



SB511 SD1
RELATING TO LAND USE
Senate Committee on Ways and Means

February 26, 2015

9:00 a.m.

Room 211

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB511 SD1, 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_s its obligations to Native Hawaiians. Pursuant to Hawai‘i’s Constitution, various statutes, and judicial decisions, the State ~~and its agencies, including the LUC,~~ has an affirmative duty to preserve and protect Native Hawaiian traditional and customary practices, while reasonably accommodating competing private interests.¹ ~~This duty is often fulfilled in part through Native Hawaiians’ Participation participation~~ in zoning and land use processes, including LUC district boundary amendment decisions, ~~whereby traditional and customary practices in the subject lands are identified and described are sometimes the only way that Native Hawaiians have been able to meaningfully participate in land use decision making and enforce their rights.~~ Accordingly, ~~C~~conditions of approval by the LUC in granting amendments often include mitigation measures that preserve and protect such 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.

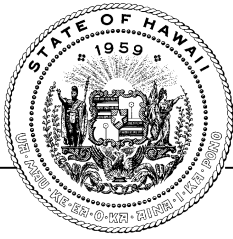
SB511 SD1 will enhance the enforceability of LUC conditions of approval, and better protect the integrity of LUC’s decisions. By providing the LUC with greater flexibility regarding when and how to respond to a petitioner’s failure to comply with conditions of approval or carry out the petitioner’s representations 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 LUC Decisions and Orders.² Such a provision is a more than reasonable accommodation of mitigating circumstances ~~that may be that may associated with be behind a~~ petitioner’s noncompliance.

Accordingly, OHA urges the Committee to **PASS** SB511 SD1. Mahalo for the opportunity to testify on this important measure.

¹ ~~See, e.g., As discussed in~~ *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission*, 94 Hawai‘i 31 (2000).

² HAR 15-15-94.



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DAVID Y. IGE
GOVERNOR

LEO R. ASUNCION
ACTING DIRECTOR
OFFICE OF PLANNING

Statement of
LEO R. ASUNCION
Acting Director, Office of Planning
before the
SENATE COMMITTEE ON WAYS AND MEANS
Thursday, February 26, 2015
9:00 AM
State Capitol, Conference Room 211

in consideration of
SB 511, SD1
RELATING TO THE LAND USE COMMISSION.

Chair Tokuda, Vice Chair Kouchi, and Members of the Senate Committee on Ways and Means.

The Office of Planning (OP) supports the intent of SB 511, SD1 which would provide the Land Use Commission (LUC) with additional tools for enforcing the conditions or requirements of a land use district boundary amendment or a special permit by allowing the LUC to amend, modify, or vacate conditions of these entitlements granted pursuant to Hawaii Revised Statutes (HRS) Chapter 205 and would allow the LUC to do so without repeating the district boundary amendment procedures or repeating a hearing by a county planning commission.

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 (HAR) § 15-15-93. The approved boundary amendment decision and order or special permit 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.

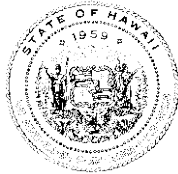
Thank you for the opportunity to testify on this matter.

DAVID Y. IGE
Governor

SHAN S. TSUTSUI
Lieutenant Governor

LUIS P. SALAVERIA
Director

MARY ALICE EVANS
Acting Deputy Director



LAND USE COMMISSION
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Statement of
Daniel E. Orodener
Executive Officer
Land Use Commission

Before the
Senate Committee on Ways and Means
February 26, 2015
9:00 AM
State Capitol, Conference Room 211

In consideration of
SB 511 SD1
RELATING TO THE LAND USE COMMISSION

Chair Tokuda, Vice Chair Kouchi, and members of the Committee on Ways and Means:

The Land Use Commission supports SB 511 SD1 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 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 the taxpayer 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. Given recent changes to Chapter 205 HRS that allow commercial solar activity on agricultural land under specific conditions, the ability to enforce provisions is critical to protecting the long term viability of agricultural land.

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. In addition, the county process does not allow interested parties to contest its failure to enforce a condition. The LUC 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 appreciate and support the amended language in the current SD1 that addresses some of the issues stemming from the recent Supreme Court decision in the DW/Bridge `Āina Le`a case.

Thank you for the opportunity to testify on this matter.

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Testimony to the Senate Committee on Ways and Means
Thursday, February 26, 2015
9:00 a.m.
State Capitol - Conference Room 211

RE: SENATE BILL NO. 511 S.D. 1 RELATING TO THE LAND USE
COMMISSION

Chair Tokuda, Vice-Chair Kouchi, and members of the Committee:

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.

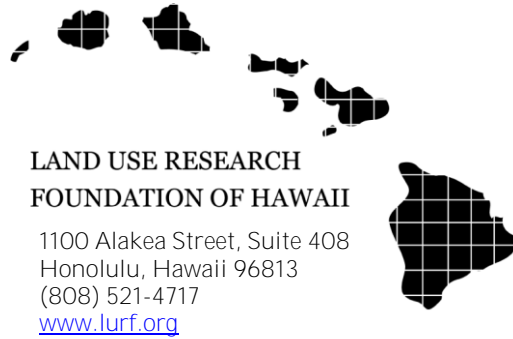
BIA-Hawaii respectfully expresses our **strong opposition** to S.B. 511 H.D. 1, which would provide the State Land Use Commission (LUC) with the authority to amend, modify, or vacate conditions of a boundary amendment and special permit conditions granted pursuant to chapter 205, Hawaii Revised Statutes.

The role of the LUC is to administer the State Land Use Law by ensuring that areas of state concern are addressed in the land use decision-making process. This includes establishing land use district boundaries for the entire State. Chapter 205 states that in establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county. This bill stands in direct contradiction to these requirements.

Authorizing the LUC to amend, modify, or vacate a boundary amendment through unilateral discretion does not meet the intent of Chapter 205, ignores the reality of the entitlement process that follows at the county level, as well as ignores market conditions and the complicated financing negotiations entailed in a project. The land use entitlement process in Hawaii is a costly and lengthy process which is a major reason why the median cost of a single family residence on Oahu hovers around \$700,000.00.

This bill only serves to create more economic uncertainty, which ultimately increases the costs of construction and housing in Hawaii. Development delays can, and do, occur due to factors beyond a land owner's/developer's control. Further, this bill promotes the troubling view that government is not responsible for providing infrastructure for public benefit in areas of planned growth.

For the aforementioned reasons, BIA-Hawaii **strongly opposes** S.B. 511 S.D. 1. We appreciate the opportunity to share our views.



February 24, 2015

Senator Jill N. Tokuda, Chair
Senator Ronald D. Kouchi, Vice Chair
Senate Committee on Ways and Means

Strong Opposition to SB 511, SD1 Relating to the Land Use Commission -
Provides the State Land Use Commission (LUC) with the power to amend, modify, or vacate conditions of a boundary amendment and special permit conditions granted pursuant to Hawaii Revised Statutes (HRS) Chapter 205.

Thursday, February 26, 2015, 9:00 a.m., in CR 211

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.**

LURF appreciates the opportunity to express its **strong opposition to SB 511, SD1**, and to offer comments.

SB 511, SD1. This bill proposes to provide the LUC with the authority to amend, modify, or vacate conditions of a boundary amendment and special permit conditions granted pursuant to HRS Chapter 205.

LURF strongly opposes SB 511, SD1, based on the following:

- **SB 511, SD1 is not consistent with the current 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 provides that the counties shall enforce the land use classification districts adopted by the LUC and the restrictions on use and conditions relating to agricultural districts under HRS §205-4.5.

- **SB 511, SD1 is not consistent with the intent and application of HRS Chapter 205 and its two-tiered (State/County) government land use approval process; the state land use district boundary amendment process; the county processes relating to general plans, development/sustainable communities plans, zoning, subdivision, and other permits; and is inconsistent with Hawaii case law; land use legal treatises (including “*Regulating Paradise – Land Use Controls in Hawaii*”, Second Edition by David L. Callies); and the position taken by the Hawaii Supreme Court in the recently decided *Aina Lea* case.¹**
- **SB 511, SD1 ignores the reality of development projects and 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 presently possess staffing, funding, expertise and experience to address such matters.**

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’ responsibility** to 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 associated delays.

LURF understands that in some cases, the City and County of Honolulu (City) and some of the other counties have not imposed strict “deadline” dates in their zoning approvals,

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

and instead 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 which 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 control and enforce the specific uses and development relating to boundary amendments once approved by the LUC, together with the fact that the counties are in fact the recognized enforcement agency for LUC district boundary amendments and conditions relating thereto, LURF **strongly opposes SB 511, SD1**, as explained in more detail below:

- 1. SB 511, SD1 is Inconsistent with the Two-tiered (State/County) System of Land Use Approvals Established by HRS Chapter 205.** This bill would allow the LUC, based solely on its own findings of failure to substantially conform with **conditions or requirements of the Commission's order**, the right to go back and unilaterally amend existing conditions or legally challenge and impose additional conditions on a project that may have subsequently been granted county zoning, county subdivision approval, county building permits, and on projects which may even be already developed.

After an LUC reclassification, and boundary amendment and reclassification, it is the **counties'** responsibility to thereafter 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.*

The counties are, in fact, the recognized enforcement agency for LUC district boundary amendments and requirements/conditions relating thereto. The counties possess the experience, expertise, capability and staffing to not only enforce the LUC conditions, but already do so for all county zoning permits, rules and regulations. The LUC lacks the necessary experience, expertise, capability and staffing to equitably enforce conditions on a statewide basis. LURF understands that the LUC staff is composed of only five staff members. Any effort to enhance the LUC to take

on and perform the proposed enforcement role would be duplicative and a waste of limited government resources.

2. SB 511, SD1 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 which 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.**

In short, the process required to change a land use classification of property should be the same for any party, including the LUC. Any petitioner desirous of changing a **property's land use designation should be required to demonstrate why the property** should be more appropriately designated in another land use district classification. **This process should consider the petition's conformance with the LUC's decision-making criteria and its consistency with state land use district standards.**

The LUC's unilateral finding of failure to meet any condition or requirement of approval is not sufficient to justify a change of designation and may even amount to an illegal taking of the petitioner's property.

3. SB 511, SD1 is Inconsistent with the Intent and Application of HRS Chapter 205 and the Two-tiered (State/County) Government Land Use Approval Process.

Contrary to prudent land use planning principles and law, SB 511, SD1 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 permit conditions or requirements. As a result, SB 511, SD1 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 agencies.

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 greater uncertainty in the land use process.

This position conforms 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.

4. **SB 511, SD1 Directly Contradicts the Hawaii Supreme Court’s Decision in the *Aina Lea* Case.** 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, 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 SB 511, SD1, 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.

5. **SB 511, SD1 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.**

- a. **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 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 would be in the best position to determine whether “there has been a failure to substantially conform with the conditions or requirements of the order granting the special permit.” Such determinations should not be made at a later date by the LUC, or by a court as a result of a lawsuit.

- b. **Any determination as to whether there has been a failure to substantially conform must address 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 being developed) over the span of many years result in very viable and sustainable projects which provide affordable housing and jobs for **Hawaii’s residents** (Mililani, Kakaako, the Second City of Kapolei, etc.). Development delays may nevertheless occur based on the following:

- 1) **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.
- 2) **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.
- 3) **SB 511, SD1 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 enforcer with a 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, and without the Commission being obligated to follow its own boundary amendment procedures or requiring a county planning commission action in doing so) would be unjust and unreasonable; will undoubtedly 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 **SB 511, SD1 be held** by this Committee.

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

SB511

Submitted on: 2/24/2015

Testimony for WAM on Feb 26, 2015 09:00AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Javier Mendez-Alvarez	Individual	Oppose	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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