



# SIERRA CLUB

## HAWAI'I CHAPTER

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### SENATE COMMITTEE ON INTERGOVERNMENTAL AFFAIRS SENATE COMMITTEE ON TRANSPORTATION & GOVERNMENT OPERATIONS

February 7<sup>th</sup>, 2006, 3:00 P.M.

35 Copies

#### TESTIMONY IN SUPPORT OF SB 2909, SUGGESTED AMENDMENT

Chairs Ige and Inouye and members of the committees:

The Sierra Club, Hawai'i Chapter, with over 5000 dues paying members statewide, **strongly supports SB 2909**, allowing the counties to opt-out of the state automatic permit approval law. We suggest, however, that the legislature go all of the way and simply repeal automatic approval.

Hawai'i has a law on the books that allows certain activities—developments, land reclassifications, liquor licenses, and others—to be granted by default if an agency deadline passes and a decision has not been reached. This provision for automatic permit approval must be repealed to ensure proper permitting.

Automatic permit approval is simply poor policy. Granting permits by default jeopardizes our environment, Native Hawaiian rights, sound decision making, and constitutional protections. Automatic approval creates a philosophical paradigm shift in their oversight capacity: agencies respond to developer applications instead of natural and cultural resource needs. While the intent of automatic approval was to expedite permitting, the result may be longer permitting times as concerns over due process rights result in lengthy and expensive litigation.

Automatic permit approval can harm our environment and communities by allowing projects to go forward where the permit would have been denied for important reasons. No community should suffer because the government fails to perform. That is a management failure, not a public policy decision. Approvals should be based on merit, not mistake.

#### VOTING PROBLEMS

What happens with a tie vote? A tie vote on a board or committee usually signals that the measure or proposal didn't garner enough supporting votes. Under the current law, a tie vote means inaction, and therefore automatic approval if the deadline passes.

What happens when there is a lack of a majority? Under current law, if a commission has a quorum to take a valid vote but there is not the required majority vote to approve or deny, the permit is approved by default if a deadline passes. For example, if a 6-member board votes 3-2

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AGAINST a project, but a majority (4) is required to ratify any action, the project may be automatically approved.

The above situations turn logic on its head. An applicant could be approved by:

1. an affirmative majority vote (the appropriate route);
2. a tie vote with time lapsing; or
3. a less than majority vote with time lapsing.

Logically, if an applicant can't get a majority of commission or board members to support the application, the application should not be approved.

The final conference committee deliberating automatic approval in 1998 recognized the voting problems when they passed the bill. They asked that the 1999 legislative session address the issues.

The report reads:

“Your Committee on Conference also notes continuing concerns with the interplay between automatic permit approval and various board and commission quorum requirements. Your Committee deleted the quorum amendment sections of this bill because the various quorum possibilities appeared to require further deliberation, and your Committee believes that the 1999 legislative session should address this issue as the automatic permit approval rules come into effect.”

The fact of the matter is neither the 1999 legislative session nor did any intervening legislative sessions do anything to address these concerns (except for the BLNR). The voting problems remain.

### **CONSTITUTIONAL PROTECTIONS**

Moreover, many of the various agencies, boards, and commissions have failed to complete rulemaking, finding a multitude of complex issues. In fact, the Land Use Commission (LUC), in its efforts to adequately address Constitutional protections of agricultural land (Article XI Section 3), natural resources (Article XI sections 1 and 9) and native Hawaiian Rights (Article XII Section 7), approved rules that contained 24 conditions that would attach to any automatically approved land use decision. This upset various special interest groups when the Governor approved them (mistakenly). Other agencies and commissions face similar predicaments.

### **OTHER ISSUES**

1. What happens when additional information is required by the department or agency and the deadline passes?
2. What happens when there are complex environmental assessments and impact statements that need to be completed pursuant to chapter 343, HRS, and the deadline passes?
3. What happens when a contested case hearing is requested pursuant to chapter 91, HRS, and for any other period for administrative appeals and review and the deadline passes?

4. Is it ever appropriate to automatically approve a permit that will irreparably damage the environment or native Hawaiian rights? Doesn't that violate protections provided by the state constitution?

With these significant questions unanswered, the legislature should repeal the automatic approval statute.

The following are some examples of automatic approval gone awry.

**Kaua'i Electric Powerplant.** In November 1999, the Kaua'i Planning Commission considered a proposal from Kaua'i Electric to build a new powerplant on agricultural land. The community testified in force against the project. Two of the seven commissioners were absent. Three supported the powerplant. Two opposed it. One of the proponents asked the corporation counsel what would happen if the vote was 3-2. The answer was that the project would be approved automatically—without any conditions at all. In order to ensure that harm caused by the plant would be mitigated a little bit, one of the opponents voted for the plant, making it a 4-1 vote.

**Ke`ahole Powerplant.** Prior to 1998, only the Board of Land and Natural Resources (BLNR) had an automatic approval provision. In 1996, the BLNR voted 3-2 to deny Hawaii Electric Light Company's request to install two combustion turbines on conservation district land in Ke`ahole. This vote took place after the hearings officer—former Supreme Court Justice Frank Padgett—recommended that the permit be denied on a number of legal grounds. Colbert Matsumoto did not vote because he owned shares in HEI and the law says that you cannot vote if you have a financial interest in the issue. Despite the vote, a Big Island circuit court held that since a majority of all 6 members of the BLNR are needed to ratify any action, no legally-binding decision was reached prior to the deadline for action. Therefore, the court held, the permit was automatically granted. After the permit was automatically approved, fourteen lawsuits were filed, effectively locking up the project for years.

**Windward O`ahu House.** The BLNR also automatically approved a house bitterly fought by the community in Windward O`ahu.

**Waimanalo 7-11.** When 7-11 received its initial permits, it had promised the community that it would not sell alcohol. Several years later, it applied for a permit from the liquor commission. The community organized massive protests. The liquor commission voted 2-2 on the permit. The Honolulu City Corporation Counsel issued an opinion that because of the way Act 164 was written, the statutory deadline for the city liquor commission became an automatic approval deadline—without having to go through the rulemaking process. The corporation counsel's opinion was that the permit would be automatically approved. Fortunately, however the vote was taken a week before the deadline and another meeting was scheduled and the final vote was found to render a 3-2 decision to deny.

Thank you for the opportunity to testify.