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A BILL FOR AN ACT

RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

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

1           SECTION 1.   In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517  
2   P.2d 57 (1973), the Hawaii supreme court held that "land below the  
3   high water mark, like flowing water, is a natural resource owned  
4   by the state subject to, but in some sense in trust for, the  
5   enjoyment of certain public rights." As a result of this  
6   ruling, any structures located seaward of the shoreline location  
7   as determined by the department of land and natural resources  
8   (department) would be considered encroachments upon public land.

9           When an encroachment is discovered, it may be resolved by  
10   either removal or obtaining an easement from the department.  
11   Generally, an easement must be obtained from the department for  
12   a structure within the shoreline area even if the structure was  
13   located within the record boundary of the landward property at  
14   the time of construction.

15           The department has been named as a party in claims  
16   regarding structures, improvements, and debris in the shoreline  
17   area that was once private property.

1 Pursuant to sections 171-13 and 171-17(b), Hawaii Revised  
2 Statutes, easements granted by the board of land and natural  
3 resources (board) under the circumstances described above  
4 require compensation at fair market value.

5 The purpose of this Act is to provide the board the  
6 discretion to grant easements for less than fair market value in  
7 regards to encroaching structures that were authorized by an  
8 appropriate regulatory agency and originally constructed  
9 landward of the shoreline and within the record boundary of an  
10 oceanfront property but are now located within the shoreline  
11 area, due to the dynamic nature of the location of the  
12 shoreline.

13 SECTION 2. Chapter 171, Hawaii Revised Statutes, is  
14 amended by adding a new section to be appropriately designated  
15 and to read as follows:

16 "§171- Special shoreline encroachment easements. (a)  
17 The term "special shoreline encroachment" means a structure that  
18 was authorized by a governmental authority and constructed  
19 landward of the shoreline as defined in chapter 205A, within the  
20 record boundary of the landward property at the time of  
21 construction, but is now located seaward of the shoreline on  
22 public land.

1        (b) The board may grant easements for such special  
2 shoreline encroachments described and defined in subsection (a)  
3 for less than fair market value.

4        (c) Easements granted in accordance with this section  
5 shall not require the prior approval of the governor or prior  
6 authorization of the legislature pursuant to section 171-53."

7        SECTION 3. Section 171-17, Hawaii Revised Statutes, is  
8 amended to read as follows:

9        "**§171-17 Appraisals.** (a) The appraisal of public lands  
10 for sale or lease at public auction for the determination of the  
11 upset price may be performed by an employee of the board of land  
12 and natural resources qualified to appraise lands, or by one but  
13 not more than three disinterested appraisers whose services  
14 shall be contracted for by the board; provided that the upset  
15 price or upset rental shall be determined by disinterested  
16 appraisal whenever prudent management so dictates. No such  
17 lands shall be sold or leased for a sum less than the value  
18 fixed by appraisal; provided that for any sale or lease at  
19 public auction, the board may establish the upset sale or rental  
20 price at less than the appraisal value set by an employee of the  
21 board and the land may be sold or leased at that price. The  
22 board shall be reimbursed by the purchaser or lessee for the

1 cost of any appraisal required to be made by a disinterested  
2 appraiser or appraisers contracted for by the board.

3 (b) The sale price or lease rental of lands to be disposed  
4 of by drawing or by negotiation shall be no less than the value  
5 determined by:

6 (1) An employee of the board qualified to appraise lands;  
7 or

8 (2) A disinterested appraiser or appraisers whose services  
9 shall be contracted for by the board, and such  
10 appraisal, and any further appraisal with the approval  
11 of the board, shall be at the cost of the purchaser;

12 provided that the sale price or lease rental shall be determined  
13 by disinterested appraisal whenever prudent management so  
14 dictates; provided further that should the purchaser fail to  
15 agree upon the sale price or lease rental, the purchaser may  
16 appoint an appraiser who together with the board's appraiser  
17 shall appoint a third appraiser, and the sale price or lease  
18 rental shall be determined by arbitration as provided for in  
19 chapter 658A which shall be final and binding. The purchaser  
20 shall pay for all appraisal costs, except that the cost of the  
21 third appraiser shall be borne equally by the purchaser and the  
22 board.

1        (c) For special shoreline encroachment easements granted  
2 pursuant to section 171-     , the board may grant such easements  
3 for less than fair market value.

4        [~~(c)~~] (d) In the repurchase of any land by the board, the  
5 board shall have the option to repurchase the land for the  
6 original sale price or the fair market value at the time of  
7 repurchase, whichever is the lower. Any improvements affixed to  
8 the realty shall be purchased at their fair market value. At  
9 the time of the repurchase, the fair market value of the land,  
10 and the improvements, if any, shall be determined by a qualified  
11 appraiser whose services shall be contracted for by the board;  
12 provided should the owner fail to agree upon the value, the  
13 owner may appoint the owner's own appraiser who together with  
14 the board's appraiser shall appoint a third appraiser, and the  
15 value shall be determined by arbitration as provided in chapter  
16 658A. The owner shall pay for all appraisal costs, except that  
17 the cost of the third appraiser shall be borne equally by the  
18 purchaser and the board.

19        [~~(d)~~] (e) In the event of reopening of the rental to be  
20 paid on a lease, the rental for any ensuing period shall be the  
21 fair market rental at the time of reopening. At least six

1 months prior to the time of reopening, the fair market rental  
2 shall be determined by:

3 (1) An employee of the department qualified to appraise  
4 lands; or

5 (2) A disinterested appraiser whose services shall be  
6 contracted for by the board;

7 and the lessee shall be promptly notified of the determination;  
8 provided that should the lessee fail to agree upon the fair  
9 market rental, the lessee may appoint the lessee's own appraiser  
10 who together with the board's appraiser shall appoint a third  
11 appraiser and the fair market rental shall be determined by  
12 arbitration as provided in chapter 658A. The lessee shall pay  
13 for the lessee's own appraiser, the board shall pay for its  
14 appraiser, and the cost of the third appraiser shall be borne  
15 equally by the lessee and the board. Any language in present  
16 leases to the contrary notwithstanding, the provisions of this  
17 subsection, when possible and notwithstanding the six-month  
18 notice required, shall apply to leases with original lease  
19 rental reopening dates effective before and after July 1, 1996.

20 [~~e~~] (f) Whenever more than one appraiser is appointed  
21 each shall prepare and submit an independent appraisal. All  
22 appraisal reports shall be available for study by the public."

1 SECTION 4. Section 171-53, Hawaii Revised Statutes, is  
2 amended by amending subsection (c) to read as follows:

3 "(c) The board, with the prior approval of the governor  
4 and the prior authorization of the legislature by concurrent  
5 resolution, may lease state submerged lands and lands beneath  
6 tidal waters under the terms, conditions, and restrictions  
7 provided in this chapter; provided that the authorization of the  
8 legislature shall not be required for leases issued under  
9 chapter 190D; and provided further that the approval of the  
10 governor and authorization of the legislature shall not be  
11 required for any grant of easement or lease of state submerged  
12 lands or lands beneath tidal waters used for moorings, cables,  
13 [~~e~~] pipelines[+], or any special shoreline encroachment as  
14 described and defined in section 171- ; provided further that  
15 this exemption shall not apply to easements for cables used for  
16 interisland electrical transmission or slurry pipelines used for  
17 transportive materials, mined at sea, or waste products from the  
18 processing of the same.

19 The lease shall provide that the lands shall be reclaimed  
20 at the expense of the lessee. Title to the reclaimed lands  
21 shall remain in the State."

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1 SECTION 5. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 6. This Act, upon its approval, shall take effect  
4 retroactive to July 1, 2012.

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INTRODUCED BY: \_\_\_\_\_



7

BY REQUEST

JAN 22 2013



# H.B. NO. 933

**Report Title:**

Special Shoreline Encroachment Easements

**Description:**

Provides the Board of Land and Natural Resources discretion to grant easements for less than fair market value for structures that were authorized by a governmental authority and constructed landward of the shoreline within the record boundary of the landward property at the time of construction, but are now located seaward of the shoreline on public land.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Land and Natural Resources

TITLE: A BILL FOR AN ACT RELATING TO SPECIAL SHORELINE ENCROACHMENT EASEMENTS.

PURPOSE: To provide the Board of Land and Natural Resources (Board) the discretion to grant encroachment type easements for less than fair market value for structures that were previously authorized by a governmental agency and originally constructed landward of the shoreline within the record boundary of the landward property at the time of construction, but are now located seaward of the shoreline on public land; and to exempt easements granted under these circumstances from prior approval of the Governor and prior authorization of the Legislature pursuant to section 171-53(c), Hawaii Revised Statutes (HRS).<sup>1</sup>

MEANS: Add a new section to chapter 171, HRS, and amend sections 171-17 and 171-53(c), HRS.

JUSTIFICATION: In *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), the Hawaii Supreme Court held that "land below the high water mark, like flowing water, is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights." As a result of the ruling, any structures located seaward of the shoreline location as determined by the Department would be considered encroachments upon public land.

When an encroachment is discovered, it may be resolved by either removal or obtaining an easement. Generally, an easement must be obtained from the Department for a structure within the shoreline area even if the structure was located within the record boundary of the landward property at the time of construction.

This legislative proposal seeks to address a situation of inherent unfairness when structures that were authorized by a governmental authority and originally constructed landward of the shoreline within the record boundary of the landward property at the time of construction, but are now located seaward of the shoreline on public land, and easements to legitimize such encroachments requires compensation to the State at fair market value under section 171-17, HRS. The purpose of requiring an easement under these circumstances is to resolve issues of liability and indemnity and not revenue generation, and as such, this measure seeks to grant the Board the discretion to issue the easements for less than fair market value.

Considering that the structures were originally built on private property, an exemption from section 171-53(c), HRS, likely would not compromise the State's fiduciary obligations. In addition, given the volume of easements that are expected to be processed, this exemption would greatly expedite the disposition process.

Allowing the easements to be granted at less than fair market value via a streamlined process<sup>2</sup> would assist in encouraging compliance from littoral landowners entering into easements with the State.

Impact on the public: By resolving the liability and indemnity issues, taxpayers will have greater protection from potential legal and financial liability against the State with regard to these structures.

Impact on the department and other agencies: By facilitating compliance from landowners, this bill will reduce the burden on staff resources from having to pursue enforcement actions.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: LNR 101.

OTHER AFFECTED  
AGENCIES: None.

EFFECTIVE DATE: Retroactive to July 1, 2012, upon its approval.<sup>3</sup>

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<sup>1</sup> Only easements for moorings, cables, and pipelines are currently exempt from the requirement of prior authorization from the Governor and the Legislature. The Department believes an exemption is also warranted for those structures that were authorized by a governmental agency and originally constructed landward of the shoreline within the record property of the landward property at the time of construction, but are now located seaward of the shoreline on public land.

<sup>2</sup> The appraisal process under section 171-17, HRS, can sometimes be expensive and time consuming.

<sup>3</sup> The Department is seeking an effective date retroactive to July 1, 2012, to accommodate certain shoreline easements that were previously approved by the Board, subject to the enactment of a statute that authorizes the Board to grant such easements for less than fair market value, that may meet the stringent requirements for below market value compensation stated in this legislative proposal.