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Statement of
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before the
HOUSE COMMITTEE ON WATER AND LAND
Monday, February 11, 2013
8:30 AM
State Capitol, Conference Room 325

in consideration of
HB 1470
RELATING TO LAND USE

Chair Evans, Vice Chair Lowen, and Members of the House Committee on Water and Land.

The Office of Planning (OP) offers the following comments on HB 1470, which makes several amendments to the land use commission (“LUC”) decision-making criteria for district boundary amendments enumerated under Hawaii Revised Statutes (“HRS”) § 205-17. As discussed below, the bill obfuscates the LUC’s role in the statewide planning and land use system, and it removes the State’s opportunity to address reasonably foreseeable project impacts to areas of statewide concern early in the planning process.

HRS Chapter 205 is Hawaii’s land use law. The purpose of the land use law is to “preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare[.]”¹ All lands in the state are placed into four major land use districts: urban², rural³, agricultural⁴, and conservation⁵. Approximately 5 percent

¹ See L. 1961, c 187, § 1.

² The urban district allows all uses determined by each of the various counties. See HRS § 205-2(b).

³ Rural districts are restricted to activities or uses as characterized by low density uses. See HRS § 205-2(c).

of state lands are designated urban, less than one-half of a percent are rural, and about 95 percent of land in the state is agricultural and conservation, about equally split between the two.

As is the case, most landowners in the state have undeveloped lands in the agricultural district. Consequently, in order to develop said lands, a landowner is required to appear before the LUC for a district boundary amendment for lands greater than fifteen acres.⁶ A district boundary amendment proceeding is a quasi-judicial process where nine commissioners are presented with evidence and arguments supporting the re-designation of a property from the agricultural to the urban district.

The commissioners must consider a set of criteria under HRS § 205-17, which includes the following “areas of state concern” under subsection (3):

- (A) Preservation or maintenance of important natural systems or habitats;
- (B) Maintenance of valued cultural, historical, or natural resources;
- (C) Maintenance of other natural resources relevant to Hawaii's economy, including agricultural resources;
- (D) Commitment of state funds and resources;
- (E) Provision for employment opportunities and economic development; and
- (F) Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups[.]

The proposed bill would remove this entire subsection from the LUC’s consideration. In essence, the LUC would no longer consider areas of state concern such as a proposed project’s impacts on state highways and water resources. This would also remove the State’s opportunity to consider long-range planning issues related to a proposed development project at the earliest practicable time. Avoiding, mitigating, and minimizing impacts from proposed projects are less

⁴ Agricultural districts are primarily for agricultural uses; however, the legislature has allowed a growing list of non-agricultural uses such as energy facilities. See, e.g., HRS §§ 205-2(d), 205-4.5. Landowners may also apply to the counties or the state land use commission for a special permit, which is generally freely granted and allows all sorts of non-agricultural uses. See HRS § 205-6.

⁵ Conservation districts are limited to uses such as protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; and open space. Certain other uses are allowed by conservation district use permits issued by the Board of Land and Natural Resources. See HRS § 205-2(e).

⁶ See HRS § 205-4.

costly for developers and the State if it occurs early in the planning process, prior to permitting, zoning, and subdivision.

Integrated into Hawaii’s land use law is the State planning system. As the law is currently written, the LUC must also consider “[t]he extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan and relates to the applicable priority guidelines⁷ of the Hawaii state plan and the adopted functional plans⁸[.]”⁹ In addition, the LUC is specifically required to implement the State Planning Act through its decision-making, as follows:

State programs that exercise regulatory powers in resource allocation shall include but not be limited to the land use and management programs administered by the **land use commission** and the board of land and natural resources. State programs shall further define, implement, and be in conformance with the overall theme, goals, objectives, and policies, and shall utilize as guidelines the priority guidelines contained within [HRS Chapter 226, *Hawaii State Planning Act*], and the state functional plans approved pursuant to this chapter.¹⁰

It is unclear why the bill adds the following language to HRS § 205-17, “the absence of a priority guideline or functional plan applicable to the proposed reclassification shall not be grounds for the LUC to defer a decision on the petition to the applicable county pursuant to its county general plan, or community development plans¹¹ adopted pursuant thereto[.]” The LUC must weigh all the criteria enumerated under HRS § 205-17, this includes consideration of county general and community plans. The functional plans, general plans, and community plans

⁷ Priority guidelines are adopted by the legislature, signed into law by the governor, and codified under HRS §§ 226-101, *et seq.* The State’s Priority guidelines are (1) economic priority guidelines, (2) population growth and land resources priority guidelines, (3) crime and criminal justice, (4) affordable housing, (5) quality education, (6) sustainability, and (7) climate change adaptation priority guidelines. See Id. Priority guidelines “take precedence when addressing areas of statewide concern.” See HRS § 226-2.

⁸ State functional plans are prepared by the “state agency head primarily responsible for a given functional area.” See Id. Functional plans “identify priority issues in the functional area and shall contain objectives, policies, and implementing actions to address those priority issues.” See Id.

⁹ See HRS § 205-17.

¹⁰ See HRS § 226-52 (emphasis added).

¹¹ “County general plan” is defined as “the comprehensive long-range plan or development plan, if any, which has been adopted by ordinance or resolution by a county council.” See HRS § 226-2. “County development plan” is defined as “a relatively detailed plan for an area or region within a county to implement the objectives and policies of a county general plan.” See Id. These may also be referred to as community plans.

are all part of the State planning system. Both the State land use law and State planning system require that the LUC consider the extent to which the LUC's final decision conforms to the aforementioned plans.¹² If a functional plan or priority guideline is not applicable to a particular project proposal before the LUC, then it would not be given much weight by the LUC. However, if a county general or community is directly related to decision-making then those plans would be given more weight.

Thank you for the opportunity to testify.

¹² "Conform" is defined as "the weighing of the overall theme, goals, objectives and policies of this chapter and a determination that an action, decision, rule or state program is consistent with the overall theme, and fulfills one or more of the goals, objectives, or policies of [the State Planning Act]." See HRS § 226-2.



HB1470
RELATING TO LAND USE
House Committee on Water & Land

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Room 325

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB1470, which **would allow the State Land Use Commission (LUC) to ignore the impacts to cultural, historical, and natural resources when the LUC reviews a petition for reclassification of a district boundary.** By not having to consider the impacts of its decision on the future use of a parcel, the State would lose a critical check on development and the public would lose an opportunity to voice concerns over the compatibility and effects of a project proposed in their community.

HB1470 opens the door to unfettered development contrary to the state-wide zoning system the LUC is tasked to administer. The current law requires the LUC to make specific findings that a proposed boundary is consistent with criteria in HRS § 205-17, when the LUC reviews a petition for reclassification of a land district boundary. Among other requirements in HRS § 205-17, the LUC must consider impacts to six “areas of state concern,” as provided in HRS § 205-17(3). These areas of concern cover a range of issues: impacts to agricultural resources, employment opportunities, preservation of habitats, commitment of state funds, and impacts to low income housing opportunities. HB1470 strikes out all of the impacts listed in HRS § 205-17(3), so the LUC would no longer need to consider any of these impacts in deciding on a reclassification petition.

In addition to the aforementioned areas of concern, OHA is particularly alarmed by the elimination of “maintenance of valued cultural, historical, or natural resources” as a consideration in a reclassification of land. HRS § 205-17(3)(B). In 2000, the Hawai’i Supreme Court in Ka Pa’akai O Ka ‘Aina v. Land Use Commission held that this specific language, as well as Article XII § 7 of the Hawai’i Constitution, “place[s] an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights[.]” The Court in Ka Pa’akai went on to outline an analytical framework for meeting the State’s obligation to protect Native Hawaiian customary and traditional practices while reasonably accommodating competing private interests. **Given the joint statutory and constitutional basis of the Ka Pa’akai decision, the proposed amendments in HB1470 would not relieve the LUC of its obligation to conduct a Ka Pa’akai analysis, but would create**

uncertainty by removing this requirement from the statute and the doing away with the mechanism for gathering information on the traditional and customary practices of an area affected by a proposed reclassification.

Although the range of factors considered under HRS § 205-17(3) may impose a burden on the LUC when reviewing a petition, the state-wide consequences of improperly planned development are even greater. Accordingly, OHA urges the committee to **HOLD** HB1470. Mahalo for the opportunity to testify on this important measure.