

**Amendment to the Hawaiian Homes Commission Act, 1920, as amended -Act 187 (2010)
LEGAL AND POLICY ANALYSIS FOR PROPOSED AMENDMENTS TO THE HHCA**

Proposed Amendment to the HHCA

[Describe existing provision that is being amended]

The HHCA authorizes general leasing of Hawaiian home lands under section 204 or development of commercial or multipurpose projects by project developer agreement under section 220.5 subject to a 65-year term limit in order to generate revenue to provide homesteads and ultimately serve native Hawaiian beneficiaries.

[Describe proposed amendment]

The proposed amendments to the HHCA contained in Act 187, 2010 Session Laws of Hawai'i, (1) direct DHHL to establish a process for consulting with beneficiaries prior to awarding leases for commercial and multipurpose projects; (2) authorize one extension of up to 20 years of commercial and multipurpose project leases to obtain financing or make improvements to the property; (3) require the HHC to adopt and publish a written policy to evaluate requests for extensions by October 31, 2010; (4) require 15% of all lease revenues from extensions granted be deposited into the native Hawaiian rehabilitation fund under section 213(i); and (5) require reporting regarding leases of available lands for commercial and multipurpose projects as well as expenditures from the native Hawaiian rehabilitation fund that are derived from the amounts deposited from commercial and multipurpose project lease extensions.

1. What are the challenges or issues that the proposed amendment addresses?

The proposed amendment seeks to increase revenue in anticipation that the last annual payment of \$30 million for settled past land claims with the State would be received in June 2015. While commercial and multipurpose projects generate revenue to enable DHHL to operate and build the infrastructure necessary for native Hawaiian beneficiaries, there are times when commercial and multipurpose projects result in short- and long-term negative consequences. Thus, the proposed amendment seeks to advance the interests of beneficiaries by first and foremost requiring beneficiary consultation in the master planning of available lands, which includes engaging beneficiaries and beneficiary-serving organizations, providing for the timely dissemination of information about commercial or multipurpose projects and gathering of input, and allowing for a reasonable time and access to relevant information for evaluation and consideration. The additional requirement for the HHCA to adopt and publish a written policy to evaluate requests for

extensions pursuant to chapter 91, Hawaii Revised Statutes, provides another opportunity for beneficiary input.

Moreover, the current 65-year term limit for commercial or multipurpose projects may be less attractive to developers of larger commercial projects. The proposed amendment strikes a delicate balance by allowing one extension of up to 20 years for certain general leases of Hawaiian home lands to make improvements to the leased property or obtain financing for the improvement of leased lands. These lease extensions allow DHHL to attract larger commercial projects which translate to increased lease rent revenues. The revenue generated will be used to fund various programs, functions, and activities, including but not limited to the development of homestead lots, loans, and rehabilitation programs. To further this objective, the proposed amendment also required 15% of all lease revenues from extensions granted be deposited into the native Hawaiian rehabilitation fund.

Finally, the reporting requirement allows for an evaluation of the leases available for commercial and multipurpose projects and the expenditures from the native Hawaiian rehabilitation fund that are derived from the amounts deposited from commercial and multipurpose project lease extensions to ensure the revenue generated is serving native Hawaiian beneficiaries.

2. Is the proposed amendment limited to administration and powers and duties of officers other than those charged with the administration of the HHCA, as further defined in section 4 of the Admissions Act?

If yes, please provide an analysis.

No.

3. Does the proposed amendment reduce or impair the enumerated funds in section 213 of the HHCA as amended?

If yes, please provide an analysis.

No.

4. Does the proposed amendment increase the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of the HHCA?

If yes, please provide an analysis.

No.

5. Does the proposed amendment change the requirement that all proceeds and income from the available lands shall be used only in carrying out the provision of the HHCA?

If yes, please provide an analysis.

No.

6. Does the proposed amendment change the qualifications of lessees?

If yes, please provide an analysis.

No.

7. Does the proposed amendment increase the benefits to lessees of Hawaiian home lands?

If yes, please provide an analysis.

Yes, see discussion in paragraphs numbered 8 – 17.

8. How does the proposed amendment advance or otherwise impact current Hawaiian homestead lessees (native Hawaiians and Native Hawaiians) of Hawaiian home lands?

The proposed amendment advances the interests of the nearly 10,000 current Hawaiian homestead lessees by requiring consultation in the master planning of available lands to be used for commercial and multipurpose projects. This provides for input early on in the process allowing for greater engagement in order to address concerns, maximize opportunities, and minimize short- and long-term negative consequences. Furthermore, the additional revenue that is anticipated from the lease extensions can be used to fund programs and services for current Hawaiian homestead lessees and appropriately evaluated with the reporting requirement.

9. How does the proposed amendment advance or otherwise impact HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease?

Similar to the response above, the proposed amendment advances the interests of over 27,000 HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease by equally requiring consultation in the master planning of available lands to be used for commercial and multipurpose projects. This again provides for input early on in the process allowing for greater engagement in order to address concerns, maximize opportunities, and minimize short- and long-term negative consequences. The additional revenue that is anticipated from the lease extensions can fund various programs, functions, and activities, including but not limited to the development of homestead lots and loans to assist HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease and be properly evaluated with the reporting requirement. Furthermore,

extended lease terms beyond sixty-five years would provide a reliable long-standing revenue stream which will improve DHHL's long term bond credit rating¹ and better credit ratings are desirable to make bonds attractive to potential investors allowing for more construction of homes for HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease.

10. How does the proposed amendment advance or otherwise impact HHCA native Hawaiians beneficiaries who have not yet applied for a Hawaiian homestead lease?

The language of the proposed amendment authorizes beneficiary consultation and is not limited to current Hawaiian homestead lessees or HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease, thereby allowing for consultation with HHCA native Hawaiian beneficiaries who have not yet applied for a Hawaiian homestead lease. Additionally, if DHHL is able to generate more revenue and in turn fund more programs and services for current Hawaiian homestead lessees and place more native Hawaiians currently on a waiting list for a Hawaiian homestead lease in homesteads, the HHCA native Hawaiian beneficiaries who have not yet applied for a Hawaiian homestead lease may be more inclined to apply for a Hawaiian homestead lease. The proposed amendment also requires 15% of all lease revenues from extensions granted be deposited into the native Hawaiian rehabilitation fund, so the revenues can be used for the rehabilitation of native Hawaiians, which shall include the educational, economic, political, social, and cultural processes by which the general welfare and conditions of native Hawaiians are improved and perpetuated.

11. How does the proposed amendment advance or otherwise impact interests other than those of the HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees?

The trust obligation and duty owed to administer the trust solely in the interest of HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees is clear and responses to the previous three questions take priority over the interests of third parties. Still in response to the question above, extended lease terms beyond sixty-five years would provide a reliable long-standing revenue stream which is aimed at replacing the annual \$30 million payment as a result of the State's settlement resolving controversies related to the Hawaiian home lands trust and at the same time improve DHHL's long term bond credit rating. The testimony submitted to the state legislature by several businesses with general leases support lease extensions as an important tool to finance or re-finance projects and infrastructure. While the original bill (HB 2923) proposed an extension for up to an additional 65 years beyond the existing term and the House Draft 1 version of HB 2923 proposed an extension from 65 to 99 years, the final language included in this proposed

¹ In August 2015, Fitch Ratings affirmed the 'A' rating for the DHHL's \$38.3 million revenue bonds, series 2009, and issued a Rating Outlook of "Stable."

amendment of a one-time 20-year extension prioritizes the interest of native Hawaiian beneficiaries in limiting the number, time and purpose for the extension but also allows businesses with general leases to access this option to extend the lease to ultimately result in greater revenue. The reporting requirement should also provide a mechanism to evaluate leases available for commercial and multipurpose projects to see if the total number, acreage, and terms of leases increases. To set the proper perspective, it's important to point out that there are 127 non-homestead general lease dispositions that covers approximately 1.3% of DHHL's 203,500 acres of land and generates almost \$11 million annually. Of the 127 leases, 59% are on Hawaii, 31% on Oahu, 5% on Kauai, 5% on Molokai, 1% on Maui, and 0% on Lanai while the revenue generated is 52% on Hawaii, 42% on Oahu, 3% on Kauai, 3% on Molokai, 1% on Maui, and 0% on Lanai. The opportunity to secure a lease extension supports businesses and commerce statewide.

12. How does the proposed amendment balance the interests of HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees?

The proposed amendment balances the interests of HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees first by equally authorizing beneficiary consultation. In other words, all beneficiaries have an equal opportunity to give input on available lands to be used for commercial and multipurpose projects. Additionally, the reporting requirement should provide information on all leases of available lands for commercial and multipurpose projects and at the same time identify the expenditures that are derived from the amounts deposited from commercial and multipurpose project lease extensions, including the amount expended, the recipient of the moneys expended, and the purpose of the expenditure. This information should identify if projects are more predominant in certain areas and whether there are short- and long-term negative consequences to offset with the revenue generated and if funds were used for that purpose. The proposed amendment also required the commission adopt and publish a policy pursuant to chapter 91, Hawaii Revised Statutes, which shall be used to evaluate any request for a lease extension, including the terms of the lease, prospective payments, and renegotiation, and shall be used by the commission for any final determination on a lease extension request. The rulemaking process is yet another opportunity for input from HHCA native Hawaiian beneficiaries and Hawaiian homestead lessees in order to shape a policy to incorporate concerns and feedback received.

13. Does the purpose/benefit to lessees of the proposed amendment outweigh the impact of the change in qualifications of lessees on the existing class of HHCA beneficiaries?

Please provide an analysis.

No, the purpose/benefit of the proposed amendment allows for equal beneficiary consultation. Furthermore, the additional revenue anticipated by allowing one extension

of up to 20 years of commercial and multipurpose project leases can be used for current lessees, HHCA beneficiaries (native Hawaiians) currently on a waiting list for a Hawaiian homestead lease, or HHCA native Hawaiians beneficiaries. The reporting requirement would identify the amount, recipient, and purpose of expenditures derived from the amounts deposited from commercial and multipurpose project lease extensions.

14. Does the proposed amendment impair or place at risk the corpus of the Trust?

Please provide an analysis.

This proposed amendment does not impair or increase risks to the corpus of the trust. As previously explained, there are 127 non-homestead general lease dispositions that cover approximately 1.3% of DHHL's 203,500 acres of land and generates almost \$11 million annually. Several of these general lease dispositions could be extended to make improvements to the leased property or to obtain financing for the improvement of leased lands which would enhance not impair the corpus of the Trust. Additionally, extended lease terms beyond sixty-five years would provide a reliable long-standing revenue stream which will improve DHHL's long term bond credit rating and better credit ratings are desirable to make bonds attractive to potential investors.

15. Alternatives Considered and Reasons Rejected (if applicable)

The original bill (HB 2923) proposed for an extension for up to an additional 65 years beyond the existing term for general leases. This bill did not have the support of homestead associations, lessees, and beneficiaries who testified in opposition. Thus, the House Committees on Water, Land & Ocean Resources and Tourism, Culture & International Affairs amended the bill in the House Draft 1 of HB 2923 to reduce the length of the extension from 65 years to 34 years. The Senate Water, Land, Agriculture, and Hawaiian Affairs Committee further amended the bill in the Senate Draft 1 of HB 2923 to address the concerns of beneficiaries by establishing a procedure of beneficiary consultation, allowing a lease term extension for commercial or multipurpose projects for improvements to the leased property or in order to obtain financing, limiting the extension to not longer than twenty years to be granted only once, specifying that 20% of all revenues generated from lease agreements and land use instruments be deposited into the native Hawaiian rehabilitation fund, and requiring DHHL to submit an annual report on specified information concerning the commercial leases and multipurpose projects. These proposed amendments were supported by homestead associations and Hawaiian organizations. The Conference Committee comprised of Senators and Representatives who were working on this proposed amendment during the legislative session reduced the amount to be set aside and deposited into the native Hawaiian rehabilitation fund from 20% to 15%. The Conference Committee report noted that "the Legislature should have an opportunity to evaluate the funds deposited into the Native Hawaiian Rehabilitation Fund under this bill ...

to determine whether any changes should be made to the provisions requiring DHHL to deposit 15 percent of all revenues generated from these leases from the time lease extensions are granted, into the Native Hawaiian Rehabilitation Fund."

16. Anomalies Created and Explained (if applicable)

The specific portion of the proposed amendment that requires 15% of all lease revenues from extensions granted be deposited into the native Hawaiian rehabilitation fund under section 213(i) is in direct violation of the HHCA. Section 213(f) of the HHCA establishes the Hawaiian home administration account and stipulates that "entire receipts from any leasing or other disposition of the available land pursuant to section [204(a)(2)]... shall be deposited into this account." This anomaly resulted in the removal of this requirement in Act 175, 2012 Session Laws of Hawai'i.

17. Additional Considerations and Discussion (optional)

None.

18. Is Congressional approval of the proposed amendment required?

Please provide an analysis.

It is the opinion of the State of Hawaii Attorney General that this amendment does not require the consent of Congress as it falls within one of the enumerated exceptions provided for under Section 4 of the Hawaii Admission Act. See opinion letter attached.