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State Land Use Commission
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Re: Proposed Revisions to LUC Administrative Rules

Aloha Land Use Commissioners:

Thank you for the opportunity to testify in person on November 15, 2023, regarding the Proposed Administrative Rules, dated November 7, 2023 (the "**Proposed Rules**") and for the opportunity to confirm my testimony in writing.

The Proposed Rules would amend the Land Use Commission's ("**LUC**") current Administrative Rules. I am concerned that two proposed amendments to Section 15-15-50 of the Proposed Rules would give other agencies the power to reject petitions for boundary amendments before the LUC accepts them. Specifically, proposed section 15-15-50(13) would require petitioners to obtain a "certification or approval" from the Commission on Water Resource Management ("**CWRM**") for the utilization of water from a specific aquifer or aquifer(s) for proposed projects prior to consideration of the petition for a district boundary amendment. Effectively the same requirement is set out in Proposed Rule § 15-15-90(9) and Proposed Rule § 15-15-94(b). Since CWRM does not have the statutory authority to function as a gatekeeper for boundary amendments, requiring applicants to obtain a certification or approval (or any other confirmation from CWRM) before the LUC will accept a petition for boundary amendment does not comport with Hawai'i law.

An administrative agency may only wield those powers granted to it by statute. Administrative rules that exceed the scope of the statutory authority of an agency are invalid. *Stop H–3 Ass'n v. State Dept. of Transp.*, 68 Haw. 154, 161, 706 P.2d 446, 451 (1985). CWRM's authority comes from the Water Code, Chapter 174C, Hawaii Revised Statutes ("**HRS**"). Section 174C-5 lists the powers and duties of CWRM. Those powers do not include reviewing LUC petitions prior to filing. Thus, granting CWRM such authority would exceed CWRM's powers and impermissibly delegate to CWRM the LUC's authority review petitions for boundary amendments. *See Puana v. Sunn*, 69 Haw. 187, 189, 737 P.2d 867, 870 (1987) (an agency's authority "is limited to

enacting rules which carry out and further the purposes of the legislation and do not enlarge, alter, or restrict the provisions of the act being administered").

Even if the LUC could grant and CWRM could accept the power to certify or approve an aspect of a petition for boundary amendment before the LUC accepts the petition for filing, due process would require express standards for the exercise of the delegated power. *See Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1437 (9th Cir. 1996). Standards guard against arbitrary and capricious approvals or denials. Because the proposed Rules do not have express standards for CWRM's exercise of the delegated power, they would violate the due process protections of the Hawaiʻi and federal Constitutions.

Exacerbating this flaw, CWRM does not have rules or processes to apply when reviewing boundary amendment petitions. Instead, CWRM has administrative rules and processes for consideration of those matters that are within its jurisdiction, such as well construction permits, stream diversion permits and current water uses. Those and other rules rely on and consider the actions of the LUC. For example, in determining whether a proposed use of water is reasonable and beneficial, CWRM must consider the state and county land use plans. (Hawaiʻi Administrative Rules § 13-168-2 (definition of "reasonable-beneficial use")).

For its part, the LUC examines the availability of water when it considers environmental review documents under HRS chapter 343 and petitions for boundary amendments under HRS chapter 205. In these ways, the LUC's decisions are considered in CWRM approvals, and CWRM has an opportunity to comment on matters pending with the LUC before the LUC decides them. It is neither necessary nor constitutionally permissible to require a certification or approval prior to accepting a petition for boundary amendment.

For the same reasons, Proposed Rule § 15-15-50(27), which would require petitioners to obtain "certification or approval" from the State Office of Planning and Sustainable Development's ("**OPSD**") State Sustainability Coordinator regarding the identified climate adaptation and mitigation measures in a district boundary petition would be invalid and unnecessary. Section 225M-2 sets out the powers of OPSD. One of those powers is to develop and present the position of the State of Hawaiʻi in all boundary amendment petitions and proceedings before the LUC. Nothing in section 22M-2 gives OPSD the power to certify or approve an aspect of petitions before they reach the LUC. On the contrary, while the LUC is administratively tied to OPSD, HRS § 205-1 provides that the LUC "shall maintain its independence on matters coming before it which the office and sustainable development is a party by establishing and adhering to" certain processes, including establishing safeguards and procedures to avoid actual or perceived conflicts of interests between the LUC

and OPSD. HRS §§ 205-1(e), 225M-2(d). Giving OPSD a veto over applications before they are accepted by the LUC would erode the independence of the LUC. The same concerns apply to Proposed Rules §§ 15-15-90(20); 15-15-90(25); and 15-15-94(c).

I also have concerns regarding to the proposed amendments to section 15-15-77. Specifically, new subsection (e) would allow the LUC to dismiss a petition if the LUC determines that the party has failed to provide sufficient evidence to render a decision on the petition. This power raises due process concerns, because the petitioner must have an opportunity to be heard on all issues of the supposed procedural defect, to submit rebuttal evidence and to cure any defect. If, after affording a petitioner the opportunity to supplement the record, the LUC determines that the petition fails to meet the standards for approval, the LUC may deny the petition. A proposed allowing the LUC to circumvent this process would be unconstitutional and unnecessary.

Turning to the amendments to section 15-15-95, which deals with petitions for a special permit, subsection (c) provides guidelines to be used in determining whether an "unusual and reasonable use" is permitted. Guideline (c)(4) currently requires consideration of whether the unusual conditions, trends and needs have arisen since the district boundaries and rules were established. The proposed change to that subsection adds additional considerations relating to the unsuitability of the particular land at issue. As revised, the guideline would read as follows (with added language underscored):

> When determining whether an 'unusual and reasonable use' is permitted, the county planning commission, and/or the commission if commission approval is required, **may deny a special permit if one or more of the following guidelines is determined to be violated**:
>
> …
>
> (4) Unusual conditions, trends, and needs **relating to the unsuitability of the land for permitted uses or the suitability of the land for other uses** have arisen since the district boundaries and rules were established.

The addition to guideline (c)(4) may have attempted to address the decision of the Ninth Circuit Court of Appeals in *Spirit of Aloha Temple v. County of Maui*, 49 F. 4th 1180 (9th Cir. 2022). That case involved an action challenging Maui County's denial of a special use permit to hold religious services. The Ninth Circuit held that the conditional use standards violated the Religious Land use and Institutionalized Persons Act of 2000 because they effectively granted an impermissible degree of

discretion to a county official to approve or deny a permit for religious services. The court held that the regulations allowed unbridled discretion, because they relied on an arbitrary guideline—"the proposed use would not adversely affect surrounding property"— that was too "general, flimsy, and ephemeral" to be used by an official to approve or deny a permit related to religious activities.

With respect, the proposed amendment to guideline (c)(4) does not address the issue raised by *Sprit of Aloha*. Instead, the proposed amendment would alter the focus of (c)(4) from general trends to the parcel of land at issue. The additional language effective incorporates a portion of the usual variance standard. and makes it virtually impossible for a special use permit to be granted. Rather than add clarity, the proposed change to (c)(4) creates a completely different standard. Proposed amendments to guideline (c)(2) appear to more directly address the issues raised by *Spirit of Aloha* and, therefore, the changes to (c)(4) are not necessary.

Finally, we noted that there is a proposal to change, in multiple instances, the word "therefor" to "therefore." These words have different meanings. Amending the rules to swap out one word for the other would create confusion.

Thank you for your considering my testimony. I would welcome an opportunity to work with the LUC to draft amendments to the rules to accomplish the intent of the Proposed Rules without the flaws in the current draft. In all events, I will be available the next time it considers the Proposed Rules to answer questions or provide other comments and suggestions.

Respectfully submitted,

Calvert G. Chipchase
for
Cades Schutte
A Limited Liability Law Partnership

cc: Land Use Research Foundation of Hawaii
State Office of Planning and Sustainable Development