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LATE

February 5. 2017

Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair
Senate Committee on Water and Land

Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Chair
Senate Committee on Judiciary and Labor

Opposition to SB 629 Relating to the Land Use Commission. (Provides the Land Use Commission [LUC] with the power to amend, revise, or modify a decision and order granting a district boundary amendment, or fine a petitioner, when there has been a finding by the Land Use Commission that a petitioner or its successors or assigns have not adhered to the conditions imposed by the commission.)

Monday, February 6, 2017, 2:45 p.m., Conf. Rm. 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 **strongly opposes SB 629**, which proposes to broadly and unfairly expand the enforcement powers of the LURF, in violation of existing statutory and Hawaii Supreme Court case law, without any factual basis or justification. This measure, which is purportedly well-meaning, violates existing State law, violates Supreme Court case law, violates the LUC's own rules; unfairly *"changes the rules in the middle of the game"* and violates the *vested rights* of land owners who have *"substantially commenced"* the use of their lands.

LURF respectfully urges your Committees to **DEFER and HOLD** this measure in your Committees. At the very least, it is necessary and prudent that the Legislature require a study or report which would validate the alleged need for SB 629.

LURF **opposes SB 629**, based on, among other things, the following:

1. **No justification for this bill and no factual evidence of any compelling need for the LUC to increase its enforcement powers.**

2. **Not consistent with the state laws which created the existing two-tiered (State/County) land use system and county enforcement process for the state land use district and LUC conditions. Directly conflicts with section 205-12, Hawaii Revised Statutes (HRS) and the Hawaii Supreme Court decision in the *Aina Lea* case;[1] which both specifically state that the counties are responsible for enforcing the LUC conditions.**

3. **Ignores the LUC's lack of land use enforcement expertise and experience and fails to defer to the counties' superior expertise and daily experience in application and enforcement of land use laws and LUC conditions.**

4. **Attempts to circumvent the *Aina Lea* decision, a prior, significant Hawaii Supreme Court land use case, and legal treatises regarding land use (including *"Regulating Paradise – Land Use Controls in Hawaii,"* Second Edition by David L. Callies).**

5. **Unsuitably and inappropriately affords the LUC new enforcement powers that lawmakers never intended or envisioned the LUC to wield, by transforming the LUC from a what was intended to be a limited planning agency into an enforcement and fining agency (imposing fines of up to $50,000 a day).**

6. **Unnecessary – the LUC currently has the ultimate *"death penalty"* enforcement power to revert the property to its former land use classification, or change it to a more appropriate classification.**

7. **Directly contradicts the Hawaii Supreme Court's findings and significance of the term *"substantial commencement"* in the Bridge Aina Lea case.**

8. **Proponents failed to consult, or seek any input from the parties which would be most affected by this legislation – the counties and the landowners which have obtained LUC approvals.**

9. **All four county planning departments opposed a similar bill in 2016.**

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

10. LUC petitioners, landowners, housing developers, the building industry and Chamber of Commerce have <u>opposed</u> a similar proposed legislation in 2016.

11. This bill 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 also opposes this bill based on the following ***<u>unintended negative consequences</u>*** of this bill, including, without limitation:

1. <u>Confusion and conflicting enforcement by the counties and LUC</u>. Under the current law, the counties are responsible for enforcing LUC conditions, and the counties' long-time interpretations of and precedents relating to certain conditions could differ from a new LUC interpretation and/or enforcement.

2. Based on the fact that the LUC has lost a majority of its Hawaii Supreme Court appeals (on issues it has experience in); it is likely that the <u>LUC will lose future Supreme Court appeals relating to new enforcement powers</u>, because it lacks the staff, expertise and experience in enforcement and imposing fines.,

3. The LUC will be required to <u>increase its budget for additional staff, specialized enforcement training, and new processes</u> to determine appropriate fines and collect up to $50,000 a day in fines.

4. <u>Unlimited LUC contested case hearings and appeals to the Supreme Court</u>. Based on unlimited motions for order to show cause by any party or interested persons, this bill will result in further unnecessary and unwarranted opportunities for contentious harassment and litigation against landowners and developers with LUC approvals (petitioners);

5. <u>Delays in housing</u>. By allowing opponents to development projects the opportunity for unlimited LUC contested case hearings and appeals on the same project, this measure will add greater delays, uncertainty and hindrances to the entitlement and post entitlement process for affordable housing, market housing and other development projects; and

6. <u>Impediment to financing of housing and other developments</u>. The uncertainty and delays caused by this bill will impede and negatively impact financing and construction of affordable housing, housing for all income levels and other projects which could support Hawaii's economy.

SB 629. This measure would illogically and unreasonably give the LURF new, expanded enforcement powers, as follows:

- Allows *any party or any interested person* to file *unlimited* order to show cause motions to initiate quasi-judicial hearings;
- Allows such motions regardless of whether or not there has been "substantial commencement of use of the land" (this means that projects with opponents could be subject to continuous
- changes the definition of "substantial commencement" means completion of all public improvements and infrastructure required by conditions imposed pursuant to this chapter, both within and outside the project area and completed construction of twenty per cent of the physical private improvements such that they are usable or habitable." (
- to exercise new powers to *modify existing conditions*, or impose new conditions and *change the terms of development conditions* pursuant to vague standards;
- new powers to impose administrative fines of up to $50,000 per day plus the costs of enforcement including, but not limited to associated hearing expenses, until such time as the party bound by the condition provides evidence to the commission showing that the violation has been cured and is not likely to be repeated; and the maximum fine for a person convicted of murder in the first degree, murder in the second degree, or a Class A Felony (the most heinous sex offenders and biggest drug dealers), is a one-time fine of $50,000. Without specific justification or facts, it is hard to understand why the LUC would need to impose daily fines that are more punitive than for murderers and the most heinous sex offenders and biggest drug dealers.

Background. The LUC was intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17; and 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 LUC standards and criteria.

Pursuant to HRS 205-12, after the LUC approves a district boundary amendment, it is the counties' responsibility to control and enforce LUC conditions, as well as the specific state land uses in the urban, rural and agricultural districts, LUC conditions, development and timing through detailed county ordinances, zoning, subdivision rules and other county permits.

The counties review, approve and impose specific conditions for zoning; subdivisions; and other development permits, to address land use planning, 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 "enforced and assisted the development of LUC petition areas by not "punishing" landowners based on strict deadline dates in their LUC or zoning approvals, 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 and specific timing deadlines and other specific requirements and conditions which are the responsibility of other State of Federal agencies, 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 (LUC), Chapter 46 (county government), HRS 46-4 (county zoning) and other county laws, rules and regulations. The counties work with the developers through all the stages of development; the counties understand the process and have the knowledge and tools to provide assistance and county services to bring projects to successful completion.

LURF's Position. LURF **opposes SB 629**, based on 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 have the expertise, experience, staff and funding to enforce LUC district boundary amendments and conditions relating thereto, as explained in more detail below:

1. **There is no justification for this bill and no factual evidence of any compelling need for the LUC to increase its enforcement powers.** Based on discussions with the county Planning Directors, the Land Use Commission (LUC) and the Office of Planning, LURF understands that the LUC has not transmitted any enforcement complaints to the counties, and the counties are unaware of any current LUC violations or complaints that would justify this measure.

2. **The Counties are statutorily responsible for the enforcement of LUC conditions; impose zoning conditions which incorporate the LUC conditions; and the Counties possess the experience, expertise, capability and staffing to enforce the LUC conditions.** 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 substantially 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.

By statute, and as confirmed in the *Aina Lea* case, 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.

On the other hand, 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.

3. **This Bill is Unnecessary, Because the LUC Already has the Authority to Impose the Most Severe Penalty – Reversion of the Property to its Former Classification.** 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. If the LUC is desirous of changing a property's land use designation, it 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 representation or condition of LUC 's approval (as provided in this bill) is not sufficient to justify a change of designation and may even amount to an illegal taking of the petitioner's property.

4. **This Bill is Not Consistent with the Intent and Application of HRS Chapter 205 and the Two-tiered (State/County) Government Land Use Enforcement Process.** Contrary to prudent land use planning principles and law, this bill 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, this bill 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.

5. **SB 629 Directly Contradicts the definition and significance of *"Substantial Commencement"* in 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.

In Aina Lea, the Hawaii Supreme Court determined that some vertical construction of units (none completed) and the construction of a portion of the infrastructure for the project satisfied the *"substantial commencement"* requirement. In the *Save Sandy Beach* case, a Circuit Court Judge (now Supreme Court Justice), concluded that over $100,000 in consultant fees was sufficient to satisfy *"substantial commencement."*

The amendment to HRS Section 205-4 now being proposed by this measure, 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 and many times, regardless of whether the development has substantially commenced, or even if portions of the project are already completed.

6. This Measure 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 representations made, 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. Determination of 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) **This bill will likely have a negative impact on project financing.** Lenders will not provide funding for major projects in Hawaii given the potential that boundary amendments may be modified or based on unlimited motions for *orders to show cause* by opponents to the projects and 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 representation or condition.

6. **Proponents failed to consult, or seek input from the most affected parties, prior to introducing this bill.** Despite the major negative consequences of this bill, proponents of this bill failed to seek any input whatsoever from the parties which would be most affected by this legislation – the counties and the landowners which have obtained LUC approvals.

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 SB 629 are attempting a "power grab" to transform the LUC's established *planning function* into an *enforcer with a big stick*. Requiring petitioners to "substantially conform" with the conditions or requirements of the order granting a land use designation or 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 unintended negative consequences, including unnecessary lawsuits and litigation; and otherwise negatively impact project financing and development, much-needed affordable housing, as well as the overall economy in Hawaii.

Based on the above, it is respectfully requested that SB 629, **be held** by your Committees.

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