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GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WATER AND LAND**

**Monday, February 8, 2021
1:00 PM
State Capitol, Conference Room 229**

**In consideration of
SENATE BILL 1167
RELATING TO LEASE EXTENSIONS ON PUBLIC LAND**

Senate Bill 1167 proposes to authorize the Board of Land and Natural Resources (Board) to extend leases of public lands for commercial, industrial, or resort use upon approval of a proposed development agreement to make substantial improvements to the existing improvements. The measure would repeal on June 30, 2026. **The Department of Land and Natural Resources (Department) strongly supports this Administration measure.**

Senate Bill 1167 proposes to authorize the Board, on a statewide basis, to extend commercial, industrial, and resort leases that have not been sold or assigned within 20 years prior to receipt of an application for a lease extension under the measure, when the lessee commits to substantial improvement to the existing improvements, provided that lease extensions cannot exceed 40 years, and additionally, the lessee cannot transfer or sell the lease during the term of the extension period, except by devise, bequest, or intestate succession. The bill is intended to support long-term tenants wishing to continue their businesses past the 65-year maximum lease term allowed under current law.

One of the arguments the Department has heard against restrictions on assignment is that lessees need to be able to mortgage their leasehold interests in the land. Senate Bill 1167 would not prohibit "true" subleases, which the Department views as those in which the lessee/sublessor retains either a portion of the lease premises for its own use or reserves a portion of the lease term after the sublease ends for its own use. In contrast, a transaction styled as a sublease but which in effect is an assignment of all of the lessee's interest in the lease would not be allowed under the bill during the extension period. The Department additionally notes that assignments and subleasing are governed by two separate subsections of Section 171-36, Hawaii Revised Statutes (HRS): Section 171-36(a)(5), HRS, for assignments, and Section 171-36(a)(6), HRS, for

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

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
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

subleasing. Senate Bill 1167 is not intended to affect subleasing under Section 171-36(a)(6), HRS.

As noted above, Senate Bill 1167 acknowledges the commitment of long-term lessees to locating their business on state lease lands and to ensure that such lessees could continue to operate those businesses for the duration of the extension period authorized under the measure. The Department is concerned that making lease extensions available on a broader basis could lead to speculators acquiring state leases, obtaining extensions, putting in the minimum 50% of substantial improvements required, and flipping the leases for a profit. The Department does not believe such speculation is in the best interests of the State.

The Department does, however, propose an amendment to the bill to allow for extensions of leases for mixed-development use in addition to commercial, industrial, or resort uses. The reason for the amendment is that leases of lands in densely populated areas of the State may involve a combination of commercial, resort, and residential and uses to make the fullest use of public lands in urban cores. Accordingly, the Department recommends amending SECTION 1 and SECTION 2, §171-___(a) of the measure as follows (amendments in gray shading):

SECTION 1. Many of the leases for commercial, industrial, ~~and~~ resort, and mixed use properties on public land statewide may be nearing the end of the lease term. Faced with the uncertainty of continued tenancy lessees have little incentive to make major investments in infrastructural improvements and to ensure the long-term maintenance of the facilities. As a result, the infrastructure on these properties has been deteriorating.

Business lessees typically sell or assign their leases that are nearing the end of the lease terms at a discount, and believes that it would be unfair to the prior assignors of the leases if the State granted extensions of leases that previously could not be extended under existing law or lease terms to the newly assigned lessees who acquired their leases at a discount due to short remaining lease terms.

The purpose of this Act is to authorize the board of land and natural resources to extend commercial, industrial, ~~or~~

resort, or mixed-use leases that have not been sold or assigned within the last twenty years, for lessees who commit to substantial improvement to the existing improvements.

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

"§171-___ Commercial, industrial, ~~[or]~~ resort, or mixed-use leases; extension of term. (a) Notwithstanding section 171-36, for leases that have not been assigned or transferred within twenty years prior to receipt of an application for a lease extension submitted pursuant to this section, the board may extend the rental period of a lease of public lands for commercial, industrial, ~~[or]~~ resort, or mixed use upon the approval by the board of a development agreement proposed by the lessee or by the lessee and developer to make substantial improvements to the existing improvements.

The Department further recommends amending SECTION 2, §171-___ to add a new subsection (i) to read as follows:

(i) As used in this section, "mixed use" means a development that combines two or more of the following uses in a single project: commercial use, resort use, or multifamily residential use.

Thank you for the opportunity to comment on this measure.



SB1167
RELATING TO LEASE EXTENSIONS ON PUBLIC LAND
Ke Kōmike ‘Aha Kenekoa o ka Wai a me ka ‘Āina

Pepeluali 8, 2021

1:00 p.m.

Lumi 229

The Office of Hawaiian Affairs (OHA) Beneficiary Advocacy and Empowerment Committee will recommend that the Board of Trustees **OPPOSE** SB1167, which would authorize century-long leases that bind the hands of the Board of Land and Natural Resources (BLNR) from fulfilling its fiduciary obligations of due diligence and undivided loyalty, in maximizing the beneficial disposition of **public lands leased for industrial, commercial, and resort purposes throughout the entire state**. OHA notes that it also opposes nearly identical bills HB499 and SB257 this year, and likewise opposed nearly identical bills last year and in 2019 for these same reasons, as described further below.

1. Act 149’s “pilot project” has not been completed or evaluated; allowing forty-year lease extensions for any and all industrial, commercial, and resort leases of public lands across the state may be premature.

As a preliminary matter, OHA notes that the legislation this measure appears to have been based on, Act 149, was enacted in 2018 as a “pilot project” to determine whether public land lease extensions in the dilapidated “Hilo community economic district” can “facilitate efficient and effective improvement, and economic opportunity,” and whether such an approach “can be replicated in other areas of the State.”

However, rather than wait for the pilot program to conclude, this measure would summarily expand much broader lease extension authorities for **any and all industrial, commercial, or resort leases of public lands throughout the entire state**. Such an expansion appears premature given Act 149’s acknowledged need to first assess whether any redevelopment benefits from its lease extension provisions “can be replicated in other areas of the State.” Indeed, there are several considerations that may need to be assessed from Act 149’s pilot project, including but not limited to:

- Whether redevelopment occurs in a timely manner as a result of its lease extension authorities;
- Whether the cost-benefits to the State and the public, including opportunity costs, foreclosed revenue increases from real estate market changes, and foregone equity in existing and new improvements that would otherwise revert to the State justify the long-term placement of public lands under private control;
- Whether 40-year extensions of lease terms and fixed rental periods are necessary to obtain redevelopment financing;

- Whether specific conditions, contingencies, safeguards, or other considerations should be considered in the development of extension terms and conditions; and
- Whether any replication of its lease extension authority should be limited to certain leases or circumstances.

Accordingly, OHA strongly recommends that the Committee allow for an appropriate assessment of the potential unintended consequences, cost-benefits, and other lessons from Act 149, before expanding much broader lease extension authorities to all other industrial, commercial, and resort public land leases throughout the islands.

2. This measure may authorize leases that violate the State’s fiduciary obligations under the public trust and Public Land Trust, and lead to the alienation of public and “ceded” lands.

Under Article 11, section 1 of the Hawai‘i State Constitution and Chapter 171, Hawai‘i Revised Statutes (HRS), the State through the 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 Hawai‘i 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 ensuring its trust corpus is productive and that its benefits are maximized for Native Hawaiian and public beneficiaries. **By authorizing the extension of commercial, industrial, or resort public land leases – many of which may already have been held by their respective lessees for the better part of a century – for up to 40 years, this bill may invite century-long leases that substantially inhibit the BLNR from fulfilling its fiduciary obligations, and otherwise ensuring the best and most appropriate uses of lands subject to the public trust and public land trust.**

For example, this measure could allow public land leases first issued for 55 years, and subsequently extended another 10 years, to be again extended for an additional 40 years, with fixed rental periods for the same amount of time. This could result in the use of public lands by private entities for **105 years, without any rent reopening for over a generation**, so long as the BLNR agrees to lessees’ proposals to make “substantial improvements to the existing improvements or constructing new substantial improvements.” **Notably, the lack of an aggregate lease length cap as well as any prohibition on additional lease extensions could allow lease terms and fixed rent periods to be repeatedly extended, for an indefinite length of time, further drawing into question the ability of future generations to ensure the appropriate disposition of public lands – something that even Act 149 does not allow.** The fact that industrial, commercial, and resort lands may have the highest revenue potential of the State’s land inventories only further exacerbates the concerns underlying this measure’s lease extension provisions.

In addition to tying the State’s and future generations’ hands in ensuring the appropriate use of and realization of revenues from public trust and Public Land Trust lands, the excessively

long-term leases that would be authorized under this measure may lead to a sense of entitlement among lessees that can result (and has resulted) in the alienation of public lands, including “ceded” lands to which Native Hawaiians have never relinquished their claims.

OHA objects to the sale or alienation of “ceded” lands except in limited circumstances and therefore has significant concerns over any proposal that may facilitate the diminution of the “ceded” lands corpus.

Accordingly, OHA urges the Committee to decline to adopt the **unlimited** and relatively unconditioned **40-year lease term and fixed rent period extensions** that would be authorized for public lands, including public land trust and “ceded” lands, leased for commercial, industrial, or resort purposes.

3. Under this measure, lease extensions would be authorized for a much broader range of justifications than even Act 149 contemplates.

Finally, OHA notes that the Act 149 pilot program explicitly and specifically requires any extension of lease terms or fixed rent periods to be only “to the extent necessary to qualify the lease for mortgage lending or guaranty purposes,” and “based on the economic life of the substantial improvements as determined by the [BLNR] or an independent appraiser.” In contrast, this measure would in fact broadly allow for lease extensions “in order [for the lessee] to make substantial improvements,” “based upon the substantial improvements to be made.” While such language would provide substantially more flexibility than Act 149 in granting lease term length and fixed rent period extensions, it would also allow for extensions in situations where the State’s interest in the redevelopment of leased parcels are not commensurate with the benefits such extensions would grant to a private entity. **Under this measure, a lessee may apply for and receive extensions that exceed the time necessary to secure redevelopment financing, and that exceed their improvements’ useful life.** Accordingly, this measure does not just expand the geographic scope of Act 149’s extension authority and remove Act 149’s limitations on total aggregate lease lengths, but would further authorize extensions to be based on a broader range of justifications that, due to political pressure or other reasons, may undermine the State’s and public’s interests in the development and disposition of its lands for generations at a time.

4. Critical amendments are necessary to minimally uphold the State’s fiduciary obligations and the interests of Native Hawaiians and the public in the disposition of public lands under this measure.

In light of the above concerns, should the Committee nevertheless choose to move this measure forward, OHA strongly urges the inclusion of amendments to uphold the BLNR’s fiduciary obligations under the public trust and public land trust, and to provide concrete safeguards to protect the interests of the State, Native Hawaiians, and the general public in our islands’ limited land base. Such amendments should minimally include:

- An effective date that coincides with the end date of the “pilot project” established under Act 149 (June 30, 2026), and a sunset date to limit the provisions of the bill to the length of time currently contemplated:

- By amending page 5, lines 15-17, to read as follows:

“SECTION 4. This Act, upon its approval, shall take effect on July 1, 2026; provided that this Act shall be repealed on June 30, 2031.”

- A limitation on the maximum aggregate fixed rent period and lease term for a lease to be no more than 20 years beyond the original fixed rent period and/or lease term, which should be sufficient for financing purposes and which would reduce the potential for foreclosing future substantial revenue generating opportunities:

- By amending page 3, lines 20-22, to read as follows:

“(d) Any extension of a lease pursuant to this section shall be based upon the economic life of the substantial improvements to be made as determined by the board or an independent appraiser and shall not extend the fixed rental period of the original lease by more than twenty years. No lease”

- Conditions similar to those in Act 149, including but not limited to, explicitly limiting any lease extensions to the length of time necessary for mortgage lending or financing of specified improvements, prohibiting lease extensions that exceed a percentage of the useful life of any improvements to be made, and requiring all proceeds from any financing or loan obtained as a result of an extension to be used specifically for proposed improvements:

- By amending page 2, line 15, to read as follows:

“improvements. Extension or modification of any provisions of the lease shall be made to the extent necessary to qualify the lease for mortgage lending or guaranty purposes with any federal mortgage lending agency; to qualify the lessee for any state or private lending institution loan, private loan guaranteed by the state, or any loan in which the state and any private lender participates; or to amortize the cost of substantial improvements. Any extension of the fixed rental period or term of the lease shall be based on the economic life of the substantial improvements as determined by the board or an independent appraiser; provided that the approval of any extension shall be subject to the following:

- (1) The demised premises have been used substantially for the purpose for which they were originally leased;
- (2) The length of any extension granted for the fixed rental period of the lease shall not extend the fixed rental period of the original lease by more than twenty years;
- (3) The length of any extension granted for the term of the lease shall not extend the original lease by more than twenty years;
- (4) If a reopening occurs, the rental for any ensuing period shall be the fair market rental as determined under section 171-17(d) at the time of reopening;
- (5) Any federal or private lending institution shall be qualified to do business in the state;
- (6) Proceeds of any mortgage or loan shall be used solely for the operations or substantial improvements on the demised premises;
- (7) Where substantial improvements are financed by the lessee, the lessee shall submit receipts of expenditures within a time period specified by the board, otherwise the lease extension shall be canceled; and
- (8) The rules of the board, setting forth any additional terms and conditions, which shall ensure and promote the purposes of the demised lands."

- Explicit extension provisions providing for improvements to either revert to the State at the end of the lease term, or be removed by the lessee at the lessee's expense, at the election of the State;
 - By adding the following language after page 4, line 13, to read as follows:

"Any extended lease shall include conditions explicitly stating that improvements on the land shall revert to the State or be removed by the lessee at the end of the lease term, at the election of the State."
- To ensure that the general public has a meaningful opportunity to review and comment on the long-term encumbrance of public lands, ensure that lease extension applications and proposals are publicly noticed for no less than one month prior to the submission of plans and specifications to the BLNR;

- By amending page 2, line 7, to read as follows:

“**extension of term.** (a) Notwithstanding section 171-36, and subject to subsection (i), for”

- By adding a new subsection (i) on above page 5, line 14, to read as follows:

“(i) No less than thirty days prior to the presentation of a lease extension applicant’s plans and specifications to the board as described in subsection (b), the department shall provide public notice of the lease extension application by posting on the lieutenant governor’s website, in a newspaper of statewide circulation, and in a county newspaper of the county in which the leased lands are located. The notice shall also be mailed or electronically delivered to all persons who have made a timely written request of the department for notice of lease extension applications. The public notice shall include information on the lease extension application, including the identity of the lessee and the location and description of the leased property, and shall include information regarding how a copy of the current lease and any plans and specifications to be presented to the board can be obtained or inspected. The public notice shall also describe where and how public comment may be submitted on the lease extension application, including expressions of interest in a public auction for the lease at the end of the current lease term or if the lease were to be terminated prior to the end of the lease term. All public comment received one week prior to the board presentation shall be collected and submitted to the board concurrently with its consideration of the applicant’s plans and specifications.”

Therefore, OHA urges the Committee to **HOLD** SB1167, or minimally include amendments as described above. Mahalo nui for the opportunity to testify on this measure.

Prince Kuhio Plaza

February 8, 2021

Hearing Date: February 8, 2021

Time: 1:00PM

Place: Via Videoconference

Sen. Lorraine Inouye, Chair
Sen. Gilbert S.C. Keith-Agaran, Vice Chair
State Capitol
Committee on Water and Land
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Testimony in opposition of Senate Bill 1167 Relating to Lease Extensions on Public Land

Dear Chairman Inouye, Vice Chairman Keith-Agaran and Committee Members:

Thank you for the opportunity to provide testimony on Senate Bill 1167 which would authorize the Board of Land and Natural Resources to extend leases of public land for commercial, industrial, or resort uses for lessees that commit to substantial improvements to their existing properties. I am the General Manager of Prince Kuhio Plaza (“PKP”), the largest indoor shopping center on the island of Hawaii. I previously submitted testimony with respect to Senate Bill 257 on January 29, 2021. Today, I wish to briefly recap elements of my prior testimony and comment on proposed Senate Bill 1167.

By way of background, PKP was previously owned by GGP, Inc. (“GGP”). In August 2018, GGP was acquired by Brookfield Properties, an affiliate of Brookfield Asset Management. Brookfield Properties’ retail group has an extensive portfolio of regional shopping center properties encompassing over 170 locations across 43 U.S. states, including GGP’s former portfolio. We assure premier quality and optimal outcomes for our tenants, business partners and the communities in which we do business.

Brookfield Properties has carried forward GGP’s legacy of being an integral part of the economic fabric of Hawaii for more than 30 years (since 1987), through good and bad times – owning, operating and reinvesting in our Hawaii real estate assets as part of a long-term commitment that provides economic stability, growth, and jobs through all economic cycles. We own and operate three major shopping centers in Hawaii – PKP in Hilo, Whalers Village in Lahaina, and Ala Moana Center in Honolulu.

Brookfield Properties supports the intent of Senate Bill 1167, however this committee has already passed Senate Bill 257, which we believe would achieve the overall intent of Senate Bill 1167. Senate Bill 257 provides a more practical application and investment strategy for proposed ground lease extensions, particularly in the midst of the worst pandemic in over 100 years. Therefore, we ask that the committee hold Senate Bill 1167 in favor of Senate Bill 257. Thank you for your consideration.

Sincerely,

Daniel Kea
General Manager

PRINCE KUHIO PLAZA

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SB-1167

Submitted on: 2/8/2021 9:12:50 AM

Testimony for WTL on 2/8/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Nicole Galase	Testifying for Hawaii Cattlemen's Council	Support	No

Comments:

The Hawaii Cattlemen's Council supports this measure.

SB-1167

Submitted on: 2/8/2021 9:55:38 AM

Testimony for WTL on 2/8/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Zachary LaPrade	Testifying for Ocean Tourism Coalition	Support	No

Comments:

The Ocean Tourism Coalition (“OTC”) supports SB1167 (the “Bill”). The OTC supports giving DLNR the flexibility to lease public lands for commercial, industrial, or resort use.

▪ February 8, 2021

The Honorable Lorraine Inouye, Chair
and Committee Members
Committee on Water and Land
Hawaii State Senate
Honolulu, HI 96813

RE: SB 1167 Relating to Lease Extensions on Public Lands

Dear Chair Inouye and Committee Members:

My name is Stanford Carr and I strongly support SB1167 Relating to Lease Extension on Public Lands.

SB 1167 amends Chapter 171, HRS to allow for the extension of lease term for Commercial, industrial, resort, or government leases. We further suggest that the section be amended as follows:

1) “§171 – Commercial, industrial, resort, mixed-used, or government leases; extension of term. (a) Notwithstanding section 171-36, for leases that have not been assigned or transferred within ten years prior to receipt of an application for a lease extension submitted pursuant to this section, the board may extend the rental period of a lease of public lands for commercial use, industrial use, resort use, mixed-use or government use upon the board’s approval of a development agreement proposed by the lessee or by the lessee and developer to make substantial improvements to the existing improvements....”; and

2) “(d) Any extension of a lease pursuant to this section shall be based upon the substantial improvements to be made and shall be for a period not longer than twenty years...”

As a developer, the inclusion of mixed-use leases for a period of at least twenty years, will allow for the financing of projects to be built as well as provide financeable mortgages for improvements on projects that all provide income to the State. Additionally, this measure will affect large projects that provide income to the State. Providing the lessees with the means to improve the properties, will allow that the properties to continually provide the State with income as well as ensure that the buildings remain maintained for future uses.

We strongly support SB1167 with the amendments suggested.

Thank you for this opportunity to testify.



Stanford S Carr

LATE

SB-1167

Submitted on: 2/7/2021 9:26:15 PM

Testimony for WTL on 2/8/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jun Shin	Individual	Oppose	No

Comments:

In opposition. I'm concerned about this automatic extension, which would prevent public input and deter Native Hawaiian cultural practioners on the land. It also inherently goes against the State's duty as a trustee, the trustee not actually putting in the work to do proper scrutiny.