**DAVID Y. IGE**
Governor

**JOSH GREEN**
Lt. Governor

**PHYLLIS SHIMABUKURO-GEISER**
Chairperson, Board of Agriculture

**MORRIS M. ATTA**
Deputy to the Chairperson

State of Hawaii
**DEPARTMENT OF AGRICULTURE**
1428 South King Street
Honolulu, Hawaii 96814-2512
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TESTIMONY OF PHYLLIS SHIMABUKURO-GEISER
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

FRIDAY, FEBRUARY 11, 2022
2:00 P.M.
VIA VIDEOCONFERENCE

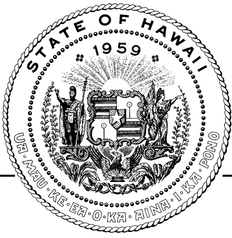
HOUSE BILL NO. 1840, HD1
RELATING TO DISTRICT BOUNDARY AMENDMENTS

Chairperson Johanson and Members of the Committee:

Thank you for the opportunity to testify on House Bill No. 1840, House Draft 1 that would allow the counties to reclassify land areas over 15 acres but not to exceed 50 acres, provided the counties have adopted ordinances establishing a procedure and requirements including that the land use boundary amendment is needed to produce for housing for occupants whose incomes do not exceed 80% of the area median income, and there is a prohibition on project parceling.

The Department is concerned about the potential impact this bill may have on the State's prime agricultural land resource. Fifty acres is equivalent to the footprint of the entire Ala Moana Shopping Center complex. Requiring petitions to be in compliance with county general plans or community plans may not be sufficient to protect prime agricultural lands from piecemeal reclassifications. We would prefer that agricultural lands that are designated Important Agricultural Lands or with "A" or "B" Overall Productivity Ratings as classified by the Land Study Bureau be exempt from the effect of this measure.

Thank you for the opportunity to provide our testimony on this measure.




# STATE OF HAWAII
# OFFICE OF PLANNING
# & SUSTAINABLE DEVELOPMENT

**DAVID Y. IGE**
GOVERNOR

**MARY ALICE EVANS**
DIRECTOR

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Coastal Zone Management Program

Environmental Review Program

Land Use Commission

Land Use Division

Special Plans Branch

State Transit-Oriented Development

Statewide Geographic Information System

Statewide Sustainability Branch


Statement of
**MARY ALICE EVANS**
Director, Office of Planning and Sustainable Development
before the
**HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE**
Friday, February 11, 2022
2:00 PM
State Capitol, Conference Room 329

in consideration of
**HB 1840, HD1**
**RELATING TO DISTRICT BOUNDARY AMENDMENTS.**

Chair Johanson, Vice Chair Kitagawa, and Members of the House Committee on Consumer Protection and Commerce.

The Office of Planning and Sustainable Development (OPSD) **supports** HB 1840, HD 1, which would amend HRS § 205-3.1 to allow the county land use decision-making authority to reclassify lands in the State Urban, Rural, and Agricultural District not classified as Important Agricultural Lands over 15 acres but equal to or less than 50 acres provided that the county establishes a procedure for determining such District Boundary Amendments, considers the impact on areas of State and county concern, and is consistent with county plans. The proposed HD1 adds a requirement to provide housing, 60 percent of which shall be reserved for occupants with incomes not exceeding 80 percent of area median income and a prohibition against parceling.

Increasing the amount of lands which the counties are allowed to reclassify up to 50 acres, especially for the provision of much needed affordable housing, would provide greater flexibility to address differences between State Land Use District classifications and county general plans and community development plans. This increase is appropriate in view of the comprehensiveness of the county planning process and extensiveness of community involvement when the county plans are updated.

Thank you for the opportunity to testify on this measure.

Mitchell D. Roth
*Mayor*

Lee E. Lord
*Managing Director*

West Hawai'i Office
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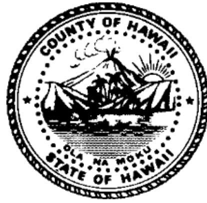


# County of Hawai'i

**PLANNING DEPARTMENT**

Zendo Kern
*Director*

Jeffrey W. Darrow
*Deputy Director*

East Hawai'i Office
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Hilo, Hawai'i 96720
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Fax (808) 961-8742

February 10, 2022

Testimony by

**ZENDO KERN, Planning Director**
**County of Hawai'i Planning Department**

before the

**Committee on Consumer Protection & Commerce**

**Friday, February 11, 2022, 2:00 P.M.**

**State Capitol, Conference Room 329**

In consideration of

## HB1840 HD1

## Relating to District Boundary Amendments

Honorable Representative Aaron Ling Johanson, Vice Chair Representative Lisa Kitagawa and Members of the Committee on Consumer Protection & Commerce:

Thank you for this opportunity to testify in **SUPPORT** of HB1840 HD1.

This testimony is submitted in response to the previous hearing before the Committee on Water and Land and concerns that were raised over the constitutionality and legality of the proposed bill. County of Hawai`i and Maui County Planning Departments have worked collaboratively along with our respective counsels to be able to provide the attached analysis to address the concerns raised.

Once again, thank you for your consideration of this testimony, attached analysis and for your support of HB1840 HD1.

HB 1840 / SB 2920

This paper is intended to address concerns raised by State Land Use Commission staff with respect to County legislatures deciding requests to amend state district boundary classifications, in particular the requirements of the *Town v. Land Use Commission* case.

Both Hawai`i and Maui Counties have adopted procedures for district boundary amendments under fifteen acres, in place for decades, that provide for extensive public participation and consideration of the constitutional rights of interested persons. At both the County of Hawai`i and the County of Maui, the procedures for State land use district boundary amendments are not subject to the Hawai`i Administrative Procedures Act, HRS Chapter 91, based on a plain reading of the statute and decisions by the Hawai`i Supreme Court.

In 1985, the Hawai`i legislature passed HRS § 205-3.1 which requires, in relevant part:

"District boundary amendments involving land areas of fifteen acres or less, except as provided in subsection (b), **shall be determined by the appropriate county land use decision-making authority** for the district and shall not require consideration by the land use commission pursuant to §205-4; provided that such boundary amendments and approved uses are consistent with this chapter (emphasis added)." It is important to note that this provision was adopted over a decade after *Town* was decided, thus the Legislature was aware of the holding when it delegated certain boundary amendments to the counties.

In 1986, the County of Hawai`i effectuated this law by adopting Chapter 28 of the Hawai`i County Code which governs State Land Use District Boundary Amendment Procedures. HCC § 28-2(a) provides that "the County council by ordinance may amend the districting of such lands fifteen acres or less located in the State land use urban, rural, and agricultural districts," thus establishing the County council as the "appropriate county land use decision-making authority."

Likewise, also in 1986, the County of Maui effectuated this law by adopting Chapter 19.68 of the Maui County Code which governs State Land Use District Boundary Amendment Procedures. That Chapter requires the Maui County Council to approve any district boundary amendment for land less than fifteen acres by ordinance after a public hearing by the appropriate planning commission, and states, in pertinent part:

"It is the purpose of this this chapter to establish procedures in order to implement the provisions of section 205-3.1, Hawai`i Revised Statutes, pertaining to petitions for boundary change/reclassification of state land use district boundaries involving lands fifteen acres or less presently classified as agricultural, rural or urban . . ."

Moving on to the contention that contested cases are always required for boundary amendments, HRS § 91-1 defines an "Agency" as: "[e]ach state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, **except those in the legislative or judicial branches**" (emphasis added). HRS Chapter 91 does not apply to a body if it is not an "agency" for purposes of the statute, thus neither the State nor County legislatures are required to conduct contested case hearings pursuant to the statute. This is true even if a different body like the LUC or a planning commission would be required to conduct a contested case hearing for the same permit.

While the requirement to conduct a contested case hearing as discussed in the *Town v. LUC* case is applicable to the State Land Use Commission, which is an agency and subject to HRS, Chapter 91, the state land use district boundary amendment procedures adopted by the Counties of Hawai`i and Maui are more akin to the City and County of Honolulu's special management area use permit procedures which the Hawai`i Supreme Court examined in the *Sandy Beach Defense Fund v. City and County of Honolulu* case (**773 P.2d 250 (1989)**). In that case, the Court recognized that the Honolulu City Council processed permit applications under the procedures set forth in Chapter 33 of the Revised Ordinances of Honolulu. Similar to the state land use district boundary amendment procedures utilized by Hawai`i and Maui Counties, the Honolulu Department of Land Utilization reviewed permit applications, held hearings on the applications and transmitted their findings to the City Council for decision-making.

In the *Sandy Beach* case, the court held that the City Council, as the legislative body of the County, was not subject to HRS Chapter 91, and that the Coastal Zone Management Act, the underlying statute at issue, did not require the City Council to conduct contested case proceedings in issuing SMA use permits. The Court further found that neither the language nor the legislative history of the CZMA supported the Appellants' contention that the City Council was required to conduct contested case hearings in SMA use permit proceedings. Rather, it was apparent to the Court that the legislature in HRS § 205A–29 allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMA use permit applications, as is the case with the delegation of authority in HRS § 205-3.1 applicable to state land use boundary amendment procedures.
The Court further held that the City Council's practice of holding public hearings rather than contested case hearings did not violate the appellants' constitutional rights to due process or equal protection. The Court stated: "Appellants argue . . . they were entitled to the full panoply of contested case procedures including cross-examination of witnesses, findings of fact and conclusions of law limited to the evidence, and prohibition on ex parte communications by decisionmakers. We disagree that a trial-type adjudicatory hearing was mandated by the constitution in this case and conclude that the hearings provided Appellants were consistent with the requirements of procedural due process."

Thus, the Hawai`i Supreme Court made clear that a contested case hearing was not required for the issuance of a Special Management Area permit by the Honolulu City Council, and that the constitutional rights of the Appellants were not violated by utilizing a process different than what was required in HRS Chapter 91.

The holding in *Sandy Beach* would apply to district boundary amendments, as both SMA permits and boundary amendments require consideration of the constitutional rights of certain members of the public. *Sandy Beach* stands for the proposition that a contested case hearing is not the exclusive method by which a body may decide approvals that may affect the rights of members of the public. In fact, the method utilized by the Hawai`i and Maui County Councils is similar to the process that was upheld in *Sandy Beach*.

Finally, it is worth noting that the proposed changes to HRS § 205-3.1 merely increase the size of certain boundary amendments that counties may determine. County legislatures have been reviewing and determining district boundaries for areas under 15 acres since 1986 and the continuation of this practice for larger areas for affordable projects is consistent with Hawai`i law.

**HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE**
February 11, 2022 2:00 PM Conference Room 329
**In OPPOSITION to HB1840 HD1:** Relating to District Boundary Amendments

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Aloha Chair Johanson, Vice Chair Kitagawa, and members of the Consumer Protection and Commerce Committee,

On behalf of our 20,000 members and supporters, the Sierra Club of Hawaiʻi **opposes HB1840 HD1,** which could remove important protections for natural and cultural resources, Native Hawaiian traditional and customary practices, and other public interests in major land use district boundary amendments.

The Land Use Commission ("LUC") has long administered a critical, comprehensive process to identify and mitigate impacts to natural and cultural resources, Native Hawaiian traditional and customary rights, food security, and other public interests that may be affected by the reclassification of conservation, rural, agricultural, and urban lands. Unlike existing county land use decisionmaking, the quasi-judicial nature of the LUC district boundary amendment process ensures that data and other information from experts, cultural practitioners, and other stakeholders are adequately considered and incorporated in district boundary amendment approvals. The LUC also possesses substantial institutional knowledge regarding how the public's interest in large-scale land use changes can be consistently protected.

**By preventing the LUC from participating in district boundary amendment changes between 15-50 acres, this measure may compromise the public's environmental, cultural, agricultural, and recreational interests in our islands' lands and waters.** While the Sierra Club appreciates the included conditions that counties enact certain ordinances and requirements prior to the proposed reduction in the LUC's authority, it is unclear whether and how these ordinances would sufficiently provide the quasi-judicial, project-specific opportunities for input under the LUC process, or replace the LUC's substantial institutional knowledge in its decades of practice overseeing large-scale land use changes.

With regards to the Proposed HD1, the Sierra Club appreciates the intent to promote the production of affordable housing. **However, the Sierra Club notes that the LUC is not the apparent barrier to affordable housing production it is often purported to be.** The LUC is already required to approve or deny completed district boundary amendment applications within a year of receipt; for Chapter 201H "affordable housing" projects such as those described in this Proposed HD1, this deadline is shortened to 45 days.[1] According to LUC staff, throughout the

[1] See https://luc.hawaii.gov/about/district-boundary-amendment-procedures/.

2010s, all major 201H affordable housing projects were approved by the LUC within the 45 day timeline.[2]

If affordable housing development is a concern, Sierra Club encourages the Committee to explore of the potential expansion of the LUC's enforcement authority. Since 1980, more than 25% of all the housing authorized by the LUC has not yet been built, much of which was proposed to be affordable and workforce housing. On O'ahu alone, 23,000 units approved by the LUC have not been constructed; this includes Ho'opili (DR Horton), Koa Ridge (Castle & Cooke), Gentry Waiawa (now owned by Kamehameha Schools), and Royal Kunia Phase II. Providing the LUC with reasonably enhanced enforcement authority will help to encourage developer-follow-through on commitments made during the district boundary amendment process, including with regards to the production of affordable housing units. Possible statutory language to accomplish this could read as follows:

"**§205- Penalty.** (a) Any petitioner for an amendment to a district boundary that:

(1) Violates; or

(2) Neglects, fails to conform to, or comply with this chapter or any lawful order of the land use commission may be subject to a civil penalty not to exceed $50,000 per day that the violation, neglect, or failure occurs, or reversion pursuant to section 205-4(g), but not both. The civil penalty shall be assessed by the land use commission after a hearing in accordance with chapter 91.

(b) Upon written application filed within fifteen days after service of an order imposing a civil penalty pursuant to this section, the land use commission may remit or mitigate the penalty upon terms that it deems proper.

[2] A record of all LUC decisions organized by island is available online at: http://luc.hawaii.gov/completed-dockets/decision-and-orders-for-boundary-amendments/.

(c) If any civil penalty imposed pursuant to this section is not paid within a time period as the land use commission may direct, the attorney general shall institute a civil action for recovery of the civil penalty in circuit court."

For the reasons described above, the Sierra Club respectfully urges the Committee to **HOLD** this measure. Mahalo nui for the opportunity to testify.

February 11, 2022
2:00 p.m.
Conference Room 329
Via Videoconference

**To: House Committee on Consumer Protection & Commerce**
**Rep. Aaron Ling Johanson, Chair**
**Rep. Lisa Kitagawa, Vice Chair**

**From: Grassroot Institute of Hawaii**
**Joe Kent, Executive Vice President**

RE: HB1840 HD1 — RELATING TO DISTRICT BOUNDARY AMENDMENTS

***Comments Only***

Dear Chair and Committee Members:

The Grassroot Institute of Hawaii would like to offer its comments on HB1840, which would change existing restrictions on the authority of the counties to amend district boundaries.

Under this bill, county decision-making officials would be permitted to amend district boundaries for certain land areas greater than 15 acres, but not more than 50 acres, if the county has adopted an ordinance that includes certain enforcement provisions and limitations on land use, such as that the amendment be consistent with the community development plan). Moreover, at least 60% of the development must be dedicated to the development of so-called affordable housing.

In raising the acreage cutoff to 50 acres, HB1840 would make an important stride toward streamlining the decision-making process and encouraging the growth of the housing pool in our state.

However, the bill includes unnecessary limitations, namely, the restrictions contained in the prescribed ordinance and the requirement that this special consideration will be given only for proposals where 60% of the land will be dedicated to the development of affordable housing.

Known as “inclusionary zoning,” this high-percentage set-aside for affordable housing will frustrate the intent of the bill by making such projects financially unfeasible.

A large body of research shows that inclusionary zoning makes housing less affordable, since developers respond to such mandates by building fewer homes.[1] To make matters worse, the mandates force developers to raise the prices of market-rate homes to make up for the so-called affordable homes.

Our research using the “Inclusionary Housing Calculator” developed by Grounded Solutions Network shows that in housing markets like Maui that have a 50% inclusionary zoning requirement, it is nearly impossible to make a profit building housing without a government subsidy.[2] As the requirement goes up to 60% and more, it becomes even less feasible to build new housing.

For example, according to the calculator, a low-rise apartment project with 30 units costing $18 million would incur a net loss of $7 million, if built in an area with an affordable housing requirement of 50%.[3]

As noted by economist Carl Bonham at the Economic Research Organization at the University of Hawaii, inclusionary zoning, “reduces incentives for developers to produce all forms of housing, and will reduce the overall supply of housing units and increase the price of housing.”[4]

A 2004 study by the Reason Foundation found that inclusionary zoning led to reduced housing growth in the San Francisco Bay Area region.[5]

---

[1] Tom Means, Edward Stringham and Edward Lopez, “Below-Market Housing Mandates as Takings: Measuring their Impact,” The Independence Institute, November 2007; “Inclusionary Zoning: Implications for Oahu’s Housing Market,” The Economic Research Organization at the University of Hawaii, Feb. 12, 2010; “How land-use regulation undermines affordable housing,” Mercatus Research, November 2015; Paul Kupiec and Edward Pinto, “The high cost of ‘affordable housing’ mandates,” The Wall Street Journal, Feb. 12, 2018; Benjamin Powell and Edward Stringham, “Housing supply and affordability,” Reason Foundation, April 1, 2004; and “Inclusionary zoning primer,” National Association of Home Builders, August 2019.

[2] “Inclusionary Housing Calculator 2.0,” Grounded Solutions Network, 2019.

[3] “Project Summary,” Grounded Solutions Network, accessed Feb. 9, 2021.

[4] Carl Bonham, “The Unintended Consequences of Affordable Housing Policy,” The Economic Research Organization at the University of Hawaii, Sept. 8, 2013.

[5] Benjamin Powell and Edward Stringham, “Housing supply and affordability,” Reason Foundation, April 1, 2004.

While well-intentioned, the inclusionary zoning requirement and other limitations may frustrate the intent of the bill by creating another regulatory roadblock to the increase of the housing supply.
Fortunately, there are ways to encourage the growth of affordable housing that would not hobble development before it even begins.

Regarding this bill, we urge you to remove the 60% requirement. Beyond that, focus on reforming the state Land Use Commission and streamlining the development process.

That said, this committee should be commended for addressing one of the root causes of the state's housing crisis: the excess of regulation and bureaucracy that can delay and frustrate development.

A Grassroot Institute report on the problem, "Reform the Hawaii LUC to encourage more housing," discussed how state policymakers could encourage the growth of housing by reexamining the role and purpose of the LUC.

The report included two recommendations that relate directly to the intent of HB1840: raising the acreage cutoff for LUC review of district boundary amendment requests, and allowing the counties to handle all DBAs for urban and agricultural lands, leaving the LUC free to focus on statewide environmental issues and DBAs of conservation lands.

Enacting bill HB1840, without the unnecessary limitations, would go part of the way toward achieving those recommendations.

Thank you for the opportunity to submit our comments.

Sincerely,

Joe Kent
Executive Vice President
Grassroot Institute of Hawaii

P.O. Box 253, Kunia, Hawai'i 96759
Phone: (808) 848-2074; Fax: (808) 848-1921
e-mail info@hfbf.org; www.hfbf.org

February 11, 2022

HEARING BEFORE THE
HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

**TESTIMONY ON HB 1840, HD1**
RELATING TO DISTRICT BOUNDARY AMENDMENTS

Conference Room 329 & Videoconference
2:00 PM

Aloha Chair Johanson, Vice-Chair Kitagawa, and Members of the Committee:

I am Brian Miyamoto, Executive Director of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,800 farm family members statewide and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic, and educational interests of our diverse agricultural community.

**The Hawaii Farm Bureau opposes HB 1840, HD1,** which authorizes the appropriate county land use decision-making authority to determine district boundary amendments involving land areas over fifteen acres but less than or equal to fifty acres if the county has adopted an ordinance that meets certain requirements, including the requirement that the district boundary amendment is necessary to produce housing, sixty percent of which shall be reserved for occupants whose incomes do not exceed eighty percent of the area median income.

HFB recognizes and supports the need for affordable housing. We also recognize that in the land category system used today, agriculture was originally the catchall land classification and that some lands included within the agricultural district were not necessarily considered optimal for agriculture.

However, agriculture has significantly evolved. Soil classification is no longer the determinant of land good for agriculture. Greenhouses, hydroponics, aquaculture, and aquaponics are just a few of the many types of agriculture that can occur on *all* classes of land (A, B, C, D, E). Some of the best floriculture and hydroponic operations in Hawaii are on C, D, and E lands. The total environment, including rainfall amount and timing, day and night-time temperatures, wind, and humidity each contribute to whether a particular region is suitable for a specific crop. In many cases, the soil type and even the existing terrain are not determinative of whether farming can exist and thrive.

Hawaii Farm Bureau has serious concerns about this measure; allowing residential developments to be interspersed with farming operations often causes problems that can result in the failure of farms. This cannot be allowed. Because of the pandemic, everyone better understands now the importance of agriculture in our isolated and vulnerable state. We must protect agricultural lands from well-known threats and avoid simplistic solutions to Hawaii's housing problems.

HFB is opposed to eliminating the oversight of the Land Use Commission and its process for agricultural boundary amendments.

The urgency to address Hawaii's need for affordable housing should not be allowed to eliminate Hawaii's use of productive agricultural land.

Thank you for your consideration of our concerns.

Hawaiʻi Association of REALTORS®
808-733-7060
808-737-4977
1259 Aʻala Street, Suite 300
Honolulu, HI 96817

February 11, 2022

**The Honorable Aaron Ling Johnason, Chair**
House Committee on Consumer Protection and Commerce
Via Videoconference

**RE: H.B. 1840, HD1, Relating to District Boundary Amendments**

**HEARING: Tuesday, February 11, 2022, at 2:00 p.m.**

Aloha Chair Johanson, Vice Chair Kitagawa, and Members of the Committee,

I am Ken Hiraki, Director of Government Affairs, testifying on behalf of the Hawaiʻi Association of REALTORS® ("HAR"), the voice of real estate in Hawaiʻi, and its over 10,000 members. HAR **strongly supports** H.B. 1840, HD1, which authorizes the appropriate county land use decision-making authority to determine district boundary amendments involving land areas over fifteen acres but less than or equal to 50% acres if the county has adopted an ordinance that meets certain requirements, including the requirement that the district boundary amendment is necessary to produce housing, 60% of which shall be reserved for occupants whose incomes do not exceed 80% of the Area Median Income (AMI.) Prohibits parceling of such lands.

Hawaiʻi has been struggling with the issue of affordable housing for decades. Challenges range from land and infrastructure costs, financing, regulatory challenges, and permitting. According to the Department of Business Economic Development and Tourism's 2019 report on Housing Demand in Hawaiʻi, the state needs up to 46,000 housing units to meet demand in Hawaiʻi by 2030. Ultimately, we have a housing supply problem, and this measure is a creative approach to address those challenges, by building affordable housing.

The Land Use Commission (LUC) is responsible for the classification of land parcels into urban, rural, agricultural and conservation districts. Additionally, the LUC acts on land use district boundary amendment petitions involving the reclassification of lands greater than 15 acres in agricultural, rural, and urban district areas, provided it is not in the conservation district or delineated as important agricultural lands. Lands that are less than the 15 acres can be reclassified by the counties. Moreover, the county process involves opportunities for public input, which includes a presentation to the appropriate neighborhood board and public input at hearings before the appropriate county Planning Commission and City Council.

HAR would respectfully recommend that the acreage be increased from 50 to 100 acres. This would allow for more housing units to be built to help the State reach its housing demand. Additionally, more acreage makes it more economically feasible for environmental safeguards to be built, such as a wastewater treatment plants or connectivity to an existing sewer system. Smaller projects may not be able to absorb said costs. Additionally, 80% of the Area Median Income ("AMI") may be too low. For example, on Oʻahu the income limit at 80% is $77,360 for a family of two. This would make much of our workforce housing ineligible, such as two public school teachers (average median income of $63,662 in Hawaiʻi.) Additionally, at 80% AMI would limit development to rentals only, as for sale units would not pencil out at that level.

Mahalo for the opportunity to testify.

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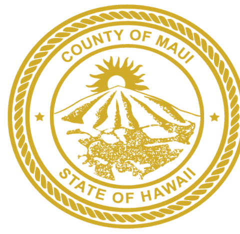


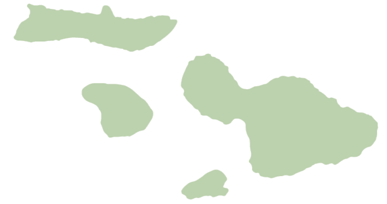

DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

February 10, 2022

TESTIMONY OF MICHELE CHOUTEAU MCLEAN, AICP
PLANNING DIRECTOR
COUNTY OF MAUI

BEFORE THE HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Friday, February 11, 2022, 2:00 PM.
Videoconference / Conference Room 329

**HB1840, HD1 RELATING TO DISTRICT BOUNDARY AMENDMENTS**

Representative Aaron Ling Johanson, Chair
Representative Lisa Kitagawa, Vice Chair
Honorable Members of the House Committee on Consumer Protection & Commerce

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Thank you for this opportunity to testify in **SUPPORT** of HB1840, HD1.

Please accept this testimony in support of this effort to allow each county to make final decisions on state land use district boundaries for properties that are 50 acres or smaller, provided that the county adopts an ordinance to provide the same standards and impose the same requirements that the State Land Use Commission follows, and providing that at least 60 percent of the units are for affordable housing.

By including these requirements, the same scrutiny will be given to larger projects – and this scrutiny will come at the local level. This will help to streamline the entitlement process, particularly for affordable and workforce housing. It is a win-win.

In a prior hearing, concerns were raised over the constitutionality and legality of the proposed bill. The Maui County Planning Department has consulted with the Hawaii County Planning Department and our respective counsels, and believes that the bill is on solid constitutional and legal ground. Attached to this testimony is an analysis that we jointly prepared in this regard.

Mahalo for your consideration of this testimony, the attached analysis, and for your support of HB1840, HD1.

Main Line: 808.270.7735 | Facsimile: 808.270.7634
Current Division: 808.270.8205 | Long Range Division: 808.270.7214 | Zoning Division: 808.270.7253

HB 1840 / SB 2920

This paper is intended to address concerns raised by State Land Use Commission staff with respect to County legislatures deciding requests to amend state district boundary classifications, in particular the requirements of the *Town v. Land Use Commission* case.

Both Hawaii and Maui Counties have adopted procedures for district boundary amendments under fifteen acres, in place for decades, that provide for extensive public participation and consideration of the constitutional rights of interested persons. At both the County of Hawai`i and the County of Maui, the procedures for State land use district boundary amendments are not subject to the Hawai`i Administrative Procedures Act, HRS Chapter 91, based on a plain reading of the statute and decisions by the Hawaii Supreme Court.

In 1985, the Hawaii legislature passed HRS § 205-3.1 which requires, in relevant part:

"District boundary amendments involving land areas of fifteen acres or less, except as provided in subsection (b), **shall be determined by the appropriate county land use decision-making authority** for the district and shall not require consideration by the land use commission pursuant to §205-4; provided that such boundary amendments and approved uses are consistent with this chapter" (emphasis added). It is important to note that this provision was adopted over a decade after *Town* was decided, thus the Legislature was aware of the holding when it delegated certain boundary amendments to the counties.

In 1986, the County of Hawai`i effectuated this law by adopting Chapter 28 of the Hawai`i County Code which governs State Land Use District Boundary Amendment Procedures. HCC § 28-2(a) provides that "the County council by ordinance may amend the districting of such lands fifteen acres or less located in the State land use urban, rural, and agricultural districts," thus establishing the County council as the "appropriate county land use decision-making authority."

Likewise, also in 1986, the County of Maui effectuated this law by adopting Chapter 19.68 of the Maui County Code which governs State Land Use District Boundary Amendment Procedures. That Chapter requires the Maui County Council to approve any district boundary amendment for land less than fifteen acres by ordinance after a public hearing by the appropriate planning commission, and states, in pertinent part:

"It is the purpose of this this chapter to establish procedures in order to implement the provisions of section 205-3.1, Hawaii Revised Statutes, pertaining to petitions for boundary change/reclassification of state land use district boundaries involving lands fifteen acres or less presently classified as agricultural, rural or urban . . ."

Moving on to the contention that contested cases are always required for boundary amendments, HRS § 91-1 defines an "Agency" as: "[e]ach state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, **except those in the legislative or judicial branches**" (emphasis added). HRS Chapter 91 does not apply to a body if it is not an "agency" for purposes of the statute, thus neither the State nor County legislatures are required to conduct contested case hearings pursuant to the statute. This is true even if a different body like the LUC or a planning commission would be required to conduct a contested case hearing for the same permit.

While the requirement to conduct a contested case hearing as discussed in the *Town v. LUC* case is applicable to the State Land Use Commission, which is an agency and subject to HRS, Chapter 91, the state land use district boundary amendment procedures adopted by the Counties of Hawai`i and Maui are more akin to the City and County of Honolulu's special management area use permit procedures which the

Hawai`i Supreme Court examined in the *Sandy Beach Defense Fund v. City and County of Honolulu* case (**773 P.2d 250 (1989))**. In that case, the Court recognized that the Honolulu City Council processed permit applications under the procedures set forth in Chapter 33 of the Revised Ordinances of Honolulu. Similar to the state land use district boundary amendment procedures utilized by Hawaii and Maui Counties, the Honolulu Department of Land Utilization reviewed permit applications, held hearings on the applications and transmitted their findings to the City Council for decision-making.

In the *Sandy Beach* case, the court held that the City Council, as the legislative body of the County, was not subject to HRS Chapter 91, and that the Coastal Zone Management Act, the underlying statute at issue, did not require the City Council to conduct contested case proceedings in issuing SMA use permits. The Court further found that neither the language nor the legislative history of the CZMA supported the Appellants' contention that the City Council was required to conduct contested case hearings in SMA use permit proceedings. Rather, it was apparent to the Court that the legislature in HRS § 205A–29 allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMA use permit applications, as is the case with the delegation of authority in HRS § 205-3.1 applicable to state land use boundary amendment procedures.

The Court further held that the City Council's practice of holding public hearings rather than contested case hearings did not violate the appellants' constitutional rights to due process or equal protection. The Court stated: "Appellants argue . . . they were entitled to the full panoply of contested case procedures including cross-examination of witnesses, findings of fact and conclusions of law limited to the evidence, and prohibition on ex parte communications by decisionmakers. We disagree that a trial-type adjudicatory hearing was mandated by the constitution in this case and conclude that the hearings provided Appellants were consistent with the requirements of procedural due process."

Thus, the Hawaii Supreme Court made clear that a contested case hearing was not required for the issuance of a Special Management Area permit by the Honolulu City Council, and that the constitutional rights of the Appellants were not violated by utilizing a process different than what was required in HRS Chapter 91.

The holding in *Sandy Beach* would apply to district boundary amendments, as both SMA permits and boundary amendments require consideration of the constitutional rights of certain members of the public. *Sandy Beach* stands for the proposition that a contested case hearing is not the exclusive method by which a body may decide approvals that may affect the rights of members of the public. In fact, the method utilized by the Hawaii and Maui County Councils is similar to the process that was upheld in *Sandy Beach*.

Finally, it is worth noting that the proposed changes to HRS § 205-3.1 merely increase the size of certain boundary amendments that counties may determine. County legislatures have been reviewing and determining district boundaries for areas under 15 acres since 1986 and the continuation of this practice for larger areas for affordable projects is consistent with Hawaii law

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

# LAND USE COMMISSION

DAVID Y. IGE
GOVERNOR

DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM
OFFICE OF PLANNING & SUSTAINABLE DEVELOPMENT

DANIEL ORODENKER
EXECUTIVE OFFICER

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February 10, 2022

LATE

Statement of
**Daniel E. Orodenker**
**Executive Officer**
State Land Use Commission

Before the
**House Committee on**
**Consumer Protection and Commerce**

Friday February 11, 2022
2:00 PM
State Capitol, Room 329 Virtual Video Conference

In consideration of
**HB 1840 HD1**
**RELATING TO DISTRICT BOUNDARY AMENDMENTS**

Chair Johanson; Vice Chair Kitagawa; and members of the House Committee on Consumer Protection and Commerce:

The Land Use Commission opposes HB 1840 HD1. The proposed measure seeks to allow the counties to approve State district boundary amendments up to 50 acres from 15 acres. The LUC believes that the justification for this bill is unsupported by any empirical data, lacks clarity as to purpose, severely negatively impacts comprehensive land use planning, puts many other State initiatives such as food security and clean energy self-sufficiency at risk and will not accomplish its purported purpose of increasing affordable housing.

At the outset it should be noted that between 2000 and the present, the LUC has approved over 40,000 homes with only a relatively small percentage actually built and/or have not begun the development process. This is a clear indication that the State approval process is only a small factor in the housing problem facing the State of Hawai‘i.

In a prior session, SB3104 (SLH2020) was introduced to address housing issues. That Omnibus bill was the culmination of discussions with all of the interested public and private sector groups involved in or concerned with the housing crisis. A minor increase to County jurisdiction was proposed but only for 100% affordable housing projects and HRS Chapter 201H affordable housing projects. This measure would grant many of the proposed changes from SB3104 (SLH2020) without commensurate negotiated safeguards.

Significantly, this bill will not result in any cost or time savings to developers that would stimulate affordable housing projects. Developers will still have to meet HRS Chapter 343 requirements and contested-case hearings can't be avoided as a matter of law. It should be recognized that the LUC process is not expensive, nor does it cause any significant delay to project development. Once a petition is deemed complete the LUC has 365 days to render a decision, often dispensing with the matter in one or two hearings within 4-6 months from filing. Costs are therefore minimal and not prohibitive.

From a planning standpoint, this measure is simply bad public policy. Hawaiʻi is unique in its land use issues. Competing uses must be carefully balanced from a State-wide perspective to ensure that the cultural rights of the community are protected, land is preserved for agricultural uses to ensure food sustainability; and that renewable energy goals are met. Releasing lands for development that are not balanced in light of important State interests is contrary to the needs of the community and good planning practices. Focusing solely on housing issues would severely impair the ability of the State to plan amongst competing needs and for its future.

This measure also poses significant risk to issues and land use needs outside of the housing crisis. We have all been made critically aware, during the course of this crisis, how important it is that Hawaiʻi have a healthy agricultural industry and that Hawaiʻi develop policies that will promote food independence and sustainability. This large-scale planning and balancing of needs does not take place at the county level. Such State-wide issues must be balanced against the need for housing. Sprawling development, rather than re-development of the already urbanized lands in Hawaiʻi will not serve Hawaiʻi well as a whole.

Further, it is also clear that the public policy goal of developing clean, renewable energy sources needs to be balanced in relation to affordable housing. This measure would jeopardize planning and initiatives by the LUC, PUC and clean energy proponents, and the Legislature itself.

Most importantly, Section 2 of this measure, which seeks to exempt re-classification of lands from HRS Chapter 91 requirements and contested case hearings is likely a violation of due process property rights embedded in the Constitution, under the Town case and the recent Mauna Kea case, and a direct violation of due process rights embodied in law. As such, the section is likely rendered invalid and contested case hearings will still have to be held before any district boundary amendment can be approved.

The counties are not set up to handle this type of proceeding making decisions via the legislative process used by its county councils. All rights of appeal and all rights to cross examine and required procedural safeguards will still have to be adhered to in order to protect constitutional rights to due process. The counties cannot grant a district boundary amendment "legislatively" without violating due process.

The LUC is also the only land use body that meets the State constitutional requirements of applying Public Trust Doctrine principles to its decisions. The public interest in water, the environment, traditional and customary practices, cultural resources, and public access rights must be taken into account in any decision-making on district boundary changes. The counties are not designed to handle these issues (which also require contested case proceedings for proper adherence to the law). The constitutional mandate cannot be met in a legislative or ministerial proceeding.

We don't believe that this measure should move forward. However, if this measure moves forward we attach the proposed language for the committee's consideration (see attached). The proposed changes would require the counties to be in compliance with constitutional requirements and those of HRS Chapter 91 in conducting contested-case proceedings for district boundary amendments.

The LUC believes that this measure will not have the intended result and will in fact cause significant harm to other equally important State initiatives. There is also a serious and very real concern that the measure is in violation of established law and won't pass constitutional muster.

Thank you for the opportunity to testify on this matter.

Proposed Amendments to HB1840 HD1

(2) If, by the date of the application, the county has adopted an ordinance that:

********

(D) Requires final action on an application for a district boundary amendment to be taken by the county legislative body and[ ~~not~~] be subject to a contested case hearing pursuant to chapter 91; and

********

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU
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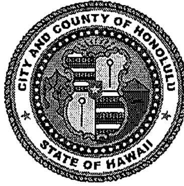
RICK BLANGIARDI
MAYOR




DEAN UCHIDA
DIRECTOR

DAWN TAKEUCHI APUNA
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

LATE

February 11, 2022

The Honorable Aaron Ling Johanson, Chair
and Members of the Committee on
Consumer Protection & Commerce
Hawaii House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Johanson and Committee Members:

**Subject: House Bill No. 1840, HD 1**
**Relating to District Boundary Amendments**

The Department of Planning and Permitting (DPP) **supports** House Bill No. 1840, HD 1, with a recommended amendment.

This Bill authorizes the counties to determine district boundary amendments (DBAs) for project areas over fifteen but less than fifty acres if the county has adopted an ordinance that meets certain requirements, including that the DBA is necessary to produce housing, 60 percent of which shall be reserved for occupants whose incomes do not exceed 80 percent of the area medium income.

We believe that this may be an efficient and useful approach to increase the development of affordable housing, which is desperately needed. However, the Legislature should carefully consider the concessions under the Bill balanced against the overall goal to provide affordable housing. For Oahu, most projects coming in under this Bill would be for reclassification of State Agricultural District lands to the Urban District, which will mean the loss of agricultural lands. We therefore suggest that the Bill be amended to prohibit DBAs on lands with good-quality production of agriculture in order to retain those lands for agricultural uses.

Thank you for this opportunity to provide testimony.

Very truly yours,

Dean Uchida
Director

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

Michael P. Victorino
Mayor

Sananda K. Baz
Managing Director

LATE

**OFFICE OF THE MAYOR**
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.mauicounty.gov

February 11, 2022

COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Aaron Ling Johanson, Chair
Rep. Lisa Kitagawa, Vice Chair
Rep. Henry J. C. Aquino Rep. Dee Morikawa
Rep. Sharon E. Har Rep. Richard H. K. Onishi
Rep. Mark J. Hashem Rep. David A. Tarnas
Rep. Sam Satoru Kong Rep. Lauren Matsumoto
Rep. John M. Mizuno

Testimony of Michael P. Victorino, Mayor, Maui County
on
H.B. 1840
Relating to District Boundary Amendments
Wednesday, February 11, 2022
2:00 P.M.
VIA VIDEOCONFERENCE
ROOM 329
State Capitol
415 South Beretania Street

As Mayor of Maui County, I support H.B. 1840. Maui County supports legislation that provides counties to meet the needs of our residents with opportunities to provide housing.

Please support amendments of H. B. 1840 authorizing the appropriate county land use decision-making authority to determine district boundary amendments involving land areas over fifteen acres but equal to or less than fifty acres according to a process to be determined by each county and subject to certain conditions. Of importance is that the district boundary amendment is necessary to produce housing and that sixty per cent of which shall be affordable housing.

Thank you for your support.

Michael P. Victorino,
Mayor, County of Maui

Contact: Stacy Crivello
Office of the Mayor
Community Liaison
808-270-1795

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

LATE

**HB-1840-HD-1**
Submitted on: 2/11/2022 8:13:00 AM
Testimony for CPC on 2/11/2022 2:00:00 PM

| Submitted By | Organization | Testifier Position | Remote Testimony Requested |
|---|---|---|---|
| Councilmember Yuki Lei Sugimura | Individual | Support | No |

Comments:

I support this as it provides for this provision to address some of our challenges of housing.   Allows the counties to make land use decision. over fifteen acres but less than 50 acres for housing projects.   Home rule may assist to expedite.

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

LATE

**HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE**
**State Capitol, Via Videoconference**
**415 South Beretania Street**
**2:00 PM**

**February 11, 2022**

RE: HB 1840, Relating to District Boundary Amendments

Chair Johanson, Vice Chair Kitagawa, and members of the committee:

My name is Daryl Takamiya, 2022 President 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 in support of HB 1840 HD1, Relating to District Boundary Amendments.**
This bill would authorize the appropriate county land use decision-making authority to determine district boundary amendments involving land areas over fifteen acres but less than or equal to fifty acres if the county has adopted an ordinance that meets certain requirements.

The bill addresses the overlapping land use entitlement process used in Hawaii. Allowing the counties to reclassify lands, especially in areas which the county has identified for urban growth, removes the time consuming process of having the state Land Use Commission reclassify the lands. The counties are responsible for identifying areas for future urban expansion, and are best suited to make these types of urban land use decisions.

We are in support of HB 1840 HD1, and appreciate the opportunity to provide our comments on this matter.

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