

LAND USE BULLETIN



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EXECUTIVE DIRECTOR'S MESSAGE

by Dean Uchida

Greetings from your new E.D.!!!

Paul and Mindy have been great at getting me acclimated to the position. As Paul says, this is my best chance to address the group with my thoughts and ideas.

Well, I did the math and found out that next year marks the 25th Anniversary for LURF. While the names and faces have changed over the years, LURF's role of providing in-depth analysis and research on land use issues; advocating the need for sound and reasonable land use laws; and keeping our membership and constituents informed on land use issues has remained the same. LURF has been a positive influence in shaping land use policies at the City and County of Honolulu and at the State for all these years.

As someone once said, change is the only constant in life. As an organization, LURF has evolved with the times by providing a voice of reason on various compelling land use issues over time. These included: the allocation of water, affordable housing, traditional and customary gathering rights, and golf course developments, to name a few.

The themes or issues that dominate the discussion on land use in Hawaii today involve: Smart Growth, Urban Growth Boundaries, mass transit and transportation, preservation of agricultural lands, and protection of open space. I am sure as we move forward as a community, other issues will rise to the top. Whatever the issues maybe, LURF will continue to engage and lead the discussion on land use issues working toward sound and reasonable solutions.

LURF will also be attempting to expand our presence and be more active on some of the neighbor island

issues. We are finding that the neighbor island Counties are dealing with many issues that have applications statewide.

More and more, I find that solutions today require an extensive collaborative effort, involving diverse and, often times, divergent groups. LURF will continue to facilitate and participate in discussions with various groups in our effort to reach reasonable solutions.

To bring us into the information age, LURF will be launching a website to disseminate information and educate and inform people about land use issues in Hawaii.

I am extremely excited to be involved with LURF as we help shape Hawaii's future land use policies. There are as many challenges and problems as there are opportunities. It all depends on your perspective. I look forward to working with all of you in the future.

LEGISLATIVE VETOES AND OVERRIDES: WHAT NEXT?

It is not too soon to begin considering LURF strategy for the 2004 Legislative Session. Among the measures which may require attention next year are the following:

Agricultural covenants. SB 255 SD2 HD1 CD1 (Act 5, 2003 Special Session), which was enacted over the Governor's veto, prohibits private restrictions on agricultural use of agricultural land, except to protect environmental or cultural resources, or where void or voidable by a County.

Possible Actions: Persons concerned with the impacts of this bill may find it worthwhile to seek amendments to Act 5 to permit landowners to place reasonable restrictions on certain agricultural uses in order to support other viable and allowable uses of the land.

Hotel tax credits. HB 1400 HD1 SD2 CD2, which was vetoed by the Governor, would have defined qualified resort area and extended the existing credit for hotel construction and remodeling to July 2006 at 8 percent, and to July 2010 at 4 percent.

Possible Actions: The authors of the bill may find it worthwhile to reintroduce a version of the bill redrafted to meet the Governor's objections, in particular by capping the overall amount of credits which may be claimed.

Administrative rules. HB 285 HD1 SD2, which was vetoed by the Governor, would have required every adopted rule to have a rational nexus and conform to the letter, spirit, and intent of the law; would have authorized petitions for regulatory review of adopted rules; would have automatically and retroactively repealed any rule 180 days from repeal of its enabling statute or ordinance; and would have expanded the scope of the biennial reports of the Small Business Regulatory Review Board.

Possible Actions: The authors of the bill may find it worthwhile to reintroduce a version of the bill redrafted to meet the Governor's objections, in particular by eliminating provisions which are unnecessary and confusing, while focusing on setting policy that administrative rules not exceed statutory mandates.

Impact fees. SB 1404 SD 1 HD1, which was not heard in the House Finance Committee, would authorize the State Department of Transportation to receive impact fee funds collected by a County (of more than 500,000 population) for State highway improvements. This bill would facilitate the transfer of funds collected under the City and County of Honolulu's Impact Fee Ordinance No. 02-52, which was enacted last year.

Possible Actions: The authors of the bill may find it worthwhile to resume efforts to persuade the Finance Committee that the bill is an essential means to expedite completion of needed State highway improvements for the Ewa region. In the alternative, the bill could be reintroduced in the next Session.

Property rights. HB 1261 HD2 would create an actionable liability of private landowners for rocks

which fall from their property and cause damage. Although HB 1261 HD2 was not heard in the Senate Committees on Transportation, Military Affairs and Government Operations; and Water, Land and Agriculture, the issue of liability for falling rocks warrants further study if the measure is revived next Session.

Possible Actions: Unclear at this time.

Commercial Leases. SCR 89 SD1 passed the Legislature calling for a study by the Legislative Reference Bureau of the commercial leasehold renegotiation issue. LRB recently sent out a questionnaire to lessors and lessees to get background information on commercial leases in Hawaii. LURF will provide our comments consistent with our past position that we continue to oppose unconstitutional bills which would require renegotiated lease rentals to be determined by appraisal to reflect fair market rental value, overriding existing "not less than" clauses.

Possible Actions: Based on the results of their study, LRB may suggest legislation. NOTE: Important that LURF members provide accurate information in their respective responses to the LRB questionnaire to assist them in their efforts.

Environmental. HB 1294 SD1, which did not clear its conference committee, would clarify that the agency which grants final development approval need not be the same agency which accepts the environmental impact statement (EIS) for a project.

Possible Actions: The authors of the bill may find it worthwhile to resume efforts to assist committee members to resolve their differences and report the bill out for a final vote.

AGRICULTURE WORKING GROUP

The Agriculture Working Group (AWG) reported on in the last issue of the *Land Use Bulletin* continues to struggle to reach consensus among the participants on means to conserve and protect agricultural lands, and to establish standards and criteria for reclassifying and rezoning such lands, in accordance with the direction given in HCR 157 HD1. Mr. Bob Wagner and resource people from the American Farmland

Trust return on October 15-16 to meet with the AWG and the Ag 2003 Conference to assist in refining the group's positions and strategies.

LURF as well as some of its members have been active participants in the AWG efforts. So far, our focus has been on working on developing incentives to support agribusiness in the state. Discussions to date have included the following:

1. Identify what agribusiness needs to be viable and what landowners need to keep lands in agriculture. Once the needs have been identified, work on incentives to help both the users and landowners to keep agriculture viable in Hawaii.
2. Given the financial situation of both State and local governments, create "business incentives" to encourage and support private sector investment of capital in agribusiness for product development, market research, infrastructure, etc., that benefit both landowner and agribusiness.
3. A landowner (lessor) and a farmer (lessee) are, in effect, partners in a business venture. Viability requires the landowner and the lessee to balance their interests based on sound financial and business sense. This partnership can only survive if it generates a fair and equitable return to both parties.
4. Incentives for the farmer include assistance with crop research and business management practices; adequate financing and capitalization; ability to identify, develop, and serve markets; environmental risk management; support of public sector investment in research, marketing, water, and transportation for agriculture; and supportive legislation for agricultural practices (such as right to farm).
5. Incentives for the landowner include tax incentives for agricultural research and development, infrastructure, and agricultural venture capital; transferable development rights (TDR) to encourage voluntary commitment of certain lands to agriculture; and streamlined/expressed processes for converting other lands to higher uses.

The following are areas that the AWG is discussing that are of concern to LURF and its members. The concerns which LURF has expressed include:

1. Avoid the temptation to "map". The constitutional mandate language is flexible; therefore any identification of agricultural lands and drafting of "standards and criteria" should also be flexible.
2. Avoid locking up a fixed acreage of agricultural lands based on resource value or soil type based on antiquated data.
3. Any system to designate important agricultural lands (IAL) should be voluntary on the part of the landowner and incentive-oriented.
4. Distinguish between the goals of preserving agricultural lands and preserving open space.

Bottom line: The focus should be on creating opportunities for agribusiness. As a matter of public policy, this will lead to greater utilization of our agricultural lands, if it is the public's goal to preserve such lands. Simply protecting agricultural lands does not equate to a viable agricultural industry.

LURF and the Hawaii Farm Bureau Federation have resumed discussions with the goal of solving the "important agricultural lands" (IAL) issue in ways that best serve both landowners and agricultural businesses. Together, we want to encourage agriculture in the State through incentives for active agriculture, rather than the traditional land use regulatory approach of simply designating IAL. Initially, the discussion has focused on specific assistance farmers need in the areas of labor, transportation, and infrastructure costs to stay in business, expand, or bring unused lands into production. In an era of minimal or non-existent governmental financial resources, we will focus on creating incentives for investment in agribusiness and agricultural infrastructure.

STATE OF HAWAII

School Fair Share Contributions

As reported in the May/June 2003 *Land Use Bulletin*, the Department of Education (DOE) intends to implement a revised formula for calculating "fair share" developer contributions for school sites and school construction costs, to be imposed by the Land Use Commission (LUC) or the Counties as conditions

of development approval of new residential projects. LURF has conducted preliminary discussions with the DOE Facilities staff to gain a better understanding of their intent. Staff has also discussed this matter with the LUC in an effort to determine how this "fair share contribution" is being implemented.

Based on our discussions, it is our understanding that the "fair share contribution" formula will be applied on all new residential development projects that do not already have an agreement with DOE, the contribution requirement will be applied on a "go forward" basis through zoning at either the State or County level, or through the SMA permit process. Funds collected can be used on any school in the school complex in which the project is located, not necessarily the closest school to the project.

The Department could not provide us with any assessment of how this "fair share contribution" would impact ongoing master planned regions like Ewa, with multiple developers and landowners. They are also unaware of the number of projects and/or units that already have met their "fair share" requirements, and thus are unaware how many future projects or units will be impacted. In that regard, and for comparison purposes, LURF will be compiling information on existing and planned projects in the Ewa region which are already subject to DOE school contribution agreements, from which the balance of units in affected projects may be estimated, and will be providing this information to the DOE.

LURF is also working on clarifying how the DOE's "fair share contribution" for school construction can be imposed on developers through a LUC or County approval. It is our understanding that the LUC's past practice with respect to schools was limited to the land dedication. We are attempting to clarify how this action was expanded now to include the vertical construction of schools.

NOTE: The LUC Executive Officer, Mr. Tony Ching, will be the featured speaker at the LURF Board of Directors meeting on October 20th. This is one of the areas he will be discussing.

Ewa Transportation Improvements

In order to assist the State Department of Transportation (DOT) and the City and County of Honolulu to expedite needed roadway improvements in the Ewa region, LURF has drafted an intergovernmental agreement (IGA) for the transfer to the DOT of the impact fee funds being collected by the City for use on State highway segments in Ewa. At this point, we are awaiting the appropriate opportunity to introduce the draft IGA to the State and City agencies. In our view the IGA would be legally sufficient whether or not SB 1404 is passed by the Legislature in 2004 (see legislative report above), and in any case, agreement by resolution of the City Council is required for a transfer of City funds to the State.

The DOT, however, is currently taking a different approach to the question of impact fee funds for State highways in Ewa, and has requested (by letter) the transfer of the funds from the City directly to the State, to be held on deposit until enactment of SB 1404 or similar legislation. Staff at the City Department of Budget and Fiscal Services (DBFS) have drafted a joint reply from DBFS and the Department of Planning and Permitting (DPP), which is expected to say that agreement of the City Council is needed to transfer any funds. Meanwhile, DOT staff have asked LURF to review a draft of a new bill to supersede SB 1404 in the 2004 legislative session. The draft bill, which is still subject to review by the Attorney General's Office, would authorize DOT to receive and expend impact fee funds for the specific highway projects for which the funds were collected.

State Department of Transportation

DOT Director Rodney Haraga recently reported to the Building Industry Association (BIA) on a number of projects in the DOT construction budget [*our thanks to BIA staff for sharing the following information*]. Director Haraga expects about \$905 million in federal highway funds over the next six years, or about \$150 million per year for Hawaii, with the possibility of a "good safety" bonus of \$700,000 or more if Hawaii's 91.8 percent compliance with the seat-belt law is recognized.

Among the pending DOT highway projects are the North-South connector road in Ewa (\$60.5 million in 2005) and the H-1 Makakilo Interchange (\$2.2 million, in planning, soon ready for bid).

In other matters, the DOT expects to implement contra-flow on Nimitz Highway on September 29. The Governor's Transportation Task Force will be considering all modes of transportation, from additional highway lanes to Bus Rapid Transit (BRT) to light rail, although Director Haraga does not consider the latter to be very viable. The DOT is researching construction of a tunnel from Leeward Oahu beneath Pearl Harbor to the Honolulu International Airport area, but there are many obstacles, including an unfavorable geological substrate, the difficulty of obtaining military clearances, and above all the huge expense.

**Department of Health
Proposed Rules for
Non-point Source Pollution Control**

The public hearing on proposed rules for non-point source pollution control, previously postponed by the Department of Health (DOH) until August or early September, 2003 (see *Land Use Bulletin* for May/June 2003), has now been postponed indefinitely. The Deputy Director for Environmental Health has consulted in depth with the U.S. Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA) to determine what is required for compliance with the Federal agencies' conditional approval in 1998 of Hawaii's Coastal Non-point Pollution Control Program. He has now reported as follows:

1. The June 30, 2003, Federal deadline for compliance will not be extended. While EPA and NOAA will not reduce grants awarded to the State in federal fiscal year 2003, they reserve their right to reduce their grants by up to 30 percent in fiscal years 2004 and later.
2. The State has two major options to demonstrate adequate enforcement of its coastal program:
 - a. Meet the specific and numerous conditions in the 1998 "Hawaii Findings" which accompanied the conditional program approval.

- b. Meet the requirements of the "Final Administrative Changes" to the program guidance, issued later in 1998. This may be done with an Attorney General (AG) opinion instead of a new rule, if the AG favorably interprets the law.

3. The State must meet other substantive requirements in addition to showing adequate enforcement, and some of these items require rule making by other agencies, such as the Department of Land and Natural Resources (DLNR), and the adoption of ordinances by the Counties.

If the State opts to go with the "Final Administrative Changes," EPA and NOAA will approve State program elements with voluntary or incentive-based programs backed with existing State enforcement authorities, if the State provides the following, including the AG opinion:

1. A legal opinion from the Attorney General, or an attorney representing the agency with jurisdiction for enforcement, that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary.
2. A description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, which the State will use to encourage implementation of the management measures.
3. A description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

LURF will continue to monitor, participate in, and report on future discussions regarding regulation of non-point source pollution in Hawaii.

CITY AND COUNTY OF HONOLULU

Agricultural Tax Dedication (Ord. 02-39)

This ordinance amends the existing tax dedication procedure which enables landowners to receive lower property tax assessments in exchange for maintenance of land in agricultural use. As LURF pointed out last

year (see the *Land Use Bulletin* for July/August 2002), the measure imposes potentially burdensome paperwork and reporting requirements, and calls for annual disclosure of confidential financial information and evidence of “substantial and continuous production” in order to keep the agricultural dedication.

Effective on September 1, 2003, as the City begins to implement Ord. 02-39, landowners are being asked to provide copies of agricultural leases and other documents to justify continued favorable tax assessment for agricultural use. In addition, the assessed valuation to which the lower tax rates may be applied if agricultural dedication is approved will be based on “fair market value” rather than agricultural use value, resulting in higher rather than lower actual taxes paid in many cases. The valuation under this ordinance will be driven by location rather than agricultural use, penalizing those farms in close proximity to hot non-agricultural real estate markets.

There may be interest among certain members of City Council in delaying implementation of Ord. 02-39 for one year to give them a chance to fix the bill. The problem is that some small fee simple owners of farms want the new ordinance because of its provision for ten-year dedication with the tax rate applied to only one percent of fair market value. LURF will be working with the Hawaii Farm Bureau Federation to alert its members to the larger issues with the ordinance.

COUNTY OF HAWAII

Kelly v. 1250 Oceanside Partners (Hokuli`a Project)

1250 Oceanside Partners designed the Hokuli`a development project to be a private, luxury resort-residential subdivision and golf community of approximately 1,455 acres on the shoreline near Kealahou, Kona, Hawaii. Oceanside received County of Hawaii rezoning for one-acre minimum lots in Phase 1 (684 acres) on June 24, 1994, and followed that with the same rezoning for Phase 2 (756 acres) on January 15, 1996. On March 13, 1997, the County amended the General Plan to designate 25 acres of Hokuli`a as “retreat resort,” then reclassified 14.854 acres within this area from the Agricultural to the Urban District, and rezoned the same parcel from

Agriculture A-1a to Resort Hotel, all for the purpose of an 80-unit members' guest lodge. Oceanside and the County entered into a Development Agreement on April 20, 1998, which provides that Oceanside will construct a bypass highway; dedicate, improve and maintain a shoreline park; establish an employee housing program; and dedicate acreage for a Kona Scenic Park. The project area then received final subdivision approval for Phase 1 on September 18, 1999, and for Phase 2 on December 1, 2000. Oceanside has sold more than 190 lots in Hokuli`a since May 1998, and has expended approximately \$191 million on construction and development costs for the project.

The plaintiffs in this action alleged violations of Chapter 205, HRS, in their second amended complaint filed on December 21, 2000. On September 9, 2003, Judge Ronald Ibarra of the Third Circuit Court in Kealahou ruled as follows: (1) Oceanside did not acquire vested rights to develop Hokuli`a without first complying with Chapter 205; (2) Oceanside is barred from asserting an equitable estoppel defense because it cannot prove that it relied in good faith on County approvals; (3) the ordinance granting retreat resort zoning for the member lodge is invalid as inconsistent with the land use classification for that parcel; (4) Oceanside is permanently enjoined from pursuing any further construction activities or development of Hokuli`a until reclassification to Urban is obtained from the Land Use Commission (LUC); (5) the reclassification requirement may be satisfied by obtaining a declaratory ruling from the LUC; and (6) the County Planning Director is permanently enjoined from granting any further permits or approvals for Hokuli`a until Oceanside has complied with the judge's court order.

LURF staff are reviewing Judge Ibarra's decision and order carefully for its implications for future land use planning and regulation in Hawaii. We have asked LUC Executive Officer Tony Ching to speak about the impacts of this decision on the LUC in his presentation to the LURF Board of Directors meeting on October 20th.

COUNTY OF MAUI**Bill No. 84
Amending the General Plan and
Community Plan Process**

The Maui County Council is, at the moment, debating proposed amendments to the General Plan and Community Plan process for the County of Maui. LURF's concerns, which were detailed in our testimony to the Council, focus on the level of detail being proposed for inclusion in the General Plan, almost duplicating the information from the Community Plans. A second area of concern is the creation of Urban Growth Boundaries in the General Plan. Recent experience from other areas where Urban Growth Boundaries have been used (e.g. Portland, Oregon) indicate that these boundaries have a negative impact on affordable housing. LURF will continue to participate in the discussion through meetings with policy makers and interest groups, and through formal testimony.

ALI-ABA LAND USE INSTITUTE

LURF staff attended the Land Use Institute on planning, regulation, litigation, eminent domain, and compensation, put on by the American Law Institute and the American Bar Association in Santa Fé, New Mexico, during August 21-23, 2003. The seminar was highly intensive, consisting primarily of brief oral presentations which made reference to 1,000 pages of written materials distributed to the Institute participants. LURF has prepared a report covering highlights of these materials, with related context in Hawaii law, on the topics of administrative and legislative decisions, hearing procedure, "sunshine" laws, vested rights and entitlements, condemnation for public purpose, Clean Water Act litigation, agricultural subdivisions, impact fees, moratoria, and homeland security. Copies of the report are available on request to the LURF office.

LOTMA**TheBus on Strike:
an Opportunity for New Partnerships?**

As TheBus strike enters its fourth week, there has been a significant increase in demand for LOTMA services. For example, during August, 134 people were added to the carpool database. This is more than twice the number of database additions in 2001 and 2002 combined. On August 26 (the first day of TheBus strike), the LOTMA website experienced 630 hits, nearly twice the number of a typical month. There were literally hundreds of telephone calls made to LOTMA; at times a new voice message was recorded every minute. Both August and September LOTMA Commuter Express passes sold out during August. (Accordingly, September pass revenue is 88 percent higher than January revenue.)

Additionally, with funding from the City and County of Honolulu, LOTMA has added "booster" buses to each of the LOTMA Commuter Express routes to accommodate additional "Walk On" riders during the duration of the strike.

As a result of the strike, LOTMA has also received substantial media coverage. For example, the Honolulu daily newspapers have published a description of LOTMA's services nearly every day since the strike began, and four television interviews have been conducted. For more information about LOTMA, please visit www.lotma.org or contact Mindy Norris at 677-7433 or at mindyn@hawaii.rr.com.



CALENDAR OF EVENTS

- July 4, 2003 Independence Day

- July 28, 2003 Noon - 1:30 p.m.
Alexander & Baldwin
-Executive Committee Meeting

- August 11, 2003 Noon - 1:30 p.m.
The Plaza Club
-Board of Directors Meeting
Speaker: Executive Director Dean Uchida

- September 1, 2003 Labor Day

- September 15, 2003 Noon - 1:30 p.m.
Alexander & Baldwin
-Executive Committee Meeting

- October 20, 2003 Noon - 1:30 p.m.
The Plaza Club
-Board of Directors Meeting
Speaker: LUC Executive Officer Anthony Ching

Although every effort has been made to ensure the accuracy of information presented in the *Land Use Bulletin*, the Land Use Research Foundation of Hawaii assumes no responsibility for any erroneous information, stated or implied.

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