

SB 995



**SB 995, SD 1
RELATING TO THE OFFICE OF HAWAIIAN AFFAIRS**

Senate Committee on Ways and Means

February 27, 2009
Room 211

9:00 a.m.

Aloha Chair Kim, Vice Chair Tsutsui, and Members. This testimony is presented on behalf of Chair Apoliona and the OHA Board of Trustees. **OHA supports with amendments Senate Bill No. 995, Senate Draft 1, Relating to the Office of Hawaiian Affairs.**

The purpose of this bill is to allow the State to most effectively and responsibly make progress toward meeting part of its constitutional obligation to Native Hawaiians pursuant to sections 4 and 6 of Article XII of the State Constitution by addressing the additional amount of income and proceeds that OHA is to receive from the public land trust for the period from November 7, 1978 to July 1, 2009.

This SD 1 leaves it to future revisions of SB 995 to state the specific dollar value that would represent the Legislature's re-examination and final determination of the resources that should be provided to OHA for the period between November 7, 1978, and July 1, 2009. Additionally, the SD 1 indicates that resources whose total value equals this yet-to-be inserted figure will be provided to OHA in two phases. In the first phase, the SD 1, if enacted, would convey to OHA the fee simple interest in certain parcels of real property that are identified in the SD 1. In the second phase, the Legislature in 2010 will pass an Act that conveys to OHA, also in fee simple, real property whose value is determined by subtracting the value of the first-phase properties' county tax assessment as of July 1, 2009, from the total as yet-to-determined dollar figure that will encompass both phases.

The original version of SB 995 and this SD 1 have provided the opportunity for the Legislature to take a major step in resolving an issue that has remained incompletely addressed for three decades and that the Hawai'i Supreme Court has ruled is primarily the responsibility of the Legislature. Appropriate legislative action would help fulfill the State's solemn obligation to native Hawaiians.

The original version of SB 995 was based on the results of negotiations in 2007 and 2008 between OHA and the State Administration, and of extensive beneficiary and legislative feedback from 2008, when other related legislation was introduced. OHA held over 45 meetings in the community and spent several months addressing comments received from those meetings. For example, to address concerns raised by the community, the original SB 995 did not resolve future claims and instead continued the annual payments of \$15.1 million to OHA. Also in response to concerns, OHA is funding and has contracted for a full real-estate due-diligence investigation on the lands specified in the original SB 995. Due diligence involves the careful examination and consideration of many complex and varied aspects of a proposed real estate acquisition and is a primary critical step in the process of determining whether the acquisition would meet OHA's strategic goals. OHA's due diligence investigation on the lands specified in the original SB 995 is intended to include, for example, real estate appraisals, title reports, legal review (e.g. lease abstracts, land use entitlements, building code conformance), property surveys, and environmental studies, all of which take considerable time to compile and analyze.

While a detailed historical narrative of the issue of land trust revenues would not be appropriate in this testimony, kindly note the following:

- Following many years of relatively small transfers to OHA, Act 304, Session Laws of Hawaii of 1990, sought to establish how the State would carry out its state constitutional and statutory mandate to dedicate 20 percent of public land trust revenues to OHA's activities.
- Act 35, Session Laws of Hawaii 1993, appropriated \$136.5 million in general obligation bond funds to OHA as a settlement of undisputed claims to that point in time.
- Act 329, Session Laws of Hawaii 1997, established OHA's pro rata share to be \$15.1 million for each of the fiscal years 1997-1998 and 1998-1999.
- In 2001, the Hawaii Supreme Court ruled that Act 304 was invalid due to a conflict between one of its technical provisions and federal law.
- Act 34, Session Laws of Hawaii 2003, required the transfer of several million dollars to OHA to help continue the revenue stream following the court ruling against Act 304.

- Executive Order No. 03-03 set forth Governor Lingle's procedure for continuing the revenue stream.
- Act 178, Session Laws of Hawaii 2006, included an interim provision setting OHA's annual amount of land trust revenues at \$15.1 million and providing a lump sum payment of \$17.5 million for certain amounts that the Legislature determined were underpaid between July 1, 2001 through June 30, 2005.

We appreciate the thoughtful consideration given to the original SB 995 by the Committee on Water, Land, Agriculture, and Hawaiian Affairs and we also appreciate that Committee's efforts to make it a better bill. However, although the SD 1 retains many of the provisions of the original SB 995, the SD 1 also revises that bill in significant ways that create, in OHA's view, the need for amendments to the SD 1, leading to a Senate Draft 2. We recommend that the SD 1 be amended as follows:

First, we recommend that the figure of a *minimum* of \$200 million be inserted in Section 1 of the SD 1 as representing the Legislature's re-examination and final determination of the resources that should be provided to OHA for the period between November 7, 1978, and July 1, 2008. By way of background: Following the passage of Act 178, OHA resumed negotiations with the Attorney General over remaining unresolved issues. In the course of those negotiations, the parties agreed on the sum of \$200 million as being owed. The original version of SB 995 used that figure. We respect the decision of the Committee on Water, Land, Agriculture, and Hawaiian Affairs to leave open for now the amount owed. However, we are concerned that not reaffirming the \$200 million, while opening the door to a larger amount, may also increase the risk that the final amount inserted will be less than \$200 million. We favor July 1, 2008 over July 1, 2009 as the end point of the amount-owed period because the former date was used when we negotiated the \$200 million figure. We believe that describing the \$200 million in the bill as a *minimum* would both re-affirm the \$200 million and allow for resources in excess of that amount to be provided to OHA.

Second, we recommend that Section 1 of the SD 1 be amended to specify that the first-phase conveyances shall consist of certain property in Kaka'ako on Oahu and to specify that this property shall be valued at the City and County of Honolulu tax assessed value for 2007-2008 of \$92,719,415. Section 1 of the original version of SB 995 made specific reference to Kaka'ako property, but Section 1 of the SD1 omits reference to Kaka'ako, apparently to allow for other properties to be added to the first-phase mix. However, as explained below in this testimony, OHA is requesting that none of the additional properties proposed

in subsection (a)(2) of section 2 of the SD 1 be included in the first phase, in order that more time be available for analysis of these properties.

Third, OHA recommends that subsection (a)(2) of Section 2 of the SD 1, which is framed as a mandatory list of additional properties to be conveyed to OHA in the first phase, be removed from Section 2, reframed as a partial list of possible properties for consideration for the second phase, and inserted in Section 1 of the SD 1 (minus the Heeia property discussed later in this testimony). Section (a)(2) of the SD 1, instead of requiring the conveyance to OHA of property at Hilo Banyan Drive as did the original SB 995, requires the conveyance to OHA of a variety of properties that appear on initial review to be primarily cultural in nature as opposed to primarily income-generating in nature. The properties include, for example, Kahana Valley and Beach Park on Oahu, the Mauna Kea Scientific Reserve on the Big Island, and state-owned fishponds statewide. We are pleased that the Committee on Water, Land, Agriculture, and Hawaiian affairs views OHA as competent to manage such an array of cultural properties, and we appreciate that Committee's reminder to OHA of our potential role in preserving cultural lands, consistent with OHA's mission of bettering the conditions of Native Hawaiians. However, OHA's Trustees need to have a reasonable and adequate opportunity to undertake at least preliminary due diligence to determine the costs and responsibilities of acquiring and managing these lands and whether, indeed, OHA can afford to take on such lands and request that these cultural properties not be considered in the minimum of \$200 million stated in the bill.

In connection with our first three recommendations above, we ask that the bill be amended wherever necessary to ensure that the value of the Kaka'ako property for purposes of this bill be its county tax assessed value for 2007-2008 and that the value of the second-phase properties be their county tax assessed value for 2010-2011.

Fourth, OHA recommends that TMK: 2-1-058:41 and TMK 2-1-058:110 in Kaka'ako, which subsection (a)(1) of Section 2 of the SD 1 deletes from the original SB 995, be re-inserted into the bill. We are not sure why these properties were deleted by the SD 1, and we are concerned that deleting them affects the overall dollar value and usability of what would be the remaining Kaka'ako Makai property identified in the original SB 995. In the event that your Committee does not re-insert the specified TMKs, we request that Section 1 of the SD 1 be amended to reflect the resulting reduction in value of the Kaka'ako Makai property.

We respectfully bring to your Committee's attention the fact that in considering land as a means of resolving past-due income and proceeds of the public land trust owed to OHA, the Trustees have focused on income-generating properties. Income

properties help OHA support its program of service to beneficiaries, and such properties help offset the costs of OHA's stewardship of cultural properties. OHA needs to assess the impact that the acquisition of these cultural properties would have on OHA's resources and OHA's capacity to satisfactorily perform its mission as required by the State Constitution and Chapter 10, Hawaii Revised Statutes. Additionally, the cultural properties proposed in this SD 1 require assessment and due diligence analysis to assess their acquisition by OHA under the requirements of OHA's formal "Real Estate Vision, Mission, and Strategy Policy" and in light of OHA's goals in pursuing past-due revenues. We respectfully suggest that these types of properties be considered for possible inclusion as second phase (2010) properties, allowing the necessary time for analysis by OHA, the community, and other interested parties. Among the key considerations in such an analysis are the resources including personnel necessary for OHA to manage the properties, which are currently being managed under the auspices of other State agencies responsible for land management, enforcement, and related functions.

Fifth, we recommend that the following be added to the end of subsection (d) of Section 8 of the bill: ", whichever is last to occur." This amendment would bring subsection (d) of Section 8 into line with subsection (c) of Section 8, and would recognize that an OHA decision whether to reject any of the property could not reasonably occur without OHA having access to all the documents and property needed for due diligence purposes.

Sixth, we recommend deletion of the first sentence in subsection (f) of Section 2 of the SD 1, which requires OHA to transfer management and control of the conveyed parcels to the sovereign Native Hawaiian entity upon its recognition by the United States and the State. We are concerned that such a provision could make it very difficult to enter into the kinds of arrangements with other entities that would lead to effective use of the properties in pursuance of OHA's mission.

Seventh, we recommend deleting subsection (a)(5) of Section 2 of the SD 1. The Heeia property described is not owned by the State, therefore the State cannot convey it to OHA.

Eighth, we recommend adding to Section 11 of the SD 1 the words "provided that Section 6 of this Act shall take effect on July 1, 2014." Section 6 removes from the Kakaako Community Development District the Kaka'ako lands being conveyed to OHA. Delaying that removal would allow sufficient time for an orderly transition of planning and management of the property from HCDA to OHA.

We wish to comment on certain other matters of concern. When the Attorney General suggested that the debt to OHA could be

satisfied by a combination of land and money, OHA agreed with that suggestion and undertook to establish internal programs and staffing to marshal and manage any such real property that OHA would receive, either in these negotiations or otherwise. OHA engaged Dr. Stephen Roulac, an internationally known real estate consultant, to assist us. Dr. Roulac interviewed all of the OHA Trustees in order to understand how OHA's real estate management capacities could be maximized. His final report was adopted by the Board of Trustees on June 6, 2007.

Some people have been circulating a preliminary report by Dr. Roulac to attempt to show that OHA's Trustees and staff are incapable of managing real estate. That is a misuse of the document. Dr. Roulac's preliminary report is being erroneously called an audit. In actuality, it was a review of the then-existing capacities of OHA as a basis for developing the final strategy. It was not an audit.

The preliminary document led to the Board's adoption of OHA's Real Estate Vision, Mission, and Strategy Policy (mentioned above) on June 6, 2007, which contains clear guidelines designed to enable OHA to competently manage real properties that it receives, however they may be received. As a result, OHA has strengthened the organization and capacity of its land management function to enable the Trustees to effectively hold and manage certain property. Particular to the original SB 995, the Trustees proposed selections of land based on approved criteria derived from our long-term real estate asset allocation. The lands proposed for acquisition by OHA in the original bill were consistent with those Board-adopted criteria and would serve to promote OHA's mission of the betterment of the conditions of Native Hawaiians.

We thank you for taking all of these points into consideration. The issue is complex, but when all the small points are stripped away, and thirty years of struggle to address this issue are examined, one key truth remains: it is ultimately the Legislature's task to resolve the issue. We urge your Committee to respond favorably to this bill by moving it forward with the amendments that we have proposed in this testimony.

Mahalo for the opportunity to testify.