



Testimony to
BOARD OF LAND AND NATURAL RESOURCES

November 12, 2021 9 AM Room 132

Offering COMMENTS on D-13:

Denial of Sierra Club of Hawai'i's [sic] Petition to Adopt Rules for Appraising Water Leases.

Aloha Chair Case, and members of the Land Board,

The Sierra Club of Hawai'i expresses comments noting serious concerns regarding legal shortcomings and misstatements in staff submittal D-13, and clarifying the intent behind the rulemaking petition now under the Board's consideration.

Much of the discussion in submittal D-13 seeks to justify the staff recommendation to the Board last month, to adopt water lease appraisal guidance without complying with the HRS Chapter 91 administrative rulemaking process. **The proffered legal analysis (or lack thereof) is erroneous and arbitrary, underscoring the need for compliance with statutory rulemaking requirements as reflected in Sierra Club's rulemaking petition.**

As an initial matter, this submittal's statement that there is no statute or other law that is being implemented or interpreted by the Board's appraisal guidance flies against the express language and purpose of the guidance, which was to interpret the appraisal requirements in HRS §§ 171-17 and -58. See [BLNR Agenda Item D-8, October 22, 2021](#).

This submittal's statement that the appraisal guidance does not affect private rights or procedures available to the public is also patently incorrect. The appraisal guidance specifically concerns the valuation of water leases, which would clearly affect the rights of the Office of Hawaiian Affairs and the Department of Hawaiian Homelands to a pro rata share of lease revenues. The guidance also specifically impacts the public auction process, which by its very nature is a procedure available to the public.

Of most concern is submittal D-13's complete lack of any case law analysis, other than a recitation of the factual situation in *Aguilar v. Hawaii Housing Authority*, 55 Haw. 478 (1974). Even a cursory review of case law indicates a plethora of Hawai'i Supreme Court opinions that would almost all result in a conclusion that the guidance adopted by the Board last month is, by law, a rule requiring rulemaking.

For example, please consider the below case opinions and summaries of their applicability to the Board's approved appraisal guidance:

[Green Party of Hawai'i v. Nago, 378 P.3d 944 \(Hawai'i 2016\):](#)

Summary: A methodology used to determine how many ballots to order for polling precincts was a rule requiring rulemaking, because it was an agency statement 1) of general applicability (i.e. not to a specific instance) and 2) of future effect. The exception for rules governing the internal management of an agency also did not apply, because the methodology would affect private rights of and procedures available to the public.

In *Green Party*, the methodology for ordering ballots was general in applicability, because it applied statewide to all precincts across the state. Here, the appraisal guidance adopted by the Board last month is general in applicability because it applies to all consumptive water leases.

In *Green Party*, the methodology for ordering ballots also had a future effect since it would be used to calculate future, anticipated ballot needs. Here, the appraisal guidance will also apply to future appraisals for leases of public trust water.

In *Green Party*, the methodology for ordering ballots also affected private rights and procedures available to the public since it would affect voting methods available to the public (i.e. paper voting vs. electronic voting machines) and individuals' private right to vote. Here, the appraisal guidance affects both private rights and procedures available to the public: appraisals will impact the rights of DHHL and OHA to a pro rata share of lease revenues, and appraisals will also impact the procedures for public auction, which are specifically open to the general public.

[Pila`a 400, LLC v. Bd. of Land & Nat. Res., 132 Hawai'i 247, 264, 320 P.3d 912, 929 \(2014\):](#)

Summary: A methodology to assess monetary damages for unlawful land use activities that resulted in sedimentation of a coral reef was NOT considered rulemaking, because it applied to a specific, *past* event instead of *future* events; in addition, the court found that assessing damage to submerged conservation lands involves complex, numerous and variable components "often unique to a particular situation" and would not be of general applicability.

Unlike the assessment in *Pila`a*, the Board's appraisal guidance applies, minimally, to a subset of *future* water leases, and is not intended to evaluate leases that were issued in the past. The appraisal guidance itself is also not unique to a particular situation, and by its very existence, refutes any contention that water leases are so complex that general guidance cannot be developed for their appraisal.

[Haw. Prince Hotel Waikiki Corp. v. City & Cty. of Honolulu, 89 Hawai'i 381, 393, 974 P.2d 21, 33 \(1999\):](#)

Summary: A city appraiser's application of a methodology to determine imparted value on lands adjacent to a golf course was a rule requiring rulemaking. **The court specifically noted that "factors that [an] agency would deem relevant and influential in its ultimate decision" regarding appraised value should require rulemaking, and that "the public has been afforded no opportunity to shape these criteria that affect their interest."**

Here, the appraisal guidance adopted by the Board last month are "factors that [the Board] would deem relevant and influential" in its appraisal of public resources, and the failure to go through rulemaking denies the public the opportunity to shape these criteria.

Notably, there is no basis to say that simply because the Board's appraisal guidance is non-binding and allows for discretion, it is not a rule requiring rulemaking; on the contrary, **the ruling in the *Hawai'i Prince* case – which held that factors influencing an appraisal decision should be adopted by rule – directly refutes this contention.**

As these and many other cases demonstrate, the appraisal guidance adopted by the Board at last month's hearing is a rule that requires compliance with the Chapter 91 administrative rulemaking process. As the Sierra Club noted, the rulemaking process itself will allow for the development of considerations and mechanisms that will ensure water lease appraisals are appropriate and reflect the full value of our public trust water resources.

The Sierra Club emphasizes that the rulemaking petition before the Board today is intended to assist the Board in complying with its legal obligations under HRS Chapters 91 and 171, and the Hawai'i State Constitution. Should the petition and its specific regulatory recommendations be denied, Sierra Club strongly urges the Board to nonetheless direct staff to initiate the rulemaking process for appraisal guidelines as a matter of legal compliance.

Mahalo nui for your consideration of this testimony.

Sincerely,



Wayne Tanaka, Director
Sierra Club of Hawai'i