HB 792

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA J. FUDDY, A.C.S.W., M.P.H
ACTING DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
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In reply, please refer to:
File:

HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

HB792, RELATING TO THE ENVIRONMENT

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Acting Director of Health

February 3, 2011

Department's Position: The Office of Environmental Quality Control supports the intent of HB792. However, we feel that there is language in the measure that requires further clarification.

Fiscal Implications: Supplemental Environmental Assessments are not specified in Chapter 343, Hawaii Revised Statutes (HRS) and Chapter 11-200, Hawaii Administrative Rules (HAR). The proposed amendments by HB792 will require funding to conduct statewide rulemaking hearings.

Purpose and Justification: HB792 requires a supplemental environmental assessment (EA) or supplemental environmental impact statement (EIS) to be provided if an action by an agency or applicant is anticipated to have a significant effect on the environment. The bill also amends Chapter 343, HRS, by adding new terms and definitions, discussing discretionary versus ministerial approvals, and language to proceed directly to the environmental impact statement preparation notice when an action is determined to be significant.

As a result of the recent appellate decisions in the Turtle Bay case, the need for supplemental statements is being carefully scrutinized by this body. While Section 11-200-26, HAR specify when supplemental statements are prepared, Section 343-5, HRS does not specify a mechanism as to how and when a review on the need for a supplemental statement takes place. The Office respectfully suggests

that language be included in Section 343-5, HRS, that provide for the acceptance of a final environmental impact statement with the proviso that the entity/agency processing the acceptance/non-acceptance of the final environmental impact statement, periodically ascertain the implementation status of the action to determine if a supplemental statement needs to be prepared. Section 11-200-27, HAR, already specifies that a supplemental statement will proceed on the existing administrative track. The same section also requires that the Office of Environmental Quality Control be notified if the entity/agency determines that one is not required (which is published as a Section 11-200-27 determination without an environmental assessment).

HB792 also establishes new definitions and proposes new processes. OEQC is concerned with language on page 21, lines 13 to 17. As noted in Section 11-200-11.2, HAR, the environmental impact statement preparation notice (EISPN) is a determination that is supported by an environmental assessment. The proposal to proceed directly to the EISPN determination must necessarily include the process by which an approving agency (for applicant actions under Section 343-5(c), Hawaii Revised Statutes) or a proposing agency (for agency actions under Section 343-5(b), HRS) will prepare the environmental assessment used to support the EISPN notice of determination that a project's impacts will be significant and therefore will require an EIS.

If a majority of the public and stakeholders want to proceed directly to a draft environmental impact statement, Section 343-5, HRS, would need to be amended to allow for such a process, as the rules promulgated by the Environmental Council are entrenched in a law that mandates the preparation of an environmental assessment as the norm.

We hope the concerns we raised will be clarified and help with the dialogue and progress of this bill.

Thank you for the opportunity to testify.

HB 792

THE GENTRY COMPANIES

February 3, 2011

The Honorable Hermina Morita, Chair,
and Committee Members
House Committee on Energy and Environmental Protection
State Capitol
Honolulu, HI 96813

Dear Chair Morita and Members:

RE: H.B. 792 RELATING TO THE ENVIRONMENT

Gentry Homes, Ltd. strongly supports H.B. 792, the purpose of which is to clarify certain provisions of Chapter 343, Hawaii Revised Statutes. We are especially supportive of the provisions in the bill which clarify the following:

- That the environmental review process outlined in Chapter 343 is a non-regulatory public disclosure system; it is *not* a permit.
- The definition of "discretionary" consent and "ministerial" consent.
- EAs, EISs and SEISs are not applicable to "ministerial" consents.
- Circumstances under which an SEIS would be triggered, what should be contained in the SEIS, and processing of the SEIS.
- For phased projects or projects developed over time, the accepted EA/EIS would remain valid as long as the discretionary consent for which the EA/EIS was prepared is still in force. The exception would be when the responsible agency determines that a SEA or SEIS would be required due to substantial changes in the agency or applicant action which are anticipated to have a significant effect.
- Agencies may waive requiring an SEA or SEIS if substantial changes are addressed in existing studies and reports that provide sufficient updated information for the government agency to make an informed decision
- The use of government owned rights-of-ways solely for utility and access connections shall not require an EA or an EIS.
- The requirement of an SEA or SEIS shall not invalidate any existing discretionary or ministerial consents that were previously issued for the applicant's action.

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- Applicants may proceed directly to an EIS instead of having to prepare both an EA and an EIS.

We have worked closely with the Land Use Research Foundation and others in trying to offer solutions to some of the major challenges that we face due to the "Turtle Bay decision" and other Chapter 343-related decisions. We concur with testimony that LURF has presented and strongly urge you to pass this bill out of Committee.

Mahalo for your consideration.

Sincerely,

GENTRY HOMES, LTD.

Debra M. A. Luning
Director of Governmental Affairs and Community Relations

HB 792

Denise Antolini
59-463 Alapi`o Road Pūpūkea, O`ahu 96712
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Hearing on HB792
House Committee on Energy and Environmental Protection
Hearing: Feb. 3, 2011 8:30 am
Conference Room 325

Dear Chair Morita, Vice-Chair Coffman, and Members of the Committee:

I write in **OPPOSITION to HB792**, which would, without justification, essentially repeal the Hawaii Supreme Court's unanimous decision in the Turtle Bay decision (April 8, 2010) and undermine the Environmental Council's rulemaking authority. The Court's decision clarified when a supplemental environmental impact statement (SEIS) is required under the administrative rules (H.A.R. §§ 11-200-26 & -27) promulgated in 1985 by the State Environmental Council pursuant to the state environmental review law (H.R.S Chapter 343 or "HEPA").

Those administrative rules currently require a SEIS when an action has "changed substantively in size, scope, intensity, use, location or timing, among other things." H.A.R. § 11-200-26. The rules require the accepting authority or approving agency to "be responsible for determining whether a supplemental statement is required," H.A.R. § 11-200-27, based upon the factors of scope, intensity, un-implemented mitigation, or "where new circumstances or evidence have brought to light different or likely increased environmental impacts not previously dealt with." The rules also prescribe the content requirements for the supplemental document, H.A.R. § 11-200-28, and provide for the same 30- and 45-day public review periods as required for other draft review documents. H.A.R. § 11-200-29.

In its decision, the Hawaii Supreme Court endorsed the Environmental Council's authority to "guide the SEIS process," Slip Op. at 52, through its administrative regulations and found that allowing an "outdated EIS to 'remain valid in perpetuity' directly undermines HEPA's purpose." Id. at 61. It explained that "[a]ny other result would be both absurd and contrary to public policy in Hawaii," id. at 60, and that "ignoring the implicit time condition dictated by the anticipated life of project upon which an original EIS has been based would allow unlimited delays and, in turn, permit possible resulting negative impacts on the environment to go unchecked." Id. at 60. Thus, the Court upheld the Council's rules requiring that a supplemental statement be prepared when an agency has "new evidence that was not considered at the time" of the original review if that new information "could likely have a significant impact on the environment." Id.

The Court's ruling strongly endorsed the Environmental Council's 25-year-old administrative rules for supplemental documents. The Court found that the City and County of Honolulu Department of Planning and Permitting (DPP) had simply failed to take a "hard look" at the evidence that the Turtle Bay EIS was over 20 years out of date, id. at 65, given the significant new information with respect to traffic, monk seals, and green sea turtles. Id. The Court carefully limited its ruling to "the particular circumstances in this case." Id. at 62 (emphasis by the Court).

The sky did not fall. One month after the decision, in May 2010, DPP apparently revised its "Environmental Checklist" (used to determine compliance with Chapter 343) to specify when a SEIS is needed, providing the agency a rational process to fill the gap identified by the Court's decision. Turtle Bay Resort itself has since commenced the court-ordered SEIS process and now "support[s] the SEIS undertaking." (Letter of Jan. 28, 2011.)

HB792 is a radical alteration of existing law, proposes unacceptable limitations on the supplemental review process, eliminates changes in timing as a trigger for supplementation, severely limits public participation that is otherwise encouraged by HEPA, and sets up a bizarre automatic approval process. By seeking to overturn the Court's well-considered opinion, upsetting ongoing agency and applicant adaptation to the ruling, and over-riding the Environmental Council's long-standing administrative rules and its recently initiated rule review process, the proponents of HB792 are over-reacting and over-reaching.

HB792 also makes various other fragmented and unnecessary amendments to Chapter 343, such as eliminating rigorous agency oversight of the environmental assessment preparation process (p. 16) and cutting judicial review to only 30 days (p. 22), while adding a patina of rationality by cherry-picking a few of the worthwhile proposed amendments from the UH Study and Working Group process described below. This kind of piecemeal alteration of Chapter 343 is one-sided, risky, and should be deferred in favor of a rational, balanced, and integrated approach to reforming the Hawaii's environmental review system.

I served as a co-principal investigator of the University of Hawaii (UH) research team that conducted a two-year study of Hawaii's environmental review system at the request of the State Legislature (Act 1, 2008). The UH study team submitted its *Final Report on Hawaii's Environmental Review System*[1] to the Legislature in October 2010. The Report included specific legislative recommendations to amend Chapters 341 and 343 based on the UH study, as modified during the 2010 Session by the collaboration of the diverse twelve-member "SB2818 Working Group," convened by Senator Gabbard.

The UH study and the Working Group took a holistic view of numerous areas of concern about the current environmental review system and proposed comprehensive inter-connected amendments, which the Working Group (after six weeks of intensive facilitated meetings) separated into two proposed draft bills: one to amend Chapter 341 (to strengthen OEQC and the Environmental Council) and one to amend Chapter 343 (omnibus amendments).[2]

In my view, of the cacophony of "environmental review" bills submitted this session, the only two bills at this time that are urgently needed and reflect the balanced findings of the UH study and the strong support of the Working Group relate to revising only Chapter 341: *SB729* (strengthening OEQC and the Environmental Council) and *SB699* (creating a fee-based special fund for modernizing OEQC). Both of these bills are scheduled for hearing by EEP on February 3, 2011 at 3:30 p.m. and should be supported by this Committee after cross-over.

Before the Legislature looks at any major reforms to Chapter 343, it should first allow the new OEQC Director to settle into office while legislatively strengthening the capacity OEQC and the Council by **supporting SB729 and SB699**.

Please **defer HB792**. Thank you.

Emailed to: ENEtestimony@capitol.hawaii.gov

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[1] A copy of the report and background documents is available at: http://hawaiieisstudy.blogspot.com/

[2] The Working Group's proposed bills, which had strong but not complete consensus, are included in the Final Report as Appendices 10 and 11. Due to the lateness of the session, neither proposed bill was formally considered by EEP or ENE.

HB 792

Sierra Club
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HOUSE COMMITTEE ON ENERGY & ENVIRONMENTAL PROTECTION

February 3, 2011, 8:30 A.M.
(Testimony is 5 pages long)

TESTIMONY IN STRONG OPPOSITION TO HB 792

Chair Morita and Members of the Committee:

The Sierra Club, Hawaii Chapter, with 8000 dues paying members and supporters statewide, ***strongly opposes*** HB 792. This proposal reverses the unanimous Hawai'i Supreme Court decision made in the Turtle Bay matter. It would weaken our three-decade old Hawai'i Environmental Protection Act, not only by adding needless ambiguity but also by allowing stale projects to evade public participation regardless of changes to the community or environment.

We also believe any changes to our environmental review law should be done in a comprehensive fashion -- such as the recommendations made by last year's working group -- instead of being done in a piecemeal fashion. If this Committee wants to push through real, comprehensive improvements to Chapter 343 (Hawai'i's Environmental Protection Act or "HEPA"), then it should incorporate the recommendations made after consulting with hundreds of attorneys, planners, developers, city and state officials, and interested citizens.

I. The Purpose of Hawai'i's Environmental Review Process.

Courts have repeatedly affirmed the strong public purpose served by Hawai'i's environmental review process.

> [T]he law requires that government give systematic consideration to the environmental, social and economic consequences of proposed development projects prior to allowing construction to begin. ***The law also assures the public the right to participate in planning projects that may affect their community.***

Sierra Club v. Dep't of Transportation ("Superferry I"), 115 Hawai'i 299, 306, 167 P.3d 292, 299 (2007).

Such a process is intended to "ensure that environmental concerns are given appropriate consideration in decision making" so that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole." Haw. Rev. Stat. § 343-1 (1993). *See also Citizens for the Protection of the N. Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 104, 979 P.2d 1120, 1130 (1999); *Kahana Sunset*, 86 Hawai'i at 70, 72, 947 P.2d at 382, 384 (recognizing the purpose of HEPA's "action-forcing procedures" is "to provide the agency and any concerned member of the public with the information necessary to evaluate the potential environmental effects of a proposed action").

II. Timing

The timing of a project has been a longstanding trigger for a supplemental environmental review. Hawai'i's Environmental Council rules expressly reference the issue of timing, specifically stating "no other statement for that proposed action shall be required, to the extent that the action has not changed substantively in size, scope, intensity, use, location or ***timing***, among other things," HAR § 11-200-26 (emphasis added).

HB 792 deliberately seeks to remove the "timing" language out of the law. This proposal is so restrictive, narrow, and rigid that it ignores the fundamental purpose of environmental review and allows a supplement ***if*** and ***only if*** the project design changes. Without a significant design change, an agency *cannot* require a SEIS, even if there are "increased environmental impacts" or "new circumstances or evidence (which bring) to light different or likely increased environmental impacts not previously dealt with." HAR § 11-200-27. Such a cramped directive ignores the strong public purpose of encouraging public participation in the planning process, consideration of potential new impacts, and disregards illustrative statutory language from other jurisdictions.

Given the purpose of HEPA, there is no logical reason to distinguish between significant changes to the anticipated environmental impacts of a development project that arise from changes to the design of the project itself, changes to conditions surrounding the project, or the discovery of new information.

Under HB 792, an environmental review document would be valid in perpetuity and no SEIS could ever be required -- even if the discovery of new information brings to light significant environmental impacts that had not been previously disclosed -- ***so long as no substantive changes to the design of the project were made.***

HB 792 would undue years of litigation, and would be tantamount to eliminating all supplemental review. As a practical matter, any developer could simply avoid changes to the design of a project, regardless of changes to the physical surroundings, impacts on the community, or potential environmental or health consequences of an "outdated" design, in order to avoid the potential of further review. Such a restrictive interpretation of the law cuts against

both the fundamental purpose of environmental review -- encouraging informed decision making, public discourse, and disclosure of potential harms -- and the actual language of the statutory and regulatory framework.

Imagine the possibilities. An earthquake could occur, destroying off roads to and from the proposed project. Or a nearby community could quadruple in size, thus causing significant traffic slowdowns. Or newly discovered information could arise about the introduction of a devastating invasive species. None of these scenarios would matter under HB 792. So long as the design of the project doesn't change, the public wouldn't have the right for an updated environmental review document.

Some of the proponents of HB 792 predicted doom and gloom as a result of the Turtle Bay decision. To the contrary. No project has fundamentally changed as a result of the decision. In fact, the end result of the Turtle Bay decision has been positive. The new owners of Turtle Bay have embraced the result. A January 28, 2011 letter from the new owner of Turtle Bay acknowledged "a succession of owners failed to achieve the expectations that were set."

> While the SEIS was a result of a decision by the Hawai'i Supreme Court, just as importantly, it reflected the coordinated effort of various stakeholders motivated to ensure the responsible development of the resort. ***We support the SEIS undertaking.***

(emphasis added).

III. Section 2 "Findings and purpose."

The remaining revisions to Chapter 343 appear deliberately intended to create ambiguity, perhaps in an effort to undermine decades of precedent, instead of providing clarity. For example, HB 792 interjects a new term like "discretionary approval" in Section 2 without a corresponding definition. It also incorrectly states that an environmental review document does not consider "mitigation measures and economic and technical considerations . . . ." The longstanding definition of an environmental impact statement says that it

> discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

Stating that the environmental impact statement doesn't give "appropriate consideration" to these issues is flatly contradictory to the entire intent and purpose of HEPA.

IV. Section 3 "Definitions."

Most of the proposed definitions in HB 792 would sow ambiguity and confusion.

For example, the accepted definition of "discretionary consent" is "consent, sanction, or recommendation from an agency for which judgment, deliberation, and free will may be exercised by the issuing agency, as distinguished from a ministerial consent." HB 792 would turn this definition on its head, however, by defining "ministerial consent" as agency action "without the use of ***extensive*** judgment or discretion." This flies in the face of well-accepted legal definition of "ministerial," that is, "of or relating to an act that involves obedience to instructions or laws instated of discretion, judgment, or skill," *Black's Law Dictionary* (7th Ed. 1999). There is no discretion or judgment exercised in a ministerial decision.

HB 792's proposed definition would create immediate controversy as interpretations of ministerial vs. discretionary action would be subject to an entirely subjective debate as to whether "extensive judgment or discretion" was exercised.

There are other examples of increased ambiguity in HB 792. For instance, "applicant action" is defined by referencing "discretionary approval." This is an undefined term. "Discretionary approval" is a new introduction which raises concerns as to why the well-interpreted phrase "discretionary consent" was ignored.

V. Section 5 "Applicability and requirements."

This section attempts to undue the Supreme Court decision involving Koa Ridge, where the Supreme Court determined a large reclassification of agricultural land would require an environmental impact statement because of a proposed connection to the State Highway system. This decision made sense -- large subdivisions, with thousands of new cars and homes on prime farmland, should be subject to an environmental review.

HB 792's indirect attempt to limit the scope and reach of our environmental review system should be rejected.

VI. Proposed Amendments.

To the extent this Committee wishes to proceed with 343 changes, we suggest adopting the Environmental Review Working Group recommendations. These proposals reflect the consensus opinion after hours of careful review and objective discussions. While the Sierra Club has several objections with the Environmental Review Working Group's recommendations, we

recognize it represents the most balanced proposal to date that incorporates recommendations from developers, conservationists, land use planners, and land use experts.

In lieu of adopting the Working Group recommendations, we respectfully ask this Committee to defer this bill indefinitely. Mahalo for the opportunity to testify.