

HB 424

NEAL ABERCROMBIE
GOVERNOR OF HAWAII



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SENATE COMMITTEE ON TRANSPORTATION & INTERNATIONAL AFFAIRS

HB 424, RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

Testimony of Gary Hooser
Director of the Office of Environmental Quality Control

March 21, 2011

1 **Office's Position:** The Office of Environmental Quality Control (OEQC) offers these comments
2 about HB 424. There is no conclusive data to show that Act 87 significantly resolved permitting
3 concerns for projects in the right-of-way, as identified during the 2008 legislative session.
4 **Fiscal Implications:** There are no direct fiscal impacts to the OEQC or the State budget.
5 **Purpose and Justification:** Act 87 of 2009 was enacted to alleviate concerns about
6 insignificant environmental impacts of ancillary "secondary action" in the right-of-way when the
7 "primary action" is not subject to discretionary consent or public hearing, and exempt such
8 actions from unnecessarily preparing environmental assessments or impact statements. OEQC
9 continues to receive inquiries from agencies about the need for environmental assessments or
10 environmental impact statements for projects in the right-of-way. The OEQC would like to
11 encourage state and county agencies to evaluate projects and actions and in cases where there is
12 an unambiguous expectation of insignificant environmental impacts, to either utilize Act 87 or to
13 utilize their existing exemption lists to clear Chapter 343, HRS requirements. Furthermore,
14 while staffing and resources are limited, the OEQC is available for Chapter 343 consultation and
15 welcomes agency inquiries.

16 Thank you for the opportunity to testify.

**Testimony before the
Senate Committee on
Transportation and International Affairs**

By Ken Morikami
Manager, Engineering Department
Hawaiian Electric Company, Inc.

March 21, 2011

House Bill 424
Relating to Environmental Impact Statements

Chair English, Vice Chair Espero and Members of the Committee:

My name is Ken Morikami and I am testifying on behalf of the Hawaiian Electric Company and its subsidiaries, Hawaii Electric Light Company and Maui Electric Company.

Position:

We support HB424 which extends the sunset date of Act 87, Session Laws of Hawaii to July 1, 2013. We would even support making Act 87 permanent.

Comments:

- Act 87 served to allow timely routine electrical service connections to our customers.

Thank you for the opportunity to testify on this matter.

NAIOP

COMMERCIAL REAL ESTATE
DEVELOPMENT ASSOCIATION
HAWAII CHAPTER

March 18, 2011

The Hon. J. Kalani English, Chair, and
Members of the Senate Committee on
Transportation and International Affairs
State Capitol, Room 205
Honolulu, Hawaii 96813

Re: Testimony in Support of House Bill No. 424 Relating to Environmental Impact Statements

Dear Chair English and Committee Members:

I am submitting this testimony on behalf of NAIOP Hawaii. We are the Hawaii chapter of NAIOP, the Commercial Real Estate Development Association, which is the leading national organization for developers, owners and related professionals in office, industrial and mixed-use real estate. The local chapter comprises property owners, managers, developers, financial institutions and real estate related professionals who are involved in the areas of commercial and industrial real estate in the State of Hawaii.

We strongly support this bill. It extends the sunset date for Act 87 of the 2009 Session Laws. Act 87 was first enacted because of substantial concerns in the real estate industry and government agencies that, in light of the *Superferry* decision, preparation of an environmental assessment or impact statement would be required for minor uses or modifications within an existing public right-of-way such as utility connections. The 2009 Legislature believed that such minor uses of public rights-of-way should not trigger the provisions of Chapter 343. We believe the same rationale is still applicable and support extension of the sunset date.

Thank you for the opportunity to testify on this measure.

Very truly yours,



James K. Mee
Chair, Legislative Affairs Committee



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March 21, 2011

The Honorable J. Kalani English, Chair
Senate Committee on Transportation and International Affairs
State Capitol, Room 224
Honolulu, Hawaii 96813

RE: H.B. 424, Relating to Environmental Impact Statements

HEARING: Monday, March 21, 2011 at 1:18 p.m.

Aloha Chair English, Vice Chair Espero and Members of the Committee:

I am Myoung Oh, Government Affairs Director of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, testifying on behalf of its 8,500 members. HAR supports H.B. 424 which extends the sunset date for EIS exceptions for secondary actions from July 1, 2011, to July 1, 2013.

Based on the court decisions, infrastructure and improvements that touch a state or county road required an Environmental Assessment ("EA")/Environmental Impact Study ("EIS"). The consequence of these decisions was that minor improvements, regardless of their environmental impact, are required to submit an EA/EIS.

Clarification and balance to the environmental review process is important, because the costs to prepare an EA/EIS are substantial regardless of whether the parcel of land is small or large. By excluding the EA/EIS requirement for government-owned rights-of-ways, the burden on homeowners who make minor improvements will be reduced, particularly where the environmental impact of the project may be minimal.

Furthermore, HAR believes that the exemption should not only be extended but remain permanent.

Mahalo for the opportunity to testify.





**Testimony to the Senate Committee on Transportation and International
Affairs**

Monday, March 21, 2011

1:18 p.m.

Conference Room 224

RE: HOUSE BILL 424 RELATING TO ENVIRONMENTAL IMPACT STATEMENTS

Chair English, Vice Chair Espero and members of the committee:

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). The Chamber is in strong support of HB 424, relating to Environmental Impact Statements.

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

The purpose of this Act is to delineate a clear exemption to the applicability of Chapter 343, Hawaii Revised Statutes, the state's environmental impact statement law, when the primary action is not subject to a discretionary consent or a public hearing and the secondary action is ancillary and limited to the installation, improvement, renovation, construction, or development of infrastructure within an existing public right-of-way.

The legislation is needed because of the recent court decisions where any action that involved the use of a state or county road right of way was a "trigger" for the EA/EIS. Because an access improvement, easement, drainage, waterline, etc., is now viewed as a use of state or county lands when it touches (over, under, across) a state or county road right of way, the entire project is then required to prepare an environmental assessment for the entire project.

Requiring the preparation of a 343 HRS document for projects with insignificant environmental impacts and cases with minor utility or access concerns is not the intent of the EA/EIS process.

We strongly support the approval of H.B. No. 424 to address the immediate problems caused by the Courts interpretation of Chapter 343 HRS. Our preference is for a longer sunset period as contained in S.B. 723 SD1.

Thank you for this opportunity to express our views.



March 21, 2011

Senator J. Kalani English, Chair and Senator Will Espero, Vice Chair
Senate Committee on Transportation and International Affairs

Support and Requested Amendments of HB 424, Relating to Environmental Impact Statements. (Extends the sunset date for EIS exceptions for secondary actions pursuant to Act 87, Session Laws 2009, from July 1, 2011, to July 1, 2013.)

Monday, March 21, 2011 at 10:30 a.m. in CR 224

My name is David Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable and rational land use planning, legislation and regulation.

While LURF supports HB 424, which extends the sunset date of Act 87, Session Laws of Hawaii 2009 (Act 87), from July 1, 2011, to July 1, 2015, however we **also respectfully request making Act 87 permanent**, as it has proven to be a fair, reasonable and workable process .

HB 424. Act 87 (2009) excepts from the environmental impact statement (EIS) law, certain primary actions not subject to discretionary consent and involving ancillary secondary actions limited to infrastructure in public rights-of-way (ROW) or exempt highways. Extending the sunset date of Act 87 pursuant to §343-5(a), Hawaii Revised Statutes (HRS), would clarify that Chapter 343 would not apply to primary actions that require a ministerial permit or approval of the installation and development of infrastructure and utilities within a public highway ROW to serve proposed development, which does not require any discretionary agency approval. The Department of Transportation, Chamber of Commerce of Hawaii and the Hawaiian Electric Company also support this bill.

Background. Ever since Chapter 343 was implemented, one of the “triggers” for the preparation of an environmental assessment (EA) document has been the “use of state or county lands.” In the past, the term was being interpreted to mean that an EA is required for all government projects or development projects on government lands. Also, in the past, EAs were never required for private applications to use or “touch” state or county roadways or ROW for minor work touching public roadways, such as easements, drainage, connection of waterlines and sewer lines, private driveways and access improvements, utility rights of way for overhead or underground connections, etc.

In 2007 and 2008, however, as a result of legal interpretations of court cases by certain state and county agencies, various state and county agencies began requiring residents to obtain EAs for minor utility connections to their existing lots. As a result, we understand that the Office of

Environmental Quality Control (OEQC) which had assumed the responsibility of determining whether an EA was necessary, was burdened with the review of a backlog of several hundred of such minor work projects touching public roadways or ROW.

Between 2008 and 2009, OEQC, the State Department of Transportation (DOT) and LURF worked for over a year with the public, environmental advocates, state and county agencies, and private businesses to develop appropriate legislative language to assure compliance with HRS Chapter 343. OEQC, DOT and LURF supported the adoption of Act 87 (2009), which provided an exemption for certain limited primary permits for minor work touching public roadways.

Since the enactment of Act 87, we understand that OEQC's review process has remained transparent and subject to review by stakeholders such as other government agencies, environmental advocates, the construction industry and the general public. We also understand that none of OEQC's determinations regarding such minor work projects have been challenged or questioned by the public or any of the stakeholders.

LURF's Position. The extension of Act 87 is necessary to continue to clarify that the EA requirement should not be interpreted and expanded to include minor work touching public roadways. Although LURF supports a permanent extension of Act 87, we also support the subject bill which extends Act 87 to 2015. The extension of Act 87 will help private parties and agencies avoid preparing unnecessary EAs. The importance of this measure was highlighted in 2009 by the Senate Committee Report by ENE and TIA Committees, which provided, "[n]otwithstanding that this may be a temporary fix, obviated by the LRB's comprehensive study, your Committees find that this matter must be clarified now and cannot wait until the LRB's study is completed and its recommendations implemented through the legislative process." Senate Standing Committee Report 986.

We respectfully request your **favorable consideration of HB 424 and LURF's recommended amendment to make Act 87 permanent.** Thank you for the opportunity to testify on this matter.

Douglas Meller
2749 Rooke Avenue
Honolulu, HI 96817

SENATE COMMITTEE ON TRANSPORTATION AND INTERNATIONAL AFFAIRS
HEARING SCHEDULED 1:18 PM ON MONDAY, MARCH 21, 2011

TESTIMONY REQUESTING AMENDMENT OF HB 424

I used to work for the State DOT. Before I retired, I drafted Section 2 (the statutory amendment section) of Act 87, SLH 2009. Act 87 was narrowly drafted to expedite DOT processing of private applications for work within the State highway right-of-way to serve proposed development that only requires a building permit. Act 87 does nothing to expedite DOT processing of private applications for work within the State highway right-of-way to serve proposed development that requires some kind of discretionary "approval". Act 87 does not resolve which agency decisions amount to a discretionary "approval". Act 87 does not address the scale of development which might be exempted from EA requirements when the State EIS law is "triggered". Act 87 does not resolve the kolohe applications of our Supreme Court's ruling that whether Chapter 343 is "triggered" by an applicant's request for a discretionary agency "approval" to develop private property may solely depend on whether proposed development requires new infrastructure in a public highway right-of-way.

To work towards resolving these kinds of issues, I recommend amending HB 424 by adding a new Section to read as follows:

"On or before December 15, 2011, the state office of environmental quality control shall provide the legislature with a draft bill which could be enacted to accomplish the following objectives:

1. When a private applicant requests an agency "approval" required for the proposed development of private property, whether Chapter 343 is "triggered" will depend on the nature and potential impacts of the required agency "approval" and will not depend on whether the proposed development requires construction of infrastructure within a public highway right-of-way.
2. An agency will be authorized to issue quick, enforceable, administrative rulings to resolve uncertainty or disputes about whether any specific agency "approval" is an automatic "trigger" for Chapter 343.
3. If Chapter 343 is "triggered" by a private application requesting an agency "approval" required for the proposed development of private property, whether an environmental assessment is required will be based on an evaluation of the potential impacts of the proposed development. An environmental assessment will not always be required if the scale of the proposed development exceeds arbitrary criteria such as those currently adopted as Section 11-200-8(A)(3), Hawaii Administrative Rules.
4. If Chapter 343 is "triggered" by a private application requesting an agency "approval" required for the proposed construction of infrastructure within a public highway right-of-

way, whether an environmental assessment is required will depend on potential direct impacts arising from construction and operation of proposed infrastructure. Whether an environmental assessment is required will not depend on the nature, scale, or potential impacts of existing or proposed development outside the highway right-of-way.”

EIS RULES CITED IN THIS TESTIMONY

§11-200-8 Exempt Classes of Action

- A. Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. Actions declared exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule. The following list represents exempt classes of action:
1. Operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing;
 2. Replacement or reconstruction of existing structures and facilities where the new structure will be located generally on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced;
 3. Construction and location of single, new, small facilities or structures and the alteration and modification of the same and installation of new, small, equipment and facilities and the alteration and modification of same, including, but not limited to:
 - a. Single-family residences less than 3,500 square feet not in conjunction with the building of two or more such units;
 - b. Multi-unit structures designed for not more than four dwelling units if not in conjunction with the building of two or more such structures;
 - c. Stores, offices, and restaurants designed for total occupant load of twenty persons or less per structure, if not in conjunction with the building of two or more such structures; and
 - d. Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; accessory or appurtenant structures including garages, carports, patios, swimming pools, and fences; and, acquisition of utility easements....