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February 6, 2009

The Honorable Ken Ito, Chair,
and Members
Committee on Water, Land and Ocean Resources
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Ito and Members of the Committee:

Re: Testimony in Opposition to House Bill No. 1767
Hearing: Monday, February 9, 2009, at 9:00 a.m., Conference Room 325

The County of Hawaii ("County") opposes House Bill 1767 because it seeks to limit the eminent domain powers of the counties to preclude condemnation of private property owned by tax exempt charitable organizations for any economic development, redevelopment, or private use or development. The County opposes House Bill 1767 for several reasons. First, the bill will provide less flexibility to the County, preventing it from condemning such private property owned by tax exempt charitable organizations despite a public interest to do so when there is public use or purpose. Second, the current statutory provisions regarding the County's power of eminent domain provides sufficient constitutional protections to all private property owners. And third, potential negative impacts of the passage of this bill include preventing the redevelopment in areas destroyed by hurricanes, tsunamis and other natural disasters, delaying the acquisition of open space lands that may partially be used as a concession, and prohibiting the purchase of leasehold lands owned by charitable trusts,

The relevant language in this bill provides that:

Each county shall have the power to exercise the power of condemnation by eminent domain in accordance with section 46-61 when it is in the public interest to do so; provided that, notwithstanding any law to the contrary, no county shall exercise this power over any property owned, in whole or in part, by a tax-exempt charitable organization as defined by section 501(c) (3) of the Internal Revenue Code of 1986, as amended,

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and subsequently transfer, by sale or otherwise, ownership, possession, or use to any entity or person for any economic development, redevelopment, or private use, including but not limited to industrial, residential, agricultural, commercial, hotel, resort, office, or retail use or development;

The counties pursuant to Hawai'i Revised Statutes ("HRS") Section 46-1.5 (6) have the authority to "exercise the power of condemnation by eminent domain when it is in the public interest to do so." Normally, the County uses its eminent domain authority to acquire property for roads and other municipal facilities.

This bill would impact the County's exercise of its authority under the provisions of HRS Chapter 53 which govern urban renewal. The chapter envisions that urban renewal would encompass both public and private redevelopment. The sale of lands to private development is frequently an essential component of any urban renewal project.

Chapter 53 has a number of safeguards to protect those members of the public impacted by an urban renewal project. The county council must first establish a local redevelopment agency. HRS Section 53-2. No member of the redevelopment agency or its employees may acquire an interest in a redevelopment project. HRS Section 53-3. Members of the agency may be removed for misconduct. HRS Section 53-4. Before adopting a redevelopment plan, the agency must assure that satisfactory housing facilities are available or that reasonable provisions will be made for temporary housing of displaced families. HRS Section 53-6(a). The redevelopment plan must be submitted to the planning commission. HRS Section 53-6(b). When submitted to the county council, the plan must be given a public hearing. *Id.* The council must find that the area is a blighted area and if the council approves the plan, further proceedings are stayed for a period of thirty days to allow for actions suits or proceedings to contest the validity of the proceedings. *Id.* Hearings and trial upon issues raised in actions, suits or proceedings are to be given precedence by the lower courts and the Hawai'i Supreme Court. HRS Section 53-6(c). Special provisions govern urban renewal projects in disaster areas. HRS Section 53-7. Disaster areas are those areas that a council has certified is in need of renewal, redevelopment or rehabilitation a result of seismic wave, flood, fire, hurricane, earthquake, storm, volcanic activity or other catastrophe of natural or human origin. It is only when all the foregoing provision have been complied with that acquisition of the lands in a redevelopment area would be undertaken. HRS Section 53-8.

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In the wake of the devastation of the 1946 and 1960 tidal waves the County exercised its power to acquire a significant portion of the Hilo bay front area for an urban renewal project through the County's Hawai'i Redevelopment Agency. The Kaiko'o Urban Renewal Project ("Kaiko'o") is generally considered an example of good planning. While most of the property became government property for open space, public recreation, flood and tsunami inundation control, and government buildings, some property was conveyed to private entities for the construction of a hotel, several commercial buildings, and a retail mall. Among the current businesses located within this project area are Longs Drugs, the Bank of Hawaii, American Savings Bank, Central Pacific Bank, a Good Year tire dealership, The Family Medicine Center, Ben Franklin (formerly a Safeway), as well as other private businesses. This project allowed the County to move blighted residential and commercial uses out of the area that had been most prone to tsunami inundation and loss of life and replace them with non-residential commercial and government uses that would hopefully reduce any future loss of life in the area. While some people were willing to sell their property, others were not. Without its eminent domain power and urban renewal authority, the county could not have undertaken the project. While the County has been fortunate that no major tsunami has occurred since 1960, in the event that either a tsunami or hurricane were to devastate the island in the future, the County would want to have the power to undertake a project like Kaiko'o.

The County has also recently set aside 2% of its funds to set up a public access, open space and natural resources preservation fund. The monies in the fund for the acquisition of land would provide public outdoor recreation, access to beaches and mountains, preservation of historic or culturally important areas and sites, protection of natural resources and watersheds. In some instances the county may not wish to own the property itself but convey it to a non-profit such as the Trust for Public Lands or other non-profits that may be better situated to care for and maintain the sites. This would hold true in particular for historic sites. This bill would prohibit such transfers if the non-profit had indicated to the county that they were willing and able to preserve and maintain the property before the county undertook eminent domain. Consequently, if the County wanted to condemn from one non-profit organization and convey to another and the new non-profit organization or the County wanted to do a county beach park with a commercial component to help underwrite expenses, this might be difficult to accomplish. Moreover, the bill would also prohibit "use" of property so if the County acquired beach property it would be prohibited from doing leases/rentals for private use such as a concession at the beach.

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The bill would also eliminate any state or county use of eminent domain for leasehold conversion as that would constitute transfer to a private entity (the homeowner) that had expressed an interest in purchasing the fee title to the property from the landowner if the property was condemned from a non-profit organization.

While the County has not utilized eminent domain in this fashion, it is possible that either the State or the County might wish to exercise such power in the future under appropriate circumstances, such as conversion of affordable rental apartments for sale to tenants or a private non-profit association committed to keeping the units affordable. Given the need for affordable housing, the County would want to be able to exercise its eminent domain power to acquire such units and have the flexibility to sell them to eligible parties. This bill would prohibit such transfers to any of the existing tenants that had expressed an interest in buying the units if offered for sale.

Thank you for your consideration of our testimony.

Sincerely,



JOSEPH K. KAMELAMELA
Deputy Corporation Counsel,
Litigation Supervisor
County of Hawai'i

JKK:fc

c via email only: Kevin Dayton, Executive Assistant
Warren Lee, Director of Public Works
Robert A. Fitzgerald, Director of Parks and Recreation
Bobby Jean Leithead-Todd, Acting Deputy Planning Director
Nancy Crawford, Finance Director

Council Chair
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Director of Council Services
Ken Fukuoka

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February 6, 2009

TO: Honorable Ken Ito, Chair
House Committee on Water, Land, & Ocean Resources

FROM: Danny A. Mateo
Council Chair 

SUBJECT: **HEARING ON FEBRUARY 9, 2009; TESTIMONY IN OPPOSITION TO HB 1767,
RELATING TO EMINENT DOMAIN**

Thank you for the opportunity to testify in opposition to this important measure. The purpose of this measure is to limit a county's eminent domain powers by precluding condemnation of private property owned, even in the smallest part, by tax exempt charitable organizations, for the purpose of any economic development, redevelopment, or private use.

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 oppose this measure for the following reasons:

1. This measure singles out one class of landowners ("property owned, in whole or in part, by a tax-exempt charitable organization") as deserving of a blanket exemption from a county's long-standing power of eminent domain. While property owned by a non-profit organization may serve the public good and provide a community service, a county should not be prohibited by law from instituting eminent domain proceedings if it finds there is a public purpose for doing so. Rather, it is for the legislative body to decide whether the balance should shift in favor of the public purpose.
2. The State here blindly places a value judgment on the intrinsic worth of any 501(c)(3) entity over the laudable and constitutionally viable public purposes of economic development and redevelopment as the basis for this measure. Indeed, the measure would allow an astute landowner who hears of a county's plan to develop property for a public purpose to transfer a small ownership interest in property to a 501(c)(3) entity to avoid condemnation.
3. As the law currently stands, the power of eminent domain can legitimately be exercised by a county (or State, for that matter) only where the taking is for a public purpose. In Kelo v. City of New London, 545 U.S. 469, 484, 125 S.Ct. 2655, 2665, 162 L.Ed.2d 439 (2005), the United States Supreme Court confirmed that promoting economic development can constitute a public purpose, and noted that, "Promoting economic development is a traditional and long-accepted function of government." Indeed, the Court went on to cite Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 242, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) -- in which fee title was taken, by statute, from lessors and

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transferred to lessees for just compensation in order to reduce the concentration of land ownership -- as precedent (upholding the "interest in breaking up a land oligopoly that 'created artificial deterrents to the normal functioning of the State's residential land market'"). Kelo, 545 U.S. at 484-85. Particularly in these economically challenging times, a county should not be hampered in its ability to use such means as are necessary to promote economic development and redevelopment.

For the foregoing reasons, I oppose this measure.

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DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

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MUFI HANNEMANN
MAYOR



DAVID K. TANOUE
ACTING DIRECTOR
ROBERT M. SUMITOMO
DEPUTY DIRECTOR

February 9, 2009

The Honorable Ken Ito, Chair
and Members on the Committee on Water,
Land & Ocean Resources
House of Representatives
State Capitol
Honolulu, Hawaii 96813
Dear Chair Ito and Members:

**Subject: House Bill 1767
Relating to Eminent Domain**

The Department of Planning and Permitting **opposes** House Bill 1767.

It would set parameters on the counties' ability to condemn land by specifically prohibiting its use on properties owned by tax-exempt charitable organizations for economic development purposes.

As noted in the first section of this bill, it is in response to the 2005 decision by the U.S. Supreme Court case, *Kelo vs. City of New London*. In this case, the taking of private land for economic development purposes based on a comprehensive redevelopment plan adopted by the city, was upheld. Clearly, the constitutional requirement of public use was established for the court to uphold the condemnation. We agree with this decision. In determining whether to condemn land for infrastructure improvements or neighborhood revitalization, the city has a deliberate decision-making process to show a public use or benefit. The determination to condemn land should not be stifled by who owns the land, but on the larger concerns of public health, safety and welfare for the neighborhood, the region, or the county. A project to provide more jobs, renewed commercial investments, and community amenities which can be of vital interest to a declining neighborhood should not be thwarted by a happenstance of ownership. Please note that any landowner must be paid the fair market value of the lands taken by condemnation.

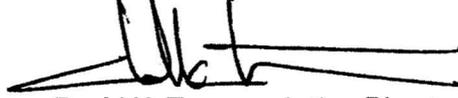
We do not know of any pending plans for the city to condemn lands owned by charitable organizations for economic development. Should this occur, the decision will not be made lightly. Like what the City has done in the past with various urban renewal projects, sometimes condemnation must occur to accomplish overarching neighborhood revitalization goals.

The Honorable Ken Ito, Chair
and Members of the Committee on Water,
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Please file this bill.

Thank you for the opportunity to testify.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'DK Tanoue', with a long horizontal line extending to the right.

David K. Tanoue, Acting Director
Department of Planning and Permitting

DKT: jmf
hb1767-kst.doc



KAMEHAMEHA SCHOOLS

February 8, 2009

TESTIMONY TO THE HOUSE COMMITTEE ON WATER, LAND & OCEAN RESOURCES

By
Paul Quintiliani, Director
Endowment/Commercial Assets Division
Kamehameha Schools

Hearing Date: Monday, February 9, 2009
9:00 a.m., Conference Room 325

To: Representative Ken Ito, Chair
Representative Sharon E. Har Vice Chair
Members of the Committee

RE: House Bill No. 1767 Relating to Eminent Domain

Kamehameha Schools submits the following comments in support of H.B. No. 1767 (the "**Bill**"):

This Bill seeks to protect the assets of tax exempt organizations by precluding the use of condemnation proceedings for economic development, redevelopment or private use or development.

In response to the governmental taking of property for private economic development in Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed. 2d 439 (2005), many states have enacted legislation restricting the use of condemnation proceedings to protect the property rights of private landowners. Hawaii has yet to adopt legislation to protect these property rights. This Bill is a first step in preventing these unfair and unreasonable governmental takings of private property.

Kamehameha Schools has seen the loss of many of its assets through condemnation. While supporters of such condemnations argue they should be upheld so long as the landowner is paid "just compensation," landowners, both large and small know from experience that forced taking of their lands almost never results in a fair economic result for the landowner. Further, it does not compensate landowners for the emotional loss of inherited lands that have been theirs for generations.



KAMEHAMEHA SCHOOLS

February 8, 2009

To: Representative Ken Ito, Chair
Representative Sharon E. Har Vice Chair
Members of the Committee

As a Native Hawaiian educational organization and as the steward of lands held in legacy for over a hundred years, Kamehameha Schools has a deep spiritual and cultural connection to its lands and has vigorously and consistently through the years defended against the forced takings of its lands, including lease-to-fee condemnations. While Kamehameha Schools has cooperated when a governmental authority has sought to acquire property for legitimate and justifiable public uses and benefits, such as roadways and utilities, we do not believe it is ever legitimate or justified for a governmental authority to take our lands for the economic and private purposes set forth in this Bill.

Thank you for this opportunity to express our support of this Bill.