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**PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

TO THE HOUSE COMMITTEES ON
ECONOMIC DEVELOPMENT AND BUSINESS
AND
WATER AND LAND

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Friday, March 16, 2018
11:00 a.m.

**TESTIMONY ON SENATE BILL NO. 1177, S.D. 1, RELATING TO COMMON INTEREST
AGRICULTURAL COMMUNITIES.**

TO THE HONORABLE CINDY EVANS, CHAIR, THE HONORABLE RYAN I. YAMANE, CHAIR,
AND MEMBERS OF THE COMMITTEES:

My name is Neil Fujitani, Supervising Executive Officer for the Professional and Vocational Licensing Division's Real Estate Branch, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department appreciates the opportunity to present testimony expressing its concerns regarding S.B. 1177, S.D. 1, Relating to Common Interest Agricultural Communities. While the Department supports efforts to further agricultural activities in the State, it has strong concerns with those portions of the measure that designate the Department as the registering entity for common interest agricultural communities ("CIAC").

S.B. 1177, S.D. 1 establishes a regulatory structure allowing for the creation of a form of nonresidential condominium property regime on agricultural lands, structured for farming operators, with allowable uses limited to agricultural and farming operations. The regulatory structure created in this measure is similar to the creation and registration process of condominiums.

As an initial matter, condominium oversight is premised on the concept of self-governance and requires full and active participation of volunteer condominium association

members, often with the assistance of property managers, attorneys, accountants, and sometimes, parliamentarians. While collaborative governance is the aspirational goal, the realities of condominium governance have proven to be challenging and have required frequent revisions to applicable law. These problems may be exacerbated in condominiums with fewer owners. The Department is unfamiliar with the issues that this bill seeks to address but recommends that the pros and cons of the condominium model should be carefully considered before adoption.

Also, S.B. 1177, S.D. 1 does not address a number of funding, personnel, and administrative issues that may be necessary to implement this proposed new regulatory measure. It is currently unknown how many agricultural communities will register under this structure, and it is therefore unknown how many staff members are necessary. Existing condominium funds, including the Condominium Education Trust Fund (“CETF”) are strictly dedicated to regulation and use under Hawaii Revised Statutes (“HAR”) chapters 514A and 514B. Consequently, if this measure moves forward, the Department requests a sufficient appropriation and personnel count to provide the comparable level of service the condominium staff provides to the existing condominium community.

With respect to other administrative issues related to implementation of this measure, it is not clear how quickly CIAC registration applications will begin to be received by prospective developers, but a number of administrative rules must be in place under this bill for the registration program to operate. While the original version of this measure included an effective date of “upon its approval,” the Department respectfully requests that should this measure move forward with the Department continuing as the designated registering entity, the Committees consider a delayed effective date to allow for the promulgation of administrative rules the Department is required to promulgate if this bill passes.

Thank you for the opportunity to provide testimony expressing strong concerns about S.B. 1177, S.D. 1.

Testimony of
Alec Sou
on
S.B. No. 1177, S.D. 1
Relating to Common Interest Agricultural Communities
Committee on Economic Development & Business
Committee on Water & Land
Friday, March 16, 2018, 11:00 a.m.
Room 309

Thank you for the opportunity to testify in strong support of S.B. No. 1177, S.D.1 which proposes to establish the regulatory structure for “common interest agricultural communities,” and to request some amendments to the bill.

S.B. No. 1177, S.D. 1, incorporates many of the regulatory provisions of the **Uniform Common Interest Ownership Act**, which is the template for the Hawaii condominium law, but includes provisions to distinguish agricultural communities from residential condominium developments.

Key features of the bill are that common interest agricultural communities are created in which:

- (1) The common interest agricultural community is on lands classified as agricultural, and the uses that are permitted are limited agricultural uses;
- (2) Any dwelling that may be used and occupied for human habitation is prohibited; and
- (3) The community shall comply with all county zoning and building ordinances.

Benefits of creating a common interest agricultural community

- A properly structured association permit independence and interdependence by providing for shared costs, pooled resources, economies of scale, and a legally recognized structure, which can benefit an individual grower;
- Common management and mandatory participation of farm parcel owners allow the spreading of the association responsibilities among many people, reducing the burden of the individual;
- The establishment of a farm parcel association provides a mechanism for the preservation and enforcement of the project’s authorized land uses and enforcement of prohibitions; and
- It will fulfill the need for agricultural parcels in the 10-20-acre size that is sought by many farmers.

Proposed amendments

After discussions with people with experience in agriculture and the planning department, we request that the following amendments be considered:

- (1) Require that common interest agricultural communities be on lands designated as important agricultural lands. (see § -2 definition of “common interest agricultural community”)
- (2) Require that common interest agricultural communities conform to:
 - Hawaii state building codes as defined in section 107-21, as may be amended by the county;
 - County subdivision and zoning ordinances;
 - Section 205-4.5, HRS, which lists the permissible uses on agricultural land, except that farm dwellings and employee housing shall be developed according to section 205-45.5, which lists the conditions for farm dwellings and employee housing on important agricultural lands, including consideration of cluster development of farm dwellings, a concept suggested by DPP; and
 - Prohibition of further parceling of the project unless approved by 75% of the board.
- (3) Require the developer to collaborate with the county fire department to develop an emergency access and fire safety plan that describes fire safety systems, water resources, contact, and access information of the project. (see § -7)
- (4) Require the developer to collaborate with the soil and water conservation district in which the project is located to prepare a conservation plan to achieve the optimum use of resources, minimize soil erosion, improve the efficiency of water use, minimize the environmental impact of farming, and qualify for exemption from grading, grubbing, and stockpiling permit requirements. (see § -8)
- (5) Require the developer to submit to the county planning department the project’s declaration, certified plat map, and bylaws for review and determination of conformance to the land use law, Hawaii state building codes, zoning and subdivision laws, emergency access, fire safety, and conservation requirements.

Provide that the county shall submit a verified statement to the chairperson of the board of agriculture if the project meets the requirements or return the documents to the developer if the information is incomplete or does not meet the requirements. (see § -9)

- (6) Change the administering department from the department of commerce and consumer affairs to the department of agriculture. The Real Estate Commission, which was originally the administering agency pointed out that this measure relates more to the development of agriculture than the development of real estate. The Department of Agriculture has the responsibility of promoting “the conservation, development, and utilization of agricultural resources...” (section 26-16).

Common interest agricultural communities shall be registered with the chairperson of the board of agriculture. Throughout the measure, “director” was replaced by “chairperson” and “rules adopted by the director” replaced by “rules adopted by the board of agriculture.”

- (7) Upon receipt of the verified statement from the county planning department after review, the common interest agricultural community may be created by recording the declaration and bylaws together with the deed or lease conveying the real estate. (see § -11)
- (8) Include in the contents of the declaration the verified statement of compliance submitted by the county pursuant to § -9, the fire safety plan, and conservation plan. (see § -12)
- (9) Require that the application for registration of the project include: a statement that the permitted uses are restricted as described in section 205-4.5(a) as permissible uses in the agricultural district, and that farm dwellings shall be regulated by section 205-45.5. (see § -21)
- (10) Require the public offering statement to include the permitted uses and prohibitions on the farm parcels.
- (11) Authorize the county planning department to inspect a project or farm parcel for conformance to the requirement of the chapter, authorizes the charging of a fee for the actual costs of conducting the inspection up to \$500, and provides that the county may keep the fees and penalties for enforcing this chapter.
- (12) Establish the insurance requirements for the common interest agricultural community, following the language in section 514B-143. (see § -38) *Section 514B-143, provides that the insurance requirement of the section may be varied or waived in the case of a project in which all units are restricted to nonresidential use.*
- (13) Change the effective date to July 1, 2018.

Please support S.B. No. 1177, S.D.1, with the requested amendments.

Thank you for the opportunity to testify on S.B. 1177, S.D. 1.

DAVID Y. IGE
Governor

DOUGLAS S. CHIN
Lt. Governor



State of Hawaii
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SCOTT E. ENRIGHT
Chairperson, Board of Agriculture

PHYLLIS SHIMABUKURO-GEISER
Deputy to the Chairperson

**TESTIMONY OF SCOTT E. ENRIGHT
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE HOUSE COMMITTEES ON ECONOMIC DEVELOPMENT & BUSINESS
AND WATER & LAND**

**MARCH 16, 2017
11:00 A.M.
CONFERENCE ROOM 309**

**SENATE BILL NO. 1177 SD1
RELATING TO COMMON INTEREST AGRICULTURAL COMMUNITIES**

Chairpersons Evans, Chairperson Yamane and Members of the Committees:

Thank you for the opportunity to testify on Senate Bill No.1177 SD1 that establishes common interest agricultural communities (CIAC). Because this measure is quite complex and the consequences of its application on agricultural land over time is uncertain, the Department opposes this bill.

SB 1177 SD1 proposes a form of agricultural land ownership and management different from the existing subdivision and condominium property regime options. As written, common interest agricultural communities (CIAC) create agricultural production areas, require sharing in common infrastructure development costs, may be fee simple with separate ownership for each farm parcel or leasehold, prohibit dwellings that may be occupied for human habitation, and have a "coordinating entrepreneur". We do not know if the parcels created would qualify as collateral by commercial lending institutions. Individual farm parcel owners may enter into agricultural production contracts with the "coordinating entrepreneur" who has the authority to select the crop to be grown, and when and how it is to be grown. This bill does offer an opportunity to provide agricultural lands for agricultural production by farmers who, prior to becoming a farm parcel owner, must fully understand and accept to work within a formalized



ownership and management structure. We have no desire to see developments similar to the Kunia Loa Ridge Farmlands situation along the foothills of the Waianae range throughout the state.

Pursuant to the recommendation of the committees on Agriculture and Energy, and Commerce, Consumer Protection and Health during the 2017 Legislature, the Office of Planning and the Department of Agriculture jointly developed and are able to offer alternative language that establishes some enforcement authority with the counties over CIACs, and strengthening the internal management and administration of CIACs. This new form of agricultural land development must support and sustain active agricultural production and not become another gateway to low-density, rural-residential development on agricultural land as is currently possible through the subdivision and condominium property regime processes.

In addition to the many features found in SD1, the Office of Planning and the Department of Agriculture identified areas where our amendments would improve the bill:

The counties should have an enforcement role in CIACs:

- “Common interest agricultural communities” must be in strict compliance with county zoning ordinances and the county planning departments must be made responsible for enforcement.
- The applicable county planning department is to be notified thirty days prior to recordation of the declaration and by-laws of a “common interest agricultural community”;
- Similarly, a copy of the “final public offering statement”, approved by the director of the Department of Commerce and Consumer Affairs which fully discloses to prospective purchasers of farm parcels all the pertinent facts of the development, must be filed with the applicable county planning department within 30 days of the final order.

The management and enforcement authority of the farm parcel owners' association and/or developer, responsibility for violations and fines, "first right of refusal" when farm parcels come up for sale.

- Ownership of farm parcels must be inseparable from the "common interest agricultural communities".
- Primary responsibility for management and enforcement within the community must be the farm parcel owners' association and/or the developer. Violations of the common and limited common infrastructure by farm parcel owners or lessees must be the responsibility of the farm parcel owners' association and/or the developer. County fines levied on a farm parcel are the responsibility of the farm parcel owner.
- "Common interest agricultural communities" are not permitted if done in conjunction with a condominium property regime pursuant to Chapter 514B or subdivision of land for the creation of individual lots of record.
- Where the owner wishes to sell the ownership interest in a farm parcel, the developer or farm parcels owners' association shall have the "first right of refusal". This is to ensure the farm parcel is being sold to another farmer who will farm.

Thank you for the opportunity to comment on this measure.



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STATE OF HAWAII**

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Statement of
LEO R. ASUNCION
Director, Office of Planning
before the
**HOUSE COMMITTEES ON ECONOMIC DEVELOPMENT AND BUSINESS, AND
WATER AND LAND**
Friday, March 16, 2018
11:00 AM
State Capitol, Conference Room 309

in consideration of
SB 1177, SD1
RELATING TO COMMON INTEREST AGRICULTURAL COMMUNITIES.

Chairs Evans and Yamane, Vice Chairs Keohokalole and Todd, and Members of the House Committees on Economic Development and Business, and Water and Land.

The Office of Planning (OP) opposes SB 1177, SD1 in its current form as the measure lacks adequate safeguards. SB 1177, SD1 would create a new chapter authorizing the creation of “common interest agricultural communities,” a form of condominium property regime (CPR) that would be structured for farming operators and limited to agriculture and farming operations on the property. OP strongly supports the bill’s prohibition on residential use of land within a project created under the proposed chapter.

However, we are concerned that the bill lacks the necessary safeguards to ensure that the tool does not facilitate establishment of non-agricultural uses on Hawaii’s limited productive agricultural lands or the conversion of these lands to residential use over time. This is the crux of OP and the Department of Agriculture’s (DOA) concerns.

OP believes that agricultural CPRs can be a useful mechanism to facilitate small- to mid-sized farmers access to land, and to lower farmers’ land rent costs of accessing land as well as their operational costs through shared agricultural infrastructure investments and maintenance. Agricultural CPRs would avoid the fragmentation of intact, contiguous blocks of agricultural land. However, these benefits will not be realized if productive agricultural land is allowed to be encumbered with structures, which would impair flexibility in field configuration, crop selection, and other agricultural operations, and hinder the use of the entire project land area for continued agricultural cultivation should an agricultural CPR be terminated.

In the 2017 Legislative Session, OP and DOA collaborated on proposed amendments to this measure, in response to legislative proposals to prohibit CPRs in the State Agricultural

District as a means to stem the expansion of residential uses in the Agricultural District. OP believes this would close the door on a potential tool that could benefit farmers. But, since this is an operationally complex tool, it is critical that there are provisions to ensure that this kind of CPR does not facilitate or result in the conversion of productive agricultural land to residential or other non-agricultural uses.

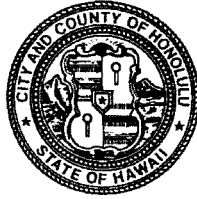
Further amendment of this measure is needed to address our concerns and safeguard against further encroachment of residential and non-agricultural uses on agricultural land in the Agricultural District. If the Committees feel that the measure should continue to move forward, we would appreciate the opportunity to provide language for amendments we believe would be necessary to address our concerns. This would ensure that there is an opportunity to continue to work towards legislation that would enable use of the tool by farmers while addressing the land use concerns raised.

Thank you for the opportunity to testify on this measure.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
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ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

March 16, 2018

LATE

The Honorable Cindy Evans, Chair
and Members of the Committee on
Economic Development & Business
The Honorable Ryan I. Yamane, Chair
and Members of the Committee on Water
and Land
Hawaii House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chairs Evans and Yamane, and Committee Members:

Subject: Senate Bill No. 1177, SD 1
Relating to Common Interest Agricultural Communities

The Department of Planning and Permitting (DPP) has **comments on** Senate Bill No. 1177, SD 1, which creates a new type of land ownership, development and management entities, and "common interest agricultural communities."

We understand that this proposal will provide a new type of agricultural entity similar to the condominium property regime program. We appreciate the provisions under the Proposed HD 1 version of the Bill that stipulate compliance with county zoning and subdivision requirements. We also appreciate the explicit provisions requiring emergency access and fire safety plans.

Although implied, there should be explicit language on whether this optional program is only available for lands in the State Agricultural District; there are agriculturally-zoned lands in the State Urban District. Similarly, while there is reference to permitted uses under Chapter 205-4.5(a), not all allowed uses are agricultural in nature; e.g., day camps and communication antennas. Is the intent to include these uses as well? We also note that the City's zoning does not permit all the uses in Chapter 205. Therefore, the Bill should be amended to recognize uses permitted under county zoning as well.

The Honorable Cindy Evans, Chair
and Members of the Committee on
Economic Development & Business
The Honorable Ryan I. Yamane, Chair
and Members of the Committee on Water
and Land
Hawaii House of Representatives
Senate Bill No. 1177, SD 1
March 16, 2018
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However, we cannot support the proposal that the counties will do wholesale enforcement of this program. We will enforce those provisions that are already part of our zoning and development codes, such as permitted uses and building safety standards. We lack the expertise in such areas as "right-to-till" agreements, arbitrating infrastructure rights amongst parcel owners, and compliance with registration requirements.

Thank you for the opportunity to testify.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathy Sokugawa". The signature is fluid and cursive, with a long, sweeping tail on the final letter.

Kathy K. Sokugawa
Acting Director