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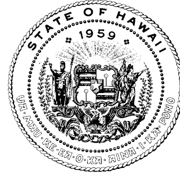

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TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE HOUSE COMMITTEE ON WATER & LAND
HEARING ON FEBRUARY 9, 2021 AT 9:15AM VIA VIDEOCONFERENCE

HB 1122, RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

February 9, 2021

Aloha Chair Tarnas, Vice Chair Branco, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) submits comments on this bill that defines beneficiary consultation; prohibits DHHL from disposing or extending a general lease to non-beneficiaries, unless there are no applicants seeking to enter into a general lease to the use and occupancy of a tract of Hawaiian Home Lands; requires DHHL to notify beneficiaries through beneficiary consultation prior to the disposition of Hawaiian Home Lands; adds language to require Section 204 lessees mandate Homestead Beneficiary Agreements; prohibits DHHL from establishing additional criteria to enter into a general lease with an applicant; specifies that DHHL may grant a license or enter into a general lease; allocates the interest or other earnings from the Hawaiian home loan fund and Hawaiian home general loan fund into their respective funds; requires DHHL submit a quarterly report to the Legislature and beneficiaries; and authorizes DHHL to negotiate with homestead association governed water agencies to maintain water systems prior to other service providers.

Section 1 of the bill amends section 201 of the Hawaiian Homes Commission Act (HHCA) to add a definition for beneficiary consultation. DHHL adopted administrative rules, including HAR §10-4-60 Beneficiary consultation that became effective on August 25, 2018. Since the administrative rules already defines beneficiary consultation, this section of the bill is unnecessary.

Section 2 of the bill amends section 204 of the HHCA to prohibit DHHL from disposing or extending a general lease to non-beneficiaries, unless there are no applicants seeking to enter into a general lease to the use and occupancy of a tract of Hawaiian Home Lands. DHHL landholdings are categorized into different land use designations based on environmental or other constraints with the land and in consultation with beneficiaries. The amendments proposed are unnecessary and propose to elevate the interest of lessees and homestead associations as defined under title 43 C.F.R. section 47.10 over the interest of applicants on the waitlist and HHCA Beneficiary Associations as defined under title 43 C.F.R. section 47.10.

Section 3 of the bill amends section 207 of the HHCA to prohibit DHHL from establishing additional criteria to enter into a lease with an applicant. These proposed amendments directly conflict with section 208 of the HHCA that were in the original Act setting forth conditions whether or not stipulated in the lease.

Section 4 of the bill amends section 213 of the HHCA to allocate the interest or other earnings from the Hawaiian home loan fund and Hawaiian home general loan fund into their respective funds. These proposed amendments are unnecessary since the Hawaiian Home Loan Fund is used principally to pay the net proceeds when a homestead lease is cancelled or surrendered or when a lessee dies without leaving a qualified successor.

Section 6 of the bill amends section 216 of the HHCA to require DHHL submit a quarterly report to the Legislature and beneficiaries. DHHL prepares extensive reports on a monthly basis to the HHC. An example from January 2021 can be viewed here: https://dhhl.hawaii.gov/wp-content/uploads/2021/01/January-19-20-2021-HHC-Packet-opt-1.pdf.

Section 7 of the bill amends section 221 of the HHCA authorizing DHHL to negotiate with homestead association governed water agencies to maintain water systems prior to other service providers. This proposed amendment is unnecessary since DHHL already has an agreement in place with regard to water maintenance on Hawaii island.

Thank you for your consideration of our testimony.

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Richard Soo, Councilman, Oahu
Ron Kodani, Councilman, Hawaii Island
Faisha Solomon, Administrator

Date: February 8, 2021

To: Honorable Members of the Water & Land Committee

Fr: Robin Puanani Danner, SCHHA Chairwoman

Re: Testimony in Support of HB1122 – Land Dispositions

Mahalo to Representative Eli and others in the House of Representatives for introducing HB1122. This legislation makes technical amendments to the Hawaiian Homes Commission Act of 1920 (HHCA) to give clarity and guidance to the State's agency mandated since the 1959 Hawaii Admissions Act to administer the HHCA for its intended purpose – the issuance of residential, farm, ranch and mercantile lands to native Hawaiians. HB1122 addresses the following:

1. **Defines Beneficiary Consultation & When It Is Required.** The term Beneficiary Consultation was introduced as a best practice by the SCHHA over a decade ago to ensure that Beneficiaries of the HHCA and Beneficiary Organizations are duly informed of significant decisions or policy changes made by the State's agency administering the HHCA. Its ultimate goal was, and still is, to embrace a tenet of a working and successful democracy – the notion that citizens impacted by government are engaged in decisions that impact them. In short, to connect State agency officials that come and go with the administrations of Governors, to the citizens that remain on homesteads, and possess incredible expertise and knowledge about what works and what does not.

   The State's agency has had mixed success and mixed use of Beneficiary Consultation. Some administrations have embraced its value, reaching far and wide, and making participation very accessible, resulting in well-informed decision making by the agency. Some administrations have limited consultation, and in the worst cases, merely used the term Beneficiary Consultation to "check the box" on the agency's predetermined decisions.

   This component of HB1122 seeks to provide increased guidance and stability to formally define Beneficiary Consultation, and to articulate the best practices of its use to maximize success by the agency and most importantly, HHCA Beneficiaries. Said simply, HHCA Beneficiaries must be the first to know, not the last to know, about significant actions and/or policy changes by the State's agency. This practice benefits the State, especially in ever changing administrations, to maximize the expertise that remains in the HHCA Beneficiary community.

   HB1122 provides a definition of Beneficiary Consultation, sets a time line of 45 days similar to the efficiency of federal register notices, and ensures at a minimum, that Homestead Beneficiary Associations defined in the 43 Code of Federal Regulations are specifically consulted by the State's agency. HB1122 identifies the following events that trigger comprehensive and inclusive consultation:

   a. **Land Dispositions to a Non-Beneficiary**. This section requires the State to consult before it executes any land disposition to any individual or organization that does not meet the definition of an HHCA Beneficiary, as currently defined under the law. Quite reasonable, especially given the HHCA was enacted by the U.S. Congress and incorporated into the Hawaii Constitution for the purpose of land dispositions to native Hawaiians as defined in the HHCA.

   b. **Creating Additional Qualifying Criteria by Waitlist Beneficiaries.** Over the decades, different State agency administrations under different Governors have adopted differing criteria when

offering a homestead land award to an HHCA Waitlist Beneficiary. For example, some administrations have required that a loan prequalification must be achieved before a Beneficiary is allowed to receive a homestead lot award.

This section simply requires that if an administration intends to require additional qualifying criteria beyond the statute, the State's agency will consult with Beneficiaries and/or Beneficiary Organizations to benefit from historical knowledge and best practices.

c. **Moves of Interest Earnings Out of Loan Fund Trust Account.** The State's agency manages a Revolving Loan Fund, where loans are made to Beneficiaries, and repayments by Beneficiaries revolve to make additional loans to other Beneficiaries. However, it is a common practice for the State's agency to transfer the interest earnings out of the Revolving Loan Fund, thereby decreasing the level of revolving capital available to Beneficiaries. For example, the annual interest earnings/revenues are between $4M and $5M annually, which means over a 10-year period, $40M to $50M in additional loan capital is not available to make farm or ranch loans, or to otherwise increase the revolving nature of the fund.

   This section requires that if the State's agency intends to redirect the interest earnings from Beneficiary repayments away from the Revolving Loan Fund to its own operational costs, it must conduct Beneficiary Consultation, again providing the State's agency with valuable expertise.

2. **Homestead Benefit Agreements.** A very successful and long-standing practice in many communities to balance the intentions of corporations and/or developers with the priorities of community advocates and community organizations, is the execution of a Community Benefits Agreement (CBA). These agreements have proven beneficial, especially in advancing the needs of low to moderate income populations in a variety of ways, including local hire goals, signage and revenues to support community-based services. For example, it is not unusual for a CBA to require a corporate entity developing a profit-making endeavor to provide annual funding to a Community Organization to deliver homeless services or another example, job training. The content of CBAs usually address community goals near the corporate development.

   HB1122 brings the benefits of CBA's to HHCA Beneficiary Organizations in the form of requiring Homestead Benefit Agreements (HBAs) between a Non-Beneficiary Lessee of Hawaiian Home Lands and a federally defined Homestead Beneficiary Association. This simple addition of a common community tool ensures that Non-Beneficiary corporate entities and individuals are directly engaged with Homestead Beneficiary Associations in advancing social and economic services in and around the homestead area.

3. **General Lease Instruments on Mercantile & Public Purpose Land Dispositions**. The general lease land instrument used by the State's agency to dispose of land is designed to maximize the lessee's ability to attract conventional capital, whether debt or equity.

   HB1122 enables land dispositions to nonprofit organizations for public purpose projects serving community on Hawaiian Home Lands or to native Hawaiians for mercantile purposes such as theatres, garages, markets and other commercial purposes, to execute general lease instruments that also attract conventional capital, whether debt or equity. This is a very prudent technical amendment that will result in increased conventional capital to flow to our trust lands.

4. **HHCA Section 204 Land Dispositions.** The core focus and intent of the HHCA is the issuance of land to native Hawaiians for residential, farming, ranching and mercantile, described in Section 207 of the HHCA.

   Section 204 of the HHCA, describes the disposition of lands, "not required" for native Hawaiian homesteading as described in Section 207. Section 204(2), an amendment by the Hawaii Legislature in 1965, states…….

"Any available lands……as provided by this Act, not leased as authorized under Section 207(a) of this Act (homesteading by native Hawaiians)*, may be returned to the board of land and natural resources……or may be retained for management by the department (DHHL).* It goes on in the next paragraph to state:

"In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of those lands or any improvements thereon to the public….."

HB1122 clarifies for DHHL the words "available lands not required" by native Hawaiians on the waitlist to receive a residential, farm or ranch homestead award, to mean lands may not be disposed of to the general public if there is a waiting list of native Hawaiians for a homestead land award, or a mercantile award, both described in HHCA Section 207.

The 1965 and 1976 Hawaii Legislature amendments to the HHCA, recognized the new State's compact with the federal government at statehood in 1959 and its establishment of DHHL in 1961. These amendments empowered DHHL to leave lands not issued for homesteading at DLNR, or to retain the lands at DHHL. The amendments articulated that if DHHL chose to retain lands, it would only issue lands to the general public if the retained lands were not required by native Hawaiians for homesteading. Tens of thousands of acres have been issued to the general public and other state agencies under Section 204, literally ignoring the words and intent from 1965 and 1976, of only issuing "available lands not required" to the public.

HB1122 strengthens the Acts in 1965 and 1976 by making clear, if there is a waitlist, now at 28,000 individuals, lands may not be disposed of to the public as long as there is a waitlist – making crystal clear that trust lands are indeed "required" by native Hawaiians if there is a waitlist. Its simply good policy making by the deliberative body, the Legislature, to provide clarification to the State's agency. A common practice by the State over decades, is to justify ignoring "not required" and replacing it with "not suited" to dispose of lands intended for native Hawaiians to the general public. It must be noted - the purpose of the HHCA is to issue land to native Hawaiians. If lands are "not suited", sections of the HHCA address the ability of the State, and the federal government has adopted specific federal regulations providing exact processes if the State needs to sell or exchange lands, again, to ensure that trust lands are not only suitable for homesteading or mercantile but issued to native Hawaiians for those purposes.

Relation of HB1122 Section 204 Clarifications to DHHL Funding Sources

It is difficult to express the simplicity of HB1122, when there is a continuous lack of understanding about the proper source of funding for the State's own agency, DHHL. Some in the public and legislature, are under the misguided notion that the State's agency, DHHL, must leave 28,000 of us on the waitlist, in order to lease out our trust lands under Section 204 to generate revenues to sustain its DHHL agency. This is a completely false narrative perpetuated by the State and perpetrated on native Hawaiians.

First, DHHL's funding is an absolute commitment made in the 1959 Hawaii Admissions Act, and in our own Hawaii Constitution (Article XII) to be determined by and sourced from the State Legislature. Nowhere in the HHCA or in the Hawaii Constitution or in the Hawaii Admissions Act does it state that DHHL is to be funded by leasing our trust lands to generate revenue to fund DHHL or the program. Frankly, under Section 204, it is expressly prohibited from leasing our land if the lands are required by native Hawaiians. Just as the Department of Education or the Department of Agriculture or the Hawaii Tourism Authority, or any other state agency is not subject to funding based on lease revenue from any State lands, or from revenues from a lottery, or a casino - DHHL is NOT dependent on generating revenues by leasing our lands.

In 2016, SCHHA launched a DHHL Budgetary Project, to analyze the submissions by DHHL to the Governor and Legislature, to ascertain the soundness of its budget requests. In that same year, the U.S. Congress reduced its annual appropriation of $13M in NAHASDA dollars to DHHL, down to $2M

annually, because DHHL had a backlog of $60M over several years in unspent NAHASDA funds - an inability to spend down the funds timely.

Our findings in 2016, and again in 2018, determined that sufficient funding to DHHL to operate (general funds) and to clear the waitlist (primarily CIP funds to develop lots), was not a calculation solely based on "need" as continuously presented by DHHL, but rather a formula of *Need to Meet the Purpose of the HHCA + DHHL Capacity & Performance + Capacity of the Economy by Island to Absorb CIP Projects*. The SCHHA came to the same conclusion that the U.S. Congress did - the limiting factor to sound and sufficient funding by the Legislative, to levels of funding beyond $25M annually in operating costs, is *DHHL Capacity & Performance*.

SCHHA recommended in the last two biennium budgets for DHHL to be funded at $19M - $26M in general funds annually for its operations, $25M in steady allocations of CIP capital each year and made suggestions to reform and make improvements to build its capacity and performance. The Governor, and the Legislature has largely funded its DHHL agency at or close to those levels, which are far beyond the years prior to 2016. In 2018, SCHHA endeavored to assess the prudence of the appropriated funding levels, particularly for DHHL operational funding. We requested a simple "budget to actual" financial report, common in comparing the amount by line item appropriated against funds actually expended. DHHL refused to provide the data, so SCHHA utilized Freedom of Information laws to obtain the necessary financial data pieces to build a proper "budget to actual" report. Our analysis confirmed that DHHL had yet to improve its capacity and performance, since in each of the fiscal years, DHHL failed to expend all of the funds appropriated by the Legislature.

It should also be understood that the primary reason the Legislature had not funded DHHL at any significant level in the prior decade, was at the direct request of DHHL itself. The "Lingle Doctrine" executed during the Lingle Administration, launched the plan to reduce any State Legislative funding to its DHHL agency to near zero, and instead to aggressively generate revenue by leasing our trust lands to sustain DHHL operations. As you know, Beneficiaries sued DHHL via the Nelson Case, and over the last two biennia, the Legislature has adequately funded DHHL, based on its capacity and performance.

The SCHHA remains in support of DHHL implementing reforms to increase its capacity to spend funds, in order to create the environment to receive prudent and increased levels of Legislative funding based on performance, but also to attract non-State funding sources. For example, SCHHA continues to advocate the U.S. Congress to return NAHASDA funds to $20M annually, an increase of $7M to its pre-2016 levels, and to position our trust lands to access federal New Market Tax Credits, Capital Magnet Funds, and other sources of conventional capital markets. We believe that reforms and improved operational performance at DHHL, will lead to capital sources beyond just State general funds, in excess of $40M each year. The unique mission of this state agency, and its management of our land trust assets, the incredible opportunities that exist with Homestead Associations, requires an environment where conventional capital sources are flowing and leveraging State general funds and/or general bonds, or revenue bonds that DHHL is authorized to issue. It is fiscally sound to issue trust lands as intended, with follow on facilitation of private capital to follow land dispositions to the intended lease holders – native Hawaiians.

HB1122, together with two other legislative reform bills (HB1123 and HB1124) have no real cost impact to the State if enacted, however, they will improve in significant ways, the success of the State in administering our Hawaiian Home Land trust, including the leverage of limited State resources with conventional capital markets.

About SCHHA. The *Sovereign Council of Hawaiian Homestead Associations* (SCHHA), founded in 1987, is the oldest and largest HHCA Beneficiary Organization, representing the interests of nearly 10,000 native Hawaiian lessees and 28,000 families on the waitlist. SCHHA is governed by a council elected to 4-year terms serving over 42 homestead areas in the Mokupuni of Kauai, Oahu, Molokai, Maui/Lanai and Hawaii Island. SCHHA leaders are experts on the HHCA, federal land trust management, finance, affordable housing, economic development and job creation.