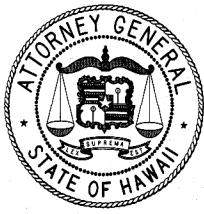


HB1581,
HD2



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

H.B. NO. 1581, H.D. 2, RELATING TO JUDICIAL PROCEEDINGS.

BEFORE THE:

SENATE COMMITTEES ON WATER, LAND, AND AGRICULTURE AND ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Monday, March 21, 2016

TIME: 9:30 a.m.

LOCATION: State Capitol, Room 224

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Linda L.W Chow, Deputy Attorney General

Chairs Gabbard and Baker and Members of the Committees:

The Department of the Attorney General has the following comments on this bill:

The primary purpose of this bill is to provide a direct appeal to the Hawaii Supreme Court from contested case hearings in certain instances. Specifically, the bill would affect appeals of contested cases arising under chapter 183C, Hawaii Revised Statutes (HRS), contested cases of the Land Use Commission under chapter 205, HRS, and contested cases from certain decisions of the Hawaii Community Development Authority (HCDA) under chapter 206E, HRS.

As described below, this bill may conflict with the current statutory provisions in chapter 602, HRS. We recommend an amendment to section 602-5, HRS, to remedy this problem.

A direct appeal to the Supreme Court, as set forth in this bill, is contrary to the provisions of section 602-5, HRS, relating to the jurisdiction and powers of the court. Section 602-5(a)(1), HRS, provides that the Supreme Court has jurisdiction and power to “hear and determine all questions of law, or of mixed law and fact, which are properly brought before it by application for a writ of certiorari to the intermediate appellate court or by transfer as provided in this chapter.” Appeals only go to the Supreme Court pursuant to a writ of certiorari or an application for transfer.¹ The Supreme Court is not authorized to hear a direct appeal under the current provision.

¹ The other circumstances in which the Supreme Court may hear a matter involve reserved questions of law from other courts, original jurisdiction under writs of mandamus, issuance of writ of habeas corpus, or to issue other writs or orders in aid of its jurisdiction.

We recommend that an amendment to section 602-5(a)(1), HRS, be included to allow for other ways in which the Supreme Court could hear appeals. Specifically, we suggest that a new section should be included that would preface the wording in section 602-5(a)(1), HRS, with the phrase, “Except as otherwise provided.”

We also have comments on specific sections of the bill, as follows:

1. Section 2 – This section would require all contested case decisions that arise under chapter 183C, HRS, to be appealed directly to the Supreme Court. We believe the scope of this section is too broad and could unnecessarily elevate minor cases to the level of creating precedent.

As currently drafted, this section would include within its purview contested cases arising out of conservation district violations involving encroachment of vegetation or walls on the shoreline, illegal structures within the conservation district, as well as conservation district use permits for individual residences or uses. The majority of these cases, although important to the landowners, would generally not be appealed to the Supreme Court. If these cases are decided by the Supreme Court, these cases would create precedent. This section, as drafted, would also decrease the State’s discretion to decide whether to appeal an adverse judgment at the circuit court level when the facts do not support a further appeal.

If sending all of these appeals to the Supreme Court is not the intent of the bill, then as an alternative, wording from section 3 of the bill could be inserted in section 1 to limit the types of cases that would come under section 1. Section 3 adds a new subsection (j) to section 91-14, HRS, that would require the court to give priority to contested case appeals of “significant statewide importance.” If the wording in section 1 is limited to those cases that arise under chapter 183C, HRS, that are of “significant statewide importance,” it would capture those cases that would normally be appealed to the Supreme Court. We note, however, that if the Supreme Court’s jurisdiction in these matters is limited to issues of significant statewide importance, that determination would require an exercise of discretion by the court.

2. Section 5 – New subsection (i) added to section 91-14, HRS, would allow the court to reserve jurisdiction over an appeal and to appoint a master or monitor to ensure compliance with the court’s orders. We believe this section is unnecessary as the court always has the authority to enforce its own orders.

3. Section 9 – This section amends section 206E-20, HRS, to distinguish this section from the amended provisions of section 206E-5.6, HRS. We do not believe section 6 is necessary and recommend that it be removed from the bill to avoid confusion. Section 206E-5.6, HRS, applies only to final decisions of the HCDA regarding the acceptance of a developer’s proposal to develop lands under the HCDA’s control. By contrast, section 206E-20, HRS, only applies to actions in which the authority, the State, or the county may be a party in which a question arises as to the validity of chapter 206E, HRS. There does not appear to be an overlap in subject matter such that an exception has to be noted in section 206E-20, HRS.

Thank you for the opportunity to testify.



The Judiciary, State of Hawai'i

**Testimony to the
Senate Committee on Water, Land and Agriculture**

Senator Mike Gabbard, Chair
Senator Clarence K. Nishihara, Vice Chair

and

Senate Committee on Commerce, Consumer Protection and Health

Senator Rosalyn H. Baker, Chair
Senator Michelle N. Kidani, Vice Chair

Monday, March 21, 2016, 9:30 a.m.
State Capitol, Conference Room 224

By

Rodney A. Maile
Administrative Director of the Courts

BILL TITLE: House Bill No. 1581, H.D. 1, Relating to Judicial Proceedings.

PURPOSE: Requires contested case hearings of the commission on Water Resource Management, Land Use Commission, Public Utilities Commission, Hawaii Community Development Authority, and those involving conservation districts, to be appealed directly to the Supreme Court.

JUDICIARY'S POSITION:

The Judiciary recognizes and appreciates that allowing direct appeals from agencies to the Hawai'i Supreme Court will expedite the appellate resolution of cases. Presently, there are direct appeals to the Intermediate Court of Appeals from the Public Utilities Commission, the Water Commission, and the Labor and Industrial Relations Appeals Board. These appeals are subject to review by the Supreme Court by an acceptance of transfer or application of writ of certiorari. With the House Draft 1 version of the present bill, appeals from the Public Utilities Commission and the Water Commission will bypass the Intermediate Court of Appeals and go directly to the Supreme Court. This is similar to a proposal the Judiciary submitted to the Legislature in 2010.



House Bill No. 1581, H.D. 1, Relating to Judiciary Proceedings
Senate Committee on Water, Land and Agriculture
Senate Committee on Commerce, Consumer Protection and Health
Monday, March 21, 2016
Page 2

In the Judiciary's initial testimony on this bill, the Judiciary offered suggested amendments to the section of the bill relating to required oral arguments and the section of the bill giving priority to cases raising constitutional issues. In discussing both sections of the bill, the Judiciary suggested providing the Supreme Court with discretion on these two matters. House Draft 1 incorporates the Judiciary's suggestions regarding both issues. The Judiciary continues to believe that giving the court discretion on these matters is consistent with the intent of the bill.

At this point in time, it is difficult to assess the number of appeals that will move directly to the Supreme Court under the present version of the bill and the impact the direct appeals will have on the court's caseload and ability to resolve matters in a timely fashion. Therefore, the Judiciary respectfully requests that the bill contain a sunset deadline of three years which will provide sufficient time to assess the impact the direct appeals will have on the caseload of the Supreme Court. If the legislature includes a sunset deadline in the bill, the Supreme Court can submit a report to the 2019 Legislature at which time the Legislature can determine future action.

Thank you for allowing the Judiciary to submit testimony on this bill.

BIA-HAWAII

BUILDING INDUSTRY ASSOCIATION

THE VOICE OF THE CONSTRUCTION INDUSTRY

2016 OFFICERS

PRESIDENT
CRAIG WASHOFSKY
SERVCO HOME & APPLIANCE
DISTRIBUTION

PRESIDENT-ELECT
EVAN FUJIMOTO
GRAHAM BUILDERS, INC.

VICE PRESIDENT
DEAN UCHIDA
SSFM INTERNATIONAL, INC.

TREASURER
MICHAEL WATANABE
JW, INC.

SECRETARY
PETER ELDRIDGE
RAYNOR OVERHEAD DOORS &
GATES, INC.

SPECIAL APPOINTEE-BUILDER
PAUL D. SILEN
HAWAIIAN DREDGING
CONSTRUCTION CO, INC

SPECIAL APPOINTEE-BUILDER
MARK KENNEDY
HASEKO CONSTRUCTION
MANAGEMENT GROUP, INC.

SPECIAL APPOINTEE-ASSOCIATE
GARY T. OKIMOTO
HONOLULU WOOD TREATING, LLC

IMMEDIATE PAST PRESIDENT
RICHARD HOBSON, JR.
GENTRY HOMES, LTD.

CHIEF EXECUTIVE OFFICER
GLADYS MARRONE
BIA-HAWAII

2016 DIRECTORS

ANTHONY BORGE
RMA SALES

BEAU NOBMANN
HPM BUILDING SUPPLY

DOUGLAS E. PEARSON
CASTLE & COOKE HOMES
HAWAII, INC.

CHRIS CHEUNG
CC ENGINEERING &
CONSTRUCTION, INC.

CLIFTON CRAWFORD
C&J CONTRACTING, INC.

CURT KIRIU
CK INDEPENDENT LIVING BUILDERS

DWIGHT MITSUNAGA
DM PACIFIC, INC.

JACKSON PARKER
D.R. HORTON, SCHULER DIVISION

JENNIFER ANDREWS
COLDWELL BANKER PACIFIC
PROPERTIES

MARK HERTEL
INTER-ISLAND SOLAR SUPPLY,
OAHU-MAUI-HAWAII-KAUAI

MARSHALL HICKOX
HOMEWORKS CONSTRUCTION, INC.

SARAH LOVE
BAYS LUNG ROSE & HOLMA

MAILING
P.O. BOX 970967
WAIPAHU, HAWAII
96797-0967

STREET
94-487 AKOKI STREET,
WAIPAHU, HAWAII 96797

P 808.847.4666
F 808.440.1198
E INFO@BIAHAWAII.ORG

WWW.BIAHAWAII.ORG

**Testimony to the Senate Committee on Water, Land, & Agriculture; and
Senate Committee on Commerce, Consumer Protection, & Health
Monday, March 21, 2016
9:30 a.m.
State Capitol - Conference Room 224**

RE: H.B. 1581 H.D. 2: Relating to Judicial Review.

Dear Chairs Gabbard & Baker, Vice-Chairs Nishihara & Kidani, and members of the Committees:

My name is Gladys Marrone, Chief Executive Officer for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii **supports the intent** of H.B 1581 H.D. 2, which proposes to require contested case hearings of the Land Use Commission, Hawaii Community Development Authority, Commission on Water Resource Management, Public Utilities Commission, and those involving conservation districts to be appealed directly to the Supreme Court.

The proposed bill would substantially reduce the time required to resolve disputes on agency actions requiring quasi-judicial, contested case hearings by removing the lower courts from the appeal process. Reducing the number of decisions and appeals on an already cumbersome land use entitlement process would improve the predictability and certainty, and also reduce the risk currently associated with Hawaii's land use entitlement process.

Thank you for the opportunity to express our views on this matter.

March 21, 2016

The Honorable Mike Gabbard, Chair

Senate Committee on Water, Land, and Agriculture

The Honorable Rosalyn H. Baker, Chair

Senate Committee on Commerce, Consumer Protection, and Health

State Capitol, Room 224

Honolulu, Hawaii 96813

RE: H.B. 1581, H.D.2, Relating to Judicial Proceedings

HEARING: Monday, March 21, 2016 at 9:30 a.m.

Aloha Chair Gabbard, Chair Baker, and Members of the Joint Committees:

I am Myoung Oh, Government Affairs Director, submitting written testimony on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its 8,900 members. HAR **supports the intent** of H.B. 1581, H.D.2 which requires contested case hearings of the Commission on Water Resource Management, Land Use Commission, Public Utilities Commission, Hawaii Community Development Authority, and those involving conservation districts to be appealed directly to the Supreme Court.

H.B. 1581, H.D.2 proposes to substantially reduce the time required to resolve disputes on agency actions requiring quasi-judicial, contested case hearings by removing the lower courts from the appeal process. Reducing the number of decisions and appeals on an already cumbersome land use entitlement process would improve predictability and certainty, thereby reducing the risk currently associated with Hawaii's land use entitlement process.

For instance, on Maui, two 201H projects held up by legal appeals to their approvals. Both, ironically are in the same district of Lahaina named for the stream that runs next to both properties: Kahoma. One project, Kahoma Residential Project, is a 70-unit, single family 100 percent affordable housing project proposed by West Maui Land Development Company and is associated with Habitat for Humanity and Na Hale O Maui.

Two parties intervened against the proposal, which one intervener appealed to 2nd Circuit Court, lost and then appealed to the Intermediate Court of Appeals – where the case remains, marooned. Because the rights of the intervener are magnified under this process, the costs to affordable housing developers greatly increase and projects are delayed indefinitely. As such, HAR believes this proposal may substantially reduce the time required to resolve such disputes.

Mahalo for the opportunity to submit written testimony.



P.O. Box 253, Kunia, Hawai'i 96759
Phone: (808) 848-2074; Fax: (808) 848-1921
e-mail info@hfbf.org; www.hfbf.org

March 21, 2016

HEARING BEFORE THE
SENATE COMMITTEE ON WATER, LAND, AND AGRICULTURE
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

TESTIMONY ON HB 1581 HD2
RELATING TO JUDICIAL PROCEEDINGS

Room 24
9:30 AM

Aloha Chair Gabbard, Chair Baker, Vice Chair Nishihara, Vice Chair Kidani, and Members of the Committees:

I am Randy Cabral, President of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,900 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

The Hawaii Farm Bureau supports HB 1581, HD2, which requires contested case hearings of the land use commission, Hawaii community development authority, and those involving conservation districts to be appealed directly to the supreme court.

HB 1581, HD2 aims to streamline the judicial process relating to certain contested cases in order to expedite the resolution of these conflicts. It provides for direct Supreme Court review, and it gives priority to those contested case appeals that are of significant statewide importance, or in which constitutional issues are raised.

Thank you for the opportunity to provide testimony.



**Testimony to the Senate Committee on Water, Land, & Agriculture and
Committee on Commerce, Consumer Protection, & Health
Monday, March 21, 2016 at 9:30 A.M.
Conference Room 224, State Capitol**

RE: HOUSE BILL 1581 HD 2 RELATING TO JUDICIAL PROCEEDINGS

Chairs Gabbard and Baker, Vice Chairs Nishihara and Kidani, and Members of the Committees:

The Chamber of Commerce Hawaii ("The Chamber") **supports** HB 1581 HD 2, which requires contested case hearings of the commission on water resource management, land use commission, public utilities commission, Hawaii community development authority, and those involving conservation districts to be appealed directly to the supreme court.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,000 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 members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The proposed bill would substantially reduce the time required to resolve disputes on agency actions requiring quasi-judicial, contested case hearings by removing the lower courts from the appeal process. Reducing the number of decisions and appeals on an already cumbersome land use entitlement process would improve the predictability and certainty, and also reduce the risk currently associated with Hawaii's land use entitlement process.

Thank you for the opportunity to testify.

**BELLES GRAHAM PROUDFOOT
WILSON & CHUN, LLP
ATTORNEYS AT LAW**

MICHAEL J. BELLES
MAX W.J. GRAHAM, JR.
DONALD H. WILSON
JONATHAN J. CHUN

Federal I.D. No. 99-0317663

WATUMULL PLAZA
4334 RICE STREET, SUITE 202
LIHUE, KAUAI, HAWAII 96766-1388

TELEPHONE NO: (808) 245-4705
FACSIMILE NO: (808) 245-3277
E-MAIL: mail@kauai-law.com

OF COUNSEL
DAVID W. PROUDFOOT

COUNSEL
LORNA A. NISHIMITSU

ASSOCIATE:
IAN K. JUNG

March 18, 2016

The Honorable Mike Gabbard, Chair
The Honorable Clarence K. Nishihara, Vice Chair
Senate Committee on Water, Land, and Agriculture

VIA EMAIL ONLY

The Honorable Rosalyn H. Baker, Chair
The Honorable Michelle N. Kidani, Vice Chair
Senate Committee on Commerce, Consumer Protection, and Health

VIA EMAIL ONLY

Re: **HB 1581 HD2 – Relating to Judicial Proceedings – In Support
Monday, March 21, 2016 – 9:30 AM, Room 224**

Dear Chair Gabbard, Vice Chair Nishihara, Chair Baker, Vice Chair Kidani and Members of the Committees:

I am writing to you in support of the provisions of H.B. No. 1581 H.D. 2 which provide for the direct appeal of decisions rendered in contested case hearings of the Land Use Commission, the Commission on Water Resource Management, the Public Utilities Commission, the Hawaii Community Development Authority, or those involving Conservation Districts to be appealed directly to the appellate courts (Intermediate Court of Appeals/Supreme Court). Such a process will benefit all parties in such cases by providing an expedited review and decision in what are generally important cases involving constitutional and environmental matters.

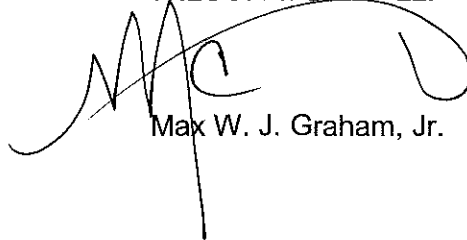
I also recommend that such direct appeals follow the procedure currently contained in the Hawaii Rules of Appellate Procedure ("HRAP"), whereby appeals (unless transferred to the Supreme Court under HRAP Rule 40.2) are first considered by the Intermediate Court of Appeals, with subsequent consideration by the Supreme Court, in its decision, in cases where certiorari is granted pursuant to HRAP Rule 40.1. Such a process will allow for an expedited review while preserving the orderly handling of appeals at the appellate court level.

The Honorable Mike Gabbard, Chair
The Honorable Clarence K. Nishihara, Vice Chair
Senate Committee on Water, Land, and Agriculture
The Honorable Rosalyn H. Baker, Chair
The Honorable Michelle N. Kidani, Vice Chair
Senate Committee on Commerce, Consumer Protection, and Health
March 18, 2016
Page 2

Thank you for the opportunity to provide testimony in support of this Bill.

Sincerely yours,

BELLES GRAHAM PROUDFOOT
WILSON & CHUN LLP

A handwritten signature in black ink, appearing to be 'MJC', written over the printed name 'Max W. J. Graham, Jr.'.

Max W. J. Graham, Jr.

MWJG:jgm

March 17, 2016

The Honorable Rosalyn H. Baker, Chair
The Honorable Michelle N. Kidani, Vice Chair
Committee on Commerce, Consumer Protection and Health

RE: HB 1581, HD2 – Relating to Judicial Proceedings – In Support
Monday, March 21, 2016 – 9:30 a.m., Room 224

Aloha Chair Baker, Vice Chair Kidani and members of the Committee,

My name is Lisa Hirahara, and I am writing in strong support of HB 1581, HD 1. I am a licensed attorney in Hawaii, and I have practiced administrative law for over ten years. I am testifying in my individual capacity.

Allowing a direct appeal from a contested case to the Hawaii Supreme Court would be efficient and in the best interest of applicants and opposing parties alike. Currently, after a contested case results in a decision, any appeal must be filed in the Circuit Court. After the Circuit Court, a further appeal must be taken in the Intermediate Court of Appeal, with the ability to apply for a transfer to the Hawaii Supreme Court. If the transfer is denied, an appeal may still reach the Hawaii Supreme Court by application for a writ of certiorari. By time certainty is achieved about whether a project may move forward, a permit application could have gone through a contested case hearing and no less than three levels of court. Worthy projects and justified oppositions could decide to stop pursuing the matter at any point in the appeal process due to lack of resources.

The ability to directly appeal a contested case decision to the Hawaii Supreme Court would be extremely efficient, saving time and money for all parties, and would provide finality regarding the subject application at an earlier date than if appeals must be taken at the various court levels. In addition, the Hawaii Supreme Court often overrules the decisions of the lower courts. It serves only to delay and add costs to the appeal process if parties must wait until the Hawaii Supreme Court eventually rules on the matter. Proceeding directly to the Hawaii Supreme Court would benefit everyone. The passage of this bill would be a positive step in streamlining the land use permitting process, which is often blamed, in part, for Hawaii's excessive housing costs.

Thank you for the opportunity to provide testimony in support of this bill.

Very truly yours,



Lisa S. Hirahara
Honolulu, Hawaii