



**HB1385 HD2 SD1**  
RELATING TO PUBLIC LANDS  
Senate Committee on Ways and Means

March 31, 2023

9:45 AM

Room 211

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The Office of Hawaiian Affairs (OHA) offers **COMMENT** on HB1385 HD2 SD1, which would clarify that the Board of Land and Natural Resources (BLNR) shall not unilaterally amend the terms and conditions of leases of public lands within the Hilo Community Economic District and must include such practices within the rules of the board if the BLNR wishes to amend terms and conditions. **OHA appreciates the limited scope of the measure that will prevent unintended impacts while promoting the revitalization of the Waiakea Peninsula. However, OHA has concerns that the measure may negatively impact Native Hawaiians by unintentionally providing a pathway that could (and has) led to the permanent alienation of public land trust lands.**

This measure would clarify that the BLNR shall not unilaterally amend the terms and conditions for leases of public lands within the Hilo Community Economic District without first establishing rules on such practices for the board under Hawaii Revised Statutes (HRS) Chapter 91. Among those items the existing law would allow the BLNR to amend is lease restrictions under HRS §171-36(a), including the 65-year lease term aggregate restriction.

OHA wishes to emphasize that the Crown and Government lands of the Hawaiian Kingdom, often referred to as “Ceded Lands” of the Public Land Trust corpus, are continuously held in trust for the betterment of the conditions of Native Hawaiians.<sup>1</sup> In addition to its codification within the Hawai‘i Admissions Act, lawmakers sought to ensure the continuous uplifting of Native Hawaiian socio-economic status through the creation of OHA and the enacting of these principles into State law.<sup>2</sup> OHA serves as the principal public agency of the State responsible for the programs and activities of Native Hawaiians,<sup>3</sup> whose well-being is often positively impacted by the programs and services funded by revenue from the public land trust.

OHA promotes the best use of public land trust lands to protect the interests and rights of Native Hawaiians. Long-term leases beyond the 65-year lease term aggregate have been used in the past to permanently alienate land from the public land trust and privatize public lands. To mitigate OHA’s concerns that the BLNR may be allowed to amend lease restrictions, including the 65-year lease term aggregate restriction, OHA asks that the following language be inserted into the measure in Section 2, on page 11, line 14, to read:

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<sup>1</sup> Pub. L. 86-3, 73 Stat. 4; Hawai‘i Admissions Act of 1959.

<sup>2</sup> HRS §10-3.

<sup>3</sup> Id.



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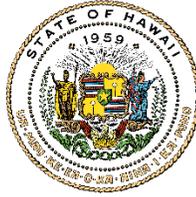
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(i) Nothing contained in this section shall diminish, alter, or amend any existing rights, privileges or practices of the Native Hawaiian people; nor shall the obligations of the State to the Native Hawaiian people be absolved.

OHA appreciates the opportunity to testify on HB1385 HD2 SD1 and **respectfully asks the Legislature to take into consideration OHA's recommendations for the betterment of conditions of Native Hawaiians.** Mahalo nui loa.

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

SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF Hawai'i | KA MOKU'ĀINA 'O HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'OIHANA KUMUWAIWAI 'ĀINA

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COMMISSION ON WATER RESOURCE  
MANAGEMENT  
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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  
WAYS AND MEANS

Friday, March 31, 2023  
9:45 AM

State Capitol, Conference Room 211 & Videoconference

In consideration of  
HOUSE BILL 1385, HOUSE DRAFT 2, SENATE DRAFT 1  
RELATING TO PUBLIC LANDS

House Bill 1385, House Draft 2, Senate Draft 1 deletes in its entirety the text of House Draft 2 of the measure (pertaining to redevelopment districts and specifically to redevelopment of Waiakea Peninsula in Hilo) and inserts the text of Senate Bill 97, Senate Draft 1, relating to lease extensions in the Hilo Community Economic District (i.e., a “gut and replace”). As such, House Bill 1385, House Draft 2, Senate Draft 1 now 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*<sup>1</sup> 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

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<sup>1</sup> *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).

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 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.

House Bill 1385, House Draft 2, Senate Draft 1 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.<sup>2</sup> 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.

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<sup>2</sup> “§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.”

**LATE**

**Kūpuna for the Mo'opuna**  
*committed to the well-being of Hawai'i for the next generations to come*  
kupuna4moopuna@gmail.com



COMMITTEE ON WAYS AND MEANS

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

Date: Friday, March 31, 2023

Time: 9:45am

Place: Room 211

HB 1385, HD2, SD1 – RELATING TO PUBLIC LANDS – **STRONG OPPOSITION**

Aloha Senators,

Kūpuna for the Mo'opuna, a network of Hawaiian Homes Commission Act kūpuna farmers from Pana'ewa, Hawai'i, submit this testimony in **STRONG OPPOSITION to HB 1385, HD2, SD1.**

Under Article 11, section 1 of the Hawai'i State Constitution and Chapter 171, HRS, the State, through the Board of Land and Natural Resources, **holds in trust** Hawai'i's 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 State specific fiduciary obligations of due diligence and undivided loyalty in ensuring its trust corpus is productive and that its benefits are maximized for Native Hawaiian and public beneficiaries. **HB 1385 disregards all of this.**

In addition, the Hawai'i County General Plan 2005 (GP 2040 way overdue) and outdated South Hilo Community Development Plan 1975 – a CDP wherein lies the targeted area - with no plans to update and enable the South Hilo CDP in the County Code *in spite of numerous attempts at engagement by the community* must be at the front of all responsible long range planning efforts. **HB 1385 puts the cart before the horse.**

**Do not pass HB 1385, HD2, SD1.**

Mahalo,  
Kūpuna for the Mo'opuna  
Pana'ewa, Hawai'i

*Ua mau ke ea o ka 'āina i ka pono!*

**HB-1385-SD-1**

Submitted on: 3/29/2023 8:30:49 PM

Testimony for WAM on 3/31/2023 9:45:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
alan nagakura	Individual	Support	Written Testimony Only

Comments:

Please consider this bill. It is important to our future and the overall well being of our community as a whole.

Hilo needs this.

thank you.

**LATE**

**HB-1385-SD-1**

Submitted on: 3/30/2023 10:06:49 AM

Testimony for WAM on 3/31/2023 9:45:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Bianca Isaki	Individual	Oppose	Written Testimony Only

Comments:

Aloha Senators - I'm writing to oppose HB1385. It says it is about the Hilo economic district, but then makes wholesale changes to 171, like: " (1) Modify or eliminate any of the restrictions specified in section 171-36(a);" including lease limitations. I'm working on a case where a foreign LLC has been nonexistent since 2014 and yet still a lease because DLNR apparently hasn't been properly reviewing it. In the meantime, Coco Palms resort developers are using the public trust lands. Please do not remove further scrutiny when there already isn't enough.

Bianca Isaki

**LATE**

**HB-1385-SD-1**

Submitted on: 3/30/2023 12:08:24 PM

Testimony for WAM on 3/31/2023 9:45:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Kerry A. Umamoto	Testifying for Hilo Fish Co	Support	Written Testimony Only

Comments:

TO Chair,

im am writing in support of HB1385. Here in hilo we are still trying to work on our lease extension and are getting no response. i would appreciate after being an owner ocupied leasee of the state for years that at some point we have some honest direction to move forward.