NEIL ABERCROMBIE
GOVERNOR

LATE TESTIMONY

GLENN M. OKIMOTO
DIRECTOR

Deputy Directors
FORD N. FUCHIGAMI
JADE BUTAY
RANDY GRUNE
JADINE URASAKI

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 21, 2012

S.B. 755 S.D.2, H.D.1 Proposed H.D.2
RELATING TO ECONOMIC DEVELOPMENT

HOUSE COMMITTEE(S) ON WATER, LAND, & OCEAN RESOURCES
and ENERGY & ENVIRONMENTAL PROTECTION

The Department of Transportation (DOT) strongly supports Senate Bill 755 S.D.2 Proposed H.D.2.

The provisions of this bill, specifically Parts III, IV, and V will temporarily remove regulatory restrictions and/or enable the Director of Transportation, with the approval of the Governor, to exempt certain state projects from several duplicative State permitting requirements. This will allow various DOT projects to be expeditiously completed and help to promote economic revitalization. These new provisions will still allow for open transparency in the public process and protection of the environment. It is important to note that removing duplicative state permitting processes, removes the redundancies of the review processes that are in place through federal regulations.

Additionally, Part VI will also assist the DOT by temporarily allowing a more streamlined processing of state projects through the environmental review requirements of Chapter 343. This will allow the DOT to more timely and efficiently implement projects to meet the growing needs of improving and maintaining our infrastructure and facilities of our systems.

As for Part II within the list of provisions, we defer to the Office of Planning as it makes them temporarily responsible for the issuance of special management area permits and shoreline setback variances for state projects. We are in discussions with the Office of Planning to develop a streamlined process that would expedite the implementation of State projects without compromising the Coastal Zone Management Program.

Similar to the Department of Land and Natural Resource's testimony, we also request a clarification regarding the word "proceedings" as used in PART VII, SECTION 42 of this proposed measure. If the intent is to allow projects that are in any stage of implementation prior to the repeal date of July 1, 2015, to continue to be exempt through the phases leading into construction, we recommend including the Governor's approval of the project's exemption as a "proceeding", and added in SECTION 42 of this proposed measure.

Through the enactment of these various temporary provisions, we are confident and excited to be an integral part of this strategy to move projects forward, generate jobs and stimulate the economy.

Thank you for the opportunity to provide testimony.

NEIL ABERCROMBIE
GOVERNOR
RICHARD C. LIM
DIRECTOR
MARY ALICE EVANS
DEPUTY DIRECTOR
JESSE K. SOUKI
DIRECTOR
OFFICE OF PLANNING

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

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Statement of
JESSE K. SOUKI
Director, Office of Planning
Department of Business, Economic Development, and Tourism
before the
HOUSE COMMITTEE ON WATER, LAND AND OCEAN RESOURCES
AND
HOUSE COMMITTEE ON ENERGY AND ENVIRONMENTAL PROTECTION
Wednesday, March 21, 2012
11:15 AM
State Capitol, Conference Room 325

in consideration of
SB 755 SD2 HD2 PROPOSED
RELATING TO ECONOMIC DEVELOPMENT.

Chairs Chang and Coffman, Vice Chairs Har and Kawakami, and Members of the House Committees on Water, Land and Ocean Resources, and Energy and Environmental Protection.

The Office of Planning (OP) strongly opposes SB 755 SD2 HD2 Proposed. Among other things, this omnibus bill makes OP responsible for the processing of special management area (SMA) permit applications for all state projects and shoreline setback variance applications for all state structures and activities. For the reasons discussed below, this would set OP up for failure, risk federal funding, detract from the effectiveness of the CZM Program to plan for and manage the sustainable use of Hawaii's coastal resources, and raise the specter of liability for OP and the state.

OP administers Hawaii Revised Statutes (HRS) chapter 205A, Hawaii's Coastal Zone Management (CZM) law, which implements the CZM Act passed by the U.S. Congress in 1972. The SMA permitting system is part of the federal and state approved Hawaii CZM

Program. The SMA, a subset of the larger coastal zone, generally extends inland from the shoreline to the nearest highway. This is the most sensitive area of the coastal zone, within which the legislature determined that special controls on developments were needed to (1) avoid permanent losses of valuable resources and the foreclosure of management options, (2) ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided, and (3) preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii. See HRS §205A-21. Within this narrow band around the coast, proposed "development" is required to obtain an SMA permit from the respective county within which it is located.

First, OP is working with state agencies to develop a streamlined process that maintains consistency with the federal and state approved CZM Program. In our preliminary discussions, we have had positive feedback from the state Department of Transportation and the Department of Land and Natural Resources. However, we still need to formalize the process, coordinate with other affected state agencies, and confer with the National Oceanic and Atmospheric Administration (the federal agency which funds the state's CZM Program). The Administration will have a proposed bill to address these issues in the next legislative session. The process we are discussing is conceptual at this point, but it will address the concerns outlined below and may not require additional funding or personnel.

In the interim, OP supports certain stop-gap bills that exempt certain state projects from SMA permitting, because those bills include a sunset date, does not change HRS chapter 205A, and provides that the affected agencies will consult with the CZM Program on consistency.

Second, OP does not have the infrastructure, staff, or finances to carry out SMA permitting activities currently carried out by the counties. The SMA permit process is part of the federal and state approved Hawaii CZM Program. When the state developed the SMA permit system, it was determined at that time that the counties would be responsible for issuing SMA permits. Over time, the counties have established regulatory systems for

assessing, reviewing, holding public hearings and contested cases, and making final determinations on SMA permits and shoreline setback provisions. These evaluations require dedicated staff, preferably with an expertise in ocean and coastal resource planning. The budget and staff of the county planning offices dwarf OP's. Among other things, OP simply does not have the budget, staff, or other infrastructure (such as a planning commission to hold hearings) that the county planning departments have. In addition, OP does not have the funds to hold public hearings in each of the counties.

Third, OP is not a permitting office. The intent of the Hawaii CZM Program is a networked concept—county, state, and federal agencies have an obligation to implement the CZM Act with OP oversight through its CZM Program. The CZM Program provides administration, support, and guidance to the network as the primary recipient of federal CZM Act funds. This allows the CZM Program to focus on the big picture as it relates to coastal zone and ocean planning and policy. For example, the CZM Program works with various University of Hawaii, public, and county, state, and federal agency stakeholders in the following activities:

- Developing and implementing the Hawaii Ocean Resources Management Plan;
- Implementing the President's National Ocean Policy;
- Implementing the Coastal and Nonpoint Source Pollution Control Program;
- Addressing beach access issues from a statewide perspective;
- Providing guidance and tools for coastal management that balances economic, cultural, and environmental impacts; and
- Addressing the impacts from climate change, primarily in the area of sea level rise.

All of these projects and programs leverage limited general funds to obtain federal grant monies to support these endeavors, which ensure that coastal resources (e.g., beaches, reefs, fish, public access, etc.) are available to future generations.

Fourth, OP has the following additional comments for the Committees' consideration. The SMA permitting process was developed over the course of several

public hearings, legislative sessions, and negotiations between county, state, and federal agencies in the 1970s. Rewriting the process in one session raises the specter of liability for OP and the state. In particular, consider the following:

1. HRS chapter 91, Hawaii Administrative Procedure Act (HAPA), provides due process provisions that are predictable and accepted by stakeholders. The legislature may exempt any process from HRS chapter 91 through legislation. However, there is also an overriding constitutional obligation to provide due process. HRS chapter 91 is a tried and true method by which due process can be provided and any deviation involves risk. These procedures permit agencies to develop administrative policy promptly and to honor the due process rights of affected parties.
2. Standing and vested interests. People other than the applicant may also have interests in the permit, for example, adjacent property owners. Any action taken in which a person has legal rights is entitled by law to have a determination on those rights. HRS chapter 205A currently provides that process through HAPA.
3. Public Hearing. Although a public hearing is not mandatory under state law (the CZM Act requires public notice and comment of some kind) it is provided for under HRS chapter 91. In addition, a hearing is customary, if not required, in most all discretionary approvals. It is prudent to always provide for public hearings, and then issue a decision.
4. Adopting rules under HAPA reduces risk to the state. As a general proposition, agencies must pass rules to implement statutes. OP may need to make rule changes to account for this new process, and new rules can take some time. As stated in the 1961 Hawaii House Journal — Standing Committee Reports, Standing Committee Report No. 8, HAPA was adopted to "provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contested cases." Also, consider that the Hawaii Supreme Court has generally applied a very liberal standard to environmental standing,

and the Hawaii State Constitution has a number of provisions related to the use and management of the state's natural resources and the environment. Although these provisions might not be self-executing, it is always risky to predict the outcome of a Hawaii Supreme Court decision. Removing HAPA, as in this proposed bill, requires the trial courts to fact find without the benefit of an administrative record.

5. Judicial limitations. The state cannot avoid lawsuits for violations of federal law, such as lawsuits for violation of the due process clause of the U.S. Constitution. The state also cannot avoid lawsuits asking for injunctive relief for violations of the state constitution.
6. Internal inconsistency within HRS chapter 205A. The bill limits judicial challenges, but that language may be inconsistent with HRS §205A-6, which allows "any person or agency may commence a civil action" for failure to comply with HRS chapter 205A.
7. Issue of Germaneness. Article III, section 14 of the Hawaii Constitution provides as follows, "Each law shall embrace but one subject, which shall be expressed in its title."

Thank you for the opportunity to comment on this bill.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

Testimony of
WILLIAM J. AILA, JR.
Chairperson

Before the House Committees on
WATER, LAND & OCEAN RESOURCES
and
ENERGY & ENVIRONMENTAL PROTECTION

Wednesday, March 21, 2012
11:15 A.M.
State Capitol, Conference Room 325

In consideration of
SENATE BILL 755, SENATE DRAFT 2, HOUSE DRAFT 1, PROPOSED HOUSE DRAFT 2
RELATING TO ECONOMIC DEVELOPMENT

Senate Bill 755, Senate Draft 2, House Draft 1, Proposed House Draft 2 proposes: (1) PART II - To temporarily make the Office of Planning (OP) responsible for the issuance of special management area permits and shoreline setback variances for state projects; (2) PART III – To temporarily exempt airport structures and improvements from the special management area (SMA) permit and shoreline setback variance (SSV) requirements when the structures and improvements are necessary to comply with FAA regulations; (3) PART IV - To temporarily authorize the Department of Land and Natural Resources and Department of Transportation, with the approval of the Governor, to exempt department projects from the special management area permit and shoreline setback variance requirements; (4) PART V – To exempt all work involving submerged lands used for state commercial harbor purposes from any permit and site plan review requirements for lands in the conservation district; and (5) PART VI – To temporarily authorize a more streamlined process for exempting state and county projects from the environmental review process of Chapter 343, Hawaii Revised Statutes (HRS), and reduce the deadline for challenging the lack of an environmental assessment for a state or county project. The Department of Land and Natural Resources (Department) supports the intent of PART IV of this measure which would temporarily exempt state projects from the requirements of SMA and SSV to expedite the implementation of state projects to improve or repair our deteriorated facilities and create jobs to improve the economy.

Although this bill proposes to allow the Department a temporary exemption from requirements of the SMA SSV under Chapter 205A, HRS, the measure also contains conditions that the Department believes are reasonable when attempting to balance the need to revitalize the

economy while ensuring the protection of the environment, coastal resources, and public access. The Department supports the conditions proposed in this measure, which are as follows:

1. The measure requires state projects to comply with Chapter 343, HRS.
2. Exemption applies only to "state projects", which essentially limits the work to within facilities and/or parcels under the Department's jurisdiction (i.e. parks, harbors, trails, etc.) and work that is consistent with the existing use within those facilities and/or parcels.
3. The measure provides accountability with the Governor through exemptions recommended by the Board of Land and Natural Resources or the Chairperson.
4. The measure requires the Department to consult with both OP and the Office of Conservation and Coastal Lands (OCCL) for state projects deemed exempt. OCCL is charged with regulating activity in conservation districts and along the shoreline and must review projects against eight criteria as identified under Subchapter 4, §13-5-30(c), Hawaii Administrative Rules. The eight criteria are attached as part of this testimony as Exhibit 1 and include addressing consistency with Chapter 205A, HRS, adverse impacts to natural resources, and compatibility with surrounding land uses. OCCL has the in-house expertise to perform these consistency evaluations.
5. The measure has a sunset date of June 1, 2015, which would allow sufficient time for the economy to recover and other changes to Chapter 205A, HRS (proposed under this same measure) to be fully implemented.

The Department also notes that it is in the early stages of discussion with OP to develop a streamlined process that would expedite the implementation of State Projects while maintaining consistency with the federal and state approved Coastal Zone Management Program. As this process develops over the next few years, the Department will continue to work with OP to effectuate a set of procedures that are the most efficient without compromising the intent of the Coastal Zone Management Law.

Since most state projects span a period of time to complete the planning, design and construction phases, the Department requests a clarification regarding the word "proceedings" as used in PART VII (SECTION 42) of this proposed measure. If the intent is to allow projects that are in progress prior to the repeal date of July 1, 2015 to continue to be exempt, we recommend including the Governor's approval of projects' exemption as a "proceeding", and added to SECTION 42 of this proposed measure.

Thank you for the opportunity to comment.

G-2 LAND USES NOT OTHERWISE IDENTIFIED

(D-1) Land uses not otherwise identified in section 13-5-22, 13-5-23, or 13-5-24, which are consistent with the objectives of the general subzone. [Eff 12/12/94; am and comp DEC - 5 2011] (Auth: HRS §183C-3) (Imp: HRS §183C-4)

SUBCHAPTER 4

PROCEDURES FOR PERMITS, SITE PLAN APPROVALS, AND MANAGEMENT PLANS

§13-5-30 Permits, generally. (a) Land uses requiring comprehensive review by the board are processed as board permits, management plans, or comprehensive management plans, and temporary variances. Departmental permits and emergency permits are processed by the department and approved by the chairperson. Site plans are processed by the department and approved by the chairperson or a designated representative. If there is any question regarding the type of permit required for a land use, an applicant may write to the department to seek a determination on the type of permit needed for a particular action.

(b) Unless provided in this chapter, land uses shall not be undertaken in the conservation district. The department shall regulate land uses in the conservation district by issuing one or more of the following approvals:

(1) Departmental permit (see section 13-5-33);
(2) Board permit (see section 13-5-34);
(3) Emergency permit (see section 13-5-35);
(4) Temporary variance (see section 13-5-36);
(5) Site plan approval (see section 13-5-38); or
(6) Management plan or comprehensive management plan (see section 13-5-39).

(c) In evaluating the merits of a proposed land use, the department or board shall apply the following criteria:

(1) The proposed land use is consistent with the purpose of the conservation district;

(2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;

(3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;

(4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;

(5) The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;

(6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;

(7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and

(8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria. [Eff 12/12/94; am and comp DEC 5 2011] (Auth: HRS §183C-3) (Imp: HRS §§183C-3, 183C-6)]

Note: For regulation of activities in:
State Parks; see Chapter 13-146.
Forest Reserves; see Chapter 13-104.

G-2 LAND USES NOT OTHERWISE IDENTIFIED

(D-1) Land uses not otherwise identified in section 13-5-22, 13-5-23, or 13-5-24, which are consistent with the objectives of the general subzone. [Eff 12/12/94; am and comp DEC - 5 2011] (Auth: HRS §183C-3) (Imp: HRS §183C-4)

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(5) Site plan approval (see section 13-5-38); or
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(1) The proposed land use is consistent with the purpose of the conservation district;

(2) The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur;

(3) The proposed land use complies with provisions and guidelines contained in chapter 205A, HRS, entitled "Coastal Zone Management", where applicable;

(4) The proposed land use will not cause substantial adverse impact to existing natural resources within the surrounding area, community, or region;

(5) The proposed land use, including buildings, structures, and facilities, shall be compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels;

(6) The existing physical and environmental aspects of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable;

(7) Subdivision of land will not be utilized to increase the intensity of land uses in the conservation district; and

(8) The proposed land use will not be materially detrimental to the public health, safety, and welfare.

The applicant shall have the burden of demonstrating that a proposed land use is consistent with the above criteria. [Eff 12/12/94; am and comp DEC - 5 2011] (Auth: HRS §183C-3) (Imp: HRS §§183C-3, 183C-6)]

Note: For regulation of activities in:
State Parks; see Chapter 13-146.
Forest Reserves; see Chapter 13-104.

NEIL ABERCROMBIE
GOVERNOR OF HAWAI'I

GARY L. HOOSER
DIRECTOR

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COMMITTEE ON WATER, LAND, & OCEAN RESOURCES

COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

SB755, SD2, proposed HD2, RELATING TO ECONOMIC DEVELOPMENT

Testimony of Gary Hooser
Director of the Office of Environmental Quality Control

March 21, 2012

Office's Position: Strongly Opposed

Fiscal Implications: None

Purpose and Justification: This measure exempts a wide range of state and county projects from the environmental review process of Chapter 343, HRS, and other important public interest safeguards.

The OEQC is opposed to many elements of this Proposed Draft but will keep our comments limited to those pertaining to HRS Chapter 343.

Chapter 343's present exemption process is based on an established procedure which already provides a straight-forward, easy to implement exemption list process for actions/projects that are likely to have no or negligible environmental impacts. Scrapping the current structure that ensures thoughtful review, complete transparency and opportunity for public input in exchange for a unilateral process that includes no public input, no transparency and no system of thoughtful impartial review sets a very bad precedent, provides a separate set of

rules for public and private projects, is unnecessary, demonstrates a lack of understanding of Chapter 343 in particular, is not in the best interest of the public and has the potential to do great damage to our natural environment.

This proposed new process begs the question: What is the basis or criteria that will be used to determine that specific types of projects probably have minimal or no significant environmental impact and therefore should be included on a categorical list of projects normally exempt from Chapter 343, HRS? Will there be any consultation before the list is finalized? Will there be any public input? The language in this proposal clearly indicates a lack of understanding of how the exemption process actually works. Passing this measure will do little or nothing to streamline or speed the process, but it will significantly muddy the waters and further confuse agencies and applicants as to what is exempt and what is not.

The Environmental Council has been current with exemption list requests now for many months. The Council has repeatedly sent notices to agencies requesting that they update or add to their lists. The existing process is not an onerous and overly burdensome one. I have seen the process in action and it works if the agency takes the small amount of time required to engage it. I suppose some agencies would just rather not deal with it, and feel it would be much simpler just to have the Governor or their Director sign off that a project is exempt. The truth is that the existing Chapter 343 rules allow for that also and no change in the law is needed to make this happen.

In addition, the OEQC is further concerned that although the proposed exemption authority, if passed, is scheduled to sunset on June 30, 2015, the governor's or mayors' lists will remain valid indefinitely unless the governor or mayors terminate them.

In addition, the proposed draft defines a State Project as: "1) The contracting agency is a state agency and 2) The funding includes state or federal funds." It would seem that there would be some further clarification needed to the word "includes" to ensure that the minimal or nominal inclusion of state funds would not be used to gain whatever benefits that would ultimately accrue to the developer of any projects. It is also unclear if "state agency" includes the Hawaii Community Development Corporation, the Agribusiness Development Corporation or other quasi-independent entities.

OEQC is also very concerned about the dramatic shortening of the judicial review period concerning a decision to exempt an agency action from 120 days to 60 days. It is important to note that there is no requirement of public notification of an exemption declaration and thus the public has no way of knowing if a project is exempted or not exempt, nor whether a proposed action has started or not. The public would be kept completely in the dark on exempted projects and 60 days is a woefully inadequate period to respond to an exemption declaration and/or action when there is no requirement to notify the public in the first place.

In light of this and many, many other serious concerns, the OEQC opposes the Proposed HD2 of SB755 and believes that if passed it would result in irreparable harm to Hawaii's environment.

Thank you.

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB 755, SD2, HD2 (Proposed)
RELATING TO ECONOMIC DEVELOPMENT
House Committee on Water, Land, & Ocean Resources
House Committee on Energy & Environmental Protection

March 21, 2012 11:15 a.m. Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** SB 755, SD 2, HD 2 (proposed), which would severly erode protections of Hawai'i's environmental and cultural resources by creating a myriad of special management area (SMA) and environmental review exemptions in the name of expediting projects with any level of state or county funding. We note that the proposed bill draft before these committees varies greatly from the version passed by the Senate, which authorized "peer-to-peer entertainment" (*i.e.*, Texas Hold 'em and Omaha poker) and created a commission in charge of oversight.

SB 755, SD 2, HD 2 (proposed) would create new SMA and environmental review exemptions for a wide variety of projects that receive any level of government funding. This bill adopts language from HB 530, HD 1, which would change four main things under the existing language and application of Chapter 205A, Hawai'i Revised Statutes:

(1) For projects where the State is the contracting agency and any state or federal funds are used, remove home-rule in SMA permitting from the counties and place review of state projects with the State Office of Planning, as lead agency for the coastal zone management program (CZMP), while also making public hearings for these projects optional;
(2) For projects where the State is the contracting agency and any state or federal funds are used, remove home-rule in granting shoreling setback variances from the counties and place review of state projects with the State Office of Planning, as lead agency for CZMP;
(3) Under Section 7 of the bill, remove the requirement that state projects need to be consistent with county general plans and zoning; and
(4) Under Sections 28-31 of the bill, grant the Board of Land and Natural Resources (BLNR) and the Director of the Department of Transportation (DOT) the authority to exempt state projects from SMA permitting and shoreline setbacks, where their respective departments are the contracting agency.

In addition to the SMA exemptions provided in HB 530, HD 1, the instant bill, as proposed, would also create a new process for exempting state or county projects from

environmental review, under Chapter 343, Hawai'i Revised Statues. These new amendments grant environmental assessment (EA) exemption authority to the Governor and mayors for specific types of state or county projects deemed to probably have minimal effect to no effect on the environment. This bill also includes the commercial harbor and airport permitting exemptions otherwise found in HB 2613, HD1 and HB 2154, HD 2, SD 1, respectively.

The proposed SB 755, SD 2, HD 2 grants the State broad powers over project planning while simultaneously reducing county and community input. The SMA amendments contained in Parts 1 through V of the bill would grant the state near unilateral control over projects with any level of state or federal funding by placing approval authority in the State of Hawai'i Office of Planning, by giving the BLNR and State DOT Director the authority to exempt their agency projects from SMA permits and shoreline setback, and by eliminating the requirements that state projects conform to county general plans and zoning.

Equally troublesome is the separate EA exemption process created for state and county projects when a functional system for creating agency exemption lists currently exists and is overseen by the Office of Environmental Quality Control (OEQC) and the Environmental Council. There appears to be no functional difference between the system that this bill would establish under the Governor or county mayors and the system currently in place, except that the proposed system would bypass public review and approval by the Environmental Council and the list of exemptions could be immediately valid following the publication of the Governor's or mayors' exemption lists in the periodic bulleting published by OEQC. Moreover, the executive branches' exemption lists do not include a mechanism for changes or deletions and would remain effective following the June 30, 2015 sunset provision, unless explicitly repealed.

Without any showing of correlation, the proposed bill appears to suggest that state and county oversight are somehow preventing economic recovery through state and county project expenditures. Although this bill may be touted as a means of promoting economic recovery, the consequences of poor planning remain the same, regardless of the State's economic state, and could result in irreversible impacts or costly remediation measures in the future.

Therefore, OHA urges the committees to HOLD SB 755, SD 2, HD 2, as proposed. Mahalo for the opportunity to testify on this measure.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

FREDERICK D. PABLO
INTERIM DIRECTOR OF TAXATION

RANDOLF L. M. BALDEMOR
DEPUTY DIRECTOR

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DEPARTMENT OF TAXATION
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SENATE COMMITTEE ON ECONOMIC DEVELOPMENT & TECHNOLOGY

TESTIMONY OF THE DEPARTMENT OF TAXATION REGARDING SB 755 RELATING TO ECONOMIC DEVELOPMENT

TESTIFIER:	**FREDERICK D. PABLO, INTERIM DIRECTOR OF TAXATION (OR DESIGNEE)**
COMMITTEE:	**EDT**
DATE:	**JANUARY 31, 2011**
TIME:	**1:45PM**
POSITION:	**SUPPORT/OPPOSED**

This measure provides an annual general excise tax (GET) holiday on the sales of certain school supplies, computers, and computer equipment starting at the beginning of the last Wednesday in July and ending five days after.

The Department of Taxation (Department) **supports the intent** of this measure; however is **concerned with the fiscal impact** of this measure given the current revenue forecast.

I. SUPPORT FOR TAX RELIEF THROUGH A GET HOLIDAY

The Department supports the tax relief intended by this measure. In light of the current economic slowing experienced in Hawaii and nationwide, both state governments and the national government have been actively seeking means to stimulate the economy. This measure serves as an efficient and effective means of stimulating the economy on a short-term basis. How much stimulus would result from this measure is difficult to project; however all tax revenue would remain in the economy. GET holidays will likely encourage people to purchase the targeted goods in higher volume.

Beyond stimulus, this measure also serves the targeted purpose of minimizing the tax impact on the sales of school supplies and expensive computers. As is well known, having access to the necessary school supplies and computer technology greatly enhances the quality of education children experience. For others, access to computers is a necessity in carrying out many daily tasks.

II. FISCAL CONCERN, REVENUE IMPACT & METHODOLOGY

As with all measures, the Department must be cognizant of the biennium budget and financial plan. This measure has not been factored into either.

This measure will result in an estimated revenue loss of $7.8 million per year from FY 2012 to FY 2016.

It is estimated that retail sales covered by the legislation amounted to about $2 billion in 2002. Using growth in retail sales from 2002 through 2009, it is estimated that the bill would affect goods with annual sales of $2.6 billion by July of 2011. For purposes of the revenue estimate, it is assumed that the bill causes consumers to move purchases of about 7.5% of the annual total into the window for GET exemption (about four times the average weekly sales amount). Thus, the GET loss is estimated to be $7.8 million (= $2.6 billion X 0.075 X 0.04) for each fiscal year beginning in FY2012 (assuming the legislation is passed before the sale time for July and August of 2011).

III. OTHER COMMENTS

The Department offers the following technical comments for the committee's consideration—

LIMIT PER PURCHASE—As currently written, the exemption applies to "purchases." This provision would not preclude people from "stacking" or "structuring" purchases by returning to the retailer later over the weekend. The Department does not object to repeat uses of the exemption and merely points it out.

SUPPORT FOR SUBSECTION (d)—The Department supports subsection (d) and requiring that proper records be required for this GET holiday. The Department appreciates this provision because it shifts the administrative burden to the retailer to ensure compliance.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LIEUTENANT GOVERNOR

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CATHY L. TAKASE
ACTING DIRECTOR

To: House Committee on Economic Revitalization & Business
House Committee on Judiciary

From: Cathy L. Takase, Acting Director

Hearing: Wednesday, March 23, 2011, 11:25 a.m.
State Capitol, Room 312

Re: Testimony on S.B. No. 755 SD2
Relating to Economic Development

The Office of Information Practices (OIP) takes no position on the purpose of this bill, which is to establish a Hawaii peer to peer gaming commission authorized to issue two 10 year licenses to operate peer to peer internet gaming operations. However, OIP offers the following comments and concerns regarding two provisions of the bill.

First, OIP notes the following regarding provisions related to the commission's meetings. The proposed §3(f) at part I, section 2 (p. 5), appears to make explicit that the commission will be subject to the open meeting provisions of part I of chapter 92 (the Sunshine Law): "The commission, subject to chapter 92, shall hold at least one meeting in each quarter of the State's fiscal year." Given this statement, OIP questions the provisions in that same section that provide that "[s]pecial meetings may be called by the chairperson or any four members upon seventy-two hours written notice to each member" and that require the commission "to keep a complete and accurate record of all of its meetings."

The Sunshine Law contains provisions that address these matters. Specifically, the Sunshine Law provides at §92-8(b) for emergency meetings where an unanticipated event requires a board to take action on a matter within less than the 6 day public notice period

required by the Sunshine Law. However, the Sunshine Law only allows such meetings where certain requirements are met to ensure the necessity of such a meeting and to allow as much public notice as possible under the circumstances. Given that this provision balances the need of boards to act under a shortened timeframe with protection of the public's interest, and generally applies to all other boards subject to the Sunshine Law, OIP recommends that the special meetings provision in the proposed bill be deleted. Further, §92-9 of the Sunshine Law requires boards to keep written minutes of all meetings that "give a true reflection of the matters discussed at the meeting and the views of the participants." Given this, OIP recommends that the requirement that the commission keep a complete and accurate record of all its meetings be deleted to avoid any confusion regarding application of the Sunshine Law's provisions.

Second, OIP questions the need for the blanket confidentiality provision provided at proposed §8(d) at part II, section 5(p. 26) for all information and records "supplied to or used by the commission in the course of its review or investigation of an application for a license." OIP notes that there is generally no such confidentiality requirement for other types of licensures, and that HRS chapter 92F, the Uniform Information Practices Act (Modified) (UIPA), already provides exceptions from public disclosure that would apply, in large part, to the licensing application information that this bill seeks to protect. For example, the UIPA's "frustration of a legitimate government function" exception would protect a license applicant's confidential commercial and financial information as well as the commission staff's recommendations and memoranda about a license applicant.

Whether to provide the confidentiality provision proposed is a policy decision for the Legislature. However, OIP notes that it would be a departure from the underlying intent of the UIPA to provide a uniform standard for records disclosure. OIP further notes that, if a confidentiality provision is enacted, language in that section that reads "and exempt from public disclosure required by chapter 92F" is unnecessary and should be deleted because the UIPA provides an exception for disclosure at §92F-13(4) for records made confidential by state statute.

Thank you for the opportunity to testify on this bill.

NEIL ABERCROMBIE
GOVERNOR

RICHARD C. LIM
DIRECTOR

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM

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STATEMENT OF
RICHARD C. LIM
DIRECTOR
DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT, AND TOURISM

BEFORE THE

COMMITTEE ON ECONOMIC REVITALIZATION & BUSINESS
AND
COMMITTEE ON JUDICIARY
Wednesday, March 23, 2011
11:25 AM
State Capitol, Conference Room 312

in consideration of

SB755 PROPOSED HD1
RELATING TO ECONOMIC DEVELOPMENT

Chair McKelvey, Chair Keith-Agaran, Vice-Chair Choy and Vice-Chair Rhoads, and Members of the Committees.

The Department of Business, Economic Development, and Tourism (DBEDT) supports the intent of SB755,HD1 PROPOSED which seeks to generate revenues for the State of Hawaii from peer-to-peer gaming, and establishes a commission under DBEDT. We do have concerns, however, about the regulatory role that DBEDT may assume in regards to overseeing and administering the commission that is licensing the gaming activities.

Thank you for the opportunity to testify on this measure.

LATE

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

ON THE FOLLOWING MEASURE:
S.B. NO. 755, S.D. 1, RELATING TO ECONOMIC DEVELOPMENT.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Tuesday, March 1, 2011 **TIME:** 9:20 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN TESTIMONY ONLY.
(For more information, contact Mary Bahng Yokota, Deputy Attorney General, at 586-1470)

Chair Ige and Members of the Committee:

This bill provides for an annual exemption from general excise tax on retail sales of certain school items, creating an annual general excise tax holiday.

The Department of the Attorney General has the following comment on this bill. It may be challenged that this bill facially violates the Commerce Clause of the United States Constitution ("Commerce Clause"). To avoid confusion and unnecessary litigation, we nonetheless recommend that the bill be amended so it is not facially discriminatory under the Commerce Clause.

The United States Supreme Court recognized that although the Commerce Clause is phrased merely as a grant of authority to Congress to "regulate Commerce . . . among the several States," article I, section 8, cl. 3, it is well established that the Commerce Clause also embodies a negative command forbidding the states to discriminate against interstate trade. Associated Industries v. Lohman, 511 U.S. 641, 646, 114 S. Ct. 1815, 1820 (1994). The Commerce Clause prohibits regulatory measures designed to benefit in-state economic interests by burdening

out-of-state competitors. Id. at 647, 114 S.Ct. at 1820 *citing* New Energy Co. of Ind. V. Limbach, 486 U.S. 269, 273-74, 108 S.Ct. 1803 (1988). The fundamental command of the Commerce Clause is that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." Id. *citing* Armco Inc. v. Hardesty, 467 U.S. 638, 642, 104 S. Ct. 2620, 2620 (1984).

This bill may be challenged as being discriminatory under the Commerce Clause because: (1) although it provides for a general excise tax holiday, it does not provide for a corresponding use tax holiday; and (2) it expressly provides that the general excise tax holiday does not apply to mail, telephone, e-mail, or internet orders with businesses operating outside the State of Hawaii.

1. There is No Corresponding Use Tax Holiday

Use tax under chapter 238, Hawaii Revised Statutes (HRS), provides for "an excise tax on the use in this State of tangible personal property which is imported . . . for use in this State." Matter of Hawaiian Flour Mills, Inc., 76 Hawaii 1, 13, 868 P.2d 419, 431 (1994), *citing* HRS § 238-2. The general theory behind such a tax is "to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State, making it subject to the [general excise] tax, or from without the State, making it subject to a use tax at the same rate." Hawaiian Flour Mills, Id., *citing* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 66, 83 S. Ct. 1201, 1202, 10 L. Ed. 2d 202, 204 (1963). In the absence of a use tax that complements a general excise tax, sellers of goods, which are acquired out-of-state, theoretically enjoy a competitive advantage over sellers of goods acquired in-state: not being

subject to the general excise tax, out-of-state products would be less expensive than in-state products, the prices of which would presumably reflect some pass-on of the general excise tax. Hawaiian Flour Mills, Id. Thus,

> [t]he [use] tax buttresses the general excise tax as it is designed to prevent the avoidance of excise taxes through direct purchases from the mainland. Its ultimate purpose is to remove the competitive advantage an out-of-state wholesaler or retailer would otherwise have over a seller subject to the payment of State excise taxes.

Hawaiian Flour Mills, Id., *citing* In re Habilitat, Inc., 65 Haw. 199, 209, 649 P.2d 1126, 1133-34 (1982).

It may be argued that the use tax exceeds the general excise tax under this bill because it provides for a general excise tax holiday but no corresponding use tax holiday. It may be argued that this is facially discriminatory under the Commerce Clause. In Associated Industries v. Lohman, 511 U.S. 641, 114 S.Ct. 1815 (1994), the Missouri use tax on imported goods, depending on the buyer's location in the State, exceeded the local sales tax. Id. at 645, 114 S.Ct. 1815. One of the issues was whether such taxes violated the Commerce Clause. In Associated, the U.S. Supreme Court held that a state's use tax that exceeds the local sales tax violates the Commerce Clause. Id. at 649, 114 S. Ct. at 1821. It stated:

> Where a state imposes equivalent sales and use taxes, we have upheld the system under the Commerce Clause . . . Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce.

Id. at 648, 114 S. Ct. 1821. Hawaii has a general excise tax, not a sales tax. However, the same analysis applies.

This Commerce Clause concern may be addressed by action taken by the Director of Taxation pursuant to section 238-3, HRS, which provides in part:

> **§ 238-3 Application of tax, etc.** (a) The tax imposed by this chapter shall not apply to any property, services, or contracting or to any use of the property, services, or contracting that cannot legally be so taxed under the Constitution or laws of the United States, but only so long as, and only to the extent to which the State is without power to impose the tax.
>
> To the extent that any exemption . . . is necessary to comply with the preceding sentence, the director of taxation shall:
>
> (1) *Exempt or exclude from the tax under this chapter, property, services, or contracting or the use of property, services, or contracting exempted under chapter 237*; . . . [Emphasis added.]

However, to avoid confusion and unnecessary litigation, we recommend that the bill be amended so it is not facially discriminatory by expressly adding a corresponding use tax holiday.

2. The Exclusion of Mail, Telephone, E-mail, or Internet Orders with Busineses Operating Outside the State of Hawaii from the General Excise Tax Holiday

The bill expressly provides that the general excise tax holiday does not apply to "[m]ail, telephone, e-mail, or internet orders with businesses operating outside the State of Hawaii" (p. 4, lines 14-15).

It is not clear what is meant by "businesses operating outside the State of Hawaii." For example, does this include businesses that operate inside as well as outside the State of Hawaii? Further, as currently drafted, it may be argued that this is facially discriminatory under the Commerce Clause because the State is taxing a transaction or incident more heavily when it crosses state lines than when it occurs entirely

within the State. This Commerce Clause concern may be addressed by section 237-22, HRS, which provides in part:

> **§ 237-22 Conformity to Constitution, etc.** (a) In computing the amounts of any tax imposed under this chapter, there shall be excepted or deducted from the values, gross proceeds of sales, or gross income so much thereof as, under the Constitution and laws of the United States, the State is prohibited from taxing, but only so long as and only to the extent that the State is so prohibited.
>
> (b) To the extent that any . . . method to determine tax liability is necessary to comply with subsection (a), each taxpayer liable for the tax imposed by this chapter shall be entitled to full offset for the amount of the legally imposed sales, gross receipts, . . .

To avoid confusion and unnecessary litigation, we nonetheless recommend that this exclusion to the general excise tax exemption on page 4, lines 14-15, of the bill be deleted.