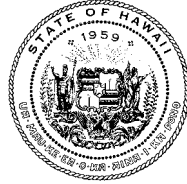


NEIL ABERCROMBIE  
GOVERNOR

SHAN TSUTSUI  
LT. GOVERNOR



**LATE**

FREDERICK D. PABLO  
DIRECTOR OF TAXATION

JOSHUA WISCH  
DEPUTY DIRECTOR

STATE OF HAWAII  
**DEPARTMENT OF TAXATION**  
P.O. BOX 259  
HONOLULU, HAWAII 96809  
PHONE NO: (808) 587-1540  
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To: The Honorable David Y. Ige, Chair  
and Members of the Senate Committee on Ways and Means

Date: Tuesday, January 29, 2013

Time: 9:00 A.M.

Place: Conference Room 211, State Capitol

From: Frederick D. Pablo, Director  
Department of Taxation

Re: S.B. 97, Relating to Taxation

The Department appreciates the intent of S.B. 97, but has serious concerns due to the impact it will have on the Department's limited budget and staffing resources, if adopted.

S.B. 97 deems transfers of controlling interest in entities holding interests in real property within the State to be subject to the conveyance tax.

The Department will have difficulty administering the provisions of this bill. Generally, the transfer of title to real property triggers the imposition of the conveyance tax. With respect to the transfers of controlling interest in an entity, in most situations, there is no similar event which would highlight that a transfer occurred.

Furthermore, a tax on transfers of controlling interest will require the development of a new tax form or substantial changes to the current form. Due to limited staff resources and technological challenges, it will be difficult for the Department to implement these provisions.

Thank you for the opportunity to provide comments.

# BIA-HAWAII

## BUILDING INDUSTRY ASSOCIATION

**LATE**

*"Building Better Communities"*

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#### Scotty Anderson

Pacific Rim Partners

#### W. Bruce Barrett

Castle & Cooke Homes Hawaii, Inc.

## Testimony to the Senate Committee on Ways and Means Tuesday, January 29, 2013 9:00 a.m. State Capitol - Conference Room 211

### RE: SENATE BILL 97, RELATING TO TAXATION

Dear Chair Ige, Vice-Chair Kidani, and members of the committee:

My name is Gladys Marrone, Director of Government Relations for the Building Industry Association of Hawaii (BIA-Hawaii), the voice of the construction industry. BIA-Hawaii promotes its members through advocacy and education, and provides community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization, chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii is **opposed** to S.B. 97, which is similar to S.B. 22, Relating to Taxation. Both bills propose to clarify that the selling, transfer, or exchange of a legal entity's stock, whose assets include realty located in Hawaii, shall be deemed to be a transfer, or conveyance of realty, that is subject to the conveyance tax when the sale, transfer, or exchange of the stock is executed with an unrelated entity or individual.

This bill would amend HRS §247-1 to specify that the sale or transfer of stock by a legal entity or individual that owns or leases realty in the State or has a controlling interest in the realty to an unrelated entity or individual, to the extent that the sale or transfer of stock reflects changes in ownership or control of the realty, shall be deemed a transfer or conveyance of an interest in the realty for purposes of subsection (a) and taxed accordingly.

We are deeply troubled by the manner in which the conveyance tax has been, and is, being applied. There is no rational nexus between the real estate transactions that are being taxed at conveyance, and the uses identified in HRS §247 as the beneficiaries of the tax.

The conveyance tax was created to cover the administrative costs of recording real estate transactions, such as those performed by the Bureau of Conveyance. With the recent amendments to the statutes, the conveyance tax is deposited into the general fund with the following allocations:

1. Ten per cent shall be paid into the land conservation fund established pursuant to section 173A-5;

1. Twenty-five per cent from July 1, 2009, until June 30, 2012, and thirty per cent in each fiscal year thereafter shall be paid into the rental housing trust fund established by section 201H-202; and
2. Twenty per cent from July 1, 2009, until June 30, 2012, and twenty-five per cent in each fiscal year thereafter shall be paid into the natural area reserve fund established by section 195-9; provided that the funds paid into the natural area reserve fund shall be annually disbursed by the department of land and natural resources in the following priority:
  - a. To natural area partnership and forest stewardship programs after joint consultation with the forest stewardship committee and the natural area reserves system commission;
  - b. Projects undertaken in accordance with watershed management plans pursuant to section 171-58 or watershed management plans negotiated with private landowners, and management of the natural area reserves system pursuant to section 195-3; and
  - c. The youth conservation corps established under chapter 193.

We do not believe that S.B 97 proposes to utilize the conveyance tax in an appropriate manner. The proposed bill only exacerbates the current problem. BIA-Hawaii is **opposed** to this measure.

Thank you for the opportunity to express our views on this matter.

**LATE**



LAND USE RESEARCH  
FOUNDATION OF HAWAII

1100 Alakea Street, 4<sup>th</sup> Floor  
Honolulu, Hawaii 96813  
(808) 521-4717  
[www.lurf.org](http://www.lurf.org)

January 28, 2013

Senator David Y. Ige, Chair  
Senator Michelle N. Kidani, Vice Chair  
Senate Committee on Ways and Means

**Testimony in Strong Opposition to SB 97 Relating to Taxation (Conveyance Tax; Transfers of Controlling Interest in Real Property Holding Entities)  
Tuesday, January 29, 2013, 9:00 a.m., in Senate Conference Room 211**

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

**SB 97.** This bill proposes to impose conveyance tax on the transfer or conveyance of a controlling interest of an entity with an interest in realty in Hawaii. As used in the bill, "controlling interest" means: (1) In the case of a corporation, either fifty per cent or more of the total combined voting power of all classes of stock of the corporation entitled to vote, or fifty per cent or more of the capital, profits, or beneficial interest in the voting stock of the corporation; and (2) In the case of a partnership, association, trust, or other entity, fifty per cent or more of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity. If passed, SB 97 is proposed to take effect on January 1, 2014.

**LURF's Position.** LURF recognizes the stated purpose of this bill, which is to apply the conveyance tax to transfers of entity ownership when such transfer is essentially equivalent to the sale of an interest in real property. However, based on the following reasons and considerations, LURF opposes SB 97, and must request that this bill be **held in Committee**.

**The proposed imposition of the conveyance tax on transfers of controlling interests in entities is inappropriate and improper given that:**

- 1. The Hawaii Conveyance Tax was never intended as a revenue-generating tax.** Hawaii Revised Statutes ("HRS"), Chapter 247 (Conveyance Tax), was purposefully enacted in 1966 to provide the State Department of Taxation ("DoTax") with informational data for the determination of market value of properties transferred, and to assist the DoTax in establishing real property assessed values. In short, the sole intent of the conveyance tax was originally to cover the administrative costs of collecting and

assessing said informational data, which necessarily entails the recording of real estate transactions, as performed by the Bureau of Conveyances.

Since the enactment of HRS Chapter 247, however, the State Legislature has proposed, and has successfully implemented changes to the law 1) to allow application of conveyance tax revenue to a number of non-conveyance type uses (land conservation fund; rental housing trust fund; and natural area reserve fund) to the point where there is no longer any clear nexus between the benefits sought by the original Act and the charges now proposed to be levied upon property-holding entities transferring ownership; and 2) also to increase the tax rates to the point where said revenues now appear to far exceed the initially stated purpose of the Act.

These expansions and deviations which go beyond the scope of the original intent of the conveyance tax law are concerning since the proposed bill, particularly if unlawfully targeting recent transactions involving the sale of interests in private entities which own real property in the State, could be characterized as imposing an improper penalty, hidden tax, or surcharge, which may be subject to legal challenge.

- 2. Transfers of stock are not “conveyances” of real property, and rightfully should not be made subject to the conveyance tax law.** The proposed bill would inappropriately subject sales of controlling interests in an entity regardless of whether real estate may be the primary or largest asset owned by the entity. Given that transfers of stock are not conveyances of real property, and given the clear intent underlying HRS Chapter 247, the methods sought to be used to impose a tax on transfers of stock (i.e., amendment or expansion of the existing conveyance tax law) is improper.
- 3. SB 97 may have unintended consequences,** especially to our island families who own large properties and may want to transfer property within their family. This measure will also have major negative consequences for many of Hawaii’s large *kama`aina* landowners who may be transferring large properties for agricultural farms, housing developments, environmental programs, or other developments which would serve the community and create needed employment.
- 4. The proposed measure creates a significant disincentive for business in Hawaii.** At a time where Hawaii is attempting to encourage business expansion in, and attract business operations to Hawaii, SB 97 actually create a disincentive, and will have a substantial negative impact on persuading new and existing businesses to open or expand in Hawaii, or to relocate their operations to this State. This disincentive will also apply to any public-private partnerships on State lands (including partnerships relating to 21<sup>st</sup> Century Schools, State harbors and marinas, Honolulu Stadium and the Public Lands Development Corporation). The proposed additional cost of doing business in Hawaii as a result of this bill would certainly appear to negatively outweigh any positive revenue impact resulting from the imposition of conveyance taxes pursuant to this measure.
- 5. The imposition of conveyance tax as proposed by SB 97 will drive up the cost of lands for agricultural production, affordable and market homes, commercial development and public-private partnerships.**

- The proposed imposition of the conveyance tax on transfers which affect **agricultural lands** will be passed on to farmers and other agricultural operators, making it even harder for agriculture to survive in Hawaii.
  - The proposed imposition of the conveyance tax on transfers which affect **land intended for housing developments** will be passed on to home buyers, will increase the price of homes, and will exacerbate the affordable housing problem in Hawaii.
  - The proposed imposition of the conveyance tax onto transfers which affect **commercial properties** will also be passed on to small businesses, creating yet another substantial financial burden on them.
  - The proposed imposition of the conveyance tax onto transfers of any interest in realty which affect public-private partnerships on **State lands** will also be passed on to any businesses or individuals that would partner with the state to develop or manage State lands, thereby discouraging future prospects for State revenues from public-private partnerships on State lands.
- 6. Proper and effective implementation of the proposed bill would involve complex, time-consuming, and subjective determinations.** As a practical matter, in order that the proposed measure be properly and effectively administered and enforced, determinations as identified in the bill must be made pursuant to rules adopted by the director. These determinations necessarily include “the value of the realty being transferred as a result of the transfer” (which would be difficult to ascertain in the case of a stock transfer as other assets in addition to real estate may be conveyed as part of the sale), and “whether persons are acting in concert for the purpose of effectuating the transfer...,” which may involve complex inquiries, involving assessments of subjective issues which entail significant time and expense.

For the reasons stated above, LURF respectfully recommends that **SB 97 be held in this Committee.**

Thank you for the opportunity to provide testimony regarding these proposed measures.



COMMERCIAL REAL ESTATE  
DEVELOPMENT ASSOCIATION  
HAWAII CHAPTER

January 28, 2012

The Hon. David Y. Ige, Chair, and  
Members of the Senate Committee on  
Ways and Means

Re: Testimony in **Opposition** to S.B. Bill No. 97, Relating to Taxation  
Hearing Date and Time: 9:00 a.m., January 29, 2013  
Conference Room 211, Hawaii State Capitol

Dear Chair Ige and Members of the Committee:

I am submitting this testimony on behalf of NAIOP Hawaii in **strong opposition** to S.B. No. 97. We are the Hawaii chapter of NAIOP, the Commercial Real Estate Development Association, which is the leading national organization for developers, owners and related professionals in office, industrial and mixed-use real estate. The local chapter comprises property owners, managers, developers, financial institutions and real estate related professionals who are involved in the areas of commercial and industrial real estate in the State of Hawaii.

NAIOP Hawaii has submitted testimony to the Legislature since the 1990s, voicing its concerns regarding the potential misuse of the conveyance tax. Unfortunately, the concerns voiced by NAIOP over the years have largely come to fruition, through radical increases in rates of the tax, diversion of tax revenues into areas totally unrelated to the conveyance tax, and now, attempts to expand the tax beyond real estate transfers.

The purpose of the conveyance tax was to cover the costs of running the Bureau of Conveyances. (Long-timers in the Legislature may remember that, years ago, the debate every year was whether there should be an increase in the tax to cover a "new computer system" and "automation" for the Bureau.) It was never intended to be a revenue-generating tax. However, over time various non-conveyance uses for the conveyance tax revenue have been proposed and implemented by the Legislature. All of these causes might be worthy, such as protection of the NARS system or facilitating affordable housing, but as NAIOP consistently testified, were never intended to be supported by the conveyance tax.

The rates of the tax have also been increased dramatically. At this point it has become a punitive surtax on many real estate transactions. It is no longer a conveyance tax but a type of capital gains tax surcharge. However, it is more onerous than a true capital gains tax, because not just the gain on the transfer is taxed, but instead the entire face value of the transaction. And it is a hidden tax, because it only shows up as a expense line item on a closing statement.

Now, S.B. No. 97 and a number of similar bills introduced into the Legislature would tax not only transfers of real estate, but also the transfers of stock of entities that own real estate in

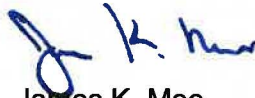
Hawaii. This is clearly beyond the scope of what the conveyance tax was ever intended to cover. And since an income tax is already being imposed on the same money, there is now double-taxation being levied by the State on the same money.

If the Legislature wants to impose a new surcharge tax on transfers of stock, it should do so by enacting a new tax. But it is not honest to claim it is just taxing a "conveyance," because a stock transfer is not a conveyance and was never intended to be covered by this tax.

If these measures become law, they will reinforce the negative image Hawaii has as a place to do business.

Thank you for the opportunity to testify on this measure. We would urge that it be held in committee.

Respectfully,

A handwritten signature in blue ink, appearing to read "J. K. Mee".

James K. Mee  
Chair, Legislative Affairs Committee



Testimony of The Nature Conservancy of Hawai'i  
Supporting with an Amendment S.B. 97 Relating to Taxation  
Senate Committee on Ways and Means  
Tuesday, January 29, 2013, 9:00AM, Room 211

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*The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of the lands and waters upon which life in these islands depends. The Conservancy has helped to protect nearly 200,000 acres of natural lands in Hawai'i. Today, we actively manage more than 32,000 acres in 10 nature preserves on Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.*

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The Nature Conservancy supports S.B. 97, with some suggested amendments noted below. We think it is reasonable that, like direct transfers of real estate via purchase and sale agreements, transfers of real estate via majority stock transfers should also be subject to the State's real estate conveyance tax.

We also think it is important to be clear in this measure that it is neither the value of stock nor the value of the business that is being assessed the conveyance tax, but the value of the realty that is a component of the stock transfer. Therefore, **rather than leaving the realty valuation to subsequent departmental rulemaking, we suggest including in the statute that the real estate valuation shall be the lesser of the county tax assessed value or a recent qualified appraisal, e.g.:**

"The conveyance tax shall be based upon the lesser of the most recent county real property tax assessed value of the realty or, if available, a current qualified appraisal by a licensed real estate appraiser in the State of Hawaii."

In this way, the valuation (1) focuses on the subject of the tax—the realty itself—not on the overall value of the stock or the business; (2) provides the seller the option of getting an appraisal on the realty or relying on the county tax assessed value; and (3) offers the tax department an appropriate external means of determining valuation.

Also, **we believe it may be helpful to specifically note a reporting requirement for stock transfers that affect realty,** and we recommend an amendment to HRS §247-6 like the following:

**"§247-6 Certificate of conveyance required.** (a) Any party, with the exception of governmental bodies, agencies, or officers, to a document or instrument subject to this chapter, or the party's authorized representative, shall file, in the manner and place which the director of taxation shall prescribe, a certificate of conveyance setting forth the actual and full consideration of the property transferred, or the value of the property transferred by way of the transfer of a controlling interest as that term is used in section 247-A, including any lien or encumbrance on the property, and any other facts as the director may by rules prescribe. The certificate of conveyance shall be verified by a written declaration thereon that the statements made therein are subject to the penalties in section 231-36. The certificate shall be appended to the document or instrument made subject to this chapter and shall be filed with the director simultaneously with the aforementioned document or instrument for the imprinting of the required seal or seals.

Under HRS §247-7, a portion of conveyance tax revenue has been appropriately used for land preservation and forested watershed conservation via the Land Conservation Fund and the Natural Area Reserve Fund, respectively. The development and sale of real estate helps drive Hawaii's economy and is helping lift us out of the recent recession, but it also puts pressure on our natural resources like fresh water resources. It makes sense to spend a portion of conveyance tax revenue on protecting those natural resources.

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**SB 97  
RELATING TO TAXATION**

**PAUL T. OSHIRO  
MANAGER – GOVERNMENT RELATIONS  
ALEXANDER & BALDWIN, INC.**

**JANUARY 29, 2013**

Chair Ige and Members of the Senate Committee on Ways & Means:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) on SB 97, "A BILL FOR AN ACT RELATING TO TAXATION."

The purpose of this bill is to apply the conveyance tax to transfers of entity ownership when the transfer of entity ownership is essentially equivalent to the sale of an interest in real property.

We understand that as presently drafted, this new application of the conveyance tax may be imposed on a transfer of controlling interest within an existing entity, which includes transfers from one member of an entity to another member of that same entity. New business entities are often established to merge various interests and types of expertise to synergize efforts to successfully implement a business endeavor. Business knowledge and expertise in the areas of financing, sales and marketing, planning, and entity branding are some of the facets that may be brought together through a business partnership in such an entity. Through these entities, partners will be able to efficiently pool their knowledge, resources, and expertise to effectively implement the entity's business plan.

Should the conveyance tax be applied to internal transfers of interest within entities that hold an interest in Hawaii real estate, we believe that it may have a negative impact on the future use of these types of entities as a means of bringing together the knowledge and expertise necessary to pursue new business opportunities in Hawaii. Potential business partners may be discouraged from becoming members in such entities, as they will need to carefully assess the potential impact of this new tax on their own business plans, goals, and investment objectives. This new application of the conveyance tax may also have a negative impact on attracting outside investments and businesses to the State of Hawaii.

We respectfully request your consideration to incorporate amendments into this bill to exclude from its applicability the transfer of controlling interest between members of an existing entity. We have attached the following amended language for your consideration:

**"§247-A Transfer of a controlling interest; applicability.** (a) Notwithstanding any provision to the contrary, the tax imposed by section 247-1 shall apply to the transfer or conveyance of an interest in realty located in the State as a result of the transfer or acquisition, or a series of transfers or acquisitions, including those combined with otherwise exempt transfers, by any person or entity, acting alone or in concert, within any twelve-month period, that result in the transfer of a controlling interest in an entity which holds an interest in realty that is located in the State and the transfer includes valuable consideration which alters the controlling interest or ownership of the realty; provided that ~~[this section]~~ the tax imposed by section 247-1 shall not apply to:

- (1) Any transfer or acquisition that consists of the change in identity or form of ownership of an entity where there is no change in the beneficial ownership, including transfers to an entity wholly owned, directly or indirectly, by the same common ownership as the transferor; ~~[or]~~

(2) Any transfer from a limited partner to a general partner of a limited partnership that owns an affordable rental housing project for which low-income housing tax credits have been issued under section 235-110.8 or 241-4.7 or section 42 of the Internal Revenue Code of 1986, as amended; or

**(3) Any transfer that consists solely of a change in controlling interest in an entity holding an interest in realty between persons with ownership interests in such entity for a minimum of three years immediately preceding the transfer.**

(b) For the purpose of determining whether, pursuant to the exercise of an option, a controlling interest was transferred or acquired within a twelve-month period, the date that the option agreement was executed shall be the date upon which the transfer or acquisition of the controlling interest is deemed to occur. For all other purposes under this chapter, the date upon which the option is exercised shall be the date of the transfer or acquisition of the controlling interest.

(c) For the purposes of this section with regard to persons acting in concert:

(1) All acquisitions of persons acting in concert shall be aggregated for the purpose of determining whether a transfer or acquisition of a controlling interest has taken place;

(2) Persons shall be considered as acting in concert when they have a relationship with each other such that one person influences or controls the actions of another through common ownership;

(3) Persons shall be considered to be acting in concert only when the unity with which the purchasers negotiate and consummate the transfer of ownership interests supports a finding that the persons are acting as a single entity; and

(4) If acquisitions are completely independent and each purchaser purchases without regard to the identity of the other purchasers, then the acquisitions shall be considered separate acquisitions.

(d) As used in this section, "controlling interest" means:

(1) In the case of a corporation, either fifty per cent or more of the total combined voting power of all classes of stock of the corporation entitled to vote, or fifty per cent or more of the capital, profits, or

beneficial interest in the voting stock of the corporation; and

- (2) In the case of a partnership, association, trust, or other entity, fifty per cent or more of the capital, profits, or beneficial interest in the partnership, association, trust, or other entity.

(e) The director shall adopt rules pursuant to chapter 91 to implement this section, including rules for determining:

- (1) The value of the realty being transferred as the result of the transfer of a controlling interest; and  
(2) Whether persons are acting in concert for the purpose of effectuating the transfer of a controlling interest.

Thank you for the opportunity to testify.



# Sierra Club Hawai'i Chapter

PO Box 2577, Honolulu, HI 96803  
808.538.6616 [hawaii.chapter@sierraclub.org](mailto:hawaii.chapter@sierraclub.org)

**LATE**

## SENATE COMMITTEE ON WAYS AND MEANS

January 29, 2013, 9:00 A.M.  
(Testimony is 1 page long)

### TESTIMONY IN SUPPORT OF SB 97

Aloha Chair Ige and Members of the Committee:

The Sierra Club, Hawaii Chapter, with over 10,000 dues paying members and supporters statewide, **supports** SB 97. This measure eliminates a loophole to the state's conveyance tax whereby transfers of stock interest in a corporation holding title to property would circumvent the intent of the conveyance tax.

As publicized by the recent sales of Lanai Island, Ala Moana Center, and the Victoria Ward Centers,<sup>1</sup> it is clear that larger property owners have found a way to avoid paying the state's conveyance tax. These entities put the property under the control of a corporation, then transfer the stock of the corporation.

This fundamentally becomes an issue of fairness. Why should some property owners be able to evade paying for services that other taxpayers must bear?

We have reviewed and support the recommendations proposed by the Nature Conservancy.

Mahalo for the opportunity to testify.

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<sup>1</sup> <http://www.civilbeat.com/posts/2012/06/28/16186-billionaires-likely-wont-pay-conveyance-tax-on-sale-of-88000-acres-on-lanai/>