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GOVERNOR OF HAWAII

SUZANNE D. CASE
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BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

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STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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Testimony of
SUZANNE D. CASE
Chairperson

Before the Senate Committees on
WATER AND LAND
and
LABOR

Friday, February 9, 2018
3:00 PM
State Capitol, Conference Room 224

In consideration of
SENATE BILL 2048
RELATING TO PROPRIETARY INTEREST PROTECTION AGREEMENTS

Senate Bill 2048 proposes to require public land leases to obligate a lessee to enter into a proprietary interest protection agreement (agreement) with any labor organization representing the lessee's employees. **The Department of Land and Natural Resources (Department) has concerns regarding this measure and offers the following comments.**

The Department takes no position on proprietary interest protection agreements themselves. However, the Department believes that it would be disproportionately affected by this measure. It is not clear as to why this measure is only limited to leases of public land that are managed subject to Chapter 171, Hawaii Revised Statutes (HRS). If the Legislature determines that such agreements are in the public interest, the Department notes that limiting the applicability of this measure to public lands subject to Chapter 171, HRS, would exclude many commercial, industrial and agricultural leases issued by other agencies

The measure should be clarified to apply prospectively to future leases, and not retroactively to current leases. The Hawaii Supreme Court in *State v. Kahua Ranch, Ltd.*, held that the terms of a lease awarded via public auction may not be modified. Although the extension of a lease is subject to approval by the Board of Land and Natural Resources (Board), the lease is extended subject to the original terms and conditions. Therefore, the Board would not have the authority to require the lessee to enter into an agreement as a condition of the extension.

The Department also has concerns regarding the potential impacts that may result from this measure. There must be assurances that require both parties to the agreement to negotiate in good faith, so that the agreement is not used solely as a means to prevent a qualified party from obtaining a lease when all other requirements imposed by the Board have been fulfilled.

Additionally, as the members of the Board are not experts in labor affairs, it would be problematic if they would need to resolve issues arising from the agreements. It is unclear under this measure whether a violation of the agreement would constitute a violation of the lease itself. If such is the case, the Board members would need to decide issues beyond the scope of their role as stewards of public land and resources.

Enactment of this measure could affect the revenue collected from leases of public land. Such a requirement could make a State lease less attractive to a potential lessee, and summarily reduce demand for public land leases. The Department notes that this could ultimately result in less revenue collected from the use of ceded lands. Additionally, the Legislature is currently considering measures that propose to significantly increase the share of ceded land revenues paid the Office of Hawaiian Affairs (OHA) via a fixed amount. The two-fold impact of a decrease in ceded land revenues coupled with an increase in fixed revenues paid to OHA would result in the Department having to pay additional funds to alleviate the shortfall, and compromise its natural, cultural and recreational resource management and protection programs.

Thank you for the opportunity to comment on this measure.

SB-2048
Submitted on: 2/7/2018 10:44:19 PM
Testimony for WTL on 2/9/2018 3:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Rachel L. Kailianu	Ho`omana Pono, LLC	Support	Yes

Comments:

LATE

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GCA of Hawaii
GENERAL CONTRACTORS ASSOCIATION OF HAWAII
Quality People. Quality Projects.

Uploaded via Capitol Website

TO: HONORABLE KARL RHOADS CHAIR, HONORABLE MIKE GABBARD, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON WATER AND LAND

HONORABLE JILL TOKUDA, CHAIR, HONORABLE J. KALANI ENGLISH, VICE CHAIR AND MEMBERS OF THE SENATE COMMITTEE ON LABOR

SUBJECT: **COMMENTS AND CONCERNS REGARDING S.B. 2048, RELATING TO PROPRIETARY INTEREST PROTECTION AGREEMENTS.** Requires public land leases to obligate a lessee to enter into a proprietary interest protection agreement with any labor organization representing the lessee's employees.

HEARING

DATE: February 9, 2018
TIME: 3:00 p.m.
PLACE: Conference Room 224

Dear Chair Rhoads and Chair Tokuda, Vice Chair Gabbard and Vice Chair English and Members of the Committees,

The General Contractors Association (GCA) is an organization comprised of over 500 general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA's comments are specific to the language related to labor on page 6 and would request clarification that it be clear that such language is not applicable to private construction work on certain public land leases:

> (10) The lease shall obligate the lessee to enter into a proprietary interest protection agreement with any labor organization that actively seeks to represent the lessee's employees assigned to work at the leased premises. For the purposes of this paragraph, "proprietary interest protection agreement" means a written enforceable agreement that complies with the requirements of the National Labor Relations Act and contains provisions requiring, at a minimum, the lessee to maintain a neutral posture with respect to efforts by the labor organization to represent the lessee's employees, the parties to adhere to a card check procedure, and the labor organization and its members to refrain from engaging in picketing,

work stoppages, boycotts, or other economic interference with the lessee's operation."

GCA requests that this language propose no obligation on the lessee to mandate certain wage rates for construction work performed by private parties on public lease lands. Labor relations and negotiations are a private matter to be determined between a project owner and a contractor providing repairs on a project. While the language appears to apply only to those lessees who may be employing persons working on such public lands, it is not clear whether or not it would apply to those from a private construction company who may be doing such repairs on the property.

In March 2014 the United States District Court for the District of Columbia held that the **development of City Center DC, a large-scale urban redevelopment project in downtown Washington, DC owned by the District of Columbia, did not involve construction of a "public building or public work" and therefore was not subject to Davis Bacon Act coverage (States prevailing wage law is commonly referred to as Little Davis Bacon).** *District of Columbia v. Department of Labor et al.*[1], 1:13-cv-00730. In *District of Columbia* it involved a CityCenter DC, a large mixed use project with retail, office and residential construction owned by the District but leased to developers. The District and developers entered development agreements and the developers agreed to build City Center DC. Upon a union demanding prevailing wages, the City's Mayor determined it did not apply because the project would not be owned by the District nor would any District Funds be used to build the project. In an Appeal, the District Court determined that prevailing wage applies only when government enters into a contract for the construction of public works. The parties in the case agreed that the Davis Bacon Act has never applied to a project that is privately financed, privately owned and privately maintained.

Thank you for the opportunity to share our comments and concerns.

[1] http://image.exct.net/lib/fefd167774640c/d/1/4.7 Govt K DDC DoL DBA Opinion.pdf