

# OFFICE OF PLANNING STATE OF HAWAII

DAVID Y. IGE  
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Statement of  
**RODNEY FUNAKOSHI**  
Planning Program Administrator, Office of Planning  
before the  
**SENATE COMMITTEE ON JUDICIARY**  
Tuesday, February 26, 2019  
9:00 AM  
State Capitol, Conference Room 016

in consideration of  
**SB 1135, SD 1**  
**RELATING TO THE LAND USE COMMISSION.**

Chair Rhoads, Vice Chair Wakai, and Members of the Senate Committee on the Judiciary,

The Office of Planning (OP) **supports** SB 1135, SD 1, which would amend Hawaii Revised Statutes (HRS) §205-4 to allow the Land Use Commission (LUC) to consider a motion by any party or interested person or would enable the LUC to consider its own motion to modify existing conditions imposed on the Petitioner or to allow the LUC to impose new conditions to ensure compliance with its Decision and Order.

Currently, during an Order to Show Cause proceeding, the LUC may only enforce their own conditions by a determination as to whether the Petition Area should remain in its current land use designation or revert to a more appropriate land use district classification, such as its original Agricultural District classification. At times, this has been too severe an action for the Petitioner. However, the LUC does not have the statutory authority to change or modify conditions which could be more appropriate. This measure would give the LUC that authority and provide more flexibility to address deficiencies and non-compliance with conditions and representations that are raised by the Project. It would also allow any parties and interested persons to similarly propose modifications to existing conditions.

OP takes no position on the definition of substantial commencement, as it could vary depending on the circumstances of a given project.

Thank you for this opportunity to testify.



**DAVID Y. IGE**  
Governor

**JOSH GREEN**  
Lieutenant Governor

**MIKE MCCARTNEY**  
Director

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

**DANIEL ORODENKER**  
Executive Officer

**Bert K. Saruwatari**  
Planner

**SCOTT A.K. DERRICKSON AICP**  
Planner

**RILEY K. HAKODA**  
Chief Clerk/Planner

**RASMI AGRAHARI**  
Planner

**FRED A. TALON**  
Drafting Technician

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Statement of  
**Daniel E. Orodener**  
**Executive Officer**  
Land Use Commission  
Before the  
**Senate Committee on Judiciary**

Tuesday February 26, 2019  
9:00 PM  
State Capitol, Conference Room 016

In consideration of  
**SB 1135 SD1**  
**RELATING TO THE LAND USE COMMISSION**

Chair Rhoads; Vice Chair Wakai; and members of the Senate Committee on Judiciary:

The Land Use Commission (LUC) strongly supports SB1135 SD1 which would provide the LUC with the power to amend, revise, or modify a decision and order after there has been an evidentiary hearing and a finding that a petitioner or its successors has not adhered to conditions of approval that protect important State interests and the public trust. It is important to note that LUC proceedings provide significant due process protections that allow a developer/petitioner to provide evidence that there was no violation or that there were legitimate reasons for an alleged violation.

The measure also provides a definition of the term "substantial commencement." This is a key provision which provides certainty to developers and the Land Use Commission in determining the level of compliance with a condition and the appropriateness of a proceeding.

The LUC already has an enforcement power, just not one sufficient or flexible enough to address the varied compliance issues it must confront. Currently the LUC does not have the ability, except in extremely limited circumstances to enforce its decisions, before there has been substantial commencement, and it only has one penalty it may assess, reversion to the former land use classification.

Under section 205-12, Hawai'i Revised Statutes (HRS), the counties are supposed to enforce conditions and notify the LUC of violations. Unfortunately, the counties do not or cannot enforce conditions for various reasons. This results in a situation that has detrimental

economic impacts in some cases and gives unfair advantages to developers who do not conform to LUC decisions. This measure gives the LUC the power to enforce conditions which are of State interest, providing more certainty to developers and the public that conditions will be enforced while also ensuring that projects would not be halted for inconsequential errors in compliance.

Once a project has been approved it can be assumed the LUC has determined the project has significant value to the community. Conditions are placed on the development of the project to protect the public's interests and prevent the State from assuming infrastructure costs as well as to protect county interests. For the most part developers adhere to the conditions. When they do not, significant impacts to water resources, the environment, cultural resources and practices, and statewide infrastructure can occur; all to the economic benefit of the developer.

From an economic standpoint it is not beneficial to completely halt or revoke a projects' permits when a violation occurs. The State has a social and economic interest in seeing projects completed. It is a benefit to both the construction industry and the pressing need for housing. This measure will allow the LUC to remedy a violation without having to revoke permits and stop a project while still protecting the public's interests. This measure would not allow the LUC to arbitrarily change conditions or reclassify land.

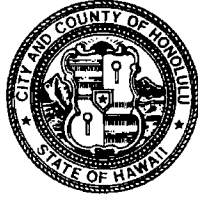
It is important to note that this measure only allows enforcement of conditions that are within the public trust, concern State expenditures or have cultural or environmental significance. The counties will continue to enforce conditions relating to county concerns.

Thank you for the opportunity to testify on this matter.

DEPARTMENT OF PLANNING AND PERMITTING  
**CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL  
MAYOR



KATHY K. SOKUGAWA  
ACTING DIRECTOR

TIMOTHY F. T. HIU  
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI  
DEPUTY DIRECTOR

February 26, 2019

**LATE**

The Honorable Karl Rhoads, Chair  
and Members of the Committee on Judiciary  
Hawaii State Senate  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Rhoads and Committee Members:

**Subject: Senate Bill No. 1135, SD 1  
Relating to the Land Use Commission**

The Department of Planning and Permitting **opposes, as drafted**, Senate Bill 1135, SD 1, which would give the Land Use Commission (LUC) additional enforcement tools to deal with parties who have not fulfilled promises or conditions related to a boundary amendment. As written, it is unclear the extent to which the counties would be obligated to enforce this law.

The Bill proposes to gauge a project's progress by defining "substantial commencement of use of the land" as the completion of all required infrastructure and 20 percent of required affordable housing. The term "substantial commencement" is vague, posing difficulties to determine and enforce, as well as overly harsh, in that "commencement" would include completion of all required infrastructure. The provisions make no allowance or acknowledgment of circumstances beyond the control of the developer or landowner that result in delays or changes. The "substantial commencement" clause would be overly burdensome on master-planned communities that may take several decades to complete.

Rather than allow "any party or interested person" to participate in a reconsideration proceeding, perhaps the Bill should refer to "intervening parties." The LUC already has the means to decide if an intervening party has standing under Section 205-4(e) with regard to boundary amendments. Perhaps the same approach should be used in the reconsideration process.

Thank you for the opportunity to testify.

Very truly yours,

A handwritten signature in black ink that reads "Kathy Sokugawa".

Kathy K. Sokugawa  
Acting Director



**TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY  
State Capitol, Conference Room 016  
415 South Beretania Street  
Tuesday, February 26, 2019  
9:00 AM.**

**RE: SENATE BILL NO. 1082 SD1, Relating to Wages**

Chair Rhoads, Vice Chair Wakai, and members of the committee:

My name is Gladys Quinto Marrone, CEO of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

BIA Hawaii is **opposed** to S.B. 1135 SD 1, which would authorize the state land use commission 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, regardless of whether there has been substantial commencement of use of the land. It also provides a definition for "substantial commencement" in section 205-4(g), HRS.

The bill finds that additional tools are necessary for the Land Use Commission to enforce conditions and requirements of land use district boundary amendments and special permits in a manner that ensures that the interests of the State, counties, and public are protected. As such, the bill proposes to:

- Insert a definition for the term "substantial commencement" in section 205-4(1), Hawaii Revised Statutes, to mean completion of all public improvements and infrastructure required by conditions imposed, both within and outside the project area, and completed construction of twenty percent of the physical private improvements such that they are usable or habitable.
- Insert language to allow the Land Use Commission on its own motion or on the motion of any interested party to vacate, void, modify, or amend boundary amendment approvals and conditions of direct state concern granted pursuant to chapter 205, Hawaii Revised Statutes.
- Insert language to allow the Land Use Commission on its own motion or on the motion of any interested party to vacate, void, modify, or amend any special permit and conditions of direct state concern granted pursuant to chapter 205, Hawaii Revised Statutes.

- Require conditions of direct state concern relating to boundary amendments and special permits to include conditions that protect the state marine and terrestrial environment and protect archaeological features and burial grounds, and conditions relating to the public trust doctrine.
- Increase the maximum fine for failure to substantially meet the conditions of direct state concern relating to boundary amendments and special permits from \$10,000 to \$50,000 per day.

The two-tiered land use entitlement system in Hawaii is cumbersome and complicated. Viewing the State LUC reclassification process independent from the Counties zoning process gives policy makers the impression that each system is independent from each other, and thus forcing compliance at the State level is necessary to insure the State imposed conditions are implemented.

The land use entitlement process has morphed over time and created more and more risks and uncertainty. There needs to be a recognition and acceptance of the roles and responsibilities of both the state and counties in the entitlement process.

The Counties are responsible for planning for growth through their respective development, community, or sustainable plans based on population projections for each County. The State's role in the process should be limited to "State" interests such as natural resource management, maintaining and protecting our water resources, and regional transportation and public educational issues. If there are no issues of direct State concern in the County's plans for directed growth, the State LUC should reclassify these lands to Urban, once the County plans have been adopted. Once the LUC reclassifies lands based on the counties' identification of future growth areas, the County's would be responsible for rezoning the lands based on their respective plans.

The proposed bill would "vacate" the LUC's reclassification action at any point in a project's development if there was a "direct State concern." It also would define "substantial commencement" as completion of all public improvements and infrastructure required by the LUC. It would appear that, based on this definition, all public infrastructure (i.e. roads, utilities, drainage, etc.) and improvements (i.e. public parks, schools, fire stations, etc.) would need to be constructed first to meet the new definition of "substantial commencement." This would be difficult for large master planned projects or any project that is phased in over time. Requiring all public infrastructure and improvements places a significant financial burden on the project with little or no revenue being generated to support the project.

With the median price of homes on Oahu currently at about \$800,000.00, it is imperative that elected officials seriously consider how proposed changes to the existing land use entitlement process will either help or hurt Hawaii's residents. We are opposed to SB 1135, as it would create too much risk and uncertainty in the land use entitlement process, and will further increase the already high cost of housing in Hawaii.

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



February 25, 2019

Senator Karl Rhoads, Chair  
Senator Glenn Wakai, Vice Chair  
Senate Committee on Judiciary

**Strong Opposition to SB 1135, SD1 RELATING TO THE LAND USE COMMISSION (Provides the Land Use Commission 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 a representation made by the petitioner or a condition imposed by the commission, regardless of whether there has been substantial commencement of use of the land. Defines "substantial commencement". Takes effect 12/31/2050.)**

**JDC Hrg: Tuesday, February 26, 2019, 9:00 a.m., Conf. Rm. 016**

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 major utility companies. 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 1135, SD1** and respectfully urges your Committees to **DEFER and HOLD** this measure in your Committee.

LURF **opposes SB 1135, SD1** based on, among other things, the following:

- 1. There is no factual justification for this bill and no factual evidence of any compelling need for the LUC to have new enforcement powers (no evidence of any projects in violation of LUC conditions, that the LUC has asked the county to enforce, and the county has refused).**
- 2. 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.**

3. **Conflicts with the existing 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; and directly conflicts with Section 205-12, Hawaii Revised Statutes (HRS) and the Hawaii Supreme Court decision in the *Aina Lea* case;<sup>1</sup> which both specifically state that the counties are responsible for enforcing the LUC conditions.**
4. **Directly contradicts and attempts an “end-run” to circumvent two Hawaii Supreme Court decisions in *Lanai Co. v. LUC* (2004), and the *Bridge Aina Lea* appeals (2014). This bill is also inconsistent with legal treatises regarding land use. (“*Regulating Paradise – Land Use Controls in Hawaii*,” Second Edition by David L. Callies)**
5. **Directly contradicts the Hawaii Supreme Court’s findings and significance of the term “*substantial commencement*” in the *Aina Lea* case.**
6. **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).**
7. **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.**
8. **All four county planning departments opposed a similar bill in 2016.**
9. **Stakeholders - LUC petitioners, landowners, housing developers, the building industry and Chamber of Commerce and the Governor’s Working Group on Housing have opposed similar proposed legislation.**
10. **This bill ignores the reality of development projects, Counties’ responsibility to enforce LUC conditions, the reasons for delays in compliance with conditions and the expertise and experience of the Counties to address such matters.**

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



- 11. 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;**
- 12. Uncontrollable, unknown and unpredictable costs affecting several state departments, the Judiciary and the State Budget (for LUC to handle County enforcement duties; hold unlimited and repeated orders to show cause filed by “any interested persons,” contested case hearings; collection of \$50,000 a day fines; and appeals to the Hawaii Supreme Court);**
- 13. The unlimited orders to show cause and contested case hearings generated by opponents to major housing projects will obstruct, delay, and may even derail needed affordable housing projects; and**
- 14. This bill will likely have a negative impact on project financing.**

**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, and the counties are the government agencies who are tasked with enforcing the LUC conditions and urban, agricultural and rural districts. However, the proponents of SB 1135, SD1 are attempting a “*power grab*” to transform the LUC’s established *planning function* into an *enforcement agency*.

The effects of the bill would be illogical, unjust and unreasonable and will undoubtedly result in unintended negative consequences, including, among other things, unnecessary and substantial costs to the State and its departments; and delays in the development, much-needed affordable housing.

Based on the above, it is respectfully requested that **SB 1135, SD1 be deferred and held** by your Committee.

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



# Chamber of Commerce HAWAII

*The Voice of Business*

**Testimony to the Senate Committee on Judiciary  
Tuesday, February 26, 2019 at 9:00 A.M.  
Conference Room 016, State Capitol**

**LATE**

**RE: SENATE BILL NO. 1135 SD 1, RELATING TO THE LAND USE COMMISSION**

Chair Rhoads, Vice Chair Wakai, and members of the Committee:

The Chamber is **opposed** to S.B. 1135 SD 1, which would authorize the state land use commission 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, regardless of whether there has been substantial commencement of use of the land. It also provides a definition for "substantial commencement" in section 205-4(g), HRS.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 2,000+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Bill finds that additional tools are necessary for the Land Use Commission to enforce conditions and requirements of land use district boundary amendments and special permits in a manner that ensures that the interests of the State, counties, and public are protected. As such, the bill proposes to:

- Insert a definition for the term "substantial commencement" in section 205-4(1), Hawaii Revised Statutes, to mean completion of all public improvements and infrastructure required by conditions imposed pursuant to chapter 205, Hawaii Revised Statutes, within and outside the project area, and completed construction of twenty percent of any affordable housing requirement such that they are usable or habitable.
- Insert language to allow the Land Use Commission on its own motion or on the motion of any interested party to vacate, void, modify, or amend boundary amendment approvals and conditions of direct state concern granted pursuant to chapter 205, Hawaii Revised Statutes.
- Insert language to allow the Land Use Commission on its own motion or on the motion of any interested party to vacate, void, modify, or amend any special permit and conditions of direct state concern granted pursuant to chapter 205, Hawaii Revised Statutes.



# Chamber of Commerce HAWAII

*The Voice of Business*

- Require conditions of direct state concern relating to boundary amendments and special permits to include conditions that protect the state marine and terrestrial environment and protect archaeological features and burial grounds, and conditions relating to the public trust doctrine.
- Increase the maximum fine for failure to substantially meet the conditions of direct state concern relating to boundary amendments and special permits from \$10,000 to \$50,000 per day.

The two-tiered land use entitlement system in Hawaii is cumbersome and complicated. Viewing the State LUC reclassification process independent from the Counties zoning process gives policy makers the impression that each system is independent from each other, and thus forcing compliance at the State level is necessary to insure the State imposed conditions are implemented.

The land use entitlement process has morphed over time and created more and more risks and uncertainty. There needs to be a recognition and acceptance of the roles and responsibilities of both the State and Counties in the entitlement process.

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The proposed bill would "vacate" the LUC's reclassification action at any point in a projects development if there was a "direct state concern." It also would define substantial commencement as completion of all public improvements and infrastructure required by the LUC. It would appear that based on this definition all public infrastructure (i.e. roads, utilities, drainage, etc.) and improvements (i.e. public parks, schools, fire stations, etc.) would need to be constructed first to meet the new definition of "substantial commencement." This would be difficult for large master planned projects or any project that is phased in over time. Requiring all public infrastructure and improvements places a significant financial burden on the project with little or no revenue being generated.

With the median price of houses on Oahu exceeding \$800,000.00, elected officials need to seriously consider how proposed changes to the existing land use entitlement process will either help or hurt Hawaii's residents. We are opposed to S.B. 1135 SD 1, as it would create too much risk and uncertainty in the land use entitlement process.

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