

ACT 173

H.B. NO. 589

A Bill for an Act Relating to Renewable Energy Facilities.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that Hawaii's dependence on petroleum for over ninety per cent of its energy needs is greater than any other state in the nation. This makes the State extremely vulnerable to any oil embargo, supply disruption, international market dysfunction, and many other factors beyond the control of the State. Furthermore, the continued consumption of conventional petroleum fuel and price volatility can negatively impact the environment and economic health of the people of Hawaii. At the same time, Hawaii has among the most abundant renewable energy resources in the world, in the form of solar, geothermal, wind, biomass, and ocean energy assets.

The legislature also finds that increased energy efficiency and use of renewable energy resources would increase Hawaii's energy self-sufficiency, achieving broad societal benefits, including increased energy security, resistance to increases in oil prices, environmental sustainability, economic development, and job creation.

To shape Hawaii's energy and environmental future and achieve the goal of energy self-sufficiency for the State, efforts must continue on all fronts, integrating new and evolving technologies, seizing upon opportunities to become more economically diversified, and providing incentives and assistance to address barriers.

To develop and finance renewable energy facilities, a site for the facilities and access to the site must often be leased, granted as an easement, or mortgaged to provide financing for the project. Renewable energy projects may require site acreage or configurations that do not coincide with existing, already subdivided lot boundaries. For instance, land required for a project may constitute only a portion of a large legal lot, and it may be impractical or undesirable to lease or convey the entire legal lot for the renewable energy project, or to encumber the entire legal lot with a mortgage that provides financing for the project. Currently,

however, subdivision laws and county ordinances generally prohibit the transfer of an interest in land that is not an entire subdivided lot or easement that has been approved by the applicable county. With respect to land in the land court system, the additional step of obtaining land court approval is required.

Reported Hawaii supreme court cases, including *Whitlow v. Jennings*, 40 Haw. 523 (1954), have recognized that transactions involving lots that have not been approved by the county pursuant to subdivision laws or county ordinances may be unenforceable. Unfortunately, the process of obtaining county, state, and land court approval of subdivision and easement maps is relatively time-consuming and often requires more than one year to complete.

As recognized by the court in the *Whitlow v. Jennings* case, the purpose of laws and ordinances requiring county subdivision approval is to protect the public by ensuring adequate light, air, fire protection, traffic safety, proper sanitation, and drainage in the proposed subdivision and the protection of innocent purchasers from buying lots upon which they could not build because of the provisions of the various health and sanitary statutes and regulations. However, these laws, ordinances, and court rulings have placed in question the validity of leases of parcels that are less than an entire legal lot, and easements without subdivision approval. This prevents or discourages the use or financing of leases and easements for renewable energy projects.

A subdivision consisting of a solar energy facility or a wind energy facility does not call for the same infrastructure requirements as a housing subdivision. Further, the legislature supports energy self-sufficiency by decreasing Hawaii's dependence on fossil fuel with renewable energy projects. On February 13, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, Public Law No. 111-5, also known as the Federal Stimulus Package, providing \$62,000,000,000 in grant funding, loan guarantees, and tax incentives for renewable energy and energy efficiency programs, including \$6,000,000,000 for new loan guarantees aimed at standard renewable projects, such as wind or solar projects, and for electricity transmission projects; \$6,300,000,000 for energy efficiency and conservation grants to help state and local governments make investments that make them more energy efficient and reduce carbon emissions; and \$500,000,000 to prepare workers for careers in energy efficiency and renewable energy fields.

The legislature further finds the original intent of subdivision laws and ordinances, Hawaii's goal for energy self-sufficiency, and obtaining financing for renewable energy projects from private or public entities can be achieved at the same time without compromising one for the other.

Accordingly, the purpose of this Act is to facilitate the financing and development of renewable energy projects by allowing leases and easements pertaining to renewable energy projects, together with mortgages and other conveyances as security for finance, to be created, enforced, and recorded, without requiring the landowner to obtain formal subdivision approval, and instead requiring approval for exemption from subdivision requirements, from the applicable county or other approving agency. This Act will also assist renewable energy projects in Hawaii to be eligible for funding under the Federal Stimulus Package.

SECTION 2. Chapter 201N, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§201N-A Exemption from subdivision requirements. (a) Notwithstanding any other law or ordinance to the contrary:

- (1) Lands within the agricultural or conservation state land use district may be leased; and
- (2) Easements may be created and granted over lands within the agricultural or conservation state land use district,

for the purpose of developing and financing a renewable energy project or accessing a renewable energy project that is a permitted use in the district, even if the leased land or easement area has not been subdivided as a separate subdivided lot or easement. Leases and easements authorized by this section shall be valid leases and easements for all purposes, but the exemption from subdivision requirements authorized by this section shall be subject to the requirements and limitations set forth in subsection (d).

(b) Without limiting the generality of subsection (a), the following may be performed without complying with subdivision requirements:

- (1) All or a portion of a legal lot may be leased as a site for a renewable energy project or access to the project;
- (2) Easements or other possessory interests, whether exclusive or non-exclusive, may be granted to use all or a portion of the legal lot as a renewable energy project site or access to the project;
- (3) Maps, leases, licenses, grants of easements, or other instruments providing for the right to use all or a portion of a legal lot as delineated on a map for a renewable energy project site or access to the project may be recorded; and
- (4) Mortgages and other security interests may be granted with respect to any lease or easement created pursuant to this section, and the holders of such mortgages or other security interests may foreclose upon the lease or easement covered and otherwise enforce the terms of the mortgage and security documents, subject to compliance with applicable laws other than subdivision requirements.

(c) The land court, bureau of conveyances, and other governmental agencies shall accept for filing and recording all instruments and maps pertaining to leases, easements, mortgages, and other security documents authorized pursuant to this section.

(d) The exemption from subdivision requirements authorized by this section shall only apply to leases and easements that meet the following requirements and shall be subject to the following limitations:

- (1) The lease or easement shall restrict the use of the leased land or easement area to the development and operation of a renewable energy project; provided that, to comply with section 205-4.6, agricultural uses and activities shall not be restricted on agricultural land;
- (2) The lease shall have an initial term of at least twenty years;
- (3) With respect to leases and easements on lands within an agricultural state land use district, the exemption from subdivision requirements provided by this section shall be for solar energy facilities permitted under section 205-2(d)(6), on land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class D or E;
- (4) With respect to leases and easements on lands within a conservation state land use district, the exemption from subdivision requirements provided by this section shall be for wind energy facilities, including the appurtenances associated with the production and transmission of wind-generated energy; and
- (5) The county agency charged with administering subdivisions in the county in which the renewable energy project is to be situated or, if the land is in a conservation state land use district, the department

of land and natural resources, shall approve the exemption from subdivision requirements within ninety days after the project's developer and the owner of the land on which the renewable energy project is to be situated have submitted the conceptual schematics or preliminary plans and specifications for the renewable energy project to the county agency or the department of land and natural resources, and have provided to such county agency or the department of land and natural resources, as applicable, a certification and agreement that all applicable and appropriate environmental reviews and permitting shall be completed prior to commencement of development of the renewable energy project. If, on the ninety-first day, an exemption has not been approved, it shall be deemed disapproved by the county agency or the department of land and natural resources, whichever is applicable.

(e) Nothing in this section shall:

- (1) Exempt the actual development, construction, or operation of any use, project, or improvement from any applicable state or county laws, ordinances, restrictions, permits, or approvals, including restrictions on allowable uses or conditions and requirements for adequate infrastructure or mitigation measures;
- (2) Exempt renewable energy projects from any permit or approval process under chapter 183C, 205, 205A, or 343;
- (3) Exempt from subdivision requirements the conveyance of any fee interest in land; or
- (4) Prevent any agency or authority that issues permits or approvals for renewable energy projects from imposing reasonable and appropriate restrictions on the type of siting, development, construction, and operation of a renewable energy project to protect agricultural resources and activities, the environment, natural resources, cultural resources and activities, or the health, safety, and welfare of the State.

(f) All agencies and authorities that issue permits or approvals for renewable energy projects may adopt rules or procedures to:

- (1) Determine the type of renewable energy project that may be allowed within an agricultural or conservation district;
- (2) Determine criteria for the appropriate siting of the renewable energy project within an agricultural or conservation district; and
- (3) Identify mitigation measures applicable to renewable energy projects to protect agricultural resources and activities, the environment, natural resources, cultural resources and activities, health, safety, and welfare of the State.

(g) This section is not intended to diminish the discretion of any agency or any authority to approve or disapprove any permit application."

SECTION 3. Chapter 201N, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§201N-B Subdivision exemptions in existence on June 30, 2013. (a) Any lease or easement (together with any mortgages or other documents encumbering either) that received a subdivision exemption that is in existence on June 30, 2013, may continue to be effective and shall continue to enjoy the exemption from subdivision requirements granted under section 201N-A after that section is repealed on July 1, 2013; provided that the following restrictions are complied with:

- (1) The terms of the lease or easement shall restrict the use of the leased land or easement area to the development and operation of a renewable energy project; provided that, to comply with section 205-4.6, agricultural uses and activities shall not be restricted on agricultural land; and
- (2) The lease shall have an initial term of at least twenty years.
- (b) Notwithstanding that the leased land or easement area is not a lot of record, the lease or easement that received the subdivision exemption may be further encumbered, or any existing encumbrance may be amended, extended, or cancelled, by recordation of a document in the bureau or the land court, as applicable, and the encumbrance shall only affect and encumber the leased land or easement area. Encumbrances shall be subject to applicable foreclosure laws, where applicable.
- (c) The lease or easement may be transferred or assigned by recordation of a document in the bureau or the land court, as applicable; provided that the restrictions in subsection (a)(1) and (2) are complied with and acknowledged by the transferee or assignee in any conveyance or assignment document.
- (d) The term of the lease or easement may be extended, and the terms and conditions of the lease or easement may be amended or modified; provided that the restrictions in subsection (a)(1) and (2) are complied with, and that any material change to the leased land or easement area shall be subject to subsection (e).
- (e) Any material change after June 30, 2013, regarding the leased land or easement area shall be subject to subdivision requirements; provided that the county agency charged with administering subdivisions (for land within the agricultural state land use district) or the department of land and natural resources (for land within the conservation state land use district) shall deem all subdivision requirements from which the lease or easement was exempt pursuant to the original subdivision exemption to be met and the lease or easement shall continue to be exempt from the requirements. The lease or easement shall only be subject to the additional subdivision requirements, if any, necessitated by the material change.
- (f) For purposes of this section:
- “Bureau” means the bureau of conveyances of the State of Hawaii.
- “Land court” means the office of the assistant registrar of the land court of the State of Hawaii.
- “Material change” means any material change affecting the location, size, boundaries, or configuration of the leased land or the easement area that would require state or county review and approval under the subdivision requirements.
- “Subdivision exemption” means the exemption to the subdivision requirements received pursuant to section 201N-A.
- “Subdivision requirements” means all state laws or county ordinances and permits setting forth standards or requirements for improvements and approvals applicable to the subdivision or consolidation of land, changes in legal boundaries, or the creation or consolidation of parcels, easements, or other interest in land.”

SECTION 4. Section 201N-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read:

““Subdivision requirements” means all state laws or county ordinances and permits setting forth standards or requirements for improvements and approvals applicable to the subdivision or consolidation of land, changes in legal

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boundaries, or the creation or consolidation of parcels, easements, or other interest in land.”

SECTION 5. In codifying the new sections added by sections 2 and 3 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 6. New statutory material is underscored.¹

SECTION 7. This Act shall take effect upon its approval; provided that sections 2 and 4 of this Act shall be repealed on July 1, 2013.

(Approved July 7, 2009.)

Note

1. Edited pursuant to HRS §23G-16.5.