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Re: K-2: Proposed New Conservation District Rules

Aloha Chair Case and BLNR Members:

I was a member of the BLNR in 1994 during the last comprehensive revision of the Conservation District Rules. The 1994 Rules were a major improvement over the prior rules, but they can be made better. The current proposal has many good suggestions, but to avoid making these comments too over-long I have to focus on the problems.

One of my professors in law school said: "It's easy to write a law that does what you intended. It's very hard to write one that doesn't also have lots of effects that you didn't intend." I'm concerned that the proposed rules, unintentionally, create severe limits on the Board's judgment and discretion and will force it to deny conservation district use permits for projects that are strongly in the public interest if they violate just one of the 29 proposed criteria.

The current rules do not explicitly say that the Board can weigh the benefits of a project against its negative environmental effects. This is the single most important thing to fix in the current rules. I've heard lawyers say that under the current rules, if a project violates just one of the eight existing criteria, it cannot be approved, even if it would be the most beneficial thing that ever happened to the State. That doesn't make sense.

When you make an important decision, you weigh the pros and cons. Even projects meant to protect the environment can have some negative environmental impact. You may have to clear some trees to build a fence to keep feral animals out of native forest. Solar photovoltaic systems can take up lots of land. Wind turbines have visual impacts and sometimes hurt wildlife. In deciding whether to implement projects like these, you can't just consider the negatives. You have to also consider the benefits.

In *Kilakila 'O Haleakala v. BLNR*, 138 Haw. 383, 382 P.3d 195 (2016), the Hawai'i Supreme Court held that the BLNR could **consider** the benefits of a project in evaluating a CDUP. It didn't say, however, whether such benefits could allow the BLNR to approve a project that doesn't meet one of the eight criteria.

I've felt that all the CDUA's that I have voted for met all eight criteria, but I can easily imagine a project that didn't really meet one criterion, but still should be approved because it is so strongly in the public interest.

Instead of eight criteria, the proposed rules have 29. Many are very specific and seem absolute: if the project violates the criterion, it can't be approved, no matter what the public benefit.

For example, I think that most people on the Big Island would agree that the new Saddle Road has a net public benefit. The death toll on the old road was horrible. It could not be realigned without a CDUP. The planners took great care to mitigate the possible negative environmental effects. But can we say that it "will not…enable invasion of habitat-modifying alien species"—one of the new criteria? If we're honest, we have to say it possibly could, despite safeguards. Does this mean that the CDUP would have to be denied, despite the loss of life on the old road?

The visual effect of projects is extremely important, but it's very site-specific. The proposed rules say that no project should be approved if it has structures that "encroach onto or near the summit of a pu'u, ridge, scenic monument, or other prominent physiographic features." The Board granted a CDUP for a telecommunications tower disguised as a Norfolk pine on the ridge overlooking Hanalei. Nobody notices this unless they know what to look for. It would violate this proposed rule, but it's not a visual problem. It's better to examine the visual impacts of projects case-by-case than try to decide them ahead of time in the rules.

The proposed 29 criteria could be useful if written as guidelines for the types of things the Board should consider. But they should not be absolute decision-making criteria.

The Board must have rules to guide its discretion. But the rules should not force the Board to make decisions that are against the public interest.

Any public interest balancing clause has to be carefully written. Certainly, in dealing with the Conservation District, the Board needs to be cautious and negative impacts must be avoided or mitigated as much as possible. "Public interest" should not expand the range of permitted uses. For example, an affordable housing project may be in the public interest, but the path to building the project is to reclassify the property out of the Conservation District.

While creating 29 specific criteria, the proposed rules have eliminated a catch-all provision, (8) in the current rules: "the proposed land use will not be materially detrimental to the public health, safety, and welfare." It's important to have some general statement like this because you can't imagine all possible negative effects in advance. For example, suppose a project would create strong noxious odors that would drift into a nearby residential community. It doesn't violate any of the proposed 29 criteria, but this could justify the Board rejecting the application.

For a long time, environmental protection in Hawai'i primarily meant fighting against bad projects. With climate change now the overriding environmental problem, stopping bad projects isn't enough. We have to build renewable energy infrastructure to replace fossil fuels in electrical production and transportation. Some of this may have to be built in the Conservation District, which is almost half the state. For example, if offshore wind proves viable, the permitting of the turbines will be federal, but the power cables on submerged lands will need a

CDUP. This may involve some negative effects, like the loss of coral in small areas, but we have to consider the overall benefit.

A few smaller issues with the proposed rules:

--They should explicitly allow offsets—such as growing coral to replace those impacted by a pipeline, for example—as a form of mitigation.

--They prohibit building houses on a parcel with a "general slope" of 30% or more. If "general slope" means the average slope of a parcel, someone with a perfectly good flat building site would be prohibited from building on it if the parcel also included steep slopes that the owner wasn't going to use.

--It's not clear why H.R.S. §195-4 (part of the endangered species law) should be mentioned. Everyone has to follow this law whether it's specifically mentioned or not.

--The implementation of smaller house sizes needs to be carefully considered. This doesn't only affect new applications. Existing homes that were legal when built will become nonconforming if they are too big under the new rules. If your house is nonconforming you cannot rebuild it to the same size if it burns down. Being nonconforming can also create problems with insurance and refinancing.

--The proposed rules would not allow someone to apply for a permit if they had a violation pending on another unrelated property. This isn't legal. Land use decisions cannot depend upon who is applying.

--Transition issues: what happens to applications submitted under the old rules, but decided after the new rules come into effect? In 1994, we agreed to decide these under the old rules, which I think is fairer. But the normal law is that you use the new rules unless you explicitly say otherwise.

The Board is only considering whether to go out to public hearing on these rules now. There are opportunities to change them later. But going out to public hearing does create an inertia. OCCL has competent staff that has worked hard on these rules, but I think the problems are serious enough that the rules should be revised before the Board authorizes public hearings. This is one of the most important issues that has come to the Board in many years. There are problems with the current rules, particularly no. 6 of the current criteria, but they shouldn't be fixed by adding many requirements that are stated as absolutes.

Thank you for considering this testimony.