

S.B. NO. 1125

JAN 28 2015

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 designated and to read as
15 follows:

16 **"§171-13.5 Special shoreline encroachment easements. (a)**
17 The term "special shoreline encroachment" means a structure that
18 was authorized by a governmental authority and legally
19 constructed landward of the shoreline (as defined in chapter
20 205A) within the record boundary of the landward property at the
21 time of construction, but is now located seaward of the valid
22 certified shoreline on public land.

1 (b) Such special shoreline encroachments described and
2 defined in subsection (a) may be granted easements for a value
3 determined by the board. The granting of an easement in
4 accordance with this section shall not be construed as state
5 approval of any risk taken by a property owner, nor state
6 ownership or approval of the shoreline encroachments.

7 (c) Easements granted in accordance with this section
8 shall not require the prior approval of the governor or prior
9 authorization of the legislature pursuant to section 171-53.

10 (d) Easements granted in accordance with this section
11 shall take into account the public policies of protection and
12 preservation of the natural shoreline and public pedestrian
13 access along the shoreline and the long-term risks to life and
14 property from coastal hazards."

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

17 "**§171-17 Appraisals.** (a) The appraisal of public lands
18 for sale or lease at public auction for the determination of the
19 upset price may be performed by an employee of the board of land
20 and natural resources qualified to appraise lands, or by one but
21 not more than three disinterested appraisers whose services
22 shall be contracted for by the board; provided that the upset

1 price or upset rental shall be determined by disinterested
2 appraisal whenever prudent management so dictates. No such
3 lands shall be sold or leased for a sum less than the value
4 fixed by appraisal; provided that for any sale or lease at
5 public auction, the board may establish the upset sale or rental
6 price at less than the appraisal value set by an employee of the
7 board and the land may be sold or leased at that price. The
8 board shall be reimbursed by the purchaser or lessee for the
9 cost of any appraisal required to be made by a disinterested
10 appraiser or appraisers contracted for by the board.

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

- 14 (1) An employee of the board qualified to appraise lands;
 - 15 or
 - 16 (2) A disinterested appraiser or appraisers whose services
17 shall be contracted for by the board, and the
18 appraisal, and any further appraisal with the approval
19 of the board, shall be at the cost of the purchaser;
- 20 provided that the sale price or lease rental shall be determined
21 by disinterested appraisal whenever prudent management so
22 dictates; provided further that if the purchaser does not agree

1 upon the sale price or lease rental, the purchaser may appoint
2 an appraiser who shall conduct an appraisal on behalf of the
3 purchaser. If, after the purchaser's appraisal, the board and
4 the purchaser do not agree on the sale price or lease rental,
5 the parties shall make a good faith effort to resolve the
6 dispute through nonbinding mediation by a single mediator,
7 appointed by mutual agreement of the parties. The cost of
8 mediation shall be borne equally by the parties. If mediation
9 does not resolve the dispute, the purchaser's appraiser together
10 with the board's appraiser shall appoint a third appraiser, and
11 the sale price or lease rental shall be determined by
12 arbitration as provided for in chapter 658A, which shall be
13 final and binding. The purchaser shall pay for all appraisal
14 costs, except that the cost of the third appraiser shall be
15 borne equally by the purchaser and the board.

16 (c) For special shoreline encroachment easements granted
17 pursuant to section 171-13.5, such easements may be granted for
18 a value determined by the board.

19 [~~(e)~~] (d) In the repurchase of any land by the board, the
20 board shall have the option to repurchase the land for the
21 original sale price or the fair market value at the time of
22 repurchase, whichever is the lower. Any improvements affixed to

1 the realty shall be purchased at their fair market value. At
2 the time of the repurchase, the fair market value of the land,
3 and the improvements, if any, shall be determined by a qualified
4 appraiser whose services shall be contracted for by the board;
5 provided that if the owner does not agree upon the value, the
6 owner may appoint the owner's own appraiser who shall conduct an
7 appraisal on behalf of the owner. If, after the owner's
8 appraisal, the board and the owner do not agree on the sale
9 price, the parties shall make a good faith effort to resolve the
10 dispute through nonbinding mediation by a single mediator,
11 appointed by mutual agreement of the parties. The cost of
12 mediation shall be borne equally by the parties. If mediation
13 does not resolve the dispute, the owner's appraiser together
14 with the board's appraiser shall appoint a third appraiser, and
15 the value shall be determined by arbitration as provided in
16 chapter 658A. The owner shall pay for all appraisal costs,
17 except that the cost of the third appraiser shall be borne
18 equally by the owner and the board.

19 ~~(d)~~ (e) If a reopening of the rental to be paid on a
20 lease occurs, 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 and provided with the complete appraisal prepared by the board
9 or the board's appraiser; provided that if the lessee does not
10 agree upon the fair market rental, the lessee may appoint the
11 lessee's own appraiser and the lessee shall provide the board
12 with the complete appraisal prepared by the lessee's appraiser.
13 Each party shall pay for its own appraiser. If the board's and
14 the lessee's appraisers do not agree upon the lease rental, the
15 lessee and the board shall in good faith attempt to resolve the
16 dispute by nonbinding mediation by a single mediator mutually
17 agreed upon by the parties. If the dispute is not resolved by
18 the mediation, the fair market rental shall be determined by
19 arbitration as provided in chapter 658A, which shall be final
20 and binding. Either the board or the lessee may initiate
21 arbitration by a written demand to the other party. The
22 arbitration shall be conducted by a single arbitrator, who shall

1 be an attorney licensed in the State, a person with experience
2 in contracts and real estate valuation, or another qualified
3 person, who shall be mutually agreed upon by the parties. If an
4 arbitrator is not selected within fifteen days of the demand for
5 arbitration, appointment of an arbitrator may be requested by
6 either party by motion made to the circuit court in circuit in
7 which the land is located. The cost of mediation or arbitration
8 shall be borne equally by the lessee and the board. Any
9 language in present leases to the contrary notwithstanding, the
10 provisions of this subsection, when possible and notwithstanding
11 the six-month notice required, shall apply to leases with
12 original lease rental reopening dates effective before and after
13 July 1, 1996.

14 [~~e~~] (f) Complete appraisal reports, including all
15 comparables relied upon in the appraisal reports, shall be
16 available for study by the public. All complete appraisal
17 reports shall be provided to the opposing party prior to the
18 commencement of mediation or arbitration, if applicable, of the
19 valuation dispute."

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

S.B. NO. 1125

1 "(c) The board, with the prior approval of the governor
2 and the prior authorization of the legislature by concurrent
3 resolution, may lease state submerged lands and lands beneath
4 tidal waters under the terms, conditions, and restrictions
5 provided in this chapter; provided that the authorization of the
6 legislature shall not be required for leases issued under
7 chapter 190D; and provided further that the approval of the
8 governor and authorization of the legislature shall not be
9 required for any grant of easement or lease of state submerged
10 lands or lands beneath tidal waters used for moorings, cables,
11 [~~or~~] pipelines~~[+]~~, or any special shoreline encroachment as
12 described and defined in section 171-13.5; provided further that
13 this exemption shall not apply to easements for cables used for
14 interisland electrical transmission or slurry pipelines used for
15 transportive materials, mined at sea, or waste products from the
16 processing of the same.

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


20 SECTION 5. Statutory material to be repealed is bracketed
21 and stricken. New statutory material is underscored.

S.B. NO. 1125

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

3

4

INTRODUCED BY: 

5

BY REQUEST

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 legally 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 valid certified 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 determine the value at which to grant shoreline encroachment easements 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).¹

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 require 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 flexibility to determine the value of such easements.

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 Board to determine the value at which the easements are granted via a streamlined process² 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.³

¹ Only easements for moorings, cables, and pipelines on submerged lands are currently exempt from the requirement of prior authorization from the Governor and the Legislature.

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

³ 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.