DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
PHONE: (808) 768-8000 • FAX: (808) 768-6041
DEPT. WEB SITE: www.honoluludpp.org • CITY WEB SITE: www.honolulu.gov

KIRK CALDWELL
MAYOR

GEORGE I. ATTA, FAICP
DIRECTOR

ARTHUR D. CHALLACOMBE
DEPUTY DIRECTOR

January 22, 2014

The Honorable Cindy Evans, Chair
and Members of the Committee on Water & Land
Hawaii State House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Evans and Committee Members:

Subject: House Bill No. 1560
Relating to Land Use

The Department of Planning and Permitting (DPP) **opposes** House Bill No. 1560, which requires the Land Use Commission (LUC) to include, in conditional approvals of boundary changes, a date by which the boundary change is no longer valid if the conditions have not been met.

Our position is based on the following:

1. The imposition of a deadline puts great uncertainty on the status of downstream county zoning and other entitlement approvals. This could have implications on financing projects.

2. The main role of the redistricting process is to decide whether land should be used for agricultural or urban purposes, or saved as conservation land. We believe the LUC focus does not include the timing of individual projects, especially in the urban district. Timing is reviewed by the counties through county planning and zoning processes, with full consultation from state agencies.

3. It is difficult for large projects, e.g., new planned communities, to be able to accurately provide a development schedule spanning many years. Moreover, there are many factors beyond the control of the landowner and developer; particularly market forces and legal actions.

4. Current LUC Rules already provide a mechanism to review the performance of projects, as warranted (Subsection 15-15-93, Enforcement of conditions, representations, or commitments, of Chapter 15-15, Hawaii Administrative Rules).

5. Although relatively minor in nature, this proposed across-the-board requirement will add to the administrative cost of monitoring conditions of approval for both government and the private sector. This is not the direction we should follow, if economic recovery and stability are desired public goals.

In short, this bill will have a chilling effect on land use entitlements, and is unnecessary as there are other mechanisms already in place to address "lagging" projects. Please defer House Bill No. 1560. Thank you for the opportunity to testify.

Very truly yours,

George I. Atta

George I. Atta, FAICP
Director
Department of Planning and Permitting

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LAND USE RESEARCH
FOUNDATION OF HAWAII
1100 Alakea Street, Suite 408
Honolulu, Hawaii 96813
(808) 521-4717
www.lurf.org

January 20, 2013

Representative Cindy Evans, Chair
Representative Nicole E. Lowen, Vice Chair
House Committee on Water and Land

Opposition to HB 1560 Relating to Land Use. (Requires the land use commission to include, in conditional approvals of boundary changes, a date by which the boundary change is no longer valid if the conditions have not been met.)

Wednesday, January 22, 2014, 8:30 a.m., in Conference Room 325

My name is Dave 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, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

This measure does not have a purpose clause, so its intent and purpose is unknown. LURF acknowledges that some conditions imposed by the Land Use Commission (Commission) may not be satisfied, however, the enforcement or of said conditions, determination of good cause for the delays and any extension of time to satisfy the conditions should lie with the counties. Based on the following reasons and considerations, LURF **OPPOSES** HB 1560, and must request that this bill be held in Committee, based on the following:

- HB 193, HD1, is not consistent with Hawaii Revised Statutes (HRS) §205-12 Enforcement, which authorizes the counties to enforce the use classification districts adopted by the Commission.

- HB 193, HD1, is not consistent with the intent and application of HRS Chapter 205 and its two-tiered government land use approval process (State/county).

- The automatic invalidation of a land use district required by HB 1560, violates HRS 205-4(h), which requires the Commission to specifically consider its own "decision-making criteria," and to make findings pursuant to HRS sections 205-2, 205-16 and 205-17.

- HB 1560 will result in a deprivation of property rights without the procedural due process of law under Fourteenth Amendment of the U.S. Constitution and Section 5 of the Hawaii State Constitution.

- The automatic invalidation of an existing land use district and automatic reclassification required by HB 1560 violates HRS 205-4 and Chapter 91 (administrative procedures for public proceedings and records).

- HB 1560 specifically disregards the reality of development projects, enforcement of conditions, the reasons for delays in compliance with conditions and the expertise and experience of the counties to address such matters.

- HB 1560, will require existing residential, commercial and industrial and resort zoned properties to revert back to the agricultural land use district, which will cause inconsistencies with county zoning, and violations of the powers granted to the counties under HRS 46-4.

- HB 1560 will result in severe unintended consequences and confusion – as it will require existing residential, commercial, industrial and resort zoned properties to revert back to agricultural land use classifications.

- Instead of passing HB 1560, the Legislature should pass HB 193 (2013), which was passed by this Committee in 2013, and is a more reasonable and rational bill which reflects reality and is consistent with Hawaii laws.

HB 1560. This bill requires the Commission to include, in conditional approvals of boundary changes, a date by which the boundary change is no longer valid if the conditions have not been met.

Background. Pursuant to Chapter 205, HRS, the Commission is charged with grouping contiguous land areas suitable for inclusion in one of the four major State land use districts (urban, rural, agricultural and conservation); and determining the land use boundaries and amendments based on applicable standards and criteria. Thereafter, for projects within the urban district, the counties control specific uses, development and timing of projects through detailed county ordinances, zoning and subdivision rules.

After the LUC approves a district boundary amendment for an urban land use (with certain conditions), then it is up to the counties to review and disapprove or approve the zoning (with additional specific conditions); disapprove or approve subdivisions (with additional specific conditions); and to disapprove or approve other development permits (with additional specific conditions) to address health, safety and environmental issues related to the development. The various county development approval and permitting processes require review, approval and imposition of specific conditions by county councils and/or planning commissions, as well as the county administrations and numerous county departments, which employ hundreds of employees, planners, architects and engineers who are knowledgeable and experienced with health, safety and environmental requirements and the nature of development and

delays. LURF understands that in some cases, the City and County of Honolulu (City) has not imposed strict "deadline" dates in their zoning approvals, and instead, the City and some other counties have addressed the development of master-planned projects in a sequential manner; by reasonably requiring the satisfaction of certain specific conditions before subsequent permits will be granted.

Over the years, issues have been raised relating to the LUC's imposition of detailed timing deadlines and other specific requirements and conditions and the LUC's continued monitoring and enforcement of conditions which involve detailed development issues and requirements which the counties are responsible to establish and enforce under HRS Chapter 205 and county laws.

LURF's Position. Given the possibility of more specific "date" deadlines and other detailed conditions in the Commission's decision and orders, LURF **OPPOSES HB 1560**, based on the following:

- **HB 1560 is not consistent with HRS §205-12 Enforcement, which grants enforcement powers to the counties.** The relevant HRS provision is as follows:

  > **§205-12 Enforcement.** The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

- **HB 1560 is not consistent with the intent and application of HRS Chapter 205 and its two-tiered government land use approval process (State/county).** Most State agencies and all of the counties operate with the understanding that the LUC should perform its duties under the law and take a broad focus of state land use issues and the four State land use districts, while deferring the issues relating to specific project development details and timing, specific conditions and enforcement to the counties. The more itemized, specific and detailed the LUC conditions are, the more chance of conflicts with county laws, procedures and policies, thereby creating more uncertainty in the land use process. This analysis is based on HRS Chapter 205, the state land use district boundary amendment process, the county processes relating to general plans, development/sustainable communities plans, zoning, subdivisions, and other permits, and is consistent with Hawaii case law, land use legal treatises (including *"Regulating Paradise – Land Use Controls in Hawaii"*, Second Edition by David L. Callies), and the ruling in the recent Aina Lea case by Third Circuit Judge Elizabeth A. Strance.

- **HB 1560 specifically disregards the reality of development projects, enforcement of conditions, the reasons for delays in compliance with conditions and the expertise and experience of the counties to address such matters.** LURF's opposition to HB 1560, is also based on the following:

- **Determinations of "substantial commencement" and "good cause" should be made by government officials with expertise and experience in planning and development.** Given their extensive expertise and experience, the appropriate county officials who understand the planning and development process and would be in the best position to determine whether "substantial development has commenced" and whether "good cause" exists for an extension.

- **HB 1560 does not address the situation of "good cause" for a delay in compliance with Commission conditions, nor the reality of development delays which are beyond the control of the land owner or developer.** It is common knowledge that many master-planned projects or areas that have developed (or are still developing) over the span of many years result in very good and sustainable projects which provide affordable housing and job opportunities for Hawaii's residents (Mililani, Kakaako, the Second City of Kapolei, etc.). In addition to economic cycles (when the economy and employment are down, the housing market and development stagnates); sometimes development delays are based on the following:

  - ***Force Majeure* ("greater force").** These are actions that cannot be predicted or controlled by the Petitioner, such as war, strikes, shortage of construction materials or fuel, etc., government action or inaction, or being caught in a bad economic cycle; and which include "Acts of God", which are unpredictable natural events or disasters, such as earthquakes, storms, floods, etc.

  - **Certain permit conditions can also actually delay projects.** There are instances where a developer cannot commence development until a certain condition is met, and sometimes the satisfaction of that condition is dependent on the action of a third party – sometimes government, over which the developer has no control. Under these circumstances, an automatic invalidation of an existing land use district and property rights would not be fair.

- **HB 1560 will result in a deprivation of property rights without the procedural due process of law under Fourteenth Amendment of the U.S. Constitution and Section 5 of the Hawaii State Constitution.**

  The Fourteenth Amendment of the U.S. Constitution and Section 5 of the Hawaii State Constitution both guarantee that no person shall be deprived of their property without due process of law.

  HB 1560 requires an automatic invalidation of an existing land use district and automatic reclassification. This process deprives landowners of their civil due process rights, including, among other things, the right to an unbiased tribunal, notice, opportunity to be represented by counsel and to be heard, the right to present evidence, the right to know the opposing evidence, the right to cross

examine adverse witnesses, to right to a decision based on the evidence presented, the requirement that the Commission prepare a record of the evidence presented and written findings of fact and reasons for its decision.

- **The automatic invalidation of an existing land use district and automatic reclassification required by HB 1560 violates HRS Chapter 91 (administrative procedures for public proceedings and records).** HRS 205-4 requires certain administrative procedures and protections for any reclassification of la and use district involving land areas greater than fifteen acres. For such reclassifications, the Commission must conduct a hearing on the appropriate island in accordance with the provisions of HRS Sections 91-9 (Contested cases; notice; hearing; records), 91-10 (Rules of evidence, official notice), 91-11 (Examination of evidence by agency), 91-12 (Decisions and orders) and 91-13 (Consultation by officials of agency), as applicable. The automatic invalidation of an existing land use district as required by HB is a clearly violates the provisions of HRS 205-4 and Chapter 91.

- **HB 1560 will result in severe unintended consequences and confusion – as it will require existing residential, commercial, industrial and resort zoned properties to revert back to agricultural land use classifications.** There are many examples of projects which are partially completed, and the automatic invalidation of land use districts for existing uses and properties will result in massive confusion, inconsistent land uses and spot zoning.

- **The automatic invalidation of a land use districts required by HB 1560, will require existing residential, commercial and industrial and resort zoned properties to revert back to the agricultural land use district, which will cause inconsistencies with county zoning, and violations of the powers granted to the counties under HRS 46-4.** Pursuant to HRS 46-4, the counties are authorized to establish and enforce zoning of properties. The zoning in all counties is accomplished within the framework of a long-range, comprehensive general plan, which is prepared to guide the overall future development of the county. Zoning is one of the tools available to the county to put the general plan into effect in an orderly manner. In establishing or regulating the zoning districts, the counties are required to give full consideration to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices. The automatic invalidation of a land use district is not prudent, as it would cause a violation of zoning ordinances.

- **HB 1560, violates HRS 205-4(h), which requires the Commission to specifically consider its own "decision-making criteria," and to make findings pursuant to HRS sections 205-2, 205-16 and 205-17**. HRS 205-4(h) provides that:

> "No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that

the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to section 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for nay boundary amendment under this section."

HRS 205-16 requires the Commission to comply with the Hawaii State Plan for any amendment of an existing land use district boundary, or other action by the Commission, and for all other actions by the Commission.

HRS 205-17 requires the Commission to consider various decision-making criteria, including, but not limited to: the extent to which the proposed reclassification conforms with the applicable goals, objectives, and policies of the Hawaii State Plan and relates to the applicable priority guidelines of the Hawaii State Plan and adopted functional plans; the extent to which the proposed reclassification conforms to the applicable district standards; the impact of the proposed reclassification on various areas of state concern; the county plan and all community, development, or community development plans, etc.

The automatic invalidation of an existing land use districts required by HB 1560, and the reversion back to the agricultural land use district, will violate HRS sections 205-4(h), 205-2, 205-16 and 205-17.

- **Instead of passing HB 1560, <u>the Legislature should pass HB 193 (2013)</u>, which was passed by this Committee in 2013, and is a more reasonable and rational bill which reflects reality and is consistent with Hawaii laws.** HB 193 (2013) provided that if a person who has petitioned for a district boundary amendment that has been approved by the Commission, requests an extension of time to comply with any requirements, terms, or conditions that were imposed as part of the approval of the amendment, the Commission shall extend the date or time by which the condition must be completed for at least two years; provided that: (1) the petitioner has substantially commenced development of the property in accordance with the imposed conditions of the district boundary amendment, or (2) other good cause exists to extend the date or time for completion of the imposed conditions of the district boundary amendment; and (3) the conditions of the extension shall not be more restrictive than those contained in the Commission decision which approved the district boundary amendment on which the extension is based. The appropriate county officer or agency identified under HRS §205-12 determines whether a petitioner has substantially commenced development of the property.

For the reasons stated above, LURF respectfully recommends that **HB 1560 be held in this Committee.**

Thank you for the opportunity to provide comments regarding this proposed measure.