



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

H.B. NO. 1917, H.D. 1, S.D. 1, RELATING TO AFFORDABLE HOUSING.

BEFORE THE:

SENATE COMMITTEES ON JUDICIARY AND ON WAYS AND MEANS

DATE: Tuesday, April 5, 2022 **TIME:** 10:05 a.m.

LOCATION: State Capitol, Room 211, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Ciara W.K. Kahahane,
Deputy Attorney General, at 586-8373)

Chairs Rhoads and Dela Cruz and Members of the Committees:

The Department of the Attorney General opposes the Senate Draft 1 of this bill because it likely violates several constitutional provisions and constitutes an unfavorable, implied repeal of existing state law provisions governing the allocation and issuance of private activity bonds.

Section 1 of this bill requires the Hawai'i Housing Finance and Development Corporation (HHFDC) to issue a new ground lease for the Front Street Apartments affordable housing project to an eligible developer for a term of seventy-five years with ground lease rent of \$1 per year, by December 31, 2022. Sections 2 and 3 appropriate funds out of the private activity bonds allocated to HHFDC and HHFDC's rental housing revolving fund, respectively, for the purposes of allowing an eligible developer to acquire and rehabilitate the project.

1. Special legislation

Section 1 of this bill appears to be unconstitutional special legislation. Article XI, section 5, of the Hawai'i State Constitution states that "[t]he 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." (Emphasis added.) Because this bill does not contemplate a transfer to the State, the special legislation analysis applies.

To determine whether a law is special or general, a court first determines "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 v. Dept. of Transportation*, 120 Hawai'i 181, 204, 202 P.3d 1226, 1249 (2009). If the law creates an illusory class, it is unconstitutional, and the second step of the analysis is not necessary.

Genuine classes have the "potential for future applicability." *Id.* By contrast, "a class that is drawn so that it will never have any members other than those targeted by the legislation is illusory, and the legislation creating such a class is unconstitutional special legislation." *Id.*

Section 1 of this bill creates a class of one with no potential for future applicability. While multiple developers may be "eligible" under the wording of this bill, only one developer will receive the new ground lease. The class of eligible developers is potentially unlimited at only one point in time—*before* the award of the new ground lease. After one developer receives a ground lease for the project, no other developer can receive one. Thus, the class created by the bill will be closed indefinitely after an eligible developer is selected.

In Attorney General Opinion No. 07-02, our department determined that a law setting aside a parcel of state land for use by the Kewalo Keiki Fishing Conservancy (KKFC) was unconstitutional special legislation. In those circumstances, the act was clearly special legislation "because it was enacted to benefit the KKFC specifically and [was] limited to a specific property." *Id.* at 3.

Here, it is not significant that the bill benefits "an eligible developer" of indeterminate identity rather than a specific developer. As our department indicated in Opinion No. 07-02, "[t]he framers of the Hawai'i Constitution intended that the Legislature be expressly limited to enacting general laws for the administration and disposition of State lands . . . and be precluded by that express limitation from enacting special laws to convey interests in land . . . directly to individuals or for specified purposes." *Id.* at 4. This bill contravenes the purpose of article XI, section 5, which was

"to prevent the alienation of lands into private hands." *Id.* Thus, this bill appears to be unconstitutional special legislation.

2. Separation of powers

Section 1 of this bill also appears to violate the separation of powers contemplated by the Hawai'i State Constitution. The separation of powers doctrine is meant to preclude a commingling of essentially different powers of government in the same hands, and thereby prevent a situation where one branch of government would be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other branches of government. *State v. Augafa*, 92 Hawai'i 454, 470 (App. 1999) (quoting *Pray v. Judicial Selection Comm'n of the State*, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993)).

Here, the relevant division of governmental powers is the distinction between appropriating state funds, a legislative power, and spending or allotting state funds, an executive power. *See Hunter v. State*, 865 A.2d 381, 392 (Vt. 2004) ("[A]ppropriation is a legislative power, but spending is an executive power."). As required under the separation of powers, "an appropriations bill cannot interfere with the executive authority to allocate staff and resources, make contracts, enter into agreements, or limit the general administration of federal funds it receives." *Colorado General Assembly v. Owens*, 136 P.3d 262, 268 (Colo. 2006). The Legislature's role is to appropriate funds to HHFDC. As an agency of the executive branch, HHFDC must decide how to spend those funds.

Section 1 of this bill appears to interfere with HHFDC's authority to allocate resources that have already been appropriated to the agency as well as its authority to make contracts, including leases, and establish the amounts to be charged thereunder. *See* section 201H-9(c), Hawaii Revised Statutes (HRS). It directs HHFDC to spend funds in a particular fashion by mandating that HHFDC issue a ground lease for the Front Street Apartments project at the cost of \$1 per year. In addition, because HHFDC incurs and will incur regular costs to manage and monitor the project, section 1 of this bill would force HHFDC to allocate funds to the Front Street Apartments project and

divert funds from its other projects and programs. Thus, section 1 of this bill appears to violate the separation of powers.

3. Impairment of contracts

As mentioned above, section 1 of this bill requires HHFDC to issue a new ground lease for the Front Street Apartments affordable housing project to an eligible developer. We believe that this requirement constitutes an impairment of contracts in violation of the Contracts Clause, Article I, Section 10, Clause 1, of the United States Constitution.

The Contracts Clause of the United States Constitution prohibits any state law "impairing the Obligation of Contracts." The obligations of a contract are impaired by a law that renders them invalid, or releases or extinguishes them. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934).

Because the property is already subject to a ground lease, the existing lease must be terminated before a new one can be issued. Section 1 of this bill therefore requires termination of the current ground lease for the Front Street Apartments project. Accordingly, this law would release or extinguish the obligations of the parties to the current ground lease, constituting the impairment of a contract.

Some statutes impairing the obligation of contracts may nonetheless be constitutional if the statute in question "[does] not prescribe a rule limited in effect to contractual obligations or remedies, but instead impose[s] a generally applicable rule of conduct designed to advance 'a broad societal interest. . . .'" *Anthony v. Kualoa Ranch, Inc.*, 69 Haw. 112, 119, 732 P.2d 55, 60 (1987) (quoting *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983)); see also *Eagerton*, 462 U.S. at 192 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)) (comparing a law imposing a generally applicable rule of conduct with unconstitutional measures whose sole effect was to repeal a contract or alter contractual duties).

Here, section 1 of this bill applies only to a single contract and does not prescribe a generally applicable rule of conduct. Thus, it likely violates the Contracts Clause of the United States Constitution.

4. Taking of private property without just compensation

As noted above, section 1 of this bill requires termination of the current ground lease for the Front Street Apartments project without condemnation proceedings or the payment of just compensation by the State.

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits state and federal governments from taking private property for public use without just compensation. The Takings Clause applies to the states as well as the federal government through the Fourteenth Amendment to the United States Constitution. In addition, the Hawai'i State Constitution, article I, section 20, states that "[p]rivate property shall not be taken or damaged for public use without just compensation." See also *Hawai'i Housing Authority v. Lyman*, 68 Haw. 55, 67, 704 P.2d 888, 895 (1985).

The termination of the ground lease for the Front Street Apartments as required by section 1 of this bill is a taking of an interest in private property by the State. Without the payment of just compensation to the current ground lessee, that taking is unconstitutional.

5. Implied repeal

Section 2 of this bill appropriates \$22,800,000 out of the private activity bonds allocated to HHFDC for the purposes of allowing an eligible developer to acquire and rehabilitate the Front Street Apartments project. Normally, the allocation and issuance of private activity bonds by HHFDC are governed by chapter 39B and section 201H-71, HRS. Upon HHFDC's request and subject to the Governor's approval, the Department of Budget and Finance may assign all or a portion of the State's allocation of the annual state ceiling for private activity bonds to HHFDC to issue. HHFDC then decides which specific projects to issue private activity bonds for.

By "appropriating" private activity bonds already allocated to HHFDC for a particular project, section 2 requires an implied repeal of the above statutes giving the Governor, the Department of Budget and Finance, and HHFDC the authority to issue bonds. While not illegal, implied repeals are generally disfavored. Therefore, our

department requests that the Committees consider removing from this bill the appropriation in section 2 of this bill.

In conclusion, because this bill raises multiple constitutional concerns, we respectfully ask the Committees to hold this bill or revert to the contents of an earlier draft, such as House Draft 1.

DAVID Y. IGE
GOVERNOR



CRAIG K. HIRAI
DIRECTOR

GLORIA CHANG
DEPUTY DIRECTOR

**STATE OF HAWAII
DEPARTMENT OF BUDGET AND FINANCE**

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EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
OFFICE OF THE PUBLIC DEFENDER

ADMINISTRATIVE AND RESEARCH OFFICE
BUDGET, PROGRAM PLANNING AND
MANAGEMENT DIVISION
FINANCIAL ADMINISTRATION DIVISION
OFFICE OF FEDERAL AWARDS MANAGEMENT (OFAM)

WRITTEN ONLY
TESTIMONY BY CRAIG K. HIRAI
DIRECTOR, DEPARTMENT OF BUDGET AND FINANCE
TO THE SENATE COMMITTEES ON JUDICIARY AND WAYS AND MEANS
ON
HOUSE BILL NO. 1917, H.D. 1, S.D. 1

**April 5, 2022
10:05 a.m.
Room 211 and Videoconference**

RELATING TO AFFORDABLE HOUSING

The Department of Budget and Finance (B&F) offers comments on House Bill No. 1917, H.D. 1, S.D. 1, which: 1) requires the Hawai'i Housing Finance and Development Corporation (HHFDC) to issue a new ground lease for the Front Street Apartments affordable housing project to an eligible developer for a lease term of 75 years and ground lease rent to be determined by HHFDC; 2) purports to appropriate private activity bonds in the amount of \$22,800,000 in FY 23 for the purposes of allowing an eligible developer to acquire and rehabilitate the Front Street Apartments; and 3) appropriates \$12,500,000 out of the Rental Housing Revolving Fund in FY 23 for the same purposes. B&F defers to HHFDC on the overall merits but offers the following comments on the portion of this measure relating to private activity bonds.

Under Chapter 39B, HRS, private activity bonds are not allocated to HHFDC, such that they may be appropriated to a specific housing project. Instead, upon HHFDC's request, and subject to the Governor's approval, B&F may assign all or a portion of the State's allocation of the annual state ceiling for private activity bonds to

HHFDC to issue pursuant to its authority under Part III of Chapter 201H, HRS.

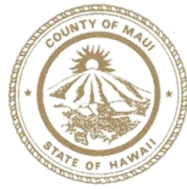
However, this assignment of state ceiling for private activity bonds is to the issuer in general and not specific to any project. The selection of the projects for which bonds will be issued is a decision made by the issuer, in this case HHFDC, pursuant to its rules and procedures. The annual state bond ceiling for private activity bonds is not allocated to a specific project until the bond closing for that project takes place and the bonds are issued.

B&F further notes that the normal practice for housing revenue bonds is that the Legislature authorizes the issuance of revenue bonds by the State or its subdivisions up to a specific aggregate dollar amount. For example, HHFDC has been given authority by the Legislature to issue up to \$3,000,000,000 in Hula Mae Multi-Family revenue bonds pursuant to Act 291, SLH 1980, as amended. However, HHFDC may only issue bonds if there is an available annual private activity bond ceiling in the amount of the proposed issuance at the time and if it is assigned a sufficient portion of that ceiling.

Thank you for your consideration of our comments.

Michael P. Victorino
Mayor

Sananda K. Baz
Managing Director



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April 4, 2022

COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair
COMMITTEE ON WAYS AND MEANS
Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S. C. Keith-Agaran, Vice Chair
AMENDED NOTICE OF DECISION MAKING
Tuesday, April 5, 2022
10:05 a.m.
Conference Room 211 & Videoconference

Thank you for this opportunity to provide testimony in support of H.B. 1917, Relating to Affordable Housing. My testimony is submitted in my capacity as Mayor of the County of Maui.

As mayor of Maui County, I support legislation of HB 1917. The importance of this legislation is that it appropriates private activity bond allocations and funds from the Rental Housing Fund to the Hawaii Housing Finance and Development Corporation for the purpose of allowing an eligible developer as defined in section 201H-32 to acquire and rehabilitate the Front Street Apartments affordable housing project on Maui.

Your efforts in support of this legislation will secure and perpetuate Affordable Housing in Maui.

Thank you.

Submitted by:

Mayor P. Victorino, Mayor, County of Maui
200 South High Street
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808-270-7855

Council Chair
Alice L. Lee

Vice-Chair
Keani N.W. Rawlins-Fernandez

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Director of Council Services
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David M. Raatz, Jr., Esq.

COUNTY COUNCIL
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April 2, 2022

TO: Honorable Karl Rhoads, Chair
Senate Committee on Judiciary

Honorable Donovan M. Dela Cruz
Senate Committee on Ways and Means

FROM: Alice L. Lee
Council Chair

DATE: April 2, 2022

SUBJECT: **SUPPORT OF HB 1917, HD1, SD1, RELATING TO AFFORDABLE HOUSING**

Thank you for the opportunity to testify in **SUPPORT** of this important measure. The purpose of this measure is to appropriate funds to the Hawaii Housing Finance & Development Corporation to allow an eligible developer to acquire and rehabilitate Front Street Apartments Affordable Housing Project in Lahaina, Maui.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I SUPPORT this measure for the following reasons:

1. This measure supports the need to keep and maintain Front Street Apartments as an affordable housing complex.
2. Front Street Apartments provides 142 rental units.
3. Maui County has a severe shortage of affordable rental housing, but the issue is especially problematic in Lahaina where rental costs are traditionally higher than other areas of Maui.

For the foregoing reasons, I **SUPPORT** this measure.



THE SENATE, COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

THE SENATE, COMMITTEE ON WAYS AND MEANS

Senator Donovan M. Dela Cruz, Chair
Senator Gilbert S.C. Keith-Agaran, Vice Chair

Tuesday, April 5, 2022 @ 10:05 am

TESTIMONY IN SUPPORT OF HB 1917 HD1 SD1 (SSCR 2456)

Aloha Chairs Rhoads and Dela Cruz, Vice Chairs Keohokalole and Keith-Agaran, and Members of the Senate Committees on Judiciary and Ways and Means. My name is Makani Maeva and I am the President of Ahe Group. Based in Kailua, Oahu, Ahe Group is one of the most active affordable housing developers in Hawaii with over 1,800 affordable rental units in the state financed through the Low-Income Housing Tax Credit and Rental Housing Revolving Fund programs administered by the Hawaii Housing Finance and Development Corporation (“HHFDC”). Thank you for the opportunity to testify in **strong SUPPORT of this bill.**

HB 1917 HD1 SD1, as proposed, is a practical solution to the preserve Front Street Apartments in Lahaina as affordable rental housing for seventy-five years. Due to the ongoing litigation regarding Front Street Apartments, its residents are currently experiencing housing uncertainty. Extending the time for HHFDC to renegotiate the ground lease is unnecessarily deferring implementation of a solution that is available immediately. Ahe Group, a qualified developer who is under contract to purchase Front Street, has a solution that will meet the needs of the various stakeholders and preserve this valuable housing asset.

The following important provisions of the bill will allow the preservation of Front Street Apartments,: (1) a 75-year ground lease at terms typical for affordable housing projects); (2) an allocation of \$22,800,000 of private activity bonds; and (3) a \$12,500,000 award of Rental Housing Revolving Fund. With these resources, Ahe Group will acquire the project and begin \$8,000,000 of renovations. Ahe Group will also agree to operate the project as an affordable rental for 75 years and to return rents to their original affordability limits (5% of the units at 30% AMI, 45% of the units at 50% AMI, and 60% of the units at 60% AMI). No tenants in good standing will be displaced. I have personally spoken to the plaintiffs’ attorneys in the ongoing litigation on several occasions and I believe this bill and these resources satisfy their concerns.

Thank you for your attention to this testimony. I will be testifying via video conference tomorrow. If you have additional questions, please contact me at 808-381-5958 or mm@ahigroup.com

A handwritten signature in black ink that reads 'Makani Maeva'.

DAVID Y. IGE
GOVERNOR



DENISE ISERI-MATSUBARA
EXECUTIVE DIRECTOR

STATE OF HAWAII

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM
HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION
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Honolulu, Hawaii 96813
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IN REPLY REFER TO:

LATE

Statement of
DENISE ISERI-MATSUBARA
Hawaii Housing Finance and Development Corporation
Before the

SENATE COMMITTEE ON JUDICIARY AND SENATE COMMITTEE ON WAYS AND MEANS

April 5, 2022 at 10:05 a.m.
State Capitol, Room 016

In consideration of
H.B. 1917 HD1 SD1
RELATING TO AFFORDABLE HOUSING.

HHFDC appreciates the bill's intent to keep Front Street Apartments (FSA) affordable and provide the tenants with certainty about their living situations until there is a final judgement on the litigation affecting the property.

However, HHFDC **cannot support** this version of the bill due to the legal concerns raised by the Department of the Attorney General (AG), as follows:

Section 1 of the bill, which requires that HHFDC issue a new ground lease to an eligible developer, appears to be special legislation in violation of the Hawaii State Constitution because there is only one developer that can receive the new ground lease. The same section appears to violate the separation of powers contemplated by the Hawaii State Constitution. Appropriating state funds is a legislative power, while spending or allotting state funds is an executive power. The issuance of a new ground lease at a cost of \$1.00 per year interferes with HHFDC's authority to allocate resources that it has already appropriated.

Furthermore, in addition to violating the Hawaii State Constitution, Section 1 of the bill appears to violate the United States Constitution. The issuance of a new ground lease would require the termination of the existing ground lease in violation of the Contracts Clause. Termination of the existing lease without condemnation proceedings or payment of just compensation would also violate the Takings Clause.

Finally, the AG points out that Section 2 of the bill appropriates \$22,800,000 in private activity bonds (PAB) to FSA. By appropriating PAB already allocated to HHFDC and to a particular project, there is an implied repeal of statutes which normally gives the

governor, the Department of Budget and Finance, and HHFDC the authority to issue bonds.

Contrary to the public statements made during the HOU hearing held on March 22, the Front Street Apartments *is* an affordable housing project. In August 2020, Judge Jill Otake ruled that the Internal Revenue Code qualified contract process was not available to FSA and the project must remain affordable until 2051 under the Low-Income Housing Tax Credit (LIHTC) declaration. That the LIHTC declaration does not appear on a title report is moot, and we do not believe that a title insurance policy which ignores the affordability restrictions on the property would be issued today.

HHFDC **recommends** reverting to the HD1 version of HB 1917.

Thank you for the opportunity to testify.