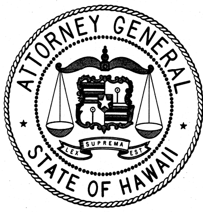

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018

LATE

ON THE FOLLOWING MEASURE:
S.B. NO. 3058, S.D. 2, H.D. 1, RELATING TO PUBLIC LANDS.

BEFORE THE:
HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT AND BUSINESS

DATE: Wednesday, March 21, 2018 **TIME:** 9:50 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Russell A. Suzuki, Acting Attorney General, or
Linda L.W. Chow, Deputy Attorney General

Chair Evans and Members of the Committee:

The Department of the Attorney General has the following comments on this bill.

This bill, as revised in H.D. 1, establishes a ten-year pilot project for the redevelopment of the Kanoelehua Industrial Area and the Banyan Drive region of Hilo, Hawaii. The bill establishes procedures for the creation of a planning committee and redevelopment plans for the identified areas. The bill also amends section 171-36, Hawaii Revised Statutes (HRS).

We believe that the amendment of the bill to create a pilot redevelopment project for the public lands only within the Kanoelehua Industrial area and Banyan Drive region of Hilo, Hawaii, may be deemed to be special legislation, in violation of article XI, section 5, of the Hawaiʻi Constitution.

Article XI, section 5, of the Hawaiʻi Constitution provides:

> The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

Because the bill is clearly an attempt to exercise legislative power over lands owned or under the control of the State, the next issue is whether this bill, if passed, would be a general law or a special law.

The most recent case on this issue is *Sierra Club v. Dept. of Transportation of State of Hawai'i*, 120 Hawai'i 181, 202 P.3d 1226 (2009), as amended (May 13, 2009) ("Sierra Club"). In that decision, the court adopted a two-step analysis to determine if a law was special legislation.

The first step is to determine "whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory." *Sierra Club*, 120 Hawai'i at 203-04, 202 P.3d at 1248-49. A class is not illusory if it had potential future applicability and could include other members in the future. *Sierra Club*, 120 Hawai'i at 204, 202 P.3d at 1249. The actual probability of other members joining the class must be considered in determining whether a class is illusory. *Id.*, at 214, 202 P.3d at 1259.

The second step of the analysis requires determination of whether the class was reasonable. *Id.* To be reasonable, the classification must be based on some distinguishing peculiarity and must reasonably relate to the purpose of the statute. *In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005*, 814 P.2d 875, 887 (Colo. 1991).

The classification in section 1 of H.D. 1 limits application of this bill to only the Kanoelehua Industrial Area and Banyan Drive region. The class, as defined, is limited only to the two named areas. There are no provisions for other redevelopment areas to be created or for other areas to be included in the future. The pilot project will also expire in ten years, providing a limited opportunity for other areas to be included. Part I of the bill, that creates the classification, appears to be special legislation and may violate article XI, section 5, of the Hawai'i Constitution.

By contrast, we believe that the original form of the bill that allowed for the designation of redevelopment districts by the Legislature, and the creation of redevelopment planning committees for those districts, was not special legislation. Under that version of the bill, even though only one redevelopment district was being designated under the bill, other redevelopment districts could be created in the future.

Should this bill go forward, we have the following comments on some technical issues in the bill. Under section 26-35(a)(8), HRS, when a board or commission is

placed within a department for administrative purposes, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers. However, section 5 of the bill provides that the committee shall have the powers and duties that are delegated to the committee by the Board of Land and Natural Resources (Board). The Board may only delegate its powers and duties to the chairperson or employees of the DLNR that are subject to the Board's control and responsibility. HRS section 171-6(8). The Board cannot delegate its powers and duties to the committee.

A second issue is that the proposed section 4, subsection (b), states that the committee shall be a policy-making committee. However, the powers of the committee, as set forth in section 5, subsection (4), includes the authority to renew or renegotiate any lease in connection with any project contained in the redevelopment plan for the designated district, on terms and conditions as the committee deems advisable, without the need to comply with any other provisions contained in chapter 171, HRS. The power of the committee to actually renew or renegotiate leases is inconsistent with the establishment of the committee as a policy-making committee.

A third issue is based both on section 5, paragraph (4) and section 9, which allow for the renegotiation or modification of existing leases. The court in *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963), made it clear that reformation of leases issued pursuant to public auction is not allowed as it would defeat the very purpose of the statutory requirements of public notice and sale at auction. *Id.*, at 36-37, 384 P.2d at 587. If any of the leases within the redevelopment areas were originally let by public auction, those leases could not be renegotiated or modified despite the wording in the bill.

Lastly, although the committee has the power to renew or renegotiate leases within the designated district, there is no provision in the bill that transfers any of the leases in the designated district to the committee. Until and unless the leases are transferred to the committee, the committee would have no authority to amend the terms of the lease. The lessor, for many of the leases in the designated district, would still be the Board. The committee cannot amend a lease to which it is not a party.

For the above reasons, we respectfully ask the Committee to hold this bill.

LATE

Testimony of
Christopher Delaunay, Government Relations Manager
Pacific Resource Partnership

HOUSE OF REPRESENTATIVES
THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS
Representative Cindy Evans, Chair
Representative Jarrett Keohokalole, Vice Chair

Wednesday, March 21, 2018
9:50 a.m.
State Capitol
Conference Room 309

Aloha Chair Evans, Vice Chair Keohokalole and Members of the Committee:

Pacific Resource Partnership (PRP) **supports SB 3058, HD1, with an amendment.**

We respectfully recommend that the redevelopment agreements contain language that would require a developer or developers to comply with chapter 104, Hawaii Revised Statutes, relating to wages and hours of employees working on construction projects within the redevelopment plan.

A prevailing wage requirement for construction projects within the designated district will discourage contractors from competing based on driving down wages and cheapening the quality of construction, which could lead to a less-skilled and less-productive workforce and to shoddy construction practices and unsafe buildings and infrastructure. A prevailing wage requirement will ensure that skilled workers on the job are paid a "living wage" in Hawaii. This not only brings economic and personal security to Hawaii's families and communities, but it also brings more money to the State's economy. Moreover, the use of public lands to develop a private project should require the payment of the prevailing wage.

As such we recommend the following amendment related to the redevelopment agreement **(on page 9, lines 13 – 20, and page 10, lines 1-3)**:

"provided that the redevelopment agreement shall require a developer or developers of the redevelopment to comply with the wage and hour requirements of chapter 104, Hawaii Revised Statutes. Wage and hour requirements of chapter 104, HRS shall be stated in the redevelopment

(Continued From Page 1)

agreement, and copies of the redevelopment agreement shall be filed with the committee; provided further that the developer shall submit weekly certified payrolls to the committee."

Thank you for allowing us to express our opinion on SB 3058, HD1, and we respectfully request your favorable consideration.

About PRP
Pacific Resource Partnership (PRP) is a not-for-profit organization that represents the Hawaii Regional Council of Carpenters, the largest construction union in the state, and more than 240 of Hawaii's top contractors. Through this unique partnership, PRP has become an influential voice for responsible construction and an advocate for creating a stronger, more sustainable Hawaii in a way that promotes a vibrant economy, creates jobs and enhances the quality of life for all residents.

LATE

49 South Hotel Street, Room 314 | Honolulu, HI 96813
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HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT & BUSINESS
Wednesday, March 21, 2018, 9:50 AM, Conference Room 309
Senate Bill 3058, SD 2, HD 1 Relating to Public Lands

TESTIMONY

Chair Evans and Committee Members:

Public notice of this public hearing was not provided until 2:09 pm on March 20, 2018. The League of Women Voters strongly oppose SB 3058, SD 2, HD 1 which designates a redevelopment district within the Kanoelehua Industrial Area and Banyan Drive region of Hawaii County and which establishes an unaccountable "committee" with authority to renew/renegotiate non-bid long-term leases to existing lessees, waive public collection of lease revenues, and adopt a "plan" which overrides unspecified land use ordinances and rules.

We support public planning for redevelopment of public lands and transparent, competitive procedures for the **BLNR** to award long-term commercial leases on public lands. We oppose SB 3058, SD 2, HD 1 because this bill contains provisions which would encourage existing commercial lessees of public lands to "play politics" to gain special unfair treatment.

Thank you for the opportunity to submit testimony

Harry Kim
Mayor

Wil Okabe
Managing Director

Barbara J. Kossow
Deputy Managing Director

County of Hawai'i
Office of the Mayor

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March 20, 2018

LATE

Representative Cindy Evans, Chair
Committee on Economic Development and Business
Hawai'i State Capitol, Room 309
Honolulu, HI 96813

Dear Chair Evans and Committee Members:

Re: SB 3058, SD 2, HD 1 Relating to Waiakea Peninsula, Hilo
Hearing Date: 03-21-18 – 9:50 am; House Conference Room 309

Thank you for this opportunity to comment on SB 3058, SD 2, HD 1.

SB 3058, SD 2, HD 1 was not our first choice in resolving the issues surrounding the redevelopment of State land on the Waiakea Peninsula, but it certainly would be a step forward. Our preferred bill, SB 2972, SD 2, is presently in Finance Committee, and we are hoping that some version of SB 3058, SD 2, HD 1 can also move to Finance, giving the community maximum opportunity to consider and weigh in on the various options.

As to the overall issue of the Waiakea peninsula, Banyan Drive is underutilized and in disrepair. It is the center of tourism in East Hawai'i, but it is a jewel that is quite tarnished at the present time.

Hawai'i County has taken first steps toward revitalizing the peninsula. The administration, Council, community, and Big Island legislators have found common purpose; the redevelopment area has been defined; the Banyan Drive Hawai'i Redevelopment Agency (BDHRA) is functioning, and a conceptual master plan has been created as a starting point. Now funds are needed to conduct the environmental impact statements necessary to complete the redevelopment plan and move forward.

The Hawai'i County budget is severely strapped, and I have already had to impose increases in our property, fuel, and vehicle weight taxes. Therefore, I am hoping the State will provide funds for an EIS. We believe that it is just and proper to ask the State to share in the EIS expense, given that the redevelopment area consists almost entirely of State land, but we recognize that the County must do its part as well, to the best of our financial ability.

County of Hawai'i is an Equal Opportunity Provider and Employer.

Although we think that SB 2972, SD 2 offers the best path forward and builds on work already done, we do not want to risk having this Legislature take no action at all. Therefore, we also support measures, such as SB 3058, SD 2, HD 1 that would direct resources, both statutorily and financially, toward the redevelopment of Banyan Drive while providing some local perspective in decision-making.

In prior testimony, we suggested that SB 3058, SD 2, should be improved with the following amendments:

(1) Changing the makeup of the committee to include appointees by the Mayor (perhaps two or more by Mayor; an equal number fewer by Governor);

(2) Providing that cultural/historical expertise be included in the makeup of the committee;

(3) Providing that the new committee coordinate with BDHRA, which was established under HRS, Chapter 53. The work of the two organizations should be compatible and complementary. In fact, it would be best if, like the BDHRA, the committee's actions were subject to Windward Planning Commission review, and Hawaiʻi County Council adoption of the redevelopment plan;

(4) Providing that all meetings of the committee be in Hilo, and open to the public;

(5) Authorizing and requiring that the district or the committee adopt rules; and

(6) Providing that public hearings be held at least annually during the life of the pilot project.

It appears that the House Committee on Water and Land took into account our concerns, and we very much appreciate that.

I hope you will act favorably on a version of SB 3058, SD 2 HD 1, and move it along to Finance.

Respectfully submitted,

Harry Kim
Mayor, County of Hawaiʻi

DAVID Y. IGE
GOVERNOR OF
HAWAII

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

ROBERT K. MASUDA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
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
SUZANNE D. CASE
Chairperson

Before the House Committee on
ECONOMIC DEVELOPMENT & BUSINESS

Wednesday, March 21, 2018
9:50am
State Capitol, Conference Room 309

In consideration of
SENATE BILL 3058, SENATE DRAFT 2, HOUSE DRAFT 1
RELATING TO PUBLIC LANDS

Senate Bill 3058, Senate Draft 2, House Draft 1 proposes to establish a ten-year redevelopment district pilot project within the Kanoelehua Industrial Area and Banyan Drive region of Hilo until June 30, 2028, and set forth procedures for implementing redevelopment plans through planning committees. The bill also proposes to modify public land leasing restrictions relating to leases of any public lands. The Department of Land and Natural Resources (Department) notes that House Draft 1 deletes the contents of the Senate Draft 2 and replaces it with the substance of another bill before the Legislature this session, House Bill 2641, House Draft 2, while also incorporating a new provision relating to prevailing wages for construction. **The Department opposes this measure.**

Under Chapter 171, Hawaii Revised Statutes, (HRS), the Board of Land and Natural Resource (Board) is authorized to issue leases up to a maximum term of 65 years. Section 171-32, HRS, provides that it is the policy of the State to issue leases by public auction. As the preamble to this bill indicates, at the end of their lease terms, lessees have little incentive to invest in improvements to their leasehold properties because the leases cannot be extended further. Rather, new leases of the lands must be issued pursuant to the public auction process. As a result, the properties frequently fall into disrepair.

In 2015, the Legislative Reference Bureau (LRB) issued Report No. 2, Commercial Leasing of Public Lands: State Policies Regarding Leases Near End of Term. LRB identified those states with maximum lease terms and reviewed how these states' leasing practices dealt with end of the term leases. LRB concluded its report in stating:

While some states have policies that generally address the maintenance and improvement of leased public lands, these policies appear to arise when a lease agreement is initially drafted and entered into, or within the context of negotiations for a lease renewal, rather than during the last few years of an existing lease. In comparison, commercial leases of public lands in Hawaii include a general covenant that requires lessees to maintain the property. The Bureau offers no conclusions regarding which, if any, of the policies employed by the other states represents practices that should be incorporated into the commercial leasing of public lands in Hawaii.

PART I of the bill seeks to promote the redevelopment of public lands in the Kanoelehua Industrial Area and Banyan Drive area of Hilo under a ten-year pilot project. Each area or district would have its own nine-member planning committee to act as the policy-making body for the district. In addition to preparing redevelopment plans for the designated districts, the planning committee would have authority to renew or renegotiate any lease in connection with any project contained in the redevelopment plan for the designated district.

Kanoelehua Industrial Area and Banyan Drive are the Department's primary industrial and hotel/resort landholdings on Hawaii Island, respectively. Regarding the Kanoelehua Industrial Area, many of the leases of public lands in that area were issued in a two or three year period following the 1960 tsunami for terms of 55 years. Most of the lessees in this area applied for ten-year extensions of their lease terms under Section 171-36(b), HRS, which requires the lessee to make substantial improvements to the premises to qualify for a lease extension. Although some of the leasehold improvements are not in good condition, a number of them are well maintained, such as HPM Building Supply, Bank of Hawaii and Big Island Toyota on Kanoelehua Avenue, Central Supply on Makaala Street, Paradise Plants, and Kitchen and Bath Supply on Wiwoole Street, and the Coca-Cola bottling plant on Holomua Street. The Department has spent approximately $138,000 on planning studies for the Kanoelehua Industrial Area since 2014.[1]

With respect to Banyan Drive, although a number of properties are in poor condition, the Department points out that the Hilo Hawaiian Hotel, the Hilo Bay Café (former Nihon Restaurant site), and the Grand Naniloa Hotel are State leasehold properties that are in good condition, with Naniloa currently wrapping up a $20 million renovation. The long-term leases for Uncle Billy's Hilo Bay Hotel (later the Pagoda Hilo Bay Hotel, which was closed in June 2017), Country Club Condominium (which is now a residential apartment building – not a condominium), and Reed's Bay Resort Hotel all expired in 2016 and have been converted to month-to-month revocable permits. No new leases for these sites have issued yet because the Department has been working the County of Hawaii Banyan Drive Hawaii Redevelopment Agency (BDHRA), and prior to that the Banyan Drive Task Force, to develop a long term plan

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1 The Department examined the possibility consolidating smaller parcels in this area to put out to lease at auction as larger lots. The Department's consultant conducted a market study on the demand for industrial parcels in Hilo, a lot consolidation analysis, and a master lease analysis of multiple parcels. These studies are also publicly available on the Department's website at http://dlnr.hawaii.gov/ld/kanoelehua-and-banyan-drive-studies/

for the area. Once a long-term plan for Banyan Drive is settled on, the Department can issue new long-term resort leases for these properties, if that is what BDHRA ultimately supports. On March 7, 2018, the Department posted a request for interest (RFI) on its website as well as on the website of the State Procurement Office regarding the potential demolition of existing structures and reconstruction of a hotel on the former Hilo Bay Hotel site. The RFI was published in several newspapers in the State on March 14, 2018. Since 2014, the Department has spent approximately $524,500 from the SLDF on consultant services and studies dedicated to the public lands at Banyan Drive.[2]

Senate Bill 3058, Senate Draft 2, House Draft 1 includes a provision in PART I specifying that for all contracts for construction projects in excess of $200,000, the redevelopment agreement shall require the developer or developers or their contractors or subcontractors to pay craft employees not less than the prevailing wage rates subject to Chapter 104, HRS. Currently, Chapter 104, HRS, applies to projects built by or for, or funded by, the State or a county, such as government offices, schools, libraries, courthouses and other government facilities. This measure would expand the law to include private projects located on leases of public lands under the jurisdiction of the Department. The Department currently has leases issued to lessees for private operations such as hotels, industrial and warehouse operations and retail centers. Examples of these leases include the Sand Island Industrial Park and West Ridge Mall on Oahu, and the Grand Naniloa and Hilo Hawaiian hotels and HPM hardware store in Hilo, which are all leases of public lands. If private businesses on public land are going to be subject to this legislation, then perhaps all projects, whether located on public or private land, should be made subject to the law. Otherwise, public lands will be placed at a significant disadvantage in the marketplace for resort, industrial and commercial operations. Business may choose to locate their operations on private land, which will ultimately lead to a reduction in ceded land revenues for the State as well as the Office of Hawaiian Affairs.

Furthermore, the bill would require the Department to have oversight over lessees and sublessees above and beyond any rights afforded to and responsibilities required of landlords. The Department's land management staff would have to ensure that its lessees and any sublessees are

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2 The Department procured a consultant to conduct a number of studies to facilitate planning for Banyan Drive including a market study on tourism to determine if the area could support a new hotel, and studies on sea level rise, the viability of master leasing multiple parcels in the area, and the remaining useful life of existing structures on expiring lease premises. These studies are publicly available on the Department's website at http://dlnr.hawaii.gov/ld/kanoelehua-and-banyan-drive-studies/. Another consultant, Erskine Architects, conducted a much more detailed architectural and engineering study on whether existing improvements on the expired lease premises should be demolished or rehabilitated. Yet another consultant recently completed a study on the cost of securing the necessary permitting for demolishing the improvements on the expired leases and completing the demolition.

complying with labor law requirements.[3] The Department does not even have the expertise or staff to evaluate payroll data for compliance with Chapter 104, HRS.[4]

PART II of the bill proposes to amend Chapter 171, HRS, to allow the Board to extend existing leases for an unlimited number of years in exchange for the lessee making substantial improvements to existing improvements or constructing new improvements under an approved development agreement.[5]

In the past, the Department has generally opposed legislative bills that proposed to allow existing lessees to acquire new lease terms on leases that are scheduled to expire soon, following instead general public policy to promote fairness in competition in access to public property. One reason for the Department's position was the statutory policy mentioned above favoring issuance of leases by public auction. Another reason was to preserve the State's legal right to the remaining value of the improvements after the lease term; when leases expire, the lessees' improvements on the land revert to State ownership pursuant to the express terms of the lease, unless the State directs the lessee to remove the improvements. Assuming the improvements have some remaining useful life, the State is then in a position to auction leases of improved properties at potentially greater rents than the State would receive for a ground lease alone, which amounts can in turn be applied to public purposes.

The Department recognizes that a prior legislative act providing for extensions of resort leases did have a beneficial effect on one State lease on Banyan Drive. The lessee of Hilo Hawaiian Hotel property took advantage of Act 219 Session Laws of Hawaii (2011) to extend its lease from 2031 to 2068, making substantial improvements to the property pursuant to a development agreement negotiated between the State and the lessee. However, even Act 219 included a limit on the duration of a lease extension – the aggregate of the remaining lease term and any extension could not exceed 55 years.

The Department thus acknowledges different public policy benefits from different approaches. Based on this, the Department now takes a neutral stance on legislative proposals to extend existing leases. Act 215 Session Laws of Hawaii 2017 allowed lessees of commercial or

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3 This could be problematic and require a reorganization and consultation with the union for the land management division because the staff are land managers and not labor law specialists. Position descriptions and class specifications may need to be changed, which may make it difficult for current staffers to qualify for the position with the added labor law requirements.

4 With the impact of reduced revenues, it would be very difficult financially for the land management division to afford adding new positions or contracting for labor law specialists.

5 Although the bill places a cap of 20 years on extensions of the "fixed rental period" of leases, "fixed rental period" needs to be clearly distinguished from the "lease term." The Department interprets "'fixed rental period" to mean the period of time for which the rent under a lease is known prior to the next rent reopening. Most of the Department's leases have rent reopenings at 10-year intervals. Public auction leases occasionally have longer fixed rental periods initially, especially when the successful bidder is required to construct new improvements. "Lease term" refers to the total lease duration from commencement to expiration. The bill seems to conflate these two concepts.

industrial lands who are in the last ten years of their lease terms to voluntarily enter into a process to determine interest in future land leases. If no interest were expressed other than by the current lessee, then the lessee would have the ability to directly negotiate a new lease with the Department. The Department believes, however, that indefinite extensions of leases that preclude the public from ever having an opportunity to bid on a lease at auction are not the appropriate solution.

In addition, the Department identifies the following issues with respect to this measure:

The bill creates an additional layer of bureaucracy in government

The bill provides that the Legislature may designate an area of public lands as a redevelopment district. Upon such designation, a nine-member planning committee is to be established as a policy-making board for the district. The planning committee, who serves without compensation, then appoints a district administrator for the district who is to be compensated. The planning committee may hire additional staff as well.

With respect to Banyan Drive, the bill creates a new layer of redevelopment process in addition to the task force and the BDHRA: a planning committee to serve as a policy-making board for the district. In addition to the administrator, the planning committee would likely require a secretary and perhaps more staff for proper administration, as well as office equipment, supplies, and travel expenses for the eleven committee members. There will be added expense for the committee to comply with sunshine law requirements under Chapter 92, HRS. Further, the committee's actions may be subject to contested case hearings and appeals. The bill provides for a general appropriation in an unspecified amount to carry out the purposes of the measure. A conservative budget for such a planning committee, including payroll, fringe benefits, hearing officer fees, and other costs and expenses, would be $500,000 annually. If the appropriation is set an amount lower than that figure, then the difference would apparently be covered by the Department's revenues from leases in the designated district.

The bill proposes an unnecessary, bureaucratic addition to the Department's operations. As explained above, the Department has been working with the BDHRA regarding plans for the Banyan Drive area. Additionally, as mentioned above, the Department has procured consultants for Banyan Drive and the Kanoelehua Industrial Area in Hilo to analyze market trends, and explore options for redevelopment and rehabilitation of specific parcels or areas. After 2013 legislative session, former Governor Abercrombie approved the formation of a Banyan Drive Task Force that met a number of times to discuss many of the issues covered by the bill as they relate to the Banyan Drive area. The task force members included representatives from local businesses, the former executive director of the Big Island Visitors Bureau, the executive director of the 'Imiloa Astronomy Center of Hawaii, and representatives from the Hawaii County Mayor's Office and State legislators also attended the meetings. This informal task force worked well and at limited expense to the State.

There are practical problems with the bill

As noted above, Senate Bill 3058, Senate Draft 2, House Draft 1 allows the Legislature to designate redevelopment districts on public lands. As defined in Section 171-2, HRS, public lands exclude lands used as roads and streets. While the State owns some contiguous parcels in

both the Banyan Drive area and Kanoelehua Industrial Area in Hilo, it does not own or manage the roads, which often include utility lines and other infrastructure. Accordingly, to the extent the bill seeks to improve infrastructure in a given area, a redevelopment district designated by the Legislature would likely not include important infrastructure components. Rather, the district would be confined to the particular parcels under the Department's management.

The Department relies on the revenues from leases of public lands to fulfill its fiduciary duties

The bill proposes to appropriate an undetermined amount from the Special Land and Development Fund (SLDF) as may be necessary for Fiscal Year 2018-2019 to carry out the purposes of the bill. In addition to this bill seeking an appropriation of the revenues from the SLDF for the redevelopment areas, there are various other redevelopment agency bills moving this session seeking to take up to 50% of the revenues generated from the Banyan Drive leases. These lands are ceded and the Office of Hawaiian Affairs is currently receiving 20% of the revenues and is seeking to increase its share by more than 100% from $15.1 million to $35 million annually. Neither this bill nor the redevelopment agency bills relieve the Department of the lease management duties. Therefore, if these measures were all to pass and become law, the Department would be left in the very unfortunate situation of having to manage all of those leases (bill, collect, inspect, procure and pay for professionals for rental and reopening valuations) but receive low revenue in return..

The Department and the Board are responsible for managing approximately 1.3 million acres of public lands comprised of sensitive natural, cultural and recreational resources. The Department's responsibilities include managing and maintaining the State's coastal lands and waters, water resources, conservation and forestry lands, historical sites, small boat harbors, parks, and recreational facilities; performing public safety duties (e.g., flood and rockfall prevention); issuing and managing leases of public lands (agriculture, pasture, commercial, industrial, and resort leases); maintaining unencumbered public lands; and enforcing the Department's rules/regulations.

To properly perform these fiduciary duties, the Board determined that the Department should utilize a portion of the lands it manages to generate revenues to support the Department's operations and management of public lands/programs. Annual lease revenues currently support the SLDF, with revenues coming primarily from leases for commercial, industrial, resort, geothermal and other renewable energy projects.

The SLDF is a critical and increasingly important funding source for various divisions within the Department to deal with emergency response to natural catastrophes such as fire, rockfall, flood or earthquake and hazard investigation and mitigation. The SLDF also is critical for staff support of various programs and funding conservation projects on all state lands. It has also become an important source of state match for federally funded endangered species and invasive species initiatives that otherwise would not go forward.

The authority to construct, improve, renovate and revitalize areas within the counties is already authorized under Section 46-80.5 and Chapter 53, HRS.

The bill seeks to redevelop the infrastructure and facilities within designated redevelopment districts. However, the bill is unnecessary because there are already existing laws and

ordinances that provide the process and financing to make such improvements, as evidenced by the County of Hawaii's creation of BDHRA under Chapter 53, HRS.

Section 46-80.5, HRS, authorizes the various counties to enact ordinances to create special improvement districts for the purpose of providing and financing such improvements, services, and facilities within the special improvement district as the applicable county council determines necessary or desirable to restore or promote business activity in the special improvement district. This is the same purpose sought by this bill.

Under the authority of Section 46-80.5, HRS, the County of Hawaii, as an example, enacted Chapter 12 of the Hawaii County Code, which authorizes the County of Hawaii to create improvement districts to construct new, or improve existing infrastructure and facilities, including roadways and utility infrastructure and improvements. It should also be noted that the responsibilities for maintaining such improvements within the proposed redevelopment districts are already vested with the County of Hawaii. Most, if not all, of the public roadways and utility infrastructure within any potentially designated district boundaries have been dedicated to the County.

Thank you for the opportunity to comment on this measure.

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

LATE

SB3058 SD2 HD1
RELATING TO PUBLIC LANDS
House Committee on Economic Development & Business

March 21, 2018 9:50 a.m. Room 309

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the Board of Trustees **OPPPOSE** SB1469 HD1, which would authorize lease extensions for a wide variety of public land leases, allowing public lands to be placed in the hands of a single private lessee for over a century.

This measure may authorize leases that violate the State's fiduciary obligations under the public trust and the public land trust. Under Article 11, section 1 of the Hawaiʻi State Constitution and Chapter 171, Hawaiʻi Revised Statutes (HRS), the State, through the Board of Land and Natural Resources (BLNR), holds in trust approximately 1.3 million acres of public lands, including the natural and cultural resources they contain, for the benefit of present and future generations. Much of these lands are also subject to the public land trust created by Article 12 of the Hawaiʻi State Constitution and section 5(f) of the Admission Act, which requires that a portion of revenues derived from public land trust lands be dedicated to OHA, for the purpose of bettering the conditions of Native Hawaiians. The trust status of these lands imposes upon the BLNR specific fiduciary obligations of due diligence and undivided loyalty, in making the trust corpus productive and maximizing its benefits for the trust's Native Hawaiian and public beneficiaries. **By authorizing the extension of agriculture, aquaculture, commercial, mariculture, livestock, pasture, hotel, resort, and industrial leases – many of which may have already been held by their respective lessees for over half a century – for up to 65 years, this bill may invite century-long leases that substantially inhibit the BLNR and future generations from ensuring the best and most appropriate uses of trust lands, which may otherwise provide much greater benefits to both Native Hawaiians and the public.** For example, this measure could allow a public land lease that has been held for 50 years, with 5 years left to run, for an additional 60 years. This would result in the use of public lands by a private entity for 110 years, so long as the lessee agrees "to make substantial improvements to the existing improvements or to construct new improvements." In addition to tying the state's and future generations' hands in ensuring the appropriate use of and revenues from public trust lands, such a long-term lease can lead to a sense of entitlement that can result and has resulted in the alienation of public lands.

OHA understands that this measure appears intended to facilitate the redevelopment of "commercial, industrial, resort, and hotel parcels," such as the commercial and hotel lands along Banyan Drive in Hilo. OHA also understands that the redevelopment of such areas may be facilitated by allowing for lease extensions consistent with standard mortgage terms, such as the 20-year extension provided for in the original version of this measure. The current measure, however, would allow for public land lease extensions far beyond any reasonable mortgage term, for a broad range of leases including hotel, resort, agriculture, pasture, and livestock leases.

Therefore, OHA urges the Committee to **HOLD** SB3058 SD2 HD1. Mahalo for the opportunity to testify on this measure.

Common Cause
Hawaii
Holding Power Accountable

LATE

House Committee on Economic Development and Business
Chair Cindy Evans, Vice Chair Jarrett Keohokalole

03/21/2018 9:50 AM Room 309
SB3058 SD2 HD1– Relating to Public Lands

TESTIMONY / OPPOSE
Corie Tanida, Executive Director, Common Cause Hawaii

Dear Chair Evans, Vice Chair Keohokalole, and members of the committee:

Common Cause Hawaii opposes SB3058 SD2 HD1 which would establish a ten-year redevelopment district pilot project in the Kanoelehua Industrial Area and Banyan Drive region.

As this bill seems reminiscent of the Public Lands Development Corporation (PLDC), we are reminded that one of the many issues raised was the lack of transparency and access. Thus, because planning committees are given broad powers including the ability to renew or renegotiate leases, and the ability to make and execute contracts, the public should be afforded every opportunity to participate and voice their opinions on plans and activities, throughout the entire process.

SB3058 SD2 HD1 specifies that planning committees "shall hold annual public hearings" on the proposed redevelopment plan. We believe that the public should be involved from the outset, not after a plan has already been drafted, as these plans and how they're implemented will affect various neighborhoods and residents' daily lives.

We respectfully urge the committee to **defer this bill**.

Thank you for the opportunity to offer testimony **opposing SB3058 SD2 HD1.**

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

Uploaded via Capitol Website

March 21, 2018

TO: HONORABLE CINDY EVANS, CHAIR, HONORABLE JARRETT KEOHOKALOLE, VICE CHAIR, HOUSE COMMITTEE ON ECONOMIC DEVELOPMENT AND BUSINESS

SUBJECT: **OPPOSITION & REQUEST FOR AMENDMENTS TO S.B. 3058 SD2, HD1 RELATING TO PUBLIC LANDS.** Establishes a ten-year redevelopment district pilot project within the Kanoelehua Industrial Area and Banyan Drive region until 6/30/2028. Modifies public land lease restrictions. Appropriates funds. (SB3058 HD1)

HEARING

DATE: Wednesday, March 21, 2018
TIME: 9:50 am
PLACE: Conference Room 309

LATE

Dear Chair Evans, Vice Chair Keohokalole, and Members,

The General Contractors Association of Hawaii (GCA) is an organization comprised of over hundred five hundred seventy general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. The 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.

S.B. 3058, SD2, HD1 proposes to provide for a special designation of public lands on the Big Island that may be classified as commercial, industrial, resort and hotel use by establishing a ten year pilot project for the redevelopment of Kanoelehua Industrial Area and Banyan Drive region. This concept would be in place to allow incentives for current and future lessees to improve their parcels and avoid disrepair toward the end of their lease term.

While GCA supports the intent of this measure which could incentivize the revitalization of this area and encourage lessees to improve their leased lands – the GCA is opposed to Section 5 of the bill which suggests that for construction projects on leased lands within this redevelopment area that exceeds $200,000 the developers and contractors must pay prevailing wage and comply with certified payroll. This provision proposes an overreach of Chapter 104, HRS in requiring that the prevailing wage rates be paid for projects that are fully funded by private monies. There are a number of questions that must be asked: How will current lessees feel about this measure – and how could this bill will affect them? What would this "committee" do with the weekly submissions of certified payroll and whether such expansion of the law comports with the intent of the original for enactment of this statute. How will this prevailing wage rate mandate affect small business and a lessee's potential to improve a parcel, and a project's overall cost?

Furthermore, compliance with Chapter 104, HRS requires a weekly submission of payroll for the general contractor and subcontractors in every craft or trade, and any non-compliance result include significant penalties. This law would require that any construction improvement over $200,000 would be subject to these Chapter 104 requirements. See attached Hawaii Department of Labor and Industrial Relations Chapter 104 weekly certified payroll requirements.

S.B. 3058, SD2, HD1 will unfairly expand the application of prevailing wage rates for laborers and mechanics, also known as "Little Davis Bacon" to include construction projects on public lands regardless of whether the work is paid from public funds, and projects for which public lands are used as security for financing. While there are some exemptions, it will still have a significant impact on current leaseholders on public state lands. Additionally, any work done on weekends or state holidays could be subject to overtime that may be equal to double or triple the cost of prevailing wage rates due to the passage of Act 165 (2015) . Will these leaseholders be subject to same?

GCA respectfully requests the Committee consider deletion of the following provision (Section 5, Page 9, Lines 13-20 to Page 10, Lines 1-3):

> ~~provided that where the contract for a construction project exceeds $200,000, the redevelopment agreement shall require the developer or developers or their contractors or subcontractors to pay craft employees not less than the prevailing wage rates subject to chapter 104, Hawaii Revised Statutes, and this prevailing wage requirement shall be stated in the redevelopment agreement, which shall be filed with the committee; and provided further that the developer or developers shall submit weekly certified payrolls to the committee;~~

Under federal law the Davis Bacon Act requires that "each contract over $2,000 to which the United States or the District of Columbia is a party for construction, alteration, and/or repair of **public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classification of laborers and mechanics employed under contract."** *21 U.S.C. 113.* Hawaii's law defines "public work" in Section 104-1, Hawaii Revised Statute similar to federal law as:

> any project, including development of any housing pursuant to section 46-15 or chapter 201H and development, construction, renovation, and maintenance related to refurbishment of any real or personal property, **where the funds or resources required to undertake the project are to any extent derived, either directly or indirectly, from public revenues of the State or any county**, or from the sale of securities and bonds whose interest or dividends are exempt from state or federal taxes.

Projects on leased lands are not considered a "public work" that triggers the applicability of Chapter 104, HRS. **While GCA agrees that the prevailing wage should be paid when applicable, GCA cannot support this proposal as it exceeds the reach of what the prevailing wage law was intended to cover. Compliance with Wage laws are in effect and should be enforced, however the applicability of Chapter 104, HRS to purely privately financed projects is an overreach of the intent of the law as originally passed.**

For these reasons, we respectfully request deleting the recently added provision mandating that Chapter 104, HRS prevailing wage rates apply to publicly leased lands.

Requirements of Chapter 104, HRS
Wages and Hours of Employees on Public Works Law

Chapter 104, HRS, applies to every public works construction project over $2,000, regardless of the method of procurement or financing (purchase order, voucher, bid, contract, lease arrangement, warranty, SPRB).

Rate of Wages for Laborers and Mechanics

- Minimum prevailing wages (basic hourly rate plus fringe benefits), as determined by the Director of Labor and Industrial Relations and published in wage rate schedules, shall be paid to the various classes of laborers and mechanics working on the job site. [§104-2(a), (b), Hawaii Revised Statutes (HRS)]

- If the Director of Labor determines that prevailing wages have increased during the performance of a public works contract, the rate of pay of laborers and mechanics shall be raised accordingly. [§104-2(a) and (b), HRS; §12-22-3(d) Hawaii Administrative Rules (HAR)]

Overtime

- Laborers and mechanics working on a Saturday, Sunday, or a legal holiday of the State or more than eight hours a day on any other day shall be paid overtime compensation at not less than one and one-half times the basic hourly rate plus the cost of fringe benefits for all hours worked. If the Director of Labor determines that a prevailing wage is defined by a collective bargaining agreement, the overtime compensation shall be at the rates set by the applicable collective bargaining agreement [§§104-1, 104-2(c), HRS]

Weekly Pay

- Laborers and mechanics employed on the job site shall be paid their full wages at least once a week, without deduction or rebate, except for legal deductions, within five working days after the cutoff date. [§104-2(d), HRS]

Posting of Wage Rate Schedules

- Wage rate schedules with the notes for prevailing wages and special overtime rates, shall be posted by the contractor in a prominent and easily accessible place at the job site. A copy of the entire wage rate schedule shall be given to each laborer and mechanic employed under the contract, except when the employee is covered by a collective bargaining agreement. [§104-2(d), HRS]

Withholding of Accrued Payments

- If necessary, the contracting agency may withhold accrued payments to the contractor to pay to laborers and mechanics employed by the contractor or subcontractor on the job site any difference between the wages required by the public works contract or specifications and the wages received. [§104-2(e), HRS]

Certified Weekly Payrolls and Payroll Records

- A certified copy of all payrolls shall be submitted weekly to the contracting agency.

- The contractor is responsible for the submission of certified copies of the payrolls of all subcontractors. The certification shall affirm that the payrolls are correct and complete, that the wage rates listed are not less than the applicable rates contained in the applicable wage rate schedule, and that the classifications for each laborer or mechanic conform with the work the laborer or mechanic performed. [§104-3(a), HRS]

- Payroll records shall be maintained by the contractor and subcontractors for three years after completion of construction. The records shall contain: [HAR §12-22-10]
  - the name and home address of each employee
  - the employee's correct classification
  - rate of pay (basic hourly rate + fringe benefits)
  - itemized list of fringe benefits paid
  - daily and weekly hours worked
  - weekly straight time and overtime earnings
  - amount and type of deductions
  - actual wages paid
  - date of payment

- Records shall be made available for inspection by the contracting agency, the Department of Labor and Industrial Relations, and any of its authorized representatives, who may also interview employees during working hours on the job. [§104-3(b), HRS]

Termination of Work on Failure to Pay Wages

- If the contracting agency finds that any laborer or mechanic employed on the job site by the contractor or any subcontractor has not been paid prevailing wages or overtime, the contracting agency may, by written notice to the contractor, terminate the contractor's or subcontractor's right to proceed with the work or with the part of the work in which the required wages or overtime compensation have not been paid. The contracting agency may complete this work by contract or otherwise, and the contractor or contractor's sureties shall be liable to the contracting agency for any excess costs incurred. [§104-4, HRS]

Apprentices and Trainees

- In order to be paid apprentice or trainee rates, apprentices and trainees must be parties to an agreement either registered with or recognized as a USDOL nationally approved apprenticeship program by the Department of Labor and Industrial Relations, Workforce Development Division, (808) 586-8877. [§12-22-6(1), HAR]

- The number of apprentices or trainees on any public work in relation to the number of journeyworkers in the same craft classification as the apprentices or trainees employed by the same employer on the same public work may not exceed the ratio allowed under the apprenticeship or trainee standards registered with or recognized by the Department of Labor and Industrial Relations. A registered or recognized apprentice receiving the journeyworker rate will not be considered a journeyworker for the purpose of meeting the ratio requirement. [§12-22-6(2), HAR]

Enforcement

- To ensure compliance with the law, DLIR and the contracting agency will conduct investigations of contractors and subcontractors. If a contractor or subcontractor violates the law, the penalties are:

  - First Violation — Equal to 25% of back wages found due or $250 per offense up to $2,500, whichever is greater.
  - Second Violation — Equal to amount of back wages found due or $500 for each offense up to $5,000, whichever is greater.
  - Third Violation — Equal to two times the amount of back wages found due or $1,000 for each offense up to $10,000, whichever is greater; and
    Suspension from doing any new work on any public work of a governmental contracting agency for three years.

  - A violation would be deemed a second violation if it occurs within two years of the **first notification of violation**, and a third violation if it occurs within three years of **the second notification of violation**.

  - **Suspension**: For a first or second violation, the department shall immediately suspend a contractor who fails to pay wages or penalties until all wages and penalties are paid in full. For a third violation, the department shall penalize and suspend the contractor as described above, **except that if the contractor continues to violate the law, then the department shall immediately suspend the contractor for a mandatory three years. The contractor shall remain suspended until all wages and penalties are paid in full.** [§§104-24, 104-25]

- **Suspension**: Any contractor who fails to make payroll records accessible or provide requested information within 10 days, or fails to keep or falsifies any required record, shall be assessed a penalty including suspension as provided in Section 104-22(b) and 104-25(a)(3), HRS. [§104-3(c)]

- If any contractor interferes with or delays any investigation, the contracting agency shall withhold further payments until the delay has ceased. Interference or delay includes failure to provide requested records or information within ten days, failure to allow employees to be interviewed during working hours on the job, and falsification of payroll records. The department shall assess a penalty of $10,000 per project, and $1,000 per day thereafter, for interference or delay. [§104-22(b)]

- Failure by the contracting agency to include in the provisions of the contract or specifications the requirements of Chapter 104, HRS, relating to coverage and the payment of prevailing wages and overtime, is not a defense of the contractor or subcontractor for noncompliance with the requirements of this chapter. [§104-2(f)]

For additional information, visit the department's website at *http://labor.hawaii.gov/wsd*
or contact any of the following DLIR offices:

Oahu (Wage Standards Division)................................(808) 586-8777
Hawaii Island ....(808) 322-4808
Kauai ....(808) 274-3351
Maui ....(808) 243-5322