

STATE OF HAWAII OFFICE OF PLANNING & SUSTAINABLE DEVELOPMENT

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Coastal Zone
Management
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Land Use Division

Special Plans Branch

State Transit-Oriented
Development

Statewide Geographic
Information System

Statewide
Sustainability Branch

DTS202401181427SE

February 20, 2024



Mr. Dan Giovanni
Chair
State of Hawai'i Land Use Commission
P.O. Box 2359
Honolulu, Hawai'i 96804-2359

Dear Chair Giovanni and members of the Commission:

Subject: Testimony on Proposed Administrative Rule Amendments

The Office of Planning and Sustainable Development (OPSD) submits this written testimony for the Land Use Commission's (LUC) consideration on amendments to Hawai'i Administrative Rules (HAR) Chapter 15-15. During the LUC's November 15, 2023 hearing on the matter, OPSD was asked to provide more detailed comments on the LUC's draft rule amendments dated November 7, 2023 (Nov. 2023 Draft) within three months.

OPSD was informed that the tentatively scheduled LUC meeting on February 22, 2024 will be postponed, and that LUC staff is currently revising the draft rules in response to comments received on November 15, 2023 and thereafter. To assist in that process, we are providing our comments on the draft rules to date based on the Nov. 2023 Draft and a working draft provided by LUC staff on February 1, 2024 (Feb. 2024 Draft, and together with Nov. 2023 Draft, the Proposed Drafts). Suggested revisions are shown based on the official Nov. 2023 Draft.

After the November 15, 2023 hearing, OPSD requested comments on the proposed rules amendments from nineteen state agencies and the four county planning departments. Attached is the consultation list and all comments received. Comment highlights have been incorporated into OPSD's testimony.

OPSD's comments can be grouped into four categories based on the nature of the proposed rule amendments: 1) substantive LUC-proposed amendments, 2) non-substantive "housekeeping" amendments, 3) amendments proposed by other entities, and 4) other recommendations.

I. SUBSTANTIVE LUC-PROPOSED AMENDMENTS

A. Definitions

The Proposed Drafts add a new definition for “adverse environmental effects.” The term is defined as “the permanent loss, reduction or transformation of resource access, ecosystem services, cultural or recreational values, or other means of livelihood and health, as well as permanent loss of land or property.” HAR § 15-15-03. This term is used only once in HAR § 15-15-18(a)(3). The fundamental purpose of that subsection is to specify certain environmental conditions of lands suitable for inclusion in the urban district. In contrast, the proposed definition appears to describe cultural and economic development effects, which creates an unclear and overly broad standard when inserted into HAR § 15-15-18(a)(3).

We recommend instead that the proposed new definition for “adverse environmental effects” be removed and HAR § 15-15-18(a)(3) be revised as follows:

It shall include lands with satisfactory topography, drainage, and reasonably free from the danger of any flood, tsunami, unstable soil condition, and other similar adverse environmental ~~effects~~ conditions.

B. Commission on Water Resource Management (CWRM)

The Nov. 2023 Draft included certain requirements for district boundary amendment (DBA) petitions and associated conditions to include certification and/or approval from the Commission on Water Resource Management (CWRM), regardless of whether the proposed action occurs within a Water Management Area. This proposal improperly delegates authority to and imposes obligations on CWRM that are not provided for in statute.

CWRM commented that it “cannot provide certification or approval of water for future projects, nor can [they] guarantee water for future projects.” CWRM further stated that it can instead “provide a statement of current water resource availability describing the affected hydrologic unit's sustainable yield or interim instream flow standard, current withdrawals, and available unused sustainable yield or interim instream flow standard.”

The Feb. 2024 Draft replaces these amendments with those proposed by CWRM amending HAR § 15-15-50(c)(13) to read as follows:

~~Certification or approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project.~~ A statement from the commission on water resource management on current water availability in the hydrologic unit from where the proposed project would withdraw its water.

And HAR § 15-15-90(e)(9) to read as follows:

Petitioner shall be required to seek a statement from the commission on water resource management on current water availability in the hydrologic unit from where the proposed project would withdraw its water approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project. The commission on water resource management may deny use of water from any existing aquifer hydrologic unit if it determines such use will harm the aquifer hydrologic unit or exceed the currently available capacity of the hydrologic unit. Petitioner shall participate in the funding and construction of adequate wastewater transmission and disposal facilities, on a fair-share basis, as determined by the respective county in which the land to which the boundary amendment applies is located, and the state department of health;

The Feb. 2024 Draft also revises the proposed amendment to HAR § 15-15-94(b) to be consistent with CWRM's statutory authority:

For modification or deletion of conditions under the purview of the state commission on water resource management, the petitioner shall be required to provide a sign-off or approval of statement from the state commission on water resource management on current water availability in the hydrologic unit from where the proposed project would withdraw its water.

OPSD has no objection to the Feb. 2024 Draft amendments related to CWRM as presented above.

The City and County of Honolulu (C&CH) and County of Hawai'i also raised concerns regarding this matter. Please see their comments attached.

C. State Sustainability Coordinator

The Nov. 2023 Draft included certain requirements for a DBA petition and associated conditions to include certification and/or approval or review from the State Sustainability Coordinator (Sustainability Coordinator) on various statements. This proposal improperly delegates authority to and imposes obligations on the Sustainability Coordinator that is not provided for in statute. It also duplicates a review normally done by the counties based on construction plans closer to issuance of building permits.

The County of Hawai'i also raised concerns regarding this matter; please see their comments attached. The Department of Corrections and Rehabilitation (DCR) raises questions about how these new procedures would be practically implemented and is concerned that adding layers of reviews and approvals may make the implementation of projects unsustainable. The Department of Land and Natural Resources (DLNR) commented:

The LUC is composed of nine (9), highly qualified members, that are appointed to make independent determinations based on the merits of a proposal. We believe that it would be unwise to set a precedent potentially allowing staff to govern approvals that should be vetted and decided by the Commission. A contrarian decision by staff could bar the Commission from acting on a petition despite its ultimate decision-making power over Boundary Amendments and the like. Further, §15-15-50(c)(25) and (26) applies to infrastructure improvements and mitigation measures which would require a background in engineering. It is unclear if the State Sustainability Coordinator possesses such expertise. More so, we query rather than an approval from the State Sustainability Coordinator whether the State's Climate Change Mitigation and Adaptation Commission would be more appropriate.

While OPSD stands in support of our current Sustainability Coordinator, we recognize that providing an individual with powers not provided for by statute may be problematic. The Feb. 2024 Draft revises HAR § 15-15-50(c)(27) into the requirement of a statement from the Sustainability Coordinator. This, however, still raises the above concerns. Moreover, the Nov. 2023 Draft amendments to HAR § 15-15-90(e)(20), requiring the Sustainability Coordinator's review of the design and construction of drainage improvements to ensure their sufficiency to meet the increased demand due to climate change, and to HAR § 15-15-94(c), requiring sign-off or approval by the Sustainability Coordinator for the modification or deletion of conditions under their purview, remain unchanged. Consequently, OPSD recommends deletion of the proposed amendments. LUC petitions for DBAs are routinely circulated for comment throughout OPSD. The existing process does not need to be revised or set forth in the HAR.

D. Dismissal or Denial of a Motion

The Proposed Drafts add a new subsection (l) to HAR § 15-15-70 that would allow the LUC to dismiss or deny a motion if the LUC determines, at the completion of the petitioner's presentation, that the petitioner has not met its burden of proof, has failed to provide sufficient evidence, or that there are substantive or procedural defects. The Proposed Drafts also add new subsections (e) and (f) to HAR § 15-15-77 that would similarly allow the LUC to dismiss or deny a DBA petition for the same reasons.

Summary dismissal of motions or petitions without county or OPSD comment will preclude the counties or State from having the opportunity to comment and to potentially remedy deficiencies in the petition. It may also raise due process concerns. Several agencies expressed concerns on these proposed changes, including the following:

- This discretion may lead to a longer approval process.
- Equity concerns between the public's concerns and county and State interests if the public is afforded a right to testify when the county or State is not.

- Denial of opportunity for the county or State to remedy deficiencies in the petition.
- Substantive or procedural defects should be identified early on, not at the hearing stage where dismissal or denial is costly in terms of time and resources,
- Lack of established opportunities to remedy deficiencies in the petition.
- Denial would prevent the petitioner from submitting additional information or re-submitting for a period of time.
- Lack of clarity as to when this would be applied under the hearing process set out in HAR §15-15-59, particularly in relation to witnesses and public testimony.

Under HAR § 15-15-50, the LUC staff has the authority to determine if a petition for a DBA is proper and accepted for processing. The LUC additionally has the power to dismiss defective or nonconforming petitions under HAR § 15-15-41. As such, OPSD recommends that the new proposed subsections in HAR §§ 15-15-70 and -77 be deleted.

E. Special Permits

While not stated, the revisions to HAR §15-15-95(c) may have been made 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). OPSD has reviewed that case as well as the case law contained in the “First Draft of Admin. Rules Spreadsheet Analysis Format (11/07/2023)” that LUC staff prepared. OPSD understands the need to address the issue raised in *Spirit of Aloha Temple*, but has concerns with the proposed revisions.

a. Subsection (c)(1)

Initially, there is a significant discrepancy in the proposed change to HAR § 15-15-95(c)(1) between the Excel spreadsheet summary and the Ramseyer versions in the Proposed Drafts. The former states that a permit may be denied “only” if one or more of the following guidelines is determined to be violated. The Ramseyer versions in the Proposed Drafts omit the word “only.” If the word “only” is included, then the ability to deny a special permit is limited to only one of the five listed guidelines. The guidelines may not, however, cover every potential reason for denial of a special permit. Additionally, while the counties may themselves create a requirement by ordinance for the county planning commissions to follow the guidelines in HAR § 15-15-95(c), there may be a question as to the LUC’s jurisdiction to place requirements on the decision of the county planning commissions.

b. Subsection (c)(2)

OPSD recognizes that the case law speaks to the need for adequate standards to guide decision-making and to limit commissioners’ discretion to deny permits. However, the revisions to HAR § 15-15-95(c)(2), appear too limiting and vague. While these revisions may have been intended to make the guidelines more specific and objective, the criteria focus solely on physical

safety. The commissioners may have other reasons to deny a permit besides those currently proposed. OPSD has also considered non-safety adverse effects to surrounding property under this guideline in the past. Some state agencies expressed concerns with both the limitations and potentially broad interpretations of the listed criteria.

The Department of Agriculture (HDOA) expressed a concern on the limitations of the list and asked whether the adverse effects to surrounding property in active agricultural production could include things like nuisance complaints by encroaching non-agricultural use and increase in land prices and land rents due to increase in value of surrounding properties that reduce economic viability of agricultural production. HDOA is concerned that “these proposed amendments may disadvantage programs and projects meant to protect and promote agricultural production on important agricultural land resources.” HDOA also expressed a concern that the proposed terms “unreasonable degree,” “unsuitability,” and “suitability” are not defined.

The Department of Corrections and Rehabilitation (DCR) noted a concern that some of the specific criteria added “could be interpreted to mean jails and prisons would no longer be ‘unusual and reasonable uses’” because “operation of their facilities generates traffic, trash, sewer and consume more water in comparison to undeveloped land.” This may place their “current and future projects that require Special Permits . . . in jeopardy.”

The State Public Utilities Commission (PUC) suggested that the proposed language could be edited to be clearer in the expectation of meeting (vs. determining violation of) said guidelines to determine permissibility of “unusual and reasonable” uses within the agricultural and rural districts.

The counties also expressed similar concerns. For example, the City & County of Honolulu (C&CH) stated that the proposed list is “too specific, hinging it solely on safety and the cause of impacts creating actual physical harm.” Additionally, that “each project is different requiring its own unique evaluation. By evaluating a project with only a ‘cookie cutter’ set of impacts, such effort may exclude impacts not listed, such as those effects on public views or the night sky.”

The County of Hawai‘i similarly stated that “some of the potential adverse effects are difficult to identify, foresee and measure,” such as “whether a proposed development or use will cause an increase in trash or debris or an increase in crime or trespassing.”

Considering the above concerns, OPSD recommends that the proposed language in HAR § 15-15-95(c)(2) be replaced as follows: “The proposed use would not cause adverse land use impacts to surrounding property or known adverse land use impacts can be mitigated to a reasonable degree to protect the surrounding property.”

c. Subsection (c)(4)

The Proposed Drafts would add the following language to HAR §15-15-95(c)(4): “(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 original intent of this guideline is to account for changes in general conditions, trends, and needs that might have occurred since the State Land Use District boundaries were established. The proposed amendment narrows the guideline by focusing on the suitability of the proposed use for the individual parcel and would render the section redundant with HAR § 15-15-95(c)(5), which provides that “the land upon which the proposed use is sought is unsuited or not well-suited for the uses permitted within the district.”

DCR is especially concerned by the revision to this subsection and suggests that inclusion of the phrase “suitability of the land for other uses” implies that any special permit application could be denied if the LUC decides that the land is better suited for uses other than jails and prisons, regardless of the societal need for such facilities. OPSD agrees and recommends that HAR § 15-15-95(c)(4) remain unchanged.

F. Distribution of Petitions

Proposed changes to HAR § 15-15-95(b) specify that in addition to distributing copies of the special permit petition to the LUC, OPSD, and HDOA, the counties must also provide copies to the CWRM, the Sustainability Coordinator, and the PUC. It is unclear why these three entities are called out and not all other potentially impacted agencies.

The C&CH had similar concerns:

The counties are already required to send special permit petitions to the LUC, the OPSD, and the State Department of Agriculture, and the [C&CH Department of Planning and Permitting] requests comments on the petition from a host of governmental and community organizations. Therefore, it is unclear why this additional requirement is necessary.

Rather than identify some entities and not others, OPSD recommends simplifying this paragraph, as follows:

The county shall assure that prior to the county hearing on the petition for special permit, copies of the special permit petition are forwarded to the land use commission, the state

office of planning and sustainable development, ~~and~~ the department of agriculture, and any other state agency that is impacted by or has jurisdiction over components of the petitioner's proposal for their review and comment.

G. Interpretation of District Boundaries

OPSD supports the proposed changes to HAR § 15-15-22(f) to clarify the procedure and timing for Commission action on boundary interpretations.

H. Ex Parte Communications

OPSD supports the proposed amendment of HAR § 15-15-62(a) to remove the LUC Executive Officer from those prohibited from participating in unauthorized ex parte communications.

II. NON-SUBSTANTIVE “HOUSEKEEPING” AMENDMENTS

OPSD has no objections to the following “housekeeping” changes:

- HAR § 15-15-07(a) Executive officer.
- HAR § 15-15-15(c) new subsection (c).
- HAR § 15-15-22(c)(1) ADA-compliant electronic filings and all subsequent amendments related to ADA-compliant filings, though we note the PUC’s request for more detail on ADA-compliance.

OPSD recommends the following revisions to agency references:

- References to the “Office of Planning” throughout the rules to the “Office of Planning and Sustainable Development.”
- Reference to the “state public utility commission” in proposed HAR §15-15-95 to the “state public utilities commission.”

The proposed rules previously included several amendments to replace the word “therefor.” We note that the Feb. 2024 Draft deletes these amendments. OPSD has no objection to replacement of the term “therefor” with a more specific reference (e.g., HAR §§ 15-15-101, -106(7), and -107(b)), or deletion where unnecessary.

The Nov. 2023 proposed rules previously amended HAR §§ 15-15-127(f) and -128(b) to replace the term “acts of God” with “natural disasters or accidents that are caused without human

intervention.” We note that the Feb. 2024 Draft retains the term “acts of God” along with the additional language previously proposed. OPSD has no objection to this later amendment.

Finally, we refer the LUC to the attached detailed formatting and typographical errors identified by the DLNR-Land Division.

III. OTHER POSSIBLE AMENDMENTS

Given that an agency’s administrative rules are not amended frequently, OPSD recommends that the LUC take this opportunity to consider other revisions. For example:

- The Legislature in 2023 contemplated clarifying revisions to Chapter 205, Part III Important Agricultural Lands (IAL), HRS, to incentivize the use of IAL, and expedite permit processing.
- OPSD’s 2022 review of land use districts identified a need to expand and make better use of the Rural District. Amendments to HAR § 15-15-27 may encourage more and better use of the Rural District and help to protect the Agricultural District from competing non-agricultural uses.
- The Governor’s emergency proclamations have identified the need to facilitate housing production. From OPSD’s communications with applicants and counties, the LUC may wish to consider eliminating some of the twenty-four mandatory conditions (*see* HAR § 15-15-90(e)), noting that the LUC would still be able to impose conditions on a case-by-case basis. Or provide clarification of what “sufficient evidence,” as used throughout the rules, entails.
- Applicability of Chapter 343 review requirements.
- During a recent hearing on a motion involving a time extension, several Commissioners raised questions regarding the existing HAR § 15-15-78 incremental districting process and what materials could be provided/requested both retroactively for earlier phases of a project as well as for future, subsequent phases.

This rule amendment process may provide an opportunity for important conversations regarding the future of the State Land Use Districts. As a first step, OPSD recommends the following amendments for the LUC’s consideration.

A. Definitions

The HDOA recommends, and OPSD agrees, that the definition of “Farm dwelling” in HAR § 15-15-03 be amended to conform to the current definition in Hawai‘i Revised Statutes § 205-4.5(a)(4), as follows:

“Farm dwelling” means a single-family dwelling located on and ~~used in connection with~~ accessory to a farm, including clusters of single-family farm dwellings permitted within

agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling.

B. Form and Contents of Petition: Subject Property Descriptions

A petition for DBA is required to include a description of the subject property and surrounding areas over the past two years. The HDOA recommends, and OPSD agrees, that the period of time be increased from two to five years for the following reasons:

Increasing the period of time to five years in describing the use of the petitioned property is necessary to partially mitigate the perception that agricultural land that is not in current or recent agricultural production has little or no value. Other reasons that explain the absence of agricultural production include landowners anticipating putting the land into non-agricultural uses, unfavorable terms of tenure for farmers, disease and insect infestations, loss of sufficient irrigation water, unfavorable markets for crops/livestock grown, and so forth. None of these reasons affect the land's capacity to support agricultural production.

The proposed revision to HAR § 15-15-50(c)(10) would read as follows: “Description of the subject property and surrounding areas including the use of the property over the past ~~two~~ five years . . .”

C. Motions

Subsections (e) and (f) of HAR § 15-15-70 require that parties file any response to a motion within seven days. For some motions – such as a motion for modification of a Decision and Order – seven days is too short a period, given the need to research the request and, for OPSD, the need to consult with State agencies. In such instances, OPSD has sought time extensions. The requirements to obtain an extension of time to respond, however, are not clearly described in HAR § 15-15-42, as explained in the next section. In addition, the seven days are calendar rather than business days, which include weekends and holidays, thereby providing even less time to review and respond to a motion or to determine whether an extension of time is needed and to obtain approval for such an extension. As such, OPSD recommends changing the seven-day requirement to twenty-one days.

D. Extensions of Time

HAR § 15-15-42(1) provides that where a party is required to file a pleading within a specific period, the party may make a written request for an extension of time before expiration of that period. OPSD has been verbally informed of other requirements from time to time, such as informing LUC staff before submission of the written request and obtaining agreement from the other parties. The exact procedure is unclear and sometimes difficult to fulfill for the reasons

stated in the preceding section and in situations involving multiple petitioners or intervenors. However, if this is the LUC's preferred procedure, we recommend that it be clearly stated in HAR § 15-15-42 Extensions of Time. For example, the LUC might consider the following revision:

(1) For good cause shown, with or without notice or hearing, extend such period if written request ~~therefor~~ is made, after notifying the executive officer of the requested extension and obtaining consent from the other parties, before the expiration of the period originally prescribed or as extended by a previous order; . . .

E. Petition before County Planning Commissions

The C&CH recommends that the rules better reflect the statute, specifically regarding establishing time periods for review. The C&CH Department of Planning and Permitting comments that:

We have concerns with the language in § 15-15-95(f) that requires county planning commissions to decide upon a reasonable time limit suited to establishing the particular use proposed, and if appropriate, a time limit for the duration of the proposed use, which shall be a condition of the special permit. The Hawaii Revised Statutes, Chapter 205 and the City and County of Honolulu, Rules of the Planning Commission do not state that the county planning commission establish a time limit for the duration of the proposed use, and it should be the County's discretion to determine if such a time limit is appropriate.

The C&CH also indicates their interest in discussing this matter further.

IV. OTHER RECOMMENDATIONS

As OPSD noted in its previous correspondence regarding this matter on November 9, 2023, we remain concerned about the discrepancies between the Ramseyer version of the proposed amendments and the summary spreadsheet posted on the LUC's website. The discrepancies between the two documents create confusion as to the substance of the proposed changes (e.g., HAR §§ 15-15-77(e) and -95(b)). We recommend that the two documents be made consistent with one another or that it be confirmed that the Ramseyer version controls. We refer also to the attached list of discrepancies provided by DLNR.

As we previously recommended, before proceeding with a vote on this matter, we recommend that the information that will be required by Administrative Directive No. 18-2 be supplied to the LUC and the public. This information would help address the issue that HDOA raised (i.e., "... it is currently unclear to what extent the amendments of HAR §§ 15-15-95(c)(2), (4), and (5) are necessary to satisfy recent court decisions."). There are components required by


Mr. Dan Giovanni
February 20, 2024
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the Directive that would provide useful information to the commissioners and facilitate a more informed discussion prior to a vote on this matter. Some of the information required includes:

- Identification of the problem the proposed rule change is meant to solve.
- The impact of changes –
 - How the rule change addresses the problem.
 - Positive and negative impacts on stakeholders.
 - Identification of the potential problems with the rule change.
 - The fiscal impact and economic impact to the State.
- The consequences if changes are not made.

OPSD thanks the LUC for the opportunity to provide comments on this matter, and we hope that our recommendations and thoughts are of use to the LUC.

Mahalo,

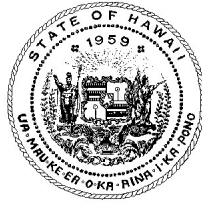


Mary Alice Evans
Interim Director

Enclosures

12/18/23		
RESPONSE TO OPSD REQUEST FOR COMMENT ON LUC RULE CHANGES		
Agency	Request Date	Comment Date (due 1/15/24)
DAGS	12/19/23	
- ADC	12/19/23	
- HSEO	12/19/23	
DOA	12/19/23	1/25/24
DBEDT	12/19/23	
- HCDA	12/19/23	
- HHFDC	12/19/23	
- Stadium Authority	12/19/23	
DOD	12/19/23	
DOE	12/19/23	
- State Libraries	12/19/23	
DHHL	12/19/23	
DOH	12/19/23	
HPHA	12/19/23	
DLNR	12/20/23	1/10/24
- CWRM	12/20/23	
DPS (DCR)	12/19/23	1/10/24
DOT	12/19/23	1/12/24
PUC	12/19/23	1/19/24
UH	12/19/23	
OHA	12/19/23	
C&C Honolulu	12/19/23	1/17/24
Hawaii County	12/19/23	1/12/24
Kauai County	12/19/23	
Maui County	12/19/23	1/19/24

JOSH GREEN, M.D.
GOVERNOR
KE KIA'AINA



STATE OF HAWAII | KA MOKU'ĀINA 'Ō HAWAII
**DEPARTMENT OF CORRECTIONS
AND REHABILITATION**
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Rehabilitation Services
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Programs

No. 2024-0015

January 9, 2024

Mary Alice Evans, Interim Director
State of Hawaii Office of Planning
And Sustainable Development
P.O. Box 2359
Honolulu, HI 96804

Dear Director Evans:

Subject: Proposed State Land Use Commission Administrative Rules Changes

In response to your December 18, 2023, letter requesting our comments on the proposed Administrative Rules changes, we offer the following:

1. *The LUC proposes to require approval from the State Commission on Water Resource Management (CWRM) for use of water from a specific aquifer(s) for a project as part of any petition for a district boundary amendment (DBA) (HAR, §15-15-50 (c) (13)), a DBA filed pursuant to Hawaii Revised Statutes (HRS), §201H-38 (HAR, §15-15-90 (e) (9)), or modification or deletion of conditions under the purview of CWRM (HAR, §15-15-94 (b)).*

Also proposed as part of a DBA filed under §201H-38 is a requirement that the design and construction of drainage improvements be reviewed by the State Sustainability Coordinator to ensure that the infrastructure and mitigation measures address the increased capacity required by climate change (HAR, §15-15-90 (e) (20)).

How would the proposed change impact on your projects or properties?

The Department of Corrections and Rehabilitation (DCR) currently has no projects that are proposing DBAs at our facilities. However, we would question the vagueness of the requirement for the CWRM approval. Potable water for most of our facilities are provided by the applicable Counties' Department of Water Supply. This proposed rule change does not stipulate how CWRM certification or approval interacts with the Counties' Board of Water Supply. It is also unclear if this rule change would only apply for specific projects that are developing new wells.

Although none of our facilities are undergoing DBAs at this time, the proposed rules change could have a direct impact as we do have current and future projects that include drainage and infrastructure improvements. Upon what criteria would the Sustainability Coordinator be reviewing our projects? Would this be merely a review, or will the Sustainability Coordinator have the authority to impose design/construction changes? Would there be review fees? These are some of the questions we have. As you know, obtaining building permits and other regulatory approvals are costly and lengthy processes. The DCR supports initiatives for the protection of environmental resources. However, this must be balanced against adding layers of reviews and approvals such that implementation of our projects becomes unsustainable.

2. *The LUC proposes amendments to HAR, §15-15-95 (c) that appears to replace the Guidelines for determining what constitutes an “unusual and reasonable use” that may be allowed with a special permit with expanded guidelines for determining whether an “unusual and reasonable use” is allowed. The amendments are meant to satisfy recent court decisions, but we are concerned that the new wording may have unintended consequences.*

How might the new guidelines impact your projects or properties?

This proposed change is of great concern to us. Operation of our facilities generate traffic, trash, sewer and consume more water in comparison to undeveloped land. The proposed rules change could be interpreted to mean jails and prisons would no longer be “unusual and reasonable uses” and current and future projects which would require Special Permits would be in jeopardy.

We are especially concerned by HAR, §15-15-95 (c)(4) which states:

*“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.”*

Inclusion of the phrase “suitability of the land for other uses” implies that any Special Permit application would be denied if the Commission decides that the land is better suited for uses other than jails and prisons, regardless of societal need for such facilities.

3. In general, the DCR would not support any Administrative Rules changes that adversely affects our mission to provide a secure correctional environment for comprehensive rehabilitative, holistic, and wraparound re-entry services, including culturally based approaches, to persons sentenced to our custody and care with professionalism, integrity, respect, and fairness. Our goal is to reduce recidivism and enhance the safety and security of our communities.

Thank you for this opportunity to provide comments. Should you have any questions, your staff may contact Wayne Takara, Chief Planner, at (808) 587-3463.

Sincerely,



Tommy Johnson
Director

Attachment

c: Aaron Setogawa - OPSD
Katia Balassiano - OPSD

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



EDWIN H. SNIFFEN
DIRECTOR
KA LUNA HO'OKELE

Deputy Directors
Nā Hope Luna Ho'okele
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IN REPLY REFER TO:


DIR 0913
STP 8.3706

January 12, 2024

VIA EMAIL: aaron.h.setogawa@hawaii.gov

TO: JAMES KUNANE TOKIOKA, DIRECTOR
DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND
TOURISM

ATTENTION: MARY ALICE EVANS, INTERIM DIRECTOR
OFFICE OF PLANNING AND SUSTAINABLE
DEVELOPMENT (OPSD)

FROM: EDWIN H. SNIFFEN 
DIRECTOR OF TRANSPORTATION

SUBJECT: REQUEST FOR COMMENTS ON PROPOSED STATE LAND USE
COMMISSION (LUC) ADMINISTRATIVE RULES CHANGES

Thank you for your letter dated December 18, 2023, requesting the Hawaii Department of Transportation's (HDOT) review and comments on the proposed amendments to the LUC's administrative rules, Hawaii Administrative Rules, Chapter 15-15.

HDOT has reviewed the proposed amendments to the LUC administrative rules and has the following comment:

Over the past 45 years, HDOT Harbors has limited historic instances in which a request to interpret or amend a district boundary have been required. While HDOT does not anticipate such requests in the foreseeable future, we note that the requirements set out in Section 15-15-50(c)(26) are not applicable to most improvements within our ports, and we request consideration that Section 15-15-50(c)(27) notes that certification or approval by OPSD is not unreasonably withheld when sustainability and smart growth principles are not applicable.

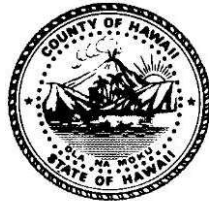
Please submit any subsequent land use entitlement related request or correspondence to the HDOT Land Use Intake email address at DOT.LandUse@hawaii.gov.

If there are any questions, please contact Mr. Blayne Nikaido, Planner, Land Use Section of the HDOT Statewide Transportation Planning Office at (808) 831-7979 or via email at blayne.h.nikaido@hawaii.gov.

Mitchell D. Roth
Mayor

Deanna S. Sako
Managing Director

West Hawai'i Office
74-5044 Ane Keohokālole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563



County of Hawai'i PLANNING DEPARTMENT

Zendo Kern
Director

Jeffrey W. Darrow
Deputy Director

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

January 12, 2024

Mary Alice Evans
Interim Director
State of Hawai'i Office of Planning and Sustainable Development
235 South Beretania Street, 6th Floor
Honolulu, HI 96813

Dear Ms. Evans:

SUBJECT: Response to Request for Comments on Proposed State Land Use Commission Administrative Rules Changes

Thank you for the opportunity to review and comment on the subject matter. Enclosed are the Hawai'i County Planning Department's comments regarding OPSD's request for comments on the proposed State Land Use Commission Administrative Rule changes. Based on our preliminary review, we offer the following comments and recommendations. The proposed deletions are stricken and in brackets while the proposed additions are in bold and underlined.

- 1. The LUC proposes to require approval from the State Commission on Water Resource Management (CWRM) for use of water from a specific aquifer(s) for a project as part of any petition for a district boundary amendment (DBA) (HAR, §15-15-50 (c)(13)), a DBA filed pursuant to Hawai'i Revised Statutes (HRS), §201H-38 HAR, §15-15-90 (e)(9)), or modification or deletion of conditions under the purview of CWRM (HAR, §15-15-94(b)). Also, proposed as part of a DBA filed under 201H-38 is a requirement that the design and construction of drainage improvements be reviewed by the State Sustainability Coordinator to ensure that the infrastructure and mitigation measures address the increased capacity required by climate change (HAR, §15-15-90(e)(20)).**

The Planning Department does not support the proposed amendment for the requirement for certification or approval by CWRM for future projects (HAR, §15-15-50(c)(13). In addition, the Planning Department does not support the proposed amendment to the imposition of conditions located in, HAR, §15-15-90(e)(9). The Planning Department requests that the Land Use Commission work with CWRM to develop a plan to better

address any ongoing issues that may exist related to water availability. Requiring a CWRM certification and/or approval will cause further delay in an already time-consuming process. In addition, not all petitions will require CWRM certification or approval if County water is available for the development or proposed use. Currently within the County of Hawai'i there are no CWRM designated water management areas. Based on that it is overly burdensome to require petitions to include a CWRM approval for the petitions that are located on the Island of Hawai'i at this time. Based on the preceding, the Planning Department is recommending that LUC amend the rules to state the following:

HAR, §15-15-50(c)(13) Certification or approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project[-], if applicable.

HAR, §15-15-90(e)(9) Petitioner shall be required to seek approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project[-], if applicable. The commission on water resource management may deny use of water from any existing aquifer if it determines such use will harm the aquifer or exceed the capacity of the aquifer.

Lastly, the Planning Department has no objection or comments to the proposed amendments to HAR §15-15-94(b) and HAR §15-15-90(e)(20).

- 2. The LUC proposes to give itself the discretion to dismiss or deny a motion at the completion of the petitioner's presentation based on a failure to meet its burden of proof, failure to provide sufficient evidence for a decision, or substantive or procedural defects (HAR, §15-15-70(1)). In addition, the LUC proposes to give itself the discretion to deny a DBA petition at the completion of the petitioner's presentation based on a failure to meet its burden of proof or substantive or procedural defects (HAR, §15-15-77(f)). Both proposed amendments would allow the LUC to dismiss or deny a motion or deny a DBA without giving the county an opportunity to comment on the motion or DBA.**

The Planning Department believes that this proposed amendment directly contradicts, circumvents, and puts a stop to the process before the process is completed, therefore the Planning Department is not in support of this amendment. A summary dismissal of motions without county or OPSD comments may preclude the county or the state from having the opportunity to remedy deficiencies in the petition. Also, would public testimony be precluded? If so, there is an issue of equity between the public's concerns and county and State interests, e.g., HAR, §15-15-70(1). It is our understanding that if the matter is dismissed then the petitioner can re-submit or submit additional information. However, if it is denied then the petitioner will not be allowed to submit additional

information. By allowing for the denial of a motion, this will further delay petitions that already take a year to get through the LUC process and if the petitioner has met the criteria for acceptance of a DBA listed in HAR, §15-15-50 then this should not be applied. Based on the preceding, the Planning Department is recommending that the LUC amend the rules to state the following:

HAR, §15-15-70(l) The commission may dismiss ~~or deny~~ a motion if it determines that at the completion of the petitioner's presentation, that petitioner has not met its burden of proof to grant the motion, has failed to provide sufficient evidence to render a decision on the motion, or there are substantive or procedural defects in the motion.

- 3. The LUC proposes amendments to HAR, § 15-15-95(c) that appears to replace the guidelines for determining what constitutes an "unusual and reasonable use" that may be allowed with a special permit with expanded guidelines for determining whether an "unusual and reasonable use" is allowed. The amendments are meant to satisfy recent court decisions, but we are concerned that the new wording may have unintended consequences.**

This amendment of HAR, §15-15-95(c) appears to replace the guidelines for determining what constitutes an "unusual and reasonable use" with criteria for determining whether an "unusual and reasonable use" is allowed. The LUC is currently recommending the following amendments to HAR, §15-15-95(c):

(c) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. ~~[The following guidelines are established in]~~ 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:

However, the Planning Department recommends that the LUC remove the word violate and replace it with the following:

(c) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. ~~[The following guidelines are established in]~~ 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 in ~~[violated]~~ **non-compliance:**

In addition to the proposed amendments in HAR, §15-15-95(c), the LUC is further clarifying what is an “unusual and reasonable use” in the proposed amendment to HAR, §15-15-95(c)(2). This amendment appears to expand the guidelines that the County Planning Commissions must take into consideration in reviewing a Special Permit. The LUC is currently recommending the following amendment to HAR, §15-15-95(c)(2):

(2) The proposed use would not adversely affect the safety of surrounding property to an unreasonable degree, by causing physical harm to property or residents; causing air, water, or noise pollution; increasing trash or debris; increasing traffic or impairing traffic safety; impairing sanitation or sewers; impairing flood control; increasing crime or trespassing; or increasing fire risk;

The Planning Department sees some of the potential adverse effects as difficult to identify, foresee and measure. While we can determine flood risks, impacts to water pollution, and the adverse effects of noise on surrounding property owners, we cannot determine, predict or measure whether a proposed development or use will cause an increase in trash or debris or an increase in crime or trespassing. Based on the preceding, the Planning Department recommends the following amendment to HAR, §15-15-95(c)(2):

HAR, §15-15-95(c)(2) The proposed use would not adversely affect the safety of surrounding property to an unreasonable degree, by causing physical harm to property or residents; causing air, water, or noise pollution; ~~increasing trash or debris;~~ increasing traffic or impairing traffic safety; impairing sanitation or sewers; impairing flood control; ~~increasing crime or trespassing;~~ or increasing fire risk;

We appreciate your efforts to work with our office on the proposed State Land Use Commission Administrative Rules Changes. We look forward to seeing how other counties view the proposed changes. If you have any questions, please contact me at (808) 961-8125.

Sincerely,

Jeffrey W. Darrow
Jeffrey W. Darrow (Jan 12, 2024 16:28 HST)

ZENDO KERN
Planning Director

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

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

January 10, 2024

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H.E. KAAKUA
FIRST DEPUTY

DEAN D. UYENO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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

Mr. Dan Giovanni, Chair
State of Hawai'i Land Use Commission
P.O. Box 2359
Honolulu, HI 96804-2359



SUBJECT: Comments on the 2023 Proposed Administrative Rules

Dear Chair Giovanni:

Land Division Staff has reviewed the proposed Land Use Commission (LUC) rule amendment and offers the following comments:

1. For the Amendment and Compilation Summary section (pages 15-1 through 15-4), we note that amendments were made to §15-15-95 (b), §15-15-109 (d), §15-15-109 (e), §15-15-127 (f), and §15-15-128 (b) and should be included accordingly.
2. Please check formatting throughout document. Specific examples include the following:
 - For the "table of contents" on page 15-7, the third line for the reference to §15-15-127 should be indented to align with previous lines.
 - In §15-15-22(c)(2), §15-15-22 should be deleted and *shoreline surveys, and subdivision maps* line should be moved up.
 - In §15-15-22(e)(1), remove indentation to align with numbers (2) and (3).
 - In §15-15-50(c)(25)(A), (A) should start on its own line.
3. In §15-15-07 there is a strikeout of the word "to" in the second sentence which makes the sentence grammatically incorrect.

4. In §15-15-37, we believe the word “compliant” was accidentally struck out. We suggest reinserting it for consistency purposes.
5. Staff notes that some of the proposed amendments to §15-15-50 appear to be duplicative of county zoning and permitting requirements. Rather than creating additional procedural requirements that will increase applicant time and effort for an already complex process, we believe it to be more important for the LUC to focus on the appropriateness of the petition as it relates to the coinciding State Land Use District Boundary rather than the minuties of a project/request.

Specifically, §15-15-50(c)(13) is proposing to require certification or approval from the Commission on Water Resource Management (CWRM). For projects/petitions that are intended to connect to the public water system, this requirement would appear duplicative as it is the County who determines availability of source and service.

Further, CWRM provided testimony at the November 15, 2023, LUC meeting in which they stated that *“we cannot provide certification or approval of water for future projects, nor can we guarantee water for future projects. Approval of water for projects from CWRM may come in the form of water use permit allocations in designated water management areas, water reservations, and approved well and stream diversion permits in areas which are not designated as water management areas. CWRM can provide a statement of current water resource availability describing the affected hydrologic unit’s sustainable yield or interim instream flow standard, current withdrawals, and available unused sustainable yield or interim instream flow standard. CWRM can also attest to whether the proposed project is consistent with the respective county WUDP [Water Use and Development Plan] (which has been adopted by CWRM)”*. Therefore, we recommend either removing this requirement or amending the requirement as requested by CWRM in their November 15, 2023, written testimony which we have included as an attachment.

In addition, §15-15-50(c)(27) requires *“certification or approval by the state office of planning and sustainable development’s state sustainability coordinator that all issues identified in §15-15-50(c)(25) and (26) have been adequately addressed and climate adaptation and mitigation measures identified.”* The LUC is composed of nine (9), highly qualified members, that are appointed to make independent determinations based on the merits of a proposal. We believe that it would be unwise to set a precedent potentially allowing staff to govern approvals that should be vetted and decided by the Commission. A contrarian decision by staff could bar the Commission from acting on a petition despite its ultimate decision-making power over Boundary Amendments and the like. Further, §15-15-50(c)(25) and (26) applies to infrastructure improvements and mitigation measures which would require a background in engineering. It is unclear if the State Sustainability Coordinator possesses such expertise. Moreso, we query rather than an approval from the State Sustainability Coordinator whether the State’s Climate Change Mitigation and Adaptation Commission would be more appropriate.

6. It is unclear at which point of the hearing process as outlined in §15-15-59, would §15-15-70(l) and §15-15-77(f) be initiated. We ask that this be clarified and would further request that such determination be made after all witnesses have been heard and cross examined. In addition, it is also unclear if public testimony would be included before such a decision is made and thus request additional further clarification on this matter as well.
7. Regarding amendments to §15-15-90(e)(9) and §15-15-94(b), please see attached comments from CWRM and regarding amendments to §15-15-90(e)(20) and (25) and §15-15-94(c), please see our comments above (No. 3).

Should you have any questions regarding this correspondence, please contact Ms. Lauren Yasaka at (808) 587-0431.

Sincerely,

A handwritten signature in black ink, appearing to be 'Dawn N.S. Chang', with a stylized flourish extending to the right.

Dawn N.S. Chang *RT*
Chairperson

Attachments

c: CWRM
OPSD

From: [Fujii, Neal D](#)
To: [DBEDT LUC](#)
Cc: [Chang, Dawn](#); [Manuel, Kaleo L](#); [Kaakua, Laura](#); [Kealialio, Kanani](#); [Kaaa, Iwalani HR](#)
Subject: Testimony LUC Agenda Item IV November 15, 2023
Date: Tuesday, November 14, 2023 9:56:36 AM
Attachments: [Testimony LUC 20231115 Item IV.docx](#)



Aloha,

Please find attached the testimony of Commission on Water Resource Management Chairperson Dawn Chang on LUC Meeting Agenda Item IV, November 15, 2023.

Mahalo,

Neal Fujii
State Drought and Water Conservation Coordinator
Commission on Water Resource Management
Hawaii Department of Land and Natural Resources
1151 Punchbowl Street, Room 227
Honolulu, Hawaii 96813
(808) 587-0264
<http://dlnr.hawaii.gov/cwrm/>



STATE OF HAWAI'I | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES | KA 'OIHANA KUMUWAIWAI 'ĀINA
COMMISSION ON WATER RESOURCE MANAGEMENT | KE KAHUWAI PONO
P.O. BOX 621
HONOLULU, HAWAII 96809

Testimony of
DAWN N. S. CHANG
Chairperson

Before the Land Use Commission

November 15, 2023
10:00 AM

Leiopapa A Kamehameha, State Office Tower, Room 405
235 S Beretania Street, Room 405, Honolulu, HI 96813



In consideration of Agenda Item IV. DISCUSSION OF PROPOSED RULE AMENDMENTS TO THE LAND USE COMMISSION ADMINISTRATIVE RULES CHAPTER 15-15

The Commission on Water Resource Management (CWRM) is providing written testimony on portions of the proposed rule amendments to Land Use Commission administrative rules Chapter 15-15, in Section 15-15-50, subsection (c), paragraph (13); and Section 15-15-90, subsection (e), paragraph (9).

While we understand the importance and need to coordinate water and land use planning, policies, and decisions, it is problematic for CWRM to provide approval or certification of water for future projects when there are many factors and uncertainties affecting water availability in Hawai'i. Some factors, such as the designation of water management areas or climate change impacts to water availability, may vary in the time scale of a few years to decades or more. CWRM can reserve water for uses in designated water management areas by rule, and for current and foreseeable development and use by the Department of Hawaiian Home Lands (DHHL). CWRM has never received a request for or reserved water for purposes other than for DHHL.

Comprehensive water resources planning to address the problems of supply and conservation of water is one of the core policies of CWRM. The Hawai'i water plan pursuant to Hawai'i Revised Statutes §174C-31 with its future amendments, supplements, and additions is the guide for developing and implementing this policy. The Hawai'i Water Plan consists of five component parts shown in the table below.

Hawai'i Water Plan Component	Agency Responsible for Preparing	Date Adopted by CWRM
Water Resource Protection Plan	Hawai'i Commission on Water Resource Management	2019
Water Quality Plan	Hawai'i Department of Health	2019
Agricultural Water Use and Development Plan	Hawai'i Department of Agriculture	2004

State Water Projects Plan	Hawai'i Department of Land and Natural Resources	2020
County Water Use and Development Plans	Respective County Water Departments	Hawai'i (2010) Honolulu (2016) Maui (2023) Kaua'i (1990)

The respective County Water Use and Development Plans (WUDP), adopted by CWRM, are the planning documents designed to coordinate water and land use planning and ensure that water will be available for future uses. The WUDP are prepared by each county, adopted by ordinance, and sets forth the allocation of water to land use in that county. Each WUDP shall be consistent with the respective county land use plans and policies including general plan and zoning as determined by each respective county. Further, each WUDP shall also be consistent with the state land use classification and policies. The WUDP contain planned future land uses and related water needs over a 20-year planning horizon based on county land use plans and county land use zoning approvals. The WUDP should also consider authorized planned use, which means the use or projected use of water by a development that has received the proper state land use designation and county development plan/community plan approvals. An authorized planned use that may cause the maximum rate of withdrawal from an aquifer to reach 90% of its sustainable yield is one criteria for designation of a ground water management area.

While CWRM supports the intent of the proposed rule amendments, we cannot provide certification or approval of water for future projects, nor can we guarantee water for future projects. Approval of water for projects from CWRM may come in the form of water use permit allocations in designated water management areas, water reservations, and approved well and stream diversion permits in areas which are not designated as water management areas. CWRM can provide a statement of *current* water resource availability describing the affected hydrologic unit's sustainable yield or interim instream flow standard, current withdrawals, and available unused sustainable yield or interim instream flow standard. CWRM can also attest to whether the proposed project is consistent with the respective county WUDP (which has been adopted by CWRM). As such, we respectfully request the following changes to the proposed rule amendments. The proposed deletions are stricken and in brackets, proposed additions are in bold underline.

§15-15-50 Form and contents of petition.

(c) The following information shall also be provided in each petition for boundary amendment:

(13) [~~Certification or approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project.~~] **A statement from the commission on water resource management on current water availability in the hydrologic unit from where the proposed project would withdraw its water.**

§15-15-90 Imposition of conditions; generally.

(e) If a boundary amendment petition filed pursuant to section 205-4, HRS, is approved pursuant to section 91-13.5, HRS, or a petition filed pursuant to section 201H-38, HRS, is deemed approved on the forty-sixth day, the following mandatory conditions shall apply:

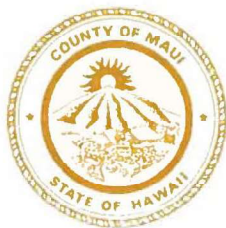
(9) Petitioner shall **be required to seek a statement from the commission on water resource management on current water availability in the hydrologic unit from**

~~where the proposed project would withdraw its water [approval of the commission on water resource management for utilization of water from a specific aquifer or aquifer(s) for the project]. The commission on water resource management may deny use of water from any existing [aquifer] hydrologic unit if it determines such use will harm the [aquifer] hydrologic unit or exceed the currently available capacity of the [aquifer] hydrologic unit. Petitioner shall~~ participate in the funding and construction of adequate wastewater transmission and disposal facilities, on a fair-share basis, as determined by the respective county in which the land to which the boundary amendment applies is located, and the state department of health;

Mahalo for the opportunity to testify.

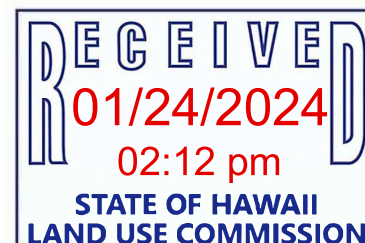
RICHARD T. BISSEN, JR.
Mayor

GARRETT E. SMITH
Acting Director



DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

January 19, 2024



Mr. Daniel E Orodener
Executive Officer, Land Use Commission
State of Hawai'i Land Use Commission
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawai'i 96804-2359

**Re: Comments on the 2023 Proposed Amendments to the LUC
Administrative Rules**

Dear Mr. Orodener,

Thank you for hosting the January 3, 2024 meeting, which was an opportunity to participate in a discussion with you and your staff along with representatives from other counties regarding the proposed 2023 Amendments to the Land Use Commission Administrative Rules. The Maui County Planning Department's Administrative Planning Officer, Gregory Pfof, attended this meeting and updated me accordingly. The Planning Department (Department) supports the comments expressed by Mr. Pfof during the meeting in addition to other comments provided by other county agencies. To ensure that you are clear on the Department's position, please let this letter serve to re-state the Department's comment on the proposed amendments.

As expressed during the meeting, the Department is particularly concerned regarding Section 15-15-77 - Decision-making criteria for boundary amendments. Specifically, sub-section (7) indicates "*In considering boundary amendments for lands designated important agricultural lands pursuant to part III, chapter 205, HRS, the commission shall specifically consider the standards and criteria set forth in section 205-50, HRS,*" and "*(e) The land use commission may dismiss a petition if it determines that the parties have failed to provide sufficient evidence to render a decision on the petition.*"

The Department's concern with this section is that it appears to grant the LUC significant authority in determining whether a petition is "complete," wherein much of that responsibility should be placed on the administrative process handled by LUC staff. Specifically, it appears that rather than making decisions on petitions that may be difficult, the LUC could take the option of simply dismissing a petition by claiming that sufficient evidence to make a decision has not been provided by the petitioner. Such a decision by the LUC could result in a potential restart of the

Mr. Daniel E. Orodenker
January 19, 2024
Page 2

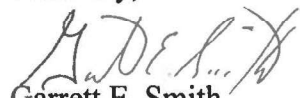
petition with significant additional time and expense to the petitioner. For example, often, many studies are prepared as part of or in support of a petition. Those studies may have functional “expiration” dates before becoming “stale” or ineffective in assessing impacts for the implementation of appropriate mitigation measures or conditions of approval. If a petition is dismissed these studies will necessitate revisions at significant expense to the petitioner.

Petitioners will be specifically vulnerable to this dismissal option when a cumulative impacts analysis is required, if the extent of analysis (distinct from the quality of the petitioner’s analysis) will remain subject to debate before the Commission after the petitioner’s realistic time to complete technical analysis in the process has passed.

As an alternative, you may wish to consider including an option for a commission and petitioner agreed upon timeframe of deferral that would procedurally extend any applicable fixed timelines to allow for supplemental technical study for submittal into the record with specific documentation from the Commission identifying the inadequate content of the petitioner’s filings similar to the administrative process described in §15-15-50.5. This would ensure a process where petitioners acting in good faith are afforded the opportunity to address any inadequacies in analysis without the loss of all prior forward progress.

Thank you again for including the County of Maui in the process of the LUC’s rule amendment process. I would appreciate it if you could continue to keep Mr. Pfof aware of any future actions related to this process. He may be reached at (808) 270-7965 or via email at Gregory.J.Pfof@co.maui.hi.us.

Sincerely,



Garrett E. Smith
Acting Planning Director

Copy to: Jordan Hart, Program Planning Manager
Gregory Pfof, Administrative Planning Officer

GES:JEH;lt

S:\All\APO\PD Comment Letters on Draft Legislation\Hawaii LUC Rule Changes\Land Use Commission Rule Change Comments 20240118.docx

JOSH GREEN, M.D.
GOVERNOR

SYLVIA LUKE
LT. GOVERNOR



STATE OF HAWAII
PUBLIC UTILITIES COMMISSION
465 S. KING STREET, #103
HONOLULU, HAWAII 96813

LEODOLOFF R. ASUNCION, JR.
CHAIR

NAOMI U. KUWAYE
COMMISSIONER

COLIN A. YOST
COMMISSIONER

Telephone: (808) 586-2020
Facsimile: (808) 586-2066

Website: puc.hawaii.gov
E-mail: puc@hawaii.gov

January 19, 2024

Via E-mail to OPSD

To: Ms. Mary Alice Evans
Interim Director
Office of Planning & Sustainable Development
235 South Beretania St., 6th Floor
Honolulu, HI 96813

Attn: Katia Balassiano
Aaron Setogawa

From: Leo R. Asuncion, Jr. 
Chairperson, Public Utilities Commission

Subject: Request for Comments on Proposed State Land Use Administrative Rules Changes

Dear Ms. Evans:

Thank you for your letter dated December 18, 2023 (DTS202311301537SE), soliciting comments from the Public Utilities Commission (PUC) on the proposed administrative rules amendments to Hawaii Administrative Rules (HAR) Chapter 15-15 proposed by the Land Use Commission (LUC).

We respond first to specific questions posed in the December 18, 2023, letter:

1. Question: The LUC proposes to require approval from the State Commission on Water Resource Management (CWRM) for use of water from a specific aquifer(s) for a project as part of any petition for a district boundary amendment (DBA) (HAR, §15-15-50 (c) (13)), a DBA filed pursuant to Hawaii Revised Statutes (HRS), §201H-38 (HAR, §15-15-90 (e) (9)), or modification or deletion of conditions under the purview of CWRM (HAR, §15-15-94 (b)).

Also proposed as part of a DBA filed under §201H-38 is a requirement that the design and construction of drainage improvements be reviewed by the State Sustainability Coordinator to ensure that the infrastructure and

mitigation measures address the increased capacity required by climate change (HAR, §15-15-90 (e) (20)).

How would the proposed change impact your projects or properties?

Response: The PUC is supportive of the proposed amendment to require approval from the State Commission on Water Resource Management (CWRM) for petitions for DBAs (HAR §15-15-50(c)(13)), DBAs filed pursuant to HRS §201H-38 (HAR §15-15-90(e)(9)), or modification or deletion of conditions under CWRM’s purview (HAR §15-15-94(b)).

The PUC acts on applications from private water companies and in review of said applications, we coordinate with the CWRM to ensure that PUC analysis and decisions are consistent with CWRM decisions and orders.

Regarding the proposed amendment to have design and construction of drainage improvements be reviewed by the State Sustainability Coordinator to ensure that the infrastructure and mitigation measures address the increased capacity required by climate change (HAR, §15-15-90 (e) (20)), we defer to the OPSD and specifically the State Sustainability Coordinator for comments.

The proposed changes above would have no impact on applications brought before the PUC, nor actions taken by the PUC on said applications. It is our belief that the proposed amendments allow State regulatory agencies to be consistent and supportive of each other’s decision-making responsibilities.

2. Question: The LUC proposes amendments to HAR, §15-15-95 (c) that appears to replace the guidelines for determining what constitutes an “unusual and reasonable use” that may be allowed with a special permit with expanded guidelines for determining whether an “unusual and reasonable use” is allowed. The amendments are meant to satisfy recent court decisions, but we are concerned that the new wording may have unintended consequences.

How might the new guidelines impact your projects or properties?

Response: The PUC’s read of the proposed amendments to HAR §15-15-95(c) does not appear to replace the guidelines for determining “unusual and reasonable” uses, but appears to clarify said guidelines, likely to be consistent with recent court decisions. However, the PUC does see how the proposed amendments may be interpreted differently resulting in unintended consequences.

The PUC suggest that the proposed language could be edited to be clearer in the expectation of meeting (vs. determining violation of) said guidelines to determine permissibility of “unusual and reasonable” uses within the agricultural and rural districts.

The proposed amendments to HAR §15-15-95(c) would have no impact on applications brought before the PUC, nor actions taken by the PUC on said applications, if Special Permits petitions are filed and decided upon by the county planning commissions (and LUC, as applicable) **before** filing with the PUC.

3. General Comments

a. Proposed Amendment to HAR §15-15-95(b) (Page 15-94)

The PUC appreciates the opportunity to review and comment on Special Permit petitions filed with the respective county planning commissions. We will strive to provide comments in a timely manner, especially if such petitions involve projects proposed by entities that are regulated by the PUC.

The reference to the “state public utility commission” should be corrected to read “state public **utilities** commission”.

b. References to electronic copies being “ADA Compliant”

It would be beneficial to have criteria or requirements outlined, or referenced to, that would make an electronic copy “ADA Compliant”.

c. Reference to State Office of Planning

On page 15-40, HAR §15-15-48(a)(3) should be amended to reflect the current name of the State Office of Planning

Thank you for the opportunity to provide comments on the proposed amendments to HAR Chapter 15-15. If you should have any questions on the above comments, please feel free to contact me at (808) 586-2010 or via e-mail at Leo.r.asuncion@hawaii.gov.

JOSH GREEN, M.D.
Governor

SYLVIA LUKE
Lt. Governor



SHARON HURD
Chairperson, Board of Agriculture

DEXTER KISHIDA
Deputy to the Chairperson

State of Hawai'i
DEPARTMENT OF AGRICULTURE
KA 'OIHANA MAHI'AI
1428 South King Street
Honolulu, Hawai'i 96814-2512
Phone: (808) 973-9600 FAX: (808) 973-9613

January 18, 2024

Rec. No. 27887

Ms. Mary Alice Evans, Director
Office of Planning and Sustainable Development
235 South Beretania Street, 6th Floor
Honolulu, Hawaii 96813

Attn: Katia Balassiano
Planning Program Administrator



Dear Ms. Evans:

Subject: 2023 Proposed Amendments to Land Use Commission Rules

The Department of Agriculture ("HDOA") has reviewed the subject document and additional concerns raised in your letter of December 18, 2023, and offers the following comments and recommendations.

Section 15-15-03 Definitions

Pages 15-9 to -10

The definition of "Farm dwelling" must be amended to conform to the current definition in Section 205-4.5(a)(4). See underscored text below:

"(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and accessory to a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;"

Section 15-15-50 Form and contents of petition

Page 15-43 – subparagraph (10)

We are recommending the following amendment:

"(10) Description of the subject property and surrounding areas including the use of the property over the past [~~two~~] five years, the present use, the soil classification, the agricultural lands of importance to the State of Hawai'i classification (ALISH), the Land Study Bureau productivity rating, the flood and drainage conditions, and the topography of the subject property;"



Concern and Rationale: Increasing the period of time to five years in describing the use of the petitioned property is necessary to partially mitigate the perception that agricultural land that is not in current or recent agricultural production has little or no value. Other reasons that explain the absence of agricultural production include - landowners anticipating putting the land into non-agricultural uses, unfavorable terms of tenure for farmers, disease and insect infestations, loss of sufficient irrigation water, unfavorable markets for crops/livestock grown, and so forth. None of these reasons affect the land's capacity to support agricultural production. However, we do not believe any of these reasons are found in the Hawaii Revised Statutes, other than insufficient irrigation water.

Section 15-15-95 Special Permits

Pages 15-94 to 95

HDOA is concerned about the proposed rule amendments for Special Permits (Section 15-15-95 (c)(2),(4) and (5), pages 15-94 to 95).

“(2) The proposed use would not adversely affect the safety of surrounding property to an unreasonable degree, by causing physical harm to property or residents; causing air, water, or noise pollution; increasing trash or debris; increasing traffic or impairing traffic safety; impairing sanitation or sewers; impairing flood control; increasing crime or trespassing; or increasing fire risk;”

Observation: The proposed amendments are based on state and Federal court decisions. The affect of a petitioned use on the safety of surrounding property must not be adverse to an unreasonable degree. The amending language describes the examples of adverse affect on safety of surrounding property as – physical harm to property/residents, pollution, trash/debris, traffic, sanitation/sewers, flood control, crime/trespassing, and fire risk. Determination of what is an “unreasonable degree” of effect on safety is left to the county planning commission or the Land Use Commission (LUC).

Concern: HDOA asks whether the examples of adverse affect could include surrounding property in active agricultural production being subject to nuisance complaints by the encroaching non-agricultural use, and increase in value of surrounding properties that may result in increased land prices and land rents that that reduce economic viability of agricultural production.

-
- “(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; ~~or~~ and
- (5) The land upon which the proposed use is sought is unsuited or not well-suited for the uses permitted within the district.”

Observation: The terms “unsuitability” and “not well-suited” with respect to agricultural land should be defined in the same manner done for guideline (2).

Concern: We are concerned that without definitions, these proposed amendments may disadvantage programs and projects meant to protect and promote agricultural production on important agricultural land resources.

In comparison, the “suitability of the land for other uses” appears easier to define because the “other uses” are usually not dependent upon the characteristics inherent in the affected soil. Agricultural production on the other hand is intrinsically a function of the soil of the petitioned area.

HDOA would like to discuss this matter with you and your staff.

Regarding your concern about the proposed approvals from the Commission on Water Resource Management (CWRM), the Agricultural Resource Management Division (ARMD) does not anticipate the CWRM-related amendments will affect their programs. As for the proposed Special Permit expanded guidelines, ARMD is, at this time, uncertain whether these amendments will have an adverse impact on their irrigation and land management programs.

This concludes our comments and recommendations. Please direct your questions to Earl Yamamoto at (808 973-9466) or email at earl.j.yamamoto@hawaii.gov.

Sincerely,



Sharon Hurd
Chairperson, Hawaii Board of Agriculture
Hawaii Department of Agriculture

c: Agricultural Resource Management Division



DEPARTMENT OF PLANNING AND PERMITTING
KA 'OIHANA HO'OLĀLĀ A ME NĀ PALAPALA 'AE
CITY AND COUNTY OF HONOLULU

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RICK BLANGIARDI
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DAWN TAKEUCHI APUNA
DIRECTOR
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JIRO A. SUMADA
DEPUTY DIRECTOR
HOPE PO'O

January 17, 2024

2023/ELOG-2326(FK)
2512377

Ms. Mary Alice Evans
Interim Director
State of Hawai'i
Office of Planning and Sustainable Development
235 South Beretania, 6th Floor
Honolulu, Hawai'i 96813



Dear Ms. Evans:

**SUBJECT: Request for Comments on Proposed State Land Use
Commission Administrative Rule Changes**

Thank you for providing the State Office of Planning and Sustainable Development's (OPSD) testimony regarding concern over the State Land Use Commission's (LUC) proposed rule amendments. The Department of Planning and Permitting (DPP) appreciates your request for comments from our agency.

Your request for comments focuses on three proposed amendments:

1. Requiring approval from the State Commission on Water Resource Management (CWRM) for use of water from a specific aquifer(s) as well as review by State Sustainability Coordinator of any drainage improvements for a project as part of any petition for a district boundary amendment (DBA);
2. The LUC gaining broad discretion to dismiss or deny a motion and to deny a DBA petition at the completion of the petitioner's presentation based on a failure to meet its burden of proof, failure to provide sufficient evidence; and
3. Altering the guideline language for determining what constitutes an "unusual and reasonable use".

Requiring approval from the State CWRM and Sustainability Coordinator

The DPP shares OPSD's concerns that requiring approval by the CWRM for water at the time or before a DBA petition is filed is burdensome and duplicates County requirements. The CWRM opposed this change in its November 14, 2023 written testimony, and stated that County Water Use and Development Plans (WUDP), prepared by each respective county and adopted by CWRM, are the planning documents designed to coordinate water and land use planning and ensure that water will be available for future uses. Similarly, the Counties' already have requirements to ensure that adequate drainage and stormwater infrastructure improvements meet local and state codes.

LUC's discretion to dismiss or deny a motion and to deny a DBA petition

The DPP understands the need for the LUC to ensure expedient and effective hearings. However, the proposed authority this discretion gives the LUC may in fact lead to a longer approval process. Substantive or procedural defects should be identified early on, not at the hearing stage where dismissal or denial is costly in terms of time and resources, especially without established opportunities to remedy deficiencies in the petition. Disputes may ultimately have to be settled in courts rather than administratively.

Altering the Special Permit guideline language for determining what constitutes an unusual and reasonable use.

§ 15-15-95 (c)(2) is awkwardly worded and the DPP believes the additional proposed list of adverse impacts is too specific, hinging it solely on safety and the cause of impacts creating actual physical harm. In addition, we suggest keeping the guideline broad, as it is not possible to list every potential impact a project may have on land use(s). Each project is different requiring its own unique evaluation. By evaluating a project with only a "cookie cutter" set of impacts, such effort may exclude impacts not listed, such as those effects on public views or the night sky. Instead, we recommend language that states, 'the proposed use may be allowed if it can be shown there are no adverse impacts or known adverse impacts can be mitigated to a reasonable degree to protect the surrounding property.'

Moreover, the double negative in this section should be removed because it is confusing. It states, "The commission may deny a permit if one of the following is violated. Since the proposed language for the five guidelines are all in the negative, i.e., "shall not...", "would not...", "unsuitability...", "unsuited...", does that mean a project that violates them would be acceptable?

Ms. Mary Alice Evans
January 17, 2024
Page 3

Other Amendments

An item not listed in the OPSD review of the LUC proposed rule amendments is the proposed requirement under § 15-15-95(b). The proposed language states that counties send copies of special permit petitions to the CWRM, the Sustainability Coordinator, and the State Public Utilities Commission. The counties are already required to send special permit petitions to the LUC, the OPSD, and the State Department of Agriculture, and the DPP requests comments on the petition from a host of governmental and community organizations. Therefore, it is unclear why this additional requirement is necessary.

The OPSD also emphasized that this is an opportunity for the Counties to suggest other amendments that we believe could improve the LUC process. We have concerns with the language in § 15-15-95(f) that requires county planning commissions to decide upon a reasonable time limit suited to establishing the particular use proposed, and if appropriate, a time limit for the duration of the proposed use, which shall be a condition of the special permit. The Hawaii Revised Statutes, Chapter 205 and the City and County of Honolulu, Rules of the Planning Commission do not state that the county planning commission establish a time limit for the duration of the proposed use, and it should be the County's discretion to determine if such a time limit is appropriate. We welcome the opportunity to discuss this issue with the LUC and OPSD.

Thank you again for the opportunity to comment, and the DPP appreciates the position the OPSD has taken on behalf of the counties in this important consideration of the LUC proposed rule amendments. Should there be any questions, please contact Franz Krintz, Community Planning Branch Chief, at (808) 768-8046 or via email at fkrintz@honolulu.gov.

Very truly yours,



Dawn Takeuchi Apuna
Director

DTA:ah

Enclosure

cc: LUC

to provide a sign-off or approval of the state commission on water resource management.

(c) For modification or deletion of conditions under the purview of the state office of planning and sustainable development's state sustainability coordinator, the petitioner shall be required to provide a sign-off or approval of the state sustainability coordinator.

(bd) For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order.

(ee) Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 119.

[Eff
10/27/86; am and comp 8/16/97; am and comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7) (Imp: HRS §205-4)

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SUBCHAPTER 12

SPECIAL PERMITS

§15-15-95 Petition before county planning commission. (a) Any person who desires to use land within an agricultural or rural district for other than a permissible agricultural or rural use may petition the county planning commission of the county within which the land is located for a special permit to use the land in the manner desired; provided that if the person is not the owner or sole owner in fee simple of the land, the record shall include evidence that the person requesting the special permit has written authorization of all fee simple owners to file the petition, which authorization shall also include an acknowledgement that the owners and their successors shall be bound by the special permit and its conditions.

(b) Special permits for areas greater than fifteen acres require approval of both the county planning commission and the commission. Special

permits approved by the county planning commission and which require commission approval must be forwarded to the commission within sixty days following the county planning commission's decision. The county shall assure that prior to the county hearing on the petition for special permit, copies of the special permit petition are forwarded to the land use commission, the state office of planning and sustainable development, the state commission on water resource management, the state sustainability coordinator, the state public utility commission, and the department of agriculture for their review and comment. The decision of the county planning commission recommending approval of the special permit, together with the complete record, including maps, charts, other exhibits and other evidence, and the complete transcript of the proceeding before the county planning commission must be transmitted to the commission. Unless otherwise required by the commission, the planning commission shall file with the commission an original, ~~one paper copy~~ of the complete record, together with an ADA compliant electronic copy of the complete record. The number and format of copies required under this section may be modified by order of the commission.

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(c) Certain "unusual and reasonable" uses within agricultural and rural districts other than those for which the district is classified may be permitted. ~~The following guidelines are established in~~ 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:

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- (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the commission;
- (2) The proposed use would not adversely affect the safety of surrounding property to an unreasonable degree, by causing physical harm to property or residents; causing air, water, or noise pollution; increasing trash or debris; increasing traffic or impairing traffic safety; impairing sanitation or

sewers; impairing flood control; increasing crime or trespassing; or increasing fire risk;

- (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
- (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; ~~or and~~
- (5) The land upon which the proposed use is sought is unsuited or not well-suited for the uses permitted within the district.

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(d) Petitions for issuance of a special permit shall specify the proposed use and state concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the special permit, and shall include any facts, views, arguments, maps, plans, and relevant data in support of the petition.

(e) The petitioner shall comply with all of the rules of practice and procedure of the county planning commission in which the subject property is located.

(f) The county planning commission may impose such protective conditions as it deems necessary in the issuance of a special permit. The county planning commission shall establish, among other conditions, a reasonable time limit suited to establishing the particular use proposed, and if appropriate, a time limit for the duration of the proposed use, which shall be a condition of the special permit; provided, however, that the commission for good cause shown, may specify or change the time period of the special permit. If the permitted use is not substantially established to the satisfaction of the county planning commission within the specified time, it may revoke the permit. The county planning commission, with the concurrence of the commission, may extend the time limit if it deems that circumstances warrant the granting of the extension. [Eff 10/27/86; am and comp 8/16/97; comp 5/8/00; am and comp 11/2/2013; comp] (Auth: HRS §§205-1, 205-7)