

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
FINANCE**

**Thursday, February 27, 2020
2:00PM
State Capitol, Room 308**

**In consideration of
HOUSE BILL 2191, HOUSE DRAFT 1
RELATING TO LEASE EXTENSIONS ON PUBLIC LAND**

House Bill 2191, House Draft 1 proposes to authorize the Board of Land and Natural Resources (Board) to extend leases of public lands for commercial, industrial, resort, or government use upon approval of a proposed development agreement to make substantial improvements to the existing improvements. House Draft 1 of the measure changed the effective date to July 1, 2050 to encourage further discussion and made technical, non-substantive amendments for the purpose of clarity, consistency and style. **The Department of Land and Natural Resources (Department) supports this measure.**

House Bill 2191, House Draft 1 proposes to authorize the Board, on a "statewide basis", and for a limited period (to be repealed on June 30, 2025), to extend commercial, industrial, resort or government leases that have not been sold or assigned within 10 years prior to receipt of an application for a lease extension under the measure, when the lessee commits to substantial improvement to the existing improvements, provided that lease extensions cannot exceed 40 years, and additionally, the lessee cannot transfer or sell the lease during the first 10 years of the extension period, except by devise, bequest, or intestate succession. The bill is intended to support long-term tenants wishing to continue their businesses past the 65-year maximum lease term allowed under current law.

One of the arguments the Department has heard against restrictions on assignment is that lessees need to be able to mortgage their leasehold interests in the land. House Bill 2191, House Draft 1 expressly exempts collateral assignment of a lease or other security granted to a leasehold mortgagee in connection with leasehold financing by the lessee from restrictions on assignment.

House Bill 2191, House Draft 1 would also not prohibit "true" subleases, which the Department views as those in which the lessee/sublessor retains either a portion of the lease premises for its

own use or reserves a portion of the lease term after the sublease ends for its own use. In contrast, a transaction styled as a sublease but which in effect is an assignment of all of the lessee's interest in the lease would not be allowed under the bill within the first 10 years of the extension period. The Department additionally notes that assignments and subleasing are governed by two separate subsections of Section 171-36, Hawaii Revised Statutes (HRS): Section 171-36(a)(5), HRS, for assignments, and Section 171-36(a)(6), HRS, for subleasing. House Bill 2191, House Draft 1 was not intended to affect subleasing under Section 171-36(a)(6), HRS.

As noted above, House Bill 2191, House Draft 1 acknowledges the commitment of long-term lessees to locating their business on state lease lands and to ensure that such lessees could continue to operate those businesses for the duration of the extension period authorized under the measure. The Department is concerned that making lease extensions available on a broader basis could lead to speculators acquiring state leases, obtaining extensions, putting in the minimum 30% of substantial improvements required, and flipping the leases for a profit. The Department does not believe such speculation is in the best interests of the State.

Thank you for the opportunity to comment on this measure.



HB2191 HD1
RELATING TO LEASE EXTENSIONS ON PUBLIC LAND
Ke Kōmike Hale o ka ‘Oihana ‘Imi Kālā

Pepeluali 27, 2020

2:00 p.m.

Lumi 308

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB2191 HD1, which would authorize century-long leases that bind the hands of the Board of Land and Natural Resources (BLNR), Hawaiian Homes Commission (HHC), and future generations from adequately fulfilling fiduciary obligations of due diligence and undivided loyalty to ensure that limited lands productively maximize benefits for HHC beneficiaries, Native Hawaiians, and the public. OHA notes that it opposed a nearly identical bill last year for the same reasons.

1. Act 149’s “pilot project” has not been completed or evaluated; allowing forty-year lease extensions for any and all industrial, commercial, and resort leases in the state may be premature.

As a preliminary matter, OHA notes that the legislation this measure is purportedly based on, Act 149, was enacted in 2018 as a “pilot project” to determine whether public land lease extensions in the dilapidated “Hilo community economic district” can “facilitate efficient and effective improvement, and economic opportunity,” and whether such an approach “can be replicated in other areas of the State.”

However, rather than wait for the pilot program to conclude, this measure would summarily expand much broader lease extension authorities for any and all industrial, commercial, government, and resort leases of public lands throughout the entire state. Such an expansion appears premature given Act 149’s acknowledged need to first assess whether any redevelopment benefits from lease extensions “can be replicated in other areas of the State.” Indeed, there are several considerations that may need to be assessed from Act 149’s pilot project, including but not limited to:

- Whether redevelopment occurs in a timely manner as a result of its lease extension authority;
- Whether the cost-benefits to the State and the public, including opportunity costs, foreclosed revenue increases from real estate market changes, and foregone equity in existing and new improvements that would otherwise revert to the State justify the long-term placement of public lands under private control;
- Whether 40-year extensions of lease terms and fixed rental periods are necessary to obtain redevelopment financing;
- Whether specific conditions, contingencies, safeguards, or other considerations should be considered in the development of extension terms and conditions; and

- Whether any replication of its lease extension authority should be limited to certain leases or circumstances.

Accordingly, OHA strongly recommends that the Committee allow for an appropriate assessment of the potential unintended consequences, cost-benefits, and other lessons from Act 149, before expanding much broader lease extension authorities to all other industrial, commercial, resort, and government public land leases throughout the islands.

2. This measure may authorize leases that violate the State’s fiduciary obligations under the public trust and public land trust, and lead to the alienation of public and “ceded” lands.

Under Article 11, section 1 of the Hawai‘i State Constitution and Chapter 171, *Hawai‘i Revised Statutes* (HRS), the State through the Board of Land and Natural Resources (BLNR) holds in trust approximately 1.3 million acres of public lands, including the natural and cultural resources they contain, for the benefit of present and future generations. Much of these lands are also subject to the public land trust created by Article 12 of the Hawai‘i State Constitution and section 5(f) of the Admission Act, which requires that a portion of revenues derived from public land trust lands be dedicated to OHA, for the purpose of bettering the conditions of Native Hawaiians. The trust status of these lands imposes upon the BLNR specific fiduciary obligations of due diligence and undivided loyalty in ensuring its trust corpus is productive and maximizing benefits for Native Hawaiian and public beneficiaries. **By authorizing the extension of commercial, industrial, resort, and government public land leases – many of which may already have been held by their respective lessees for the better part of a century – for up to 40 years, this bill may invite century-long leases that substantially inhibit the BLNR and HHC, from fulfilling fiduciary obligations, and otherwise ensuring the best and most appropriate uses of public trust and public land trust lands.**

For example, this measure could allow public land leases first issued for 55 years then extended another 10 years for 65 years to be extended for an additional 40 years, with fixed rental periods of the same amount of time. This could result in the use of public lands by private entities for 105 years, **without any rent reopening for over a generation**, so long as the BLNR agrees to the lessees’ agreement proposal to make “substantial improvements to the existing improvements or constructing new substantial improvements.” **Notably, the lack of an aggregate lease length cap as well as any prohibition on additional lease extensions could allow lease terms and fixed rent periods to be repeatedly extended, for an indefinite length of time, further drawing into question the ability of future generations to ensure the appropriate disposition of public lands – something that even Act 149 does not allow.** The fact that industrial, commercial, and resort lands may have the highest revenue potential of the State’s public land and public land trust land inventories only further exacerbates the concerns underlying this measure’s lease extension provisions.

In addition to tying the State, HHC, and future generations’ hands in ensuring the appropriate use of and realization of revenues from public trust and public land trust lands, the excessively long-term leases that would be authorized under this measure may lead to a sense of entitlement among lessees that can result (and has resulted) in the alienation of public lands,

including “ceded” lands to which Native Hawaiians have never relinquished their claims.

OHA objects to the sale or alienation of “ceded” lands except in limited circumstances and therefore has significant concerns over any proposal that may facilitate the diminution of the “ceded” lands corpus.

Accordingly, OHA urges the Committee to decline to adopt the **unlimited** and relatively unconditioned **40-year lease term and fixed rent period extensions** that would be authorized for public lands, including public land trust and “ceded” lands, leased for commercial, industrial, resort, and government purposes.

3. Under this measure, lease extensions would be authorized for a much broader range of justifications than even Act 149 contemplates.

Finally, OHA notes that Act 149 explicitly and specifically requires any extension of lease terms or fixed rent periods to be only “to the extent necessary to qualify the lease for mortgage lending or guaranty purposes,” and “based on the economic life of the substantial improvements as determined by the [BLNR] or an independent appraiser.” In contrast, this measure – which has been characterized as only expanding the geographic scope of Act 149’s provisions – would in fact broadly allow for lease extensions “in order [for the lessee] to make substantial improvements,” “based upon the substantial improvements to be made.” While such language would provide substantially more flexibility than Act 149 in granting lease term length and fixed rent period extensions, it would also allow for extensions in situations where the State’s interest in the redevelopment of leased parcels are not commensurate with the benefits such extensions would grant to a private entity. **Under this measure, a lessee may apply for and receive extensions that exceed the time necessary to secure redevelopment financing, and that exceed their improvements’ useful life – at which point the lessee would be allowed to apply for an additional extension.** Accordingly, this measure does not just expand the geographic scope of Act 149’s extension authority and remove Act 149’s limitations on total aggregate lease lengths, but would further authorize extensions to be based on a broader range of justifications that, due to political pressure or other reasons, may undermine the State, HHC, and public’s interests in the development and disposition of its lands for generations at a time.

4. Critical amendments are necessary to minimally uphold the State’s fiduciary obligations and the interests of Native Hawaiians, HHC beneficiaries, and the public in the disposition of public lands under this measure.

In light of the above concerns, should the Committee nevertheless choose to move this measure forward, OHA strongly urges the inclusion of amendments to uphold the State’s fiduciary obligations under the public trust and public land trust, and to provide concrete safeguards to protect the interests of the State, HHC beneficiaries, Native Hawaiians, and the general public in its limited land base. Such amendments should minimally include:

- An effective date that coincides with the end date of the “pilot project” established under Act 149;
- A sunset date to limit the provisions of the bill to the length of time currently contemplated;

- A limitation on the maximum aggregate fixed rent period and lease term for a lease to no more than 15-20 years beyond the original fixed rent period and/or lease term, which should be sufficient for financing purposes and which would reduce the potential for foreclosing future substantial revenue generating opportunities;
- Conditions similar to those in Act 149, explicitly limiting any lease extensions to the length of time necessary for mortgage lending or financing of specified improvements, prohibiting lease extensions that exceed a percentage of the useful life of any improvements to be made, and requiring all proceeds from any financing or loan obtained as a result of an extension to be used specifically for proposed improvements;
- Explicit extension provisions providing for improvements to either revert to the State or HHC at the end of the lease term, or be removed by the lessee at the lessee's expense, at the election of the State or HHC;
- To ensure the general public has a fair shot at expressing interest in an auction and bidding for a lease:
 - A prohibition on extensions of lease terms prior to 3 years and within one year of the end date of a lease; and
 - A prohibition on the extension of a lease term where, after public notice of no less than one year, there is sufficient interest in the parcel by third parties to hold a public auction for the lease.

Therefore, OHA urges the Committee to **HOLD** HB2191 HD1, or minimally include amendments as listed above. Mahalo nui for the opportunity to testify on this measure.

Prince Kuhio Plaza

February 27, 2020

Hearing Date: February 27, 2020

Time: PM

Place: State Capitol, Conference Room

Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair
State Capitol
Committee on Finance
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Testimony in Support of House Bill No. 2191 HD1

Dear Chairman Luke, Vice Chairman Cullen and Committee Members:

Thank you for the opportunity to provide written testimony on House Bill No. 2191 HD1. The intent of the Bill is to authorize the board of land and natural resources to extend commercial, industrial, resort, or governmental leases, other than those to which the University of Hawaii is a party, for lessees who commit to making substantial improvements on existing facilities. I am the General Manager of Prince Kuhio Plaza ("PKP" or "Shopping Center"), the largest indoor shopping center on the island of Hawaii.

By way of background, PKP was previously owned by GGP, Inc. ("GGP"). In August 2018, GGP was acquired by Brookfield Properties, an affiliate of Brookfield Asset Management. Brookfield Properties' retail group has an extensive portfolio of regional shopping center properties encompassing over 170 locations across 43 U.S. states, including GGP's former portfolio. We assure premier quality and optimal outcomes for our tenants, business partners and the communities in which we do business.

Brookfield Properties has carried forward GGP's legacy of being an integral part of the economic fabric of Hawaii for more than 30 years (since 1987), through good and bad times – owning, operating and reinvesting in our Hawaii real estate assets as part of a long-term commitment that provides economic stability, growth, and jobs through all economic cycles. We own and operate three major shopping centers in Hawaii – PKP in Hilo, Whalers Village in Lahaina, and Ala Moana Center in Honolulu.

Home to more than 60 stores, restaurants and entertainment options, PKP is the primary shopping, dining and gathering place for Kama'aina and visitors on the island of Hawaii. PKP hosts over 50 community events a year and provides premium event space for local Kupuna groups passing on their knowledge of music and dance, artisan craft fairs, and the celebration of other local traditions, including but not limited to: monthly performances by Hilo and Pahoa Kupuna groups, school performances, performances by the Armed Forces band, performances by local artists such as Ben Kaili, Bruddah Walter, and Komakakino, Chinese New Year celebration events, the Arthritis Foundation's Walk for the Cure event,

PRINCE KUHIO PLAZA

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and Mother's Day craft fairs. In particular, PKP is a favorite host location for the Merrie Monarch Craft Fair, one of the biggest events in Hilo, because the Mall is indoors, air conditioned, centrally located, and has the capacity to cater to thousands of customers each day. The Merrie Monarch Craft Fair involves around 45 unique, local vendors and crafters from all the islands, including Manaola, Hawaii's Finest, Missing Polynesia and Nahe Wahine. We are committed to hosting enriching experiences for people of all ages and creating a warm and welcoming environment that celebrates the community and its rich history.

In recent years, Brookfield Properties has invested substantial resources in redeveloping PKP to maintain its status as a premier shopping center and community gathering place. In 2016, we completed a \$6,000,000 aesthetic interior renovation of PKP, transforming the Shopping Center with cosmetic updates and improvements to its common areas, including: new finishes, updated seating areas, column treatments, and new flooring. Also, in 2016, we demolished and rebuilt the former "Hilo Hattie Building" to make way for new retailers such as Verizon Wireless, Spectrum, Daiichi Ramen, and Genki Sushi, at a cost of \$5,000,000. In 2018, we expended another \$7,400,000 to re-lease the former Sports Authority premises to TJ Maxx and Petco. We are also currently working with several prospective tenants interested in opening at PKP this year, as well as pursuing future tenants that will further job creation and investment in Hilo. We are constantly reinvesting in our properties to enhance the customer experience and to ensure that our properties evolve to meet the needs of our tenants and the community.

The future of PKP and the commitment we've made to our tenants, business partners and the community is of the utmost importance to Brookfield Properties. While we intend to pursue further renovations of PKP in the near future, these renovation plans could be jeopardized if the term of our existing ground lease is not extended. We cannot justify significant capital investments to PKP without the assurance that our leasehold interest will continue for the long-term. In addition, our existing financing matures in July of 2023 and it will be extremely difficult for us to refinance our interest in PKP without an extension of our ground lease.

The Shopping Center's future depends on our ability to secure an extension of our ground lease so that we can not only refinance PKP, but also develop more definitive plans to invest in capital improvements that will ensure the long-term viability and success of PKP. As we look forward to the next 30 years, our hope is to remain a vital member of the Hilo community.

For the foregoing reasons, we strongly support House Bill No.2191 HD1. Thank you for your consideration.

Sincerely,

Daniel Kea
General Manager

Prince Kuhio Plaza

February 27, 2020

Hearing Date: February 27, 2020

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Place: State Capitol, Conference Room

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Rep. Ty J.K. Cullen, Vice Chair
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