



Via E-Mail

September 10, 2018

Land Use Commission
Department of Business, Economic Development & Tourism
State of Hawaii

Comments in Strong Opposition to the Land Use Commission's
Proposed Amendment to §15-15-93 (e) Relating to Substantial Commencement
and Acceptance of the LURF's Proposed Amendment to §15-15-93 (e)

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.

This is written to respectfully request your consideration of LURF's **opposition** to the Land Use Commission's (LUC) proposed Rules Amendment §15-15-93(e) and **acceptance of the attached LURF proposed amendment to §15-15-93(e)**, based on the Hawaii Supreme Court's decision in the Bridge 'Aina Lea case, and the reasons and discussion below.

The proposed rule change proposed by the LUC should be rejected, based on the following:

1. The proposed rule directly contradicts, circumvent and attempts an end-run around the Hawaii Supreme Court's decision in a prior, significant land use case, Bridge 'Aina Lea;
2. The LUC failed to seek input from the LUC petitioners and counties. The LUC has repeatedly failed to seek input from the parties which would be most affected by this particular changes in the law, and this particular rule change, relating to the Bridge 'aina Lea case, despite the fact that the petitioners/landowners which have obtained LUC approvals and counties would suffer the effects of the major unanticipated negative consequences of such changes. LURF would respectfully request that the LUC should convene these stakeholders to discuss proposed amendments.

3. It is opposed by housing developers and county planning departments. In addition, since the Bridge 'Aina Lea decision, all four county planning departments, landowners and housing developers, as well as the building industry are strongly opposed to the LUC's many attempts to change the law to circumvent the decision by the Hawaii Supreme Court.
4. The LUC's proposed rule would impede the anticipated construction of much-needed affordable housing, by subjecting housing developments to orders to show cause actions;
5. There is no evidence of any compelling need for the addition of a rule amendment relating to "substantial commencement" in the LUC rules. Based on discussions with the county Planning Directors, the Land Use Commission (LUC) and the Office of Planning earlier in 2018, LURF understands that the LUC has not transmitted any enforcement complaints to the counties, and the counties are unaware of any current LUC violations or complaints that would justify this measure.
6. The LUC website includes a LUC Index of Proposed Changes, which is misleading and deceptive to the public, as it specifically refers to the term "substantial compliance," which is erroneous.
7. The proposed LUC rule unsuitably and inappropriately expand the LUC's enforcement powers in a manner that lawmakers never intended or envisioned the LUC to wield;
8. It is also inconsistent with the existing two-tiered (State/County) system of land use approvals and enforcement process established by state statutory law;
9. The LUC proposed rule fails to properly recognize and defer to the counties' expertise in application and enforcement of land use laws;
10. It impinges upon and violate the contractual and constitutional vested rights of landowners and developers;
11. The proposed LUC rule invites needless contentious harassment and litigation against LUC petitioners, the counties and other state agencies; and
12. It would result in other economic repercussions for this State,

Conclusion. The LUC's proposed amendment to add a new LUC Rule §15-15-93 (e) **should be rejected**; and if an amendment is deemed necessary, the LUC should **adopt the attached amendment proposed by LURF**, which is specifically based on the Hawaii Supreme Court decision in the Bridge 'Aina Lea case.

In view of the unanticipated negative consequences of, and the lack of any factual support for the proposed rule change, LURF believes it would be unwarranted and unreasonable for the Commission 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 purpose of the proposed measure, as well as the potential consequences thereof.

At the very least, it is necessary and prudent that the Commission require a study or report which would validate the alleged need for the proposed rule change.

**LURF's Proposed LUC Rule Change to Define
"Substantial Commencement of Use of the Land"**

(based on the Bridge 'Aina Lea decision of the Hawaii Supreme Court)

(e) The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition 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. For purposes of this subsection (e), substantial commencement of use of the land in accordance with representations made to the commission shall be determined based on the circumstances or facts presented, including, among other things, the dollar amount expended on the project, percentage of work completed, or any of the following:

- (i) The definition of "substantial" is "considerable in amount or value; large in volume or number."¹
- (ii) Substantial completion is not required,
- (iii) Actively proceeding with plans and studies, including building plans and studies for an Environmental Impact Statement,
- (iv) Continued work on infrastructure,
- (v) Proceeding forward with building portions of the project, or on portions of the land, 4% or more of total residential units represented and required,²
- (vi) Completion of exteriors and interiors of some of the structures,
- (vii) Installation of some appliances,
- (viii) Some electrical, plumbing and other utilities ready for hookup,
- (ix) Partial construction of structures in various stages of completion,
- (x) Partial mass grading of the land, grading of portions of the land for immediate access and internal roadways,
- (xi) Foundation slabs for some of the land,
- (xii) A considerable amount of money expended for plans and construction work on the project or land, or
- (xiii) Other facts relating to the commencement of use of the land in accordance with representations made to the commission.

The interpretation of substantial commencement of use of the land, this subsection (e), and Section 205-4(g), Hawaii Revised Statutes is a question of law which is freely reviewable by appellate courts.³

¹ Black's Law Dictionary 1656 (10th ed. 2014), cited in the Bridge 'Aina Lea decision.

² In its Bridge 'Aina Lea decision, the Hawaii Supreme Court specifically found that 72 of the required 1,924 housing units (3.74%) were in various stages of construction, and none of the required units had been completed.

³ Paragraphs (i) to (xii) and the review standard are findings by the Hawaii Supreme Court in the Bridge 'Aina Lea decision.