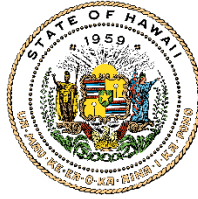


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT
LAURA H.E. KAAKUA
FIRST DEPUTY
M. KALEO MANUEL
DEPUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
DAWN N. S. CHANG
Chairperson

Before the Senate Committee on
WATER AND LAND

Monday, February 6, 2023
1:05 PM

State Capitol, Conference Room 229 & Videoconference

In consideration of
SENATE BILL 97
RELATING TO PUBLIC LANDS

Senate Bill 97 proposes to amend Section 171-36, Hawai'i Revised Statutes (HRS), to prohibit the Board of Land and Natural Resources (Board) from updating the terms of leases when they are extended under Act 149, Sessions Laws of Hawai'i (SLH) 2018 (Act 149), unless the most current lease forms and leasing practices and policies of the Board are included in rules of the Board adopted in accordance with Chapter 91, HRS. **The Department of Land and Natural Resources (Department) opposes this measure.**

Act 149 is limited in application to the Hilo Community Economic District (HCED). The Department's leases in the HCED were issued either by: (i) public auction; or (ii) direct negotiation under disaster relief legislation enacted after the 1960 tsunami that impacted Hilo and other areas of the State. For many years, the Board was under the understanding that the Hawai'i Supreme Court's decision in *Kahua Ranch*¹ precluded the Department from updating public auction leases to the current standard terms and conditions used by the Department of the Attorney General (AG) in the extension period. In contrast, the Board could update direct negotiation leases to the current standard terms and conditions used by the AG. Accordingly, the Department initially processed lease extension applications differently under Act 149, depending on whether the leases were issued by public auction or direct negotiation; public auction leases

¹ *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963), *aff'd on reh'g*, 47 Haw. 466, 390 P.2d 737, *reh'g denied*, 47 Haw. 485, 391 P.2d 872 (1964).

would be extended on their original terms and conditions while direct negotiation leases would be updated in the extension period to the current standard terms and conditions used by the AG.

The disparate treatment of these two types of leases troubled the Department and members of the Board. The Department therefore sought legal advice from the AG on the effect of the *Kahua Ranch* decision on Act 149 lease extensions. Pursuant to an advice letter from the AG dated July 26, 2022, the Department determined that public auction leases could be updated to the AG's current lease terms and conditions, to the extent necessary to implement the requirements of Act 149. Below is a summary of three substantive provisions the Department is now allowed to update in extensions of public auction leases:

- **Lease Assignments.** AG's current lease form includes an assignment of lease premium analysis that allows the State to share in the consideration paid for an assignment of a lease under some circumstances. This term is consistent with Section 171-36, HRS, which was amended to allow for the assessment of a lease assignment premiums by Act 55, SLH 1982. Leases issued prior to 1982 contain no such provision.
- **Sublease Rents.** AG's current lease form includes language allowing the State to adjust the lease rent based on the sublease rent charged to the sublessee. This is consistent with Section 171-36, HRS, which was amended to allow for rent adjustments in the subleasing context by Act 239, SLH 1965. Leases issued prior to 1965 contain no such provision.
- **Ownership of Improvements.** AG's current lease form includes a provision on ownership of improvements at lease expiration giving the State the option of assuming ownership or requiring the lessee to remove them at lessee's expense. State leases have incorporated this provision since about the mid-1960s. The older leases simply provide that at the expiration of the lease, title to the improvements vests in the State, leaving open the question whether the State is responsible for removing improvements that have outlived their useful lives. The lease extension period should include the current standard terms clarifying the State's options relating to ownership of improvements.

Senate Bill 97 would hamstring the Department's leasing practices by requiring the Board to use outdated lease forms for Act 149 extensions, unless the lease form and leasing practices and policies of the Board are included in rules governing the extensions of public lands pursuant to applicable law, adopted by the Board in accordance with Chapter 91, HRS. The Board does have policies on lease assignment premiums and adjustment of rent for subleases that were adopted at its noticed, sunshine meetings where the Department's lessees and the public at large had an opportunity to testify. However, the lease forms and practices at issue are actually those of the AG, not the Board or the Department. The AG prepares the lease documents and approves them as to form. It would not make sense for the Board to adopt rules about the lease forms prepared and used by the AG. Additionally, the AG needs flexibility in drafting and revising its lease forms to accommodate industry changes, developments in landlord-tenant law as determined by courts or new statutory enactments. Requiring rules for the contents of AG's legal documents is not a workable approach.

The Department also takes issue with the use of language in the bill to the effect that the Department “unilaterally amends . . . terms and conditions of the extended lease to conform to the most current lease form and leasing practices and policies” of the Board. A lease extension is effectuated by a document requiring the signature of both the State and representatives of lessee. If the lessee does not agree with the terms and conditions of the extension documents, it does not have to sign it.

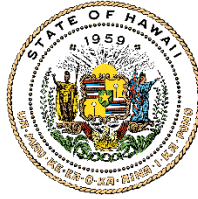
The best interests of the State are not served by extending leases on outdated forms that are not even compliant with the current requirements of Chapter 171, HRS. Further, there is no compelling reason that lessees should continue to benefit from lease provisions that are outdated. The Legislature already provided a significant benefit to State lessees by allowing them to apply for extensions of their leases beyond the maximum term of 65 years that existed prior to 2018. Act 149 was in derogation of the stated public policy of leasing State lands through a competitive process under Section 171-32, HRS.² Additionally, even under the outdated lease forms discussed above, the State is entitled to ownership of improvements built by lessee on the premises at lease expiration. If the leases in HCED were allowed to expire, the State would be able to lease them with improvements (assuming the improvements retain useful life) thereby potentially increasing the fair market rental rent payable to the State. Act 149 provides that the rent for the lease extension period is to be based on land only – another benefit to the lessee. Under these circumstances, the Department should be permitted to update its lease forms in the extension period in accordance with the advice provided by the AG.

Mahalo for the opportunity to provide testimony in opposition to this measure.

² “§171-32 Policy. Unless otherwise specifically authorized in this chapter or by subsequent legislative acts, all dispositions shall be by lease only, disposed of by public auction in accordance with the procedure set forth in sections 171-14 and 171-16.”

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McCully Works
69 Railroad A-19 Hilo, Hi. 96720

February 3, 2023

Senate Committee on Water and Land
The Honorable Senator Lorraine Inouye, Chair
The Honorable Senator Brandon Elefante, Vice Chair

Re: Support for SB97, Relating to Public Lands

Aloha Chair Inouye and Vice Chair Elefante,

Mahalo for the opportunity to support SB97, which seeks to clarify to the Land Division of DLNR that Act 149, 2018 did not allow for the unilateral amending of existing leases except when very specific conditions were met. Namely to improve the lessees ability to mortgage the property or should the Board promulgate and establish Hawaii Administrative Rules that would address whatever issues were deemed significant. As it stands the Land Division has chosen to arbitrarily apply *ad hoc* policies to amend existing leases. This contravenes Act 149 and frustrates the will of the Legislature.

It's unfortunate, and actually causes real damage to East Hawaii, that Act 149 has only been able to assist two companies to extend their leases with the fifth anniversary of its enactment this July, 2023. In that time the 50+ remaining lessee's have watched prices for all goods and services, but particularly construction expenses, increase dramatically. As well, the cost of money as measured by the interest rate charged for mortgage lending has more than doubled. This means that the Hilo Community Economic District has been harmed by the mismanagement of the public lands in East Hawaii once again. It should also be noted that the two lessees who were able to extend their leases were both forced to accept amended leases in order to meet the time requirements that they were facing. Any of the processes used in the management of public lands should be fair and reasonable, this has not been the case in terms of implementing Act 149. All the remaining lessees are waiting for a fair and transparent process to be established.

Please Support SB97 and allow for the redevelopment of these public land leases through the efforts and investments of the businesses that have operated on them for the past 60 years.

Sincerely,

James McCully

SB-97

Submitted on: 2/6/2023 8:43:38 AM

Testimony for WTL on 2/6/2023 1:05:00 PM

LATE

Submitted By	Organization	Testifier Position	Testify
Kerry A. Umamoto	Testifying for Hilo Fish Company	Support	Written Testimony Only

Comments:

Aloha Chair,

Im in support of SB97. i believe we need to continue to work together to creat a structure to be followed. right now, we have a law in place but it is being changed as we go through lease extensions. This is not the best way to handle mid stream through a process. i hope this helps everyone moving forward in these complicated times.

SB-97

Submitted on: 2/3/2023 5:41:09 PM

Testimony for WTL on 2/6/2023 1:05:00 PM

Submitted By	Organization	Testifier Position	Testify
Michael Nakashima	Individual	Support	Written Testimony Only

Comments:

I support this bill because the lessor keeps changing the rules of a lease. Its so hard to stay in business these days, why make it harder for the lessee