

**Summary of Comments Received in Response to an Electronic Consultation
Regarding Act 173, Session Laws of Hawai‘i 2014
Proposing to Amend the
Hawaiian Homes Commission Act, 1920, 42 Stat. 108**

Overview

On July 28, 2016, the Office of Native Hawaiian Relations (ONHR) distributed an email to Native Hawaiian Community members through the Department’s Native Hawaiian Organization List seeking input on Act 173, Session Laws of Hawai‘i 2014. The ONHR also accepted an invitation from the Sovereign Councils of the Hawaiian Homelands Assembly to hear comments from their beneficiary community leaders and their membership about Act 173 during conference calls hosted by their organization on August 16 and 20, 2016.

Act 173 proposes to amend the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (HHCA), by permitting the State Department of Hawaiian Home Lands (DHHL) to lease by direct negotiation and at fair market rents, and for a term not to exceed five years, any improvements on Hawaiian home lands, or portions thereof, that are owned or controlled by the DHHL. This summary lists responses to questions asked of the consultation participants and other comments organized by issue. Responses to questions 1 and 2 also include comments received from the DHHL.

Responses to Questions

1. Does Act 173 increase or decrease the benefits to the HHCA beneficiaries or the Hawaiian Home Lands Trust?

According to one commenter, Act 173 would give the general public the same or similar direct negotiation benefit enjoyed by HHCA beneficiaries. Thus, beneficiaries would no longer have a benefit separate and apart, resulting in a reduction of beneficiary rights.

Another commenter held that Act 173 removes available improved lands from the trust corpus and eliminates the possibility for native Hawaiian businesses to benefit from "improvements" to Hawaiian home lands.

State Comment on Question 1

The Hawaiian Homes Commission is responsible for the “big picture,” which means best managing the Trust in the interest of all beneficiaries—lessees, applicants, and those who would qualify but have not applied. In balancing these sometimes competing interest, the current HHC envisions (1) moving applicants from the waitlist on to the land; (2) strengthening the corpus financially; and (3) building healthy communities.

Act 173 aims to increase benefits by ensuring that funds will be available to accomplish these HHC priorities and, in particular, move applicants from the waitlist on to the land. Although the Hawaii State Constitution Article XII sec. 1 mandates the state legislature sufficiently fund the DHHL for lot development, homesteading loans, rehabilitation projects, and operating and administrative costs, the legislature has consistently failed to do so. The ongoing litigation on this matter, Nelson v. HHC, has been narrowed by justiciability to questions about administration and operation funding, and as of the 2016 session, the legislature has yet to fund the remaining purposes of lot development, homestead loans, and rehabilitation projects. As a result, the HHC must do at least two things: (1) Make the full sufficient funding request (all 4 purposes) and advocate at the legislature for that request; and (2) Raise funds to make progress toward lot development, homestead loans, and rehabilitation projects, as well as the administration and operating costs that are required to effectuate the other three purposes. Act 173 is a funding mechanism that maintains income stream.

Without Act 173, there is no gap-filling safety valve to ensure property value and income. If a general lease expires without a new lease executed under HRS 171, any month to month tenant (the only existing option between general lease tenants) in that space pays less than market value rent and does not invest in the space because there is no guarantee the tenant will be allowed to stay for more than a month. The Trust and beneficiaries, in turn, do not see the full income potential from the property and potential funding for lot development, homestead loans, and rehabilitation projects is lost. In addition, the Trust is paying for the repair and maintenance of the building/space. This means the Trust is both losing income and incurring costs that could otherwise be borne by a term of years tenant. If there is no tenant, the Trust realizes no rental income and pays for repair and maintenance of the property, or the Trust lets the property deteriorate and ultimately sees less than premium rent from a general lease tenant. General leasing and Act 173 are, at present, essential to managing the Trust in accordance with the fiduciary duty to all three categories of beneficiaries present and future.

As to the specific scenarios mentioned above in the draft report, Act 173 does not reduce benefits to HHCA beneficiaries nor does it remove available lands from the Trust to the detriment of beneficiary businesses.

Act 173 authorizes a process separate from HRS 171 applies specifically to the interim between HRS 171 tenants, but for no more than a five-year lease term. Direct negotiation with any prospective general lease tenant is not currently authorized under HHCA 204(2). Act 173 would allow direct negotiation with any prospective short term,

interim tenant whether that prospective tenant is native Hawaiian or a member of the general public.

Beneficiaries are an integral part of DHHL's planning process and, as such, beneficiaries actually decide which lands are prioritized for homesteading and which lands are better suited for general leasing. The DHHL uses a tiered planning system, which includes Island Plans as one layer. In the Island Plans, DHHL identifies and designates, or zones, land uses for all of its lands within ten land use designations including the different types of homesteading uses, conservation, special district, industrial, and commercial. During the planning process, DHHL consults with beneficiaries to develop each Island Plan and conducts a land suitability analysis that looks at the natural and built environments on and adjacent to Hawaiian Home Lands to determine appropriate land uses. In addition, DHHL conducts a beneficiary survey with the homestead lessees and Island Wait List applicants to determine beneficiary needs and preferences for homesteading, community facilities, and services. Using the land suitability analysis and beneficiary input, DHHL designates lands most appropriate and needed for homesteading under HHCA section 207(a) and those lands that are most appropriate for other uses. The Island Plans, inclusive of the designated land uses, are presented to and approved by the HHC. Beneficiaries have direct input on land use decisions at the planning stages and also have opportunity to provide input directly to the Commission. Act 173 does not change or impact this process or the level of beneficiary input.

2. Does Act 173 advance homesteading opportunities for the beneficiary community?

One commenter stated that with limited access to State and Federal funding, Act 173 will allow for maximization of DHHL assets, providing much needed funding to deliver homestead opportunities. The commenter went on to say that it is essential DHHL have use of a wide variety of revenue-generating and funding sources for land acquisition, infrastructure development, home financing, and beneficiary programs.

Another commenter expressed concern about DHHL's justification for Act 173 that states the amendment is necessary for the DHHL to generate revenue so it will have resources to support programs for native Hawaiian lessees and applicants, including the development of homestead lots, loans and other rehabilitation programs. This commenter held the DHHL's line of reasoning was faulty because the courts have already stated and the Hawaii State Constitution provides that DHHL must be provided with "sufficient funds" to carry out and administer their programs. The transfer of "improved" lands to the general public rather than to the benefit of native Hawaiians is a depletion of the trust and its assets and undermines the purpose of the HHCA. Another commenter also raised concerns about DHHL's statement that revenues generated through Act 173 activities will be deployed in loans and

rehabilitation programs for beneficiaries. According to the commenter, in 95 years, and even after the \$600M payment to the Trust, DHHL has yet to establish loan programs called for by the HHCA, i.e., – farm/ranch loans, mercantile loans, beneficiary association loans, and other financing.

Commenters suggested that under current short term leasing policies, HHCA beneficiaries are bypassed for leases and that this practice will not end under Act 173. According to one commenter, Act 173 will further impede self-sufficiency efforts by allowing DHHL to issue improvements to the general public through direct negotiations for up to five years.

State Comment on Question 2

The Nelson decision issued by Judge Castagnetti is of limited scope in that it addresses sufficient funding only in relation to administration and operating costs because, of the four constitutionally identified funding purposes, “A and O” was determined by the Hawaii Supreme Court to be the only justiciable issue; the other three were determined to be political questions. As favorable as Castagnetti’s decision was for the HHC, it remains unfollowed by the state legislature; it is no different from any other judicial outcome where money is involved: collection is key. The 2016 legislature did not sufficiently fund DHHL’s A and O costs or any of the other purposes. The DHHL needs support from beneficiaries and the Department of Interior at the legislature to secure sufficient funding. The needs under the HHCA exist whether the legislature funds the DHHL or not; whichever purpose and whatever the project, the DHHL must move the purposes forward and provide funding (or be in breach of trust) even if the legislature does not. Act 173 is one way to ensure steady, reliable revenue stream so that beneficiary interests can be furthered and applicants can be moved from the waitlist on to a homestead lot.

3. Are you in favor or opposed to Act 173?

All but one commenter was opposed to Act 173. The reasons behind opposition and support of Act 173 are discussed in greater detail in the other comments section.

4. What community do you live in or, if you are seeking a homestead, where is that homestead community located?

Comments were received from beneficiary organizations and beneficiaries located on Hawai‘i Island, Maui, Molokai, O‘ahu, and Kauai. 83.6% of the commenters were identified as residing on homelands or as HHCA beneficiaries. Only one commenting organization, the Association of Hawaiian Civic Clubs, did not identify itself as a beneficiary organization.

- 5. Do you have any additional comments related to Act 114 or whether it impacts the special funds, increases encumbrances on Hawaiian home lands by officers other than those charged with administering the HHCA, or changes the qualification of lessees?**

No comments addressed question 5.

Other Comments

Act 173 not consistent with purpose of the HHCA – Many commenters were concerned that by authorizing the State to engage in direct negotiations with the general public for short term leases prior to offering the leases to beneficiaries would be detrimental to achieving one of the main purposes of the HHCA, which is to assist the HHCA beneficiaries to become self-sufficient through agricultural and mercantile/commercial endeavors. Along these lines two beneficiary organizations suggested DHHL was in competition with beneficiaries for self-sufficiency and Act 173 would increase the DHHL’s advantage. The following is an excerpt from comments made by these two beneficiary organizations explaining their concern about their competition with the State:

“DHHL sees themselves as a private foundation striving for income generating opportunities using our lands to perpetuate the trust created by a Congressional Act. With that mindset, every possible opportunity created by the brilliant minds of our homestead leaders that will create self-sufficiency and build greater capacity towards self-governance, will be, and has been, sabotaged by DHHL. In order to obtain lands for the above mentioned purposes, we have created business plans and projections that must first be brought to the Department for approval and thereby revealing our proprietary knowledge and plans for our economic opportunities. The department reviews such plans, written or verbalized and they decide whether to take it to the commission for a land disposition.

When the Department uses that information to create a plan or broker a deal for themselves, they are not only competing against us but violating our rights by using our proprietary knowledge and plans. This creates an unfair advantage over us as a government department controlling the disposition of our lands. This proposed amendment increases the unfair advantage that the department has already been using to repress our people.”

One commenter held that DHHL can already issue mercantile leases through direct negotiation with beneficiary organizations under Section 207, thus, fulfilling a purpose of the HHCA.

Consultation by DHHL Inadequate or Non-existent – Many commenters expressed concern that the State failed to initiate a beneficiary consultation process. Some commenters holding that discussion at Hawaiian Homes Commission (HHC) meetings or the hearings on Act 173 at the State Legislature do not constitute consultation with the HHCA beneficiary community. The rationale offered by one commenter was that consultation did not take place because there is only a 24 hour agenda notice for HHC meetings and 48 hour notice for State Legislature hearings. Another commenting organization noted that only two HHCA beneficiaries testified on Act 173. This minimal testimony indicated to them that the HHCA beneficiary community was unaware of this bill and that they were not provided an opportunity to question DHHL staff, raise concerns, or provide input. However, in comments received from the DHHL, the DHHL proclaimed that going forward it is their intent to engage beneficiaries on legislative priorities, preparation, and support.

More information necessary – Two commenters asked for more information before being able to fully comment. At the time there was no further information available to provide to the two commenters.

Circumvents the State of Hawai‘i’s current transparent bid process – Commenter maintains that Act 173’s provision allowing direct negotiations with the general public gives the State the ability to avoid the mandate found in HRS CH 171, which requires public notice and a bid process, thereby ensuring that the State may not be negotiating for the highest and best value for these improvements.

State is unable to overcome requirement that any land leased commercially must be deemed to not be needed – Commenter (oral) stated that the State cannot possibly deem any Trust lands unneeded for homesteading when more than 20,000 beneficiaries are waiting for homesteading lots.

Miscellaneous - There is no articulation as to what is wrong with section 204 of the HHCA; Act 173 does not address the opportunity for beneficiaries to secure a general lease; and no alternatives were considered.

Recommendations – The following recommendations were made by commenters.

1. HHCA beneficiaries should be informed at routine intervals when Hawaiian home lands commercial leases (short and long-term) will expire or when they become available.
2. HHCA beneficiaries be afforded the opportunity to engage in direct negotiations with DHHL prior to negotiations with the general public (right of first refusal).
3. HHCA beneficiaries should be allowed to elect the Hawaiian Homes Commission and the DHHL Director. Rationale given is that the DHHL Director cannot serve two masters.

4. Initiate HHCA beneficiary consultation on Act 173.
5. Provide a plan to implement HHCA sections 204 and 207.
6. Create a waitlist for beneficiary mercantile leases.
7. Rather than an Amendment to 204, a Federal Regulation is needed to oversee the implementation of Section 207 Mercantile.

Summary

Commenters generally oppose the proposed amendment in Act 173 on three main points. First, commenters are concerned with the lack of consultation with the beneficiary community in the adoption of Act 173. Second, the amendment would allow for direct negotiations with the general public for the short term commercial leasing of property and improvements prior to those leases being offered to beneficiaries seeking to engage in mercantile activity. Third, that the amendment, while waiving of the State's current competitive bid process, does not provide a process for ensuring fair market rents are obtained.