

OFFICE OF PLANNING STATE OF HAWAII

DAVID Y. IGE
GOVERNOR

LEO R. ASUNCION
ACTING DIRECTOR
OFFICE OF PLANNING

235 South Beretania Street, 6th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

Telephone: (808) 587-2846
Fax: (808) 587-2824
Web: <http://planning.hawaii.gov/>

Statement of
LEO R. ASUNCION
Acting Director, Office of Planning
before the
HOUSE COMMITTEE ON WATER AND LAND
Friday, February 13, 2015
10:00 AM
State Capitol, Conference Room 325

in consideration of
HB 1169
RELATING TO LAND USE.

Chair Yamane, Vice Chair Cullen, and Members of the House Committee on Water and Land.

The Office of Planning supports the intent of House Bill 1169. This bill would give the Land Use Commission (LUC) additional tools for enforcing the conditions of a land use district boundary amendment decision and order granted pursuant to Hawaii Revised Statutes (HRS) Chapter 205 by allowing the LUC to amend, revise, or modify conditions of a decision and order.

Currently, the LUC's only remedy for a failure to perform according to the conditions imposed, or the representations or commitments made by the petitioner, is the granting of an order to show cause pursuant to Hawaii Administrative Rules § 15-15-93. The approved decision and order could then be subject to reversion, whereby the land is reverted to its former land use classification or changed to a more appropriate classification. In some cases, reversion is not the most appropriate mechanism for addressing violations and prevents the LUC and the parties from developing a more practical solution.

This bill provides the LUC with greater flexibility, beyond reversion, to enforce conditions and a more effective tool for ensuring that the interests of the State, the counties, and the public are protected.

It is unclear, however, what is meant by the term “including by reason of ineligibility” on page 2, lines 15 and 16, and we suggest the term be omitted from the proposed bill. This section of the bill should be amended so that the language is consistent with HRS § 205-4(g) pertaining to situations where conditions necessary to be met for a property’s land reclassification are unmet by the petitioner and should instead read as follows:

“If the commission finds that the petitioner’s failure to adhere to or comply with the representations or conditions does not warrant reversion to the land’s former land use classification, ~~including by reason of ineligibility,~~ or change to another classification, the commission may:”

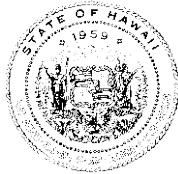
Thank you for the opportunity to testify on this matter.

DAVID Y. IGE
Governor

SHAN S. TSUTSUI
Lieutenant Governor

LUIS P. SALAVERIA
Director

MARY ALICE EVANS
Acting Deputy Director



LAND USE COMMISSION
Department of Business, Economic Development & Tourism
State of Hawai'i

DANIEL ORODENKER
Executive Officer

Bert K. Saruwatari
Planner

SCOTT A.K. DERRICKSON AICP
Planner

RILEY K. HAKODA
Chief Clerk/Planner

FRED A. TALON
Drafting Technician

Statement of
Daniel E. Orodener
Executive Officer
Land Use Commission
Before the
House Committee on Water and Land
February 13, 2015
10:00 PM
State Capitol, Conference Room 325

In consideration of
HB 1169
RELATING TO LAND USE

Chair Yamane, Vice Chair Cullen, and members of the Committee on Water and Land:

The Land Use Commission supports HB 1169 in that it provides the Land Use Commission (LUC) with much needed enforcement powers.

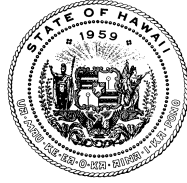
Currently, the Land Use Commission has only the remedy of reversion if there is a violation of an LUC decision and order. Reversion of land back to its original classification is an extreme measure and often not in the best interest of the community. Under recent Supreme Court decisions it may not even be allowable if a developer has begun construction, even if it the development is in direct violation of an LUC order.

Recognizing that most, if not all, of the conditions contained in LUC orders are designed to either protect the public interest under the umbrella of the public trust doctrine, or are designed to protect this body and taxpayers from having to provide infrastructure improvements to the benefit of private developers, the lack of enforcement capabilities and the inability to craft appropriate remedies is troublesome.

Currently the LUC must rely on the county planning departments to enforce conditions. This has proven problematic in that counties do not often have the motivation or resources to enforce conditions and is especially troublesome if the conditions violated relate to the public trust, public benefits or protects state funds and resources. In addition, the county process does not allow interested parties to contest its failure to enforce a condition. The LUC, in contrast, allows an aggrieved party, including members of the public at large, to bring a request for an "order to show cause" before the commission and to have its grievance heard and present evidence to support its claim. This measure would allow the LUC the ability to fairly and beneficially deal with violations as they arose.

We would also note that this issue also exists with regard to special permits. In order to ensure consistency, we would suggest that HRS 205-6(d) also be amended to give the LUC enforcement powers in situations where conditions have been placed on a special permit.

Thank you for the opportunity to testify on this matter.



STATE OF HAWAII
OFFICE OF ENVIRONMENTAL QUALITY CONTROL
235 S BERETANIA ST., SUITE 702
HONOLULU, HAWAII 96813
Tel. (808) 586-4185
Fax. (808) 586-4186
oeqchawaii@doh.hawaii.gov

**Testimony in SUPPORT of HB 1169
RELATING TO LAND USE**

REPRESENTATIVE RYAN I. YAMANE, CHAIR
HOUSE COMMITTEE ON WATER & LAND

Hearing Date: February 13, 2015
10:00 a.m.

Room Number: 325

1 **Office Testimony:** The Office of Environmental Quality Control (OEQC) strongly supports HB
2 1169, which provides the Land Use Commission (LUC) with enforcement options in situations
3 where a petitioner does not meet the necessary conditions granted during a property's land
4 reclassification.

5 Approving this measure will strengthen the framework in which the LUC grants
6 reclassifications by compelling petitioners to follow the conditions imposed by the Commission.

7 Thank you for the opportunity to testify.



HB1169
RELATING TO LAND USE
Committee on Water and Land

February 13, 2015

10:00 a.m.

Room 325

The Office of Hawaiian Affairs (OHA) Committee on Beneficiary Advocacy and Empowerment will recommend to the Board of Trustees a position of **SUPPORT** for HB1169, which addresses long-standing compliance challenges for conditions placed on district boundary amendments, by providing the Land Use Commission (LUC) with flexible alternative enforcement tools.

Conditions of approval are a critical means by which the LUC can fulfill its obligations to Native Hawaiians. Pursuant to Hawai'i's Constitution, various statutes, and judicial decisions, the State has an affirmative duty to preserve and protect Native Hawaiian traditional and customary practices, while reasonably accommodating competing private interests.¹ Participation in zoning and land use processes, including LUC district boundary amendment decisions, are sometimes the only way that Native Hawaiians have been able to meaningfully participate in land use decision-making and enforce their rights. Accordingly, conditions of approval by the LUC in granting amendments often include mitigation measures that preserve and protect traditional and customary practices identified during the decision-making process. The effective enforcement of LUC conditions can therefore be critical to enforcing the rights of Native Hawaiians, and perpetuating the Hawaiian culture.

HB1169 will enhance the enforceability of LUC conditions of approval, and better protect the integrity of LUC's decisions. By providing the LUC with greater flexibility regarding when and how to respond to a petitioner's failure to comply with conditions of approval or the petitioner's representations to the LUC, this bill gives the LUC additional tools to more effectively ensure that important land use conditions are adhered to.

Finally, OHA notes that under this measure, if a petitioner needs more time to comply with conditions of approval, a petitioner may request extensions of time and other modifications of Decisions and Orders.² Such a provision is a more than reasonable accommodation of mitigating circumstances that may be behind a petitioner's noncompliance.

Accordingly, OHA urges the Committee to **PASS** HB1169. Mahalo for the opportunity to testify on this important measure.

¹ As discussed in *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Hawai'i 31 (2000).

² HAR 15-15-94.



LAND TESTIMONY

LAND USE RESEARCH
FOUNDATION OF HAWAII

1100 Alakea Street, Suite 408
Honolulu, Hawaii 96813
(808) 521-4717
www.lurf.org



February 12, 2015

Representative Ryan I. Yamane, Chair
Representative Ty J.K. Cullen, Vice Chair
House Committee on Water & Land

Strong Opposition to HB 1169 Relating to Land Use; Land Use Commission; Imposed Conditions on Land; Land Classification - Provides the land use commission with greater enforcement flexibility in situations where conditions, necessary to be met for a property's land reclassification, are unmet by the petitioner.

WAL Hearing: Friday, February 13, 2015, 10:00 a.m., in Conference Room 325

The Land Use Research Foundation of Hawaii (LURF) is 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.

HB 1169. Provides the Land Use Commission (LUC) with greater enforcement flexibility in situations where conditions, necessary to be met for a property's land reclassification, are unmet by the petitioner.

LURF appreciates the opportunity to offer comments and express its strong **opposition to HB 1169**, based on, amongst other things, the following:

- **HB 1169 is a "power play" to alter and subvert the existing land use enforcement process by giving broad and unbridled enforcement powers to the LUC. HB 1169 would damage the integrity of the existing land use enforcement process and would require additional LUC staff and funding for the LUC to perform the additional enforcement powers.**
- **The interests of the State, the public and the LUC are adequately protected by the existing two-tiered land use enforcement process that divides land use enforcement responsibilities between the State and the counties. The State is authorized to impose the "Death Penalty" by approving an order to show cause and revert the property back to its original land use classification. The counties are authorized to enforce all other LUC land use classifications, regulations and conditions. This land use enforcement process has been confirmed by State law, Attorney General Opinions and Hawaii Supreme Court cases.**

- **HB 1169 is inconsistent with the existing law relating to the two-tiered (State/County) system of land use approvals established by Hawaii Revised Statutes (“HRS”) Chapter 205, in particular, HRS § 205-12, which authorizes the counties to enforce land use classification districts, restrictions and conditions and take action against violators. This is confirmed by State law, Attorney General Opinions and Hawaii Supreme Court cases.**
- **HB 1169 is inconsistent with the intent of Chapter 205 and the powers given to the LUC. The LUC was never intended to be an investigative and enforcement sheriff, judge and jury for all matters of noncompliance with LUC conditions or petitioner representations. This is confirmed by State law, Attorney General Opinions and Hawaii Supreme Court cases.**
- **HB 1169 is inconsistent with the application of HRS Chapter 205 and its two-tiered government land use approval process (State/county); the state land use district boundary amendment process, the county responsibilities and processes relating to general plans, development/sustainable communities plans, zoning, subdivisions, and other permits; and well as staffing, technical expertise and funding for enforcement actions.**
- **HB 1169 is inconsistent with land use legal treatises (including “*Regulating Paradise – Land Use Controls in Hawaii*”, Second Edition by David L. Callies).**
- **HB 1169 ignores the reality of development projects, enforcement of conditions, the reasons for delays in compliance with conditions (including force majeure occurrences and permitting delays, etc.) and fails to recognize the very important fact that the counties have more staffing, funding, expertise and experience to address such matters.**
- **HB 1169 will likely have a negative impact on project financing.**

Background. The LUC was intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17. Therefore, pursuant to HRS Chapter 205, the LUC 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 boundary amendments based on applicable standards and criteria.

After the LUC approves a district boundary amendment for an urban land use (with certain conditions), it is the counties which control the specific uses, development and timing through detailed county ordinances, zoning, subdivision rules and other county permits.

- The counties review and approve/disapprove the zoning (with additional specific conditions); approve or disapprove subdivisions (with additional specific conditions); and approve or disapprove 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, it 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 arisen relating to the LUC’s imposition of detailed timing deadlines and other specific requirements and conditions, as well as the LUC’s continued attempts to monitor and enforce conditions, which involve detailed development issues, and requirements that the counties are rightfully responsible to establish and enforce under HRS Chapter 205 and county laws.

LURF’s Position. Given the statutory mandate that the counties be afforded the responsibility to enforce the specific uses, development relating to boundary amendments once approved by the LUC, LURF **opposes HB 1169**, based on the following:

- **HB 1169 is Inconsistent with HRS Chapter 205 and its Two-tiered (State/County) System of Land Use Approvals Established by.** This bill would allow the LUC the right to go back and amend existing conditions or legally challenge and impose additional conditions on a project that may have already been granted county zoning, county subdivision approval, county building permits, and on projects that may already be developed. After an LUC reclassification, and boundary amendment and reclassification, it is the counties’ responsibility to then enforce the LUC conditions. 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.*
(Emphasis added)

- **State law and Hawaii Supreme Court cases confirm that the LUC was never intended to be an enforcement sheriff, judge and jury for all matters of noncompliance with LUC conditions or petitioner representations.** Pursuant to HRS 205-2, the primary purpose and duties of the LUC are “to group contiguous land areas suitable for inclusion in one of the four major State land use districts” (urban, rural, agricultural, and conservation).

State law and the Hawaii Supreme Court cases have also confirmed that the LUC has the specific and limited authority to impose the “Death penalty” – to file and approve and order to show cause for non-compliance with a condition or representation and the reversion to prior land use classification, or a more appropriate classification, if the landowner has not substantially commenced the use of their land

- **HB 1169 is Inconsistent with the Intent and Application of HRS Chapter 205 and the Two-tiered (State/county) Government Land Use Approval Process.** HB 1169 is contrary to prudent land use planning principles and law, because it would allow the LUC to re-open any LUC decision and order relating to boundary amendment reclassifications, based on its own, arguably biased findings of noncompliance with LUC permit conditions or requirements.

As a result, HB 1169 may therefore generate legal proceedings and lawsuits that would paralyze projects and result in more unnecessary costs and time for the LUC, its staff and other state and county agencies. The LUC has a limited staff and professional and technical expertise (architects, engineers, attorneys) and lacks administrative rules to investigate and enforce all conditions and representations, while the counties have such professional and technical expertise, funding, and an established process to enforce non-compliance with LUC conditions.

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 (Conservation, Agriculture, Rural and Urban), 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 greater uncertainty in the land use process.

The position that the counties should enforce the LUC conditions is consistent with 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 also 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 recent Hawaii Supreme Court decision in the *Aina Lea* case.

- **HB 1169 is Inconsistent with Currently Existing Hawaii Administrative Rules (HAR) Section 15-15-93.** Section 15-15-93, HAR, already contains an order to show cause provision that provides an adequate means of addressing the failure to substantially conform to the conditions or requirements of a district boundary amendment. Pursuant to that provision, the LUC, following an evidentiary hearing on the matter, has the authority to decide whether the property should revert to the former land use classification, or to a more appropriate classification. Any modification or repeal of a permit or entitlement (e.g., downzoning) must therefore be based on a process or evidentiary hearing which is at the very least, equivalent to that contained in HAR 15-15-93, to prove and justify the removal or amendment of any permit right previously granted.

The LUC's unilateral finding of failure to meet any condition or requirement of approval is not sufficient to overcome the vested rights of a property owner who has substantially commenced or substantially completed a project and may even amount to an illegal taking of the petitioner's property.

- **HB 1169 is inconsistent with the position taken by the Hawaii Supreme Court in the recently decided *Aina Lea* case¹ and other Hawaii case law, which confirm the two-tiered division of authority between the LUC and the counties, and that the enforcement of the LUC's conditions and orders generally lies with the various counties.**

HB 1169 is inconsistent with the Supreme Court's *Aina Lea* decision, because it would usurp the counties' statutory role to enforce LUC conditions and cause confusing and overlapping authority between the LUC and the counties. In the *Aina Lea* case, the

¹ *DW Aina Lea Development, LLC v. Bridge Aina Lea, LLC*, 339 P.3d 685 (November 25, 2014)

Hawaii Supreme Court recognized the “**division of authority between the LUC and the counties**” and confirmed its position in its prior *Lanai Co.* decision, as follows:

“...the power to enforce the LUC’s conditions and orders generally lies with the various counties. The one exception to this general rule, of course, is the LUC’s express grant of authority to revert land if the petitioner has not substantially commenced use of the land in accordance with its representations.” (Emphasis added)

Thus, HB 1169 is also inconsistent with the *Aina Lea* decision because it deletes the important statutory protections under HRS Section 205, afforded to land owners who have substantially commenced the use of their land. The Hawaii Supreme Court in *Aina Lea* essentially ruled that if substantial commencement of use of the land for the proposed development has not begun, the LUC could revert the land to its former classification upon a finding of substantial non-compliance, however, if the landowner had substantially commenced use of the land for the development, the LUC must comply with and satisfy all of the statutes, rules and procedures (including HRS 205-4, 16, and 17) in order to change a property’s land use classification.

The amendment to HRS Section 205-4 now being proposed by HB 1169, however, directly contradicts the Hawaii Supreme Court’s decision in *Aina Lea*, as it would allow the LUC to change a property’s land use classification under the vaguest of criteria, based on its own biased findings, literally at any time, regardless of whether the development has substantially commenced, or even if it is nearly completed.

- **HB 1169 ignores the reality of development projects, county enforcement of conditions, the reasons for delays in compliance with conditions and the expertise and experience of the counties to address such matters.**
 - **Determinations as to whether there has been a failure to substantially conform to conditions or requirements of an amendment or permit should be made by county 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 there has been a failure to substantially conform to the conditions or requirements. Such determinations should not be made at a later date by the LUC, which lacks the technical and professional experience, staffing a funding to enforce all conditions and representations.
 - **Any determination as to whether there has been a failure to substantially conform must address the reality of development delays that are beyond the control of the landowner or developer.** It is common knowledge that many master-planned projects or areas that have developed (or are still being developed) over the span of many years result in very viable and sustainable projects which provide affordable housing for Hawaii’s residents (Mililani, Kakaako, the Second City of Kapolei, etc.). Development delays may nevertheless occur based on the following:
 - ✦ **Force Majeure (“greater force”).** These are actions that cannot be predicted or controlled, 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 is unable to commence development until a certain condition is met, and sometimes the satisfaction of that condition is dependent upon the action of a third party, including government agencies, over which the developer has no control.
- **HB 1169 may likely have a negative impact on project financing.** Lenders will not be agreeable to provide funding for major projects in Hawaii given the potential that boundary amendments may be modified or vacated at what will essentially be the LUC's unilateral discretion. Investors will likewise be hesitant to commit to financing projects for which entitlements may be amended or repealed due to what the LUC finds to be non-conformance of a condition or requirement.

Conclusion. It is a well-recognized fact that the LUC's role was always intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17, however, proponents of this bill attempt once again to transform the LUC's established function into a development manager, or enforcement agency with a broad and big stick. Requiring petitioners to "substantially conform with the conditions or requirements of the order granting the special permit," or risk amendment, modification or vacation of said permit (based, no less, upon the LUC's unilateral findings of the petitioner's failure to conform) would be unjust and unreasonable, and will no doubt result in unnecessary lawsuits and litigation, and otherwise negatively impact project financing and development, as well as the overall economy in Hawaii.

Based on the above, it is respectfully requested that **HB 1169 be held** by this Committee.

Thank you for the opportunity to present comments in opposition to this measure.