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Subject Testimony for HB1378 on 2/25/2011 6:00:00 PM

LATE TESTIMONY

Testimony for FIN 2/25/2011 6:00:00 PM HB1378

Conference room: 308

Testifier position: comments only

Testifier will be present: Yes

Submitted by: Joshua Wisch

Organization: Department of the Attorney General

Address:

Phone:

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Submitted on: 2/25/2011

Comments:

Randall Nishiyama, Deputy Attorney General, will be present at the



hearing to testify. HB1378 PROPOSED HD1_ATG_02-25-11_FIN.pdf



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2011**

ON THE FOLLOWING MEASURE:

H.B. NO. 1378, PROPOSED H.D. 1, RELATING TO THE STATE OF
HAWAII ENDOWMENT.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

LATE TESTIMONY

DATE: Friday, February 25, 2011 TIME: 6:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): David M. Louie, Attorney General, or
Randall S. Nishiyama, Deputy Attorney General

Chair Oshiro and Members of the Committee:

The Department of the Attorney General provides the following comments regarding H.B. No. 1378, H.D. 1 (Proposed), Relating to the State of Hawaii Endowment Fund ("SOH Endowment Fund" or "Fund").

This bill amends section 40-88, Hawaii Revised Statutes, to establish the SOH Endowment Fund directly by statute and add to the permissible use of the moneys in the fund. The SOH Endowment Fund consists of \$2,000,000 contributed by the State (see Conf. Comm. Rep. No. 104, Haw. H.J. 1000-1001 (1995)), and a \$4,000,000 appropriation authorized by Act 97, Session Laws of Hawaii (SLH) 2006, as amended by Act 156, SLH 2007.

The purpose of the SOH Endowment Fund is to support the production of music by an Oahu-based symphony orchestra as determined by the State Foundation on Culture and the Arts ("SFCA"). This bill broadens the purpose of the SOH Endowment Fund to permit moneys from the Fund to be used for the education of children in school in preparation for the production of music with instruction by a performer from an Oahu-based symphony orchestra, including any Oahu-based youth symphony orchestra.

Also, this bill amends Act 97, SLH 2006, to add corresponding wording regarding the purpose the \$4,000,000 appropriation made to the SOH Endowment Fund.

Implementation of this bill may face administrative and constitutional challenges.

The \$2,000,000 Amount

The deletion of the reference to the fund created by the trust agreement, dated December 5, 1986, indicates the intent is to create a new statutorily established fund. If, however, such a fund is established, separate from the trust agreement, it is unclear how the money from the trust agreement fund is being transferred to the statutorily established fund.

If the intent, however, is to work with the existing trust fund, then the bill should be clarified to continue the trust agreement fund. Then the proposed amendments to section 40-88 will be applicable to the \$2,000,000 amount in the Fund on the effective date of this bill, as long as the underlying trust agreement is consistent with the proposed amendments because that amount is not encumbered by statutory or contractual restrictions.

The \$4,000,000 Amount

However, as for the \$4,000,000 amount in the SOH Endowment Fund, we believe that the proposed amendments to section 40-88 cannot be effective until after the Symphony Foundation has raised the full \$4,000,000, which, at the latest, must be February 28, 2013, which is the expiration of the contract ("Agreement") between the State (acting through the Department of Accounting and General Services and the SFCA) and the

Honolulu Symphony Foundation, Inc. ("Symphony Foundation") (attached). The \$4,000,000 appropriation to the SOH Endowment Fund was authorized by Act 97, SLH 2006, as amended by Act 156, SLH 2007, and was deposited into the SOH Endowment Fund pursuant to the Agreement.

Under the Agreement, the Symphony Foundation pledged that it will pay or cause to be paid by February 28, 2013, at the latest, \$4,000,000 to the SOH Endowment Fund, and to be in compliance with section 40-88. The Agreement represents an approved match needed for the \$4,000,000 appropriation from the State to be deposited into the SOH Endowment Fund. Any portion of the \$4,000,000 in the SOH Endowment Fund which is not matched by February 28, 2013, at the latest, will revert to the general fund at that time pursuant to section 40-88(a)(3). However, we note that on February 28, 2013, if the Symphony Foundation were to simply obtain pledges amounting to \$4,000,000, then the \$4,000,000 appropriation would be retained by the SOH Endowment Fund.

We note that the Symphony Foundation, which manages the SOH Endowment Fund, is a separate organization from the Honolulu Symphony Society, which filed for liquidation under a chapter 7 bankruptcy.

We believe that the amendments to section 40-88 in section 2 of the bill, as applied and implemented to the \$4,000,000 amount in the SOH Endowment Fund, if enacted, could be challenged as violating violate Section 10 of Article I of the Constitution of the United States which provides in part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

In 2008 when the Agreement was executed, section 40-88 provided that moneys in the SOH Endowment Fund could only be

used for the production of music by an Oahu-based symphony orchestra as determined by the SFCA. The additional uses of the SOH Endowment Fund were not a part of section 40-88 when the Symphony Foundation contracted with the State to raise \$4,000,000 in matching funds as provided in the Agreement. The proposed amendments to section 40-88, which add additional uses for the expenditure of moneys from the SOH Endowment Fund, could represent an impairment of the existing Agreement.

While the Honolulu Symphony Society has filed for liquidation under a chapter 7 bankruptcy, we understand that because there are proposals to start a symphony orchestra, which would fulfill the purpose of the SOH Endowment Fund, the SFCA has considered the Symphony Foundation to be in compliance with section 40-88 and not in breach of the Agreement.

Conclusion

As for the \$2,000,000 amount in the SOH Endowment Fund, we believe that the proposed amendments to section 40-88 in section 2 of the bill will be effective on the date stated in the bill. Also, we believe that the amendment to Act 97, SLH 2006, in section 3 of the bill, is ineffective because the appropriation has already been disbursed.

With respect to the \$4,000,000 amount in the SOH Endowment Fund, we believe that the amendments to section 40-88 proposed in section 2 of the bill cannot be effective until after the Symphony Foundation has raised the full \$4,000,000, which, at the latest, must be February 28, 2013, the expiration date of the Agreement with the Symphony Foundation. Please note, however, that any portion of the \$4,000,000 that is not matched by that time will revert to the general fund. However, only a pledge is needed to meet this requirement.

PLEDGE AGREEMENT

KNOW ALL BY THESE PRESENTS:

That HONOLULU SYMPHONY FOUNDATION, INC., a Hawaii nonprofit corporation (the "Foundation"), hereby pledges and promises to pay or cause to be paid to the State of Hawaii endowment fund established under a trust agreement dated December 5, 1986 (the "SOH Endowment Fund"), the sum of Four Million Dollars (\$4,000,000). Said sum shall be payable no later than the date which is the fifth (5th) anniversary from the date that funds in the amount of Four Million Dollars (\$4,000,000) are deposited into the SOH Endowment Fund from the general revenues of the State of Hawaii pursuant to Act 97 of the 2006 Session Laws of Hawaii, as amended by Act 156 of the 2007 Session Laws of Hawaii (collectively, the "Acts").

The Foundation acknowledges that it must make or cause to be made the payment of said Four Million Dollars (\$4,000,000) in order to satisfy its pledge and that said payment must be made in full on or before the fifth (5th) anniversary specified above, and the Foundation understands that the amounts paid by it to the SOH Endowment Fund shall be invested in accordance with the requirements of Section 40-88 of the Hawaii Revised Statutes.

The Foundation also understands and acknowledges that, in reliance on this pledge, the State of Hawaii will deposit by February 29, 2008, Four Million Dollars (\$4,000,000) into the SOH Endowment Fund, which the State of Hawaii would not do so but for the Foundation's pledge as provided herein.

This Agreement is made pursuant to and in compliance with the provisions of the Acts and Section 40-88 of the Hawaii Revised Statutes, and this Agreement is a legal, valid, and binding obligation of the Foundation. A Certificate of Corporate Resolution authorizing the execution of this Agreement by the Foundation is attached hereto as Exhibit "A".

This instrument may be executed in several counterparts. In addition, this instrument may contain more than one counterpart of the signature page and this instrument may be executed by the affixing of the signatures of each of the parties to one of such counterpart signature pages and the assembly of such signature pages with this instrument as one document; and all of such counterpart signature pages shall be read as though one, and they shall have the same force and effect as though all of the signers had signed a single signature page.

The remainder of this page is intentionally left blank; the next page is the signature page.

Signature Page of Honolulu Symphony Foundation, Inc.
to Act 97/Act 156 Pledge Agreement

IN WITNESS WHEREOF, the Foundation has executed this Pledge Agreement
on this 7 day of February, 2008.

HONOLULU SYMPHONY FOUNDATION, INC.,
a Hawaii nonprofit corporation

By Mark D. Wong
Name: Mark D. Wong
Title: Chair

By Carolyn A. Berry
Name: Carolyn A. Berry
Title: Vice Chair

Acceptance Page for Honolulu Symphony Foundation, Inc. Pledge Agreement

The foregoing Pledge Agreement of the Honolulu Symphony Foundation, Inc. is hereby acknowledged and accepted.

STATE FOUNDATION ON CULTURE
AND THE ARTS

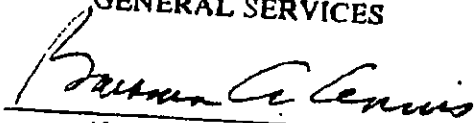
Date: 2-8-08



Name: RONALD R. TAMURA
Title: EXECUTIVE DIRECTOR

DEPARTMENT OF ACCOUNTING AND
GENERAL SERVICES

Date: 2/8/08

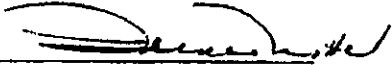


Name: BARBARA A. ANNIS
Title: DEPUTY COMPTROLLER

STATE OF HAWAII)
) ss.:
CITY AND COUNTY OF HONOLULU)

On this 7 day of Feb., 2008 before me personally appeared
Mark D Wong, to me personally known, who, being by me duly sworn
or affirmed, did say that such person executed the foregoing instrument as the free act
and deed of such person, and if applicable, in the capacity shown, having been duly
authorized to execute such instrument in such capacity.

Irene Nitta
(Print or Type Name of Notary)


(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires: **9/1/2010**

IRENE NITTA
NOTARY PUBLIC, FIRST JUDICIAL CIRCUIT
State of Hawaii
Commission Expires 9/1/2010
Comm. Number 32333

STATE OF HAWAII)
)
) SS.:
)
CITY AND COUNTY OF HONOLULU)

On this 7 day of February, 2008 before me personally appeared
Carolyn A. Barry, to me personally known, who, being by me duly sworn
or affirmed, did say that such person executed the foregoing instrument as the free act
and deed of such person, and if applicable, in the capacity shown, having been duly
authorized to execute such instrument in such capacity.

Irene Nitta

(Print or Type Name of Notary)


(Signature of Notary)

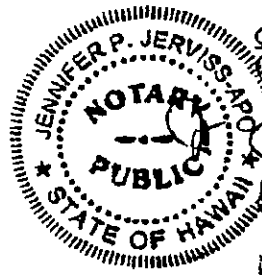
Notary Public, State of Hawaii

My Commission Expires: 9/1/2010

IRENE NITTA
NOTARY PUBLIC, FIRST JUDICIAL CIRCUIT
State of Hawaii
Commission Expires 9/1/2010
Comm. Number 82-633

STATE OF HAWAII)
) ss. :
CITY AND COUNTY OF HONOLULU)

On this 8th day of February, 2008, before me personally appeared Barbara A. Annis, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.



Jennifer P. Jerviss-Apo
(Print or Type Name of Notary)

Jennifer P. Jerviss-Apo
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires:

STATE OF HAWAII)

) ss.:

CITY AND COUNTY OF HONOLULU)

On this 07th day of February, 2008, before me personally appeared Ronald K. Yamakubo, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Sharon Y Gibu
(Print or Type Name of Notary)

Sharon Y Gibu
(Signature of Notary)

Notary Public, State of Hawaii

My Commission Expires: April 7, 2011

THIS CERTIFIES that the undersigned is the Vice Chair of the HONOLULU SYMPHONY FOUNDATION, INC., a Hawaii nonprofit corporation (the "Foundation"), and that the following Resolutions were adopted by unanimous written consent of the Board of Directors thereof pursuant to the Bylaws of the Foundation:

**"HONOLULU SYMPHONY FOUNDATION
RESOLUTION APPROVING PLEDGE
TO THE HAWAII STATE ENDOWMENT FUND**

WHEREAS, the State of Hawaii has appropriated \$4 million to the Hawaii State Endowment Fund with Act 97 of S.L.H. 2006, amended by Act 156 of S.L.H. 2007;

WHEREAS, funds will be deposited into the endowment fund when matched on a dollar-for-dollar basis by private funds;

WHEREAS, a pledge pursuant to and in compliance with the provisions of the Act and Section 40-88 of the Hawaii Revised Statutes constitutes a match by private funds;

NOW, THEREFORE, BE IT RESOLVED, the Board of Directors authorizes any two officers of the Honolulu Symphony Foundation to execute an agreement to pledge and promise to pay or cause to be paid to the State of Hawaii endowment fund established under a trust agreement dated December 5, 1986 (the "SOH Endowment Fund"), the sum of Four Million Dollars (\$4,000,000). Said sum shall be payable no later than the date which is the fifth (5th) anniversary from the date that funds in the amount of Four Million Dollars (\$4,000,000) are deposited into the SOH Endowment Fund from the general revenues of the State of Hawaii pursuant to Act 97 of the 2006 Session Laws of Hawaii, as amended by Act 156 of the 2007 Session Laws of Hawaii (collectively, the "Act").

The Foundation acknowledges that it must make or cause to be made the payment of said Four Million Dollars (\$4,000,000) in order to satisfy its pledge and that said payment must be made in full on or before the fifth (5th) anniversary specified above, and the Foundation understands that the amount paid by it to the SOH Endowment Fund shall be invested in accordance with the requirements of Section 40-88 of the Hawaii Revised Statutes.

This pledge is made pursuant to and in compliance with the provisions of the Act and Section 40-88 of the Hawaii Revised Statutes.

IN WITNESS WHEREOF, I have hereunto set my hand this 8th day of February, 2008.

Robert A. ...
Vice Chair of Honolulu Symphony Foundation, Inc.