



OFFICE OF HAWAIIAN AFFAIRS
Administrative Testimony

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Ka Pouhana, Chief Executive Officer

Board of Land and Natural Resources
Agenda Item D-1

ANNUAL RENEWAL OF REVOCABLE PERMITS ON THE ISLAND OF KAUAʻI

October 26, 2018

9:15 a.m.

Conference Room 132

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on agenda item D-1, which proposes to renew various revocable permits (RPs) for public lands, including “ceded” and public land trust lands, on the island of Kauaʻi. The following testimony highlights questions and ongoing significant concerns regarding the agenda item submittal and its recommendations.

1. The recommended delegation of authority to set RP rents is inconsistent with the submittal’s contents, and removes public accountability and transparency in decisionmaking over thousands of acres of public lands.

As with the Maui Island revocable permit renewal submittal, this submittal’s recommended action regarding RP rents and the delegation of rent authority to the Chairperson is ambiguous and inconsistent with the submittal’s contents, including the RP renewal table in Exhibit 2. Notably, the proposed delegation of authority would also remove public transparency and accountability in the disposition of thousands of acres of public lands throughout Kauaʻi. **OHA strongly suggests revising the recommended action for clarity, and to minimally ensure that Board of Land and Natural Resources (BLNR) and public oversight are retained in the setting of RP rent.**

First, the submittal fails to actually increase any RP rent, despite the appraisal and “recommendations” for rent increases it details. The submittal’s contents strongly suggest that RP rent would be increased by the recommended BLNR actions: page 2 of the submittal outlines various categories of RPs, and explains staff’s “recommendation” that the RP rents be increased for each category by a certain percentage; in addition, the “2019 Proposed Rent” and the “Comments” columns in the RP renewal table in Exhibit 2 indicate increased annual rents for 2019, with the latter describing how “Staff recommends increasing 2019’s rent” for nearly every listed RP. However, the submittal’s “RECOMMENDATION” section for BLNR action requests that the BLNR “Approve no immediate change in current monthly rent for revocable permits” (emphasis added), and instead “Delegate[] to the Chairperson the right authority [sic] at any time to review and implement new rental charges for the revocable permits listed in Exhibit 2, effective any time from and after January 1, 2019.” **Accordingly, notwithstanding the detailed**

description of “Proposed” annual rental changes in the submittal and its Exhibit 2, no actual change in rent would appear to be ensured by the submittal’s recommended formal action.

Second, the submittal would revert to the much-criticized prior practice of setting RP rent with no public transparency or BLNR scrutiny. By delegating the “right authority” to establish RP rents to the Chairperson, the RP’s recommended action would allow RP rents to be established without any public meeting or opportunity for public or BLNR review, much less input. As a trustee of our public trust, the BLNR has fiduciary obligations to ensure a level of due diligence in obtaining a fair return from the private use of the public trust corpus, which include public lands under its jurisdiction. Maintaining the authority to set RP rents is critical for the BLNR to ensure its fiduciary obligations are fulfilled. The public review and input our Sunshine Law requires for BLNR decisionmaking also adds an additional level of public oversight in the setting of RP rent, which can help to better inform the BLNR, as well as safeguard against the inappropriate disposition of public lands via permitted private uses that do not provide fair and commensurate compensation to the public. **The submittal’s recommended delegation of “right authority [sic]” to the Chairperson would remove both BLNR and public review of RP rent decisionmaking for public lands throughout Kaua‘i, thereby precluding the BLNR from fulfilling its fiduciary obligation to ensure an appropriate return from these lands, and limiting the public’s ability to help hold the state accountable to this obligation.**

OHA appreciates that presumably, the recommended delegation of “right authority [sic]” would allow the Chairperson to implement the proposed rent changes, while allowing for some flexibility to adjust the proposed rent for certain RPs with exigent circumstances. However, OHA believes that the likely few deviations from the otherwise “proposed” RP rents in the submittal could easily be attained by having the Chairperson or Land Division staff return to the BLNR, for approval of any changes to the BLNR-established RP rent. OHA notes that RPs are by definition revocable on a month-to-month basis, giving permittees little justifiable expectation that their permits, much less their annual rents set by the BLNR, will remain unchanged for any period of time greater than one month.

Accordingly, OHA urges the BLNR to revise the recommended action to ensure that rent increases are actually implemented, and to ensure that all RP rent decisions – including whether or not to adopt or amend the instant submittal’s proposed rents – continue to be made in a public BLNR meeting.

2. The submittal’s recommendations continue to neglect conservation district compliance concerns.

The recommended actions proposed in the submittal fail to address a number of concerns relating to conservation district compliance issues, some of which were initially raised over two years ago. As both OCCL and OHA have already noted, **RP3827,**

RP5567, RP6511, RP6842, RP7584, RP7644, RP7699, RP7727, RP7739, RP7749, RP7805, RP7842, and RP7881 all involve the use of conservation district lands, but do not have any conservation district use permits (CDUPs) on file with OCCL. **Of these, conservation district compliance concerns regarding RP6842, RP7584, and RP7749 were raised by OCCL and OHA over two years ago;** although Land Division staff had assured they would “instruct permittee to apply for a CDUP or provide proof to OCCL that its use/structure is nonconforming” for each of these RPs, the instant submittal fails to indicate any efforts by these RPs’ permittees to comply with OCCL regulations in the two years since. In any case, despite the conservation district compliance issues raised for all of the RPs mentioned above, the instant submittal’s recommended BLNR actions still do not provide any conditions of renewal that would ensure compliance with conservation district regulations intended to protect lands and resources of particular environmental and cultural significance. **Accordingly, OHA strongly urges BLNR to, at minimum, condition the renewal of these RPs on their respective permittees’ proof of compliance, by a specific time certain.**

3. Required timetables continue to be omitted for the conversion of RPs to leases or other longer-term dispositions where such dispositions are expressly considered.

OHA again notes that contrary to the recommendations of the Revocable Permits Task Force as adopted by the Board of Land and Natural Resources (BLNR), timetables are not provided for a number of RPs that are explicitly expected to be converted to leases, easements, or other longer-term dispositions.¹ These include **RP3827, RP6511, RP7256, RP7259, RP7466, RP7480, RP7498, RP7507, RP7509, RP7516, RP7521, RP7584, RP7627, RP7628, RP7644, RP7669, RP7701, RP7710, RP7712, RP7721, RP7727, RP7729, RP7739, RP7770, RP7785, RP7790, RP7798, RP7833, RP7842, RP7845, RP7848, RP7865, RP7872, RP7881, RP7882, and RP7897.** Notably, many of these RPs involve parcels that have been continuously issued to the same permittee for years, if not decades, and several have been approved for conversion to leases since the 1990s or prior (see RP7507, RP7521, RP7627, RP7628, RP7669, RP7701, RP7729, RP7739, RP7770, and RP7833). Delays in the conversion of such RPs to longer-term, market value leases or similar dispositions accordingly represent continued lost opportunities to obtain a more

¹ On June 24, 2016, the BLNR adopted a number of recommendations from the Revocable Permits Task Force, which included a “checklist” of relevant considerations as to whether a month-to-month tenancy of a parcel under an RP would be more appropriate than a long-term lease or other disposition: (1) The existence of site issues (i.e. lack of legal access, lack of necessary infrastructure, permittee’s interest only including a portion of a parcel that cannot be subdivided, etc.) that make the property unsuitable for public auction or a long-term lease; (2) The truly short-term nature of the proposed permitted use; (3) A pending lease disposition (with a timetable) or long-term decision for which a revocable permit is an interim arrangement; (4) The testing of market and operational issues through the permitted use; (5) A pending executive order or other long-term disposition for government use (with a timetable), or a government use that only requires a short-term transfer; (6) A pending direct lease (with a timetable) to a non-profit or the need to provide a non-profit with a short-term “trial period” use; (7) The lack of interest in a long-term disposition; and (8) Any other unusual circumstances.

appropriate return from the private use of public lands, including public land trust lands whose revenues are subject to Native Hawaiians' pro rata share. **The establishment of timetables that can better ensure the timely conversion of these RPs is therefore not only required by the Revocable Permits Task Force recommendations adopted by the BLNR, but would also uphold the BLNR's fiduciary obligations as well as the interests of the DLNR, Native Hawaiians, and the general public.** Accordingly, OHA urges the BLNR to defer the renewal of the aforementioned RPs, until the provision of timetables for their contemplated conversion to longer-term dispositions.

4. RP recommendations should include additional explicit considerations relevant to its responsibilities and obligations under the public trust

Finally, OHA reiterates its request that RP renewal recommendations include explicit, substantive considerations relevant to the BLNR's primary, public trust duties to conserve and protect Hawai'i's natural and cultural resources. Such duties include the fulfillment of the constitutional mandate that the state "conserve and protect Hawai'i's . . . natural resources . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state. All public natural resources are held in trust by the state for the benefit of the people."² The BLNR also holds a constitutional duty to protect cultural resources, as well as the practices which rely upon them.³ Accordingly, OHA urges the inclusion of additional relevant information on all RPs recommended for renewal, which would assist the BLNR in better upholding these duties. Such information may include:

- **An indication as to when the last affirmative review of a permittee's compliance with previously-issued RP terms and conditions occurred, if any;**
- **An indication as to the existence of any known culturally or environmentally significant or sensitive areas or resources within or adjacent to the subject parcel; and**
- **An indication of any previous or planned future uses of the parcel or on areas adjacent to the parcel, which may result in cumulative impacts to natural and cultural resources.**

Mahalo nui for the opportunity to comment on this matter.

² HAW. CONST. ART. XI SEC. 1.

³ HAW. CONST. ART. XII SEC. 7; Ka Pa'akai o ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31 (2000).