

HB499 HD2
RELATING TO LEASE EXTENSIONS ON PUBLIC LAND
Ke Kōmike ‘Aha Kenekoa o ka Wai a me ka ‘Āina
Senate Committee on Water and Land

Malaki 15, 2021

1:00 p.m.

Lumi 229

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB499 HD2, which would authorize century-long leases that bind the hands of the Board of Land and Natural Resources (BLNR) from fulfilling its fiduciary obligations of due diligence and undivided loyalty, in maximizing the beneficial disposition of lands leased for commercial, industrial, resort, mixed-use, and governmental purposes **throughout the entire state**. OHA notes that it also opposes nearly identical bills this year, and likewise opposed nearly identical bills last year and in 2019 for these same reasons, as described further below. **Should the Committee choose to move this measure forward, OHA does offer amendments below that would mitigate our concerns and opposition.**

- 1. Act 149’s “pilot project” has not been completed or evaluated; allowing forty-year lease extensions for any and all commercial, industrial, resort, mixed-use, and government leases of public lands across 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 commercial, industrial, resort, mixed-use, and government 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 its lease extension provisions “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 authorities;
- 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 commercial, industrial, resort, mixed-use, 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 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 that its benefits are maximized for Native Hawaiian and public beneficiaries. **By authorizing the extension of commercial, industrial, resort, mixed-use, 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 from fulfilling its fiduciary obligations, and otherwise ensuring the best and most appropriate uses of lands subject to the public trust and public land trust.**

For example, this measure could allow public land leases first issued for 55 years, and subsequently extended another 10 years, to be again extended for an additional 40 years, with fixed rental periods for 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 lessees’ proposals 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 commercial, industrial, resort, and mixed-use lands may have the highest revenue potential of

the State's land inventories only further exacerbates the concerns underlying this measure's lease extension provisions.

In addition to tying the State's 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, mixed-use 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 the Act 149 pilot program 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 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.** 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's 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 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 BLNR's fiduciary obligations under the public trust and public land trust, and to provide concrete

safeguards to protect the interests of the State, Native Hawaiians, and the general public in our islands' 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 (June 30, 2026), and a sunset date to limit the provisions of the bill to the length of time currently contemplated:
 - By amending page 6, line 16, to read as follows:
 - “SECTION 4. This Act, upon its approval, shall take effect on July 1, 2026; provided that this Act shall be repealed on June 30, 2031.”
- A limitation on the maximum aggregate fixed rent period and lease term for a lease to be **no more than 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:
 - By amending page 4, lines 10-12, to read as follows:

“(d) Any extension of a lease pursuant to this section shall be based upon the economic life of the substantial improvements to be made as determined by the board or an independent appraiser and shall not extend the fixed rental period of the original lease by more than twenty years. No lease”
- Conditions similar to those in Act 149, including but not limited to, 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:
 - By amending page 3, line 5, to read as follows:

“ leasehold financing by a lessee. Extension or modification of any provisions of the lease shall be made to the extent necessary to qualify the lease for mortgage lending or guaranty purposes with any federal mortgage lending agency; to qualify the lessee for any state or private lending institution loan, private loan guaranteed by the state, or any loan in which the state and any private lender

participates; or to amortize the cost of substantial improvements. Any extension of the fixed rental period or term of the lease shall be based on the economic life of the substantial improvements as determined by the board or an independent appraiser; provided that the approval of any extension shall be subject to the following:

- (1) The demised premises have been used substantially for the purpose for which they were originally leased;
- (2) The length of any extension granted for the fixed rental period of the lease shall not extend the fixed rental period of the original lease by more than twenty years;
- (3) The length of any extension granted for the term of the lease shall not extend the original lease by more than twenty years;
- (4) If a reopening occurs, the rental for any ensuing period shall be the fair market rental as determined under section 171-17(d) at the time of reopening;
- (5) Any federal or private lending institution shall be qualified to do business in the state;
- (6) Proceeds of any mortgage or loan shall be used solely for the operations or substantial improvements on the demised premises;
- (7) Where substantial improvements are financed by the lessee, the lessee shall submit receipts of expenditures within a time period specified by the board, otherwise the lease extension shall be canceled; and
- (8) The rules of the board, setting forth any additional terms and conditions, which shall ensure and promote the purposes of the demised lands."

- Explicit extension provisions providing for improvements to either revert to the State at the end of the lease term, or be removed by the lessee at the lessee's expense, at the election of the State;
 - By amending page 5, line 3, to read as follows:

"approval by the board. Any extended lease shall include conditions explicitly stating that

improvements on the land shall revert to the State or be removed by the lessee at the end of the lease term, at the election of the State."

- To ensure that the general public has a meaningful opportunity to review and comment on the long-term encumbrance of public lands, ensure that lease extension applications and proposals are publicly noticed for no less than one month prior to the submission of plans and specifications to the BLNR;

- By amending page 2, line 12, to read as follows:

"section 171-36, and subject to subsection (h), for leases that have not been assigned or"

- By adding a new subsection (h) on page 6, after line 14, to read as follows:

"(h) The department shall provide no less than thirty days notice of a lease extension application prior to the presentation of the extension applicant's plans and specifications to the board as described in subsection (b), by posting on the lieutenant governor's website, in a newspaper of statewide circulation, and in a county newspaper of the county in which the leased lands are located. The notice shall also be mailed or electronically delivered to all persons who have made a timely written request of the department for notice of lease extension applications. The public notice shall include information on the lease extension application, including the identity of the lessee and the location and description of the leased property, and shall include information regarding how a copy of the current lease and any plans and specifications to be presented to the board can be obtained or inspected. The public notice shall also describe where and how public comment may be submitted on the lease extension application, including expressions of interest in a public auction for the lease at the end of the current lease term or if the lease were to be terminated prior to the end of the lease term. All public comment received one week prior to the board presentation shall be collected and submitted to the board concurrently with its consideration of the applicant's plans and specifications."

Therefore, OHA urges the Committee to **HOLD** HB499 HD2, or minimally include amendments as listed above. Mahalo nui for the opportunity to testify on this measure.