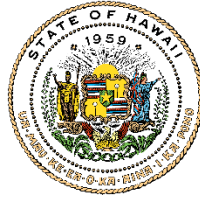


JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

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STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
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COMMISSION ON WATER RESOURCE
MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Testimony of
DAWN N.S. CHANG
Chairperson

Before the House Committee on
WATER & LAND

Tuesday, February 14, 2023
8:30 AM

State Capitol Conference Room 430 and Videoconference

In Consideration of
HOUSE BILL 1386
RELATING TO THE DEPARTMENT OF LAND AND NATURAL RESOURCES

House Bill 1386 proposes to amend Hawaii Revised Statutes (HRS) §92-2.5 and HRS §171-5 to add language to allow no more than two (2) members of the Board of Land and Natural Resources (Board) to discuss possible agenda items, and to submit those items to the chairperson for placement on the agenda. **The Department of Land and Natural Resources (Department) offers comments.**

HRS §92-2.5(a) reads:

- (a) Two members of a board may discuss between themselves matters relating to board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board.

This bill would amend HRS §92-2.5 to add paragraph (i) which will allow no more than two members of the Board to meet in private to select items to be placed on a meeting agenda. The amendment is specifically directed at the Board and no other agency. The Department believes that board members can already meet to discuss agenda items per 92-2.5 (a) cited above.

Additionally, this bill would amend HRS §171-5 to allow

no more than two of its [the Board) members to determine items that shall be placed on a meeting agenda and to submit those items to the chairperson for placement on the agenda. A discussion between the two members for the purpose of this paragraph shall

be considered a permitted interaction pursuant to HRS §92-2.5(1) provided that the discussion is limited to the selection items to be placed on the agenda and no commitment relating to a vote on any matter is made or sought

The Department reads this to mean that two members can discuss potential agenda items and present them to the chair for consideration of placement on the agenda. In all likelihood the chair would discuss these agenda items with the two members (HRS §92-2.5 (g)). Some of the factors that account for when an item is agendized include:

1. Is the request submitted timely?
2. When will staff be able to draft a board submittal with the appropriate background information in time for the proposed meeting dates?
3. Has this issue already been decided by the Board?
4. If the item is controversial and many testifiers can be expected, what other items are on the agenda, and will the agenda be manageable?
5. Is there a clock on the item?
6. What other items need to be on the agenda because they have a clock or are ripe for a board discussion?

This process is legal under current law without the need for either amendment.

On the other hand, if the intent of the amendment is that the Board elect a Permitted Interaction Group to determine the agenda for a set number of meetings, rather than the chair, this is also within the power the board without amending either HRS §92-2.5 or HRS, HRS §171-5 (See HRS §92-2.5 (b)).

If the Department is mis-reading the proposed amendment, then the Department requests that the bill be amended for clarity.

Mahalo for the opportunity to comment on this measure.

OFFICE OF INFORMATION PRACTICES

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To: House Committee on Water & Land

From: Cheryl Kakazu Park, Director

Date: February 14, 2023, 9:30 a.m.
State Capitol, Conference Room 430

Re: Testimony on H.B. No. 1386
Relating to the Board of Land and Natural Resources

Thank you for the opportunity to submit testimony on this bill, which would create a new permitted interaction within the Sunshine Law for two members of the Board of Land and Natural Resources (BLNR) to discuss what items to place on its agenda. The Office of Information Practices (OIP) offers comments and, if this Committee wishes to pass the bill out, a suggested amendment.

OIP is concerned that **this bill is not necessary, and if passed would create confusion** about what the Sunshine Law's existing permitted interactions allow. Section 92-2.5, HRS, sets out a list of permitted interactions, i.e. situations in which a stated number of board members are allowed to discuss board business outside a meeting, so long as they follow the requirements set out in the relevant permitted interaction. **One of those permitted interactions, section 92-2.5(a), HRS, already allows up to two members of any board to discuss any board business, so long as no commitment to vote is made or sought. There is no reason why two BLNR members could not use that permitted interaction now to discuss what items to place on an agenda in the same**

way the new permitted interaction would allow. Adding a new permitted interaction to specifically allow two BLNR members to discuss what to put on an agenda would confusingly imply that the existing permitted interactions do not allow this, creating confusion as to other boards' ability to have two members discuss what to include on an agenda, or other board business, outside a meeting as authorized by subsection 92-2.5(a), HRS.

OIP is further concerned about the proposed placement of a permitted interaction applicable only to BLNR in the Sunshine Law itself. When a board is provided with a special board-specific permitted interaction, executive session purpose, or other Sunshine Law exception, **the appropriate placement is not in the Sunshine Law itself but rather in the board's own governing statute.**

OIP also notes that the language proposed to be added to section 171-5, HRS, is confusing and could be read to be inconsistent with the proposed permitted interaction: the proposed permitted interaction would allow two BLNR members to discuss the agenda, while the amendment to section 171-5, HRS, would apparently allow two BLNR members "[i]n addition to the chairperson" to discuss items to be placed on the agenda, for a total of three BLNR members involved in the discussion of what should go on the agenda. **Since the proposed permitted interaction is clearly limited to two BLNR members, OIP assumes that was the bill's intent and the amendment to section 171-5, HRS, was poorly worded.**

While OIP believes this entire bill is unnecessary given the existing two-member permitted interaction provided by subsection 92-2.5(a), HRS, OIP would not object to an amendment to BLNR's own statute to confirm that two members' discussion of agenda items is authorized by the Sunshine Law.

If this Committee wishes to do that, OIP would recommend changes to clarify the confusion about the number of members involved and to refer to the correct Sunshine Law permitted interaction. Specifically, if passing out this bill, this Committee should:

- (1) delete the proposed Sunshine Law amendment set out in bill section 1 (from bill page 1 line 1 to bill page 6 line 11);
- (2) delete bill section 3 (bill page 8 lines 3-7); and
- (3) amend the proposed new language for section 171-5, HRS, from bill page 7 line 14, to read as follows:

No more than two of the board's members, one of which may be the chairperson, may determine items that shall be placed on a meeting agenda. A discussion between the two members for the purposes of this paragraph shall be considered a permitted interaction pursuant to section 92-2.5(a); provided that the discussion is limited to the selection of items to be placed on the agenda and no commitment relating to a vote on any matter is made or sought.

Thank you for considering OIP's testimony.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

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House Committee on Water & Land
Honorable Linda Ichiyama, Chair
Honorable Mahina Poepoe, Vice Chair

**RE: Testimony Commenting on H.B. 1386, Relating to the
Board of Land and Natural Resources**
Hearing: February 14, 2023 at 8:30 a.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **commenting on H.B. 1386**.

The bill proposes to create a permitted interaction group to allow no more than two members of the Board of Land and Natural Resources (BLNR) to discuss items to be placed on a BLNR agenda. *This bill is unnecessary.*

First, no more than two board members of any board can discuss anything, including items to be placed on an agenda. HRS § 92-2.5(a).

Second, any number of board members for any board may discuss what items are to be placed on an agenda, so long as there is no substantive discussion of the agenda item itself. *E.g.*, OIP Op. No. F19-03 at 9 n.10 (“using e-mail for routine, administrative matters such as scheduling purposes may be permissible under the Sunshine Law.”); OIP Op. No. 04-01 at 10-11 (adding item to agenda is routine administrative matter so long as discussion is not substantive).

Thank you again for the opportunity to comment on H.B. 1386.