Hilo mall at heart of Department of Hawaiian Home Lands dispute

The federal government is clashing with the state Department of Hawaiian Home Lands over a move by DHHL to use a controversial year-old Hawaii law enabling long extensions of state commercial land leases.

The clash this week upset a move by DHHL to possibly add 40 years to a land lease with multibillion-dollar mall operator Brookfield Properties, which owns Hawaii island's largest enclosed shopping center, Prince Kuhio Plaza, built in 1985 on DHHL land in Hilo.

DHHL wanted its governing board, the Hawaiian Homes Commission, to consider approval of a lease extension for Brookfield earlier this week, but the U.S. Department of the Interior informed Hawaii Attorney General Holly Shikada last week that it would be "imprudent" to do so because the federal agency believes the 2021 Hawaii law as it applies to DHHL needs DOI concurrence and approval by Congress.

"I am writing to give notice that the United States has significant concerns that any actions by the Hawaiian Homes Commission to grant extensions of commercial leases of Hawaiian home lands pursuant to (the new Hawaii law) violate Federal law and constitute a breach of trust by the State," said the Oct. 13 letter from Robert Anderson, the DOI's solicitor, or chief law officer.

Some DHHL beneficiaries, Native Hawaiians who are eligible for homestead land leases from the agency, and their advocates are incensed that DHHL was entertaining a Brookfield lease extension after the federal agency in May disagreed with a Hawaii attorney general opinion contending that DHHL's use of the state lease extension law, Act 236 in 2021, didn't require DOI review and approval by Congress.

"This letter is not intended to serve as the Secretary's formal review of Act 236 . . . Rather, this letter serves as notice that Act 236 can have no effect on the (Hawaiian Homes Commission Act) or the Trust," Joan Mooney, DOI's principal deputy assistant secretary, said in the May 11 letter to William Aila Jr., DHHL's director and Hawaiian Homes Commission chair.

The Hawaiian Homes Commission Act was enacted by the U.S. Congress in 1920 to protect and improve the lives of Native Hawaiians, and governs DHHL and its lands held in trust for beneficiaries who must be at least half Hawaiian.

The Sovereign Council of Hawaiian Homestead Associations said in a Tuesday announcement to members that DHHL leadership disregarded the federal government's determination and decided not to provide Hawaiian Homes Commission members with the May letter as the agency prepared commissioners to consider a lease extension for Brookfield.

"I think it's a pretty serious breach," said Robin Danner, chair of the council. "It is blatant dishonesty."

DHHL spokesperson Cedric Duarte said the agency didn't share the May letter with commissioners because the letter said, in part, that it wasn't intended to serve as the interior secretary's formal review of Act 236.

The homestead association council unsuccessfully urged Hawaii lawmakers to exclude DHHL from the commercial land lease extension bill before it became law last year without Gov. David Ige's signature.
After the law was enacted, the council sought an opinion from DOI with the help of U.S. Rep. Kai Kahele and contended that federal oversight is required for DHHL to use the new law.

In a Friday letter to Ige, Kahele said, “I am writing to convey my deep concern that DHHL intends to circumvent the DOI and not comply with the requirements laid out in the Admissions Act for consent by the United States for all substantive changes by applying the provisions in Act 236 with DHHL commercial lease extensions. To avoid legal action by the United States against the State of Hawaii, I am requesting your intervention to address this issue with DHHL.”

Cindy McMillan, Ige’s communications director, said Wednesday that the Attorney General’s Office is reviewing the DOI letter.

In September, DHHL let Hawaiian Homes Commission members know that the agency intended to seek action from the commission in October on a request from Brookfield to extend its Prince Kuhio Plaza land lease to 2082 from 2042. If approved, the lease, which began in 1977, would span 105 years.

During the Sept. 19 meeting, commissioner Mike Kaleikina asked whether there should be a discussion of Act 236.

Peter “Kahana” Albinio Jr., DHHL’s acting land management division administrator, replied that there had been no response from DOI and that DHHL was proceeding based on the Hawaii attorney general’s opinion, which was produced in December and conveyed to DOI in February.

Commissioner Patty Kahanamoku-Teruya asked what DOI had to do with the matter of a lease extension.

To this question, Katie Lambert, a deputy attorney general advising the commission, explained that the federal agency had taken the position that DHHL using the new law needed concurrence from DOI and approval from Congress.

“We disagreed with that,” she said. “We think that’s, honestly, not right. I was going to use a different term, but I realize this is a public forum.”

After another commissioner, Russell Kaupu, described DOI’s view as informal, Lambert said, “I should be careful because I’m not actually sure where it is in the process, but I don’t believe that DOI ever came back with an actual written anything of the nature. They just kind of sat on it.” Aila appeared to nod in agreement.

Kaupu encouraged fellow commissioners to act on a Brookfield lease extension at the next meeting as planned by DHHL.

“I’m in favor of us kind of pushing the envelope on this one as far as the extension that’s sought on the lease,” he said. “I think if we’ve gotten our counsel to advise that we don’t need to seek the Department of Interior approval or consent, then I think that we move forward for our own reasons. We have the highest and best user (Brookfield) on board already . . . I’d be in favor of us being a little bit bold on this one and seeing what we can do.”

Commissioner Randy Awo questioned whether that might be trouble given federal law possibly superseding state law.
“Can we just roll with what the AG is saying?” he asked.

At that point Lambert said it would be more appropriate to discuss the issue in executive session. “You’re starting to go into things that probably shouldn’t be discussed in open session,” she said.

Danner, a beneficiary leader from Kauai, expressed shock that a Brookfield lease extension would even be on the September meeting agenda as an informational item that included a presentation from Brookfield given DOI’s May letter to Aila.

“I was like, that cannot be,” she said.

At Monday’s Hawaiian Homes Commission meeting in Hilo, a Brookfield lease extension was listed as a discussion item for executive session.

Several DHHL beneficiaries who testified at the meeting, as well as Native Hawaiian Legal Corp. litigation director David Kopper, opposed a Brookfield lease extension as wrong or illegal, and a few criticized DHHL for how it attempted to have commissioners take action on the extension requested by the company.

Sue Lee Loy, a Hawaii County Council member, told commissioners that beneficiaries are frustrated about depressed public discourse in light of important information being withheld and commission discussions held in executive session.

“We want to provide good comment and good context,” she said. “However, what we saw this morning is exactly what has happened consistently in the homestead with our beneficiaries not being able to get all the information to provide this body with good information to make good decisions.”

Concerns from DHHL beneficiaries over long-term extensions of DHHL land leases to commercial tenants that generate revenue for the department were raised last year while the bill that became Act 236 was being debated at the Legislature.

The bill, sought by Ige’s administration, was largely aimed at giving the state Department of Land and Natural Resources an ability to avoid having lessees stop making capital improvements on DLNR land near the end of leases, which were historically capped at 65 years, by allowing extensions up to 40 years if lessees agree to revised rent based on land value and make property improvements costing at least 30% of what existing facilities on the land are worth.

House Bill 499 also applied to commercial DHHL leases, and provides an avenue for current land lessees to bypass competitive bidding for a new lease upon expiry of an existing lease.
Supporters of the bill included DLNR and several commercial lessees of public lands, including Brookfield.

DHHL submitted no testimony on HB 499.

The vote to pass the bill was 36-15 in the House and 16-9 in the Senate.

In a statement Wednesday, Aila said DHHL intends to continue discussions with DOI to address concerns.