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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
P. O. BOX 621
HONOLULU, HAWAII 96809

REF:WL-MH

October 4, 1989

MEMORANDUM

TO: State Agencies

FROM: William W. Paty

SUBJECT: Administrative Rules for Geothermal and Cable System Development Permitting

Enclosed for your information is a copy of the administrative rules for Sec. 196D, Hawaii Revised Statutes, "Geothermal and Cable System Development Permitting Act of 1988". These rules were adopted on September 5, 1989, and affect a wide variety of agencies in that they provide for coordination of the various state and county permitting activities that will come into play in the development of our geothermal resources. A number of affected federal agencies have indicated they will also participate in the coordination process on a voluntary basis.

If you have any questions about the rules, please call Manabu Tagomori at X7533.

WILLIAM W. PATY

Enclosed

REF:WL-MH

1989

MEMORANDUM

TO: Mr. Samuel B. K. Chang, Director
Library Reference Bureau

FROM: William W. Paty

SUBJECT: Administrative Rule 13-185, "Rules of Practice and Procedure for Geothermal and Cable Systems Development Permitting", to implement Chapter 196D, Hawaii Revised Statutes

Our Department of Land and Natural Resources has prepared the attached administrative rules to implement the State's new geothermal and cable system development permitting law. These rules have been adopted by the Board of Land and Natural Resources at its meeting August 11, 1989, and have been forwarded to the Attorney General for his approval as to form.

May we ask that your Legislative Reference Bureau review the proposed rules for compliance with Hawaii Administrative Rules Format?

[redacted] Manabu Tagomori at Ext. 7533 if you have any [redacted]

WILLIAM W. PATY

Attach.

COUNTY OF MAUI CONCERNS

Re: Act 301 Proposed Rules

Councilman Nishiki's letter of June 20, 1989 expressed his concerns that:

NISHIKI: it appears that in the transfer of functions from the Land Use Commission to the DLNR, the DLNR has taken over some County powers;

DLNR: RESPONSE: this was not the intent of the original draft rules; the intent was to transfer the functions by reference to the existing LUC rules, but this could not be done. The original draft attempted to paraphrase section 205-3.1 et seq. and 205-5, HRS, the section cited in Act 301. In order to make this matter more clear, in the final draft, entire sections of the LUC administrative rules have been borrowed, including the sections on decision making criteria and the county's role.

NISHIKI: there are no standards indicated in the transfer of functions from the Land Use Commission to the DLNR with regard to district boundary amendments and changes in zoning;

DLNR: RESPONSE: standards have been copied from LUC administrative rules to cover both district boundary amendments and changes in zoning, and enforcement of both.

NISHIKI: in permitting matters, there appears to be a conflict because DLNR appears to be both the permit grantor and the agency assisting the developer.

DLNR: RESPONSE: Act 301 makes DLNR the lead agency for permitting and tasks DLNR with assisting developers. However, DLNR keeps separate the tasks of permit coordination and developer assistance, as called for in the act, and the regulatory review functions.

NISHIKI: do the rules take away the authority of the county planning commission; in the conflict resolution process, can the administrative director overturn a permitting decision of the planning commission.

DLNR: RESPONSE: no; no

NISHIKI: do the rules attempt to take away the county's zoning functions.

DLNR: RESPONSE: no

NISHIKI: shouldn't there be standards for changes in zoning, just as there should be standards for changes in district boundary amendments.

DLNR: RESPONSE: there are

NISHIKI: what information and criteria for issuing a permit, what public access.

DLNR: RESPONSE: no agency's statutory permitting authority is changed; permits must still be issued agency by agency with public access through the various agencies' normal public hearings processes.

NISHIKI: why do the rules talk about contest case hearings.

DLNR: RESPONSE: CDUA permits and others may be subject to contested case hearings; whatever other processes exist by statute, ordinance or administrative rule will continue to be processed by those statutes, ordinances or laws.

NISHIKI: what issues can be considered in declaring an impasse.

DLNR: RESPONSE: the rules do not deal with conflicts of authority; the only type of conflicts treated by the conflict resolution process are administrative or procedural conflicts.

COUNTY OF HAWAII CONCERNS

Re: Act 301 Proposed Rules

Two letters were received from Hawaii County officials, one from Russel Kokobun, Council Chairman and Councilman from the Puna District, and from Duane Kanuha, Planning Director.

Councilman Kokobun's letter of 7/6/89 expressed the following concerns:

KOKOBUN: Potential usurption of county powers in zoning and in geothermal resource permitting.

DLNR: RESPONSE: Act 301 states that "The consolidated permit application and review process shall not affect or invalidate the jurisdiction or authority of any agency under existing law except to the extent that the permitting functions of any agency are transferred by section 196D-19 to the department for the purposes of the project." (Sec. 5(c)5) In earlier draft versions of the proposed rules it was understood that the department could transfer by reference to existing Land Use Commission administrative rules the two functions transferred to the department for purposes of the act, i.e. district boundary amendments and changes in zoning under 205-3.1 et seq. and 205-5, HRS. The intent from the outset was to follow LUC existing rules. The rules as currently written in section 13-195-3 have been expanded by copying verbatim from Land Use Commission rules, substituting the word "department" for "commission". Land Use Commission standards have been copied for both district boundary amendments and changes in zoning. Land Use Commission standards have been copied for "unusual and reasonable uses" for zoning changes, and Land Use Commission and County of Maui language has been copied for the enforcement of such amendments or changes under section 13-185-16.

KOKOBUN: Conflict resolution process infringes upon county's jurisdiction; suggests using mediation process rather than administrative director or Governor as ultimate decision maker.

DLNR: RESPONSE: The term conflict has been defined specifically so as to exclude conflicts of authority, since conflicts of authority are not treated in Act 301. Conflict has been defined as limited to administrative or procedural conflicts, i.e. conflicts of administrative interpretation. Act 301 specifically states that agencies' existing statutory authority or jurisdiction shall not be affected by their participation in the consolidated permitting process.

KOKOBUN: inconsistently between June 21, 1989, rules and Act regarding review team - review team is to come from members of the interagency group, not from among representatives of agencies having jurisdiction over any aspect of the project.

DLNR: RESPONSE: Rules have been changed to say the review team will be selected from members of the interagency group (note: the interagency group includes but is not limited to those agencies listed in the rules; additional agencies as defined in the act may become designated members of the interagency group at some later time).

Planning Director Kanuha's concerns from his letter of 7/7/89 are as follows:

KOKOBUN: suggestion to change the wording under section 13-185-3 from "...changes in zoning..." to "...special permits..." since, he says, the language in unclear.

DLNR: RESPONSE: The language is copied from Act 301. The changes in section 13-185-13 copy much of the LUC rules regarding changes in zoning through the special permit process. This wholesale copying of the LUC language should make it clearer that the department's intent is to transfer the function by administering the function in the same way as was done by the Land Use Commission.

KOKOBUN: is the intent to require an EIS/EA for all petitions? Director of DBED needs to be amended to OSP; is the intent to operate as a contested case? County should be automatic party to an SLUC boundary amendment proceeding; rules must include basis for granting or denying a petition.

DLNR: RESPONSE: Only where EIS/EA is required; director of DBED has been amended to OSP; contested case will apply only as required. Present wording shows County is automatic party in boundary amendment proceeding; rules now include basis for granting or denying a petition.

KOKOBUN: section 13-185-3 should include provisions of subchapter 12 of the SLUC rules regarding requirement of approval of the County Planning Commisison for a special permit for areas greater than 15 acres, and guidelines for determinig "unusual and reasonable" uses.

DLNR: RESPONSE: This language has been incorporated into Section 13-185-3.

KOKOBUN: not clear how 13-185-5 on contested case hearings will work.

DLNR: RESPONSE: This section has been copied almost verbatim from Act 301. The intent was (section 196D-5(d), HRS) to provide that only one contested case hearing should be held by an agency that has jurisdiction over more than one permit that could be subject to a contested case hearing.

KOKOBUN: on section 13-185-6 "streamlining", Act 301 requires public review; concern that streamlining may cause conflict of authority; concern that federal agencies may dominate the interagency group in giving it authority to adopt changes in procedure.

DLNR: RESPONSE: Words have been added to provide public review of any streamlining proposals; streamlining can only apply to administrative interpretation since Act 301 prohibits interference in any agency's statutory authority; is not anticipated the interagency group will be "dominated" by federal agencies who serve only on a volunteer basis.

KOKOBUN: on section 13-185-11 "interagency group", a suggestion to eliminate the listing of the agencies.

DLNR: RESPONSE: The interagency group has already been formed and has begun doing business; it is a body that can be added to by the department if circumstances warrent expansion.

KOKOBUN: on section 13-185-12 "consolidated permit application and review team", suggested wording to make sure agencies with permitting responsibilities are not excluded from participation on the joint agreement.

DLNR: RESPONSE: Wording of this section was changed per Councilman Kokobun's pointing out that the previous wording was not consistent with the wording of Act 301 which provides that the review team members come from the interagency group. The intent of the department is to have appropriate members on each review team depending on the nature of the

DLNR: depending on the nature of the application; the interagency group can be changed as required; it is the understanding of the department that the various mayors' offices listed as members of the interagency group will suggest appropriate individuals to participate in the review team, serving as their representatives. Likewise, state agencies represented on the interagency group may name individuals serving in various roles to serve on the review team, as appropriate for each particular project application.

KOKOBUN: on section 13-185-14(c) and (d) regarding the conflict resolution process between a county and state agency, suggestion that the Governor and Mayor be named, rather than the administrative director and the head of the mayor's designated agency.

DLNR: RESPONSE: The types of conflicts that the conflict resolution process addresses are conflicts of administrative interpretation, not conflicts of authority, since the rules do not deal with conflicts of authority, since the Act says that "the consolidated permit application and review process shall not affect or invalidate the jurisdicton or authority of any agency under existing law". Therefore it would be inappropriate to involve the mayors and the governor in a minor administrative disagreement.