



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

LATE

ON THE FOLLOWING MEASURE:

S.B. NO. 3170, RELATING TO FUEL TAXES.

BEFORE THE:

SENATE COMMITTEE ON TRANSPORTATION

DATE: Thursday, February 10, 2022 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Janine R. Udui, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General has concerns about this bill and provides the following comments.

This bill in part amends section 243-6(8), Hawaii Revised Statutes (HRS), to allow for the County of Hawaii fuel taxes deposited into the County of Hawaii highway fund to be "expended for the maintenance of substandard private subdivision roads that are used by the public; provided that neither the State nor the county shall be required to maintain any infrastructure installed under this provision; . . . " (page 5, lines 3-9).

This bill may be subject to constitutional challenge.

Article VII, section 4, of the State Constitution provides in part:

No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, **except for a public purpose.** [Emphasis added.]

Determining what constitutes a public purpose is generally a question for the Legislature to decide. *State ex rel. Amemiya v. Anderson*, 56 Haw. 566, 574, 545 P.2d 1175, 1180-81 (1976). And, "[t]hrough the legislature's determination is not conclusive, it is given wide discretion and should not be voided by the courts unless it is manifestly wrong, i.e., the purpose involved is clearly a private one." *Id.* at 574, 545 P.2d at 1181. Further, "it is the duty of the court to ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith. . . . The

presumption, however, is in favor of constitutionality, and all doubts must be resolved in favor of the act." *Id.* "What is a public purpose . . . is not always easy to determine. No general definition, to apply in all cases, need be laid down. It is sufficient to determine in each particular case whether, upon all the facts and circumstances, the purpose is a public one." *In re Queen's Hospital*, 15 Haw. 663 (1904).

The question at issue in *Amemiya* was "whether or not the Director [of Finance] may issue, sell, and deliver twenty million dollars (\$20,000,000) worth of anti-pollution revenue bonds, authorized by Act 161, Session Laws of Hawaii 1973 (Act 161), and enter into a 'project agreement' with a private, profit-making utility company to finance a government-mandated anti-pollution project with the proceeds of the bond sales." *Amemiya* at 582, 545 P.2d at 1177. Act 161 expressly provided that the financing of anti-pollution measures with the assistance of the State through the issuance of revenue bonds is a public purpose. The court concluded that the purpose of Act 161 constituted a public purpose. The court reasoned that (i) the history of the constitutional provision implied that the issuance of industrial bonds was for a public purpose and the court determined that the purpose of Act 161, which was to aid in the control of pollution, was as important as, or more so than, the encouraging of industrial development, (ii) virtually every State appropriation, financing, or lending of credit results in some private benefit and the crucial factor is the ultimate object of the law, and (iii) the exigencies of modern state government virtually compel the use of tax exempt financing as an incentive to publicly desirable activities in the private sector.

In *Queen's Hospital*, the court found that appropriation of public money to the hospital, even though a private one, would be for a public purpose. The court reached its finding by, among other things, considering the hospital's charter, which strictly limited the use of funds for charitable purposes and provided that no part of its profits could inure to the benefit of any private individual. Further, assistance and relief by the hospital was to be extended to all indigent sick and disabled alike, without distinction as to nationality, creed, or otherwise. *In re Queen's Hospital*, 15 Haw. at 664.

There is no indication by the Legislature in the fuel tax statute that maintenance of a private roadway shall be construed as a "public purpose." *See also Bowen v.*

Tucker, 164 P. 3d 1155, 1159 (Okla. 2007) (If the county voluntarily expended public funds to relocate a private road and expended public funds to maintain such a road, this could constitute a violation of the Oklahoma Constitution, art. 10, section 14(A), which provides, in pertinent part, "taxes shall be levied and collected by general laws, and for public purposes only.")

As currently worded, S.B. No. 3170 would allow the use of public money for the maintenance of "substandard private subdivision roads that are used by the public." The bill does not contain any finding or declaration by the Legislature indicating that the bill serves a "public purpose." Accordingly, the bill may be challenged under article VII, section 4, of the Constitution.

We respectfully ask that this concern be addressed. One way to do this is to insert additional wording in the bill to demonstrate a public purpose. Another is to delete the proposed amendment to section 243-6(8), HRS, on page 5, lines 3-9, of the bill.

Thank you for the opportunity to provide comments on this bill.

DAVID Y. IGE
GOVERNOR



CRAIG K. HIRAI
DIRECTOR

GLORIA CHANG
DEPUTY DIRECTOR

EMPLOYEES' RETIREMENT SYSTEM
HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
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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 COMMITTEE ON TRANSPORTATION
ON
SENATE BILL NO. 3170

February 10, 2022
3:00 p.m.
Via Videoconference

RELATING TO FUEL TAXES

The Department of Budget and Finance (B&F) offers comments on this bill.

Senate Bill No. 3170 amends Section 243-6, HRS, to allow federal pandemic relief funds received by the State to be used to supplement payment into the county highway fund and permits the County of Hawai'i (COH) to appropriate the county's share of fuel tax revenues for the maintenance of substandard private subdivision roads that are used by the public. This bill sunsets on June 30, 2027.

B&F has concerns with amending the purpose of the fuel tax revenues for COH. Rather than using fuel tax revenues, B&F recommends directly appropriating funds to COH for the maintenance of substandard private subdivision roads that are used by the public.

Additionally, B&F notes that federal American Rescue Plan Coronavirus State Fiscal Recovery Funds are not an appropriate source of funding for capital improvement projects.

Thank you for your consideration of our comments.

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 305

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: FUEL, Allow Supplementation of Highway Fund with Federal Pandemic Funds

BILL NUMBER: SB 3170

INTRODUCED BY: SAN BUENAVENTURA, CHANG, MISALUCHA, Gabbard, Nishihara, Shimabukuro, Wakai

EXECUTIVE SUMMARY: Allows federal pandemic relief funds received by the State to be used to supplement payment into the county highway funds. Permits the County of Hawaii to appropriate the county's share of fuel tax revenue for the maintenance of substandard private subdivision roads that are used by the public. Sunsets 6/30/27.

SYNOPSIS: Amends section 243-6, HRS, to provide that payments of county fuel taxes may be supplemented by a fair and reasonable allocation, as determined by the state director of finance, by the use of federal pandemic relief funds received by the State and other federal pandemic relief sources, to the extent authorized by law.

Also provides that for Hawaii county, funds may be expended for the maintenance of substandard private subdivision roads that are used by the public; provided that neither the State nor the county shall be required to maintain any infrastructure installed under this provision; provided further that no expenditure shall be made that would jeopardize federal aid for highway construction.

EFFECTIVE DATE: Effective July 1, 2022; provided that this Act shall be repealed on June 30, 2027, and section 243-6, Hawaii Revised Statutes, shall be reenacted in the form in which it read on the day prior to the effective date of this Act.

STAFF COMMENTS: We appreciate the effort to use federal aid to lessen the tax burden on the people of Hawaii.

We unfortunately need to question whether the funds used to maintain private subdivision roads would be considered public money spent for a private purpose in violation of Article VII, Section 4 of the Hawaii Constitution.

Digested: 2/8/2022

SB-3170

Submitted on: 2/7/2022 1:15:15 PM

Testimony for TRS on 2/10/2022 3:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
linnette quade	Individual	Support	No

Comments:

some subdivisions roads are in such a state of disrepair it is impossible for safe ingress/egress of police fire ambulance etc. if the state allowed for the creation of subdivisions without any thought about future infrastructure, then the state/county needs to do something to help these citizens access their homes. folks in these private subdivisions pay the same fuel, property tax, vehicle tax as those on "public roads". some of these roads are actually major arteries that many people use who dont live in the subdivisions, making them in effect public roads. something needs to be done and this along with the bill to make dues mandatory will help these people. if roads are so bad that bus service can not be accomplished then this further handicaps students and workers and elderly who might not have an other transportation.

SB-3170

Submitted on: 2/7/2022 2:05:49 PM

Testimony for TRS on 2/10/2022 3:00:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Gerard Silva	Individual	Oppose	No

Comments:

Is'nt this Ellegal!!