definition:

"Revenues of the office" or "office's revenue" means all rates, rents, fees, and charges, and user taxes, received by the office of Hawaiian affairs and all money and revenues derived from the operations of the office of Hawaiian affairs, other than: (a) general appropriations; and (b) funds the terms of which preclude their being used for payment of the costs of construction or cost of maintenance of an office project or the payment of principal or interest of revenue bonds. For purposes of the issuance of revenue bonds, the office of Hawaiian affairs or any office project or projects shall constitute a public undertaking, improvement or system.

The foregoing language is similar to language in the revenue bond statutes of the University of Hawaii. See HRS §§ 304A-2671 (definitions of "appropriation" and "revenues of the university") and 304A-2680 (university constitutes a public undertaking, improvement, or system).



**HB 899, HD1, SD1
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS**

Senate Committee on Ways and Means

April 2, 2009
Room 211

9:30 a.m.

Aloha Chair Kim, Vice Chair Tsutsui, and Members. OHA strongly supports, with a proposed amendment, House Bill No. 899, House Draft 1, Senate Draft 1 Relating to the Office of Hawaiian Affairs.

The purpose of this bill is to clarify and strengthen OHA's existing authority to issue revenue bonds. OHA already has authority to issue its own revenue bonds, under Chapter 10, Hawaii Revised Statutes. This bill makes it clear that no other law need be enacted to authorize the principle amounts of a particular OHA revenue bond issuance, and that the OHA Board of Trustees can issue revenue bonds without further authorization or approval.

The bill also clarifies the variety of revenue sources that OHA can draw upon to meet the requirement that a project financed by OHA bonds be self-supporting. In addition, the bill makes a number of technical changes in OHA's existing bond statute to make it consistent, where appropriate, with other State of Hawaii bond statutes and current government-bond practice.

This bill represents a gradual evolution of existing law, largely in technical areas. The bill updates and clarifies OHA's bond statute, which was enacted in 1994. The changes are designed to put OHA in the best possible position to enter the bond market on a solid footing at a time when the Hawaii and national economies are creating a new impetus for OHA to seek alternative sources of funding for its projects.

We respectfully request that the SD1's effective date of July 1, 2020 be changed to "effective upon its approval."

We urge your Committee to respond favorably to this bill by moving it forward with the amendment that we have suggested.

Mahalo for the opportunity to testify.