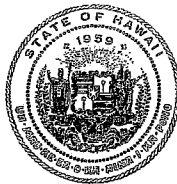


LINDA LINGLE  
GOVERNOR



MARK J. BENNETT  
ATTORNEY GENERAL

**STATE OF HAWAII**  
**DEPARTMENT OF THE ATTORNEY GENERAL**

425 QUEEN STREET  
HONOLULU, HAWAII 96813  
(808) 586-1500

LISA M. GINOZA  
FIRST DEPUTY ATTORNEY GENERAL

September 11, 2007

The Honorable Theodore E. Liu  
Director of Business, Economic Development  
and Tourism  
State of Hawai'i  
No. 1 Capitol District Building  
250 South Hotel Street, Fifth Floor  
Honolulu, Hawai'i 96813

Dear Mr. Liu:

Re: Constitutionality of Act 3, First Special Session 2007  
(House Bill No. 718, S.D. 2, C.D. 1)

By memorandum dated July 20, 2007, you asked for our advice regarding the constitutionality of Act 3, First Special Session Laws of Hawai'i 2007 ("Act 3"), which requires the Hawai'i Community Development Authority (HCDA), to set aside State lands for use by the Kewalo Keiki Fishing Conservancy (KKFC), a private nonprofit section 501(c)(3) organization under the Internal Revenue Code. In legislative testimony on House Bill No. 718, my department testified that the bill violated article XI, section 5 of the Hawai'i Constitution because the bill was a special law involving State lands that would benefit a particular private entity. The Legislature nevertheless passed House Bill No. 718, S.D. 2, C.D. 1, and, following the Governor's veto of the bill, the Legislature in special session overrode the Governor's veto and enacted the bill as Act 3.

We have conducted further legal research in light of the enactment of Act 3, and have reviewed the July 10, 2007, legal memorandum issued by the Legislative Reference Bureau to Representative John Mizuno, that advises that "[t]here is no definitive answer to your inquiry since the constitutional language in question is general and there is no case law

clarifying or interpreting it," and concludes that "an argument may be made that the constitutional prohibition is not applicable because H.B. No. 718 merely sets that land aside for KKFC." For the reasons discussed below, we confirm our advice that Act 3 violates article XI, section 5 of the Hawai'i Constitution.

### Background

Section 2 of Act 3 provides that the HCDA "shall set aside portions of tax map key (first division) 2-1-058:41 and 2-1-058:116, comprised of approximately fifteen thousand square feet, at Kewalo Basin cove and known as the former ice chute and fuel dock operations building site and perimeter area . . . for continued use by the Kewalo Keiki Fishing Conservancy." Act 3 does not specify a duration for the set aside or indicate whether it is to be at no cost to the KKFC. Section 3 of Act 3 requires the HCDA to determine if environmental remediation work is required on that property and section 4 of Act 3 provides an appropriation of \$30,000 for whatever environmental remediation work HCDA determines is necessary.

### Discussion

Article XI, section 5 of the Hawai'i Constitution, provides that:

The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

The Hawai'i Constitution clearly states that the legislative power over "lands owned by or under the control of the State and its political subdivisions **shall be exercised only by general laws.**" [Emphasis added.] There is no dispute that the land in question is State land.

General laws are "laws which apply uniformly throughout all political subdivisions of the State . . . [or] uniformly to a class of political subdivisions." Bulgo v. Maui County, 50 Haw. 51, 58, 430 P.2d 321, 326 (1967). See also People ex rel. City of Canton v. Crouch, 79 Ill. 2d 356, 403 N.E.2d 242 (1980); Sheffield v. Rowland, 87 Ohio St. 3d 9, 716 N.E.2d 1121 (1999). A law uniformly applying to a class of persons or things having a reasonable and just relationship to the regulated subject matter is a general law. 73 Am. Jur. 2d Statutes § 3 (2001). A law is a "special," not a general, law if it operates upon and affects only a fraction of persons or a portion of the property encompassed by a classification, granting privileges to some and not others. Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991) (holding unconstitutional legislation appropriating money to compensate depositors for losses on deposits in failed industrial loan and investment companies). Special legislation discriminates in favor of a person or entity by granting them a special or exclusive privilege. A statute relating to particular persons, places, or things is a special law, not a general law.

Act 3 can only be interpreted as being a special legislation because it was enacted to benefit the KKFC specifically and is limited to a specific property. Although courts will generally defer to a legislature's decision regarding general law, no deference can be accorded in this case because there is no way that Act 3 can be interpreted to be a general law. See Republic Inv. Fund I v. Town of Surprise, 166 Ariz. 143, 800 P.2d 1251 (1990) (deannexation statute limited in application to twelve small cities and towns in one county was unconstitutional special legislation).

In interpreting article XI, section 5, we apply the cardinal rule of statutory construction that "if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written." Hawaii State AFL-CIO v. Yoshina, 84 Hawai'i 374, 376, 935 P.2d 89, 91 (1997).

Article XI, section 5 is a simple, unambiguous sentence which provides that control of lands owned by or under the control of the State is to be exercised pursuant to general laws

only, except for land transfers to or for the use of the State, a political subdivision, or any department or agency thereof.

Standing Committee Report No. 78, 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 233 (1960), the Constitutional Convention's Committee on Agriculture, Conservation and Land states:

This section reiterates the legislative power of the State but does provide for the restriction that in administering or disposing of the natural resources the legislature must do so by general law. This is to control dissipation of the assets by land exchanges under private laws or by homestead laws governing a particular tract of land and the like, however it does not require a general law for a land transaction between departments of government. [Emphases added.]<sup>1</sup>

The framers of the Hawai'i Constitution intended that the Legislature be expressly limited to enacting general laws for the administration and disposition of State lands and other natural resources and be precluded by that express limitation from enacting special laws to convey interests in land and other natural resources directly to individuals or for specified purposes. The debates at the 1950 Constitutional Convention state that "the real purpose of this section is to prevent the alienation of lands into private hands," and to prevent "exchanges by special law which would work to the disadvantage of the State." 2 Proceedings of the Constitutional Convention of Hawaii of 1950, at 641 (1961). "It is put in so as to restrict possible special land exchange deals or things of that nature which as we know in the past have definitely caused a considerable loss to the Territory." Id., at 631.

There is no conceivable way to interpret Act 3 other than as special legislation that treats the KKFC differently from all

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<sup>1</sup>The Legislative Reference Bureau's legal memorandum focuses only on the disposition of state lands and natural resources, and does not consider the administration of state lands and natural resources.

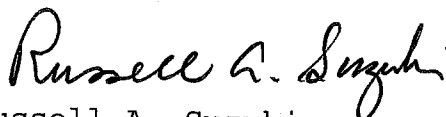
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other persons or entities that might wish to use tax map key  
(first division) 2-1-058:41 and 2-1-058:116 for other purposes.

Conclusion

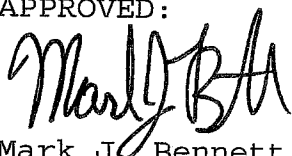
For the foregoing reasons, we believe that Act 3 violates  
article XI, section 5 of the Hawai'i Constitution.<sup>2</sup> Because Act  
3 violates article XI, section 5, we advise that no steps should  
be taken to implement Act 3.

Very truly yours,



Russell A. Suzuki  
Deputy Attorney General

APPROVED:



Mark J. Bennett  
Attorney General

c: Hawai'i Community Development Authority

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<sup>2</sup> This is not to say that HCDA on its own initiative or at the  
request of KKFC or any other person or organization would be  
precluded from allowing KKFC exclusive use of the area in  
question by one or more of the means specified in the general  
laws set out in Hawai'i Revised Statutes chs. 171, 206E, or any  
other general law.