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LAWRENCE M. REIFURTH
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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

TO THE SENATE COMMITTEE ON
JUDICIARY AND GOVERNMENT OPERATIONS

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION, 2009

TUESDAY, FEBRUARY 10, 2009
9:00 A.M.

WRITTEN TESTIMONY ONLY

TESTIMONY ON SENATE BILL NO. 1343 - RELATING TO FEES AND OTHER
ASSESSMENTS

TO THE HONORABLE BRIAN T. TANIGUCHI, CHAIR,
AND TO THE HONORABLE DWIGHT Y. TAKAMINE, VICE-CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify **in opposition** to Senate Bill No. 1343, Relating to Fees and Other Assessments. My name is Lawrence M. Reifurth, and I am the Department's Director. Senate Bill No. 1343 would codify the fees assessed by the Department and a handful of other state departments and agencies

and, in so doing, removes the authority of the Department and those other agencies from setting fees pursuant to chapter 91 rulemaking.

The Department appreciates the context in which this measure arises. We understand the state's current financial situation, and the reduced number of options that decision makers have after the Supreme Court's ruling in the *Hawai'i Insurers Council v. Lingle* case.

The Department nevertheless opposes this bill on two grounds: (1) as a matter of principle, and for as long as our customers are charged fees for departmental services on top of taxes already paid, the Department opposes the transfer of its funds to the general fund; and (2) establishing fees and assessments via statute, rather than by rule, reduces the Department's flexibility and, hence, our ability to respond to changing economic circumstances.

(1) The Department opposes the transfer of monies from the compliance resolution fund to the general fund.

The genesis of this bill appears to rest in a legislative reaction to the Supreme Court's decision in *HIC v. Lingle*, where the Court held that the Legislature had violated the separation of powers doctrine. Presumably, this proposal reflects the Legislature's interest in avoiding the separation of powers problem if, in the future, it again wishes to transfer special funds of the sort addressed in the *HIC* case. As such, the proposal here appears to reflect a legislative determination that it may need to again transfer funds from the

Department's compliance resolution fund ("CRF") and other special funds to the general fund, and that it wishes to position itself to be able to do so without running afoul of the separation of powers doctrine.

Without understating or failing to appreciate the severity of the state's current financial condition, the Department has a long-standing objection to the practice of transferring money from the CRF to the general fund which it restates here. The CRF has become the financing vehicle by which the department has been assured of sufficient funds and its customers are thereby assured of sufficient service. The CRF amounts to an implicit promise to the Department's customers, including hundreds of thousands of licensees and hundreds of thousands of business registrants, that if they paid more for the Department's services (including an amount for protection against those among them who violated the laws) in the form of fees (on top of the taxes that they already paid), that those monies would be segregated from the general fund, and put to their exclusive use.

As a result, to the extent that this proposal presages or makes possible the future transfer of additional CRF funds to the general fund, the Department objects. In addition, the Department objects to the extent that any future transfer of funds would leave the Department in a position that it is not able to fulfill its promise to its customers related to improved service.

This latter point is a matter of degree, and reasonable people might differ to some extent on the precise amount of money that the Department might need, for

instance, in order to address cash flow and contingencies at the beginning of each fiscal year. Budgeting is certainly an inexact science. When an excess is determined, however, the Department strongly prefers reducing fees and returning excess to its customers. In fact, we have been able to do so by more than \$50 million over the last seven fiscal years.

(2) Determining the amount of a fee or assessment by statute, rather than by rule, reduces the Department's flexibility and, hence, our ability to respond to changing economic circumstances.

Addressing the proposal on its own merits, and without regard to its apparent underlying intent, the Department nevertheless objects to restricting the flexibility inherent in allowing fees or assessments to be set by rule. The Department's fees authorized and assessed under section 26-9(o), HRS, which are expressly affected by this proposal, are a case in point.

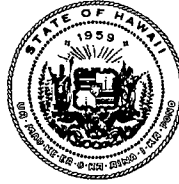
When the CRF was established, section 26-9(o), HRS set a single fee to apply for all licenses and renewals at \$10 (ten dollars). The Legislature subsequently amended the law to provide the Department with the ability to determine and assess fees by rule. While the Department could, conceivably, approach the Legislature every time that it determined that cost changes required a change in any one of the hundreds of fees set under the authority of section 26-9(o), the Legislature, too, appears to have valued the flexibility associated with setting fees via the rulemaking process. In addition to increased flexibility, the

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rulemaking process provides multiple levels of review and significant opportunity for public involvement.

Thank you for the opportunity to address the Department's concerns with regard to Senate Bill No. 1343.

Linda Lingle
GOVERNOR



KAREN SEDDON
EXECUTIVE DIRECTOR

STATE OF HAWAII

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM
HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION
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IN REPLY REFER TO

Statement of
Karen Seddon
Hawaii Housing Finance and Development Corporation
Before the

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

February 10, 2009 9:00 a.m.
Room 016, State Capitol

In consideration of
S.B. 1343
RELATING TO FEES AND OTHER ASSESSMENTS.

The Hawaii Housing Finance and Development Corporation (HHFDC) **opposes** S.B. 1343 as it applies to its own authority to establish and revise fees and charges via administrative rulemaking pursuant to Chapter 91, Hawaii Revised Statutes. As a special-funded agency, the ability to establish and revise fees and service charges to ensure that administrative expenses are covered is very important.

S.B. 1343 would establish statutory fees for several HHFDC housing financing and development programs, which, from the effective date thereafter, could only be amended while the Legislature is in session. Because of this limitation, as time goes on it will be difficult to ensure that the fees charged are appropriate.

For example, in 2006 the Legislature authorized the HHFDC to impose reasonable fees for developers applying for general excise tax (GET) exemptions for eligible government-assisted housing projects. The HHFDC, through the administrative rulemaking process, was able to determine the actual amount of time and manpower needed to process a typical GET exemption application. These pro rata costs were used to set the fee amounts. By ensuring that the fees are both reasonable and sufficient to cover associated administrative expenses, a larger portion of the HHFDC's special funds can be devoted to direct housing financing and development assistance.

Thank you for the opportunity to testify.

Date of Hearing: February 10, 2009

Committee: Senate Judiciary and
Government Operations

Department: Education

Person Testifying: Patricia Hamamoto, Superintendent

Title of Bill: S.B. No.1343, Relating to Fees and Other Assessments

Purpose: Removes administrative agencies' authority to establish fees and replaces administratively established fees with statutory fees.

Department's Position: The Department of Education (Department) does not support this Bill. The Department requests that setting statutory fees for the After-School Plus (A+) Program should not be included in this Bill for the following reasons:

(1) §8-400-19, Hawaii Administrative Rules, Title 8, Subtitle 4, Chapter 400 clearly specifies that the "monthly fee up to the total monthly cost per pupil of providing such services be assessed." As such, the monthly fees may change as the cost for provision of services changes. A set statutory fee may hinder the Department's ability to deliver appropriate services of program requirements.

(2) §8-400-20, Hawaii Administrative Rules, Title 8, Subtitle 4, Chapter 400 states that "The provisions of this chapter are deemed specific to the after-school plus (A+) program of the department and shall control over any conflicting provisions of this title." Section 17 (c) of this Bill specifically cites "after-school plus program" which is

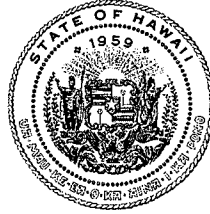
controlled by provisions cited in §8-400-20.

(3) Board of Education Policy # 4700 After-School Plus (A+) Fees Policy “authorizes the Superintendent to establish a fee schedule for the A+ program that shall: a. Reflect the need to adjust fees for families with more than one child participating in the A+ program
b. Reflect the need to adjust fees for families on reduced-lunch status
c. Reflect the need to adjust fees for families on free-lunch status.”

This Bill does not provide for adjustments to a family’s ability to pay based on a sliding scale for the number of children enrolled and for free and reduced fee status.

For these reasons, the Department suggests that sections 16 and 17 be deleted from this Bill and opposes it as it is currently drafted.

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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**Testimony of
LAURA H. THIELEN
Chairperson**

**Before the Senate Committee on
JUDICIARY AND GOVERNMENT OPERATIONS**

**Tuesday, February 10, 2009
9:00 a.m.**

State Capitol, Conference Room 016

**In consideration of
SENATE BILL 1343
RELATING TO FEES AND OTHER ASSESSMENTS**

Senate Bill 1343 proposes to remove the administrative agencies' authority to establish fees and replaces administratively established fees with statutory fees. This measure is intended to address issues in the Hawaii Supreme Court's decision in *HIC versus Lingle*, in which the Supreme Court (Court) ruled that the State cannot move moneys from certain special funds unless the fees are set in statute. While the Department of Land and Natural Resources' (Department) supports the intent of this measure, limited to SECTION 6, that address the Court's issues, the Department is nonetheless cautious as to its potentially adverse impact on the Board of Land and Natural Resources' (Board) ability to tailor an attendant fine to the degree of a violation under chapter 179D, Hawaii Revised Statutes (Hawaii Dam and Reservoir Safety Act of 2007).

If the penalties for violations are established statutorily, the penalty assessed would be the same regardless of the nature of the violation. For example, the fine assessed per day if a dam owner was a day late in submitting a maintenance schedule for their dam would be the same as the fine assessed per day if a dam owner fails to comply with appropriate action regarding the poor condition of their dam in the interest of public safety. The Board would normally set the fine after due consideration has been given to the circumstances, including but not limited, to the degree of willful noncompliance, the degree of impact of noncompliance would have on public safety, and case history.

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
DEPUTY DIRECTOR - WATER

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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



HAWAII COMMUNITY
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STATEMENT OF

ANTHONY J. H. CHING, EXECUTIVE DIRECTOR
HAWAII COMMUNITY DEVELOPMENT AUTHORITY

BEFORE THE
SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT
OPERATIONS

Tuesday, February 10, 2009

9:00 A.M.

State Capitol, Conference Room 016

S. B. 1343 – RELATING TO FEES AND OTHER ASSESSMENTS.

Purpose: This measure removes administrative agencies' authority to establish fees and replaces administratively established fees with statutory fees.

Position: The Hawaii Community Development Authority ("HCDA") offers comments.

The mission of the HCDA is to not to simply administer zoning rules in Kakaako which might produce the delivery of reserved housing units from willing developers, but also includes: a responsibility to plan and implement capital improvement projects to upgrade infrastructure and develop public facilities; coordinating the development of mixed-use projects; and most importantly identifying the preferred future that stakeholders and residents of our development districts desire. In sum, with the support of the Legislature stakeholders, the HCDA strives to create efficient and sustainable communities that enhance the quality of life for its residents.

The HCDA supports the intent of this measure and the Legislature's efforts to make fees charged by government more uniform and "user friendly", and offers the following comments:

Section 206E-113, *Hawaii Revised Statutes*, permits the HCDA to charge fees, premiums, and charges for its reserved housing loan programs, which is presumably a loan program for purchasers of reserved housing in Kakaako. Current HCDA rules do not contain provisions for administering a reserved housing loan program for qualified families.

While the concept of offering qualified families a loan to purchase a reserved housing unit is a good idea, especially with the condition of capital markets today, the HCDA has never loaned money to a qualified purchaser of a reserved housing unit. As a practical matter, the HCDA does not contemplate utilizing this Section.

The HCDA is, however, providing a soft \$15 million second mortgage loan to the developers of Halekauwila Place, which is a 200-unit affordable rental project to be developed by a private developer. In this situation, it is anticipated that fees or charges (similar to points) would be imposed upon the borrower. While those fees have not yet been determined, we expect that such fees will be commercially reasonable and in line with what other second mortgage lenders might charge for a similar loan. Since this transaction is currently pending, we expect that this measure, if passed, would not apply to this transaction.

Thank you for the opportunity to submit this testimony.