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STATE OF HAWAII



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HAWAIIAN HOMES COMMISSION

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STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879
HONOLULU, HAWAII 96805

ALAPAKI NAHALE-A, CHAIRMAN
HAWAIIAN HOMES COMMISSION
COMMENTS TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR ON

SB 2212, RELATING TO HAWAIIAN HOMES COMMISSION ACT, 1920, AS AMENDED.

February 24, 2012

Chair Hee, Vice-Chair Shimabukuro, and Members of the Committee:

Act 302 (2001) added Section 201.6 to the enabling legislation of the Hawaiian Homes Commission to promote community-based self-governance in Hawaiian homestead communities. This language also allows for the delegation of certain authorities from the commission to democratically-elected homestead community governing organizations. The repeal of the congressional consent requirement amends the Act to read in a way that implies the department may implement this section of the Act without congressional consent. The department supports legislation like this that promotes autonomy and self-determination for DHHL and our homestead communities.

However, the repeal of this language does not necessarily change the requirement for consent. At this time, the Department of the Attorney General has not yet reviewed this legislation to determine whether congressional consent would be required if this language is repealed.

Mahalo for the opportunity to provide comments on this measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. NO. 2212, RELATING TO HAWAIIAN HOMES COMMISSION ACT, 1920, AS AMENDED.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 24, 2012 **TIME:** 10:00 a.m.
LOCATION: State Capitol, Room 016
TESTIFIER(S): David M. Louie, Attorney General, or
Craig Y. Iha, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General (the "Department") offers the following comments on this bill.

If the purpose of this bill is to give immediate effect to that portion of section 2 of Act 302, Session Laws of Hawaii 2001 (Act 302), entitled "Community based governance on Hawaiian home lands," we believe that this bill does not achieve its purpose. The bill eliminates the Congressional approval prerequisite from the text of what the Revisor of Statutes has codified as section 201.6 of the Hawaiian Homes Commission Act (HHCA). The Department has two comments regarding this bill.

First, even if the Congressional approval prerequisite were removed from section 201.6, that removal would be ineffective. The effective date provision in section 4 of Act 302 makes the entire Act – including the "community based governance" provision at issue here – effective only after it is approved by Congress. Amending only what has been codified as section 201.6 would not lift the Congressional consent prerequisite from section 4 of Act 302.

Second, this bill would not obviate the need to obtain the consent of the United States in implementing section 201.6. The Hawaii Admission Act, which supersedes this legislation, requires the "consent of the United States" to amendments to the HHCA, with certain exceptions. Section 4 of the Admission Act provides:

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be

adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, section 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

The Admission Act allows the HHCA to be amended to "increase the benefits to lessees of Hawaiian home lands" without federal consent. Provisions of the HHCA "relating to administration" may also be amended without federal consent. On the other hand, federal consent is required to change "the qualifications of lessees" or to increase the "encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of [the] Act."

The "community based governance" section of Act 302 appears to broadly authorize the Commission to delegate all "authorities delegated to the State by the United States relating to the administration of the Hawaiian Homes Commission Act." Taken to its extreme, this might be interpreted to mean that the Commission is authorized to delegate unqualified authority and duties to a homesteader organization, effectively replacing the State as the administrator of the HHCA with respect to that homestead community. This is inconsistent with the State's (through DHHL) assumption of responsibility for administering the HHCA. See, e.g., HHCA section 204(a) ("all available lands shall immediately assume the status of Hawaiian home lands and be under control of [DHHL]").

Suggested Amendments

We suggest amending this bill to affirmatively enact the “community based governance” provision as a new section added to the HHCA. This would give effect to that provision despite the congressional consent requirement found in section 4 of Act 302.

We further suggest that, when enacting the “community based governance provision,” the provision be amended to read as follows:

“§__ **Community based governance on Hawaiian home lands.** It is the policy of the State to support participation in governance by promoting the empowerment of democratically-elected Hawaiian homestead community self-governance organizations.

~~In furtherance of this policy, [and with the consent of the Congress of the United States, the State may delegate to a democratically-elected organization representing a Hawaiian homestead community or communities the authorities delegated to the State by the United States relating to the administration of the Hawaiian Homes Commission Act, 1920, as amended.~~

~~—The] the~~ commission may establish a working relationship with a democratically-elected Hawaiian homestead community self-governance organization to promote community welfare. The selection of authorities to be delegated shall be left to the Hawaiian homes commission’s discretion. The commission may establish criteria to determine the boundaries and location of a Hawaiian homestead community and ~~[whether a Hawaiian homestead community organization is eligible for delegation]~~ to qualify organizations as a democratically-elected Hawaiian homestead community. Criteria for eligibility shall include but not be limited to the following:

- (1) The organization and its leadership is a bona fide representative body of native Hawaiian residents, homestead lessees, qualified successors residing within the homestead community, and native Hawaiians who have designated that homestead community as their primary choice of residence with the department of Hawaiian home lands and who are awaiting an award of a lease under this Act;
- (2) The organization is governed by free and fair elections; and
- (3) The organization demonstrates sufficient capacity to implement ~~[the authorities— that are delegated]~~ any task the commission authorizes the organization to perform or to deliver any service that the department would otherwise perform or deliver.

The commission may contract with and delegate authority to a Hawaiian homestead community self-governance organization to perform governmental services for the homestead community represented by that homestead organization. Any such contract shall include a requirement that the government service shall be performed at a level and quality comparable to the services that would otherwise be provided by the department of Hawaiian home lands.

The department of Hawaiian home lands may adopt rules in accordance with chapter 91, Hawaii Revised Statutes, to implement this section."



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Act 302 (2001) added Section 201.6 to the enabling legislation of the Hawaiian Homes Commission to promote community-based self-governance in Hawaiian homestead communities. This language also allows for the delegation of certain authorities from the commission to democratically-elected homestead community governing organizations. The repeal of the congressional consent requirement amends the Act to read in a way that implies the department may implement this section of the Act without congressional consent. The department supports legislation like this that promotes autonomy and self-determination for DHHL and our homestead communities.

However, the repeal of this language does not necessarily change the requirement for consent. At this time, the Department of the Attorney General has not yet reviewed this legislation to determine whether congressional consent would be required if this language is repealed.

Mahalo for the opportunity to provide comments on this measure.



COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT

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Date: February 24, 2012

To: Senator Clayton Hee, Chair, Committee on Judiciary and Labor
Senator Maile S.L. Shimabukuro, Vice Chair, Committee on Judiciary and Labor
Committee Members

From: William Fernandez, CNHA Native Hawaiian Policy Center Chair
Robin Danner, CNHA President and CEO

Re: Testimony in SUPPORT of SB 2212 Relating to Hawaiian Homes Commission Act, 1920, as Amended, with AMENDMENTS

Aloha Honorable Chair, Vice Chair and Committee Members:

CNHA, founded in 2001, works to advance the well-being of Hawaii through the cultural, economic and community development of Native Hawaiians. We promote our mission through the administration of the Native Hawaiian Policy Center (Policy Center) to advance sound public policy, the deployment of capital in all counties under our certified Community Loan Fund and Tax Credit Program, operation of the Hawaiian Way Fund to support cultural and community practitioners, and the delivery of affordable housing and economic development projects owned and operated by community based nonprofits.

CNHA and its Policy Center, stands in full support of SB 2212. This bill honors the outstanding work done by the legislature in 2006 with the passage of Act 302, which amended the Hawaiian Homes Commission Act of 1920 to establish a stronger working relationship between the State agency, the Department of Hawaiian Home Lands (DHHL), and the more than 30 homestead associations located across the State. It has not been implemented to date, due to the generosity of inclusion of its original author, former Representative Mike Kahikina. Although not required, Act 302 extended the opportunity to the U.S. Congress to concur. As we have come to witness all across the nation, the gridlock in Congress has placed the opportunities of Act 302 to DHHL and the homestead associations, along with hundreds of other simple actions, left undone.

SB 2212, removes the sentence that extended inclusion of the Congress to concur, and allows DHHL, and the leadership of homestead associations, some of which are more than 20 years old, to move forward to implement the partnerships encouraged and intended by the legislature in passing Act 302. In these times of economic hardship and the need to streamline and leverage the limited resources available to DHHL, SB 2212 will leverage homestead associations to more actively engage in the delivery of services to assist DHHL in reducing its operating costs. Our proposed amendments to SB2212 (attached), would allow additional flexibility for DHHL to establish working relationships with homestead associations to effectively implement Act.

Mahalo for the opportunity to add to the committee's record through this testimony.

A BILL FOR AN ACT

RELATING TO HAWAIIAN HOMES COMMISSION ACT, 1920. AS AMENDED.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 201.6, Hawaiian Homes Commission Act,
2 1920, as amended, is amended to read as follows:

3 "~~§~~**201.6.**~~§~~ **Community based governance on Hawaiian home**
4 **lands.** It is the policy of the State to support participation
5 in governance by promoting the empowerment of democratically-
6 elected Hawaiian homestead community self-governance
7 organizations.

8 In furtherance of this policy, ~~[and with the consent of the~~
9 ~~Congress of the United States.]~~ the State may negotiate agreements
with delegate to a

10 democratically-elected organization representing a Hawaiian
11 homestead community or communities to perform tasks under the
authorities delegated to
12 the State by the United States relating to the administration of
13 the Hawaiian Homes Commission Act, 1920, as amended.

14 The commission may establish a working relationship with a
15 democratically-elected Hawaiian homestead community self-
16 governance organization to promote community welfare. The
17 selection of authorities to be mutually agreed upon, ~~delegated~~
shall be left to the

18 Hawaiian homes commission's discretion. The commission may

1 establish criteria to determine the boundaries and location of a
2 Hawaiian homestead community and whether a Hawaiian homestead
3 community organization is eligible for negotiation. ~~delegation.~~
Criteria for

4 eligibility shall include but not be limited to the following:

- 5 (1) The organization and its leadership is a bona fide
6 representative body of native Hawaiian residents,
7 homestead lessees, qualified successors residing
8 within the homestead community, and native Hawaiians
9 who have designated that homestead community as their
10 primary choice of residence with the department of
11 Hawaiian home lands and who are awaiting an award of a
12 lease under this Act;
- 13 (2) The organization is governed by free and fair
14 elections; and
- 15 (3) The organization demonstrates sufficient capacity to
16 implement the authorities that are delegated.

17 The commission may contract with ~~and delegate authority to~~
18 a Hawaiian homestead community self-governance organization to
19 perform governmental services for the homestead community
20 represented by that homestead organization. Any such contract
21 shall include a requirement that the government service shall be
22 performed at a level and quality comparable to the services that

1 would otherwise be provided by the department of Hawaiian home
2 lands.

3 The department of Hawaiian home lands may adopt rules in
4 accordance with chapter 91, Hawaii Revised Statutes, to
5 implement this section."

6 SECTION 2. The provisions of the amendments made by this
7 Act to the Hawaiian Homes Commission Act, 1920, as amended, are
8 declared to be severable., and if any section, sentence, clause,
~~9 or phrase, or the application thereof to any person or~~
~~10 circumstances is held ineffective because there is a requirement~~
~~11 of having the consent of the United States to take effect, then~~
~~12 that portion only shall take effect upon the granting of consent~~
~~13 by the United States and effectiveness of the remainder of these~~
~~14 amendments or the application thereof shall not be affected.~~

15 SECTION 3. Statutory material to be repealed is bracketed
16 and stricken.

17 SECTION 4. This Act shall take effect upon its approval.

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INTRODUCED BY: _____