

SB

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From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: sderrick@dbedt.hawaii.gov
Subject: Submitted testimony for SB511 on Feb 2, 2015 14:45PM
Date: Friday, January 30, 2015 11:01:31 AM
Attachments: [SB511_BED-LUC_02-02-15_WTL_AGL.pdf](#)

SB511

Submitted on: 1/30/2015

Testimony for WTL/AGL on Feb 2, 2015 14:45PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
Scott Derrickson	State Land Use Commission	Support	Yes

Comments: Executive Officer, Dan Orodenker will be present for testimony.

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Acting Deputy Director



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

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Statement of
Daniel E. Orodenker
Executive Officer
Land Use Commission
Before the
Senate Committee on Water & Land
Senate Committee on Agriculture
February 2, 2015
2:45 PM
State Capitol, Conference Room 224

In consideration of
SB 511
RELATING TO THE LAND USE COMMISSION

Chairs Thielen and Ruderman, Vice Chairs Galuteria and Riviere, and members of the Committee on Water and Land and the Committee on Agriculture:

The Land Use Commission supports SB 511 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 would suggest however, that in light of the recent Supreme Court decision in the DW/Bridge AinaLea case the language in the new subsection (i) should be modified to provide that the LUC can, without going through the district boundary amendment procedures of subsections (a) through (h), vacate, void, modify or amend a district boundary amendment if it finds there has been a failure to substantially conform with conditions. Also with respect to the new subsection 205-6(g), it should be made clear that the LUC can take action to enforce the conditions of a special permit without the counties holding a hearing first.

Thank you for the opportunity to testify on this matter.

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: thee@dbedt.hawaii.gov
Subject: Submitted testimony for SB511 on Feb 2, 2015 14:45PM
Date: Friday, January 30, 2015 9:57:28 AM
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SB511

Submitted on: 1/30/2015

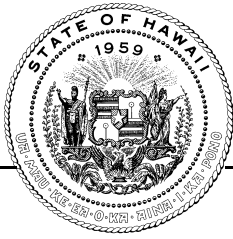
Testimony for WTL/AGL on Feb 2, 2015 14:45PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
Teri Hee	Office of Planning	Support	Yes

Comments: Please see attached Testimony file.

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Statement of
LEO R. ASUNCION
Acting Director, Office of Planning
before the
**SENATE COMMITTEE ON WATER AND LAND
AND
SENATE COMMITTEE ON AGRICULTURE**
Monday, February 2, 2015
2:45 PM
State Capitol, Conference Room 224

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

Chairs Thielen and Ruderman, Vice Chairs Galuteria and Riviere, and Members of the Senate Committees on Water and Land and Agriculture.

The Office of Planning (OP) supports the intent of Senate Bill 511. This bill would give the Land Use Commission (LUC) 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.

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 a 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.

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: legechair@gmail.com
Subject: Submitted testimony for SB511 on Feb 2, 2015 14:45PM
Date: Sunday, February 01, 2015 8:26:22 PM

SB511

Submitted on: 2/1/2015

Testimony for WTL/AGL on Feb 2, 2015 14:45PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
Simon Russell	Hawaii Farmers Union United	Support	No

Comments: Mahalo to the authors of this bill, it will go a long way towards preventing non agricultural uses of our agricultural lands. Aloha, Simon Russell HFUU Vice President and Legislative Committee Chair (808) 269 8162

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January 30, 2015

Senator Laura H. Thielen, Chair
Senator Brickwood Galuteria, Vice Chair
Senate Committee on Water and Land

Senator Russell E. Ruderman, Chair
Senator Gil Riviere, Vice Chair
Senate Committee on Agriculture

Strong Opposition to SB 511 Relating to the Land Use Commission - Provides the 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.

WTL/AGL Hearing: Monday, February 2, 2015, 2:45 p.m., in CR 224

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**, and to offer comments.

SB 511. 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's Position. LURF strongly opposes SB 511, based on, amongst other things, the following:

- **SB 511 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 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)

- **SB 511 is not consistent with the intent and 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 processes relating to general plans, development/sustainable communities plans, zoning, subdivisions, 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 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.**

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 which the **counties** are rightfully responsible to establish and enforce under HRS Chapter 205 and county laws.

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

LURF's Position. Given the statutory mandate that the counties be afforded the responsibility to control and enforce the specific uses, development relating to boundary amendments once approved by the LUC, LURF **opposes SB 511**, based on the following:

- **SB 511 is Inconsistent with the Two-tiered (State/County) System of Land Use Approvals Established by HRS Chapter 205.** 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 which 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)
- **SB 511 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. The LUC's unilateral finding of failure to meet any condition or requirement of approval is not sufficient and may even amount to an illegal taking of the petitioner's property.
- **SB 511 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 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 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.

- **SB 511 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, 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.

- **SB 511 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.**
LURF’s opposition to SB 511 is also based on the following:
 - **Determinations as to whether there has been a failure to “substantially conform” with 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 and 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.
 - **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:
 - ✚ **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.

- **SB 511 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) 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 **SB 511 be held** by these Committees.

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

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: darakawa@lurf.org
Subject: Submitted testimony for SB511 on Feb 2, 2015 14:45PM
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SB511

Submitted on: 1/30/2015

Testimony for WTL/AGL on Feb 2, 2015 14:45PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
David Z. Arakawa	Land Use Research Foundation of Hawaii	Oppose	No

Comments:

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