PIA Committee

From: David Arakawa <darakawa@lurf.org>
Sent: Friday, September 02, 2016 11:50 AM
To: PIA Committee; Kim Willenbrink
Cc: Wynde Yamamoto; Michael Victorino; Don Couch; Mike White; Donald S. Guzman; Gladys Baisa; Robert Carroll; Elle Cochran; Stacy S. Crivello; Riki Hokama
Subject: MAUI - HSAC Leg. Pkg. - PIA Agenda Items (9) Increase Conveyance Tax and (10) Add'l LUC Enforcement - LURF Testimony in Opposition
Attachments: 160901 MAUI - 2017 HSAC Leg Pkg - Bill re Cnvy Tax for Aff Hsg Fund (PIA) - LURF Testimony (wmy).pdf; 160901 MAUI - HSAC Leg Pkg - Bill re Addtl LUC Enfcmnt Auth (PIA) LURF Testimony w-attch (wmy).pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Aloha Policy and Intergovernmental Affairs Committee of the Council of the County of Maui (PIA),

This is a follow-up to the voicemail message I left this morning, attached for submittal to the PIA for its meeting on Tuesday, September 6, 2016, are LURF's testimonies in **OPPOSITION** to:

> 9. Correspondence dated August 30, 2016, from Councilmember Elle Cochran, transmitting a proposed resolution entitled "APPROVING FOR INCLUSION IN THE 2017 HAWAII STATE ASSOCIATION OF COUNTIES LEGISLATIVE PACKAGE A BILL TO INCREASE REVENUE FOR EACH COUNTY'S AFFORDABLE HOUSING FUND THROUGH A ONE PERCENT CONVEYANCE TAX." The purpose of the proposed resolution is to approve for inclusion in the 2017 HSAC Legislative Package a proposed State bill, attached to the proposed resolution as Exhibit "A," entitled "A BILL FOR AN ACT RELATING TO THE CONVEYANCE TAX." The purpose of the proposed bill is to increase revenue for the counties' affordable housing funds through a one percent conveyance tax on the sale of residential properties over $700,000 for the next five years.
>
> 10. Correspondence dated August 30, 2016, from Committee Chair Michael P. Victorino, transmitting a proposed resolution entitled "APPROVING FOR INCLUSION IN THE 2017 HAWAII STATE ASSOCIATION OF COUNTIES LEGISLATIVE PACKAGE A STATE BILL TO ALLOW COUNTIES TO PETITION THE STATE LAND USE COMMISSION FOR REGIONAL DISTRICT BOUNDARY AMENDMENTS AFTER ADOPTION OF GENERAL PLAN UPDATES AND TO GRANT TO THE STATE LAND USE COMMISSION ADDITIONAL ENFORCEMENT AUTHORITY OVER ITS DECISIONS AND ORDERS." The purpose of the proposed resolution is to approve for inclusion in the 2017 HSAC Legislative Package a proposed State bill, attached to the proposed resolution as Exhibit "A," entitled "A BILL FOR AN ACT RELATING TO LAND USE." The purpose of the proposed bill is to expand the enforcement powers of the State Land Use Commission and to specifically allow the counties to engage in comprehensive, regional reclassification of land after the adoption of updates to the counties' general plans.

Please feel free to contact me if you have any questions.

Mahalo, Dave

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Via E-Mail

September 1, 2016

Honorable Michael P. Victorino, Chair
Honorable Don Couch, Vice-Chair,
and Members of the Policy and Intergovernmental Affairs Committee
Council of the County of Maui
County of Maui
200 South High Street, 8th Floor
Wailuku, Maui, Hawaii

Testimony in Opposition to Legislative Proposal Relating to 2017 Hawaii State Association of Counties ("HSAC") Legislative Package - Approving for Inclusion in the 2017 HSAC Package a State Bill to Increase Revenue for Each County's Affordable Housing Fund Through a One Percent Conveyance Tax (Item PIA-3(2)(9) on the Committee's Agenda).

Tuesday, September 6, 2016, at 9:00 a.m. in the Council Chamber, Kalana Pakui Building, 8th Floor, 250 South High Street, Wailuku, Hawaii 96793

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

For consideration before this Committee, is a legislative proposal requesting approval for inclusion the 2017 HSAC Legislative Package, a State bill to increase revenue for each county's affordable housing fund through a one percent conveyance tax on the sale of residential properties over $700,000 (the "Proposed Conveyance Tax Bill") (Item 3(2)(9) on the Committee's agenda).

The Proposed Conveyance Tax Bill. The bill proposes to impose a one percent conveyance tax on the sale of residential properties (condominiums or single family residences) with a value of more than $700,000. The proposed measure would take effect upon its approval and be repealed on June 30, 2022.

Based on the following reasons and considerations, LURF **opposes the Proposed Conveyance Tax Bill**, and must request that this bill **be excluded** from the 2017 HSAC Legislative Package.

Background. The proposed measure expressly states that it is intended as a method to raise revenue specifically for each county's affordable housing fund.

LURF's position is that the Hawaii Conveyance Tax was never intended as a revenue-generating tax. Hawaii Revised Statutes ("HRS"), Chapter 247 (Conveyance Tax), was purposefully enacted in 1966 to provide the State Department of Taxation ("DoTax") with informational data for the determination of market value of properties transferred, and to assist the DoTax in establishing real property assessed values. In short, the sole intent of the conveyance tax was originally to cover the administrative costs of collecting and assessing said informational data, which necessarily entails the recording of real estate transactions, as performed by the Bureau of Conveyances. As such, the conveyance tax should not be utilized as a vehicle to generate revenue, especially for non-conveyance tax-related funds and programs.

Since the enactment of HRS Chapter 247, however, the State Legislature has proposed, and has successfully implemented changes to the law 1) to allow application of conveyance tax revenue to a number of non-conveyance type uses (land conservation fund; rental housing trust fund; and natural area reserve fund ["NARF"]) to the point where there is no longer any clear nexus between the benefits sought by the original Act and the charges now proposed to be levied upon property-holding entities transferring ownership; and 2) also to impose conveyance taxes to the point where said revenues now appear to far exceed the initially stated purpose of, or need identified in the Act.

LURF's Position.

1. **The Hawaii Conveyance Tax was Never Intended to be, and should not Operate as a Revenue-Generating Tax.**

    a. **Revenues from the proposed imposition of the conveyance tax on sales of certain types of properties by a targeted group of property owners are arguably unwarranted and would not be supported by the State Auditor.**

In the recent past, sufficient general funding for the NARF has been successfully earmarked by this Legislature. Efforts, such as Standing Committee Report No. 928 dated March 11, 2013, and relating to HB 200, HD1 (the State Budget for FY2014-2015), confirm the importance of projects that preserve the State's natural resources, and the appropriation of millions of dollars by the Committee on Finance to the NARF, making supplemental funding through the conveyance tax revenue sought to be collected pursuant to this proposed bill unnecessary and unwarranted.

1) **Application of the conveyance tax revenue collected pursuant to this bill to increase the NARF and other similar funds which lack a clear nexus is arguably illegal and in violation of HRS Sections 37-52.3 and 37-52.4.**

Criteria for the establishment and continuance of special and revolving funds including the NARF, was enacted by the 2002 Legislature through Act 178, SLH 2002; HRS Sections 37-52.3 and 37-52.4. According to the law, in order to be approved for continuance, a special fund must:

- serve the purpose for which it was originally established;
- reflect a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program (as opposed to serving primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process);
- provide an appropriate means of financing for the program or activity; and
- demonstrate the capacity to be financially self-sustaining.

The first and second criteria are nearly identical to those in Act 240, SLH 1990, codified in Section 23-11, HRS, which requires the State Auditor to review, each session, all legislative bills that propose to establish new special or revolving funds.

The 2012 Auditor's Report was issued in July, 2012, and applied the criteria in HRS Sections 37-52.3 and 37-52.4 to forty-seven (47) funds and accounts that were the subject of general fund transfer authorizations during FY2009, FY2010, and FY2011, including the NARF. The Report includes an analysis of the NARF, and states:

> "...the Natural Area Reserve Fund has minimal linkage between the benefits and the fund revenue, which comes from conveyance taxes paid on real estate transactions. The fund supports programs such as the Natural Area Partnership and Forest Stewardship programs, projects undertaken in accordance with watershed management plans, and the Youth Conservation Corps. Individuals that pay this tax may benefit from the Natural Area Reserves program, but so do other Hawai'i residents and visitors to the state." (2012 Auditor's Report, p. 30)

The 2012 Auditor's Report further concluded that the NARF **did not meet the criteria for continuance, because there was no clear link between the benefits sought and user or beneficiary charges**. The Auditor further concluded that the NARF fund earmarked by the Legislature should be repealed and that the unencumbered balance should lapse to the General Fund.

In letters dated June 18, 2012 and June 22, 2012 commenting on the draft 2012 Auditor's Report, the State Director of Finance and the State Attorney General, respectively, stated that in general, they agreed with the Auditor's recommendations, and did not dispute or object to the Auditor's conclusion that the NARF did not meet the criteria for continuance as a special fund, and that the NARF should be repealed.

Despite the State Auditor's findings, conveyance tax revenue collected pursuant to this bill are nevertheless being proposed for use to increase the NARF and other similar funds which have been determined **not** to have a clear nexus between the benefits sought and charges made upon the users or beneficiaries of the program, thereby subjecting this measure to legal challenge, and the State to a possible class-action lawsuit by all parties who pay conveyance taxes to finance such fund.

Programs such as the NARF deserve funding through broad taxes on the public and the State General Fund, rather than through the conveyance tax, which targets few, is unreliable, and fluctuates with the housing market.

In its 2012 Report, the State Auditor also found that the beneficiaries of such special funds and conservation/ preservation programs are state residents as a whole, and such programs are so important that they should be supported by funding from **a broader tax on all state residents**, because of the broad state benefit.

As explained in the 2012 Auditor's Report:

> "Designating revenue for specific purposes flows from the "benefit theory" of public finance, which postulates that those who benefit from a program should pay for it. Revenue earmarking is more defendable when there is a clear benefit-user charge as opposed to when there is no such linkage and earmarking is used solely as a political shield to protect a program by providing it with an automatic means of support." (2012 Auditor's Report, p. 28)

The Report also found that the NARF fell into the category of a "revenue earmark" with "no clear benefit-user charge" and that the NARF "is used solely as a political shield to protect a program by providing it with an automatic means of support." (*See* 2012 Auditor's Report, p. 28)

Moreover, because the conveyance tax is dependent on activity in the real estate market, it is considered an undependable source and should not be relied upon to fund important programs.

2) **Existing Legislation Supports the Impropriety of Channeling Conveyance Tax Revenue Obtained from a Targeted Group to Special Funds or Programs.**

During the 2013 Hawaii legislative session, HB 504 (now Act 130 (SLH 2013)) also directly addressed the issue relating to use of special funds and reinforced the requirement that special and revolving funds must reflect a clear link between the program funded and the source of revenue. The principles underlying Act 130 are clear, and the measure settles without question, the fact that special, revolving, and trust funds must, amongst other things:

a) **serve a need** as demonstrated by the purpose of the program to be supported by the fund; the scope of the program; and an **explanation of why the program cannot be implemented successfully under the general fund appropriation process**; and

b) **reflect a clear nexus** between the benefits sought and charges made upon the program users or beneficiaries; or a clear link between the program and the sources of revenue, **as opposed to serving primarily as a means to provide the program or users with an automatic means of support that is removed from the normal budget and appropriation process**.

As applied to the Proposed Conveyance Tax Bill, Act 130 thus makes it unequivocally clear that it is improper to channel conveyance tax revenue obtained through assessments randomly targeted at a specific group of property owners to special, revolving, or trust funds/programs with no nexus or clear link to the sources of revenue. Moreover, emphasis is put on the requirement that special funds be supported when and if at all possible, through the general fund appropriation process rather than through a means removed from the normal budget and appropriation process.

b. **If Required, Alternative, More Appropriate Methods Exist to Secure Revenues for Special, Revolving, and Trust Funds.**

In lieu of improperly imposing the conveyance tax to particular sales of certain types of properties, proponents of the Proposed Conveyance Tax Bill seeking to increase revenue for a certain special fund should look to other possible legitimate means to do so, including the following which have been proposed by legislation introduced previously:

1) Funding support through county board of water supply charges;
2) Funding through voluntary donations; and
3) Voluntary contribution programs such as an income tax refund check-off box which was recently proposed to permit all Hawaii taxpayers to voluntarily designate a specified amount of the taxpayer's income tax refund to be deposited into the State's Early Learning Trust Fund.

Given the "clear nexus" and "clear link" requirements for special and revolving funds, and also given that general funding and alternative methods to secure revenues for these funds exist, expansions and deviations of HRS Chapter 247 which go beyond the scope of the original intent of the conveyance tax law are concerning since this Proposed Conveyance Tax Bill, particularly if unlawfully targeting random types of properties or a random group of property owners, could be characterized as imposing an improper penalty, hidden tax, or surcharge, which will likely be subject to legal challenge.

c. **Proper, Efficient, and Effective Implementation of the Revenue Generating Tax Proposed Would Require Proper Administration and Involve Complex, Time-Consuming, and Subjective Determinations.**

The Proposed Conveyance Tax Bill in effect, creates a broad, complex, revenue-generating tax, which, as discussed above, is far from what was intended when the conveyance tax was initially enacted by the Hawaii Legislature.

The Proposed Conveyance Tax Bill may also necessitate or trigger terms, requirements and exemptions relating to the imposition of, and compliance with the proposed expanded conveyance tax, which would assumedly continue to be administered by the Hawaii Bureau of Conveyances (Bureau). LURF questions the ability of the Bureau, given current and unrelated, non-tax expertise of its staff, to administer and enforce the requirements prescribed by the proposed bill, as well as collect the conveyance tax and allocate the same to the respective counties.

In addition, in order that the Proposed Conveyance Tax Bill be properly and effectively administered and enforced, more detailed determinations (administrative and legal) regarding the measure would still need to be made pursuant to rules adopted by the Bureau. These determinations may involve assessments of subjective issues which entail significant time and expense by individuals and/or entities which have not yet been contemplated, let alone identified.

Since a revenue-generating tax is what is actually intended by the proponents of this proposed measure, the terms and provisions relating to all aspects of such a tax, including legality, administration, imposition, compliance and enforcement, should be fully and properly vetted by the public.

For the reasons stated above, LURF respectfully recommends that the Proposed Conveyance Tax Bill **be excluded** from the 2017 HSAC Legislative Package.

Thank you for the opportunity to provide comments regarding this proposed measure.

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Via E-Mail

September 1, 2016

Honorable Michael P. Victorino, Chair
Honorable Don Couch, Vice-Chair,
and Members of the Policy and Intergovernmental Affairs Committee
Council of the County of Maui
County of Maui
200 South High Street, 8th Floor
Wailuku, Maui, Hawaii

Testimony Regarding Legislative Proposal Relating to 2017 Hawaii State Association of Counties ("HSAC") Legislative Package - Approving for Inclusion in the HSAC Package a State Bill to Allow Counties to Petition the State Land Use Commission ("LUC") for Regional District Boundary Amendments After Adoption of General Plan Updates and to Grant to the LUC Additional Enforcement Authority Over Its Decisions and Orders (Item PIA-3(2)(10) on the Committee's Agenda).

Tuesday, September 6, 2016, at 9:00 a.m. in the Council Chamber, Kalana Pakui Building, 8th Floor, 250 South High Street, Wailuku, Hawaii 96793

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

For consideration before this Committee, is a legislative proposal requesting approval for inclusion the 2017 HSAC Legislative Package, a State bill to allow counties to petition the LUC for regional district boundary amendments after

adoption of general plan updates and to grant to the LUC additional enforcement authority over its decision and orders (the "Proposed LUC Bill") (Item 3(2)(10) on the Committee's agenda).

While LURF supports the portion of the Proposed LUC Bill which proposes to allow the counties to petition the LUC for regional district boundary amendments after adoption of general plan updates, **LURF strongly opposes the portion (Section 3) of the Bill which proposes to grant the LUC additional enforcement authority over its decision and orders**.

Background. The LUC was intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17; and pursuant to HRS Chapter 205, the LUC is charged with grouping contiguous land areas suitable for inclusion in one of the four major State land use districts (urban, rural, agricultural and conservation); and determining the land use boundaries and boundary amendments based on applicable standards and criteria.

Pursuant to HRS 205-12, after the LUC approves a district boundary amendment, it is then the responsibility of the counties to control and enforce the specific State land uses, conditions, development and timing through detailed county ordinances, zoning, subdivision rules and other county permits.

The counties review, approve and impose specific conditions for zoning; subdivisions; and other development permits, to address land use planning, health, safety and environmental issues related to the development. The various county development approval and permitting processes require review, approval and imposition of specific conditions by county councils and/or planning commissions, as well as the county administrations and numerous county departments, which employ hundreds of workers, planners, architects and engineers who are knowledgeable and experienced with health, safety and environmental requirements, and the nature of development and associated delays.

Over the years, issues have arisen relating to the LUC's attempts to overextend its statutory authority by imposing detailed and specific timing deadlines and other specific requirements and conditions which are the responsibility of other State of Federal agencies, as well as the LUC's continued attempts to monitor and enforce conditions which involve detailed development issues and requirements which the counties are rightfully responsible to establish and enforce under HRS Chapter 205 (LUC); Chapter 46 (county government); HRS 46-4 (county zoning) and other county laws, rules and regulations. The counties work with the developers through all the stages of development; the counties understand the process and have the knowledge and tools to provide assistance and county services to bring projects to successful completion.

LURF's Position. Given the distinct role of the LUC as established by State statutory law, LURF believes that a number of serious, negative consequences and repercussions would result from an expansion of the LUC's authority as set forth in the Proposed LUC Bill, including the fact that the Bill would:

1. be inconsistent with the existing two-tiered (State/County) system of land use approvals and enforcement process established by state statutory law;
2. fail to properly recognize and defer to the counties' expertise in application and enforcement of land use laws;
3. contradict the Hawaii Supreme Court's decision in a prior, significant land use case;
4. unsuitably and inappropriately afford the LUC new enforcement powers lawmakers never intended or envisioned the LUC to wield;
5. impinge upon and violate the contractual and constitutional vested rights of landowners and developers;
6. invite needless contentious harassment and litigation against petitioners;
7. impede the anticipated construction of much-needed affordable housing; and
8. result in other economic repercussions for this State.

In light of these significant concerns, this Committee, in its consideration of this measure, should be compelled to determine that inclusion of this Bill in the 2017 HSAC Legislative Package is incontrovertibly justified. Bills similarly attempting to expand the authority of the LUC (including H.B. 2617 (2016) which is substantively identical to the Proposed LUC Bill) have recently been introduced in, but have failed passage by the State Legislature.[1]

In LURF's opinion, there is no evidence of any compelling need for the Proposed LUC Bill which unjustifiably transforms the LUC from a planning agency into an enforcement agency. Based on discussions with the County Planning Directors, the LUC, and the Office of Planning, LURF understands that the LUC has not heretofore transmitted any enforcement complaints to the counties, and the counties are unaware of any current LUC violations or complaints that would justify this measure.

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[1] LURF's concerns have been reiterated extensively and in more detail in testimony submitted in opposition to other similar legislative measures proposed in the past but which have been deferred by the State Legislature (*e.g.*, H.B. 2044 (2016); S.B. 2355 (2016)); and H.B. 2617 (2016)). A copy of LURF's April 26, 2016 testimony in opposition to H.B. 2617, HD1, SD2 (which is substantively identical to this Proposed LUC Bill) is attached hereto.

Moreover, proponents of the Proposed LUC Bill failed to seek any input whatsoever from the parties which would be most affected by this legislation – the counties and the landowners which have obtained LUC approvals - despite the major unanticipated negative consequences of this measure.

In addition, all four county planning departments, landowners and housing developers, as well as the building industry are strongly opposed to the proposed Bill.

In view of the unanticipated negative consequences of, and the lack of any factual support for the Proposed LUC Bill, LURF believes it would be unwarranted and unreasonable for this Committee to agree to support this measure which may potentially violate petitioners' constitutional rights and result in other negative economic consequences including the stifling, if not reversal of the current growth of the State's economy, without thorough review, analysis, and vetting of all the facts and information relating to the legitimacy of the Bill's true purpose, as well as the potential consequences thereof.

Conclusion. It is a well-recognized fact that the LUC's role was always intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17, however, proponents of this Bill are unjustifiably attempting a "power grab" to transform the LUC's established planning function into an enforcement one. Requiring petitioners to comply with representations and the conditions or risk action or fine by the Commission (based, no less, upon the LUC's unilateral findings of the petitioner's failure to comply, and without the Commission being obligated to follow its own boundary amendment procedures or requiring a County Planning Commission action in doing so) is unjust and unreasonable; will undoubtedly result in unintended negative consequences, including unnecessary lawsuits and litigation; and otherwise negatively impact project financing and development, much-needed affordable housing, as well as the overall economy in Hawaii.

Based on the above, LURF respectfully urges this Committee to carefully consider all of the facts and circumstances relating to the Proposed LUC Bill and to **exclude this measure from the 2017 HSAC Legislative Package**, or at the very least, defer support of this Bill until all potential consequences and repercussions relating to this very significant issue have been thoroughly vetted and reviewed.

Thank you for the opportunity to provide comments regarding this matter.

Attachment

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April 26, 2016

House Conferees: Representatives Ryan I. Yamane/Karl Rhoads/Kyle T. Yamashita, Co-Chairs; and Representative Feki Pouha (WAL, JUD, FIN)
Representative Joseph M. Souki, Speaker of the House

Senate Conferees: Senator Clarence K. Nishihara, Chair; Mike Gabbard/Jill N. Tokuda, Co-Chairs (PSM/WLA, WAM)
Senator Ronald D. Kouchi, President of the Senate

Opposition to HB 2617, HD1, SD2 Relating to the Land Use. (Requires the counties to petition the Land Use Commission [LUC] to reclassify lands. Provides flexibility to the LUC in addressing violations of representations made to the LUC or conditions imposed by it in its decisions and orders.)

Conference Meeting: Wednesday, April 27, 2016, 2:00 p.m., Conf. Rm. 224

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

LURF appreciates the opportunity to express its **strong opposition to Section 3 of HB 2617, HD1, SD2**, which proposes to expand the authority of the LUC to allow anyone to file unlimited motions to initiate quasi-judicial actions; impose penalties and change the terms of development conditions pursuant to vague standards. This measure, which is purportedly well-meaning, violates existing State law, violates Supreme Court case law, violates the LUC's own rules; *"changes the rules in the middle of the game"* and violates the constitutional *vested rights* of land owners who have *"substantially commenced"* the use of their lands.

The unintended negative consequences of the passage of Section 3 of this bill would:

1) result in further unnecessary and unwarranted opportunities for contentious harassment and litigation against landowners and developers with LUC approvals (petitioners);

2) add greater delays, uncertainty and hindrances to the entitlement and post entitlement process for affordable housing, market housing and other development projects; and
3) severely impede and negatively impact financing and construction of affordable housing, housing for all income levels and other worthy projects.

HB 2617, HD1, SD2 . This measure includes two distinct parts and subject matters:

- **Section 2. County submittal of General Plan amendments to LUC for approval of boundary amendments.** LURF supports Section 2 of the bill, which provides that after the completion of county proceedings to amend its General Plan, and adoption by the County Council, each county shall submit the General Plan to the LUC for review and petition the commission to approve any boundary amendments as may be required and processed pursuant to Hawaii Revised Statutes, Section 205.

- **Section 3. New LUC Enforcement Powers.** LURF strongly opposes this section of the bill. Without any warning, discussion or collaboration with the counties or those directly affected, the Senate Committee on Public Safety, Intergovernmental, and Military Affairs and Committee on Water, Land, and Agriculture, unjustly and unfairly inserted the following provisions into HB 2617:

    - Allows ***"any party"*** to file an **unlimited number of motions for an *Order to Show Cause*** why the property should not revert to its former land use classification or be changed to a more appropriate classification.

    - **Without any specific factual basis or justification, this measure provides the LUC with new powers to modify conditions or impose new conditions, regardless of whether there has been substantial commencement of use of the land**, if the LUC finds that the petitioner's failure to adhere to or comply with the representations or conditions does not warrant reversion to the land's former land use classification or change to a more appropriate classification.

    - **Without any specific legal basis or justification, this bill arbitrarily creates an unreasonable and illogical definition of *"substantial commencement,"* which is not consistent with existing law, conflicts with Hawaii Supreme Court case law and is contradictory to Hawaii cases regarding *"vested rights."*** This measure defines *"substantial commencement"* as completion of all public improvements and infrastructure required by conditions imposed pursuant to this chapter, both within the project area and outside the project area and completed construction of twenty per cent of the physical private improvements such that they are usable or habitable.

- **Without any specific financial basis or justification, this measure authorizes new LUC powers to impose administrative fines in an arbitrary and capricious amount of up to $50,000 a day, and assess the costs of enforcement, including, but not limited to associated hearing expenses.** Regardless of whether there has been *substantial commencement* of the use of the land, if the LUC finds that one or more such representations or conditions contained in a LUC decision and order have not been adhered to, the LUC may assess such administrative fines and costs against the party bound by the representation to LUC or subject to the LUC condition. The maximum fine for a person convicted of murder in the first degree, murder in the second degree, or a Class A Felony (the most heinous sex offenders and biggest drug dealers), is a one-time fine of $50,000. Without specific justification or a fact situation, it is hard to understand why the LUC would need to have daily fines that are more punitive than for murderers and the most heinous sex offenders and biggest drug dealers.

- **Furthermore, using a totally *arbitrary and capricious* standard of "*not likely to be repeated,*" the LUC has new powers to "indefinitely" impose fines of up to $50,000 a day and the costs of enforcement, including, but not limited to associated hearing expenses.** This *arbitrary and capricious* standard is unjustified by any facts and unprovable. What criteria will the LUC use to determine *"not likely to be repeated?"*

- **Finally, this bill gives the LUC the power to record a notice of non-conformance on the title to the property and the LUC can file a lawsuit in Circuit Court to collect the *arbitrary and capricious* fines (which are more punitive than murder or the worst sex offense).** If the party bound by the representation or condition fails to pay the fine as ordered by the LUC, the LUC may issue a notice of non-conformance to be recorded on the title of the property at the bureau of conveyances and pursue collection procedures in circuit court.

LURF's Position. LURF strongly opposes to portions of HB 2617, HD1, SD2, which propose to expand the LUC's enforcement powers, based on the following:

- **This measure is not consistent with the existing law relating to the two-tiered (State/County) system of land use approvals established by Hawaii Revised Statutes ("HRS") Chapter 205, in particular, HRS § 205-12**, which provides that the counties shall enforce the land use classification districts adopted by the LUC and the restrictions on use and conditions relating to agricultural districts under HRS §205-4.5.

- **This bill inconsistent with the intent and application of HRS Chapter 205 and its two-tiered (State/County) government land use approval process; the state land use district boundary amendment process; the county processes relating to general plans, development/sustainable communities plans, zoning, subdivision, and other permits;**

- **HB 2617, HD1, SD2 is not consistent with the Hawaii Supreme Court decision in the *Aina Lea* case;[1] and land use legal treatises (including *"Regulating Paradise – Land Use Controls in Hawaii,"* Second Edition by David L. Callies);**

- **This measure ignores the reality of development projects and enforcement of conditions; is oblivious to the reasons for delays in compliance with conditions (including force majeure, permitting delays, etc.); and fails to recognize that the counties (not the LUC) possess the expertise, experience, staffing, and funding to enforce the LUC conditions; and**

- **This bill is unnecessary and not based on any facts or evidence that there are any major problems which would warrant expanded LUC enforcement powers.**

Background. The LUC was intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17; and pursuant to HRS Chapter 205, the LUC is charged with grouping contiguous land areas suitable for inclusion in one of the four major State land use districts (urban, rural, agricultural and conservation); and determining the land use boundaries and boundary amendments based on applicable standards and criteria.

Pursuant to HRS 205-12, after the LUC approves a district boundary amendments, it is the counties' responsibility to control and enforce the specific state land uses, conditions, development and timing through detailed county ordinances, zoning, subdivision rules and other county permits.

The counties review, approve and impose specific conditions for zoning; subdivisions; and other development permits, to address land use planning, health, safety and environmental issues related to the development. The various county development approval and permitting processes require review, approval and imposition of specific conditions by county councils and/or planning commissions, as well as the county administrations and numerous county departments, which employ hundreds of employees, planners, architects and engineers who are knowledgeable and experienced with health, safety and environmental requirements and the nature of development and associated delays.

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[1] *DW Aina Lea Development, LLC v. Bridge Aina Lea, LLC*, 339 P.3d 685 (November 25, 2014)

LURF understands that in some cases, the City and County of Honolulu (City) and some of the other counties have "enforced and assisted the development of LUC petition areas by not "punishing" landowners based on strict deadline dates in their LUC or zoning approvals, and instead have addressed the development of master-planned projects in a sequential manner; by reasonably requiring the satisfaction of certain specific conditions before subsequent permits will be granted.

Over the years, issues have arisen relating to the LUC's imposition of detailed and specific timing deadlines and other specific requirements and conditions which are the responsibility of other State of Federal agencies, as well as the LUC's continued attempts to monitor and enforce conditions which involve detailed development issues and requirements which the counties are rightfully responsible to establish and enforce under HRS Chapter 205 (LUC), Chapter 46 (county government), HRS 46-4 (county zoning) and other county laws, rules and regulations. The counties work with the developers through all the stages of development; the counties understand the process and have the knowledge and tools to provide assistance and county services to bring projects to successful completion.

LURF's Position. LURF **opposes HB 2617, HD1, SD2**, based on the statutory mandate that the counties be afforded the responsibility to control and enforce the specific uses and development relating to boundary amendments once approved by the LUC, together with the fact that the counties have the expertise, experience, staff and funding to enforce LUC district boundary amendments and conditions relating thereto, as explained in more detail below:

1. **This Measure is Not Consistent with the Two-tiered (State/County) System of Land Use Approvals Established by HRS Chapter 205.** This bill would allow the LUC, based solely on its own findings of failure to substantially conform with conditions or requirements of the Commission's order, the right to go back and unilaterally amend existing conditions or legally challenge and impose additional conditions on a project that may have subsequently been granted county zoning, county subdivision approval, county building permits, and on projects which may even be already developed.

   After an LUC reclassification, and boundary amendment and reclassification, it is the counties' responsibility to thereafter enforce the LUC conditions. The relevant HRS provision is as follows:

   > **§205-12 Enforcement.** *The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission* and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

By statute, the counties are, in fact, the recognized enforcement agency for LUC district boundary amendments and requirements/conditions relating thereto. The counties possess the experience, expertise, capability and staffing to not only enforce the LUC conditions, but already do so for all county zoning permits, rules and regulations. The LUC lacks the necessary experience, expertise, capability and staffing to equitably enforce conditions on a statewide basis. LURF understands that the LUC staff is composed of only five staff members. Any effort to enhance the LUC to take on and perform the proposed enforcement role would be duplicative and a waste of limited government resources.

2. **This Bill is Unnecessary, Because the LUC Already has the Authority to Impose the Most Severe Penalty – Reversion of the Property to its Former Classification.** Section 15-15-93, HAR, already contains an *Order to Show Cause* provision which provides an adequate means of addressing the failure to substantially conform to the conditions or requirements of a district boundary amendment. Pursuant to that provision, the LUC, following an evidentiary hearing on the matter, has the authority to decide whether the property should revert to the former land use classification, or to a more appropriate classification. Any modification or repeal of a permit or entitlement (e.g., downzoning) must therefore be based on a process or evidentiary hearing which is at the very least, equivalent to that contained in HAR 15-15-93, to prove and justify the removal or amendment of any permit right previously granted.

   In short, the process required to change a land use classification of property should be the same for any party, including the LUC. If the LUC is desirous of changing a property's land use designation, it should be required to demonstrate why the property should be more appropriately designated in another land use district classification. This process should consider the petition's conformance with the LUC's decision-making criteria and its consistency with state land use district standards.

   The LUC's unilateral finding of failure to meet any representation or condition of LUC 's approval (as provided in this bill) is not sufficient to justify a change of designation and may even amount to an illegal taking of the petitioner's property.

3. **This Bill is Not Consistent with the Intent and Application of HRS Chapter 205 and the Two-tiered (State/County) Government Land Use Enforcement Process.** Contrary to prudent land use planning principles and law, this bill would allow the LUC to re-open any LUC decision and order relating to boundary amendment reclassifications, based on its own, arguably biased findings of noncompliance with permit conditions or requirements. As a result, this bill may therefore generate legal proceedings and lawsuits that would paralyze projects and result in more unnecessary costs and time for the LUC, its staff and other state agencies.

Most State agencies and all of the counties operate with the understanding that the LUC should perform its duties under the law and take a broad focus of State land use issues and the four State land use districts, while deferring the issues relating to specific project development details and timing, specific conditions and enforcement to the counties. The more itemized, specific and detailed the LUC conditions are, the more chance of conflicts with county laws, procedures and policies, thereby creating greater uncertainty in the land use process.

This position conforms with HRS Chapter 205; the state land use district boundary amendment process; the county processes relating to general plans, development/sustainable communities plans, zoning, subdivisions, and other permits; and is also consistent with Hawaii case law, land use legal treatises (including *"Regulating Paradise – Land Use Controls in Hawaii"*, Second Edition, by David L. Callies); and the recent Hawaii Supreme Court decision in the *Aina Lea* case.

4. **HB 2617, HD1, SD1 Directly Contradicts the definition of *"Substantial Commencement"* in the Hawaii Supreme Court's Decision in the *Aina Lea* Case.** The Hawaii Supreme Court in *Aina Lea* essentially ruled that if *substantial commencement* of use of the land for the proposed development has not begun, the LUC could revert the land to its former classification, however, if the landowner had substantially commenced use of the land for the development, the LUC must comply with and satisfy all of the statutes, rules and procedures (including HRS 205-4, 16, and 17) in order to change a property's land use classification.

   The amendment to HRS Section 205-4 now being proposed by this measure, however, directly contradicts the Hawaii Supreme Court's decision in *Aina Lea,* as it would allow the LUC to change a property's land use classification under the vaguest of criteria, based on its own biased findings, literally at any time and many times, regardless of whether the development has substantially commenced, or even if portions of the project are already completed.

5. **This Measure Ignores the Reality of Development Projects, County Enforcement of Conditions, the Reasons for Delays in Compliance with Conditions and the Expertise and Experience of the Counties to Address Such Matters.**

   a. **Determinations as to whether there has been a failure to "substantially conform" to conditions or requirements of an amendment or permit should be made by government officials with expertise and experience in planning and development.** Given their extensive expertise and experience, the appropriate county officials who understand the planning and development process would be in the best position to determine whether there has been a failure to substantially conform with the representations made, conditions or requirements of the order granting the special permit. Such determinations should not be made at a later date by the LUC, or by a court as a result of a lawsuit.

b. Determination of a failure to substantially conform must address the reality of development delays which are beyond the control of the land owner or developer. It is common knowledge that many master-planned projects or areas that have developed (or are still being developed) over the span of many years result in very viable and sustainable projects which provide affordable housing and jobs for Hawaii's residents (Mililani, Kakaako, the Second City of Kapolei, etc.). Development delays may nevertheless occur based on the following:

1) ***Force Majeure* ("greater force").** These are actions that cannot be predicted or controlled, such as war, strikes, shortage of construction materials or fuel, etc., government action or inaction, or being caught in a bad economic cycle; and which include "Acts of God", which are unpredictable natural events or disasters, such as earthquakes, storms, floods, etc.

2) **Certain permit conditions can also actually delay projects.** There are instances where a developer is unable to commence development until a certain condition is met, and sometimes the satisfaction of that condition is dependent upon the action of a third party, including government agencies, over which the developer has no control.

3) **This bill will likely have a negative impact on project financing.** Lenders will not provide funding for major projects in Hawaii given the potential that boundary amendments may be modified or based on unlimited motions for *Orders to Show Cause* by opponents to the projects and the LUC's unilateral discretion. Investors will likewise be hesitant to commit to financing projects for which entitlements may be amended or repealed due to what the LUC finds to be non-conformance of a representation or condition.

Conclusion. It is a well-recognized fact that the LUC's role was always intended to be a long-range land use planning agency guided by the principles of HRS 205-16 and 17, however, proponents of the Senate drafts are attempting a "power grab" to transform the LUC's established function into an *enforcer with a big stick*. Requiring petitioners to "substantially conform with the conditions or requirements of the order granting the special permit," or risk amendment, modification or vacation of said permit (based, no less, upon the LUC's unilateral findings of the petitioner's failure to conform, and without the Commission being obligated to follow its own boundary amendment procedures or requiring a county planning commission action in doing so) would be unjust and unreasonable; will undoubtedly result in unintended negative consequences, including unnecessary lawsuits and litigation; and otherwise negatively impact project financing and development, much-needed affordable housing, as well as the overall economy in Hawaii.

Based on the above, it is respectfully requested that HB 2617, HD1, SD2, **be held** by this Conference Committee, until the county planning directors, the LUC, Office of Planning, land use experts and stakeholders can review these issues during the legislative interim. LURF and the named stakeholders would be willing to make recommendations to the Legislature for next legislative session.

Thank you for the opportunity to present comments in **opposition** to this measure.