

# **HAWAII'S AUTOMATIC PERMIT APPROVAL LAW**

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## FOREWORD

This report was prepared in response to House Resolution No. 128, H.D. 1 (2000), requesting the Legislative Reference Bureau to review the legal and logistical questions pertaining to the automatic permit approval, Act 164, Session Laws of Hawaii 1998.

The Bureau sincerely appreciates the cooperation and assistance of the numerous individuals in both the public and private sectors who have assisted in the preparation of this report, including their comments on the surveys distributed by the Bureau. The Bureau particularly wishes to acknowledge the insightful comments of the following individuals in response to the Bureau's private sector survey:

- Mr. Leo R. Asuncion, Jr., AICP, President, American Planning Association, Hawaii Chapter;
- Mr. Donald A. Bremner (Kailua);
- Mr. David L. Callies, Professor of Law, Richardson School of Law, University of Hawaii at Manoa;
- Mr. Carl C. Christensen, Staff Attorney, Native Hawaiian Legal Corporation;
- Mr. Daniel Chun, State Government Affairs Chair, American Institute of Architects, Hawaii State Council;
- Mr. Alan B. Clarke, Tongg Clarke & McCelvey (President, American Society of Landscape Architects, Hawaii Chapter);
- Mr. Dan Davidson, Executive Director, Land Use Research Foundation of Hawaii;
- Mr. Henry Eng, AICP, Community Development Manager, The Estate of James Campbell;
- Mr. David Frankel and Mr. Jeffrey Mikulina, Sierra Club, Hawaii Chapter;
- Mr. William "Buzz" Hong, Executive Director, Hawaii Building and Construction and Trades Council AFL-CIO;
- Mr. Keichi Ikeda (Kailua-Kona);
- Ms. Beverly Kirk, Senior Vice President, Aston Hotels and Resorts;
- Ms. Michelle Matson, The League of Women Voters of Hawaii;

- Mr. Michael J. Matsukawa, Attorney at Law (Kailua-Kona);
- Ms. Jacqueline A. Parnell, AICP, Principal, KRP Information Services;
- Mr. Peter Rappa, University of Hawaii Environmental Center;
- Mr. John B. Ray, President, Hawaii Leeward Planning Conference;
- Mr. Carl Takamura, Executive Director, Hawaii Business Roundtable, Inc.;
- Ms. Bette Tatum, State Director, National Federation of Independent Business;
- Ms. Donna Wong, Executive Director, Hawaii's Thousand Friends;
- Mr. Don Young, President, Hawaii Resort Developers Conference;
- Ms. Marjorie Ziegler, EarthJustice Legal Defense Fund;

The Bureau also greatly appreciates the efforts and knowledge of individuals in the many state and county departments and agencies, who are too numerous to name here, who took the time to respond to the Bureau's public sector survey on the automatic approval law. A summary of those responses appears in Appendix C. The Bureau also wishes to thank Ms. Delia Ulma, the Bureau's summer law intern, for her assistance in compiling that survey and for her other assistance in this report.

Finally, the Bureau particularly wishes to express its thanks and appreciation for the invaluable assistance provided by Mr. Winfred Pong, former Deputy Attorney General (now with the Hawaii Tourism Authority), and Mr. Scott Derrickson, Planner, state Office of Planning, both of whom helped to make this report possible. However, all of the opinions expressed in this report are those of the Bureau and not those of the Attorney General or the Office of Planning.

The generous assistance and cooperation of each of these individuals greatly contributed to the timely preparation and completion of this report.

Wendell K. Kimura  
Acting Director

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## EXECUTIVE SUMMARY

**Findings.** House Resolution No. 128, H.D. 1 (2000), requested the Legislative Reference Bureau “to conduct a legal review” of concerns regarding the automatic permit approval, Act 164, Session Laws of Hawaii 1998. Upon reviewing the constitutional, quorum, rulemaking, and other issues raised by that law, the Bureau has found that there is nothing about the automatic permit approval law that renders it inherently defective or that otherwise compels its amendment as a matter of law. Each of the legal and logistical problems identified may be addressed in rules adopted by each state and county agency. The Bureau has further found that many agencies have not yet adopted rules to implement section 91-13.5, HRS, despite a December 31, 1999 deadline for the adoption of these rules as required by section 4 of Act 164, Session Laws of Hawaii 1998. Since section 91-13.5 is not self-executing and does not impose statutory time limits for anything other than the adoption of the respective agencies’ implementing rules, a determination as to whether problems will arise once agencies have adopted rules to implement that section is mostly a matter of speculation.

**Recommendations.** The Bureau recommends the following:

1. **Definition.** Amend the definition of “application for a business or development-related permit, license, or approval” in section 91-13.5, HRS to clarify legislative intent by specifying the statutes to which the automatic approval law applies;
2. **Rulemaking deadline.** Amend Act 164, Session Laws of Hawaii 1998, to extend the date specified in that Act for agency rulemaking from December 31, 1999, to a more realistic date, such as December 31, 2003, and impose a statutory maximum automatic permit approval deadline of one year for those agencies that fail to comply with that deadline;
3. **Federal programs.** Require affected state and county agencies to review the statutory references in section 91-13.5(e), HRS and make recommendations to the Legislature as to whether the affected laws consist of “state administered permit programs delegated, authorized, or approved under federal law”; and
4. **Model rules.** Require the Attorney General to propose model rules that may be used by the administrative agencies to implement section 91-13.5. Each agency may choose to adopt or reject portions of the model rules, depending on the experience and needs of each particular agency.

While the Bureau has found that there is no legal requirement to amend section 91-13.5 and that there is nothing inherent in the automatic approval law itself that would likely result in a constitutional violation, problems may still arise due to a particular agency’s application of section 91-13.5, HRS. Accordingly, this report discusses optional amendments that the Legislature can take on its own initiative if it concludes that there is a need to address one or more of these issues before the affected agencies address them through rulemaking.

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## Chapter 1

### INTRODUCTION

#### A. Scope of Study

This report was prepared in response to House Resolution No. 128, H.D. 1, adopted in the Regular Session of 2000, entitled “Requesting the Legislative Reference Bureau to conduct a legal review of concerns regarding automatic permit approval.” (See Appendix A.) Specifically, the resolution requests the Bureau to:

- “review the legal and logistical questions pertaining to automatic permit approval, including case law and statutes enacted in other states pertaining to automatic permit approval;”
- “recommend statutory changes to address ... concerns regarding quorum, rulemaking, constitutional protections, and citizens’ rights to due process; and”
- “submit a report on the Legislative Reference Bureau’s findings and recommendations, including draft legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2001”.

The reference in House Resolution 128, H.D. 1 to “automatic permit approval” is to Act 164, Session Laws of Hawaii 1998, the operative portion of which was subsequently codified as section 91-13.5, Hawaii Revised Statutes (HRS). References to that law in this report are to “section 91-13.5, HRS”, “the automatic permit approval law”, “automatic approval law”, or “Act 164”. A copy of that law is contained in Appendix B. A permit, license, or approval that has been “automatically approved” under that law is also variously referred to as “deemed approved” or “approved by operation of law”.

#### B. Methodology

The Bureau sent out, both by mail and e-mail, two informal surveys – one to the public sector and one to the private sector – to assist in gathering information to conduct this study. The intent of the surveys was not to produce scientific results, but rather to serve as an informal questionnaire to allow respondents to discuss their experience with Act 164, Session Laws of Hawaii 1998.

The public sector survey was sent to the heads of each state and county department. A copy of that survey, together with a compilation of the public sector survey responses, including a list of rules adopted or pending with each state and county department in accordance with Act 164, is attached as Appendix C. Surveys were sent to every department, despite the fact that Act 164 does not apply to every department, since it was not always clear which departments were exempt from that Act.

The private sector survey was sent to individuals identified on the distribution list in Appendix D. This survey was sent to private sector individuals and organizations who were likely to be affected by, or were known to have an interest in, Act 164, including representatives of business interests, environmental interests, engineers, architects, planners, Native Hawaiian interests, developers, contractors, labor interests, and consultants, as well as people who submitted testimony on bills proposing amendments to that law that were introduced in the 2000 regular session.

The two surveys are similar in intent. Both requested information regarding any legal or logistical problems with Act 164, and ways to address those problems. However, the public sector survey also asked state and county departments whether they had adopted any administrative rules as required by Act 164, and if not, why not. The second survey also asked private sector respondents who believe Act 164 does not have any problems to explain why not, and to give examples that illustrate how that law is working as intended. The private sector survey was intended to allow both supporters and opponents of Act 164 to address the perceived positive or negative aspects of that law, as the case may be, in an open-ended manner.

In addition, interviews were held with various persons, primarily in the public sector, to obtain additional information and materials on the application and impact of Act 164. The Attorney General was also requested to address the issues presented in the House Resolution, in light of the Attorney General's testimony presented to the Legislature expressing its willingness to assist in analyzing the issues involved (see Appendix E). The author of this report held conversations with former Deputy Attorney General Winfred Pong on numerous occasions to discuss various legal issues associated with that law. The Attorney General's comments are included in response to the Bureau's survey, as contained in footnote 1 of Appendix C.

The Attorney General's survey response indicates that the Attorney General has distributed eight letter opinions that were approved by the Attorney General in response to requests for legal opinions on various legal issues associated with Act 164. Copies of those opinions, which are addressed to the following persons or agencies, are included in the following appendices to this report:

- Senator Les Ihara, Jr. (two opinions) – Appendix F;
- Department of Taxation – Appendix G;
- Department of Labor and Industrial Relations, Division of Occupational Safety and Health – Appendix H;
- Department of Business, Economic Development, and Tourism regarding the Coastal Zone Management Program – Appendix I;
- Public Utilities Commission (three opinions) – Appendix J;

This report also contains copies of three opinions of the City and County of Honolulu Corporation Counsel, which are addressed to the following persons or agencies and included in the following appendices to this report:

- Managing Director – Appendix K;
- Department of Planning and Permitting – Appendix L;
- Department of Parks and Recreation – Appendix M.

Finally, the Governor has issued an executive memorandum (Memo No. 98-07) on August 19, 1998, regarding the implementation of Act 164, which was augmented by a directive from Mr. Sam Callejo, the Governor’s Chief of Staff, in a memorandum dated July 22, 1999. These memoranda are contained in appendices N and O, respectively.

### **C. Focus of Study**

It should be noted at the outset that, despite the apparently one-sided nature of House Resolution 128, H.D. 1, in favor of amending section 91-13.5, HRS to resolve the perceived legal and logistical problems of that law, this study is not concerned with whether automatic permit approval is appropriate as a policy choice. The Legislature has already decided in favor of the appropriateness of automatic approval as a policy choice by enacting that law. While repealing that law is always an option available to the Legislature, the question addressed by this report, rather, is whether there are problems associated with the implementation of section 91-13.5, and, if so, how to resolve them in keeping with the intent of that law, as requested by the House Resolution.

In 1998, in response to Senate Concurrent Resolution No. 153, S.D. 1, H.D. 1, the Legislative Reference Bureau was asked to study, in conjunction with the former City and County of Honolulu Department of Land Utilization, existing laws for proposed projects in the Waikiki area, and “suggest mechanisms to streamline and eliminate duplicative process...”<sup>1</sup> That concurrent resolution essentially requested a policy review of the streamlining options available for Waikiki. Accordingly, the Bureau’s report to the Legislature recommended a number of policy options and draft legislation, including, among other things, amendments to section 91-13.5, HRS, as they related only to streamlining the regulatory process in Waikiki.<sup>2</sup>

By comparison, House Resolution No. 128, H.D. 1 (2000) requests that the Bureau conduct a “legal review of concerns regarding automatic permit approval”, as applied to the entire State, rather than only Waikiki, and make recommendations on that basis, not on a policy basis. For example, many of the recommendations made in the 1998 study calling for extensions of time, while useful from a policy standpoint for purposes of the Waikiki regulatory streamlining study, are not legally required in order to implement section 91-13.5, HRS. Similarly, recommendations in the 1998 study for additional requirements for application completeness and the establishment of an expedited appeals procedure, while appropriate for the purposes of that study, are also not legally required for the successful implementation of section

91-13.5 under the terms of the current study. Agencies may nevertheless use many of the permit streamlining techniques identified in the earlier study to enhance the effectiveness of section 91-13.5.

It is axiomatic that it is ultimately the responsibility of the Legislature to decide what amendments, if any, should be made to section 91-13.5, HRS, or, for that matter, whether the law should be repealed. For the purposes of responding to the House Resolution, however, the question presented to the Bureau – and the focus of the Bureau’s study – is whether that law must be amended, and the manner in which it should be amended, if necessary.

#### **D. Organization**

This chapter introduces House Resolution 128, H.D. 1, and presents a methodology and an organizational framework for the study. Chapter 2 provides background information on the automatic approval law. Chapter 3 reviews Hawaii’s and selected other states’ automatic approval laws. Chapter 4 reviews a number of the perceived legal and logistical problems associated with Act 164, including those relating to quorum, rulemaking, constitutional protections, and citizens’ rights to due process, as requested by the House Resolution. Chapter 5 reviews other legal and logistical issues. Chapter 6 provides a brief summary of the issues discussed in the preceding chapters. Chapter 7 contains the Bureau’s findings, recommendations, and conclusion. Proposed legislation, as requested by the House Resolution, is contained in the Appendices.

#### **Endnotes**

1. Senate Concurrent Resolution No. 153, S.D. 1, H.D. 1 (1998), p. 2, lines 36-37 (first “resolved” paragraph).
2. The recommendations relating to automatic approval in that study, which were applicable only to Waikiki, were subsequently expanded in bills introduced in the House of Representatives and Senate. For example, House Bill No. 1349 (1999) ([www.capitol.hawaii.gov/session1999/bills/hb1349 .htm](http://www.capitol.hawaii.gov/session1999/bills/hb1349.htm)) incorporated recommendations made in that report as applied to the entire State, rather than only Waikiki. *See also* S.B. Nos. 88 and 792 (1999); S.C.R. No. 159 and S.R. No. 67 (1999), “requesting each state and county executive department and agency to incorporate application completeness provisions and extenuating circumstances in preparing rules that specify a maximum time period to grant or deny a business or development-related permit under the automatic permit approval law.”

## Chapter 2

### BACKGROUND

#### A. Economic Revitalization Task Force

Hawaii's automatic approval law grew out of efforts to revitalize Hawaii's economy proposed by the Hawaii "Economic Revitalization Task Force". The 27-member task force, convened in 1997 by Hawaii's Governor, Senate President, and Speaker of the House of Representatives, included some of the State's top business, political, and labor leaders, who recommended a package of reforms to improve the State's business climate and government efficiency, as well as make other recommendations dealing with taxation, tourism, education, and other areas.

Before issuing its final recommendations, the Task Force considered several regulatory options designed to streamline Hawaii's permitting process by shortening the time period for the issuance of permits, including "permit by rule" or "general permits" to provide specified time frames for the permit review process with respect to "routine" activities.<sup>1</sup> The Task Force also considered a "fast track" permitting approach that allowed customers to pay an additional fee to expedite their project.<sup>2</sup> In its final recommendations, the Task Force rejected these preliminary options in favor of a more sweeping structural change to the State's regulatory process, namely, an automatic approval law for *all* state and county permits, licenses, and approvals:<sup>3</sup>

Require that all permits, approvals and licenses have a maximum time frame for review and approval

- (a) For all licenses, permits and approvals, the issuing agency of department (either State or County) must establish a time frame
- (b) The license, permit or approval must be granted or denied within that time frame (no extensions permitted); otherwise approval is automatically granted
- (c) Administrative appeal process with specific time limits would be available at relevant level (e.g., Governor at State and Mayors at County)

Process provides certainty in the time to gain necessary approvals, permits and licenses. Disclosure also provides measures and standards to both public sector managers and private sector users.

The proposal was introduced as Senate Bill No. 2204 during the 1998 Regular Session of the Hawaii State Legislature, and eventually enacted as Act 164, Session Laws of Hawaii 1998, and subsequently codified as section 91-13.5, Hawaii Revised Statutes. Section 1 of Act 164 notes that "[t]he purpose of this Act is to implement the regulatory process recommendations of the Economic Revitalization Task Force...".

## B. Reasons for Enacting Act 164

As discussed in chapter 3 of this report, the stated intent of Act 164, Session Laws of Hawaii 1998, as reflected in section 2 of that Act, was to improve Hawaii's business climate and prevent administrative agency delay. These reasons for enacting the automatic approval law are briefly discussed to provide a context to some of the issues and controversy underlying that law.

As noted earlier, Hawaii's Economic Revitalization Task Force was created to serve as a catalyst to position Hawaii for a recovery and long-term economic viability.<sup>4</sup> The impetus for the recommendations made by the Task Force was the State's lengthy and unprecedented period of economic stagnation.<sup>5</sup> The state Department of Business, Economic Development, and Tourism noted that "steady progress" had been made in improving the State's regulatory process "in accelerating the review of a wide range of permits and approvals that affect business and development..."<sup>6</sup> The Department further noted that the State has established Internet web sites to solicit input from businesses regarding rules and other areas of concern involving government.

However, the Department noted, the Task Force determined that "long permit approval processes and internal government efficiency problems are impeding the development and growth process" and that "a more basic change in the regulatory structure is warranted".<sup>7</sup> Among other proposals, an automatic permit approval law, together with an appeals process,<sup>8</sup> was recommended by the Task Force to address these problems. To a large extent the automatic approval law seeks to improve Hawaii's business climate by assisting the State's construction and building industry. Providing greater predictability in the issuance of building permits, for example, will reduce uncertainty and improve planning by allowing businesses to make firm commitments for future construction activities without risking additional delays caused by agency inaction.

Another reason for enacting Act 164 is the perception that Hawaii's governmental departments and agencies are unreasonably slow to approve or deny project permits and licenses, and as a response to the de facto denial of projects through delay.<sup>9</sup> The Department of Business, Economic Development, and Tourism has noted that, "[d]eserved or not, Hawaii has a reputation for being a difficult and costly place to do business. Business people complain of the complicated and slow regulatory processes required to engage in economic activity. While the goals of government regulatory action remain valid (such as assuring a clean environment, a safe workplace, and so on), the methods for achieving these goals can be improved."<sup>10</sup> The Department found that the Task Force's recommendations were intended to improve the efficiency of legitimate regulatory activity, and eliminate unnecessary costs associated with that activity.<sup>11</sup>

Any delay – but especially agency delay in approving or denying a permit – has been described as "the bane of the developer's existence".<sup>12</sup> Regulatory delays and complexity may also produce an anti-competitive effect on land development by keeping prices high, limiting options in housing types, and driving out smaller developers: "Small developers complain they cannot compete with larger developers, who have the money to wait out lengthy approval time lines and hire top-notch consultants and attorneys. The point is an important one for communities, because small builders can often keep costs down and deliver a product for less

money than their larger competitors.”<sup>13</sup> This may be especially true in Hawaii, for, as University of Hawaii Law Professor David Callies has noted, “Hawaii’s development permit process is easily the most complex and time-consuming in the fifty states....”<sup>14</sup>

With respect to land development in particular, agency delays in issuing permits add to an already uncertain process: “Land development—especially residential development—is a highly competitive and risky business. Already sensitive to business cycles, at the mercy of labor and material shortages, influenced by changing consumer tastes and lifestyles, ... land development can be made even riskier by an uncertain regulatory process.”<sup>15</sup> Regulatory delay and complexity add significant costs – both up-front and to sustain the development over the course of the entire project – which are then passed onto consumers.<sup>16</sup> Factors and costs associated with regulatory delays include the following areas:<sup>17</sup>

- **The developer’s status as owner or purchaser.** For example, a developer may have only a ninety-day purchase option and may not wish to exercise that option until the needed land use approvals have been obtained, in which case prompt action is necessary. Extending options on land may require the payment of additional fees. Prompt action may not be necessary if the developer is the owner of the project site or has a lengthy option to purchase;
- **Construction constraints.** Land use approvals often need to be in place by a certain date to obtain reasonable bids for construction;
- **Form of financing.** For example, a commitment letter for a construction loan may be available for only a certain specified period of time. “A standard requirement for closing the loan is the completion of all required governmental permits for the project. Obviously, if a commitment letter has a 60 or 90 day term, the requisite land use approvals must be obtained within that time frame or the commitment letter will terminate.” While the commitment letter may be extended, an extension usually requires the payment of an additional fee or an increase in the interest rate of the loan if the market has adjusted since the issuance of the commitment letter; and
- **Other expenses arising from delays** include cost outlays for attorneys and other professional experts to prepare additions or alterations to proposed designs and construction schedules as the permit request moves through the regulatory process.

A developer, however, may be reluctant to make its time constraints known. While local officials who are made aware of these time constraints “may encourage a commission to act expeditiously... [o]n the other hand, they might inform a group opposing the project that the proposal is vulnerable to delaying tactics.”<sup>18</sup> Interested third parties, including groups that are opposed to a project, “usually view the passage of time as an ally and seek to promote any possible extension or delay in the review and permitting process. This allows them to seek support from other individuals or groups while tending to discourage the developer from persisting with the application.”<sup>19</sup>

Environmentalists contend that the permitting process itself, while often lengthy, is necessary to ensure each person's "right to a clean and healthful environment" under Article XI, section 9 of the Hawaii Constitution;<sup>20</sup> that most environmental permits are issued at relatively low cost; and that "[m]ost delays or confrontations during the [permitting] process arise from ill-planned, poorly located projects".<sup>21</sup> For example, Mr. Dave Raney, former Regional Vice-President of the Sierra Club and Vice-President of the Hawaii Coastal Zone Management Program Statewide Citizens' Forum, in speaking at a 1978 workshop on government simplification in Honolulu, acknowledged that agency delay often worked to the advantage of third parties who seek to preserve and maintain Hawaii's environment, but that there should nevertheless be a clearer identification of potential conflicts "early in the game".<sup>22</sup>

Other factors causing delays in the permitting process include changes in land development strategies and market conditions.<sup>23</sup> Moreover, while several laws have already been enacted in Hawaii to streamline the permitting process, such as the facilitated application process<sup>24</sup> and the central coordinating agency<sup>25</sup> laws, many applicants choose not to use these processes for various reasons, including the reluctance of many applicants to invest large sums of capital up front because of the greater financial risks involved.<sup>26</sup> Generally, delays in agency decision making are attributable to a number of sources, including the following:<sup>27</sup>

- **Large workload.** "Many agencies confront a workload of staggering proportions, whether their mission requires them principally to adjudicate disputes or principally to make policy";<sup>28</sup>
- **Difficult issues.** Many agencies are faced with the task of resolving complicated issues, some of which require data that science is not yet able to provide with confidence;
- **Limited resources.** Resources available to many agencies are inadequate to perform the tasks that they are assigned. Many are assigned an increasing workload and greater responsibilities, even as the number of staff decreases. Higher salaries in the private sector for senior level staff makes filling vacancies difficult, and some positions require a lengthy training period before staff can be entrusted with the task of reviewing or issuing permits. A reduced staff, especially when other staff members are unable to be at work due to illness or other reason, may result in no person from that office who is able to review and approve or deny a permit. This inadvertent automatic approval of a permit could have negative consequences in terms of the health and safety of the general public.<sup>29</sup>
- **Structural problems.** Many agencies must also deal with a variety of structural and managerial problems. For example, "[s]ome agencies are run by multi-member collegial bodies, each member of which is prohibited from communicating with her colleagues except at formal public meetings that must be announced in advance.... Anyone who has participated in collegial decision making understands that (1) it is difficult for a collegial body to reach agreement



and (2) the ability to reach agreement expeditiously depends critically on the ability to engage in frequent, informal, and candid exchanges of views. Most agencies experience a high rate of turnover in their senior management positions.”<sup>30</sup>

- **Time-consuming procedures.** Agencies are also often required to make decisions through the use of unnecessarily time-consuming procedures.
- **Judicial review.** Judicial review of agency decisions creates delay in two ways: “Judicial review is an indirect source of delay because courts often impose time-consuming procedural obligations on agencies. It is also a more direct source of delay, however, because no one, including the agency, can make a confident prediction of the outcome of a review proceeding. An agency that is attempting to construct an integrated set of regulatory policies often must delay its decision with respect to one policy until a court has decided whether to uphold a related policy.”<sup>31</sup>
- **Small business impact.** Under the Hawaii Small Business Regulatory Flexibility Act,<sup>32</sup> each agency must determine whether the agency’s proposed rules will affect small business, and if so, the availability and practicability of less restrictive alternatives that could be implemented. Before submitting the proposed rules for adoption, amendment, or repeal, the agency must consider creative, innovative, or flexible methods of compliance for small businesses and prepare a small business impact statement to be submitted with the proposed rules to the departmental advisory committee on small business (whose members serve on a volunteer basis) and the small business regulatory review board before providing notice for a public hearing. A small business impact statement must also be submitted to the same bodies after the public hearing is held. This additional layer of rule review may constitute an additional source of delay;
- **Strategic, intentional delay.** Some agency delay results from the “intentional pursuit of illegitimate goals. Sometimes agencies delay implementation of a congressionally mandated program because the agency disagrees with the program. At other times an agency delays a decision in a particular case to allow a politically favored party to continue to benefit from an unlawful practice. On still other occasions an agency delays resolution of a policy dispute because the agency head anticipates, and desires to avoid, public and congressional criticism of any policy the agency chooses.”<sup>33</sup>

The automatic approval statute was clearly intended to prevent the latter type of agency delay, namely, intentional delay for illegitimate goals, as well as instances of agency procrastination. One of the questions to be reviewed in chapter 4, however, is whether the automatic approval law was intended to apply to instances in which an agency has in fact taken some form of “action” – such as the good faith, timely consideration of an application that results in a tie vote – but which ultimately results in the automatic approval of a permit because of the agency’s failure to grant or deny the permit within the maximum time period specified in the

agency's rules. Opponents of the automatic approval law argue that the law was not intended to apply in this type of case, in which the agency is not procrastinating but has acted in good faith, while proponents contend that the complete failure of an agency to act on an application should be treated in the same manner as cases ending in a tie vote.

### Endnotes

1. For example, the Task Force considered the following option:

“Option F”

Goal	Streamline permitting process while ensuring the integrity of the regulation controls.
Actions	Adopt “permit by rule” or “general permit” approaches for routine activities with specified time frames for the permit review process. The applicant would submit a Notice of Intent to Proceed with an activity and a commitment to abide by all applicable regulations. If the department does not object within a specified time period, automatic permit coverage is granted and applicant is able to proceed.

Hawaii, Economic Revitalization Task Force (“ERTF”), Hawaii’s Economic Future, vol. 2 (Honolulu, HI: Oct. 1997) (Business Climate Work Group, “Other Options Considered”, Oct. 7, 1997, p. 7).

“General permits” and “permits by rule” generally allow for permits that prospectively approve certain activities that are minor or routine in nature, or involve a minimal environmental impact. General permits, which eliminate the need for individual applications, may be issued with various conditions attached, thereby allowing agencies to specify design, performance, and construction standards without having to review each individual project. See Mark J. Rosen, Waikiki Developments: Streamlining the Regulatory Process (Honolulu, HI: Legislative Reference Bureau, Report No. 4, Dec. 1998), pp. 75 and 85 n. 62.

2. The Task Force’s “Collected Working Group Action Items” offered the following regulatory approach:

Structure “fast track” permitting/license, etc. Set up expedited process for a fee will offer the client (business/public) an agreed short completion time. Offer as an alternative the option to client to provide in-kind services in place of fee for use of the fast track process.

Hawaii, ERTF, Hawaii’s Economic Future, vol. 2, *supra* note 1 (“Collected Working Group Action Items”, p. 5).

3. “Recommendations of the Hawaii Economic Revitalization Task Force”, Honolulu Star-Bulletin (Oct. 22, 1997) (<http://starbulletin.com/specials/taskforce.html>), item IV(B)(1).
4. It is not clear whether the Task Force actually served as a catalyst to improve Hawaii’s stagnant economy or if the economy has improved due to other factors. For example, some commentators have explained Hawaii’s improved economy as due in part to “an incredibly strong U.S. economy” and “a rebounding Asia”. See Carl Bonham and Byron Gangnes, “Hawaii Celebrates the End of an (Awful) Era,” Hawaii Business, July 2000, p. 27.
5. Hawaii, Department of Business, Economic Development, and Tourism, “Hawaii’s Economic Future: Proposals of the Economic Revitalization Task Force”, Hawaii’s Economy (Honolulu, HI: 1998), pp. 1-2 (hereinafter, “ERTF Proposals”) (<http://www.hawaii.gov/dbedt/he98sp/proposal.html>):

BACKGROUND

From statehood to 1990, Hawaii's economic engine has been the marvel of the nation, with real gross state product (GSP) increasing at an annual rate of 4.4 percent. Hawaii's non-agricultural wage and salary job count grew at 3.6 percent per year for the period. But in the last decade the story has been very different. From 1990 to 1996, the annual growth rate of real GSP has slowed to an average 0.5 percent. Since 1990 Hawaii has lost jobs in five out of seven years.

In the course of its deliberations, the Task Force relied on various economic data, including the following:

- Recessions in 1974 and 1982 were followed by a resumption of economic growth; after the 1991 recession real GSP remained flat. (See ERTF, Hawaii's Economic Future, vol. 1 (Honolulu, HI: Sept. 1997), p. Outlook-1.)
  - Hawaii's 1990s recession started out a cyclical phenomenon but took on structural characteristics: downsizing and restructuring persisted after the initial cyclical shocks dissipated ("bubble" inflation, the Persian Gulf War). (Id. at Outlook-2.)
  - During the 1990s stagnation overall Hawaii employment stopped growing. (Id. at Outlook-5.)
  - No industry [in Hawaii] has lost as many jobs in the 1990s as construction, which peaked at nearly 34,000 jobs and has fallen through mid-1997 to around 21,000 jobs. (Id. at Outlook-6.)
  - In a 1997 study, Regional Financial Associates ranked Hawaii 1st among the states in relative business costs with an overall index value of 123.23. The next highest cost state was Connecticut with an index value of 116.84. (Id. at Bus-1.)
  - In 1995, Hawaii ranked 1st among the states in a cost of living index. (Id.)
  - Hawaii had the highest median home prices in 1994 at \$353,400 compared to the next highest (California) at \$181,300. Hawaii ranked 50th among the states in 1996 with a home ownership [rate] of just over 50 percent. (Id.)
6. Hawaii, ERTF Proposals, *supra* note 5, at 18 (<http://www.hawaii.gov/dbedt/he98sp/govt.html>): "For instance, the processing time for clean water, clean air and ventilation permits has been cut substantially. Moreover, the State has reinstated its Consolidated Application Process [subsequently renamed the 'facilitated application process' under Haw. Rev. Stat. §201-62] for developers and conducts pre-application meetings among major developers and all agencies that might become involved. This allows all parties concerned to work out a strategy for the efficient application and review of all necessary permits."
7. Id.
8. The appeals process originally proposed by the Task Force was not enacted in 1998 Haw. Sess. Laws Act 164.
9. For example, the Economic Revitalization Task Force stated this concern as follows:

Hawaii is perceived as a poor place to do business. Our processes tend to be lengthy and cumbersome.

In a world where speed and reaction time are crucial, we are uncompetitive in providing approvals, permits and licenses to individuals. Businesses cannot accept undetermined or lengthy timeframes reaching into years when their product life cycles are measured in

months. To attract opportunities for our people which also benefit our tax base and ability to fund our community, we need to recognize those new standards.

Hawaii, Economic [Revitalization] Task Force, “Adapting to a Changed World’: A Bold Plan to Revitalize Hawaii’s Economy,” (Honolulu, HI: Oct. 22, 1997), pp. 3-4.

10. Hawaii, ERTF Proposals, *supra* note 5, p. 3 (<http://www.hawaii.gov/dbedt/he98sp/proposal.html>).
11. The Department also drafted the following question and answer relating to government reform to indicate how automatic permit approval would increase certainty and predictability in the permitting process and reduce delay:
  - Q. *How will time limits and automatic approvals improve the permitting process?*
  - A. For reasons of public safety, health and orderly development, government tries to ensure that a wide range of business and development activities meet certain standards before they are allowed to proceed. However the process instituted to ensure that the standards are met can be a source of considerable delay which ultimately mean higher costs to business. Reducing the multiplicity of permits and processes for approval has been the subject of considerable effort by both State and local governments over the past three years and the situation is clearly improving. However, a definitive estimate for the time frame that any given permit request will be acted upon is still often unavailable. This uncertainty is a source of frustration for business. It is difficult for them to make firm commitments for future stages of activity without the risk of delays. A time limit on the approval process will improve business planning and set benchmarks for government agencies to improve upon. The time limit will be set by the agencies, so they can take into account the reasonable time they will need for review and better establish internal accountability for the process. For business, time limits with automatic approvals if no action has been taken make the process predictable and allow firm commitments to be made further in advance. (*Id.* at 19.)
12. *See U.S., Office of Community Planning and Development and Office of Policy Development and Research, Department of Housing and Urban Development, The Private Development Process: A Guidebook for Local Government (prepared by the U.S. Conference of Mayors, National Community Development Association, and the Urban Land Institute; HUD Contract H2422) (Washington, DC), p. 10:*

The phrase ‘time is money’ conveys the notion that a project once begun bears costs even when no activity is taking place. One can think of a project as having a clock labeled ‘interest’ which starts ticking early in the planning stage of a project and stops only when the project is completed or closed down.

... The common causes [for delay] are weather, material shortages, labor disruptions and governmental action. Delays that are caused by government action or inaction are often dramatic and can be fatal. Sewer moratoria and other no-growth related halts impose heavy tolls on projects underway. A major large scale development outside of Washington, D.C., for instance, was held up close to two years when insufficient sewer capacity in the county halted all construction. The developers’ interest clock was ticking at the rate of \$10,000/day! Most of this interest expense was not recoverable.

A developer is constantly aware of delay. All time is costly; that which is unproductive is doubly so. Since market demand controls to a very great extent the dollars that will be received for a product produced, any increase in cost, especially those caused by delay, is money out of his pocket.

13. National Institute of Building Sciences Land-Use Task Force, Land-Use Regulations Handbook: A Land Development Handbook for Local Planning Commissioners, Developers, Builders, Elected and Appointed Officials, and Citizens (Washington, DC: Natl. Inst. of Building Sciences, 1990), p. 9.

A 1991 review of land development regulations also concluded that regulatory delay and complexity influences land and housing costs “by making it difficult for developers to respond quickly to changing housing demands and [creating] barriers for new firms wanting to build and sell housing”:

A comparison of Malaysia’s and Thailand’s system of development approval is instructive. A recent appraisal by the World Bank concluded that newly-built housing prices in Malaysia increased by an annual rate of 18.9 percent between 1972 and 1982, a rate about triple the overall increase in consumer prices.... According to the Bank report, the reason for the rise in Malaysia’s housing prices is the combination of high government-imposed housing standards, overly complex and time-consuming housing project approval procedures, the sluggish response of the housing industry to increases in housing prices, and high housing demand. For example, [in Malaysia] it takes between five and eight years to obtain all the necessary permits from 15 to 20 government agencies for subdivision approval. In Thailand, in sharp contrast, it takes about five months to secure subdivision approval from five government agencies. (Emphasis added.)

David E. Dowall, Less is More: The Benefits of Minimal Land Development Regulation (Sponsored by the Office of Housing and Urban Programs, U.S. Agency for International Development, Working Paper 531) (Berkeley, CA: University of California at Berkeley, Institute of Urban and Regional Development, Feb. 1991), p. 19.

14. David L. Callies, Preserving Paradise: Why Regulations Won’t Work (Honolulu, HI: University of Hawaii Press, 1994), p. 59.

15. National Institute of Building Sciences Land-Use Task Force, *supra* note 13, at 9.

16. For example, in 1977, Hawaii’s Construction Industry Legislative Organization noted the following:

Approvals, when obtained, may be conditional and costly revisions in the project may be required. It is not uncommon for approvals obtained at one stage of the process to be reversed or substantially altered at later stages. Coupled with the length of time required to progress through the process, this increases the cost of development substantially. All of these costs must then be passed on to the consumer. In certain cases the magnitude of the costs will have a direct effect on feasibility, and can result in the abandonment of worthwhile projects.

It is becoming increasingly difficult for developers to institute projects in those jurisdictions having complicated and time consuming review and approval processes. The ‘front-end’ investment required and the ability to absorb the costs of delay are often beyond the financial capability of all but the largest developers with substantial financial resources. Yet, at the same time, the larger developers, those who undertake medium to large projects, face the most extreme governmental controls. They are sometimes unwilling to wait out the two to five years it takes to obtain land use approvals. This is particularly unfortunate since the medium to large projects offer the greatest potential for comprehensive land use planning, which is sensitive to environmental, recreational, social and economic concerns.

As the time required for the project approval increases, added costs result. Concurrent with the governmental approval process the developer is making

commitments for land acquisition, financing, bonding of site improvements, and committing to a specific product design tailored to an identified market. The builder is dependent upon a variety of organizations for the successful completion of the project. A relatively simple but required approval can bring the project to a complete halt.

Michelle Dick, Coordinated Approval Process: Streamlining Land Use Decision-Making (Honolulu, HI: Construction Industry Legislative Organization, March 1977), pp. 2-3. *See also* remarks of John B. Connell in Hawaii Coastal Zone Management Program, Department of Planning and Economic Development, Red Tape vs. Green Light: A Workshop on Government Permit Simplification, Coordination, and Streamlining (Honolulu, HI: July 7, 1978), pp. 8-12.

17. Nyal D. Deems and N. Stevenson Jennette III, A Practical Guide to Winning Land Use Approvals and Permits (New York, NY: Matthew Bender & Co., Inc., 1994), pp. 6-8 to 6-11.
18. Id. at 6-9 to 6-10.
19. Id. at 6-9.
20. Article XI, section 9 of the Hawaii Constitution (“environmental rights”) provides: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”
21. Donna C. Rona, Environmental Permits: A Time-Saving Guide (New York, NY: Van Nostrand Reinhold Co., 1988), pp. 12-13:

In all cases, obtaining environmental permits adds to the costs of a project. Between 50 and 60 percent of all environmental permit applications are granted with little more than paperwork processing and payment of permit fees. When obtained in conjunction with traditional building permits, the additional costs to the project are minimal. The number of relatively simple permit processes is increasing as developers, planners, engineers, and architects develop greater environmental awareness and demonstrate sensitivity in project designs and site selection.

The remaining 40 to 50 percent of the projects requiring permits experience delays because of a variety of factors. Poor planning and blatant disregard for environmental degradation account for some of the delays and difficulties. Most delays, however, stem from two general problems: the applicant’s failure to prepare an unambiguous application and provide all required data, or the deterioration of the agency/applicant relationship into that of adversaries. In most cases these delays are caused or aggravated by permit applicants.

22. In particular, Mr. Raney stated the following:

Frankly, the present spaghetti-like maze of agencies and permits has quite often proven useful to citizen groups who discover they are about to be impacted by a major project which they oppose—once they finally realize the true nature of the project. The procedural requirements for a major project are so complex that it is usually possible to find some procedural grounds for delaying, or perhaps halting altogether, the project. Where several agency approvals are required, this has the effect of offering multiple routes of appeal for citizens who oppose a project on grounds which might appear immaterial to the proposing agency. ...

BACKGROUND

My point is that the very delays and multiple sources of delays ... have proven in the past to be very crucial in struggles to acquire parks, preserve wildlife, protect historic sites, and otherwise intervene on behalf of the public interest when certain values were threatened by proposed projects. In many cases it takes time to inform and rally the public, to gain legislative approval for acquisition funds, or to properly research and fund a lawsuit.

To ask our help in simplifying and speeding up the permit process is to ask us to accept a possible handicap in future conflicts over projects. This should be clearly recognized as a matter of great concern to many citizens who have participated in governmental decision-making processes and have felt they were already quite handicapped in comparison to the strong economic interests they might be opposing.

From another perspective, however, I believe that many such conflicts are symptoms of flaws in our overall resource management system, or failures in the public participation and communication process. Everyone loses when a project is stopped in its latter phases, and everyone would benefit from a system which more clearly identifies potential conflicts early in the game and produces permit approvals or denials which direct development into appropriate areas and which adequately protect areas of special value to the public.

Red Tape vs. Green Light, *supra* note 16, pp. 15-16 (remarks of Dave Raney). Mr. Raney also noted that some applicants who seek to hide aspects of a project that may be controversial may end up contributing to delays: "I submit that the more the public knows about a project the better, and believe that project proponents who try to conceal controversial aspects of their projects will only delay and magnify the impacts of the controversy. It should not take great effort to anticipate what the potential conflicts of a project would be and work toward addressing those conflicts early in the game." Id. at 18.

23. *See Rosen, supra* note 1, at p. 9, n. 19.
24. Haw. Rev. Stat. §201-62.
25. Haw. Rev. Stat. §46-18.
26. *See generally Rosen, supra* note 1, at 65-70.
27. *See generally* Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, Vol. II (New York, NY: Little Brown and Co., 3rd ed., 1994, and 1999 Supp.), at 211-228.
28. Id. at 214.
29. For example, the Hawaii Boiler and Elevator Branch of the Department of Labor and Industrial Relations noted that it was understaffed, which could result in the inability to devote the time necessary for the review of applications for new, renovated, or replacement boilers and elevators. *See* Appendix C of this report at endnote 13.
30. Davis and Pierce, *supra* note 27, at 216.
31. Id. Davis and Pierce cite one example in which the courts took nine years to uphold a program that the Social Security Administration initiated in 1980. *See Nash v. Bowen*, 869 F.2d 675 (2d Cir. 1989).
32. 1998 Haw. Sess. Laws Act 168, section 2; section 5 of that Act states that the Act is repealed on June 30, 2002.

33. Davis and Pierce, *supra* note 27, at 217.



## Chapter 3

### AUTOMATIC APPROVAL LAWS

House Resolution No. 128, H.D. 1 (2000) requested a review of “case law and statutes enacted in other states pertaining to automatic permit approval”. This chapter reviews Hawaii’s automatic approval law as well as the statutes of three other states – California, Massachusetts, and Minnesota – that have adopted automatic approval laws that are fairly broad in scope or illustrate different approaches to automatic approval. Chapters 4 and 5 of this report review applicable case law on relevant issues relating to automatic approval.

The idea of automatic approval is not new to Hawaii and other states; “[n]early half the states have adopted deemed approval statutes” whose emphasis is fairly narrow in scope, which are not reviewed in this chapter.<sup>1</sup> Many of these laws, however, “were adopted before land use regulations became a complex and sophisticated regulatory device in the post-1950s. These early statutes most commonly apply only to the subdivision process and lack detailed specifications and definitions.”<sup>2</sup> Other automatic approval statutes that have a narrow scope include those relating to coastal development, environmental approval, applications for conditional use permits, and approval of historic landmarks.<sup>3</sup> Hawaii has also enacted several automatic approval provisions that are fairly narrow in scope and which are briefly discussed in this chapter.

#### A. Hawaii

##### 1. Act 164, Session Laws of Hawaii 1998

Senate Bill No. 2204 (1998), the bill for Act 164, went through a number of changes before reaching its final form.<sup>4</sup> The operative provisions of the automatic permit approval law, as contained in section 3 of Act 164 and codified as section 91-13.5, Hawaii Revised Statutes, are as follows:

- Maximum time period. Agencies must adopt rules specifying a maximum time period to grant or deny a “business or development-related permit, license, or approval”. Exceptions are made where “otherwise provided by law” and where the application is not subject to “state administered permit programs delegated, authorized, or approved under federal law.”
- Application completeness. Issuing agencies must clearly articulate requirements for applications and review them for completeness “in a timely manner”.
- Automatic approval. Issuing agencies must take action to grant or deny applications within the maximum time period established by agency rules, or the application is “deemed approved”.

- Extensions are permitted for national disasters, state emergencies, or union strikes that would prevent the applicant, the agency, or the department from fulfilling application or review requirements.
- Definition. The term “application for a business or development-related permit, license, or approval” is broadly defined to mean “any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.”

In addition, section 4 of Act 164 required all agencies to adopt rules as required by section 3 of that Act “on the first occasion that the agency's rules are amended upon approval of this Act or by December 31, 1999, whichever is earlier.”

## **2. Legislative Purpose and Intent**

The legislative purpose and intent of Act 164 are contained in sections 1 and 2 of that Act. Section 1 states that the purpose of the Act “is to implement the regulatory process recommendations of the Economic Revitalization Task Force which was convened by the governor, the president of the senate, and the speaker of the house of representatives.” Section 2 states that the legislative intent is to improve Hawaii’s business climate by providing all parties “with a greater level of certainty” of the time in which any agency will review and either approve or deny a business or development-related permit, license or approval:

The legislature recognizes the need to take constructive steps to improve Hawaii’s business climate. Businesses inside and outside of the State have described the lengthy and indeterminate time required for business and development-related regulatory approvals, and the duplicative nature of the approval process, as an area which requires immediate attention. Substantive changes to these processes must be made in order to send a strong signal to the businesses community of the State’s intent to improve the overall regulatory climate.

The purpose of this Act is to require the establishment of maximum time periods for the review and approval of all business and development-related permit approvals and licenses. Issuing agencies would be required to review applications for completeness in a timely manner and then to act upon the applications within an established time frame, or application approval would be automatic.

Maximum review and approval time periods would serve to provide all parties with a greater level of certainty of the time required for review and final determination by an agency on any application for a business or development-related permit, license, or approval.

Implicit in this statement of purpose is the need to prevent administrative agency delay, presumably undue delay, caused by “the lengthy and indeterminate time required for business

and development-related regulatory approvals, and the duplicative nature of the approval process...”. In a letter to the Public Utilities Commission, the Attorney General has stated that Act 164 should be interpreted broadly, and should be applied so as to cover all business and development-related approvals that impact on state economic activity.<sup>5</sup>

Floor debates on the Conference Committee Draft of S.B. No. 2204 were predominantly in favor of the bill in the Hawaii Senate. In the House of Representatives, while most members spoke in favor of that draft, several Representatives expressed concerns that the bill would “legislate worker productivity” (Rep. Morita) or “lead towards opening the door for development in areas that are so important to be preserved” (Rep. Santiago).<sup>6</sup> The Conference Committee Report for S.B. No. 2204 will be addressed in chapters 4 and 5 in the context of relevant issues.

### **3. Other Automatic Approval Laws in Hawaii**

Hawaii has also enacted at least fifteen other automatic approval provisions in fourteen statutory sections, each of which has a more narrow focus than section 91-13.5, HRS. One of these statutes, section 201G-118, contains two separate automatic approval provisions. The most common type of such a provision includes statutory language containing the phrase “deemed approved”, “deemed accepted”, or similar language; section 183C-6 provides instead “that the owner may automatically put the owner's land to the use or uses requested in the application.”<sup>7</sup>

## **B. Other States**

### **1. California**

California’s Permit Streamlining Act<sup>8</sup> provides under certain circumstances for the automatic approval of applications for “development projects”<sup>9</sup>, which apply only to adjudicatory approvals such as tentative maps, conditional use permits, and variances.<sup>10</sup> Ministerial projects such as building permits, lot line adjustments, and certificates of compliance are not subject to the time limits established under that Act.<sup>11</sup> Several cases interpreting that Act are discussed in greater detail in chapters 4 and 5 of this report.

The California Governor’s Office of Planning and Research has described the Permit Streamlining Act as “reminiscent of a flashing light. It turns on when an application is submitted, off when accepted as complete and the environmental review [the California Environmental Quality Act, or “CEQA”] process begins, and on again after the CEQA determination has been made.”<sup>12</sup> In general, that Act requires public agencies to follow maximum statutory time limits and procedures for specified types of land use decisions. The procedural requirements of that Act are as follows:<sup>13</sup>

- Application completeness. All public agencies must establish one or more detailed lists specifying the information required from applicants for a development project.<sup>14</sup> Upon receipt of a project application containing a statement identifying the application as being for a “development permit”, an agency must notify the applicant in writing within 30 calendar days regarding

whether the project application is complete for processing. If rejected as incomplete, the agency must identify where deficiencies exist and how they can be remedied. The resubmittal of the application begins a new 30-day review period. If the agency fails to notify the applicant of completeness within either of the 30-day periods, the application is deemed to be complete.<sup>15</sup> If the application is rejected as incomplete a second time, the applicant may appeal the decision to jurisdiction's hearing body, which must make a final written determination within 60 calendar days. Failure to meet this time period constitutes acceptance of the application as complete.

- Environmental review. Once complete and accepted, the agency then proceeds with the CEQA process, and the approval or denial of the project.<sup>16</sup>
- Automatic approval. Once an environmental impact report (EIR) is certified for a project under CEQA, the public agency must either approve or deny the project within one of the following statutory time limits:<sup>17</sup>
  - 180 days from the date of certification;
  - 90 days from the date of certification if the development project is affordable to very low or low-income households and the application requests financial assistance from a public or federal agency; or
  - 60 days when a project is found to be exempt from CEQA or a negative declaration<sup>18</sup> is adopted for a project.

If no action is taken within the specified time, the project is deemed approved by operation of law if the lead or responsible agency fails to act to approve or disapprove the project within the specified time limits.<sup>19</sup> An application may not be disapproved in order to comply with the statutory time limits. Any disapproval must specify reasons for the disapproval other than the failure to timely act in accordance with the maximum time limits.<sup>20</sup>

- Extensions. The project applicant and agency may mutually agree in writing to a one-time extension of the statutory time limits for a period not to exceed 90 days from the date of extension. No other extension, continuance, or waiver is permitted, unless there has been an extension under CEQA to complete and certify an environmental impact report, in which case the project must be approved or disapproved within 90 days after the certification of that report.<sup>21</sup>
- Public notice and review requirements. An application may be deemed approved only if the public notice required by law has occurred.<sup>22</sup> Public notice and an opportunity to be heard may be provided by the agency or an applicant. Applicants have two options available to ensure that these requirements are met:

- The applicant may file a civil mandamus action to force the agency to provide notice or hold a hearing, or both; or
- If the applicant has provided 7 days advance notice to the permitting agency of the intent to provide public notice, an applicant may provide the required public notice using statutory distribution information no earlier than 60 days from the expiration of the maximum time limits. If the applicant chooses to provide public notice, the notice must include a description and location of the proposed development, the permit application number, the name and address of the permitting agency, and a statement that the project will be deemed approved if the permitting agency has not acted within 60 days. Notice by the applicant extends the time limit for action by the permitting agency to 60 days after the public notice is provided.

## 2. Massachusetts

Massachusetts' Zoning Act,<sup>23</sup> while fairly narrow in terms of the scope of permits included under that Act, demonstrates two different ways in which automatic approval laws may be structured, namely, for failure to act within a maximum time period after an application has been filed, and for failure to act within a maximum time period after a public hearing has been held.<sup>24</sup>

- (1) Zoning Appeals.<sup>25</sup> Decisions of the board of appeals must be made within 100 days after the date of the filing of an appeal, application, or petition, except in regard to special permits. Failure by the board to act within 100 days or an extended time, if applicable, is deemed to be the grant of the appeal, application, or petition.

Extensions. The required time limits for public hearing and action for both zoning appeals and special permits may be extended by written agreement between the applicant and the board of appeals. A copy of the agreement must be filed in the office of the city or town clerk.

- (2) Special Permits.<sup>26</sup> The special permit granting authority must hold a public hearing, for which notice has been given, on any application for a special permit within 65 days from the date of filing of the application. The decision of the granting authority must be made within 90 days following the date of the public hearing. Failure by the granting authority to take final action within 90 days or an extended time, if applicable, is deemed to be a grant of the special permit.

Extensions. The required time limits for a public hearing and action may be extended by written agreement between the petitioner and the special permit granting authority. A copy of such agreement must be filed in the office of the city or town clerk.

Other requirements. A special permit issued by a special permit granting authority requires a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board. Special permits may also impose “conditions, safeguards and limitations on time or use”.

Certificate of approval. The automatic approval provisions also allow applicants who have received an automatically approved application to receive a certificate from the city or town clerk indicating the date of approval, the fact that the agency failed to take final action, and that the approval resulting from that failure has become final.<sup>27</sup>

Record. In addition, the board or special permit granting authority, as applicable, must cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and setting forth clearly the reason for its decision and of its official actions, copies of all of which must be filed within 14 days in the office of the city or town clerk and shall be a public record.<sup>28</sup>

### **3. Minnesota**

Minnesota’s automatic approval law, which was enacted in 1995, generally establishes a sixty-day time limit for agency action for the following:

- (1) Written requests for permits, licenses, or other government approval relating to “zoning, septic systems, or expansion of the metropolitan urban service area”;<sup>29</sup> and
- (2) Applications for licenses required as a condition for doing business in that State, excluding certain professional and vocational licenses.<sup>30</sup>

(1) Zoning and septic systems. The agency’s failure to deny a request within 60 days is deemed approval of the request. If the agency denies the request, it must state at that time in writing the reasons for the denial.<sup>31</sup> The statutory time limit begins to run when the agency has received a written request that contains all information required by law, or by a previously adopted rule, ordinance, or policy of the agency. If the request does not contain all required information, the time limit starts over only if the agency sends notice within 10 business days of receipt of the request telling the requester what information is missing.<sup>32</sup> If approval of more than one state agency in the executive branch is required, the 60-day period begins to run for all executive branch agencies on the day a request containing all required information is received by one state agency. The agency receiving the request must forward copies to other state agencies whose approval is required.<sup>33</sup>

Extensions. The 60-day time limit is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in those laws or orders make it impossible to act on the request within 60 days, in which case the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order. Final approval of an agency receiving a request is not

considered a process.<sup>34</sup> The time limit is also extended if a request submitted to a state agency requires prior approval of a federal agency, or an application submitted to a city, county, or other political subdivision requires prior approval of a state or federal agency, in which case the deadline for agency action is extended to 60 days after the required prior approval is granted.<sup>35</sup> Finally, an agency may extend the time limit before the end of the initial 60-day period by providing written notice of the extension to the applicant, stating the reasons for the extension and its anticipated length, which may not exceed 60 days unless approved by the applicant.<sup>36</sup>

(2) Business licenses. Unless a shorter period is provided by law, all state agencies that must act on a customer's application for a license must take final action on it within 60 days after the customer's submission of a completed application to the responsible agency or within 60 days after the customer has been provided with a work plan, whichever is later. If action on the application is not completed within 60 days, the license is deemed to be granted. The time period does not begin to run until the customer has completed any required application in complete, correct form and has provided any additional required information or documentation.<sup>37</sup>

Longer time limits. An agency may provide for a longer time for the conclusion of action on an application if:

- (1) The agency states in writing to the customer that a longer time is needed to protect against serious and significant harm to the public health, safety, or welfare, states the reason why, and specifies the additional time needed;
- (2) The agency states in writing to the customer that a longer time is needed to comply with state or federal requirements, states the requirements, and specifies the additional time needed; or
- (3) An agency that must take action is a multimember board that meets periodically, in which case the agency must complete its action within 60 days after its first meeting after receipt of the application, or within a longer period established under clause (1) or (2).<sup>38</sup>

Exclusions and compliance. The automatic approval provision does not apply to an application requiring one or more public hearings or an environmental impact statement or environmental assessment worksheet. When a license is deemed granted, the automatic approval provision does not limit the right of an agency to suspend, limit, revoke, or change a license for failure of the customer to comply with applicable laws or rules.<sup>39</sup>

### Endnotes

1. Carolyn W. Poulin, "Comment: Land Use Applications Not Acted Upon Shall Be Deemed Approved: A Weighing of the Interests," 57 UMKC L. Rev. 607, 611 (Spring, 1989) (footnote omitted).
2. Id. (footnotes omitted); *see also* Gregory G. Brooker and Karen R. Cole, "Automatic Approval Statutes: Escape Hatches and Pitfalls," 29 The Urban Lawyer 440-441 (Summer 1997). For a comprehensive review of case law interpreting land use statutes providing for automatic approval, *see also* Annotation, "Zoning:

Construction and Effect of Statute Requiring that Zoning Application Be Treated as Approved if Not Acted on Within Specified Period of Time,” 66 A.L.R.4th 1012.

3. See Poulin, *supra* note 1, at 612-613 (footnotes omitted).
4. The salient changes made by each House and Senate Draft is described as follows:
  - S.B. No. 2204: Did not include a definition section. Contained no provision for extensions. Required all issuing agencies to establish, by rule, maximum time frames “for the review and approval of all permits, approvals and licenses under their jurisdiction”. Included an automatic approval provision.
  - S.B. No. 2204, S.D. 1: Added additional intent to the purpose section relating to dilatory or inexcusable inaction and public health, safety, and welfare. Deleted the “maximum” time requirement; required agencies to establish time periods for completing the approval process. Exempted applications subject to “federal review and approval”. Required agencies to establish time periods to rejecting applications for incompleteness. Required agencies to allow sufficient time to afford an opportunity to all parties to establish a record in contested case hearings. Required agencies to establish a time period to act on a completed application after the hearing record is complete; allowed for the tolling of this period if there was good cause to reconvene or agency action resulted in a tie vote. Retained automatic approval provision, but limited approval only to “matters that an agency is authorized to approve by statute, ordinance, or rule” and that “any public notice of the automatically approved application that is required by law has occurred.” Allowed for extensions and waivers by the applicant, by stipulation of the parties in an agency hearing, or by an agency under certain circumstances. Defined “application for a business or development-related permit, license, or approval” as including applications “to conduct any profession, vocation, or occupation requiring a license or certificate of registration issued by a board or commission pursuant to section 26H-4, or to change the intensity of the use of land, water, air, natural or cultural resources, or access thereto.” Amended section 92-15, HRS, to change the quorum requirement to those that are present and not disqualified, and to add language to provide that an application under the automatic approval provision shall be “deemed denied unless a majority of all members present and not disqualified vote to approve the application.” Changed the effective date from upon approval to July 1, 2005.
  - S.B. No. 2204, S.D. 2: Similar to S.D. 1 version, but deleted automatic approval provision. Added exclusions in which another law governed the agency which establishes a time period in which to act, or where a federal regulatory program has been delegated to an agency. Allowed an additional extension in contested case hearings by the agency for good cause shown that the due process rights of any party to the hearing, who has not unduly delayed the hearing, will otherwise be jeopardized. Amended definition to include references to specific statutes. Retained amendment to section 92-15, but added a proviso that the section did not apply to any board or commission that was governed by a specific law setting forth the number of members constituting a quorum or the number of members necessary to validate any act.
  - S.B. No. 2204, S.D. 2, H.D. 1: Replaced contents with the language of H.B. No. 2557, H.D. 2. Deleted legislative intent relating to dilatory inaction and public health, safety, and welfare. Re-included automatic approval provisions. Provided for a 90-day maximum time period for agency action. Required agencies to establish a deadline or form for administrative appeal within each agency. Retained exclusion for federally-delegated permit programs. Required application completeness reviews in a timely manner. Deleted statutory definition, but limited automatic approval to applications for a



“state” business or development-related permit, approval, or license. Limited extensions to national disasters, state emergencies, or union strikes that would prevent the applicant, agency, or department from fulfilling application or review requirements. Deleted amendment to section 91-15. Effective upon approval.

- S.B. No. 2204, S.D. 2, H.D. 2: Technical, nonsubstantive amendments only.
- S.B. No. 2204, S.D. 2, H.D. 2, C.D. 1: Enacted as 1998 Haw. Sess. Laws Act 164.

5. Letter from John P. Dellera, Deputy Attorney General, to Paul Shigenaga, Administrative Director, Public Utilities Commission, March 29, 2000, regarding the implementation of Act 164, pp. 2 – 3 (Appendix J):

... [T]he legislative history and principles of statutory construction show that Act 164 should be interpreted broadly.

First, the stated purpose of the law is to implement the recommendations of the Economic Revitalization Task Force (“ERTF”), Act 164, Sess. L. Haw. 1998, §1, and to reduce the “lengthy and indeterminate time required for business and development-related regulatory approvals ... in order to send a strong signal to the business community of the State’s intent to improve the overall regulatory climate.” *Id.*, §2. The ERTF had recommended “that all permits, approvals and licenses have a maximum timeframe for review and approval.” ERTF Recommendations, October 22, 1997, at 3.

The legislature, as well as the ERTF, responded to concerns voiced by “businesses inside and outside the State,” obviously a reference to existing businesses. Act 164, Sess. L. Haw. 1998, §2; ERTF Recommendations at 4. Those concerns focused on improving the regulatory climate for all business enterprises, not just new ones.

There is no indication in the legislative debates that the law would cover only approvals needed to initiate operations of a new business. *See* remarks of Sen. Metcalf, Hawaii Senate Journal (1998) at 680 (“We owe it to business to tell them in a timely manner whether their request is approved or denied”); remarks of Sen. Kawamoto, *ibid.* (“I have a project in my community that has been on the books going on 14 years and still on the books. This bill will provide the opportunity that we can cut the process shorter, we can save money in consultant fees....”); remarks of Rep. Tarnas, Hawaii House Journal (1998) at 874 (argued that bill applied to applications to reclassify agricultural lands as well as approvals issued by the Public Utilities Commission, Land Use Commission and county planning boards); remarks of Rep. Marumoto, *id.* at 876 (“There is a major industry in the State that was required by the State to install scrubbers for their smokestacks and then had to wait five years to get a permit”); remarks of Rep. Okamura, *ibid.* (“Existing processes are cumbersome and fraught with uncertainty inhibiting capital investment and stifling new business opportunities”). Those comments are about permits required by existing businesses, not just new ones.

In sum, the evidence of legislative intent points to a broad interpretation of Act 164 that would cover all business and development-related approvals that impact economic activity in the State.

6. See generally Journal of the Senate of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998, pp. 243 (S.B. No. 2204, S.D. 2); 679-680 (C.D. 1); Journal of the House of Representatives of the Nineteenth Legislature of the State of Hawaii, Regular Session of 1998, pp. 589-590 (S.B. No. 2204, S.D. 2, H.D. 2); 874-878 (C.D. 1).
7. The following is a brief description of these provisions:

- §51D-5(c), HRS (transit capital development fund; “projects; authorization”): Allows counties by ordinance to authorize the executive branch of the county to enter into a development agreement with the Governor, subject to the disapproval of the Legislature for a mass transportation project. Requires the Legislature to approve or disapprove the development agreement within 60 days of its first regular legislative session convened after receipt of the development agreement from the Governor and the county. If the development agreement is not disapproved after the 60th day, it shall be deemed approved by the Legislature.
- §166-4(3)(A) and (C), HRS (“park development”): Allows the Department of Agriculture to develop agricultural parks which, at the option of the Board of Agriculture, are to be exempt from various planning and zoning laws, provided that the legislative body of the county in which the agricultural park is to be situated must approve or disapprove the agricultural park within 45 days after the department has submitted the preliminary plans and specifications for the agricultural park to the legislative body. If after the 45th day an agricultural park is not disapproved, it shall be deemed approved by the legislative body. The final plans and specifications for the agricultural park shall be deemed approved by the legislative body if the final plans and specifications do not substantially deviate from the preliminary plans and specifications.
- §171-134(b)(3)(A) and (C), HRS (“industrial park development”): Allows the Department of Land and Natural Resources to develop an area of public lands as an industrial park. Provides that, at the option of the Board of Land and Natural Resources, the development is to be exempt from various planning and zoning laws, provided that the legislative body of the county in which the industrial park is proposed to be situated must approve or disapprove the industrial park within the same time period specified in section 166-4(3)(A), HRS, or it shall be deemed approved by the legislative body.
- §183C-6(b), HRS (“permits and site plan approvals”): Requires the Department of Land and Natural Resources to render a decision on a completed application for a conservation district use permit within 180 days of its acceptance by the Department. If within 180 days after acceptance of a completed application for a permit, the Department fails to give notice, hold a hearing, and render a decision, the owner may automatically put the owner's land to the use or uses requested in the application. When an environmental impact statement is required or a contested case hearing is requested, the 180 days may be extended an additional 90 days at the request of the applicant. Any request for additional extensions are subject to the approval of the Board.
- §§342B-42(b)(1), HRS (air pollution control; enforcement); 342D-9(b)(2), (water pollution; enforcement); 342F-7(b)(2) (noise pollution, enforcement); and 342P-5(b)(2) (asbestos and lead, enforcement; education): Each of these environmental enforcement sections provides that if the Director of Health determines that any person is continuing to violate the chapter in question, the director must send written notice to be served on the alleged violator or violators, requiring the person to submit a written schedule within 30 days specifying the measures to be taken and the time within which the measures will be taken to bring the person into compliance. The director must accept or modify the submitted schedule within 30 days<sup>7</sup> of receipt of the schedule. Any schedule not acted upon after 30 days of receipt by the director shall be deemed accepted by the director.
- §343-5(c), HRS (environmental impact statement; “applicability and requirements”): When an applicant proposes an action that requires approval of an agency, the agency receiving the request, among other things, must notify the applicant and the Office of Environmental Quality Control of the acceptance or nonacceptance of a final statement within 30 days of receipt of the final statement. The final statement shall be “deemed to be accepted” if the agency fails to accept or

not accept the final statement within 30 days after receipt of the final statement. The 30-day period may be extended at the request of the applicant for a period not to exceed 15 days.

- §201G-118(a)(3)(A) and (C); (a)(4), HRS (“housing development; exemption from statutes, ordinances, charter provisions, rules”): This section, which allows the Housing and Community Development Corporation of Hawaii to develop or assist in the development of housing projects that are exempt from various planning and zoning laws, contains the following two automatic approval provisions:
    - Similar to the process described in section 171-134, HRS, the legislative body of the county in which the project is to be situated must approve or disapprove the project by resolution within the same time period as provided in section 166-4(3)(A), or it shall be deemed approved by the legislative body; and
    - The Land Use Commission must approve or disapprove a boundary change within 45 days after the corporation has submitted a petition to the commission as provided in section 205-4. If on the 46th day the petition is not disapproved, it shall be deemed approved by the Commission.
  - §261-7(e), HRS (“operation and use privileges”): Requires schedules of rates, rentals, fees, and charges developed by the Director of Transportation with respect to the operation of an airport or air navigation facility controlled by the Department in certain cases to be submitted to the Legislature prior to the convening of the next regular session. Within 45 days after the convening of the regular session, the Legislature may disapprove any such schedule by concurrent resolution. If no action is taken within the 45-day period, the schedule is deemed approved. If the legislature disapproves the schedule within the 45-day period, the director must develop a new schedule within 75 days of the disapproval.
  - §323D-75(b), HRS (“review; decision; rules”): Provides that if the Attorney General does not approve or disapprove of an application for hospital acquisition within 90 days after receipt of an application, the application shall be deemed approved. However, subsection (e) provides that if both the State Health Planning and Development Agency and the Attorney General review an application, it shall not be granted unless it is approved by both.
  - §431:10A-309(e), HRS (“filings; approval of forms”): Provides that a medicare supplement policy or certificate shall be deemed approved if it is in accordance with all applicable laws and rules, it has not been disapproved earlier than 61 days after the date of filings, it fully meets all filing requirements, and it is received by the Insurance Commissioner.
  - §432D-3(b), HRS (“powers of health maintenance organizations”): Requires a health maintenance organization (HMO) to file notice with the Insurance Commissioner before exercising certain powers that may affect the financial soundness of the HMO. If the Commissioner does not disapprove the request within 30 days of the filing of the notice, it shall be deemed approved.
8. Cal. Gov’t Code §65920 et seq. (West 2000). The Act does not apply to administrative appeals either within or to a state or local agency. Cal. Gov’t Code §65922(b). Thus, if an application is appealed within or to an agency, there is no maximum time period within which the appeal must be heard.
  9. Cal. Gov’t Code §§65927, 65928.
  10. Landi v. Monterey County, 189 Cal.Rptr. 55, 139 Cal.App.3d 934 (App. 1 Dist. 1983).

11. Findleton v. El Dorado Co. Board of Supervisors, 15 Cal.Rptr.2d 665, 12 Cal.App.4th 709 (App. 3 Dist. 1993).
12. See [http://ceres.ca.gov/planning/pub\\_notice/part2.html#part2\\_anchor](http://ceres.ca.gov/planning/pub_notice/part2.html#part2_anchor), citing Cal. Gov't Code §65950. CERES ("California Environmental Resources Evaluation System") is an information system developed by the California Resources Agency to facilitate access to a variety of electronic data describing California's various environments.
13. The information contained in this section is derived from both the Permit Streamlining Act itself and the CERES web site discussed in note 12, *supra*.
14. Cal. Gov't Code §65940.
15. Cal. Gov't Code §65943; see Orsi v. City Council of City of Salinas, 268 Cal.Rptr. 912, 219 Cal.App.3d 1576 (App. 6 Dist. 1990).
16. The California Environmental Quality Act (CEQA) is contained in Cal. Pub. Res. Code §21000, et seq. For a general discussion of the procedural requirements of this Act, see [http://ceres.ca.gov/planning/pub\\_notice/part3.html#part3\\_anchor](http://ceres.ca.gov/planning/pub_notice/part3.html#part3_anchor).
17. Cal. Gov't Code §65950(a).
18. A negative declaration is equivalent to a "finding of no significant impact" as defined in Haw. Rev. Stat. §343-2.
19. Cal. Gov't Code §65956(b).
20. Cal. Gov't Code §65952.2.
21. Cal. Gov't Code §§65950(b), 65950.1, and 65957.
22. Cal. Gov't Code §65956.
23. Mass. Gen. Laws ch. 40A (2000).
24. See generally Brooker and Cole, *supra* note 2, at 443-444. Brooker and Cole note that there are a number of other laws in Massachusetts that also provide for the automatic approval of land-use applications, including Mass. Gen. Laws ch. 41, §§81U, 81P; and ch. 40B, §21. *Id.* at 443 n. 26.
25. Mass. Gen. Laws ch. 40A, §15 ("Appeals to permit granting authority; notice; time; boards of appeal hearings; procedure") (2000).
26. Mass. Gen. Laws ch. 40A, §9 ("Special permits") (2000).
27. In particular, the petitioner who seeks approval by reason of the failure of the board or special permit granting authority, as applicable, to act within the maximum statutory time limit, or extended time limit, must notify the city or town clerk, in writing, within 14 days from the expiration of the time or extended time, of the approval and that notice has been sent by the petitioner to the parties in interest. The petitioner must mail notice to the parties in interest, and each notice must specify that appeals, if any, shall be filed within 20 days after the date the city or town clerk received written notice from the petitioner of the failure to act within the time prescribed. After the expiration of 20 days without notice of appeal, or, if appeal has been taken, after receipt of certified records of the court in which the appeal is adjudicated, indicating that the approval has become final, the city or town clerk must issue a certificate stating the date of approval,

the fact that the board failed to take final action, and that the approval resulting from such failure has become final, and the certificate shall be forwarded to the petitioner. Mass. Gen. Laws ch. 40A, §9, 15.

Brooker and Cole note that “[t]his provision gives affected landowners immediate notice of an automatic approval so that they may bring an appeal in the district court challenging it.” Brooker and Cole, *supra* note 2, at 444. They further note that Mass. Gen. Law. ch. 41, §81W mitigates the harshness of automatic approval as to subdivision approvals by allowing government bodies to modify, amend, or rescind subdivision approvals, either on the motion of an interest party or their own motion. They further note that this section has been liberally construed to allow the rescission of an automatic approval where the government body’s failure to act was inadvertent or there was a failure to timely file the decision as required, citing Kay-Vee Realty Co. v. Town Clerk of Ludlow, 243 N.E.2d 813 (Mass. 1969). *Id.* at 444 n. 27.

28. Mass. Gen. Laws ch. 40A, §9, 15.
29. Minn. Stat. §15.99 (“Time deadline for agency action”) (2000).
30. Minn. Stat. §15.992 (“Time limitation”) (2000). Minnesota also provides for the automatic preliminary and final approval of proposed subdivisions. Minn. Stat. §462.358(3b).
31. Minn. Stat. §15.99(2). The term “agency” includes departments, agencies, boards, commissions, and other groups in the executive branch of state government; a statutory or home rule county, charter city, town, or school district; a metropolitan agency or regional entity; and any other political subdivision. *Id.*, subd. (1).
32. *Id.*, subd. (3)(a).
33. *Id.*, subd. (3)(b).
34. *Id.*, subd. (3)(d).
35. *Id.*, subd. (3)(e).
36. *Id.*, subd. (3)(f). In Manco of Fairmont, Inc. v. Rock Dell Tp., 583 N.W.2d 293, 295 (Minn. App. 1998), the Minnesota Court of Appeals found that a letter from a township board to an applicant for a conditional use permit stating that the township intended to take an additional 60 days to make decision on the application complied with the statutory requirement that written notice of the extension state the reasons for the extension under §15.99(3)(f). In particular, the court found that although the timing element of that statute was mandatory, the provision allowing an extension was directory in nature, and that the doctrine of substantial compliance was applicable to the extension. *Cf. Demolition Landfill v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000) (holding that simultaneous written reasons for denial under §15.99(2) are mandatory and not directory, distinguishing Manco; an agency’s rejection of a resolution granting a permit is not equivalent to a denial of a permit application; failure to issue a specific denial, supported by simultaneous, written reasons, resulted in the automatic approval of the application).
37. Minn. Stat. §15.992(1). “License” or “business license” includes, among other things, “any permit, registration, certification, or other form of approval authorized by statute or rule to be issued by any agency or instrumentality of the state of Minnesota as a condition of doing business in Minnesota.” It excludes most occupational and professional licenses. *See* Minn. Stat. §§15.991(1) and 116J.70(2), (2a) (2000). “Customer” includes an individual, small business, nonprofit corporation, family farm, and political subdivision. Minn. Stat. §15.991(2). A “work plan” must be prepared by the responsible agency at the request of the customer, which is not a binding contract, setting out such information as the steps necessary to complete the application, the time when the responsible agency may be expected to take action on the application, and the process by which other agencies may be expected to act. The work plan must include information on the deadline for agency action and the result of agency failure to meet the deadline. The

work plan must be provided to a customer no later than 20 working days after the customer requests the plan. Minn. Stat. §15.991(2)(c).

38. Minn. Stat. §15.992(2). A decision of an agency that a time longer than 60 days is needed to complete action on an application is not subject to judicial review. Id., subd. (5).
39. Id., subd. (3), (4).

## Chapter 4

### CONSTITUTIONAL, QUORUM, AND RULEMAKING ISSUES

As requested by House Resolution No. 128, H.D. 1 (2000), this chapter and chapter 5 review the major legal and logistical issues raised by the automatic approval law. This chapter addresses concerns regarding constitutional protections, citizens' rights to due process, quorum, and rulemaking, as requested by that Resolution. Other relevant legal and logistical issues raised by the automatic approval law are addressed in chapter 5.

The House Resolution specifically asks that the Bureau "recommend statutory changes"<sup>1</sup> to address these issues. "Statutory changes" may conceivably mean amendments to section 91-13.5, HRS, amendments to an agency's implementing statute, or amendments to other state laws. With respect to each constitutional issue identified in parts A and B of this chapter, the following two questions are asked:

- (1) Question: Is there anything inherent in the automatic approval law that is likely to result in the specific constitutional problem identified?

Short answer: No. In each instance, the Bureau has found that while an agency's application of that law may result in a constitutional violation, there is nothing inherent in the automatic approval law itself that would likely result in the identified constitutional violation, primarily because that law gives agencies broad discretion to address ways to resolve these problems in rulemaking.<sup>2</sup> While agencies do not have unfettered discretion to address these issues, as discussed in the next chapter, the law gives little guidance to agencies and broadly relies on agency expertise to address legal and policy issues. Accordingly, the Bureau believes that the Legislature is not required to make any statutory changes to section 91-13.5, HRS, to ensure that it passes constitutional muster. While taking no action to amend the law will not prevent litigation, it leaves to the agencies the existing statutorily delegated broad discretion to adopt rules that set definite time periods for agency action and to adopt other measures consistent with both the automatic approval law and the agencies' implementing statutes.

- (2) Question: Could the application of the automatic approval law result in the specific constitutional problem identified, depending upon the manner in which that law is applied?

Short answer: Yes. Section 91-13.5, HRS, is not unconstitutional on its face. However, as discussed in parts A and B of this chapter, the Bureau has found that a violation (such as a due process violation) could occur depending upon how, or whether, the problem is addressed by the agency. In that case, the problem is not the law itself but the possible manner of agency application. Since few agencies have adopted rules to implement the automatic approval law, however, this is impossible to predict. Nevertheless, examples of rules adopted by several state and county agencies that have addressed these issues are used as illustrations to show how agencies can address and seek to resolve the problem in question. The Bureau believes that no statutory amendments are legally required. From a policy perspective, however, the Legislature

may wish to consider various statutory changes – whether to the automatic approval law or to various agencies' underlying statutory authority – in order to provide for the more efficient implementation of that law if the Legislature believes, for example, that there is a need to:

- (a) Reduce the risk of litigation and state and county exposure to liability. Providing a proactive legislative solution may be preferable to accepting a judicially-crafted solution to what is essentially a policy problem, since the Legislature is better situated as a policy-making institution than the Judiciary, whose members are not elected;
- (b) Increase consistency and clarity in the application and implementation of the automatic approval law;
- (c) Ensure fairness and impartiality in administrative proceedings,<sup>3</sup> and increase uniformity in the application of the Hawaii Administrative Procedure Act (of which section 91-13.5, HRS, is a part);<sup>4</sup> and
- (d) Give greater statutory guidance to administrative agencies in adopting rules under the automatic approval law.

With respect to the issues relating to quorum and majority requirements in part C of this chapter, the Bureau similarly believes that state and county agencies can address the problems identified through rulemaking. Since most agencies to which section 91-13.5, HRS applies have not yet adopted rules to address these issues, the resolution of these issues is again premature. However, if the Legislature seeks to address these issues proactively, without waiting for agencies to adopt their rules, options for amendments to section 91-13.5 and other relevant statutes are proposed. The issues identified in part D of this chapter relating to rulemaking also do not generally require statutory amendment.

## **A. Constitutional Protections**

This part discusses the automatic approval law as it relates to state constitutional protections for agricultural lands, water and other natural resources, and traditional and customary rights. Due process concerns are discussed in part B of this chapter.

### **1. Agricultural Lands**

#### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS, that violates Article XI, section 3 of the Hawaii Constitution?
- (2) Could the automatic approval of an application impacting on agricultural lands violate the State's obligation to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the



availability of agriculturally suitable lands” under Article XI, section 3 of the Hawaii Constitution?<sup>5</sup>

**Short Answers:**

- (1) No.
- (2) Yes, but agencies are able to address this problem under the broad rulemaking authority authorized by section 91-13.5, HRS.

**Discussion:**

There is nothing *inherent* in section 91-13.5 that violates Article XI, section 3 of the Constitution. A land use reclassification petition that is automatically approved would presumably be void if found to be in violation of Article XI, section 3, since the State Constitution supersedes state statutes. This does not mean that section 91-13.5, HRS, is unconstitutional *per se*. It does, however, require agencies to address this problem in adopting rules under section 91-13.5, HRS, to ensure that these types of petitions are not inadvertently (or intentionally) approved automatically. As discussed in part D of this chapter, section 91-13.5, HRS broadly delegates to agencies the discretion to adopt rules to implement that section in a manner that protects the interests of each particular agency. Agencies may use this broad authority to fashion rules that address the unique needs of each particular agency in implementing that section.

Of concern, however, is that *the application* of section 91-13.5, HRS, may erode the State’s constitutional authority to protect agricultural lands.<sup>6</sup> As noted by Maui’s Corporation Counsel, “[t]he State Constitution’s mandate to protect agricultural lands, found in Article XI, section 3 of the Constitution, is not served by an automatic approval of non-agricultural uses in the state agricultural districts.”<sup>7</sup> The intent of section 91-13.5, HRS, is to ensure definite time periods for agency action and to require agencies to make decisions within those time periods. However, state and county agencies that are responsible for protecting Hawaii’s agricultural lands under statutes designed to protect agricultural lands are faced with the possibility that these two goals – namely, ensuring definite time periods for agency action on the one hand, and protecting Hawaii’s agricultural lands on the other – may conflict.

For example, the state Land Use Commission<sup>8</sup> must adopt rules that establish maximum time periods for agency action in compliance with section 91-13.5, HRS, but must also adopt rules that protect Hawaii’s agricultural districts in accordance with the Commission’s implementing statute, section 205-4.5, Hawaii Revised Statutes.<sup>9</sup> Section 91-13.5, HRS may be viewed as the more *general* statute in this case, since it applies to all state and county agencies indiscriminately, whereas section 205-4.5, HRS, is the more *specific* statute in that it applies only to the state Land Use Commission. In interpreting a general statute that may appear to be in conflict with a specific statute relating to similar subject matter, the Hawaii Supreme Court has noted that the following three rules of statutory construction apply:<sup>10</sup>

First, legislative enactments are presumptively valid and “should be interpreted [in such a manner as] to give them effect.” ... Second, “[l]aws in *pari materia*, or upon the same

subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.” ... Third, “where there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.” ... (Emphasis added.)

In this case, the more specific statute – section 205-4.5, HRS – would be favored over the more general section 91-13.5, HRS. The task of the agency, in this case the Land Use Commission, is to reconcile the two potentially conflicting laws by striving to give effect to both, ensuring that the goals of the specific statute are not defeated by the more general statute.

As a practical matter, agencies must implement and enforce the specific laws over which they have jurisdiction. To the extent that these laws come into conflict with other, more general laws, the agency must include in its rules specific provisions to protect their statutory mandate, such as the statutorily (and constitutionally) mandated conservation of agricultural lands. In seeking to resolve this conflict, agencies striving to meet the goals of both statutory goals in their rules may seek to harmonize the statutes in various ways.

One way to do this is by requiring that certain mandatory conditions attach to automatically approved permits. It may be argued that this method impermissibly conflicts with the spirit of section 91-13.5, HRS, since the attachment of automatic conditions slows down the permitting process by forcing the applicant to return to the agency to remove those conditions that do not apply, thereby increasing the time needed to obtain a valid permit and not allowing for a definite time period for agency action. However, the attachment of mandatory conditions is arguably within the broad scope of agency discretion permitted by section 91-13.5, HRS, and allows the agency to reconcile conflicting statutes.<sup>11</sup>

For example, in resolving this conflict between section 91-13.5, HRS, and chapter 205, HRS, the administrative rules adopted by the state Land Use Commission on May 8, 2000, seek to protect agricultural lands and farming by attaching the following mandatory conditions on automatically approved petitions for boundary changes:

- If the petition for a boundary amendment involves the conversion of prime agricultural lands, petitioner shall be responsible for contributing to the protection of an equivalent amount of prime agricultural lands and related infrastructure via long-term agricultural conservation easements or other agriculturally-related assets as determined by and to the satisfaction of the Department of Agriculture;
- Petitioner shall notify all prospective buyers of property of the potential odor, noise, and dust pollution if there are any agricultural district lands surrounding the reclassified area;
- Petitioner shall notify all prospective buyers of property that the Hawaii Right to Farm Act, chapter 165, HRS, limits the circumstances under which pre-existing farm activities may be deemed a nuisance if there are any agricultural district lands surrounding the reclassified area ...<sup>12</sup>

In addition, the Commission's rules allow the Commission "to impose conditions necessary to uphold the general intent and spirit of chapters 205 ... and 226, HRS, and to assure substantial compliance with representations made by the petitioner in seeking the boundary amendment."<sup>13</sup> Section 205-4.5, HRS, for example, specifies permissible uses within the agricultural districts, while section 226-7, HRS, specifies objectives and policies for the economy relating to agriculture. These conditions provide safeguards that are necessary to ensure that an automatically approved petition will protect agricultural land.

Legislative options. The Bureau believes that section 91-13.5, HRS does not have to be amended to address these problems. The affected agencies have the ability to resolve this conflict in their administrative rules. The Legislature may amend section 91-13.5, HRS if it believes that there is a need to increase clarity and uniformity in the application of section 91-13.5, HRS, as well as to avoid the inadvertent conversion of prime agricultural lands due to an automatically approved petition when an agency has failed to adopt rules addressing Article XI, section 3, by either amending the agency's implementing statute (e.g., chapter 205, HRS, with respect to the Land Use Commission) as applicable, or by adding language that:

- (1) Permits additional extensions for the review of constitutionally mandated areas such as agricultural lands; or
- (2) Requires the agency, when adopting rules, to include either:
  - (A) A mandatory review of constitutionally mandated areas such as agricultural lands and indicate its having done so in writing, in findings of fact and conclusions of law, so that a court may review the record of the agency's proceedings; or
  - (B) The attachment of mandatory conditions on automatically approved permits, which would require the applicant to return to the agency to have the condition removed if the conditions are not applicable.

## **2. Water and Other Natural Resources**

### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS that violates Article XI, section 1 or 7, of the Hawaii Constitution?
- (2) Does the automatic approval of an application impacting on:
  - (A) water resources violate the State's "obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people" under Article XI, section 7 of the Hawaii Constitution?

- (B) natural resources violate the State's and counties' obligation to "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources" under Article XI, section 1 of the Hawaii Constitution?

**Short Answers:**

- (1) No.
- (2) Yes in both cases, but agencies are able to address these problems under the broad rulemaking authority authorized by section 91-13.5, HRS.

**Discussion:**

Water resources. Article XI, section 7 of the Hawaii Constitution provides that the State "has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people." In addition, Article XI, section 7 requires the Legislature to provide for a "water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources."

Any application that is automatically approved would presumably be void if found to be in violation of Article XI, section 7, since the State Constitution supersedes state statutes. Again, this does not mean that section 91-13.5, HRS is *per se* unconstitutional. Section 91-13.5 does not absolve state agencies of their constitutional responsibility to conserve and protect water resources; rather, it provides direct consequences for their failure to address these concerns in a timely manner. While there is apparently nothing inherent in section 91-13.5 that violates this constitutional provision, the automatic approval of an application impacting on water resources, such as ground and surface water resources, watersheds, and natural stream environments, may nevertheless violate the State's constitutional obligation to protect these resources. Agencies must therefore address this problem in adopting rules under section 91-13.5, HRS, to ensure that applications affecting water resources are not inadvertently or intentionally approved automatically.

Water resources in the State are regulated under the State Water Code (chapter 174C, Hawaii Revised Statutes) by the Commission on Water Resource Management.<sup>14</sup> The Hawaii Supreme Court has recently held that Article XI, section 7, when read together with Article XI, section 1 of the State Constitution, "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii."<sup>15</sup> That doctrine – that Hawaii's water (and other natural resources) are held in trust for the benefit of the people of the State – is also restated in the State Water Code.<sup>16</sup> The Court also stated that the Constitution designates the Commission on Water Resource Management "as the primary guardian of public rights under the trust."<sup>17</sup>

Accordingly, since the Commission plays a central role in protecting, controlling and regulating the use of Hawaii’s water resources under Article XI, section 7, a preliminary question is whether section 91-13.5, HRS applies to the Commission on Water Resource Management. The Department of Land and Natural Resources, according to correspondence with the Legislative Reference Bureau, has taken the position that only the Land Division of that Department is affected by section 91-13.5, HRS.<sup>18</sup> The Department, therefore, presumably does not believe that permits and licenses issued by the Commission on Water Resource Management are covered under section 91-13.5, HRS. While this interpretation is open to debate, for example, a landowner may argue that an application for a stream diversion permit to expand agricultural operations is an “application for a business or development-related permit, license, or approval” under section 91-13.5(e), HRS, it is assumed for the purposes of this discussion that section 91-13.5, HRS does not apply to the Commission for the purposes of this discussion.

Assuming that section 91-13.5, HRS does not apply to the Commission on Water Resource Management, then that section presumably would apply to the county Boards of Water Supply,<sup>19</sup> which, among other things, review applications for water systems, including such areas as extensions from and connections to the public water system, new water systems to areas where no public water supply exists, the availability of water for proposed developments, and the availability of water for large landscaped areas.<sup>20</sup>

The analysis used in the previous section regarding agricultural resources also applies to a discussion of water resources under the state constitution. The automatic approval of an application related to water resources is voidable if it is found to have violated the State Constitution. Agencies that issue permits affecting water rights may use their broad authority under section 91-13.5, HRS to adopt rules that address the unique needs of the agency in implementing that section. However, agencies that are responsible for protecting Hawaii’s water rights, for example, county Boards of Water Supply under chapter 54, are faced with the possibility that the goals of section 91-13.5 and chapter 54, HRS may conflict, since section 91-13.5, HRS seeks to ensure agency action within definite time periods, while chapter 54 seeks to provide for the management, control, operation, preservation, and protection of county water systems.

As discussed in the previous section, section 91-13.5, HRS may be viewed as the more *general* statute, since it applies to all state and county agencies indiscriminately, whereas chapter 54, HRS, is the more *specific* statute in that it applies only to the county Boards of Water Supply. The county boards must implement and enforce the specific laws over which they have jurisdiction. To the extent that these laws conflict with section 91-13.5, HRS or other general laws, the agency must include in its rules specific provisions to protect their mandate, such as the statutorily mandated “preservation ... and protection of the waterworks of the county.”<sup>21</sup>

Accordingly, in seeking to resolve the conflict between these laws, county boards and other affected agencies may use their broad rulemaking authority under section 91-13.5, HRS to require that certain mandatory conditions attach to automatically approved permits,<sup>22</sup> increase the maximum time period for agency action to ensure that sufficient attention is given to constitutional water rights issues, or take such other action in adopting rules as the agency deems appropriate and that is within the scope of both section 91-13.5 and chapter 54, HRS.

Legislative options. The Bureau believes that no statutory changes to section 91-13.5, HRS are required. The Legislature, however, may amend section 91-13.5, HRS, if it believes that there is a need to increase clarity and uniformity in the application of section 91-13.5, HRS, as well as to prevent the inadvertent approval of water rights for a purpose that the Legislature considers not to be “for the benefit of [Hawaii’s] people” due to an automatically approved application if an agency has not adopted rules addressing Article XI, section 7, by either amending the agency’s implementing statute (e.g., chapter 54, HRS, with respect to the county boards of water supply) as applicable, or by adding language that:

- (1) Permits additional extensions for the review of constitutionally mandated areas such as water rights; or
- (2) Requires the agency, when adopting rules, to include either:
  - (A) A mandatory review of constitutionally mandated areas such as water rights and indicate its having done so in writing, in findings of fact and conclusions of law, so that a court may review the record of the agency’s proceedings; or
  - (B) The attachment of mandatory conditions on automatically approved permits, which would require the applicant to return to the agency to have the condition removed if the conditions are not applicable.

Other natural resources. Article XI, section 1 (“conservation and development of resources”) of the Hawaii Constitution provides as follows:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

The issue presented by this constitutional provision is similar to that discussed in this section regarding water resources. Section 91-13.5, HRS, does not itself violate that constitutional provision. However, an automatically approved permit affecting natural resources may violate the State’s constitutional obligation to protect those resources, thereby violating Article XI, section 1 of the Hawaii Constitution. Such an automatically approved permit may also violate the public trust doctrine, by which Hawaii’s natural resources are held in trust by the State for the benefit of the people.<sup>23</sup>

Legislative options. The Legislature does not have to amend section 91-13.5, HRS, for similar reasons discussed in the previous section – namely, that agencies have the broad flexibility and authority to adopt rules to address this problem, whether by attaching mandatory

conditions pursuant to the agency's implementing statute, extending the maximum time period to ensure adequate review, or other methods.<sup>24</sup> However, as discussed in this section, the Legislature may amend section 91-13.5, HRS for policy reasons in the manner suggested in this section with respect to water resources.

### **3. Traditional and Customary Rights**

#### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS, that violates Article XII, section 7 of the Hawaii Constitution?
- (2) Could the automatic approval of an application impacting on native Hawaiian rights violate the State's constitutional obligation to protect the rights of native Hawaiians that were customarily and traditionally exercised for subsistence, cultural, and religious purposes, as provided under Article XII, section 7 of the Hawaii Constitution?

#### **Short Answers:**

- (1) No.
- (2) Yes, but agencies are able to address this problem under the broad rulemaking authority authorized by section 91-13.5, HRS.

#### **Discussion:**

Article XII, section 7 of the Hawaii Constitution provides that “[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.” Although there is apparently nothing inherent in section 91-13.5 that violates this constitutional provision, the problem is that the automatic approval of an application relating to native Hawaiians may violate the State's constitutional obligation to protect their traditional and customary rights if the project impairs those constitutionally protected rights.<sup>25</sup>

The importance of protecting and enforcing traditional and customary native Hawaiian rights while reasonably accommodating competing private development interests was recently reaffirmed by the Hawaii Supreme Court in Ka Pa'akai O Ka 'Aina v. Land Use Commission.<sup>26</sup> In that case, the Court considered the Land Use Commission's grant of a petition to reclassify over one thousand acres of land from conservation to urban district on the Big Island. The Court reversed the Third Circuit Court's judgment affirming the grant of the petition, finding that the Commission's findings of fact and conclusions of law were “insufficient to determine whether it fulfilled its obligation to preserve and protect customary and traditional rights of native Hawaiians.”<sup>27</sup>

In particular, the Court found that the Land Use Commission is obligated to independently assess the impact of the proposed reclassification on the traditional and customary practices of native Hawaiians under statutory directives and administrative rules.<sup>28</sup> Moreover, the Court stated that Article XII, section 7 of the Hawaii Constitution imposes “an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights, and confers upon the State and its agencies ‘the power to protect these rights and to prevent any interference with the exercise of these rights.’”<sup>29</sup>

The Court reemphasized its previous findings that “the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7”, and that “[t]he State’s power to regulate the exercise of customarily and traditionally exercised Hawaiian rights ... necessarily allows the State to permit development that interferes with such rights in certain circumstances.... Nevertheless, *the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.*”<sup>30</sup> Accordingly, the Court adopted an analytical framework “to accommodate the competing interests of protecting native Hawaiian culture and rights, on the one hand, and economic development and security, on the other.”<sup>31</sup>

The Legislature itself has also recently recognized the importance of protecting traditional and customary native Hawaiian rights by enacting a requirement that environmental impact statements include the disclosure of the effects of the proposed action on the cultural practices of the community and the State.<sup>32</sup> That law noted that “the past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature finds that due consideration to the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.”<sup>33</sup>

Legislative options. The Bureau believes that the Legislature does not have to amend section 91-13.5, HRS. Agencies in general, and the Land Use Commission in particular, have broad discretion to address this problem in rulemaking. For example, the Land Use Commission has included in its rules adopted on May 8, 2000, the following mandatory condition on automatically approved boundary amendment petitions: “Petitioner shall preserve and protect any established gathering and access rights of native Hawaiians who have customarily and traditionally exercised subsistence, cultural, and religious practices on the reclassified area.”<sup>34</sup>

If the Legislature believes that there is a need to increase clarity and uniformity in the application of section 91-13.5, HRS, or to prevent the inadvertent violation of Article XII, section 7 due to an automatically approved petition when an agency has failed to adopt rules addressing that constitutional provision, then the Legislature can either:

- (1) Amend the implementing statute of the agency concerned (e.g., chapter 205, HRS) to preserve and protect the customary and traditional rights of native Hawaiians; or
- (2) Add language to section 91-13.5, HRS, to:



- (A) Permit additional extensions for the protection of customary and traditional native Hawaiian rights; or
- (B) Require the agency, when adopting rules, to include either:
  - (i) A mandatory review of constitutionally mandated areas relating to native Hawaiian rights, and indicate its having done so in writing, in findings of fact and conclusions of law, so that a court may review the record of the agency’s proceedings; or
  - (ii) The attachment of mandatory conditions on automatically approved permits, which would require the applicant to return to the agency to have the condition removed if the conditions are not applicable.

**B. Due Process**

Procedural due process issues under the Fourteenth Amendment to the United States Constitution<sup>35</sup> and Article I, section 5 of the Hawaii Constitution<sup>36</sup> generally arise under section 91-13.5, HRS in the context of contested cases. Accordingly, the discussions which follow in this part should be read as applying to contested cases unless otherwise stated.

As a threshold matter, assuming that a court has jurisdiction over the subject matter of the claim,<sup>37</sup> a due process claim must generally allege as a prerequisite that liberty or property has been deprived.<sup>38</sup> A claim to a due process right to a hearing generally involves the deprivation of a *property* interest, which may include being deprived of a benefit that a person is entitled to receive by statute.<sup>39</sup> What process, then, is due when an aggrieved party alleges a deprivation of a property interest? The United States Supreme Court has required a balancing of “the individual’s interest in avoiding a grievous loss against the interests which the government seeks to advance by using summary proceedings. If the private interest outweighs the government’s interest, greater procedural due process rights will be afforded to the affected party.”<sup>40</sup>

The Hawaii Supreme Court has held that due process is a flexible concept that “calls for such procedural protections as the particular situation demands. . . . The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>41</sup> Moreover, section 91-9(a), HRS, provides that “[i]n any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.” (Emphasis added.) However, Hawaii’s Supreme Court has also noted that the “full rights of due process present in a court of law, including presentation of witnesses and cross examination, do not automatically attach to a quasi-judicial hearing.”<sup>42</sup> Following the United States Supreme Court’s decision in Mathews v. Eldridge,<sup>43</sup> the Hawaii Supreme Court has held that a determination of the specific procedures needed to satisfy due process requires a balancing of the following factors:

- (1) The private interest which will be affected;
- (2) The risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and
- (3) The governmental interest, including the burden that additional procedural safeguards would entail.<sup>44</sup>

Given the Hawaii Supreme Court's determination that procedural due process is a flexible concept that requires a weighing of the interests involved, it appears that the Court would be more inclined to review denial of due process claims on a case by case basis, since the scales may be tipped one way or another depending on the relevant facts of each case.<sup>45</sup>

In the discussions that follow, the primary question appears to be whether the delegation of broad rulemaking authority to state and county agencies by section 91-13.5, HRS, combined with the ability (or obligation) of hearings officers to ensure a fair contested case hearing for each of the parties and the need for agencies to adopt internal controls to prevent automatic approvals, is sufficient to overcome a claim of denial of due process for automatically approved applications, or whether section 91-13.5 needs to be amended to ensure that due process is satisfied. In particular, this part discusses section 91-13.5 as it relates to due process concerns relating to notice and hearing, the introduction of new evidence, and the need for the adoption of findings of fact and conclusions of law.

## **1. Notice and Hearing**

### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS that violates the due process clause of either the federal or state constitutions for failure to provide notice and hearing to interested parties?
- (2) Could the automatic approval of an application (e.g., for a change of zoning) violate the due process rights of an aggrieved party when the agency has failed to provide notice and a hearing to interested parties, such as an adjoining landowner or other person with standing whose property rights may be adversely affected by the proposed project?

### **Short Answers:**

- (1) No.
- (2) Yes, but agencies are able to address this problem under the broad rulemaking authority authorized by section 91-13.5, HRS.

**Discussion:**

While there is apparently nothing inherent in section 91-13.5 that violates the due process clause,<sup>46</sup> the automatic approval of an application may violate procedural due process depending upon how that law is applied, namely, when the appropriate agency fails to notify parties who may be adversely affected by the proposed project. This may deny the meaningful participation of adjoining landowners, native Hawaiians, community members with environmental interests, and other interested parties who may be adversely affected by the approval of a permit or license.

The Hawaii Supreme Court has taken a fairly liberal interpretation of persons “aggrieved by a final decision and order in a contested case” under section 91-14(a), HRS, for purposes of determining the issue of standing for native Hawaiians and those with environmental concerns.<sup>47</sup> In addition, the Court has ruled that “as a matter of constitutional due process, an agency hearing is required where the *issuance* of a permit implicating an applicant’s property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency’s rules governing participation in contested cases.”<sup>48</sup>

A brief review of California’s Permit Streamlining Act,<sup>49</sup> which was outlined in chapter 3 of this report and which also contains a “deemed approved” provision, is instructive in resolving this issue. Under that Act, which establishes time limits within which the approval or denial of certain permits must occur, the failure to meet the statutorily established deadlines results in the automatic approval of the permit. However, under the California statute as amended in 1987, a permit may be deemed approved only if public notice and an opportunity to be heard have been provided either by the agency or the applicant.

The 1987 amendments to California’s Permit Streamlining Act were a response to the California Supreme Court’s due process concerns as expressed in its decision in Horn v. County of Ventura.<sup>50</sup> That case involved a challenge to a county’s subdivision approval that was initiated by an adjoining landowner who complained that affected property owners were afforded neither notice nor an opportunity to be heard.<sup>51</sup> The Court found that the affected landowners had a property interest in subdivision approvals, that the approvals were quasi-judicial in nature, and that the due process clause required that the affected persons be given prior reasonable notice and a hearing.<sup>52</sup>

However, the Court in Horn rejected the applicant’s contention that the notice provided to the affected property owners was adequate. In particular, the Court found that while the posting of environmental documents at certain public buildings and the mailings of notice to those persons who specifically requested it pursuant to agency guidelines adopted pursuant to the California Environmental Quality Act (CEQA) “may well suffice to encourage the generalized public participation in the environmental decision making contemplated by CEQA, they are inadequate to meet due process standards where fundamental interests are substantially affected.”<sup>53</sup> The Court further found that the county’s environmental evaluation process did not constitute an adequate “hearing”, since the CEQA process did not guarantee affected landowners a “‘meaningful’ predeprivation hearing ... at which his specific objections to the threatened interference with his property interests may be raised.”<sup>54</sup>

California's appellate courts subsequently held that due process guarantees apply to automatic approvals under that State's subdivision statute and the Permit Streamlining Act. In particular, the Court of Appeals in Leavenworth v. City and County of San Francisco noted that due process concerns would arise under the automatic approval provision of the subdivision act if the statute "could be read to permit approval of a subdivision without minimum requirements of notice and hearing."<sup>55</sup> In Selinger v. City Council of Redlands, the Court of Appeals found that automatic approvals under the Permit Streamlining Act are unconstitutional without provision for notice and a hearing to affected landowners.<sup>56</sup>

In response to the California Supreme Court's decision in Horn, the California Legislature amended the Permit Streamlining Act in 1987 to provide compliance with the requirements of due process: "The amendments provided that a development project is deemed approved after the specified time has run 'only if the public notice required by law has occurred.' The amendments permit the applicant either to bring a writ of mandate to compel the public body to provide [the] required notice and hearing, or, in the alternative, to allow the applicant to itself provide such notice."<sup>57</sup> The court in Selinger also noted that these amendments, which were made "in tacit recognition of the due process problems inherent in the deemed approval provisions," resolved the constitutional problems for future cases.<sup>58</sup>

The Bureau believes that the Legislature does not have to amend section 91-13.5, HRS to include a notice and hearing provision – similar to the 1987 amendments to the California Permit Streamlining Act, for example – before an application is deemed to be approved automatically. Under the three factors of the Mathews balancing test discussed earlier, it may be argued that while there are potentially significant private interests that will be affected by an automatically approved permit, the risk of an erroneous deprivation of those interests through the procedures actually used is relatively low, given the fact that there are a number of provisions that already require notice and hearing under other Hawaii laws. This is substantially different from the situation in Horn, in which the California Supreme Court was concerned primarily with the fact that the affected landowners did not have any meaningful notice and an opportunity for a hearing to address their concerns.<sup>59</sup> Those Hawaii provisions include the following:

- (1) The Hawaii Administrative Procedure Act (chapter 91, HRS);<sup>60</sup>
- (2) The "Sunshine Law" (chapter 92, HRS, relating to public agency meetings and records);<sup>61</sup>
- (3) Notice and hearing provisions are already required in the implementing statutes for most agencies. These laws typically require an agency to hold a contested case hearing in compliance with chapter 91, HRS (the Hawaii Administrative Procedure Act),<sup>62</sup> or set forth independent notice and hearing provisions;<sup>63</sup> and
- (4) Notice and hearing provisions may also be included in the agency's rules adopted pursuant to section 91-13.5, HRS.<sup>64</sup>

Thus, even assuming that the agency does not have notice and hearing provisions in its implementing statute, and the agency has quasi-judicial authority that is not specifically provided

under chapter 91 (so that the notice and hearing provisions in chapter 91 do not apply), the agency could still adopt provisions under the broad rulemaking authority of section 91-13.5, HRS to require notice and hearing. Section 91-13.5 is sufficiently flexible to give agencies the power to build in due process protections in adopting rules setting maximum time periods; accordingly, there is no apparent need to amend that section to provide for a separate, independent notice and hearing requirement. If the agency inadvertently or intentionally fails to give notice, the remedy is through judicial review of agency action, as at present.

The legislative history of section 91-13.5, HRS, also notes that concerns that the bill would limit public input could be addressed in agency rulemaking.<sup>65</sup> Moreover, Hawaii's agencies are not bound by rigid statutory time limits as provided under California's law, but may establish their own maximum time limits based on each agency's experience and unique circumstances.

While the Hawaii Administrative Procedure Act and other statutes affecting agency action include notice and hearing provisions with respect to contested cases, however, it may be argued that this in itself may be insufficient where an automatic approval occurs in the middle of a contested case, before all of the parties have had the opportunity for a full and fair hearing, or when an automatic approval occurs even before a contested case hearing has been initiated. Agencies may therefore wish to take several actions (that do not require the enactment of legislation) to ensure that due process requirements are met by reducing the risk of failing to provide notice and a hearing, including the following:

- (1) Agencies should adopt rules that provide sufficient time to accommodate contested case hearings. Agencies must use their experience with respect to the time it takes to issue permits, the frequency and length of contested case hearings, and related matters in determining the maximum time period for agency action. As the Governor noted in Executive Memorandum No. 98-07 (a copy of which is set forth in Appendix N): "The first step in making sure that the automatic approval provision is not triggered will be in the careful setting of a maximum time period by an agency during rule-making. An agency will need to be realistic about the time required to adequately decide whether to grant or deny a permit, license, or approval. *In establishing its maximum time period, an agency shall consider its staffing resources, the public hearing process, and the adjudicatory due process requirements in a contested case hearing.*" (Emphasis added.)
- (2) Agencies may specify in their rules that the maximum time period starts upon the termination of all contested case hearings or is tolled by contested case hearings. In order to protect an agency's responsibilities as provided in its implementing statute, section 91-13.5 would appear to give agencies the broad discretion to adopt rules to specify that the maximum time period for agency action begins at the end of a contested case. Alternatively, it would appear to be permissible for an agency to adopt rules that toll the maximum time period. "Toll" in this sense means to "suspend or stop temporarily as the statute of limitations is tolled during the defendant's absence from the jurisdiction and during the plaintiff's minority."<sup>66</sup> Under this method, the maximum time period clock would stop

while the contested case hearing is taking place, and the clock would restart after the hearing terminated. The difference between extensions and tolling is that extensions are used after the maximum time period has expired, while tolling stops the maximum time period clock before the maximum time period runs out.<sup>67</sup>

- (3) Hearings officers must take control of contested case hearings to ensure that all of the parties, including intervenors, are given a fair<sup>68</sup> and full<sup>69</sup> hearing. Sufficient time must be given to allow for the introduction of evidence and submittal of rebuttal evidence, together with all of the other procedural due process safeguards deemed necessary in the discretion of the hearings officer, to ensure that a fair, open hearing is completed and that findings of fact and conclusions of law are made before the maximum time period expires.
- (4) Agencies must adopt internal controls to ensure that a permit, license, or approval is not about to be automatically approved without the necessary agency review. Again, as the Governor noted in Executive Memorandum No. 98-07: “When the agency has adopted by rule a maximum time period, the agency shall establish internal procedures to notify departmental directors and my office of any permit, license, or approval which is nearing the end of the time period and has not been acted upon. Notification shall be required no later than an agency’s final opportunity to act prior to expiration of the time period for action. Such notification will allow a departmental director and the Governor’s Office the opportunity to make sure a final action is taken.” However, it would be preferable if notification were made before the agency’s final opportunity to act before the end of the maximum time period, in order to give the agency more than enough time to act in the event of any unforeseen events that may prevent agency “action” (as contemplated in section 91-13.5, HRS<sup>70</sup>) before the maximum time period runs.

Legislative options. The Bureau believes that no statutory changes are required, since each agency can address these due process issues through rulemaking. If, however, the Legislature believes a danger exists that interested persons will be deprived of property interests without adequate notice and opportunity for hearing, the Legislature may amend section 91-13.5, HRS to include additional procedural safeguards, including the addition of language that:

- (1) Permits an additional extension in cases in which notice and a contested case hearing has not already occurred;
- (2) Uses language similar to that of California’s “deemed approval” statute to specify that a project is deemed approved “only if the public notice required by law has occurred”,<sup>71</sup> and allow the applicant to compel the agency to provide the required notice and hearing or allow the applicant to itself provide that notice;
- (3) Ensures that the public has advanced notice of an impending automatic approval of an application. For example, it has been suggested that section 91-13.5 could be amended by providing that “no application shall be approved by default until

30 days after public notice of the impending deadline shall have been published in the semimonthly Bulletin of the Office of Environmental Quality Control. The rights of a permit applicant could be protected by allowing the applicant to request publication of such a notice if the agency failed to do so.”<sup>72</sup>;

- (4) Requires the agency to include relevant notice and hearing provisions in adopting rules under section 91-13.5, HRS.

## **2. Introduction of New Evidence**

### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS that violates the due process clause for failure to allow for the introduction of newly discovered evidence or a response to new evidence in a contested case hearing?
- (2) Could the automatic approval of an application which is the subject of a contested case hearing violate the due process rights of an aggrieved party (including intervenors), in cases in which automatic approval results in denying that party the opportunity to introduce newly discovered evidence or respond to new evidence introduced by another party, for example, if the application is deemed to be automatically approved before the completion of the contested case?

### **Short Answers:**

- (1) No.
- (2) Yes, but agencies are able to address this problem under the broad rulemaking authority authorized by section 91-13.5, HRS.

### **Discussion:**

House Resolution No. 128, H.D. 1 (2000) notes that “a situation could arise where a contested case hearing is requested pursuant to Chapter 91, HRS, and for any other period for administrative appeals and review, but the deadline passes, denying citizens their rights to due process ...”.

There does not appear to be anything inherent in section 91-13.5 that violates the due process clause. But parties and intervenors may be denied their right to due process if: (1) they are not given the opportunity to present relevant new evidence; or (2) are prohibited from responding to new evidence presented by another party in a contested case hearing, either because of the automatic approval of an application, or if the agency is forced to deny the introduction of new evidence because that evidence or argument is made near the end of the maximum time period for agency action. Automatically granting an application in the middle of a contested case hearing when the maximum time period expires may abridge Hawaii’s citizens’ procedural due process rights.

In addition, maximum time periods for agency action established under section 91-13.5, HRS, may cause agencies to rush through a decision without giving full deliberation to all of the claims and arguments of the parties in a contested case hearing, for example, when the issues involved are extremely complex and require more lengthy deliberations in a contested case hearing. This may result in a due process violation if the agency needs (but cannot obtain) additional time to give the case back to the hearings officer for clarification or further development of the record on a particular issue, and the agency feels that the issue was not sufficiently developed and needs additional testimony on factual or evidentiary issues before the agency can act.

Several sections of the Hawaii Administrative Procedure Act appear to support this position:

- Section 91-9(c), HRS (“contested cases; notice; hearing; records”), provides that in any contested case, “[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved.”
- Section 91-10, HRS (“rules of evidence; official notice”),<sup>73</sup> provides, among other things, for the admissibility of “[a]ny oral or documentary evidence” subject to the agency’s exclusion of “irrelevant, immaterial, or unduly repetitious evidence” as a matter of policy; the admissibility of “documentary evidence ... in the form of copies or excerpts, if the original is not available”, subject to the right of parties to compare the copy to the original; and the right “to conduct such cross-examination as may be required for a full and true disclosure of the facts, and ... the right to submit rebuttal evidence”; and
- Section 91-11, HRS (“examination of evidence by agency”),<sup>74</sup> provides that when agency officials in a contested case have not heard and examined all of the evidence, the decision, if adverse to the non-agency party, shall not be made until a proposal of decision has been served on each party, and an opportunity has been given for each party adversely affected to file exceptions and present arguments.

In general, while judicial hearings are bound by rules of evidence, contested case hearings have much more liberal rules regarding the admissibility of evidence. This less formalistic or restrictive approach is designed to admit as much evidence as possible: “The rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial proceedings. This is due in part to the absence of a jury. ... Thus, the general rule is that hearsay evidence is admissible in agency proceedings.”<sup>75</sup> However, while technical rules of evidence do not govern contested case hearings, the Hawaii Supreme Court has stated that the refusal to hear all evidence which is “competent, relevant and material, regardless of its weight ... can constitute denial of due process.”<sup>76</sup>

In addition, the scope of discovery may also be broader and more liberal in contested case hearings than at judicial proceedings, at the discretion of the agency. For example, a party may have no prior knowledge of certain new evidence until the hearing itself, since there is no



discovery in contested cases. The hearings officer will typically give the opposing party sufficient extra time to prepare and review the new evidence. The hearings officer, however, must monitor the pace of the case and be aggressive in questioning to ensure that the hearing does not extend endlessly. For the most part, the parties can dictate the manner in which the case is presented, subject to the hearings officer's ability to limit evidence. As noted earlier, under section 91-10(1), HRS, evidence may be excluded based on its relevance, materiality, and whether it is unduly repetitious.

One danger is that if new evidence is admitted on the eve of a maximum time period deadline, then the opposing party needs an opportunity to rebut that evidence. The question is whether the party delayed introducing the new evidence because of a litigation strategy of waiting until near the end of the case to introduce certain evidence (which is permissible), or whether the new evidence is introduced near the end of the case as a strategy to delay the hearing in order to obtain an automatic approval. However, the latter strategy, which is evidence of bad faith, may be difficult to prove. Unless it is possible to prove that the case is unduly delayed to obtain an automatic approval, it is difficult to frame a remedy, since the delay could be a legitimate litigation strategy.

Moreover, the due process rights of a party to a contested case hearing may be adversely affected if they are given only one week, say, to present their case, because of an impending automatic approval deadline, but the petitioner has already been given a much longer time, say, four months, to present the petitioner's case. This situation, which may result in rushed decision making, forces the party to restrict its testimony and limit its case if the impending automatic approval deadline prevents further review.

A related problem is that of intervenors in the contested case process, who voluntarily interpose in a proceeding with the leave of the hearing officer. Multiple intervenors may seek to present testimony at a hearing, and each intervenor may bring in expert witnesses and cross-examine witnesses, which significantly lengthens the proceeding. Some agencies, such as the Land Use Commission, may be more generous in granting standing to intervene in the contested case process, following recent court decisions allowing a more liberal construction for standing.<sup>77</sup> In addition, there appear to be more groups today that are seeking inclusion in the contested case process, such as those affected adversely by restrictions on beach access, water access, and traditional and customary rights. This may substantially increase the time it takes to issue permits in Hawaii. Accordingly, contested case hearings for some agencies may be longer in duration than others, which may result in automatically approved permits for those agencies whose maximum time periods are not sufficiently long.

However, the Bureau believes that no statutory changes to section 91-13.5 or any other statute are required, since each agency can address these issues through rulemaking. The agency may, for example:

- (1) Increase the maximum time period for agency action. As discussed in the previous section, the establishment of maximum time periods for agency action by rule, as required by section 91-13.5, HRS, could be made sufficiently long to allow for a full deliberation of the issues and for unexpected delays and

contingencies in contested case hearings. Building in a sufficiently long time period in the rulemaking process allows the agency to meet a number of unexpected contingencies, including the introduction of newly discovered evidence. While this still allows for a definite period of time for agency action, however, as discussed in chapter 5, this may defeat one of the purposes of section 91-13.5, HRS, namely, to ensure prompt action by the agency. In establishing a maximum time period in rules adopted under section 91-13.5, the agency may extend the time period longer than the agency may have otherwise needed to ensure that the agency leaves itself enough time to allow for extensions for contested case hearings or for other contingencies.

- (2) Specify that the maximum time period begins upon the termination of all contested case hearings or is tolled by any contested case hearings. As discussed in the previous section, in order to protect an agency's responsibilities as provided in its implementing statute, the agency could arguably adopt rules to state that the maximum time period for agency action begins at the end of a contested case,<sup>78</sup> or that the contested case tolls the maximum time period. This would give the agency sufficient time to deliberate the issues, allow for intervenors, and leave room for unexpected delays, including the introduction of newly discovered evidence or the rebuttal of evidence.
- (3) Require hearings officers to take control of contested case hearings, for example, through prehearing conferences, to ensure that all of the parties, including intervenors, are given a fair and full hearing.<sup>79</sup> Agencies can rely on their hearings officers to protect the rights of parties and allow everyone to present their full cases. Agencies can use their experience in conducting cases and setting reasonable time limits for presenting evidence, for example, if contested cases for a particular agency typically last no longer than a certain period of time. Also, as discussed in the previous section, it is recommended that agencies adopt additional internal controls to ensure that a permit is not about to be automatically approved without the necessary agency review.

Legislative options. The Bureau believes that no statutory changes are required, since each agency can address these issues through rulemaking. The primary source of potential problems is that under the balancing test discussed in Mathews v. Eldridge, an agency's failure to take one or more of these measures could result in an erroneous deprivation of the property interests of interested persons, which would result not only in a denial of their due process rights, but may result in a deprivation of one or more constitutional protections discussed in part A of this chapter. The agencies will either adopt the rules necessary to provide these protections or they will not. If the Legislature is not confident that the agencies will respond appropriately, it can amend section 91-13.5, HRS to include additional procedural safeguards in order to reduce the risk of litigation, increase consistency and clarity in the application and implementation of the statute, and give greater statutory guidance to administrative agencies. For example, section 91-13.5 could be amended by adding language that alternatively:

- (1) Permits an additional extension for contested case hearings;<sup>80</sup>

- (2) Specifies that the maximum time period does not include or is tolled by contested case hearings to protect the due process rights of parties and intervenors;<sup>81</sup> or
- (3) Provides that section 91-13.5, HRS does not apply to contested case hearings. California's Permit Streamlining Act, for example, states that that Act does not apply to "administrative appeals within a state or local agency or to a state or local agency".<sup>82</sup> Thus, if a permit under that Act is appealed to a higher administrative agency, there is no strict time limit within which the appeal must be heard. However, contested case hearings under Hawaii law are not generally referred to as "administrative appeals", and agency actions are generally not appealed to an appellate division within the same agency.<sup>83</sup>

### **3. Findings of Fact and Conclusions of Law**

This section reviews the effect of section 91-13.5, HRS, on an agency's failure to issue findings of fact, conclusions of law, decision and order in the context of contested case hearings. Part C of this chapter relating to quorum and majority requirements discusses this issue in the context of agency voting, in which a motion to adopt findings of fact, conclusions of law, decision and order cannot be obtained because of a failure to obtain the requisite number of members to vote on the motion.

#### **Issues:**

- (1) Is there anything inherent in section 91-13.5, HRS that violates the due process clause due to an agency's failure to issue written findings of fact and conclusions of law?
- (2) Could the automatic approval of an application which is the subject of a contested case hearing violate the due process rights of an aggrieved party if automatic approval results in the failure of the agency to issue written findings of fact and conclusions of law?

#### **Short Answers:**

- (1) No.
- (2) Yes, but agencies are able to address this problem under the broad rulemaking authority authorized by section 91-13.5, HRS.

#### **Discussion:**

A typical contested case produces a record of the hearing. The Hawaii Administrative Procedure Act specifies what the record is to include for the purpose of agency decisions, including pleadings, motions, intermediate rulings, evidence received or considered, proposed findings and exceptions, and the report of the presiding hearings officer.<sup>84</sup> Other statutes also

specify the contents of the record for purposes of an appeal from a decision from a public hearing.<sup>85</sup> A reviewing court is confined to a review of the record of the agency's proceedings and decision.<sup>86</sup>

However, if a permit or license has been automatically approved in the beginning or middle of a contested case hearing, for example, there may not be any record upon which a court may review the agency's proceedings. Furthermore, there may be no decision and order of the agency, and no separate findings of fact (FOFs) and conclusions of law (COLs) as required by the Hawaii Administrative Procedure Act.<sup>87</sup> In particular, section 91-12, HRS ("decisions and orders") requires that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law." (Emphasis added.) The Hawaii Supreme Court has noted that "[t]he purpose of the statutory requirement that the agency set forth separately its findings of fact and conclusions of law is to assure reasoned decision making by the agency and enable judicial review of agency decisions."<sup>88</sup>

The absence of a decision and order and findings of fact and conclusions of law, or the presence of only limited findings and conclusions, it is argued, fails to provide the reviewing court with a record upon which to determine whether the agency's decision was based on reliable, probative, and substantial evidence, or whether that decision was arbitrary, capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.<sup>89</sup> While the Hawaii Supreme Court has afforded great deference to agency decisions, which carry a "presumption of validity",<sup>90</sup> and has stated that an administrative agency's factual findings are "presumptively correct",<sup>91</sup> these presumptions and deference are irrelevant if there is, in fact, no decision or findings of fact for a court to review.

It may be argued that the failure to provide findings of fact and conclusions of law is not fatal to the proceedings and does not amount to a due process violation, since the reviewing court has the power to remand the case back to the agency for further proceedings, which may include a requirement that the agency produce written findings of fact and conclusions of law.<sup>92</sup> Moreover, the aggrieved party may always seek other means of review, including a trial *de novo* on the same issues.<sup>93</sup>

However, while a remand may be an appropriate remedy where there is no record for a court review, a remand in itself does not terminate the administrative proceedings, "but is instead only one stage of a single process which may continue to include a second agency hearing and appeal therefrom."<sup>94</sup> This would appear to be counter to the intent of section 91-13.5, HRS, since additional administrative proceedings would extend the permitting process and fail to lead to a definite date for agency action. In the absence of any statutory time requirements for subsequent agency action upon remand, the courts may impose a reasonableness standard.<sup>95</sup> A trial *de novo* may also extend the permitting process well beyond that which was originally anticipated.

It may also be argued that the agency has already had its chance to develop a record, issue a decision and order, and make findings of fact and conclusions of law, but its failure to do so cannot now be rectified because the maximum time period is now passed – it is now simply

too late because the agency was too slow in taking action. Section 91-13.5, it is argued, embodies the policy direction that agencies that are dilatory in taking action and fail to meet their own self-imposed maximum time period deadlines must suffer the consequences if they neglect to develop a record. However, the community may also have to suffer the consequences if there is harm to the public, or if the public's health and safety are threatened by the automatically approved application. If the community doesn't like this result, it can challenge the result in court or petition the Legislature to change the law.<sup>96</sup>

Legislative options. The Bureau believes that the Legislature does not have to amend section 91-13.5, HRS to require agencies to issue findings of fact, conclusions of law, decisions, and orders for automatically approved applications. The broad rulemaking powers given to agencies give them ample ability to address these potential problems. Agencies already have the power under section 91-13.5, HRS to adopt rules requiring the adoption of agency decisions, orders, findings of fact, and conclusions of law for automatically approved applications. For example, the rules regarding special permits of the Kauai County Planning Commission specify that if the commission fails to act on a petition within the maximum time period, "the petition shall be deemed approved after an additional thirty (30) days subject to such protective restrictions as may be deemed necessary and as permitted under HRS 205-6(c). These conditions may be established by the Commission within the thirty (30) days. The Commission shall adopt findings of fact, conclusions of law, and decision and order reflecting approval and conditions of the petition."<sup>97</sup>

However, if the Legislature wishes to provide additional guidance to agencies and increase uniformity in the application of the law, the Legislature can amend section 91-13.5, HRS, for example, to allow for an extension of the maximum time period to allow agencies to adopt findings of fact, conclusions of law, decisions, and orders for automatically approved applications. Alternatively, if the Legislature feels it necessary to ensure that a record of the proceedings is developed for automatically approved applications, it may seek to amend section 91-13.5 to add language similar to a Massachusetts' automatic approval statute (discussed in chapter 3 of this report) requiring each agency to cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and setting forth clearly the reason for its decision and of its official actions.<sup>98</sup>

## C. Quorum

### 1. Quorum and Majority Requirements

#### Issue:

Does the failure of an agency to obtain a quorum or the requisite majority requirements in voting on an application constitute a lack of a decision or "inaction", resulting in an application being automatically approved, or agency "action", constituting a denial of the application?

**Short Answer:**

It depends whether the agency resolves this problem in its rules. If agencies do not resolve the quorum and majority requirement issues in their rulemaking, the default position under section 91-13.5, HRS, is that the failure to obtain a quorum or the requisite number of members to vote on a motion before the end of the maximum time period will constitute agency inaction, thus causing the application to be deemed to be approved.

**Discussion:**

One of the major issues raised by section 91-13.5, HRS is that section's effect on quorum and majority requirements. This issue has been framed in several ways:

- House Resolution No. 128, H.D. 1 (2000) states: “[T]he current language of the automatic permit approval statute may force unintended outcomes from a board or commission ... [I]f a time for action expires and less than a majority of a board or commission is in support of a permit or license, or a quorum is not maintained, then a permit or license may be automatically granted, even if it failed to garner the required affirmative support for approval ...”.
- Allowing the deemed approval provision of section 91-13.5, HRS to supersede existing statutory quorum and majority requirements unfairly penalizes those boards and commissions that make good faith efforts to obtain a quorum for their meetings. Logistically, board and commission members, who generally serve without compensation on a part-time basis and are subject to the external demands of their employment or personal schedules, often have a difficult time reconciling their respective schedules, or may be unable to attend meetings or hearings due to illness or prior business or personal commitments that would otherwise cause personal hardship to the member. A board, for example, may meet on a monthly basis and may not have a quorum to vote on an application. Section 91-13.5 should instead penalize only those boards or commissions that fail to make a good faith effort to obtain a quorum, not boards or commissions that act in good faith but must continue a meeting or hearing due to unforeseen circumstances.
- Requiring automatic approval of an application when an agency has voted to deny the application but has been unable to obtain the requisite number of affirmative votes leads to an absurdity in the interpretation of section 91-13.5, HRS.<sup>99</sup> As discussed in chapter 5, generally, when the applicant fails to meet its burden of showing that it meets the agency's requirements for approval of the application, such as when there are genuine questions about the proposal's effects, a denial of the application may be justified. Where a board or commission has voted on an application that results in less than a majority, for example, to either grant or deny the application, the applicant may have simply failed to carry this burden. Providing for the “extraordinary remedy” of automatic approval in these circumstances would therefore be inappropriate: “[T]he intent of the drafters [of automatic approval laws] could not have been to have developments

automatically approved in situations where the applicant has failed to convince a planning board, as reflected in a less-than-majority vote of the board, to authorize the development.”<sup>100</sup>

Quorum and majority requirements. Generally, a “quorum” is the number of members of a group required to be present in a deliberative body before business may be transacted: “The idea of a quorum is that, when that required number of persons goes into a session as a body, ... the votes of a majority thereof are sufficient for binding action.”<sup>101</sup> Generally, under rules of parliamentary procedure, “once a quorum is present, any vote by an organization on any proposal is considered ‘action’.”<sup>102</sup>

The common law rule is that “a majority of any body constitutes a quorum for the transaction of business, and concurrence of a majority of the quorum is sufficient to take any action, in the absence of a contrary statutory provision ...”.<sup>103</sup> In other words, if there was a quorum present to begin with, then a majority of those present was sufficient for the board to take valid action.<sup>104</sup> The applicability of the common law rule, however, “has been generally limited in more recent times by statutes which prescribe specific bases upon which to calculate and determine the requisite majority to validate action by a body.”<sup>105</sup>

The common law rule was abrogated in Hawaii by the enactment of section 92-15, Hawaii Revised Statutes, which provides a statutory default position for boards and commissions. In particular, that section provides that unless another statute or ordinance specifies otherwise, “a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid ...”<sup>106</sup> Similar quorum and majority requirements are provided in other statutes,<sup>107</sup> county charters,<sup>108</sup> and the rules of parliamentary procedure of the Hawaii Senate and House of Representatives.<sup>109</sup>

While a quorum is usually a majority, however, Hawaii and other states have statutes that require a “super majority” for certain land use or zoning decisions.<sup>110</sup> For example, under section 205-4(h), Hawaii Revised Statutes, “[s]ix affirmative votes of the [land use] commission shall be necessary for any [district] boundary amendment [involving land areas greater than fifteen acres] ...”. The Commission may therefore approve an application for a boundary reclassification of conservation or agricultural land only on the affirmative vote of six out of the Commission’s nine members.

When there is no majority of the full membership of a board or commission voting in favor of a motion to approve or deny an application, or a motion to adopt findings of fact and conclusions of law, does the failure to obtain the requisite number of members to vote on the motion require automatic approval of the application? Or, if a super majority is required, as for the Land Use Commission, may conservation or agricultural land be reclassified through automatic approval with less than six affirmative votes (for example, if the vote is 5 to 4 or a tie vote<sup>111</sup> of 4 to 4) due to the absence or recusal of one or more members due to a conflict of interest?

Statutory analysis. The relevant portion of section 91-13.5, HRS provides as follows: “All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license or approval within the established maximum period of time, or the application shall be deemed approved.”<sup>112</sup> The language of section 91-13.5, HRS – particularly the words “take action” – is ambiguous on this issue. Generally, where the words of a statute are ambiguous, section 1-15, Hawaii Revised Statutes, provides for the following rules of statutory construction:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.<sup>113</sup>

In examining the context of this language, two different analyses may be advanced. One argument is that the words “take action” must be read in the context of the requirement that an agency must either grant or deny an application. The agency must do one or the other.<sup>114</sup> A motion to grant or deny an application that fails because of the inability to obtain the requisite number of affirmative votes cannot be considered an “action”. Other agency actions are not valid unless they have a quorum – why should an action for purposes of automatic approval be any different? Consequently, the failure to approve or disapprove an application will result in an automatic approval. The policy basis for this position is that the agency has been given sufficient time needed to deliberate, since the agency has established its own deadlines in its rules. The purpose of section 91-13.5, HRS is to provide for streamlining of the permitting process by providing for an “established time frame” for agency action, as stated in section 2 of section 91-13.5, HRS. If the agency takes a vote but cannot obtain the requisite number of votes to either grant or deny, then the application must be automatically approved to fulfill the intent of the law, i.e., to provide for a definite time period for agency action.

The opposing argument in interpreting the words “take action” is that the language of section 91-13.5, HRS does not say that the agency “shall grant or deny” the application, but rather that it “shall take action to grant or deny”. Whenever a board votes on an application, it may be argued, it is taking “action”. For example, when a motion to approve or deny an application fails, while this is a “non-decision”, it is still an “action”. Since “action” is undefined in section 91-13.5, HRS, agencies can define that term to mean an agency’s vote on an application for purposes of section 91-13.5, whether or not the vote results in an approval or denial of the application. The policy basis for this position is that it is unfair to penalize or punish the agency for deliberating, since this is not dilatory conduct.

Legislative history. In reviewing the legislative history of Act 164, Session Laws of Hawaii 1998, the Conference Committee report for the bill for Act 164 “is the most reliable evidence of ... intent as it represents the final statement of terms agreed to by both houses.”<sup>115</sup> Conference Committee Report No. 143<sup>116</sup> on S.B. No. 2204, S.D. 2, H.D. 2, C.D. 1 (1998) states



that “this bill is not meant to change the existing legal requirements for actions necessary to approve applications and petitions which must be voted on by boards and commissions, as long as the actions are taken within the time limits established by statute or rule.” Representative Menor, the lead manager for the House conferees that reviewed S.B. No. 2204, S.D. 2, H.D. 2, C.D. 1 (1998), argued in floor debates on the Conference Committee Draft that this language addressed the concern “that this bill would override State laws that established voting requirements to be legally met before a proposed development project can be approved.”<sup>117</sup> This language would therefore appear to negate the argument that agencies can define the term “action” in rulemaking to mean an agency’s vote on an application for purposes of section 91-13.5, whether or not the vote results in an approval or denial of the application.<sup>118</sup>

Specific vs. general statutes. Other rules of statutory construction may be useful in seeking to resolve this ambiguity. For example, in resolving super majority requirements, it may also be argued that the more specific statute, such as section 205-4(h), Hawaii Revised Statutes, which applies to boundary amendments before the Land Use Commission, supersedes the more general provisions of section 91-13.5, HRS, which relates to applications for business or development-related permits, licenses, or approvals.<sup>119</sup> As noted earlier, where there is a ‘plainly irreconcilable’ conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. In addition, the language “unless otherwise provided by law” in that section is persuasive on this issue: “Section 91-13.5, HRS, does not state ‘Notwithstanding any law to the contrary ...’, but rather begins ‘Unless otherwise provided by law ...’, and therefore leaves open the possibility of other, more specific laws taking precedence.”<sup>120</sup>

Substantial compliance. It may also be argued that a vote on a motion to grant or deny an application that does not result in a grant or denial because of the inability to obtain the requisite number of affirmative votes constitutes “substantial compliance” with the requirement in section 91-13.5 that the agency “take action”. However, since a court will most likely find that the maximum time period required by section 91-13.5 is mandatory, rather than directory, as discussed in chapter 5 of this report, the court may require strict compliance with those mandatory conditions, especially given the fact that the agency itself specified its own maximum time period in adopting rules under that section.

Meaning of “action”. Another rule of statutory construction, which is codified in the Hawaii Revised Statutes, is that “[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning.”<sup>121</sup> In determining the intent of section 91-13.5, HRS, the word “action” is therefore to be given its usual meaning. While the meaning of “action” in its “usual legal sense” is that of a “suit brought in a court”,<sup>122</sup> the general or popular meaning of that term, in the context of section 91-13.5, HRS, is that of “something done or performed; act; deed.”<sup>123</sup> The implication of the latter definition is that nearly any act performed by an agency in the course of its functions may be covered under the term “action” in section 91-13.5, HRS, whether or not the agency had a quorum to act.

However, it may be argued that only official actions of the agency should be included within the scope of that term. Other relevant statutory definitions may be useful in analyzing this term. For example, the State Ethics Code defines “official act” or “official action” as “a decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.”<sup>124</sup> Similarly, the federal Administrative Procedure Act defines “agency action” as including “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act ....”<sup>125</sup> The inclusion of inaction in these definitions would appear to imply that the failure to obtain a quorum under section 91-13.5, HRS will not result in automatic approval of an application, since even inaction can be considered to be a type of “action”.

However, it may be argued, these definitions are inapposite to the situation covered by section 91-13.5, HRS. An inquiry into whether an individual has taken “official action” to determine whether there is a conflict of interest under the Ethics Code, for example, is different from an agency taking action to approve or deny an application for a business or development-related permit, license, or approval. Similarly, the definition of “agency action” under the federal Administrative Procedure Act (APA) is intended to “assure the complete coverage of every form of agency power, proceeding, action, or inaction” in order “to simplify the language of the judicial-review provisions” of the APA.<sup>126</sup>

Hawaii case law. There are apparently no Hawaii Supreme Court cases directly on point. However, the following Hawaii Circuit Court cases address this issue:

- (1) Hawaii Electric Light Co., Inc. v. Dept. of Land and Natural Resources (hereinafter referred to as “HELCO”).<sup>127</sup> At issue in this case is the disposition of HELCO’s Conservation District Use Application (CDUA) to expand its power plant at Keahole on conservation district land on the Big Island under the automatic approval provisions of section 183-41(a), Hawaii Revised Statutes (“conservation districts”). Prior to its repeal,<sup>128</sup> that section provided that if the Department of Land and Natural Resources failed to give notice, hold a hearing, and render a decision within 180 days after receipt of an application, “the owner may automatically put the owner’s land to the use or uses requested in the owner’s application.”<sup>129</sup>

In determining whether to grant or deny the CDUA, the Board of Land and Natural Resources (BLNR) voted 3-2 against a motion to grant the CDUA, and subsequently voted 3-2 in favor of adopting the hearing officer’s recommended findings of fact, conclusions of law, and decision and order. The Board therefore concluded that the CDUA was denied.<sup>130</sup> The Third Circuit Court concluded as a matter of law that the Board erred in stating that the CDUA was denied, since section 171-5, HRS,<sup>131</sup> requires four votes of the Board to approve or disapprove a CDUA: “the BLNR failed to take any action, be it denial or approval, on either ... [motion], as both 3-2 votes fell one vote short of the requisite four (4) votes. ... By failing to garner the necessary four (4) votes to take valid agency action on

either ... [motion], the BLNR took no action on HELCO's CDUA and, therefore, erroneously stated that it had denied HELCO's CDUA."<sup>132</sup>

Pursuant to section 183-41, HRS, the Board's "failure to take any valid action or render a proper decision on HELCO's CDUA" after the expiration of the statutory deadline resulted in the automatic approval of the CDUA, by which HELCO could "automatically put its land to the uses requested in its application."<sup>133</sup> The court subsequently ruled that the automatic approval of the application "does not prevent the land board from imposing conditions and monitoring the project."<sup>134</sup> That case is now on appeal to the Hawaii Supreme Court.<sup>135</sup>

- (2) Engelstad v. Board of Land and Natural Resources.<sup>136</sup> This case involved the denial of the Engelstads' CDUA, which requested a subzone change from the limited to the general subzone and permission to build a single family house in Lanikai, Oahu. The application in question was submitted to the BLNR on June 24, 1987, and the 180-day statutory deadline for board action<sup>137</sup> began to run and was established as January 30, 1988. That deadline was moved up to December 21, 1987, at the request of the Engelstads' attorney, who argued that the commencement date should run from the date the department received the application and not filing fees.

At its regularly scheduled meeting of December 18, 1987, the BLNR's staff recommended denial of the CDUA because the physical conditions of the land did not justify a zoning change and because approval would constitute spot zoning. Of the six members making up the board, one member was absent, and another member had excused himself from voting due to a conflict of interest, leaving four members to take action. Pursuant to section 171-5, HRS, four board members are required to take action at meetings. Upon a motion that the CDUA be denied, three members voted in favor and one member voted against the motion. Because the Board lacked four affirmative votes to pass the motion, the motion died for lack of action. Accordingly, since no action was deemed to have been taken, the Circuit Court for the First Circuit subsequently held that the "Conservation District Use Application was automatically approved on December 21, 1987, as the Board of Land and Natural Resources was unable to render a decision by that date as required by Section 183-41(a), HRS."<sup>138</sup>

- (3) Cockett v. Planning Commission of the County of Kauai.<sup>139</sup> The Circuit Court for the Fifth Circuit has recently stated in *dicta* that an automatic approval provision under the Kauai County Code (KCC) that is similar in nature to section 91-13.5, HRS, requires a concurrence of a majority of all the members to which the Kauai County Planning Commission (Commission) is entitled. In Cockett, one of the contentions of the appellants was that the advice of the County Attorney to the Commission was defective on the issue of the majority requirement necessary for automatic approval under section 8-19.6, KCC. That section provides that if the Commission's Director fails to take action on certain permits within the prescribed time limits, the application shall be deemed approved. Section 1-2-4

of the Commission's Rules required that a concurrence of all the members to which the Commission is entitled (four) is necessary to make a Commission decision valid. The court found this rule to be consistent with section 23-02(J) of the Kauai County Charter and section 92-15, HRS. The court ruled that the "advice of the County Attorney that the application would be deemed approved, if a majority of four of the seven member Commission failed to take action, was correct in view of the foregoing and sustains the granting of the Class IV Permit and the Variance Permit."<sup>140</sup>

Although it is uncertain how the Hawaii Supreme Court will decide this issue, the Circuit Court's decision in HELCO – the most recent Hawaii case to address this issue on its facts – is persuasive on a similar issue presented under section 91-13.5, HRS. Since the court ruled that a 3-2 vote denying HELCO's CDUA constituted the "failure to take any valid action" when four votes were necessary to take action by the Board, thereby resulting in automatic approval of the application, the failure to obtain the requisite number of affirmative votes could result in the automatic approval of an application under section 91-13.5, HRS under similar circumstances.

Case law of other jurisdictions.<sup>141</sup> While it may be argued that there is a split of authority in other jurisdictions on this issue,<sup>142</sup> others contend that only one jurisdiction, namely, New York, takes the position adopted by the Hawaii Circuit Court in HELCO.<sup>143</sup> For example, the New York Appellate Division<sup>144</sup> has held that a planning board's vote to deny a development application was invalid where only two of five members of the board voted to deny the application (of the remaining members, one member voted to disapprove, one member disqualified himself, and the last member was absent). The failure to validly approve or disapprove of the application within the statutory time period resulted in automatic approval of the application.<sup>145</sup>

The Bureau has found only one other jurisdiction that arguably supports this position. The United States Court of Appeals for the Ninth Circuit<sup>146</sup> has found that there was no "final action" taken by the Tahoe Regional Planning Agency to preliminarily enjoin the building of a hotel-casino at Lake Tahoe. The Court found that although the California members of the Agency voted unanimously against the proposal to build the hotel-casino, the Nevada members voted 3 to 2 in favor of the proposal; however, a dual majority was required before any "action" could be taken. Accordingly, the Court ruled, there was no "action" taken within the relevant statutory time period for action, and the proposal was deemed approved.

Courts in Pennsylvania and Vermont have held that a vote of less than the requisite majority could constitute an "action" or "decision" for purposes of an automatic approval law. For example, a Commonwealth Court of Pennsylvania<sup>147</sup> has ruled that the denial of an application for approval of a preliminary land development plan by an affirmative vote of less than the majority of five members of a township's board of supervisors (because two members did not participate in the vote) constituted a "decision" within the statutory time period that did not result in automatic approval. The Court found that allowing a deemed approval for non-substantive reasons, despite alleged violations of township ordinances, would result in an "undeserved windfall benefit".<sup>148</sup>

The Vermont Supreme Court<sup>149</sup> recently reversed a lower court decision that a town’s zoning board of adjustment had failed to take action on an application within the statutory time period, and that the application was therefore automatically approved, where less than a majority of a town’s zoning board of adjustment voted to deny a request to change a nonconforming use (5 of 7 members were present, but one member abstained due to a conflict of interest, and the remaining 4 members voted to deny the request on a 3 to 1 vote). The Court argued that “improper application of the deemed approval remedy can operate to grant permits wholly at odds with the zoning ordinance”, and therefore “strictly construed the remedy to apply only when it clearly implements the statutory purpose”.<sup>150</sup>

Agency rulemaking. The Bureau believes that agencies have the flexibility to address this issue in their rules. The approach taken by several agencies may be useful in analyzing how an agency may resolve the quorum problem without amending section 91-13.5, HRS. For example, the following agencies have addressed this issue as follows:

- The Kauai County Planning Commission has adopted special permit rules as follows: “Pursuant to Section 205-6(c), HRS, a decision in favor of the applicant shall require a majority vote of the total membership of the County Planning Commission. For purposes of Section 91-13.5, HRS, a vote by the Commission on a petition for Special Permit within the maximum time period specified in Section 13-7 of these Rules, shall be construed as the Commission having acted on the petition.”<sup>151</sup> The rules further provide that if the Commission votes on an application, but fails to obtain a majority vote, the matter may be continued to another regular meeting within the maximum time period. If the application fails to obtain a majority vote of the Commission’s total membership before the maximum time period expires, “a subsequent vote adopting findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the Commission.”<sup>152</sup> However, if the Commission “fails to act upon the petition by failing to vote on the petition” within the maximum time period, the petition is deemed approved subject to protective restrictions as may be deemed necessary.<sup>153</sup>
- The City and County of Honolulu Department of Planning and Permitting has adopted rules of practice and procedure that define “action” as “a decision rendered by the director on an application pursuant to the Land Use Ordinance and to any other ordinance whose administration is vested in the department of planning and permitting; a decision rendered on a petition for a declaratory ruling; and an enforcement order pursuant to Land Use Ordinance Section 21-2.150-2.” The term “decision” or “decision and order” is defined as “the written findings of fact, conclusions of law, and decision and order signed by the director in any proceeding within the department’s jurisdiction.”<sup>154</sup> While these rules are useful in expressly defining the term “action”, so that there is no question as to what constitutes an action for purposes of section 91-13.5, HRS, the rules nevertheless do not appear to address the issue of whether a vote of less than the requisite number of members required to vote constitutes an “action” of the agency, since “action” is defined as a decision or enforcement order in the department’s rules.

- The Land Use Commission has adopted rules that provide that if “the commission’s action on a petition for boundary amendment under section 205-4, HRS, fails to obtain six affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the commission.”<sup>155</sup> However, this language may not be sufficient to prevent an automatic approval if the Commission fails to adopt findings of fact, conclusions of law, and a decision and order before the expiration of the maximum time period, or if the Commission again lacks the requisite number of members required to vote on a motion to adopt the findings and conclusions.<sup>156</sup>

Legislative options. The Bureau believes that the Legislature does not have to amend section 91-13.5, HRS to resolve the quorum and majority requirement issues. Agencies are able to adopt rules to address these issues, such as those adopted by the Kauai County Planning Commission as discussed earlier. Whether or not one agrees with the course of action taken by the commission, the rules demonstrate how the issues can be addressed without statutory amendment.

Agencies also have the flexibility to set longer maximum time periods that allow for contingencies in circumstances in which board or commission members are unavailable and cannot obtain a quorum. The Legislature therefore need not take any action on this issue unless it is dissatisfied with the courses of action followed by the agencies. The Legislature has already been asked to take a “wait and see” approach to observe how agencies have resolved these issues.<sup>157</sup>

If the Legislature concurs with the court's decision in HELCO, it may add language to section 91-13.5, HRS, to require that result. If the Legislature leaves section 91-13.5, HRS unamended, however, it should be aware that the courts may decide other cases in the same manner if agencies do not resolve this issue in rulemaking. While the resolution of this issue is a policy decision for the Legislature to decide, the lack of guidance given to agencies on this issue could also result in different outcomes on the same issue for different agencies, depending on how this issue is addressed in the agency’s rules.

Moreover, if the Legislature fails to act, it may be argued that the Legislature agrees with the Circuit Court's decision in HELCO, given the fact that the Legislature was apprised of this problem when it enacted Act 164, Session Laws of Hawaii 1998. In an apparent reference to HELCO, the Chairperson of the Board of Land and Natural Resources testified on S.B. No. 2204 (1998) (the bill for Act 164) that applicants have been able to proceed with their projects where the Board voted to deny those projects, but did not have the requisite number of affirmative votes required by statute to take action.<sup>158</sup> If agencies do not address this issue in their rules, there may be litigation to resolve this issue, in which case the result will be a judicial solution rather than a legislative one on an issue that is essentially one of policy. Moreover, Maui and other counties have expressed an interest in resolving the potential conflict between sections 91-13.5 and 205-6 (special permits), HRS, and in maintaining consistency in the interpretation of those sections.<sup>159</sup>

If the Legislature decides to address this issue statutorily to prevent a decision like that of HELCO, it may, for example, add language to section 91-13.5, HRS such as that proposed in H.B. No. 1349 (1999) or S.B. No. 2515 (2000). The House Bill defined the term “decision” as including “any timely vote by the agency to approve or deny a permit, whether or not effective under other applicable law to constitute an action of the agency.” Alternatively, the Senate Bill amended the “deemed approved” provision of section 91-13.5, HRS to add the following proviso: “provided that no such application which requires a decision by a board or commission shall be deemed approved by operation of law if the board or commission takes a vote on, and does not approve, the application within the specified time period.” Alternatively, or in addition to these amendments to section 91-13.5, HRS, the Legislature may wish to amend section 92-15, HRS or the specific statutory authority of particular agencies relating to quorum or majority requirements, by specifying that those sections, as the more specific statutes, supersede section 91-13.5 when in conflict.<sup>160</sup>

In addition, the Legislature may add language to require one or more alternate members to be appointed to boards and commissions, in the same manner as the appointment of the original members, to address the problem of members who are absent (due to illness, travel, or other reason) or otherwise unable to vote, such as those who recuse themselves due to a conflict of interest.<sup>161</sup> An example of this type of statute is Connecticut’s law providing for three alternate members, also referred to as “the panel of alternates”, to the five regular members of the zoning board of appeals in each municipality having a zoning commission.<sup>162</sup>

## 2. Tie Votes

### Issue:

Does an agency’s tie vote constitute a lack of a decision or “inaction”, resulting in an application being automatically approved, or agency “action”, constituting a denial of the application?

### Short Answer:

It depends whether the agency resolves this problem in its rules. If agencies do not resolve this issue in their rulemaking, the default position under section 91-13.5, HRS, appears to be that a tie vote will result in agency inaction and the application will be deemed to be approved.

### Discussion:

As discussed in the previous section, this issue revolves around the interpretation of the word “action” in section 91-13.5, HRS. Does a tie vote mean that an agency has taken “action” to grant or deny an application within the meaning of section 91-13.5, HRS? It has been noted that a tie vote “is merely the consequence of the democratic structure of the planning process that is reflected in planning boards comprised of local residents.”<sup>163</sup> The often controversial nature of certain proposed projects makes it “not uncommon for planning boards to become deadlocked over development applications. In applying automatic approval statutes to such cases, courts

have left a trail of inconsistent and conflicting decisions that have provided little guidance to developer and planner alike.”<sup>164</sup>

There do not appear to be any Hawaii cases directly on point. With respect to other jurisdictions, New York is apparently the only state that has held that a tie vote is equivalent to “inaction”, requiring automatic approval of an application.<sup>165</sup> Courts in Connecticut,<sup>166</sup> New Jersey,<sup>167</sup> and Pennsylvania<sup>168</sup> have held that a tie vote is equivalent to “action”, requiring a denial of the application.

Also as noted in the previous section, rules of parliamentary procedure generally provide that once a quorum is present, “any vote by an organization on any proposal is considered ‘action’”; accordingly, it is argued that an equally divided vote of a board or commission should be deemed a denial of an application, rather than “inaction” subject to automatic approval: “Thus, if there is a proposal on the floor for approval of a new meeting time, and it fails to gain a majority vote (e.g., the vote ends in a tie), ‘action’ has been taken and the proposal is considered *rejected*. ... Consistent with this parliamentary rule are numerous holdings that tie votes by zoning boards or other governmental bodies have the effect of *denying* the proposals before them.”<sup>169</sup>

It has also been argued that tie votes should be regarded as denials of applications in view of the underlying purpose of automatic approval statutes, namely, to reduce agency procrastination or the failure of some agencies to even consider development applications: “Thus, the complete failure of a planning board to act on an application must be distinguished from the good-faith consideration of an application by a board that results in a tie vote. After all, the thrust of these statutes is to provide an incentive for planning boards to consider applications for development in a timely manner, not to disregard the democratic process that can produce tie votes in the politically charged world of land use.”<sup>170</sup>

Legislative options. The Attorney General has noted that the Legislature should clarify whether a tie vote should result in an automatic approval of a license or permit under section 91-13.5, HRS.<sup>171</sup> As noted previously, if the Legislature does not amend section 91-13.5, HRS, it may be argued that the Legislature is presumptively taking the position of the Hawaii Circuit Court in HELCO. If the Legislature disagrees with the result in that case that a vote of less than a majority entitled to vote (presumably including a tie vote) constitutes agency inaction, thereby rendering an application subject to automatic approval, the Legislature should amend section 91-13.5, HRS, for example, to define the term “action” as any vote taken by an agency, whether or not effective under other applicable law to constitute agency action, or similar language. Leaving section 91-13.5, HRS unamended will allow each agency to resolve this issue in its rulemaking. In so doing, agencies may resolve this issue inconsistently. One way for the Legislature to require uniformity would be to amend section 91-13.5 to define “action” discussed in the previous section.



### 3. Potential for Abuse

**Issue:**

Could the implementation of section 91-13.5, HRS, result in manipulation by the parties, thereby resulting in an automatic approval or a denial?

**Short Answer:**

Yes, although:

- (a) The potential for abuse exists with or without section 91-13.5;
- (b) Agencies may address this issue in rulemaking; and
- (c) Section 91-13.5 does not prohibit the use of existing remedies for abuse, including judicial review.

**Discussion:**

It may be argued that the enactment of section 91-13.5, HRS itself brought with it the potential for increased abuse and manipulation of the permitting process by the parties to an action, including both applicants and opponents of a proposed project. However, the potential for abuse existed well before the enactment of section 91-13.5, HRS, for example, if a party or an agency sought to delay a project so that only those applicants, such as large developers who had the money or staying power, could outlast an attempt to kill the project by dilatory inaction or unreasonable delay. With respect to agency abuse, for example, it has been noted that “[u]nreasonable delay in approving plat applications may be just as much an exclusionary device as an unconstitutional exclusionary zoning plan itself.”<sup>172</sup> Even without a showing of coercion or other “overreaching by local officials to extract extra-legal concessions from developers”, it has been noted that “the unreasonable lapse of time alone ... can prove unconstitutionally detrimental to a developer” who is harmed by the inaction.<sup>173</sup>

With respect to automatic approvals, the potential for abuse has already existed in Hawaii in other automatic approval provisions as discussed in chapter 3, for example, beginning in 1957 with respect to automatically approved applications for certain nonconforming uses in the “forest reserve boundaries”, later changed to the “conservation district”.<sup>174</sup> Although abuse can occur anywhere in the permitting process, it appears to be focused primarily in two substantive areas affected by section 91-13.5, HRS, namely, contested case hearings, as discussed in part B of this chapter, and quorum and majority requirements. In particular, the possibility exists for manipulation of agency voting, either fraudulently through “vote rigging”, or unintentionally, through the absence or recusal of a member from voting, for example, due to a conflict of interest.

It may be argued, however, that the agency can remedy this problem in rulemaking by defining the word “action” in section 91-13.5, HRS, for example, to mean any timely vote by the

agency to approve or deny a permit, whether or not effective under other applicable law. However, it is questionable whether an agency, either explicitly or implicitly, may define any vote of the agency as an “action” if the requisite number of members are not present to officially take such action as required under section 92-15, HRS. A court would presumably read section 91-13.5, HRS *in pari materia* with section 92-15, HRS, discussed earlier, which requires “the concurrence of a majority of all the members to which the board or commission is entitled ... to make any action of the board or commission valid ...” (emphasis added). The word “action” in this context would appear to supersede a contrary interpretation by an agency in rules adopted pursuant to section 91-13.5. It is also uncertain whether the agency can avoid this result by limiting its rules, for example, by using the phrase “for the purposes of automatic approval only”, or similar language.

Assuming, however, for the purposes of this discussion, that an agency may legally define “action” in this manner if the agency specifies that this definition applies only for the purposes of section 91-13.5, if the agency begins its meeting with a quorum, but one or more members must recuse themselves from voting due to a conflict of interest or bias, which would leave the agency without a quorum to take action, this definition of “action” would allow the agency to nevertheless vote on a motion to grant or deny the application.

The agency’s failure to garner the requisite number of majority votes to either grant or deny the application, or the agency’s subsequent failure to garner the requisite number of votes to approve or disapprove of a motion to adopt findings of fact, conclusions of law, and decision and order, would consequently result in the denial of the application, since the agency made a “timely vote” (i.e., before the expiration of the maximum time period), but which was not otherwise effective for failure to obtain a quorum for voting purposes. It is argued that the agency cannot be accused of procrastinating on the application, since it made one or more diligent efforts to vote on an application, but simply could not obtain a quorum for whatever reason. Since one of the purposes of section 91-13.5, HRS is to prevent dilatory inaction by agencies, the fact that the agency took “action”, as defined by the agency’s rules, means that there was no dilatory inaction, and the purpose of that section is satisfied.

If, on the other hand, the agency does not define the term “action” in this manner, the agency would still require an affirmative vote of the majority of the members entitled to vote to approve or disapprove a motion to grant or deny an application, or a subsequent vote on a motion to adopt findings of fact and conclusions of law. The failure to garner the requisite votes in either case would result in the automatic approval of the application. Therefore, the argument goes, if all agencies would simply adopt rules that define “action” in this manner (again assuming they do this in a manner that is permissible and the agency’s rules do not violate section 92-15, HRS), there would be no more decisions similar to that described earlier in this chapter, in which the Board of Land and Natural Resources rejected HELCO’s application by a 3-2 vote, and adopted findings of fact and conclusions of law by a 3-2 vote, but the application was deemed automatically approved.

If agencies may not legally define “action” in this manner, it is argued that the Legislature should amend section 91-13.5, HRS itself to include this type of definition in that section, such as that proposed by H.B. No. 1349 (1999), or alternatively amend section 91-13.5,

HRS to specify that “no application which requires a decision by a board or commission shall be deemed approved by operation of law if the board or commission takes a vote on, and does not approve, the application within the specified time period”, as proposed by S.B. No. 2515 (2000). The fact that an agency could not obtain a quorum, it is argued, should not be held against an agency that has not otherwise procrastinated, but has diligently proceeded to move the application along within the maximum time period.

The problem with this line of reasoning is that the possibility exists for the manipulation of the voting process, whether intentional or unintentional, under either scenario, (i.e., whether or not the agency defines “action” as any agency vote, whether or not effective under applicable law):

- If the agency does define “action” to mean any vote, whether or not there is a quorum to vote, then if one or more members recuse or absent themselves and the agency votes on the project despite the lack of the requisite number of members to form a quorum, the agency will have been deemed to have “taken action”, and the project will be denied for failure to obtain a quorum. It may be argued that this is unfair, since the recusal or absence of one or more members in this case will mean that it requires less than a quorum to deny an application, but that it still requires a quorum to approve the application.
- On the other hand, if the agency does not define “action” to mean any vote (i.e., the agency still needs to obtain the requisite number of votes for there to be agency “action”), then if one or more members recuse or absent themselves, there will not be a quorum, and the project will be automatically approved. It may be argued that it is equally unfair as the previous situation, since the recusal or absence of one or more members will mean that it requires less than a quorum to automatically approve an application but that it still requires a quorum to deny the application.

The policy position adopted by the Legislature is apparently to leave it to the agencies to take whichever poison suits them. If agencies choose to do nothing, i.e., they do not define “action” in the manner suggested, or do not otherwise seek to resolve this issue in rulemaking, the default policy position is to allow automatic approvals to occur under section 91-13.5, HRS, when no quorum is obtained. This achieves another purpose underlying section 91-13.5, HRS, namely, to provide for a definite, established time period for agency action. If a board votes on an application, but each time can never obtain a quorum because a member is always recusing himself or herself or is always absent, there will still be certainty, since the application will be automatically approved at the termination of the maximum time period. Accordingly, gubernatorial or mayoral appointments to boards and commissions may need to be scrutinized more carefully as to their potential conflicts of interest and need to recuse themselves when voting on controversial projects.

Legislative options. The Bureau believes that such a policy decision is entirely within the discretion of the Legislature. Accordingly there is no requirement to amend section 91-13.5, HRS. Under the existing law, the Legislature is allowing agencies to resolve this problem in any

way they deem appropriate, consistent with the intent of section 91-13.5, HRS and the agency's implementing statute. The failure of an agency to resolve this problem may result in an increased number of approvals by operation of law, which could, in worst case scenarios, expose both state and county agencies to greater liability. To some degree, this is true of any legislative policy decision.

If the Legislature believes that it needs to do something immediately about potential manipulation, the Legislature can amend the laws of agencies where it believes the problems may occur to provide for a panel of alternates to boards and commissions, similar to that provided for in Connecticut. The alternates would be appointed to a board or commission at the same time and under the same terms and conditions as the original members, and may step in and vote on an application when the original member is absent or recused from voting. This would in most cases appear to resolve the problem of an agency's failure to obtain a quorum to vote on an application.

Another option is to amend the implementing statute of the agency concerned in such a manner as to minimize the recurring problems. One such measure may be to reduce an agency's super majority voting requirement to a simple majority requirement, or to provide that a majority means all those present (assuming there is originally a quorum) under the common law rule, rather than the default provision in section 92-15 requiring the concurrence of the majority "of all the members to which the board or commission is entitled" to make any action valid. However, the policy decision to reduce a quorum requirement in this manner, or make similar amendments to "streamline" the permitting process in the agency's implementing statute, may defeat the very purposes underlying that statute and should not be lightly undertaken.

The Bureau has no reason to believe that members of any particular board or commission are likely to attempt to manipulate the process. Accordingly, the Bureau is not recommending amendment of the statutes of any agencies in this regard.

## **D. Rulemaking**

### **1. Non-implementation of Rules**

#### **Issue:**

Must agencies adopt administrative rules pursuant to section 91-13.5, HRS before the automatic approval provisions of that law are triggered?

#### **Short Answer:**

Yes, unless an agency already has a statute establishing a maximum time period (as discussed in the next section). However, the rulemaking deadline specified in Act 164, Session Laws of Hawaii 1998, should be extended to a more realistic date, such as December 31, 2003.

**Discussion:**

In response to inquiries from Senator Les Ihara, Jr., the Attorney General has stated that section 91-13.5, HRS is not self-executing, and that unless an agency already has a statute establishing a maximum time period (as discussed in the next section), the automatic approval provision of section 91-13.5, HRS is not triggered until the agency has adopted rules to establish a maximum time period as provided in that law. The Attorney General noted that “[w]ithout a rule establishing the maximum time period, and there being no statute otherwise establishing the time period, there is no practical way to effect the automatic approval consequence of Act 164.”<sup>175</sup>

Act 164, however, required all agencies to adopt rules as required by that Act “on the first occasion that the agency’s rules are amended upon approval of this Act or by December 31, 1999, whichever is earlier.”<sup>176</sup> As noted in Appendix C, however, a number of agencies are still in the process of adopting rules to implement that Act nearly one year after the statutory deadline.

In 1998, several agencies testified that the time period allowed for the adoption of agency rules was unrealistically short and would require the expenditure of scarce funds.<sup>177</sup> Another reason for the non-implementation of agency rules, it may be argued, are suggestions in a Conference Committee Report that the bill would be subsequently amended in the 1999 legislative session, which would presumably require agencies to make additional rule changes.<sup>178</sup> While delays in the rulemaking process are a matter of concern, there may be several reasons why agencies are taking a longer period of time to adopt rules to implement section 91-13.5, HRS, including the following:<sup>179</sup>

- Complexity. The number and complexity of the issues involved in the implementation of section 91-13.5, HRS, as discussed in this report, may simply take a longer period of time to resolve;
- Controversy. Section 91-13.5, HRS has been extremely controversial since its enactment, and has provoked conflict and debate among a number of groups that are potentially affected by agency rules;
- Procedural requirements. The Hawaii Administrative Procedure Act requires notice and hearing for proposed rules.<sup>180</sup> Hearings on proposed rules that are controversial may generate more attention and additional time to accommodate interested parties. The Small Business Regulatory Flexibility Act,<sup>181</sup> which, among other things, requires agencies proposing rules that affect small businesses to include a small business statement to be considered by the small business regulatory review board and the departmental advisory committee on small business, also lengthens the time necessary to adopt rules;
- Shortages of resources. As noted earlier,<sup>182</sup> agency officials noted that the time period allowed for the adoption of agency rules was unrealistically short and would require the expenditure of scarce funds;

- Management obstacles. Internal management differences in the direction of agency rulemaking may delay implementation; and
- Inertia. Finally, delay may occur “simply because the agency does not want to act. ... Realizing that any form of action will cause them untold grief, the responsible officials choose to wait, often using a study of some sort as a surrogate for action.”<sup>183</sup>

Legislative options. To avoid litigation designed to force agencies to adopt rules,<sup>184</sup> the Bureau recommends extending the rulemaking deadline specified in Act 164, Session Laws of Hawaii 1998, to a more realistic deadline, such as December 31, 2003, and specifying a statutory maximum time period of one year as a default time period for agencies that have failed to adopt rules by that date.

## **2. Preexisting Statutory Time Periods**

### **Issue:**

Do the automatic approval provisions of section 91-13.5, HRS apply to agencies that were subject to a preexisting statutory time period, even if the agency fails to adopt rules in accordance with that section?

### **Short Answer:**

Yes.

### **Discussion:**

In response to inquiries from Senator Les Ihara, Jr., the Attorney General has stated that “[f]or those agencies that had maximum time periods established by statute prior to Act 164, those agencies must take action to grant or deny an application within those time periods, or the application will be deemed approved. The agency does not need to adopt rules specifically incorporating the automatic approval consequence set out in Act 164.”<sup>185</sup> (See Appendix F.) Thus, for example, if a county liquor commission fails to “give its decision granting or refusing the application”<sup>186</sup> within the existing statutory deadline of fifteen days, the application will be deemed approved, even if the commission has not adopted rules pursuant to section 91-13.5, HRS. The county liquor commission, in this case, would be considered to already be “Act 164-compliant”. Although not specified in section 91-13.5, HRS itself, however, the Conference Committee Report to Act 164 further notes that with respect to agencies with existing statutory time limits, the status quo would not be altered until those agencies have had the opportunity to adopt new rules.<sup>187</sup>

### 3. Delegation of Rulemaking Powers

**Issue:**

Is section 91-13.5, HRS an overly broad delegation of rulemaking authority to agencies?

**Short Answer:**

No.

**Discussion:**

In general, “the validity of a statute delegating power depends apparently upon (1) the agency to which the power is delegated, (2) the subject matter of the regulation, and (3) the character of the delegated power.”<sup>188</sup> Where a delegation to an agency “is made with sufficient guidelines or clarity, the exercise of the delegated power does not violate the separation of powers provision of the Constitution.”<sup>189</sup> However, the converse is not necessarily true, since many valid delegations of power have been accompanied by statutory standards that are either “inherently inconsistent” or “literally meaningless”.<sup>190</sup> Act 164, for example, includes a legislative intent section but gives little direction or guidelines to agencies as to how to implement that intent.

Generally, “[a] public administrative agency possesses only such rule-making authority as is delegated to it by the state legislature and may only exercise this power within the framework of the statute under which it is conferred.”<sup>191</sup> The Hawaii Administrative Procedure Act further provides that, when reviewing the validity of a rule, a court must declare the rule invalid “if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures.”<sup>192</sup> The question nevertheless remains: “how much power can the legislature delegate to administrative agencies to fill in the details of the larger policy decisions that the legislature makes? In a practical sense, it is impractical and undesirable for the legislative branch to concern itself with regulatory minutia.”<sup>193</sup>

Generally, on the federal level, legislative power in Congress cannot be delegated to other institutions. This nondelegation doctrine is based on Article I, section 1 of the United States Constitution, which specifies that all legislative powers shall be vested in a Congress of the United States. Except for two 1935 cases, however, the United States Supreme Court has “never enforced its frequently announced prohibition on congressional delegation of legislative power.”<sup>194</sup> Instead, “Congress routinely delegates to agencies the power to make major policy decisions in the form of rules of conduct that bind all citizens.”<sup>195</sup>

The nondelegation doctrine under Hawaii law has developed a parallel route. Article III, section 1 of the Hawaii Constitution similarly vests the legislative power in a legislature. While the Hawaii Supreme Court also “has adopted the non-delegation doctrine as part of its own body of constitutional law”,<sup>196</sup> the Legislature has routinely delegated broad rulemaking powers to administrative agencies, and the Court has routinely upheld that delegation.<sup>197</sup>

One example of a broad delegation of power to an administrative agency was in the case of Hyatt Corp. v. Honolulu Liquor Commission,<sup>198</sup> in which the Hawaii Supreme Court noted that the legislature had “vested unusually broad discretionary powers in the liquor commission.”<sup>199</sup> In that case, Hyatt Corporation sought to enjoin the Honolulu Liquor Commission from enforcing an administrative rule adopted by the Commission that prohibited liquor licensees from engaging in discriminatory practices, arguing that the lower court erred in determining that the Commission had the requisite authority to adopt a rule prohibiting racial discrimination. The Supreme Court affirmed the circuit court’s decision “[b]ecause of the exceptionally broad authority granted to the Commission by statute, the substantial deference to which the Commission’s interpretation of the statute is entitled and the strong public policy against racial discrimination recognized by this State ...”.<sup>200</sup> The Court further noted the “well established rule of statutory construction that, *where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.*”<sup>201</sup>

Section 91-13.5, HRS, similarly delegates broad rulemaking authority to state and county administrative agencies to implement that section using “words of broad and indefinite meaning”,<sup>202</sup> and gives little direction to agencies as to how to implement the section. Under these circumstances, Hawaii’s courts would presumably find that the delegation of rulemaking authority under section 91-13.5 to state and county agencies is permissible, and would “accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous”.

### Endnotes

1. House Resolution No. 128, H.D. 1 (2000), p. 2, line 42 (second “resolved” paragraph).
2. The Bureau has found only one case in another jurisdiction addressing the constitutionality of an automatic approval law – a California appellate court upheld that State’s Permit Streamlining Act in a due process challenge; *see infra* note 46 and accompanying text.
3. The Hawaii Supreme Court has noted that “[a] fundamental reason for the enactment of the Hawaii Administrative Procedure Act was to insure fairness and impartiality of administrative proceedings.” In re Hawaiian Telephone Co., 54 Haw. 663, 668, 513 P.2d 1376 (1973), *quoting* In re Terminal Transportation, Inc., 54 Haw. 134, 139, 504 P.2d 1214, 1217 (1972).
4. The Hawaii Supreme Court has noted that the Hawaii Administrative Procedures Act was adopted to “provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and adjudication of contested cases.” Bush v. Hawaiian Homes Commission, 76 Haw. 128, 133, 870 P.2d 1272 (1994), *quoting* Hse. Stand. Comm. Rep. No. 8, in 1961 House Journal, at 653 (emphasis added). Moreover, section 91-13.5, HRS, must be construed in harmony with the Hawaii Administrative Procedure Act, since “a statute must be construed as part of and in harmony with the law of which it forms a part.” State v. Murray, 63 Haw. 12, 23, 621 P.2d 334 (1980), *quoting* State v. Millette, 112 N.H. 458, 465, 299 A.2d 150, 154 (1972).



5. A related issue is whether the automatic approval of a petition to reclassify or rezone “important state lands” violates Article XI, section 3 of the Hawaii Constitution, which requires approval by a two-thirds vote of the body responsible for the reclassification or rezoning action. Article XI, section 3 of the Hawaii Constitution provides in relevant part that lands identified by the State as “important agricultural lands ... shall not be reclassified by the State or zoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.”

Conceivably, the automatic approval of a land use reclassification petition that has been filed with the state Land Use Commission to reclassify “important state lands” would not be approved by a two-thirds vote of that Commission, and would therefore violate Article XI, section 3 of the State Constitution. However, the State has never designated “important state lands” as required by the Constitution. Moreover, when the State designates “important state lands” under Article XI, section 3, it can specify in implementing legislation, or alternatively in an amendment to chapter 205, HRS (the Land Use Commission law), that a land use reclassification petition filed with the Land Use Commission to reclassify “important state lands” is exempt from the automatic approval law.

As discussed in this section, the Bureau believes that no statutory changes to address this issue are required at this time, since agencies have broad discretion to address this problem in rulemaking when the need arises. Those state and county agencies that are affected by Article XI, section 3, can take a number of different measures in adopting rules that address this issue, such as providing for a sufficiently long maximum time period to obtain a quorum and vote on the matter in question, provide that various mandatory conditions shall attach to automatically approved petitions that requires a two-thirds vote of the agency before the reclassification or rezoning of important state lands may take effect, or both, or adopt other language to protect agricultural lands.

The Twentieth State Legislature has begun the first step toward the identification of important state lands under Article XI, section 3, by appropriating funds for FY 2000-2001 to be expended by the Department of Agriculture “for the purposes of developing the composition, role and costs of an agricultural lands commission to identify mechanisms by which to fulfill the intent and purpose of Article XI, section 3, of the Hawaii State Constitution, which seeks to conserve and protect agricultural lands and promote diversified agriculture and agricultural self-sufficiency; [and] analyze agricultural land use issues...”. 2000 Haw. Sess. Laws Act 281, section 4(5).

6. For example, the Hawaii Supreme Court has noted that the State has rejected the circumvention of district boundary amendment procedures “to allow the ad hoc infusion of major urban uses into agricultural districts.” Neighborhood Board No. 24 v. State Land Use Commission, 64 Haw. 265, 273, 639 P.2d 1097 (1982) (citations omitted). The Court further noted: “We believe that the allowance of a special permit for the development of a recreational theme park covering 103 acres of agricultural land, a major commercial undertaking which developers estimate will attract approximately 1.5 million people annually to the Waianae Coast, accordingly frustrates the objectives and effectiveness of Hawaii’s land use scheme.” Id., 64 Haw. at 272.
7. Letter from James B. Takayesu, Maui Corporation Counsel, to Earl I. Anzai, Hawaii Attorney General, May 11, 2000, p. 2 (*see* Appendix P).
8. Generally, the Land Use Commission (LUC), which is composed of nine members appointed by the Governor and confirmed by the Hawaii Senate, ensures that areas of state concern are addressed and considered in the land use decision making process under chapter 205, HRS (state land use law). That law provides the major regulatory framework for land development in the State, requiring all land to be placed into one of four districts, namely, urban, rural, agricultural, or conservation district; the LUC establishes the district boundaries for the entire state:

[T]he state of Hawaii through its land use commission retains the power to control land development in over 90 percent of the state's land area, leaving the four counties with power of land planning and control over less than 10 percent. It is only in the "urban" district that counties have authority for land use planning, zoning, and subdivision. The state controls the use of land more or less absolutely in two of the remaining three classifications (the land use commission in the "agricultural" district and the Department of Land and Natural Resources's land board in the "conservation district"; the fourth, or "rural," district is statistically irrelevant as less than 1 percent of Hawaii's land is so classified), and it is the land use commission that decides what land is classified in which of the four districts.

David L. Callies, "How Development Agreements Work in Hawaii," in Development Agreements: Practice, Policy, and Prospects (Douglas R. Porter and Lindell L. Marsh, eds.) (Washington, DC: The Urban Land Institute, 1989), p. 71.

District boundary amendments under the land use law are obtained by petition to the LUC, and can be initiated by state or county agencies or any person with a direct interest in the property sought to be reclassified. Upon acceptance of a completed petition, the Commission must hold a hearing on the island in which the property is situated within not less than 60 days and not more than 180 days, either before the entire Commission or before a hearings officer. The decision making process is quasi-judicial in nature, giving those who are most directly affected due process rights before an action is taken. The LUC must decide upon the request within 120 days after the termination of the hearing, and may approve, approve with conditions, or deny the petition. Amendment of a district boundary requires approval by at least six of the nine Commission members. An environmental impact statement may also be required under chapter 343, HRS, on petitions to redistrict conservation lands. *See generally* Land Use Commission, "The State of Hawaii Land Use Law: A Summary" (undated), *reprinted in* Hawaii, Economic Revitalization Task Force, Hawaii's Economic Future (Sept. 1997), vol. 1, pp. BUS-36 to BUS-42; *see also* David Kimo Frankel, Protecting Paradise: A Citizen's Guide to Land & Water Use Controls in Hawaii (Kailua, HI: Dolphin Printing & Publishing, 1997), pp. 4-7.

On Oahu, district boundary amendment petitions are referred to the City's Department of Planning and Permitting for evaluation and processing. The Honolulu City Council may also initiate a petition by resolution. The Planning Commission holds a public hearing on proposed boundary amendments and makes recommendations to the City Council, which must also hold a hearing before enacting the boundary amendment by ordinance. The City may also process a boundary amendment concurrently with a Development Plan amendment for the same property. *See* City and County of Honolulu Office of Council Services, A Staff Handbook of City Council Decision-Making Processes (Honolulu, HI: Jan. 1999), p. 53.

9. Permitted uses in agricultural districts include the cultivation of crops, game and fish propagation, the raising of livestock, farm dwellings, and agricultural parks. Uses not expressly permitted are prohibited, except uses permitted under §§205-6 ("special permit") and 205-8 ("nonconforming uses"), and construction of single-family dwellings on lots existing before June 4, 1976. Haw. Rev. Stat. §205-4.5 ("permissible uses within the agricultural districts"). In addition, section 205-17(3)(C), HRS ("land use commission decision making criteria") requires the commission, in its review of any petition for reclassification of district boundaries, to specifically consider the impact of the proposed reclassification on the "[m]aintenance of other natural resources relevant to Hawaii's economy, including, but not limited to, agricultural resources...".
10. Richardson v. City and County of Honolulu, 76 Haw. 46, 54-55, 868 P.2d 1193, *reconsideration denied*, 76 Haw. 247, 871 P.2d 795 (1994), *judgment aff'd*, 124 F.3d 1150 (9th Cir. 1997) (citations omitted; emphasis added); *see also* State v. Putnam, 93 Haw. 362, 370 n.9, 3 P.3d 1239 (2000); State v. Kotis, 91 Haw. 319, 330, 984 P.2d 78 (1999).
11. Mandatory conditions in agency rules are discussed more generally in part D.4. of chapter 5.

12. Haw. Admin. Rules §15-15-90(e)(17), (18), and (19). The rules of the Land Use Commission went into effect after the adoption of House Resolution No. 128, H.D. 1 (2000), which states on p. 2 that “the State of Hawaii is constitutionally obliged to protect the important agricultural lands and native Hawaiian rights (Article XI, section 3, and Article XII, section 7, of the State Constitution, respectively) but such issues have yet to be addressed in rulemaking...”. The Commission’s rules also address traditional and customary issues; *see* part A.3. of this chapter, *infra*, for a discussion of these issues.
13. Haw. Admin. Rules §15-15-90(a). Section 15-15-77(b)(6) further provides that “[l]ands in intensive agricultural use for two years prior to date of filing of a petition or lands with a high capacity for intensive agricultural use shall not be taken out of the agricultural district unless the commission finds either that the action: (A) Will not substantially impair actual or potential agricultural production in the vicinity of the subject property or in the county or State; or (B) Is reasonably necessary for urban growth.”
14. The Commission, which is established within the Department of Land and Natural Resources by section 174C-7, HRS, implements the Code and must adopt rules under the Code. All proceedings before the Commission concerning the enforcement or application of the Code, or rules adopted under the Code, or the “issuance, modification, or revocation of any permit or license” under the Code by the Commission, are to be conducted in accordance with chapter 91, HRS (the Hawaii Administrative Procedure Act), of which the automatic permit approval law is a part. *See* Haw. Rev. Stat. §174C-9 (“proceedings before the commission concerning water resources”).
15. In re Water Use Permit Applications, 94 Haw. 97, 132, 9 P.3d 409 (2000) (Waiahole Ditch Combined Contested Case Hearing; online at: <http://www.state.hi.us/jud/21309.htm>); *see also* Robbie Dingeman, “Waiahole Water Allocation Rejected,” The Honolulu Advertiser, August 23, 2000, p. A1. Article XI, section 7 of the Hawaii Constitution is discussed in part A.3. of this chapter.
16. Haw. Rev. Stat. §174C-2(a) (“declaration of policy”): “It is recognized that the waters of the State are held for the benefit of the citizens of the State. It is declared that the people of the State are beneficiaries and have a right to have the waters protected for their use.”
17. In re Water Use Permit Applications, *supra* note 15, 94 Haw. at 143.
18. E-mail correspondence to the author of this report from Dede Mamiya, Land Division, Department of Land and Natural Resources, dated August 1, 2000.
19. The county Boards of Water Supply are charged with managing, controlling, and operating the waterworks of the county for the purpose of supplying water to the public in the county. Haw. Rev. Stat. §54-15. The Boards may fix and adjust rates and charges for the furnishing of water and for water service after notice and a hearing pursuant to §54-26, HRS, and may adopt rules under §54-33, HRS, relating to “the management, control, operation, preservation, and protection of the waterworks of the county”. Hawaii County’s Board of Water Supply is established under chapter 54, part III, HRS (§§54-51 et seq.).
20. *See* City and County of Honolulu, Department of Permitting and Planning, Permit Register (Honolulu, HI: April, 2000), pp. 214-215. It is unclear whether section 91-13.5, HRS, applies to a State Water Quality Certification issued by the state Department of Health under Haw. Rev. Stat. ch. 342D, pursuant to Section 401 of the federal Clean Water Act of 1977, which is required by an applicant for a federal license or permit to conduct an activity in state waters that include the construction and operation of facilities that may result in a discharge. *Id.* at 207. Section 91-13.5 does not apply to applications that are “subject to state administered permit programs delegated, authorized, or approved under federal law”, but chapter 342D is nevertheless specifically included in the definition of “application for a business or development-related permit, license, or approval”. *See* Haw. Rev. Stat. §91-13.5(a), (e).
21. Haw. Rev. Stat. §54-33 (“rules and regulations”).

22. For example, the Land Use Commission has included in its rules adopted on May 8, 2000, the following mandatory condition on automatically approved boundary amendment petitions:
- Petitioner shall participate in the funding and construction of adequate water source, storage, and transmission facilities and improvements to accommodate the proposed uses. Water transmission facilities shall be coordinated and approved by appropriate state and county agencies. The county's water use and development plan shall be amended to reflect changes in water demand forecasts and in water development plans to supply the proposed uses... (Haw. Admin. Rules §15-15-90(e)(23).)
23. See discussion of the public trust doctrine, *supra* notes 15 to 17 and accompanying text; see also Kent D. Morigara, "Comment: Hawaii Constitution, Article XI, Section 1: The Conservation, Protection, and Use of Natural Resources," 19 University of Hawaii Law Review 177 (Spring 1997).
24. For example, the Land Use Commission is already required by statute to address certain criteria in its review of petitions for reclassification of district boundaries, including the impact of the reclassification on the "[p]reservation or maintenance of important natural systems or habitats; ... [m]aintenance of valued ... natural resources; [and] ... [m]aintenance of other natural resources relevant to Hawaii's economy ...". See Haw. Rev. Stat. §205-17(3)(A) to (C). The Commission may adopt rules, including the attachment of conditions, to address these statutory requirements.
25. It may also be argued that automatic approval may impair native Hawaiians' inherent right to a healthy environment. See, e.g., John Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law," 25 Columbia Journal of Environmental Law 283, 328 (2000) ("A linkage is developing between the rights of indigenous peoples and the environment. A right to a healthy environment can be considered to have a particular applicability to indigenous peoples.")
26. 94 Haw. 31, 7 P.3d 1068 (2000).
27. Id., 94 Haw. at 35.
28. Haw. Rev. Stat. §205-17(3)(B) and Haw. Admin. Rules §15-15-77, respectively.
29. Ka Pa'akai O Ka 'Aina v. Land Use Commission, 94 Haw. at 45, quoting Stand. Comm. Rep. No. 57, in 1 Proceedings of the Constitutional Convention of 1978, at 639 (1980).
30. Id., 94 Haw. at 45-46, quoting Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Haw. 425, 903 P.2d 1246 (1995), cert. denied, 517 U.S. 1163, 116 S.Ct. 1559, L.Ed.2d 660 (1996) (also known as "*PASH*") (emphasis in original). See generally Paul M. Sullivan, "Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii," 20 UH L.Rev. 99 (Summer/Fall 1998); D. Kapoa Sproat, "Comment: The Backlash Against *PASH*: Legislative Attempts to Restrict Native Hawaiian Rights," 20 UH L.Rev. 321 (Summer/Fall 1998); Paul Bunn and Wayne Costa, "Note: *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*: The Affirmative Duty to Consider the Effect of Development on Native Hawaiian Gathering Rights," 16 UH L.Rev. 303 (Summer 1994); David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings," 96 Colum. L.Rev. 1375, 1426-1434 (Oct. 1996).
31. Id., 94 Haw. at 46. The analytic framework is as follows: "In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must – at a minimum – make specific findings and conclusions as to the following:"

- (1) [T]he identity and scope of ‘valued cultural, historical, or natural resources’ in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
  - (2) [T]he extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
  - (3) [T]he feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist. *Id.*, 94 Haw. at 47 (emphasis in original; footnotes omitted).
32. 2000 Haw. Sess. Laws Act 50, cited in Ka Pa‘akai O Ka ‘Aina v. Land Use Commission, 94 Haw. at 47 n.28.
  33. 2000 Haw. Sess. Laws Act 50, section 1.
  34. Haw. Admin. Rules §15-15-90(e)(24).
  35. The Fourteenth Amendment to the United States Constitution provides in part: “nor shall any State deprive any person of life, liberty, or property, without due process of law...”.
  36. Article I, section 5 of the Hawaii Constitution similarly provides in part: “No person shall be deprived of life, liberty or property without due process of law...”.
  37. For example, an agency hearing must be “required by law” under the definition of “contested case” in section 91-1, HRS: “If the statute or rule governing the activity in question does not *mandate* a hearing prior to the administrative agency’s decision-making, the actions of the administrative agency are not ‘required by law’ and do not amount to ‘a final decision or order in a contested case’ from which a direct appeal to circuit court is possible.” Bush v. Hawaiian Homes Commission, *supra* note 4, 76 Haw. at 134 (emphasis in original; citations omitted). Standing to invoke judicial review under the Hawaii Administrative Procedure Act is also contingent upon a showing that the party seeking review is a “person aggrieved by a final decision and order in a contested case” that is conducted before an administrative agency. *Id.*, 76 Haw. at 134; Haw. Rev. Stat. §91-14(a).
  38. “The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.” Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).
  39. See Bush v. Hawaiian Homes Commission, *supra* note 4, 76 Haw. at 136:
 

The claim to a due process right to a hearing requires that the particular interest which the claimant seeks to protect be “property” within the meaning of the due process clauses of the federal and state constitutions. ... A “property interest” is not limited to “the traditional ‘right-privilege’ distinction[,] ... [but also includes] a benefit which one is entitled to receive by statute[.]” ... “To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.” (Citations and footnote omitted.)
  40. Stein, Mitchell, and Mezines, 4 Administrative Law §32.02[1] (Lexis Publ. 2000), pp. 32-23 to 32-26 (footnotes omitted); see generally Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, Vol. II (New York, NY: Little Brown and Co., 3rd ed., 1994, and 1999 Supp.), at 1-116.
  41. Bank of Hawaii v. Kunimoto, 91 Haw. 372, 388, 984 P.2d 1198 (1999), *reconsideration denied* (1999), *citing* Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 243, 953 P.2d 1315, 1341 (1998).

42. Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, *supra* note 41, 87 Haw. at 243; *see also* Medeiros v. Hawaii County Planning Commission, 8 Haw.App. 183, 195, 797 P.2d 59, *reconsideration denied*, 8 Haw.App. 661, 868 P.2d 466 (App. Div. 1990) (“A contested case hearing is not essential to the guarantee of due process. The legislature has inherent power to establish the procedure for a particular type of case”); 2 Am.Jur.2d, Administrative Law, §298 (“no absolute right to formal hearing”) (1994).
43. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
44. Id.; Bank of Hawaii v. Kunimoto, *supra* note 41, 91 Haw. at 388, *citing* Mathews v. Eldridge, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.
45. The process that is due in any particular case may vary greatly depending on the facts of the case and the competing interests involved. For example:

In one case, the [United States] Supreme Court held that a welfare recipient’s interest in avoiding an erroneous termination of welfare benefits prior to a full hearing outweighed the government’s interest in summary adjudication. The Court determined that prior to the termination of benefits the welfare recipient was entitled to an evidentiary hearing with the following procedural due process components: (1) timely and adequate notice; (2) an opportunity to confront adverse witnesses and present oral evidence; (3) the right to appear with counsel; (4) a determination based solely on the record and one that states reasons for the decision and the evidence relied on; (5) and an impartial decisionmaker.

However, the fact that there is a right to a hearing does not necessarily mean that a full trial-type hearing is mandated, at least outside the welfare area. For example, the Supreme Court has held that students cannot be suspended from public school without a prior hearing but that the hearing need entail no more than an opportunity for the student to tell his side of the story.

Stein, Mitchell, and Mezines, *supra* note 40, §32.02[1] at 32-26 to 32-28 (footnotes omitted).

46. *See, e.g.*, Palmer v. City of Ojai, 178 Cal.App.3d 280, 223 Cal.Rptr. 542, 545 (App. 2 Dist. 1986) (California’s automatic approval law did not violate due process clause for failure to specifically provide notice and hearing to persons who may be adversely affected by proposed development project).
47. *See, e.g.*, Ka Pa’akai o Ka’aina v. Land Use Commission, 94 Haw. 31, 42, 7 P.3d 1068 (2000) (citations omitted):

With regard to native Hawaiian standing, this court has stressed that “the rights of native Hawaiians are a matter of great public concern in Hawai[‘i].” ... Our “fundamental policy [is] that Hawaii’s state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the ‘needs of justice’ would be best served by allowing a plaintiff to bring claims before the court.” ...

We have also noted that, “where the interests at stake are in the realm of environmental concerns[,] ‘we have not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements.’” ... Indeed, “[o]ne whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.”

48. Pele Defense Fund v. Puna Geothermal Venture, 77 Haw. 64, 68, 881 P.2d 1210 (1994) (emphasis in original).
49. Cal. Gov't Code §§65920 et seq. (West 2000).
50. 156 Cal.Rptr. 718, 596 P.2d 1134 (1979).
51. While Horn did not involve a “deemed approval” under the Permit Streamlining Act, “its analysis has been the foundation for subsequent deemed approval decisions.” Gregory G. Brooker and Karen R. Cole, “Automatic Approval Statutes: Escape Hatches and Pitfalls,” 29 The Urban Lawyer 3 (Summer 1997), p. 471.
52. Horn v. County of Ventura, 596 P.2d at 1138-1140. In particular, the Court held that “whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs.” Id., 596 P.2d at 1140.
53. Id., 596 P.2d at 1141. The Court further noted that “[t]hose persons significantly affected by a proposed subdivision cannot reasonably be expected to place themselves on a mailing list or ‘haunt’ county offices on the off-hand chance that a pending challenge to those interests will thereby be revealed.” Id.
54. Id.
55. 234 Cal.Rptr. 598, 603 n.2, 189 Cal.App.3d 986 (Cal. App. 1 Dist. 1987).
56. 264 Cal.Rptr. 499, 508, 216 Cal.App.3d 259 (Cal. App. 4 Dist. 1989), *review denied* (1990).
57. Brooker and Cole, *supra* note 51, at 472.
58. Id.; *see Selinger v. City Council of Redlands*, 264 Cal.Rptr. at 502 n.3 and 508 n.8.
59. Similarly, Massachusetts’ automatic approval statutes “do not run afoul of the Due Process Clause in this respect because they separately provide for public notice before hearings are held.” Brooker and Cole, *supra* note 51, at 473 n.151.
60. Relevant sections of the Hawaii Administrative Procedure Act include the following:
  - Haw. Rev. Stat. §91-9(a) and (b) (“contested cases; notice; hearing; records”), provides for notice and hearing in contested cases. Subsection (a) provides: “In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.” (Emphasis added.) Subsection (b) lists what items are to be included in the notice, including the date, time, place, and nature of the hearing; the legal authority for holding the hearing; the sections of statutes and rules affected; a statement of the issues involved and facts alleged by the agency; and the fact that any party may retain counsel.
  - Haw. Rev. Stat. §91-9.5 (“notification of hearing; service”), specifies that, unless otherwise provided by law, “all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.” (Emphasis added.) If service cannot be made by mail, “the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing.”
  - Haw. Rev. Stat. §91-1(5) and (6) (“definitions”), defines a “contested case” as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined

after an opportunity for agency hearing.” (Emphasis added.) An “agency hearing”, on the other hand, “refers only to such hearing held by an agency immediately prior to a judicial review of a contested case...”.

61. While chapter 92, HRS, does not apply to contested case hearings or most other adjudicatory functions exercised by agencies (*see* section 92-6(a)(2)), it does apply to agency meetings at which official actions are taken, as well as to “open deliberation of the adjudicatory functions of the land use commission.” Haw. Rev. Stat. §92-6(b). Relevant sections of the “sunshine law” include the following:

- Haw. Rev. Stat. §92-7 (“notice”), requires agencies to “give written public notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance” (emphasis added), which is to include an agenda listing all of the items to be considered at the meeting, the date, time, and place of the meeting, and the purpose in the case of an executive meeting. The board is required to maintain a list of names and addresses of persons who request notification of meetings and mail a copy of the notice to those persons no later than the time the agenda is filed.
- Haw. Rev. Stat. §92-15 (“boards and commissions; quorum; number of votes necessary to validate acts”) provides that the concurrence of a majority of all the members to which the board or commission is entitled is necessary to make any action of the board or commission valid; “provided that due notice shall have been given to all members of the board or commission or a bona fide attempt shall have been made to give the notice to all members to whom it was reasonably practicable to give the notice.” (Emphasis added.)
- Haw. Rev. Stat. §92-41 (“giving public notices”), requires all agencies scheduling a public hearing to give public notice in the county affected by the proposed action, to inform the public of the time, place, and subject matter of the public hearing. Moreover, this section provides that “[t]his requirement shall prevail whether or not the governmental agency giving notice of public hearing is specifically required by law, and shall be in addition to other procedures required by law.” (Emphasis added.)

62. For example, Haw. Rev. Stat. §436B-7(1) allows licensing authorities to conduct contested case proceedings pursuant to chapter 91, HRS.

63. *See, e.g.*, Haw. Rev. Stat. §205-4(b) and (c), which requires the Land Use Commission to provide notice and hearing in petitions to amend district boundaries involving land areas greater than fifteen acres:

(b) Upon proper filing of a petition pursuant to subsection (a) the commission shall, within not less than sixty and not more than one hundred and eighty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, as applicable.

(c) Any other provision of law to the contrary notwithstanding, notice of the hearing together with a copy of the petition shall be served on the county planning commission and the county planning department of the county in which the land is located and all persons with a property interest in the land as recorded in the county's real property tax records. In addition, notice of the hearing shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and public notice shall be given at least once in the county in which the land sought to be redistricted is situated as well as once statewide at least thirty days in advance of the hearing. The notice shall comply with section 91-9, shall indicate the time and place that maps showing the proposed district boundary may be inspected, and further shall inform all interested persons of their rights under subsection (e).



See also Haw. Rev. Stat. §§281-52 and 281-57, regarding notice and hearing provisions to obtain a license from a county liquor commission.

64. For example, notice and hearing are provided in chapter 5 (“public hearings”) of the Rules of Practice and Procedure of the City and County of Honolulu’s Department of Planning and Permitting, and section 13-5 (“public hearing”) of the Special Permit rules of the Kauai County Planning Commission.
65. Conference Committee Report No. 143 to S.B. No. 2204, C.D. 1 (1998), p. 2, states: “Your Committee on Conference notes the continued concerns of some that automatic permit approval will be misused to short-circuit existing public input processes. Your Committee is confident that agencies will account for the preservation of such processes in their rulemaking.”
66. Black’s Law Dictionary (West, 5th ed., 1979), p. 1334.
67. The question may be asked whether agencies may use tolling in place of extensions, since tolling is not specifically prohibited by section 91-13.5, HRS, but extensions for an event other than a national disaster, state emergency, or union strike are prohibited. Under the legislative intent of that section to provide for agency action within a “definite” time frame or date certain, it may be argued that agencies would similarly be prohibited from using this technique, since tolling the maximum time period would extend the maximum time period to an indefinite point in time.

The counter argument is that statutes of limitation, which provide fixed, maximum time periods for the commencement of causes of action, also allow for the tolling of those periods in the event of a person’s minority or other incapacity to act, but the limitations period re-starts upon the removal of the disability. See, e.g., Haw. Rev. Stat. §657-13 (“infancy, insanity, imprisonment”).

68. A fair and open hearing is especially important in the regulatory context. As noted by the United States Supreme Court in Ohio Bell Tel. Co. v. Public Utilities Comm’n of Ohio, 301 U.S. 292, 304-305 (1937) (emphasis added):

Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. ... Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the “inexorable safeguard” ... of a fair and open hearing be maintained in its integrity. ... The right to such a hearing is one of the “rudiments of fair play” ... assured to every litigant by the Fourteenth Amendment as a minimal requirement. ... There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.

69. A “full hearing” is one in which “ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken ... ‘A hearing may be a full one, although evidence introduced does not enable the tribunal to dispose of issues completely or permanently, and although the tribunal is convinced, when entering the order ... that, upon further investigation, some changes in it will have to be made.’” Application of Kauai Elec. Division of Citizens Utilities Co., 60 Haw. 166, 182, 590 P.2d 524 (1978).
70. Agency “action” is discussed in greater detail in part C.1. of this chapter; see Haw. Rev. Stat. §91-13.5(c) (“All such issuing agencies shall take action to grant or deny any application ...”) (Emphasis added).

71. Similar language was included in an earlier draft of the bill for Act 164. Specifically, S.B. No. 2204, S.D. 1 (1998), section 3, added the following proviso to the “deemed approved” provision: “... provided further that any public notice of the automatically approved application that is required by law has occurred.”
72. Letter to the author from Carl C. Christensen, Staff Attorney, Native Hawaiian Legal Corporation, dated June 30, 2000, p. 2. Mr. Christensen notes that “such an amendment would substantially reduce the adverse impacts of Act 164 by allowing the public to put pressure on relevant officials to ensure that important or controversial applications are acted upon under the existing regulatory system and are not allowed to fall into the approval-by-default category, thus ensuring public accountability.” Id.
73. Haw. Rev. Stat. §91-10 provides as follows:
- §91-10 Rules of evidence; official notice.** In contested cases:
- (1) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.
  - (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.
  - (3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.
  - (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.
  - (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.
74. Haw. Rev. Stat. §91-11 provides as follows:
- §91-11 Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.
75. Price v. Zoning Bd. of Appeals of City and County of Honolulu, 77 Haw. 168, 176 n.8, 883 P.2d 629 (1994) (citation omitted). Moreover, the requirements under section 91-9(c), HRS, that “[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved” does not apply “in every situation where someone’s interest may be adversely affected by agency action”, i.e., in agency proceedings that do not involve contested cases. Sharma v. State, Dept. of Land and Natural Resources, 66 Haw. 632, 639, 673 P.2d 1030, *cert. denied*, 469 U.S. 836, 105 S.Ct. 131, 83 L.Ed.2d 72 (1983).

76. Desmond v. Administrative Director of the Courts, State of Hawaii, 91 Haw. 212, 220, 982 P.2d 346 (App. 1998) (citing 2 Am.Jur.2d, *Administrative Law* §345 (1994)):

The technical rules of evidence applicable to judicial proceedings generally do not govern administrative agency proceedings, and need not be observed so long as evidentiary rules which are applied are not applied in an arbitrary or oppressive manner that deprives a party of his or her right to a fair hearing. The more liberal an administrative agency's policy is in admitting evidence, the more essential it is that the agency grant the parties the right to cross-examine and rebut evidence considered by the agency. An agency should receive all evidence which is competent, relevant and material, regardless of its weight, and a refusal to hear such evidence can constitute denial of due process.

See also Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, *supra* note 41, 87 Haw. at 236, quoting Dependents of Cazimero v. Kohala Sugar Co., 54 Haw. 479, 510 P.2d 89 (1973): At a contested case hearing required under the Hawaii Administrative Procedures Act, the agency must admit "any and all evidence limited only by considerations of relevancy, materiality and repetition." See generally Davis and Pierce, *supra* note 40, at 117-172.

77. See, e.g., *supra* note 47; see also Haw. Rev. Stat. §205-4(e)(1) to (5), permitting agencies and persons to intervene in proceedings to petition the Land Use Commission for a change in the boundary of a district involving land areas greater than fifteen acres; Haw. Admin. Rules §15-15-52.
78. For example, Kauai County Planning Commission's special permit rules specify that "[i]n cases where contested case/intervention proceedings pursuant to these Rules are instituted, the time lines established for such proceedings shall apply and the maximum period of time for action by the Commission shall be within sixty (60) days after the presentation of final oral arguments or within a longer period as may be agreed by the parties to the extent permitted by law. If a quorum or a majority vote on a petition is not obtained by the expiration of the applicable time period above, the Commission shall have a maximum time period of an additional forty-five (45) days to vote on the petition." Kauai County Planning Commission's rules on special permits, §13-7(b) ("maximum time period"). The question whether an automatic extension as provided in this subsection violates section 91-13.5, HRS's requirement of a "maximum time period", i.e., not two maximum time periods, is discussed in part C of chapter 5 relating to extensions and waivers.
79. See *supra* notes 68 and 69 and accompanying text. The rules of the Land Use Commission, for example, require the presiding officer at a hearing to "control the schedule and course of the hearings ... and take all other actions authorized by law that are deemed necessary to the orderly and just conduct of a hearing." Haw. Admin. Rules §15-15-60(b). The Commission's rules also allow the presiding officer to refer a matter involving a question on the admissibility of evidence to the Commission for determination "[i]n extraordinary circumstances, where prompt decision by the commission is necessary to promote justice...". Haw. Admin. Rules §15-15-63(c). The presiding officer may also limit the number of witnesses or the time for testimony on a particular issue to avoid unnecessary cumulative evidence. Haw. Admin. Rules §15-15-65.
80. In particular, section 3 of S.B. No. 2204, S.D. 2 (1998), the bill for Act 164, contained language that the Legislature could reconsider that provides additional due process safeguards in contested case hearings:

Unless otherwise provided by law governing the agency which establishes a time period to act, for contested case hearings, an agency shall establish a time period that affords an opportunity to all parties to establish the record on all matters related to the completed application pursuant to section 91-9; provided that the agency for good cause shown may extend the time period upon a specific finding that the due process rights of any party to the contested case hearing, who has not unduly delayed the hearing, will be jeopardized without such extension. The agency also shall establish a time period in which to act on a

completed application after the hearing record is complete; provided that unless otherwise provided by law governing the agency which establishes a time period to render a decision the period may be tolled if the agency determines that there is good cause to reconvene a hearing.

81. The Attorney General has also suggested that the Legislature may wish to clarify whether section 91-13.5, HRS authorizes agencies to adopt rules specifying that the maximum time period begins to run after the completion of a contested case hearing. *See* Appendix C, endnote 1 (paragraph 7).
82. Cal. Gov't Code §65922(b) (West 2000).
83. One type of administrative appeal is discussed in section 6E-43(c), HRS (“prehistoric and historic burial sites”), which provides that determinations of island burial councils may be administratively appealed to a panel composed of three council chairpersons and three members from the board of land and natural resources as a contested case pursuant to chapter 91, HRS. The Land Use Commission also reviews petitions for special permits submitted by county planning commissions and may act to approve, approve with modification, or deny the petition. *See* Haw. Admin. Rules §15-15-96(a).
84. Haw. Rev. Stat. §91-9(e) (“contested cases; notice; hearing; records”).
85. *See, e.g.*, Haw. Rev. Stat. §205-5.1(h) (“geothermal resource subzones”).
86. *See, e.g.*, McGlone v. Inaba, 64 Haw. 27, 32-33, 636 P.2d 158 (1981).
87. Another possibility is that there may be a record on appeal, but the application was automatically approved because the agency simply could not reach a decision, for example. The court in this case could rule that the agency should have been able to decide, based on the record, under section 91-14(g)(5) and (6), HRS, and that failure to decide was clearly erroneous or arbitrary or capricious.
88. Application of Hawaii Elec. Light Co., Inc., 60 Haw. 625, 641-642, 594 P.2d 612 (1979) (citations omitted; emphasis added). However, while an administrative agency is required to rule upon proposed findings, a separate ruling on each proposed finding filed by a party “is not indispensable”: “It requires that the parties not be left to guess, with respect to any material questions of fact, or to any group of minor matters that may have cumulative significance, the precise findings of the agency.” Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 265, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020, 108 S.Ct. 1573, 99 L.Ed.2d 888; *see also* Davis and Pierce, *supra* note 40, at §8.5 (“When Must an Agency Provide Findings and Reasons?”), vol. 1, pp. 392-394.
89. Haw. Rev. Stat. §91-14(g)(5) and (6) (“judicial review of contested cases”) sets forth the standard of review for a review court as follows:

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under this subsection, conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of its discretion is reviewable under subsection (6). Accordingly, a reviewing court “will reverse an agency's findings of fact if it concludes that such a finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. HRS §91-14(g)(5). On the other hand, the agency's conclusions of law are freely reviewable.” In re Gray Line Hawaii Ltd., 93 Haw. 45, 53, 995 P.2d 776 (2000) (citations omitted).

90. *See, e.g., Curtis v. Board of Appeals, County of Hawaii*, 90 Haw. 384, 392, 978 P.2d 822 (1999) (citation omitted): “[T]he agency’s decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.” *See also In re Gray Line Hawaii Ltd.*, *supra* note 89, 93 Haw. at 53: “[C]ourts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field.”)
91. Sifagaloa v. Board of Trustees of Employees’ Retirement System of State of Hawaii, 74 Haw. 181, 194, 840 P.2d 367 (1992) (footnote and citation omitted).
92. The remand of an agency’s decision pursuant to HRS §91-14(g) is appropriate if the agency’s findings are incomplete and provide no basis for review. International Broth. Of Elec. Workers, Local 1357 v. Hawaiian Telephone Co., 68 Haw. 316, 328, 713 P.2d 943 (1986) (citation omitted); *see also Application of Kauai Elec. Division of Citizens Utilities Co.*, *supra* note 69, 60 Haw. at 185, quoting McQuay v. Delaware Alcoholic Beverage Control Comm’n, 338 A.2d 129 (Del. 1975) (“A remand is proper where an agency has made invalid, inadequate or incomplete findings.”)
93. Haw. Rev. Stat. §91-14(a) (“judicial review of contested cases”), states that “[a]ny person aggrieved by a final decision and order in a contested case ... is entitled to judicial review under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.” (Emphasis added).
94. Jordan v. Hamada, 64 Haw. 446, 449, 643 P.2d 70 (1982).
95. *See, e.g., Conservation Council for Hawaii v. Babbitt*, 24 F.Supp.2d 1074, 1076 (D. Haw. 1998) (citations omitted): “In setting a timetable for agency action, the Ninth Circuit has instructed courts to follow a standard of reasonableness.”
96. For example, one option may be to amend Haw. Rev. Stat. §91-14(g), to add a new standard of appellate review in contested cases, namely, that the court may stay the automatic approval and remand if the court determines that automatic approval “jeopardizes public health, safety, and welfare” or “fails to adequately protect public health, safety, and welfare”. But there are other problems with this approach. First, by amending the Hawaii Administrative Procedure Act, this would apply to all contested cases, not merely those for which there is an automatic approval. Moreover, it may be argued, there is nothing to prevent an agency from deliberately not developing a record, allowing a project to be automatically approved (assuming that it will be appealed), and the appellate court remands the case because it harms public health and safety. Will the agency obtain another chance to review the permit? What is the new time limit, if any? It may be a judicially imposed maximum time limit, or there may be no new time limit.
97. Special Permit Rules of the Kauai County Planning Commission, §13-8(a)(2) (“action”). The rules further allow any party to seek judicial review of the Commission’s final decision in the manner set forth in section 91-14, HRS. *See* §13-8(d). The issue of failure to obtain a quorum to vote on a motion to adopt findings of fact, conclusions of law, decision and order, is addressed in the next section of this chapter.
98. *See* Mass. Gen. Laws ch. 40A, §9, 15.

99. See Haw. Rev. Stat. §1-15(3).
100. Brooker and Cole, *supra* note 51, at 458 (footnote omitted).
101. Black's Law Dictionary (West 1979, 5th ed.), p. 1130 (definition of "quorum"; citation omitted).
102. California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215, 218 (9th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975).
103. Hawaii Attorney General Op. No. 85-11, p. 2 (citations omitted).
104. See, e.g., D.E.P. Resources, Inc. v. Planning Bd. of Village of Monroe, 516 N.Y.S.2d 954, 955, 131 A.D.2d 757 (App. Div. 2d Dept. 1987), quoting Matter of Town of Smithtown v. Howell, 31 N.Y.2d 365, 376, 339 N.Y.S.2d 949, 292 N.E.2d 10: "At common law, 'a majority of a body constituted a quorum, and if there were a quorum, a vote of a majority of those present was sufficient for valid action.'" (Emphasis added.)
105. Hawaii Attorney General Op. No. 85-11, p. 2.
106. Haw. Rev. Stat. §92-15 ("boards and commissions; quorum; number of votes necessary to validate acts") provides as follows:
- Whenever the number of members necessary to constitute a quorum to do business, or the number of members necessary to validate any act, of any board or commission of the State or of any political subdivision thereof, is not specified in the law or ordinance creating the same or in any other law or ordinance, a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board or commission is entitled shall be necessary to make any action of the board or commission valid; provided that due notice shall have been given to all members of the board or commission or a bona fide attempt shall have been made to give the notice to all members to whom it was reasonably practicable to give the notice. ... (Emphasis added.)
107. See, e.g., Haw. Rev. Stat. §205-6(c) ("special permit"), which provides that "[a] decision in favor of the applicant shall require a majority vote of the total membership of the county planning commission"; see also §171-5 (board of land and natural resources; meetings, regular, special; quorum), which provides that "[a]ny action taken by the board shall be by a simple majority of the members of the board. Four members of the board shall constitute a quorum to do business." See also Hawaii Attorney General Op. No. 80-1 (four affirmative or negative votes are necessary for a decision at any meeting of the Board of Trustees of the Employees' Retirement System; however, there is no requirement that any motion failing to receive either four affirmative or negative votes must be automatically deferred to a subsequent meeting, reversing a Sept. 13, 1963 Attorney General letter opinion to the Retirement System).
108. See, e.g., Maui County Charter, §13-2(8) ("boards and commissions"), which provides that "[a] majority of the entire membership of a board or commission shall constitute a quorum to do business, and the affirmative vote of a majority of the entire membership of a board or commission shall be necessary to take any action."
109. Both the Hawaii Senate and House of Representatives have adopted Mason's Manual of Legislative Procedure to govern in those bodies, where otherwise not inconsistent with their respective rules. See Senate Rule No. 86; House of Representatives Rule No. 59, Twentieth State Legislature, State of Hawaii (1999-2000). Mason's Manual (1989) provides that "[o]rdinarily a 'quorum' means a majority of all entitled to vote.... Every member entitled to vote should be counted in determining whether a quorum is

present, but members disqualified on account of interest from voting on any question cannot be counted for the purpose of making a quorum to act on that question.” §502(1) and (2).

110. Brooker and Cole, *supra* note 51, at 457 n.85, citing Minn. Stat. §462.357(2) (1996) (two-thirds majority required for zoning ordinance amendments).
111. Tie votes are discussed more generally in part C.2. of this chapter.
112. Haw. Rev. Stat. §91-13.5(c) (emphasis added).
113. Haw. Rev. Stat. §1-15 (“construction of ambiguous context”).
114. *But see* discussion in part D.4. of chapter 5, arguing that this language can be read to imply that the agency may take action to conditionally grant and application.
115. Sutherland Stat. Const. §48:08 (6th ed., 2000), p. 448 (footnote omitted).
116. Conference Committee Report No. 143 replaced an Conference Committee Report No. 127. The bill was recommitted to the Conference Committee “to make technical corrections to Conference Committee Report No. 127 which did not accurately reflect the contents of the C.D. 1 agreed upon in conference.” Conf. Comm. Rep. No. 143, p. 1.
117. Journal of the House of Representatives of the Nineteenth Legislature, State of Hawaii, Regular Session of 1998, 64th Day, p. 875.
118. Moreover, as noted in chapter 5 of this report, the following language was originally included in section 2 of Senate Bill No. 2204, S.D. 1 and S.D. 2 (1998), but was removed from subsequent drafts of the bill that finally became Act 164: “The Act is intended to avoid prejudice to applicants for business or development-related approvals that are the result of an agency’s deliberate, dilatory, or inexcusable inaction ...”. It may be argued that the Legislature originally considered section 91-13.5, HRS to apply to an agency’s deliberate or dilatory inaction, not to all agency inaction. By excising this language from subsequent versions, the intent of the Legislature was to remedy all types of agency inaction, not only inaction resulting from undue agency delay. Inaction, in this sense, could mean the simple failure of a board or commission to grant or deny a permit, for whatever reason.

However, the fact that the Legislature removed language from the preamble that the law was intended to apply to “an agency’s deliberate, dilatory, or inexcusable inaction” does not change the fact that automatic approval laws in general are intended to avoid prejudice to applicants resulting from procrastination, not cases in which the agency has in fact acted to vote on an application. Since section 91-13.5 was intended to reduce procrastination by agencies, where the agency in fact took the necessary actions but could not reach the requisite number of affirmative votes to approve or deny, the rationale for penalizing the agency is missing. In these cases, the purpose of reducing agency procrastination ““would be unjustifiably distorted in a manner patently subversive to the public interest if the automatic approval provision were to be applied in a mechanical fashion.’ ... [A]utomatic approval was not required in cases of ‘inadvertence, ignorance or misunderstanding’ and ... it is reserved for cases involving ‘bad faith, sharp practice, overreaching or dilatory conduct.’” Brooker and Cole, *supra* note 51, at 448, quoting D’Anna v. Planning Board of the Township of Washington, Morris County, 606 A.2d 417, 419 (N.J. Super. Ct. App. Div. 1992). Brooker and Cole note, however, that “[g]overnment bodies should not, however, rely on cases like the *D’Anna* decision because plenty of other decisions have strictly interpreted the time deadlines and completeness requirements [of automatic approval statutes].” Id. at 448-449.

119. For example, in testifying on S.B. No. 2204, S.D. 2, H.D. 1 (1998), the bill for Act 164, the Attorney General noted the following:

We understand that one of the various motivations for this bill is to shorten the time period for approvals of land use boundary amendments by the Land Use Commission under chapter 205[, Hawaii Revised Statutes]. We note that under section 205-4(h), “six affirmative votes of the commission shall be necessary for any boundary amendment under this section.” We believe that section 205-4(h) will be in conflict with the automatic approval provisions of S.B. No. 2204[, S.D. 2, H.D. 1 (1998)]. In the event of a conflict between statutory provisions, the rules of statutory construction would require the specific provisions of section 205-4(h), which are only applicable to land use boundary amendments, to supersede the general automatic approval provisions that appear to apply to a very broad range of “state business and/or] development-related permits.” Consequently, the automatic approval provisions of S.B. 2204, may not be applicable to petitions for land use boundary amendments. (Emphasis added.)

Memorandum from Winfred Pong, Deputy Attorney General, to Rick Egged, Director of Office of Planning, April 7, 1998, page 3, included as “Attachment 1” in letter from Rick Egged to Norman Mizuguchi, Senate President, April 17, 1998, regarding S.B. No. 2204 (1998).

120. Letter from James B. Takayesu, Maui Corporation Counsel, to Earl I. Anzai, Hawaii Attorney General, May 11, 2000, p. 2 (*see* Appendix P).
121. Haw. Rev. Stat. §1-14 (“words have usual meaning”).
122. Black’s Law Dictionary (West 1979, 5th ed.), p. 26 (definition of “action”); *see also* Leslie v. Estate of Tavares, 93 Haw. 1, 4, 994 P.2d 1047 (2000) (“An ‘action’ is generally defined as a ‘proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.’”)
123. The Random House Dictionary of the English Language (Unabridged), (2nd Ed., 1987), p. 20 (definition of “action”; meaning no. 2).
124. Haw. Rev. Stat. §84-3 (“definitions”).
125. 5 U.S.C. §551(13) (emphasis added).
126. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 423 n.7 (1980), cited in Stein, Mitchell, and Mezines, *supra* note 40, §43.01, p. 43-7 n.13. Moreover, under the APA, “courts have adopted a pragmatic approach, considering factors such as the binding nature of the decision, its force as a regulatory mechanism, and injury to affected parties.” Id. at 43-2. An “action” taken by a board or commission with less than a quorum to take official action will not have “binding” effect on the applicant. However, under the APA, “[c]ourts will consider the effect of administrative action in terms of the agency’s statutory mandate...”. Id. at 43-10 (footnote omitted). If the statutory mandate of the agency requires an affirmative majority of four out of six members to approve or deny an application, for example, anything short of that number is a non-decision – which, under the APA’s definition of “agency action” is itself an action, since may be deemed to be a “failure to act”.
127. Civil No. 96-131K (Kona) (Agency Appeal); this case is currently pending before the Hawaii Supreme Court under the name Waimana Enterprises, Inc. v. Maile, Hawaii Supreme Court Docket No. 21369 (consolidating Civil Nos. 94-059K, 94-070K, 94-123K, 95-094K, 96-131K, 96-141K, 96-142K, 96-143K, and 96-144K).
128. *See* 1994 Haw. Sess. Laws Act 270, section 3.
129. The new corresponding automatic approval provision is contained Haw. Rev. Stat. §183C-6(b).



130. In the Matter of Conservation District Use Application for Keahole Generator Station Expansion, CDUA No. HA-487A, Minute Order No. 11, dated April 22, 1996, paragraphs 1 to 3.
131. Section 171-5, HRS, provides in relevant part: “Any action taken by the Board shall be by a simple majority of the members of the board. Four members of the board shall constitute a quorum to do business.” It has been argued that this section does not require a fixed number of votes, but requires only a simple majority under the common law rule discussed earlier in this section. *See, e.g.*, Appellant Peggy Ratliff’s Opening Brief to the Hawaii Supreme Court in Waimana Enterprises, Inc. v. Maile, Hawaii Supreme Ct. Docket No. 21263, dated March 27, 1998, at 22-26.
132. Hawaii Electric Light Company, Inc. v. Department of Land and Natural Resources, Civil No. 96-131K (Amended Findings of Fact, Conclusions of Law, and Decision and Order), Conclusions of Law Nos. 7, 8 (Ibarra, J., dated July 9, 1997).
133. *Id.*, paragraph 13. Former Board of Land and Natural Resources member Chris Yuen has commented on this result as follows: “As far as the HELCO court case, Judge Ibarra ruled that a 3-2 vote against was not a denial, so the project could go forward.... I think that the judge was locked in to ruling this way to some extent by the fact that the people opposed to the permit had argued that the 2-0 vote in 1994 was going to result in approval, and that they would then not have a contested case hearing, which would be a denial of due process. And Judge Ibarra agreed with that. ... So they were all locked into the line of thinking that the failure to get enough votes for a denial was approval.” “An Interview with Chris Yuen as He Leaves the Land Board,” Environment Hawaii, vol. 9, no. 1 (July 1998), p. 9; *see also* David Kimo Frankel, “Automatic Development”, Honolulu Weekly, June 17-23, 1998, p. 4 (“It is irrelevant, as far as HELCO is concerned, that a board member recused himself from voting because of a potential conflict of interest. Since, according to HELCO, the only way to block the automatic approval of a project in the conservation district is for four members of the BLNR to vote ‘no,’ the recusal becomes a de facto ‘yes’ vote.”)
134. Frankie Stapleton, “State Can Regulate Expansion of Keahole Power Plant, Judge Rules,” Honolulu Star-Bulletin, December 10, 1997, p. A2.
135. *See* “Land Board Vote on Keahole Plant Is Taken to State Supreme Court,” Environment Hawaii, vol. 8, no. 11 (May 1998), p. 4.
136. Civil No. 88-0648, Order (Hawaii Circ. Ct., March 20, 1989); *see also* “Judge Overturns Land Board Denial of Time Extension for Engelstad House,” Environment Hawaii, vol. 7, no. 9 (March 1997), p. 8; “Board Extinguishes Conservation Permit for Engelstad House on Lanikai Hillside,” Environment Hawaii, vol. 6, no. 6 (March 1997), p. 7.
137. The deadline was established under repealed §183-41, HRS, and §13-2-20, HAR, the same provisions at issue in HELCO, *supra*.
138. Civil No. 88-0648, Order (Hawaii Circ. Ct., March 20, 1989), p. 4. The Board later successfully challenged the revision of the 180-day deadline, which was re-established to expire on January 30, 1988. The Board took another vote on the CDUA on January 21, 1988, and was able to garner a four-vote majority to deny the application. *See* Environment Hawaii (March 1997), *supra* note 136, at 8. Related litigation on the CDUA has continued through 1997.
139. Civil No. 99-0254, Decision and Order Dismissing the Appeal and Affirming the Decision of the Kauai Planning Commission, (Hawaii Circ. Ct., Aug. 10, 2000).
140. *See id.* at 26; *see generally* “Activists Around the State Mobilize to Halt Electric Utility Projects,” Environment Hawaii, vol. 10, no. 8 (Feb. 2000), p. 7 (“Kauai Power Plant Draws Court Challenge”).

141. The cases discussed in this section are representative only; no attempt has been made to include an exhaustive list of cases on this subject.
142. *See, e.g.*, Brooker and Cole, *supra* note 51, at 457-458.
143. For example, the *amicus curiae* brief of the Sierra Club submitted by the Earthjustice Legal Defense Fund in Waimana Enterprises, Inc. v. Maile, Hawaii Supreme Court Docket No. 21369, argues at p. 12 that “although HELCO and DLNR try to suggest that there is simply a split of authority on this critical issue, with some courts holding that a failure to garner the number of votes needed to render effective action results in automatic approval, and others going the other way, they can cite only one jurisdiction – New York – that takes the position adopted by the circuit court in this case and urged by HELCO and DLNR.”
144. D.E.P. Resources v. Planning Board of Village of Monroe, 516 N.Y.S.2d 954, 131 A.D.2d 757 (App. Div., 2d Dept., 1987).
145. *See also* Squicciarini v. Planning Bd. of Town of Chester, 367 N.Y.S.2d 845, 48 A.D.2d 687 (App. Div. 2d Dept., 1975), *aff'd*, 38 N.Y.2d 958, 348 N.E.2d 609 (1976) (where planning board’s denial of an application for a special permit was by less than a majority of the 7 members, the vote was ineffectual to deny the application and was equivalent to “nonaction”; failure of planning board to take action within 45-day period resulted in application being deemed approved); *but see* Steers Sand & Gravel Corp. v. Village Bd. of Village of Northport, 129 N.Y.S. 403 (Supreme Ct., Suffolk Cty., 1954) (where 4 of 5 members of village board of trustees were present at hearing and one member disqualified himself and 2 of the 3 remaining members present voted against a petition for a change of zone, the vote of less than a majority of the authorized membership was sufficient to defeat petition for change of zone).
146. California ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215 (9th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975); *see also* California Tahoe Regional Planning Agcy. v. Jennings, 594 F.2d 181 (9th Cir. 1979).
147. Penllyn Lands v. Bd. of Supervisors of Lower Gwynedd Township, 638 A.2d 332 (Pa. Cmwlth. 1994), *appeal denied*, 652 A.2d 1328 (Pa. 1994).
148. *Id.*, 638 A.2d at 336, *quoting* Giant Food Stores, Inc. v. Zoning Hearing Board of Whitehall Township, 93 Pa. Commw. Ct. 437, 441, 501 A.2d 353, 355 (1985).
149. In re Appeal of Newton Enterprises, 167 Vt. 459, 708 A.2d 914 (1998).
150. *Id.*, 167 Vt. at 465, 708 A.2d at 918. The Court further maintained that “[a]pplication of the deemed approval remedy in this case produces a perverse result unrelated to the statutory purpose. Instead of remedying indecision or excessive deliberation, the granting of the permit turns a negative decision into a positive one with no finding that the landowner meets the requirements of the zoning ordinance. Thus, the landowner, who does not have the requisite votes to obtain the necessary board approval, receives a permit by operation of law. We doubt the situation here is unique. Recusals are probably common in small towns and would have the same effect in many cases. As our recent decisions make clear, we will not apply the deemed approval remedy in this wooden fashion.” (Citations omitted.)
151. Special Permit Rules of the Kauai County Planning Commission, §13-8(a) (“action”).
152. *Id.*, §13-8(a)(1).
153. *Id.*, §13-8(a)(2).
154. City and County of Honolulu Department of Planning and Permitting, Rules of Practice and Procedure, §1-1 (“definitions”).

155. Haw. Admin. Rules §15-15-13(b). Similarly, subsection (c) of that section provides that if “the commission’s action on a special permit under section 205-6, HRS, fails to obtain five affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the commission.” *See also* chapter 5 of this report discussing the validity of “automatic denial” provisions in administrative rules adopted pursuant to section 91-13.5, HRS.
156. In a letter to the Commission on the Commission’s proposed rules, the Governor of Hawaii has noted that there was a need to clarify that a vote by the commission constituted an action under section 91-13.5, HRS by adding the following language: “A vote by the commission on a petition for boundary amendment or special permit shall constitute an action for the purposes of section 91-13.5, HRS;” and that additional language that “a subsequent vote adopting” findings of fact, conclusions of law, and decision and order was necessary. However, this language was not added to the final draft of the rules. (Letter from Governor Benjamin J. Cayetano to Mr. Merle A. K. Kelai, Chairperson, Land Use Commission, April 28, 2000, p. 2.) The Governor explained his reasoning for the proposed amendment as follows:

We find that there needs to be language to clarify that a vote by the commission constitutes an action under Section 91-13.5, HRS. This language is necessary to address the following situation. The law requires six affirmative votes to approve a boundary amendment. A motion is made to approve a boundary amendment. If the motion fails to receive six affirmative votes, the motion fails. The commission subsequently adopts findings of fact, conclusions of law and decision and order reflecting a denial of the petition. The latter effectuates the commission’s decision. Under the present language of the rules, the petition could be automatically approved if the three hundred and sixty-five day time period runs out between the time the commission has taken its vote on the motion to approve and the time that the commission adopts its findings of fact, conclusions of law and decision and order. This result would be contrary to the intent of Chapter 205, HRS, which requires six affirmative votes for a boundary amendment and to Act 164, SLH 1998, because the commission did take action by voting on the boundary amendment within the time limit. (Emphasis added.)

157. Conference Committee Report No. 143 on S.B. No. 2204, C.D. 1 (1998) states that “[y]our 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.” (Emphasis added.) House Resolution No. 128, H.D. 1 (2000) states that “the 1999 Legislature was assured by representatives of the state administration that as agencies adopted rules, these concerns would be addressed, and therefore, the administration requested the Legislature wait until agencies adopted rules...”. (Emphasis added.)
158. Testimony of the Chairperson of the Board of Land and Natural Resources before the Senate Committee on Commerce, Consumer Protection & Information Technology and the Senate Committee on Health & Environment, regarding S.B. No. 2204 (1998), Feb. 17, 1998:

The Department is statutorily mandated to process Conservation District Use Applications (CDUA’s) within 180 days. The current rules require certain kinds of applications to be approved by the Land board while others may be considered by the Chairman alone. A Circuit Court has interpreted the time limitation and the Land Board voting requirements to mean that unless four of six Board members vote against a CDUA within the time limit, the CDUA is automatically approved. As a result, applicants have been able to proceed with their projects in situations where the Board voted 3-1 or 3-2 to deny the application. An issue has arisen whether any reasonable conditions, including the agency’s general conditions, would then apply to the particular project. Therefore, if

such timeframe mandates are imposed and voting by a board is required, the voting requirements should be examined carefully. (Emphasis in original.)

159. See, e.g., the letter from James B. Takayesu, Maui Corporation Counsel, to Earl I. Anzai, Hawaii Attorney General, dated May 11, 2000, which notes that the County of Kauai had also “struggled with resolving the conflict between the two state laws”, and that it was possible that Maui County “would resolve the conflict between these statutes in a manner different from the approach taken in Kauai’s draft rules and the Land Use Commission’s proposed rules.” (See Appendix P, p. 2; Kauai County and the Land Use Commission have both subsequently finalized their respective rules.) Honolulu Deputy Corporation Counsel Jane H. Howell, in a July 10, 2000, letter to Wendell K. Kimura, Acting Director of the Legislative Reference Bureau, also “agree[d] with Maui County that the issue is an interesting and important one as to which the Land Use Commission and the counties should certainly be consistent.” (p. 2).
  
160. For example, Haw. Rev. Stat. §183C-6(b), which relates to the regulation of land use in the conservation district by the issuance of permits by the Department of Land and Natural Resources, requires the Department to render a decision on a completed application within 180 days of its acceptance. If the department fails to “give notice, hold a hearing, and render a decision” within that time period, “the owner may automatically put the owner’s land to the use or uses requested in the owner’s application.” H.B. No. 2877 (1998), among other things, amended this section by providing that the board’s failure to “conduct a vote on the application” within that time period would trigger the automatic approval provision of that section. The H.D. 1 version of that bill added the following “deemed denied” provision to section 183C-6(b), HRS: “If a timely vote is conducted by the board, the application shall be deemed denied unless approved by a simple majority of the members of the board present and qualified to vote.”
 

Section 92-15, HRS could also be amended as provided in earlier versions of the bill for Act 164, Session Laws of Hawaii 1998, which proposed to return the default quorum requirement back to the common law rule, i.e., that a majority of the members “that are present and not disqualified” constitute a quorum, and that failure to garner enough votes for approval constituted an automatic denial: “If a timely vote on an application which is subject to the time periods provided in section [91-13.5] is conducted by a board or commission, the application shall be deemed denied unless a majority of all members present and not disqualified vote to approve the application.” See section 4 of S.B. No. 2204, S.D. 1 and S.D. 2 (1998).
  
161. Interview with Mr. Jeyan Thirugnanam, Office of Environmental Quality Control, August 23, 2000.
  
162. Conn. Gen. Stat. §8-5 (1999) (“Zoning board of appeals. Alternate members.”) Section 8-5a (“designation of alternate members to act”) states that if a regular member of a board is absent, “he may designate an alternate from the panel of alternates to act in his place. If he fails to make such designation or if he is disqualified, the chairman of the board shall designate an alternate from such panel, choosing alternates in rotation so that they shall act as nearly equal a number of times as possible. If any alternate is not available in accordance with such rotation, such fact shall be recorded in the minutes of the meeting. ”
  
163. Brooker and Cole, *supra* note 51, at 456 n.83, citing Land Waste Management v. Contra Costa County Board of Supervisors, 271 Cal.Rptr. 909, 916, 222 Cal.App.3d 950 (1990): “The political deadlock in this case is a measure of just how controversial this proposed project has become. It is precisely because changes in zoning and the general plan have such far-reaching effects on the future that they cannot be left to nonelected administrative entities, but must be the responsibility of a policy-making body politically answerable to the public.”
  
164. Brooker and Cole, *supra* note 51, at 453.
  
165. New York’s Appellate Division has held that a tie vote of a planning board on a motion to approve a subdivision plat was “tantamount to inaction” and that the application must be deemed approved. See Robert Kapson Enterprises, Ltd. v. Planning Board of Incorporated Village of Amityville, 410 N.Y.S.2d

- 540 (App. Div. 2d Dept. 1978). A 1975 Pennsylvania Commonwealth Court’s holding that a tie vote amounted to inaction under an automatic approval provision was apparently disavowed; *see infra* note 169.
166. The Connecticut Supreme Court has held that the tie vote of an inland wetlands and watercourses agency on a motion to approve a landowner’s application for a permit to construct a single-family dwelling on property located adjacent to a lake constituted a denial of the application, noting that “the failure of an application to garner enough votes for its approval amounts to a rejection of the application...”. *See Huck v. Inland Wetlands and Watercourses Agency of the Town of Greenwich*, 203 Conn. 525, 533, 525 A.2d 940, 945 (1987), *quoting Merlo v. Planning and Zoning Commission*, 196 Conn. 676, 683, 495 A.2d 268 (1985).
167. The New Jersey Supreme Court similarly held that a tie vote by a city council on an application for a use variance did not constitute inaction on the application where the council complied with statutory requirements that it hold a hearing, conduct a review, and render a decision within the statutory period; “[t]he fact that the ‘decision’ reached was inconclusive – at least in the sense that its meaning remained a continuing subject of dispute – does not serve to convert the Council’s attempted action into ‘inaction’ such as to produce a statutory affirmance of the Board’s grant of the variance.” *See Committee for a Rickel Alternative v. City of Linden*, 111 N.J. 192, 199, 543 A.2d 943, 947 (1988).
168. A Pennsylvania Commonwealth Court has held that a tie vote of a zoning board on a petition for the construction and operation of a trash transfer station in a limited industrial district was a “valid decision” when conveyed to the applicant in writing within the statutory time period, since the aggrieved party had the benefit of a statutory zoning appeal as a remedy. *See Danwell Corp. v. Zoning Hearing Board of Plymouth Township*, 108 Pa.Cmwlth. 531, 535, 529 A.2d 1215, 1217 (1987), *citing Giant Food Stores, Inc. v. Zoning Hearing Board of Whitehall Township*, 93 Pa.Cmwlth. 437, 501 A.2d 353, 356 (1985). In *Giant Food Stores*, the Pennsylvania Commonwealth Court held that a zoning board’s tie vote had the legal effect of denying a request for a zoning use variance in accordance “with the settled principle that a tribunal’s divided vote confirms the status quo...”. *Id.*, 93 Pa.Cmwlth. at 438, 501 A.2d at 354. Both *Danwell* and *Giant Food Stores*, however, apparently ignored a previous holding of the Pennsylvania Commonwealth Court that a tie vote of a board of commissioners on a plat application constituted “inaction” under an automatic approval statute, in that there had been no decision by the board. *See Petrone v. Board of Commissioners of Swatara Township, Dauphin County*, 22 Pa.Cmwlth. 415, 349 A.2d 500 (1975). However, the court in *Penllyn Lands v. Bd. of Supervisors of Lower Gwynedd Township*, *supra* note 147, noted that *Petrone* had been disavowed. *See Penllyn Lands*, 638 A.2d at 335; *see also* Brooker and Cole, *supra* note 51, at 455 n.81 and accompanying text.
169. *California ex rel. Younger v. Tahoe Regional Planning Agency*, 516 F.2d 215, 218 (9th Cir.), *cert. denied*, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97 (1975) (citations omitted; emphasis in original); *see also Robert’s Rules of Order Newly Revised* §43 (1970) (“On a tie vote, a motion requiring a majority vote is lost, since a tie is not a majority.”); 59 Am.Jur.2d *Parliamentary Law* §14 (1987) at 365 (footnote omitted) (“Under common law or parliamentary law, an affirmative resolution or action which is the subject of a tie vote fails of adoption.”); Brooker and Cole, *supra* note 51, at 456 (footnote omitted) (“Established rules of order provide that a motion is defeated if it fails to achieve a majority vote of those present and voting. Under general procedural rules, by which most planning boards operate, a tie vote on a motion signifies that the motion has been defeated.”)
170. Brooker and Cole, *supra* note 51, at 455-456 (footnotes omitted).
171. *See* Appendix C, endnote 1 (paragraph 4).
172. *Norco Const., Inc. v. King County*, 649 P.2d 103, 106 (Wash. 1982) (*en banc*):

At some point, however, the clear inference arises that delay is being used as a device to exclude. Such an inference is irresistible in circumstances where planning board or other

approving agency meetings are infrequent, canceled, or simply not scheduled; where relatively minor defects in developer submissions give rise to a tabling of the proposal; where requests for additional data, new information, or the input of state or local agencies are made at each stage of the review process or strung out interminably; where the criteria of judgment continually shift; or where local officials suggest, often informally, that project approval might be more readily forthcoming if the developer voluntarily made concessions not technically required by law.

649 P.2d at 106-107, *quoting* Delogu, “The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses”, 32 Me.L.Rev. 29, 51-52 (1980).

173. Id., 649 P.2d at 107.
174. *See* 1957 Territory of Hawaii Session Laws Act 234, section 2. The current law is contained in Haw. Rev. Stat. §183C-6, replacing §183-41.
175. Letter opinion from Winfred K. T. Pong, Deputy Attorney General, approved by Earl I. Anzai, Attorney General, to Senator Les Ihara, Jr., dated March 20, 2000, pp. 4-5 (Appendix F; footnote omitted). *See also* Jacober v. Sunn, 6 Haw. App. 160, 168-169, 715 P.2d 813 (1986) (statute requiring the state Department of Social Services and Housing to “promulgate such rules and regulations as it deems necessary to enforce and carry out this section” and to “establish criteria and standards for the foregoing conditions and requirements” did not become operative until the Department “performed the conditions specified by the statute by adopting rules implementing the amendments and establishing certain standards for its provisions”).
176. 1998 Haw. Sess. Laws Act 164, section 4.
177. For example, in testifying in favor on S.B. No. 2204, S.D. 2 (1998), which required agencies to adopt rules by December 31, 1999 (section 5) and provided for an effective date of July 1, 2005 (section 7), the following agencies made the comments as follows:
  - The Director of Health testified: “... we suggest amending the bill to either delete the December 31, 1999 rulemaking deadline, and allow agencies to amend their administrative rules to describe the details of the application and approval process on the first occasion that program rules are updated in the normal course of business, or to extend the deadline to December 31, 2004. The 1999 deadline provides too short a period of for major rule amendments by our resource-limited programs, and would also place considerable demands on staff in the Department of the Attorney General, who review all proposed rule amendments for legal form.” Testimony of Lawrence Miike, Director of Health, to the House Committee on Consumer Protection and Commerce, regarding S.B. No. 2204, S.D. 2 (1998), dated March 19, 1998, pp. 1-2. In the Department’s testimony on S.B. No. 2204 as introduced, the Department further noted that “lack of funds to cover public hearing expenses associated with rulemaking and involvement by other agencies, especially the Department of the Attorney General, in the review and approval of proposed amendments will restrict our ability to meet the December 31, 1999 deadline for establishing maximum time frames by rule. Although we may be able to reduce the cost of a Statewide rulemaking by holding a single hearing in Honolulu for all DOH rules needing a time frame amendment, we still may need to request additional funds to carry out the intent of the proposed statute if a 1999 deadline is retained in the bill.” Testimony of Lawrence Miike, Director of Health, to the Senate Committee on Consumer Protection and Information Technology, Health and Environment, regarding S.B. No. 2204 (1998), dated February 17, 1998, pp. 2-3.
  - The Director of the Office of Planning in the Department of Business, Economic Development and Tourism testified: “Sections 5 and 7 are in conflict with one another. In order to avoid potential legal defects in this bill, we have suggested language which cures this defect. This

language would have agencies adopt rules required in Section 3 of this bill, the next time they open their rules for amendment or by July 1, 2005, whichever is earlier. This addresses concerns voiced by various agencies regarding the cost impacts and long lead times required for amending rules.” Testimony of Rick Egged, Director of the Office of Planning, Department of Business, Economic Development and Tourism, to the House Committee on Consumer Protection and Commerce, regarding S.B. No. 2204, S.D. 2 (1998), dated March 19, 1998, p. 3.

- The Chairperson of the Commission on Water Resource Management in the Department of Land and Natural Resources testified: “The bill requires the time frames required by Section 3 be established by December 31, 1999. Due to the legal requirements of Chapter 91, HRS, in promulgating rules, this time frame may not be realistic and will require costs related to advertising and conducting public hearings statewide. At a time of fiscal restraint, such unanticipated expenses, in addition to the staff time which must be committed to such an effort, will strain already limited resources.” Testimony of the Chairperson of the Commission on Water Resource Management, Department of Land and Natural Resources, to the Senate Committee on Ways and Means, regarding S.B. No. 2204, S.D. 1 (1998), dated February 27, 1998, p. 2.
178. The following comment in Conference Committee Report No. 143 to S.B. No 2204, C.D. 1 (the bill for Act 164) suggests that the issue of quorum requirements was not resolved, and would again be taken up at the 1999 legislative session: “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.” Due to the uncertain nature of the quorum problem, it may be argued, agencies may have been waiting for subsequent legislative action to resolve the quorum issue before amending their rules to include maximum time periods for agency action. However, the Report uses the language “as the automatic permit approval rules come into effect”, which appears to negate this argument.
179. *See generally* Cornelius M. Kerwin, Rulemaking: How Government Agencies Write Law and Make Policy (Washington, DC: Congressional Quarterly, Inc., 1994), pp. 105-114; *see also* United States Senate Committee on Government Affairs, Delay in the Regulatory Process (Study on Federal Regulations prepared pursuant to S. Res. 71, to Authorize a Study of the Purpose and Current Effectiveness of Certain Federal Agencies, 95th Cong., 1st Sess., Vol. IV) (Washington, DC: July 1977); Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (Office of the Chairman) (Washington, DC: 2nd ed., 1991), pp. 354-369; Neil Eisner, “Agency Delay in Informal Rulemaking,” 3 The Administrative Law Journal 7 (1989); “Note: Judicial Review of Administrative Inaction,” 83 Colum. L.Rev. 627 (April 1983).
180. Haw. Rev. Stat. §91-3.
181. 1998 Haw. Sess. Laws Act 168, section 2. Section 5 of that Act states that the Act shall be repealed on June 30, 2002.
182. *See supra* note 178.
183. Kerwin, *supra* note 180, at 113. In addition, Kerwin noted that “[s]talling tactics are attractive because in time a conflict may dissipate on its own, the contending parties may reach an agreement that the agency can then ratify, or the burden may pass to an unlucky successor.” Id. at 113-114.
184. For example, the Attorney General has stated that “[i]f rules are not adopted by December 31, 1999, interested persons could commence suit in order to force the [Public Utilities] Commission to adopt rules.” Letter from Randall S. Nishiyama, Deputy Attorney General, approved by Earl I. Anzai, Attorney General, to Paul Shigenaga, Administrative Director, Public Utilities Commission, December 28, 1999, p. 4 (*see* Appendix J).

185. Letter opinion from Winfred K. T. Pong, Deputy Attorney General, approved by Earl I. Anzai, Attorney General, to Senator Les Ihara, Jr., dated March 20, 2000, p. 4 (*see* Appendix F).
186. Haw. Rev. Stat. §281-59.
187. Conference Committee Report No. 143 on S.B. No. 2204, S.D. 2, H.D. 2, C.D. 1 (1998) noted the following: “In some cases in which state permit processing time limits are already established by statute, your Committee on Conference further notes concerns with whether the bill alters the status quo without rulemaking to implement automatic permit approval. These concerns have been articulated with specific reference to the Land Use Commission under chapter 205, Hawaii Revised Statutes. Your Committee’s intent is that all agencies to which this bill applies shall adopt rules implementing the purpose of this bill and that the status quo shall not be altered until such rules are adopted.” (Emphasis added.)
188. 1 Sutherland Stat. Const. §4.05 (5th ed. 1994), p. 128.
189. Id. at 129 (footnote omitted); *see also id.* at §1.07, p. 13: “So long as the determination of the legislative principle remains within the control of the legislative body, the determination of the secondary structure which insures and assists the establishment of the principle is not legislation. The creative element delegated is limited exclusively to arrangements and procedures consistent with the substantive principle.”
190. *See, e.g.,* Davis and Pierce, *supra* note 40, at §2.6, pp. 66-85.
191. Stop H-3 Association v. State Dept. of Transp., 68 Haw. 154, 161, 706 P.2d 446 (1985) (citations omitted); *see also* Foytik v. Chandler, 88 Haw. 307, 319, 966 P.2d 619 (1998), *as amended* (citations omitted); Agsalud v. Blalack, 67 Haw. 588, 591, 699 P.2d 17 (1985) (a rule cannot contradict or conflict with the statute it attempts to implement); Puana v. Sunn, 69 Haw. 187, 189, 737 P.2d 867 (1987) (an agency’s authority to adopt rules is limited to enacting rules that carry out and further the purposes of legislation and do not enlarge, alter, or restrict provisions of the statutes being administered).
192. Haw. Rev. Stat. §91-7(b) (“declaratory judgment on validity of rules”).
193. “Note: Restraining Agency Action: Administrative Discretion and Adoption of Statutes by Reference in Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994),” 75 Nebraska L. Rev. 621, 633 (1996) (arguing that only limited administrative discretion can be delegated by the legislature).
194. Davis and Pierce, *supra* note 40, at §2.6, p. 66: “The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress’ power to delegate its legislative power to an appropriate institution. ‘[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.’ Mistretta v. United States, 488 U.S. 361, 372 (1989). ‘[T]he nondelegation doctrine do[es] not prevent Congress from obtaining the assistance of its coordinate Branches.’ Id. at 372.”
195. Id. at 67.
196. Application of Kauai Elec. Division of Citizens Utilities Co., *supra* note 69, 60 Haw. at 181, *citing* State v. Willburn, 49 Haw. 651, 426 P.2d 626 (1967).
197. For example, the Court has noted that “[a]lthough administrative convenience or even necessity cannot override the constitutional requirement of due process, ... agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” Dedman v. Board of Land and Natural Resources, 69 Haw. 255, 264, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020, 108 S.Ct. 1573, 99 L.Ed.2d 888, *quoting* Yamada v. Natural Disaster



Claims Commission, 54 Haw. 621, 627, 513 P.2d 1001, *opinion adhered to on denial of rehearing*, 55 Haw. 126, 516 P.2d 336 (1973). The Hawaii Supreme Court has also noted that “[i]n many government endeavors it may be impossible in the nature of the subject matter [for the legislature] to specify with particularity the course to be followed. This is most obvious when a new field of regulation is undertaken.” Vega v. National Union Fire Ins. Co. of Pittsburgh, Pa., Inc., 67 Haw. 148, 153, 682 P.2d 73 (1984), *quoting* Stewart, “The Reformation of American Administrative Law,” 88 Harv. L.Rev. 1667, 1695 (1975). In these types of situations, the legislature generally sets down the objects to be attained, legislates on the subject as far as it is reasonably practicable, and delegates the task of developing detailed regulations to an administrative agency. Id.

198. 69 Haw. 238, 738 P.2d 1205 (1987).
199. Id., 69 Haw. at 241.
200. Id., 69 Haw. at 239.
201. Id., 69 Haw. at 242-243 (emphasis added).
202. For example, the word “action”, which has a broad and indefinite meaning, is not defined in section 91-13.5(c), HRS; *see* discussion in part C of this chapter. Similarly, the term “application for a business or development-related permit, license, or approval” is vaguely defined in section 91-13.5(e); *see* discussion in part A of chapter 5.

## Chapter 5

### OTHER LEGAL AND LOGISTICAL ISSUES

As requested by House Resolution No. 128, H.D. 1 (2000), this chapter addresses relevant legal and logistical issues raised by section 91-13.5, HRS other than those already addressed in chapter 4.

#### A. Drafting Problems

##### 1. Statutory Definition

###### Issue:

Is the definition of “application for a business or development-related permit, license, or approval” in section 91-13.5, HRS unconstitutionally vague?

###### Short Answer:

No, but the definition nevertheless should be amended to clarify legislative intent and limit the possibility of state and county agency liability by adding specific statutory references.

###### Discussion:

Section 91-13.5(e), Hawaii Revised Statutes, defines “application for a business or development-related permit, license, or approval” as “any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.”

Detractors argue that the above definition is so vague and overbroad as to render section 91-13.5, HRS unconstitutional. Moreover, the definition could conceivably apply to a variety of permits and licenses, ranging from permits to operate amusement parks to licenses to practice dentistry, the automatic approval of which could substantially jeopardize public health and safety. The Legislature did not intend the definition to apply in these circumstances, it is argued.

In determining whether a statute is unconstitutionally vague, the Hawaii Supreme Court has stated that “[w]hen a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness.”<sup>1</sup> The Court added that “to constitute a deprivation of due process, [the civil statute] must be ‘so vague and indefinite as really to be no rule or standard at all.’ ... To paraphrase, uncertainty in this statute is

not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible.<sup>2</sup> Thus, it is not enough for the definition of “application for a business or development-related permit, license, or approval” in section 91-13.5, HRS to be simply vague or broad in scope for a court to hold that section to be unconstitutionally vague. Does the definition rise (or fall) to the level of being “substantially incomprehensible”?

In resolving this question, it is necessary to review both the statutory language itself and the legislative intent. In construing a statute, the Hawaii Supreme Court has stated that the Court’s “foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.”<sup>3</sup> Furthermore, the Court “may also consider ‘[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning.’”<sup>4</sup>

(1) Statutory language.

The definition of “application for a business or development-related permit, license, or approval” may logically be divided into two parts, namely, (a) **business**-related permits, licenses, or approvals, which cover the first half of the definition, and (b) **development**-related permits, licenses, or approvals, which cover the second half of the definition, since the statutory references in the latter half of the definition apply more reasonably to “development-related” rather than “business-related” permits:<sup>5</sup>

- (a) “Business-related permits, licenses, or approvals” means “any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise...”.

This part of the definition does not list the specific statutory provisions affected. However, a review of the Hawaii Revised Statutes reveals a number of statutes that could be included under this part of the definition, including those listed in Table 1. Some of the statutory references included in that table, particularly those with question marks “(?)” immediately following the reference, require further review.

**TABLE 1**  
***Business-Related Permits, Licenses, or Approvals***  
**Hawaii Revised Statutes, §91-13.5(e)**

39A (?)	Industrial enterprises – special purpose revenue bonds
46 (?)	Counties (other than 46-4, 46-4.2, 46-4.5, and 46-5; see Table 2)
54	Water systems (county boards of water supply)
102 (?)	Concessions on public property
103 (?)	Expenditure of public money and public contracts
103D (?)	Hawaii public procurement code
103F (?)	Purchases of health and human services
149A	Pesticide licensing and sale

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150	Seed licenses
159	Hawaii meat inspection act; licensing
161	Poultry inspection; licensing
174C (?)	State water code
181	Strip mining
183	Forest reserves, water development, zoning
183B	Hawaiian fishponds
183D	Wildlife (hunting licenses, etc.)
186D	Tree farms
187A	Aquatic resources (aquaculturalist licenses, etc.)
188	Fishing rights and regulations
189	Commercial fishing
190D	Conservation and submerged lands leasing; conservation district use applications
196D	Geothermal and cable system development
200	Ocean recreation and coastal areas; small boat harbors (for commercial vessel activities)
206E	Hawaii community development authority
206J (?)	Aloha tower development corporation
206M (?)	High technology development corporation
206P (?)	Hawaii information network corporation (Hawaii INC)
209E (?)	State enterprise zones
211F (?)	Hawaii strategic development corporation
227D (?)	Natural energy laboratory of Hawaii authority
261	Aeronautics (licensing of airports)
261C	Hawaii air carriers
262	Airport zoning act
266	Commercial harbors
269	Public utilities commission
271	Motor carriers
271G	Water carriers
273	Railways
281	Intoxicating liquor (liquor licenses)
286	Highway safety (licenses for driver training schools and driver instructors; permits to operate official inspections stations; transportation of hazardous materials; commercial driver licensing, etc.)
289	Used motor vehicle parts and accessories
321	Adult residential care homes, licensing of tattoo artists, etc.
329 (?)	Controlled substances (regulated chemicals for the manufacture of controlled substances; permit for conduct of business)
343 (?)	Environmental impact statements
346	Department of human services (licenses and permits for child care facilities, etc)
396	Occupational safety and health (certification of safety and health professionals, hoisting machine operators)
397	Boiler and elevator safety law (including permits to operate boilers, pressure systems, amusement rides, and elevators)

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412	Financial institutions (including banks, international banking corporations, savings banks, savings and loan associations, trust companies, financial services loan companies, credit unions, and financial institution holding companies)
415	Business corporations
415A	Professional corporations
415B	Nonprofit corporations
419	Corporations sole for ecclesiastical purposes
420	Business development corporations
421	Agricultural cooperative associations
421C	Consumer cooperative associations
421H	Limited-equity housing cooperatives
421I	Cooperative housing corporations
421J	Planned community associations
423	Dental service corporations
424	Optometric service corporations
425	Partnerships
425D	Limited partnerships
428	Limited liability companies
429	Unincorporated nonprofit associations
431	Insurance companies (including mutual and stock insurers, reciprocal insurers, reinsurers, guaranty associations, and captive insurance companies)
431K	Risk retention groups
432	Mutual and fraternal benefit societies
432C	Nonprofit entities; conversion of assets
432D	Health maintenance organizations
435E	Physicians and surgeons cooperative indemnity corporations
436E	Acupuncture practitioners
436M	Alarm businesses
437	Motor vehicle industry licensing
437B	Motor vehicle repairs
437D	Motor vehicle rentals
438	Barbering
439	Beauty culture
440	Boxing contests
440G	Cable television systems
441	Cemetery and funeral trusts
442	Chiropractic
443B	Collection agencies
444	Contractors
445	County licenses (includes auctions; food products; lodging or tenement houses, hotels, and boardinghouses; outdoor advertising; pawnbrokers; peddlers; secondhand dealers; solicitors; vehicles and drivers for hire; and scrap dealers)
446	Debt adjusting
446E	Unaccredited degree granting institutions
447	Dental hygienists

448	Dentistry
448D	Dental service organizations
448E	Electricians and plumbers
448F	Electrologists
448H	Elevator mechanics
449	Escrow depositories
451A	Hearing aid dealers and fitters
451D	Health care professionals
451J	Marriage and family therapists
452	Massage
453	Medicine and surgery
454	Mortgage brokers and solicitors
455	Naturopathy
456	Notaries public
457	Nurses
457A	Nurse aides
457B	Nursing home administrators
457G	Occupational therapy
458	Dispensing opticians
459	Optometry
460	Osteopathy
460J	Pest control operators
461	Pharmacists and pharmacy
461J	Physical therapy
462A	Pilotage
463	Private investigators and guards
463E	Podiatrists
464	Professional engineers, architects, surveyors, and landscape architects
465	Psychologists
466	Public accountancy
466J	Radiologic technology
466K	Real estate appraisers
467	Real estate brokers and salespersons
467B	Solicitation of funds from the public
467E	Social workers
468E	Speech pathologists and audiologists
468L	Travel agencies
468M	Activity providers and activity desks
469	Undertakers, embalmers, and funeral directors
471	Veterinary medicine
501 (?)	Land court registration
514A (?)	Condominium property regimes; registration
605 (?)	Attorneys

The inclusion of many of these statutory references in the definition of “application for business or development-related permit, license, or approval” is open to debate. For example, does section 91-13.5, HRS apply to the issuance of special purpose revenue bonds (SPRBs) for

industrial enterprises under chapter 39A, part V (§§39A-151 et seq.), Hawaii Revised Statutes? More specifically, to take a somewhat extreme example, is a “project agreement”,<sup>6</sup> which must be entered into before the issuance of a SPRB for an industrial enterprise, a “request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise...” under section 91-13.5, HRS?

The argument that section 91-13.5 does apply would note that a project party<sup>7</sup> who seeks to have SPRBs issued for a project must first obtain approval from the Legislature,<sup>8</sup> and then negotiate and enter into a project agreement with the Department of Budget and Finance.<sup>9</sup> Although the project party is able to negotiate with the Department regarding the agreement to finance and operate the project, the project party is requesting, and must first obtain, the discretionary consent of the Department before any SPRBs may be issued. In this sense, the project agreement may be considered to be “any other form of a request for approval” under the very broad language of the automatic approval law.<sup>10</sup> If section 91-13.5, HRS applies to SPRBs for industrial enterprises, the Department of Budget and Finance must adopt rules to establish maximum time limits for the completion of the project agreement, or the “request for approval”, in this case the project agreement, will be deemed approved automatically.

Similarly, the licensing of attorneys under chapter 605, HRS, appears at first glance to be a business-related license within the meaning of the above definition. However, it may be argued that the judiciary has the inherent power to take steps as may be necessary to function as a separate branch of government. Since attorneys are officers of the court, the Hawaii Supreme Court, which regulates attorneys, should not be forced to comply with section 91-13.5, HRS.

- (b) “Development-related permit, license, or approval” means “...any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P.”

This part of the definition lists the specific statutory provisions affected.<sup>11</sup> The subject matter of each reference is included in Table 2. Unlike the first part of the definition relating to business-related permits, there is no question as to which laws section 91-13.5, HRS applies with respect to development-related permits.<sup>12</sup>

**TABLE 2**  
***Development-Related Permits, Licenses, or Approvals***  
**Hawaii Revised Statutes, §91-13.5(e)**

46-4	County zoning
46-4.2	Nonsignificant zoning changes
46-4.5	Ordinances establishing historical, cultural, and scenic districts
46-5	Planning and traffic commissions; creation
183C	Conservation district
205	Land use commission
205A	Coastal zone management
340A	Solid waste

340B	Wastewater treatment personnel
340E	Safe drinking water
340F	Water treatment personnel
342B	Air pollution control
342C	Ozone layer protection
342D	Water pollution
342E	Safe drinking water
342F	Noise pollution
342G	Integrated solid waste management
342H	Solid waste pollution
342I	Special wastes recycling
342J	Hazardous waste
342L	Underground storage tanks
342P	Asbestos and lead

(2) Legislative intent.

As discussed earlier, a review of the legislative intent of section 91-13.5, HRS may be useful “to discover its true meaning” and resolve ambiguities. While it is plausible to assert that the definition of “application for a business or development-related permit, license, or approval” is vague, it is unlikely that the Hawaii Supreme Court will find that the definition is unconstitutionally vague so as to result in a deprivation of due process, given the fact that the definition is not “substantially incomprehensible” under the standard of review for civil statutes used by the Court, but rather extremely broad as to include almost any type of business-related permit, license, or approval.<sup>13</sup> The Legislature’s intent in enacting section 91-13.5, HRS, as discussed by the Attorney General, was to provide a broad coverage of that section applying to “all business and development-related approvals that impact economic activity in the State.”<sup>14</sup> The fact that the definition does not set forth the specific statutes affected does not in itself render the definition void for vagueness.<sup>15</sup>

However, although the definition of “application for a business or development-related permit, license, or approval” in section 91-13.5, HRS may not be considered unconstitutionally vague, it has nevertheless led to uncertainties in its application. The threshold issue in applying that law is whether or not section 91-13.5 applies to certain permits, licenses, or approvals. Upon the enactment of that section, several agencies were uncertain as to whether that section applied to their agency, and requested opinions from the Attorney General as to the applicability of that section.<sup>16</sup> (See Appendices G to J.)

Liability issues may also arise without further clarification of the law. For example, if section 91-13.5, HRS applies to SPRBs for industrial bonds, as discussed earlier, this may adversely affect the State’s bond ratings. Accordingly, the Attorney General and the State’s bond counsel should be consulted for their legal opinions on this and related issues. As another example, suppose that the Maui County Board of Water Supply finds that section 91-13.5, HRS applies with respect to a certain type of permit, but the Honolulu Board of Water Supply believes that the law does not apply, choosing to adopt a more narrow interpretation of that law. A developer may sue the City and County of Honolulu, citing Maui County’s automatic approval rules on this issue. Conversely, an environmental group, for example, may sue Maui County,



citing Honolulu's decision that section 91-13.5 should not apply. Both counties may be exposed to liability for arbitrary or capricious decision making. Adding more specific statutory references to the definition in section 91-13.5 will reduce the risk of liability by providing for a more consistent application of that law.

Finally, adding specific statutory references to the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS may help to ensure that agencies cannot sabotage the implementation of that section by declaring themselves exempt from automatic approval. For example, if an agency does not want section 91-13.5 to apply to that agency, it may adopt rules that interpret the definition of "application for a business or development-related permit, license, or approval" as simply not applying to that agency. The agency may also choose to reject the advice of the Attorney General that section 91-13.5 does apply to that agency as advisory in nature and not binding on the agency.<sup>17</sup> This would defeat the legislative intent in having a broad application of that section.

Legislative options. Is the Legislature legally obligated to amend the definition? Probably not.<sup>18</sup> However, for the reasons discussed in this section, the Bureau recommends that the Legislature amend the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS to specify those statutes to which section 91-13.5 applies. The Attorney General has also noted that the Legislature should clarify this definition.<sup>19</sup> Adding statutory references to the definition of "application for a business or development-related permit, license, or approval" will increase certainty in the application of the law, prevent agencies from undermining the implementation of the law, and may reduce the State's and counties' exposure to additional liability.<sup>20</sup>

## **2. Internal Inconsistency**

### **Issue:**

Is section 91-13.5, HRS internally inconsistent as it applies to "state administered permit programs delegated, authorized, or approved under federal law"?

### **Short Answer:**

Possibly. Affected state and county agencies should review their programs to determine which are delegated, authorized, or approved under federal law, and report to the Legislature to determine if there is a need to amend section 91-13.5.

### **Discussion:**

Several of the programs included under the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS have a federal component, namely, chapters 205A, 340E, 342B, 342D, 342L, and 342P, Hawaii Revised Statutes. However, another provision of section 91-13.5, HRS specifically exempts from the rulemaking provisions of that law applications that are "not subject to state administered permit programs delegated, authorized, or approved under federal law".<sup>21</sup>

Are the programs specifically included in the definition that have a federal component overridden by the other provision of section 91-13.5, HRS exempting applications “not subject to state administered permit programs delegated, authorized, or approved under federal law”, or must agencies still adopt rules setting maximum time periods with respect to these applications? On the one hand, it appears that the Legislature specifically intended to include the identified chapters under the purview of section 91-13.5, HRS, since the statutory references are spelled out in the definition itself. On the other hand, it may be argued that applications for business or development-related permits, licenses, or approvals under these programs may not be automatically approved, since they are specifically exempt under section 91-13.5, HRS.<sup>22</sup>

In an attempt to harmonize these apparently conflicting provisions, guidance may be obtained from the Attorney General’s letter opinion regarding whether the Coastal Zone Management program under chapter 205A, Hawaii Revised Statutes, is exempt from section 91-13.5, HRS (see Appendix I).<sup>23</sup> After concluding that it was the opinion of the Attorney General “that the Hawaii CZM [Coastal Zone Management] program is a state administered permit program ‘approved under federal law’” and therefore exempt from the application of section 91-13.5, HRS, the Attorney General stated that section 91-13.5 does not apply to Special Management Area (SMA) permits under the CZM program.<sup>24</sup> However, while section 91-13.5 does not apply to SMA permits under chapter 205A, it may nevertheless apply to other programs under chapter 205A that are not so “delegated, authorized, or approved under federal law”. For example, this may include variance applications with respect to shoreline setbacks under chapter 205A, part III, Hawaii Revised Statutes.

The same reasoning may be applied to permit programs under the other statutes identified earlier as having a federal component, namely, chapters 340E, 342B, 342D, 342L, and 342P, Hawaii Revised Statutes. These chapters include “state administered permit programs delegated, authorized, or approved under federal law.” However, to the extent that these chapters include other permit programs that are not so delegated, authorized, or approved, applications for these other permits would be subject to the automatic approval provisions of section 91-13.5.

Accordingly, affected state and county agencies should:

- (1) Review the chapters specified in section 91-13.5, HRS to determine the specific programs in those chapters to which section 91-13.5 applies, in order to increase certainty in the application of that law and potentially reduce the State’s and counties’ exposure to additional liability; and
- (2) Make recommendations to the Legislature as to whether all or portions of the affected chapters consist of “state administered permit programs delegated, authorized, or approved under federal law”. Upon receiving the agencies’ reports, the Legislature can take action, if necessary, to amend section 91-13.5 accordingly.

## **B. Maximum Time Period**

### **1. Starting Point**

#### **Issue:**

Does the maximum time period under section 91-13.5, HRS begin to run when an application is filed or when the application is deemed to be complete?

#### **Short Answer:**

While not stated in that section, agencies may adopt rules specifying that the maximum time period begins to run when the application is deemed complete.

#### **Discussion:**

Section 91-13.5, HRS does not specify whether the maximum time period begins when the application is complete or filed. The section provides only that “[a]ll such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.”<sup>25</sup> The section further provides that issuing agencies shall take action to grant or deny “any application” for a business or development-related permit, license, or approval within the established maximum time period, or the application is deemed approved.<sup>26</sup> Since failure to take action on “any application”, rather than “any completed application”, may result in automatic approval of the application, section 91-13.5, HRS may arguably be read to provide that the maximum time period applies to applications as soon as they are filed, even when the application is considered defective or incomplete.

As noted earlier, agencies have broad discretion to adopt rules to implement section 91-13.5, HRS in a manner that protects the statutorily imposed interests of the agency, while seeking to stay within the intent of that section. Agencies may use this broad authority to adopt rules specifying that the maximum time period begins to run only when the agency deems an application to be complete.<sup>27</sup> In addition, it has been noted that “[g]overnment bodies generally have ample authority either under express statutory provisions or implicitly, to reject or decline to process incomplete land-use applications. To avoid an automatic approval, however, many courts require that the government body reject the application, and perhaps, inform the applicant that the application was found wanting.”<sup>28</sup>

Detractors claim that section 91-13.5, HRS is inconsistent in several respects, producing unfair results. One criticism is that the law “treats all applications alike, regardless of the kind of permit or approval requested,”<sup>29</sup> despite the fact that some ministerial discretionary permits may be issued in a matter of hours, whereas other discretionary permits may require months of review by an agency. Another criticism is that section 91-13.5 applies only to issuing agencies, not reviewing agencies.<sup>30</sup> Since reviewing agencies do not have maximum time requirements under section 91-13.5, while issuing agencies must set maximum time periods, the issuing agency may be required to wait for the reviewing agency to complete its own review before the issuing

agency may review the application, which could exceed the maximum time period established for agency review.

An agency may address these dichotomies in the agency's completeness requirements. For example, agencies may adopt rules that specify when an application is deemed to be complete, and that applicants will be notified in writing that the application is complete and accepted by the agency before the maximum time period begins to run, so that there is no misunderstanding as to the beginning date of the maximum time period. Agencies may also include certain items in their application completeness rules, for example, that the applicant has obtained all "necessary or discretionary permits or approvals",<sup>31</sup> whether from other issuing or reviewing agencies, and that all necessary environmental reviews have been completed under chapter 343, HRS (environmental impact statement law). By building these types of provisions into their application completeness requirements, each agency has the flexibility to address the unique problems associated with the permits and approvals issued by that particular agency.

Legislative options. The Bureau believes that no statutory amendments are necessary. Agencies are able to adopt completeness rules as outlined in this section. Alternatively, the Legislature may amend section 91-13.5, HRS in a manner similar to that provided under California law. California's Permit Streamlining Act, which also provides for "deemed approvals" of certain permits within statutorily defined time periods, formerly required agencies to approve or disapprove projects "from the date on which an application requesting approval of such a project has been received and accepted as complete by such agency."<sup>32</sup> However, that Act was later amended to measure "all time limits for final approval or disapproval in terms of the environmental review process, rather than the date the application was 'complete'."<sup>33</sup> Hawaii's section 91-13.5, HRS could similarly be amended to require agencies to adopt rules providing that the maximum time period under that section begins to run following the acceptance of an environmental impact statement or a finding of no significant impact under chapter 343, HRS, as applicable, or a finding by the agency that the application is exempt from that chapter.

## **2. Pending Applications**

### **Issue:**

Does the maximum time period for agency actions under section 91-13.5, HRS apply to applications that were pending at the time of enactment?

### **Short Answer:**

No; that section applies prospectively.

### **Discussion:**

The Conference Committee Report to S.B. No 2204, S.D. 2, H.D. 2, C.D. 1 (the bill for section 91-13.5, HRS) noted questions relating to whether the effective date provision of the bill "applies the provisions of this bill and any resulting agency action to pending applications for business or development-related permits, licenses, or approvals, including but not limited to

matters before the Land Use Commission and the Board of Land and Natural Resources. Your Committee [on Conference] intends that this bill shall apply purely prospectively.”<sup>34</sup> Moreover, as discussed in the previous chapter relating to rulemaking, the Attorney General has stated that section 91-13.5, HRS is not self-executing, and that the automatic approval provision of that section is not triggered until an agency has adopted rules to establish a maximum time period, unless the agency already has a statute establishing a maximum time period.

### 3. Multiple Periods

#### Issue:

May agencies adopt rules providing for more than one maximum time period under section 91-13.5, HRS?

#### Short Answer:

No, although agencies may adopt rules providing for a certain maximum time period if certain events or conditions are not met, but a shorter period if those events or conditions do not apply.

#### Discussion:

Section 91-13.5 provides for only one “maximum time period”, not multiple maximum time periods.<sup>35</sup> Are there circumstances, however, in which there may be one maximum time period, for example, if there is a contested case hearing, but a shorter maximum period if there is no such hearing? Section 91-13.5, which is silent on this issue, would appear to allow this result through agency rulemaking, since the shorter time period may be considered to be subsumed within the longer one.

Example 1: The rules of the City and County of Honolulu Board of Water Supply state that “[m]aximum time limits shall not apply: ... [w]here plans need to be coordinated with other City agencies; or ... [w]here the applicant failed to obtain necessary discretionary permits or approvals ...”<sup>36</sup>

Is this type of rule permissible, or is it a *de facto* extension of the maximum time period that violates the intent of section 91-13.5, HRS? This is most likely a permissible interpretation of that section. If the Board of Water Supply is waiting for a response from other agencies that are reviewing the application or must issue a permit before the Board may act, the maximum time period may run before the Board even has a chance to review the application. However, had the Board stated that “an extension” shall be granted “[w]here plans need to be coordinated with other city agencies”, for example, this would presumably violate section 91-13.5, HRS.

As discussed earlier in this part, rather than include this type of provision under “applicability” requirements, these types of contingencies may also be included in the agency’s “application completeness” requirements, so that until all of the necessary permits, approvals, and reviews are obtained from or completed by other agencies, the application will not be

deemed to be complete. In this manner, other agencies' reviews or approvals would be required before the maximum time period clock begins to run. Once the approvals are received from the other agencies, the application is deemed to be complete, and the maximum time period will begin to run.

The problem is that this type of provision may result in extending the overall time period for agency action, thereby violating the spirit or intent of section 91-13.5, HRS. In these cases, or, for example, if an agency is waiting for the issuance of an environmental impact statement or finding of no significant impact under chapter 343, HRS, may the agency simply exclude this review from the maximum time period altogether? This would again appear to be permissible, given the broad discretion given to agencies to implement section 91-13.5, HRS, discussed earlier in this chapter, combined with the lack of guidance to agencies to implement that section.

Example 2: Kauai County Planning Commission's special permit rules provide where "contested case/intervention proceedings" are instituted, the time lines established for those proceedings are to apply "and the maximum period of time for action by the Commission shall be within sixty (60) days after the presentation of final oral arguments or within a longer period as may be agreed by the parties to the extent permitted by law." However, "if a quorum or a majority vote on a petition is not obtained by the expiration of the applicable time period above, the Commission shall have a maximum time period of an additional forty-five (45) days to vote on the petition."<sup>37</sup>

If the "additional forty-five (45) days" is read as a *second* maximum time period or an *extension* of the maximum time period, neither of these is permitted under section 91-13.5, HRS. However, the rules may alternatively be read as defining the maximum time period as *including* the additional 45-day period. Under this reading, any period of time less than that period will not trigger the automatic approval provisions of that section.

Perhaps more problematic, in the same rules, is the language "within a longer period as may be agreed by the parties to the extent permitted by law", which implies that the parties can agree or consent to extend the maximum time period if permitted by law, without using the word "extension". As discussed in part C of this chapter relating to extensions, since the time provisions of section 91-13.5, HRS are mandatory, it is unclear whether this rule is in "strict compliance" with the express statutory terms.

Does section 91-13.5, HRS allow this result? Yes. For example, if the rules stated that the maximum time period is extended if no quorum is obtained, this would appear to violate section 91-13.5, HRS, which gives only three specific instances for extensions. However, if the rules state that the maximum time period occurs after a quorum is obtained, then this is not an extension. Similarly, if the law allows the parties to agree to an extension of the maximum time period, without actually calling it an extension, this would appear to be permissible under section 91-13.5, HRS.

While it may be argued that agencies should not be able to evade the requirements of section 91-13.5 by simply using different terminology for requirements that are prohibited under that section, that section would nevertheless appear to allow this result. If the Legislature does

not agree with this result, it should amend the law to produce a different result. However, given the broad discretion to adopt rules under section 91-13.5, HRS, agencies appear to have the authority to fashion rules that satisfy the requirements of their implementing statutes, which are the more *specific* statutes and which probably will take precedence over section 91-13.5 as the more *general* statute. Where the implementing law is an ordinance, however, section 91-13.5 would control.<sup>38</sup>

## C. Extensions and Waivers

### 1. Extensions

#### Issue:

In implementing section 91-13.5, HRS, may agencies adopt rules adding extensions of the maximum time period for agency action in addition to those already provided for national disasters, state emergencies, and union strikes?

#### Short Answer:

No. As discussed in the previous section, however, agencies may adopt rules providing for a certain maximum time period if certain events or conditions are not met, but a shorter period if those events or conditions do not apply. In addition, if the Legislature does not address this issue, Hawaii's courts may use the equitable doctrine of "waiver" if the applicant, through the applicant's own actions, voluntarily relinquishes the right to have the agency render its decision within the maximum time period, or the doctrine of "substantial compliance" to imply statutory extensions.

#### Discussion:

Section 91-13.5, HRS, provides in relevant part that "[t]he maximum period of time established pursuant to this section shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements."<sup>39</sup>

Under the rule of statutory construction "*expressio unius est exclusio alterius*" (the expression of one thing implies exclusion of the other),<sup>40</sup> it may be argued that the express inclusion of the words "national disasters, state emergencies, and union strikes" implies that the Legislature intended to exclude any other event that would trigger an extension of the maximum time period under section 91-13.5, HRS. Citing this rule, Hawaii's Attorney General has stated that "section 91-13.5(d)'s enumeration of the specific grounds for the extension of the time period implies that other grounds are excluded."<sup>41</sup> However, this rule "exists only as an aid to statutory interpretation and its application should be limited to ascertaining legislative intent which is not otherwise apparent."<sup>42</sup>

Despite statutory provisions for extensions in automatic approval statutes, courts in other states have applied common law principles in interpreting these provisions to allow for the implied or implicit consent of an applicant to an extension or an implied waiver of the statutory deadlines.<sup>43</sup> It has been noted that “[t]he confusing state of the law on extensions and waivers is partially the product of poorly drafted automatic approval statutes that do not establish procedures for the extension of statutory deadlines.”<sup>44</sup> Where, however, “the statutory requirements for extensions are explicit, much of the confusion in the case law dissipates. ... [A] statutory requirement that the extension be in writing free[s] the court from assessing whether any actions of the applicant constitute[] ‘implicit’ waiver.”<sup>45</sup>

An analysis of whether extensions would be permitted other than those specifically listed under the extensions provision in section 91-13.5, HRS depends in part upon whether a court views the maximum time period for agency action required by that section as mandatory or directory in nature: “If the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of administrative action. If the language of the statute is directory only, then deviation from its directions does not invalidate the administrative action. ... To avoid invalidity doubt may be resolved in favor of a mandatory interpretation.”<sup>46</sup> Thus, if the maximum time period under section 91-13.5, HRS is mandatory, extensions other than those specifically listed in the section (e.g., if the applicant consented to an extension) would presumably be prohibited; if directory, extensions other than those listed may be permissible under certain circumstances to avoid a harsh or manifestly unfair result. A determination of whether time provisions in a statute have mandatory or directory effects, “[n]otwithstanding legislative intent”, are generally “based on grounds of policy and equity to avoid harsh, unfair or absurd consequences”.<sup>47</sup>

Hawaii Supreme Court has issued opinions expressing both sides of this issue based on different fact situations. In the 1974 case of Town v. Land Use Commission,<sup>48</sup> for example, the time provision at issue<sup>49</sup> required a decision by the Land Use Commission on a boundary change petition not less than 45 days after, but within 90 days of a public hearing, but the decision was made after 175 days had elapsed. The Court found that the adjoining landowners had been placed in a “state of limbo” after the hearing by continuances requested by the petitioner: “The appellant was placed in an impossible position, which worked only to the advantage of the petitioner. Petitioner was allowed to pick and choose the meeting at which he felt his petition would receive the most favorable treatment, or wait until such time as the other interested parties, either for financial reasons or for sheer lack of time, had given up on making an appearance at a meeting at which there was no guarantee that a decision would be reached.”<sup>50</sup> The court accordingly held that the word “shall” in the statute was mandatory rather than directory, and noted that failure to act within the prescribed period would render any decision rendered thereafter null and void.<sup>51</sup>

In contrast, in the 1980 case of Perry v. Planning Commission of Hawaii County,<sup>52</sup> the time period at issue<sup>53</sup> required a public hearing by a county planning commission on an application for a special permit within 120 days of its receipt. The circuit court held that the application in this case was void because the County of Hawaii Planning Commission failed to conduct a hearing within that time period, and the state Land Use Commission therefore lacked jurisdiction to act on the permit. The Hawaii Supreme Court reversed, concluding that the



statutory time period was directory rather than mandatory.<sup>54</sup> The Court first noted that the 120-day period was “intended to counter possible administrative sluggishness and to promote expeditious determinations”,<sup>55</sup> but that the circuit court applied that statute to the detriment of the intended beneficiaries, i.e., those seeking special permits.<sup>56</sup> The Court in Perry found that time periods for agency action are generally characterized as directory, unless at least one of the following three conditions is met:

- (1) Time is of the essence of the act required;
- (2) The statute contains negative language denying the exercise of authority beyond the period prescribed for action; or
- (3) A disregard of the relevant provision would injuriously affect public interests or private rights.<sup>57</sup>

The Court noted that time was not of the essence in that case; there was nothing in the statute to negate the planning commission’s authority to conduct a delayed hearing; and no public interests or private rights were jeopardized by the delay. Accordingly, the Court read the statute as having a non-mandatory effect, since “any other ruling would be inconsistent with fundamental fairness.”<sup>58</sup>

Using the three-part test outlined by the Court in Perry to analyze whether the time provisions of section 91-13.5 are mandatory or directory, it seems fairly clear that the Legislature intended the maximum time provisions in that section to be mandatory rather than directory:

- (1) Time is of the essence, as discussed in the preamble of section 91-13.5, HRS by the legislative intent to require agencies to act upon applications “within an established time frame, or application approval would be automatic”;<sup>59</sup>
- (2) Section 91-13.5 denies the exercise of authority beyond the period prescribed for action by stating that the application shall be “deemed approved”. While this is not “negative language” as discussed in Perry, the “deemed approved” language nevertheless implies the cessation of agency action after that point in time because it provides for the approval of an application by operation of law if no agency action is taken; and
- (3) The third prong of the test – that a disregard of the relevant provision would injuriously affect public interests or private rights – could conceivably work either way. For example, a disregard of the maximum time period could help a party in a contested case if the automatic approval deadline will come in the middle of the hearing. Alternatively, a disregard of the deadline could injuriously affect private interests, such as those of an applicant who has obtained other necessary approvals and needs to hear from a particular agency by maximum time period, or a bank will deny financing for the applicant’s project.

Accordingly, under the maximum time period established pursuant to section 91-13.5, HRS, extensions other than those specifically listed in the section would presumably be prohibited, since, as noted earlier, “[i]f the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of administrative action.”

However, much depends on the manner in which extensions are characterized in agency rules. As noted earlier, agencies have broad discretion to adopt rules under section 91-13.5, HRS. As discussed in the previous section, it may be asked whether an agency, as a matter of policy in implementing that section, may establish *one* maximum time period for a permit, and *another* maximum time period to address other issues, such as failure to obtain a quorum or a majority vote on a petition. Since section 91-13.5, HRS provides for only *one* maximum time period, not multiple maximum time periods, would the second maximum time period be considered to be an *extension* beyond the first maximum time period (although other extensions are prohibited under that section), even if the agency does not label this as an “extension”? As discussed, agencies may apparently adopt rules setting forth a maximum time period if certain events or conditions are not met, but a shorter period if those events or conditions do not apply.

For example, the City and County of Honolulu Department of Planning and Permitting’s Rules of Practice and Procedure state that no extension shall be permitted except as provided in section 91-13.5 and as provided under Honolulu’s Land Use Ordinance (LUO), pertaining to time in cases in which a permit must first be preceded by a special management area use permit; additional extensions pertaining to “major” and “minor” permits as authorized by the LUO are also allowed. Minor permits are eligible for one extension of up to fifteen days, or up to thirty days for a major permit.<sup>60</sup> Aside from the question whether an ordinance can supersede a county agency’s rules adopted under section 91-13.5, as discussed in part F of this chapter, are these extensions permissible under that section? The City’s Corporation Counsel has responded in the affirmative: “We ... agree that the ‘extensions’ which you have prescribed (which are authorized by the LUO) can properly be characterized as being part of the maximum time period.”<sup>61</sup>

Of greater concern are rules that allow parties to consent to extensions. For example, the Honolulu Board of Water Supply’s rules relating to extensions provide that extensions from the maximum time limit may be granted under the statutory events of a national disaster, state emergency, or union strike, “or when adequately justified by the Department and mutually acceptable to the Department, the applicant, and/or owner.”<sup>62</sup> Similarly, the Maui Department of Liquor Control’s rules governing the manufacture and sale of intoxicating liquor also allow extensions for the events specified for extensions under section 91-13.5 or “at the request of the applicant with the approval of the director.”<sup>63</sup> The underscored language in these rules appears to violate the specific language of section 91-13.5, HRS, which limits extensions only to “national disasters, state emergencies, and union strikes”, by essentially allowing the parties to consent to an extension. However, these extensions alternatively could be characterized as being part of the maximum time period itself.

As discussed in the previous section, agencies may adopt rules providing for a certain maximum time period if certain events or conditions are not met, but a shorter period if those events or conditions do not apply. For example, an agency could conceivably adopt a rule

stating that the maximum time period shall be “X days” if the applicant makes a written request for additional time, and “X minus thirty days” if the applicant does not make such a request. In this case, the maximum time period is not changed if the condition (in this case, the applicant’s waiver or request for additional time) occurs before the expiration of the “X minus thirty days” time period. It would be questionable in this example, however, if the applicant could make such a request for additional time in the final thirty days before the expiration of the maximum time period.

While it is unclear how a Hawaii court would rule in evaluating the validity of administrative rules implementing section 91-13.5, HRS that grant *de facto* extensions without using the term “extension”, the court might be guided by the foregoing analysis, namely:

- Since the maximum time provisions of section 91-13.5, HRS are presumably mandatory rather than directory, “then strict compliance with the statutory terms is essential to the validity of administrative action”,<sup>64</sup>
- The legislative intent of section 91-13.5, HRS is to require agencies to act upon applications “within an established time frame, or application approval would be automatic”,<sup>65</sup>
- “Notwithstanding legislative intent”, a court may still decide a case or determine the validity of an administrative rule “based on grounds of policy and equity to avoid harsh, unfair or absurd consequences.”<sup>66</sup>

In cases where the implementation of section 91-13.5, HRS may work an injustice, the court may be tempted to mitigate harsh results. For example, the court may use the equitable doctrine of “waiver”, as discussed in the next section, if the applicant, through the applicant’s own actions, voluntarily relinquishes the right to have the agency render its decision within the maximum time period. Alternatively, the court may use the doctrine of “substantial compliance” with respect to implied statutory extensions. While the maximum time provision of section 91-13.5, HRS is mandatory, as discussed earlier, other provisions of that section may be considered directory, since “[a] statute may have portions that are mandatory and portions that are directory.”<sup>67</sup> Accordingly, the court may find that an agency has substantially complied with section 91-13.5, HRS, for example, if it finds that the extension provisions are directory in nature.<sup>68</sup> There is also support for the position “that substantial compliance with even mandatory provisions may be legally sufficient.”<sup>69</sup>

Legislative options. The Bureau believes that no statutory changes are necessary. Agencies are able to adopt rules to address the issues discussed in this section. However, the Attorney General has suggested that the Legislature resolve the issue of extensions.<sup>70</sup> If the Legislature desires, as a policy matter, to prevent agencies from adopting administrative rules that provide for *de facto* extensions without using that term, the Legislature can amend section 91-13.5(d), Hawaii Revised Statutes, for example, by including the word “only” as follows: “The maximum period of time established pursuant to this section shall be extended only in the event of a national disaster, state emergency, or union strike ...” (emphasis added). Additionally, the Legislature can also specify negative consequences if the extension provisions

are not followed, satisfying the second prong of the Perry test, as well as to give directions in section 91-13.5, HRS to specify that only one maximum time period may be established in agency rules. Alternatively, the Legislature can leave the section unamended and allow a court to resolve any perceived discrepancies between the section and agency actions.

If the Legislature wishes as a policy matter to give greater flexibility to agencies to extend the maximum time period for reasons other than national disasters, state emergencies, or union strikes, the Legislature can amend section 91-13.5, HRS, for example, to include specific extensions in section 91-13.5, HRS, such as those provided in Appendix S,<sup>71</sup> or allow agencies to adopt rules to provide “reasonable”<sup>72</sup> extensions of the maximum time period as may be necessary to “avoid harsh, unfair or absurd consequences”, including rules in the interests of the public’s health, safety, and welfare under the general police power of the State.<sup>73</sup> As noted earlier, if the Legislature believes that it is necessary as a policy matter to allow for additional extension, e.g., when consented to by an applicant, it is preferable that the statute specify that the extension be in writing.

The Legislature could also permit agencies to adopt rules allowing for emergency extensions of the maximum time period if automatic approval of an application will impinge on the constitutional rights of a party, or will otherwise result in a violation of any other law. For example, the agency could adopt rules allowing the agency to hold an emergency session within a definite time period, say, 30 days, to review and either approve or deny the application.<sup>74</sup>

In addition, if the Legislature is concerned that the automatic permit approval law will lead to unfair or harsh results, the Legislature can also amend the preamble (section 2 of Act 164, Session Laws of Hawaii 1998) to include additional language outlining legislative intent to the effect that the automatic approval law was designed to minimize procrastination by administrative agencies, rather than situations in which the agency has taken “action” but was unable to obtain a quorum or a majority vote to grant or deny an application, and that section 91-13.5 was not intended to jeopardize the public health, safety, and welfare of Hawaii’s citizens. The Attorney General has also noted that the Legislature should clarify the purpose for enacting Act 164 by identifying the special interest it was attempting to promote.<sup>75</sup>

For example, the following language was originally included in the preamble (section 2) to Senate Bill No. 2204, S.D. 1 and S.D. 2 (1998), but was removed from subsequent drafts of the bill that finally became section 91-13.5, HRS: “The Act is intended to avoid prejudice to applicants for business or development-related approvals that are the result of an agency’s deliberate, dilatory, or inexcusable inaction, and is not intended to adversely affect the public’s health, safety, and welfare.” Assuming this language reflects the Legislature’s intent, the Legislature may add this or other language to assist in resolving uncertain statutory meaning.<sup>76</sup>

## **2. Waivers**

### **Issue:**

Can the actions of an applicant be deemed to constitute an implied waiver of the maximum time period for agency action under section 91-13.5, HRS?

**Short Answer:**

Yes; although the language of section 91-13.5 does not address the issue of waivers, a Hawaii court might read the equitable doctrine of waiver into that section depending on the facts of a particular case. Alternatively, a court could decline to allow waivers under a strict interpretation of that section, since only three types of extensions are specified in section 91-13.5(d).

**Discussion:**

While section 91-13.5, HRS specifically allows extensions under certain circumstances, it does not specifically allow for waivers<sup>77</sup> of the maximum time period for agency action. May waivers, nevertheless, be implied by the actions of the applicant? As noted in the previous section, the failure of many state legislatures to establish adequate rules for valid extensions of the prescribed time limits has led to a general state of confusion in this area.<sup>78</sup>

The 1997 California case of Bickel v. City of Piedmont<sup>79</sup> is informative on this issue. In that case, the California Supreme Court sought to determine whether the application of the common law of waiver is prohibited by the purpose or statutory language of that State's Permit Streamlining Act, which, like Hawaii's section 91-13.5, HRS, provides for the automatic approval of certain development permits that are not approved or disapproved by an agency within certain time limits. In holding that waiver is permitted under that Act, the Court stated that it could "see no good reason why the waiver doctrine should not apply if the administrative record shows that the applicant has made a knowing, intelligent, and voluntary waiver in circumstances where the applicant might reasonably anticipate some benefit or advantage from the waiver, and if the waiver does not seriously compromise any public purpose that the Act's time limits were intended to serve."<sup>80</sup>

In reviewing the purpose of that Act, the California Supreme Court in Bickel agreed with the concurring and dissenting justice of the Court of Appeals that the Act's public benefit was merely incidental to the legislation's primary purpose: "The primary beneficiary of the time limits is the applicant, the Act being designed to prevent the agency from foot-dragging and coercing time waivers at the applicant's expense. The general public may *incidentally* benefit from expedited land use decisions, aided progress of important large-scale developments, reduced delay for other applicants and perhaps an enhanced business environment generally."<sup>81</sup>

The Supreme Court rejected the concern that applying the waiver doctrine would "open the door to subtly coerced waivers" by the agency,<sup>82</sup> noting that a waiver is not effective unless it is voluntary: "Therefore, if an agency improperly coerces an applicant into relinquishing the right to have the agency act within the statutory time limits, the applicant cannot be said to have voluntarily given up that right. In that event, there is no valid waiver." The Court found that nothing in the language of the Act itself prohibits an applicant from voluntarily relinquishing the right to an agency decision within the statutory time limits, and that the following negative consequences would result if waiver of those time limits was not allowed that would be inconsistent with the Act's purpose of streamlining the permitting process:

If waiver of the Act's time limits were not permissible, an applicant whose permit application contained substantial but curable defects would be unable to obtain a postponement of the decision beyond the Act's time limits to amend the application, because such a postponement would ... result in the automatic approval of the defective application. In order to cure the defects in the application, the applicant would have to accept a denial of the original application, submit a new application, pay new application fees, and start the entire approval process again, a time-consuming and expensive procedure. Moreover, a "no waiver" rule would unfairly reward those applicants who, anticipating a denial of their land-use permit application, request or agree to a continuance for the purpose of revising and resubmitting their plans, wait until the Act's time limits have expired, and then assert that the application has been denied because of the Planning Commission failed to act within the requisite time limit. These consequences are inconsistent with the Legislature's intent to "streamline" the processing of land-use permit applications.<sup>83</sup>

The dissenting opinion in Bickel, however, noted that California's Permit Streamlining Act expressly permitted only one 90-day extension of the initial time limits by mutual consent, and that the Act "nowhere authorizes agencies to free themselves from these strict and mandatory time limits by extracting time waivers from permit applicants."<sup>84</sup> The dissent further noted that strict time limits of the Act, among other things, sought to ameliorate a number of public concerns, including delays by either party: "foot dragging *by either the agency or the applicant* on a permit application denies closure to neighbors and other vitally concerned persons, both 'pro' and 'con', who are entitled to a resolution at some point so they may cease their efforts in opposition or support and get on with their lives."<sup>85</sup>

The dissent acknowledged that objections to a particular application may sometimes be solved or compromised if the parties are allowed an additional (but not indefinite) time period, but that this was already recognized by the Act's allowance for extensions by mutual consent: "It may then be best to permit diligent, focused, and good faith negotiations to continue for a reasonable period rather than force the agency to deny the application prematurely and require the applicant to start the process over. The Act recognizes these realities by providing that the applicant and the agency may extend the time deadline for 90 days by 'mutual consent.'"<sup>86</sup> The California Legislature subsequently followed the dissent's interpretation in Bickel by amending that Act in 1998 to provide that "it is the intent of the Legislature to clarify that the Permit Streamlining Act ... does not provide for the application of the common law doctrine of waiver by either the act's purpose or its statutory language."<sup>87</sup>

Legislative options. The Bureau believes that there is no legal requirement to amend section 91-13.5 to address this issue. If the Legislature does not amend that section, a Hawaii court may do either of two things when faced with a waiver problem under that section depending on the facts of the particular case:

- (1) Imply the equitable doctrine of waiver; or
- (2) Decline to allow waivers under section 91-13.5, since there are only three extensions specified in the language of section 91-13.5(d). A strict interpretation of that language would appear to prohibit the addition of another extension under

the rule of statutory interpretation “*expressio unius est exclusio alterius*” (the expression of one thing implies exclusion of the other).

The California Supreme Court’s decision in Bickel, and the California Legislature’s response to that decision, is instructive for Hawaii. Although the language of California’s Permit Streamlining Act did not allow for waivers of the statutory time limits, the Court nevertheless permitted waivers under that law. Similarly, while Hawaii’s automatic approval law does not allow for waivers of the maximum time period for agency action, a Court may also read that common law doctrine into section 91-13.5. If the Legislature seeks to prevent this result, it should amend section 91-13.5 to specifically preclude the application of the common law doctrine of waiver, similar to California’s 1998 statutory amendment.

Alternatively, the Legislature could amend section 91-13.5 to allow waivers if it believes there is a need to statutorily address intentional applicant delay and substantial but curable defects in applications:

- (1) Intentional delays. Such an amendment would prevent the problem discussed by the majority opinion in Bickel where an applicant intentionally delays proceedings to obtain an automatic approval.<sup>88</sup> The court in that case noted that a “no waiver” rule would unfairly reward applicants who expect a denial of their application and who request or agree to a continuance to revise and resubmit their plans, but instead wait until the maximum time period has expired, asserting that the agency failed to take action within that time period. An express waiver could state that the applicant may waive the maximum time period and thereby consent to an extension of that period in a manner proposed in an earlier draft of the bill that became section 91-13.5, HRS, which stated that “[u]nless otherwise provided in this section, the time period for the completion of any procedure may be extended, modified, waived, tolled, or otherwise extended by the applicant, by stipulation of the parties in an agency hearing...”<sup>89</sup>
- (2) Substantial but curable defects. Amending section 91-13.5 to allow waivers could also address the situation addressed by the majority in Bickel in which an application contains “substantial but curable defects” that may result in the automatic approval of the defective application, that the applicant wishes to address and that could be addressed if there was an extension of time. Rather than requiring the applicant to resubmit the corrected application at considerable additional time and expense, it would be preferable to allow for an extension for a reasonable, fixed period of time. Even the dissent in Bickel found that it may be preferable “to permit diligent, focused, and good faith negotiations to continue for a reasonable period rather than force the agency to deny the application prematurely and require the applicant to start the process over”, and argued that California’s Permit Streamlining Act recognized “these realities” by allowing for a one-time extension of the statutory time limit “upon the mutual written agreement of the project applicant and the public agency for a period not to exceed 90 days”.<sup>90</sup> Alternatively, the extension could allow the agency to extend the time limit by providing written notification and reasons for the extension to

the applicant, which may not exceed 60 days unless approved by the applicant, such as required under Minnesota law.<sup>91</sup>

## **D. Approvals**

### **1. Project Implementation**

#### **Issue:**

May an applicant start work on a project immediately after the applicant's permit has been deemed approved (assuming that no conditions have been attached), or must the applicant petition the court for an order that a permit be issued?

#### **Short Answer:**

The Bureau believes that an applicant should be able to begin work immediately, since "deemed approved" permits have the same legal effect as tangible permits issued by agencies. However, if the agency's rules or other laws require the permit to comply with applicable provisions of other laws, those other laws must first be satisfied.

#### **Discussion:**

California's experience could serve as a guide for Hawaii. An article in the 1987 California Lawyer raised the following question regarding California's Permit Streamlining Act, which requires the automatic approval of certain permits similar to that provided under Hawaii's section 91-13.5, HRS: "The Permit Streamlining Act is virtually silent about a developer's rights after the time for approval has expired .... Is it, for example, necessary to go to court to get an order that a permit be issued, or may a developer start bulldozing and wait to see if the public agency will try to stop the project?"<sup>92</sup>

In 1991, the California Court of Appeals apparently resolved this issue in the case of Ciani v. San Diego Trust and Sav. Bank,<sup>93</sup> which held that a "deemed approved" permit "is a permit which bears all the legal entitlements of a tangible permit issued by the agency."<sup>94</sup> The court noted that "[i]t may be that practical problems will interfere with the use of a permit which exists only in the eyes of the law, devoid of paperwork or city seal. Contractors and subcontractors may be reluctant to enter upon development projects in the coastal zone without some tangible evidence of permit entitlement."<sup>95</sup> The fact that the Act "may not have avoided all practical problems created by agency delay does not, however, in our opinion mitigate against our validating its obvious objective."<sup>96</sup>

The California Attorney General has also subsequently issued an opinion concurring with this result. In particular, the Attorney General of that State was asked whether a tentative map that had been validly "deemed approved" under the Subdivision Map Act by the failure of the legislative body of a city or county to take timely action to approve, conditionally approve, or disapprove it, was entitled to be treated in the same manner as a tentative map that had been



approved by a vote of the legislative body. The Attorney General responded in the affirmative, citing Ciani for the proposition that a “deemed approval” is the legal equivalent of actual approval in a variety of circumstances. However, the Attorney General noted that the Act in question specified that a tentative map is deemed approved only “insofar as it complies with all applicable requirements of [the Act] and local ordinance.” Accordingly, the Attorney General concluded, “a tentative map must conform to all applicable provisions of the Act and local ordinances enacted pursuant thereto if it is to qualify as being deemed approved under the statute.”<sup>97</sup>

Legislative options. The Bureau believes that there is no legal requirement to amend section 91-13.5. The Legislature could take a “wait and see” approach and allow cases to develop through the agencies and courts. Alternatively, to ensure a more concrete result, the Legislature can amend section 91-13.5, HRS to specify that a permit, license, or approval, as applicable, shall be issued by the agency within a specified number of days after the application has been deemed approved, provided that the permit complies with all other applicable laws.<sup>98</sup> For example, a Massachusetts automatic approval statute (as discussed in chapter 3 of this report) allows applicants who have received an automatically approved application to receive a certificate from the city or town clerk indicating the date of approval, the fact that the agency failed to take final action, and that the approval resulting from that failure has become final.<sup>99</sup> This type of provision also gives immediate notice of an automatic approval to those seeking to challenge the approval in court.

## **2. Noncompliance with Other Laws**

### **Issue:**

May an applicant begin work on an automatically approved project that may be in violation of other state or county laws?

### **Short Answer:**

Existing laws covering a certain area, such as occupational safety and health, may allow an agency to seek a revocation or suspension of an automatically approved permit because of the permit holder’s failure to comply with those laws. If these laws do not exist, agencies may adopt rules prohibiting work on automatically approved projects that do not comply with existing federal, state, or county laws.

### **Discussion:**

A permit or license may be automatically approved under section 91-13.5, HRS yet still not comply with other applicable state or county laws. For example, House Resolution No. 128, H.D. 1 (2000) notes that “a situation could arise where an agency is considering a complex environmental assessment or impact statements that are required pursuant to Chapter 343, Hawaii Revised Statutes (HRS), but the deadline passes, preventing adequate environmental disclosure...”. Similar criticisms have been leveled against California’s Permit Streamlining Act in 1990.<sup>100</sup>

However, California's Permit Streamlining Act was subsequently amended to address some of these concerns. For example, that Act now provides that the time limits of the Subdivision Map Act shall not be extended by operation of the Permit Streamlining Act.<sup>101</sup> In addition, the Permit Streamlining Act was amended to address concerns raised by the California Environmental Quality Act by measuring all statutory time limits for final approval or disapproval in terms of the environmental review process, rather than the date that the application was found to be complete.<sup>102</sup> For example, the Permit Streamlining Act provides, among other things, that a project is to be approved or disapproved within 180 days after an environmental impact report has been certified by a lead agency, or within 60 days from the adoption of a negative declaration.<sup>103</sup>

Hawaii's section 91-13.5, HRS, in contrast, does not address conflicts with other state or county laws in the statute itself, but implicitly delegates to agencies the power to address these concerns in adopting rules pursuant to that section. While this gives agencies great flexibility in addressing these concerns, little guidance is offered in the statutory language itself or in the legislative history as to how agencies may effectuate this objective. In particular, how may Hawaii's agencies address situations in which an automatically approved permit may be in violation of other state or county laws?

One example of a conflict created by section 91-13.5, HRS is in the area of county Building Code standards. The issue is whether the automatic approval of building permits that do not comply with the Building Code may jeopardize the public's health and safety. On the one hand, it may be argued that even if a building permit that does not meet Building Code standards is automatically approved, county agency rules still provide for building inspections and opportunities to remedy the problem before an occupancy permit is issued. On the other hand, it is argued that various factors – including limited staff and agency resources, the complexity of the issues, and the need for too many additional permits requiring input from both reviewing and issuing agencies before a final building permit is issued – unreasonably endanger the public's health and safety by allowing insufficient time for permit review and force the agency to focus most of its attention on responding to permit applications to prevent automatic approval rather than on proactive planning or environmental management.

Automatic approvals of building code permits at the county level have already occurred. In particular, staff shortages and the retirement of a person at the City and County of Honolulu's Department of Planning and Permitting have resulted in the automatic approval of building permits with respect to mechanical reviews (which include plumbing, some ventilation, and other areas).<sup>104</sup> Although these permits were deemed approved, however, it is not clear whether the applications met City and County Building Code standards. While section 91-13.5, HRS supersedes county ordinances and rules, thereby requiring the approval of these permits by operation of law if the maximum time period is exceeded, these permits must still comply with the county Building Code.

Prior to the enactment of section 91-13.5, HRS, if a permit reviewer found any problems or defects in an application, the applicant could be told to simply make the required changes under the Building Code – or any other county code, such as the Electrical Code, Plumbing

Code, or Housing Code. Since the enactment of section 91-13.5, HRS, however, if a project that does not meet code standards is automatically approved, the person who is required by ordinance to make inspections before construction will inform the applicant that changes must be made to the project because it is not up to code standards, notwithstanding the fact that the applicant has received a valid, necessary permit, although it has been deemed approved.<sup>105</sup> This may prove to be potentially costly for applicants.

It may be argued that the automatically approved permit, in this type of situation, results in greater uncertainties: although the applicant has a validly approved permit, the applicant still does not know whether the project complies with applicable ordinances. As a result, the applicant must increasingly rely on architects and engineers, who may not wish to self-certify their work as code compliant,<sup>106</sup> or who may charge more for representations that their plans meet all of the code requirements when they sign off on a project. The argument is that this type of situation will likely result in increased litigation and uncertainty in projects or hold them up, rather than increase certainty and speed in construction as intended by section 91-13.5, HRS.

One of the primary areas of concern is that the public's health, safety, and welfare may be jeopardized. If a building permit is automatically approved, for example, and there are no subsequent inspections or only a cursory inspection because of a staff shortage, the public's safety may unreasonably be placed at risk. In other situations – for example, the automatic approval of an elevator permit, a license to practice medicine, a permit to operate an amusement park ride, or a liquor permit – it is argued that the resulting license or permit may result in jeopardizing public health, safety, or welfare. Under its general police powers, the State has an obligation to protect the public's health safety, and welfare.<sup>107</sup>

However, it is argued that agencies have the opportunity under section 91-13.5, HRS to adopt rules to ensure that permits, licenses, or approvals are acted upon within the agency's self-imposed time limit. If there is dissatisfaction with a harsh or unfair result, the appropriate remedy is either litigation or an amendment to section 91-13.5, HRS. Moreover, while the term "public welfare" traditionally "embraces the primary social interests of safety, order, morals, economic interest, and non-material and political interests[,] ... [i]t has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience."<sup>108</sup> Thus, it may be argued that section 91-13.5, HRS is *already* in the interest of the public welfare to improve the State's economy by giving businesses more definite information about the time in which a permit, license, or approval will be granted or denied.

Does the State's obligation to protect the health, safety, welfare of the people of Hawaii outweigh the State's interest in obtaining prompt agency action under section 91-13.5, HRS? The Vermont Supreme Court, in reviewing an automatic approval provision, has held that the statute's purpose of encouraging prompt action within a time certain "must be balanced against the state's 'paramount obligation to promote and protect the health, safety, morals, comfort and general welfare of the people.'"<sup>109</sup> However, it is unclear whether a Hawaii court would similarly balance the legislative intent of section 91-13.5, HRS with the State's obligation to promote public health, safety, and welfare to mitigate unfair or harsh results from the application of that law, or whether the court would note that the agency already had an opportunity to address this problem within the agency's own self-imposed time limits.

Moreover, Hawaii's Attorney General has noted that existing laws may be used to address situations in which automatically approved permits may jeopardize public safety. In response to an inquiry from the Department of Labor and Industrial Relations, the Attorney General responded that applications for various permits, variances, and certificates processed by the Division of Occupational Safety and Health pursuant to chapter 396 and 397, HRS were subject to the automatic approval provisions of section 91-13.5, HRS. While expressing reservations about this conclusion "because of the importance of assuring health and safety to employees and the general public", the Attorney General noted that "we do not believe that any automatic approval under [section 91-13.5, HRS] would preclude the Department from exercising its enforcement powers under [applicable laws].... The Department may seek a revocation or suspension of a holder's permit or certificate if it finds that the holder of an automatically approved permit is unqualified or equipment to which the permit or certificate attaches is unsafe. Nothing in [section 91-13.5] or its legislative history suggests that the Legislature intended to enhance Hawaii's business climate at the expense of employee or public safety."<sup>110</sup>

Regulatory options. There are several potential solutions that agencies may use to address this problem and avoid a harsh result under section 91-13.5, HRS, none of which would appear to require the amendment of that section:

- (1) Application completeness. As discussed in part B.1. of this chapter, one solution is for agencies to adopt rules specifying that an application will not be deemed to be complete until all necessary approvals from other agencies have been received, or until the acceptance of an environmental impact statement or finding of no significant impact under chapter 343, Hawaii Revised Statutes. In other words, the environmental impact statement or other reviews are requirements that must be satisfied before an application is deemed to be complete and accepted.
- (2) Mandatory conditions. As discussed in part D.4. of this chapter, the agency may also adopt rules requiring the attachment of reasonable conditions to an automatically approved permit, license, or approval, provided that the conditions are consistent with the intent of the agency's implementing statute and section 91-13.5.
- (3) Public health, safety, and welfare. Agencies may adopt rules to provide that automatically approved permits shall not jeopardize the public's health, safety, or welfare. "In practically every jurisdiction courts have permitted delegation of almost unlimited discretion to issue rules in the interest of public health, safety, and morals."<sup>111</sup> In some cases, the agency's implementing statute may require the adoption of rules for the protection of public health and safety.<sup>112</sup> In other cases, the adoption of this type of rule may arguably be implied under section 91-13.5, HRS; while that section does not specifically authorize agencies to adopt this type of rule, neither does that section specifically prohibit it. It is unclear, however, how far an agency may go in adopting these types of rules. For example, should an agency have the authority to adopt rules to protect public, health, and safety

under the general police power by: (A) denying applications that do not meet these standards; or (B) denying applications for projects that have already received other automatically approved permits that do not meet these standards?

- (4) Inspections. Agency rules can specify that even though a permit has been deemed approved, the project is still subject to inspections that are required under an applicable ordinance at some future date, and are still subject to legal sanctions if the project is found not to be compliant with applicable laws, such as the county's building code.
- (5) Exclusion. Agencies rules may state that an automatically approved permit shall not be construed to be an approval of violations of other laws. An example of this approach is that taken by the City and County of Honolulu Board of Water Supply, which provides that "[a]utomatic approval shall not be construed to be an approval of any violation of applicable codes, regulations, ordinances, standards, or waiver/inapplicability of any applicable charges."<sup>113</sup> While this does not prevent a project that is in violation of an applicable code from being automatically approved, it nevertheless may limit the county's liability in cases in which an injury results from the automatically approved permit.

Legislative options. The Bureau believes that there is no legal requirement to amend section 91-13.5 to address the issues raised in this section, in view of the ability of agencies to adopt rules prohibiting the implementation of automatically approved projects that do not comply with existing federal, state, or county laws. If there are no existing statutory provisions relating to enforcement or that protect public health and safety, however, agencies can presumably adopt rules designed to protect public health and safety in the event that a permit is automatically approved.

However, if agencies do not adopt these rules, or these rules are not complied with, the state or county may be exposed to additional liability. If it is concerned about these issues, the Legislature may amend section 91-13.5, HRS as discussed in part C of this chapter to specifically allow agencies to adopt rules to provide reasonable extensions of the maximum time period as may be necessary in the interests of the public's health, safety and welfare under the general police power of the State, and may also amend the preamble in section 2 of section 91-13.5, HRS to include additional language outlining legislative intent to the effect that section 91-13.5, HRS was not intended to jeopardize the public health, safety, and welfare of Hawaii's citizens. Section 91-13.5 may also be amended, similar to Minnesota's automatic approval law, to provide that an automatic approval under section 91-13.5 "does not limit the right of an agency to suspend, limit, revoke, or change a license for failure of the customer to comply with applicable laws or rules."<sup>114</sup>

In addition or alternatively, the Legislature may add specific statutory references to statutes other than section 91-13.5, HRS, to require an automatically approved application to be consistent with applicable laws and health and safety standards. For example, as discussed in chapter 3 of this report, section 201G-118, HRS, which allows the Housing and Community Development Corporation of Hawaii to develop or assist in developing housing projects that are

exempt from various planning and zoning laws, contains two automatic approval provisions – one with respect to the legislative body of the county in which the project is to be situated, and another regarding the Land Use Commission. However, that section also requires the Corporation to find that the project is consistent with the purpose and intent of that chapter, meets minimum requirements of health and safety, and does not contravene any safety standards, tariffs, or rates and fees approved by the public utilities commission for public utilities or the various boards of water supply. In addition, that section provides for the certification of maps and plans “as having complied with applicable laws and ordinances relating to consolidation and subdivision of lands...”<sup>115</sup> Similar language could be added as appropriate to statutes that authorize the issuance of business or development-related permits, licenses, or approvals, to require compliance with other applicable laws in the interests of public health and safety.

### **3. Vague Proposals**

#### **Issue:**

May a vague proposal that has been automatically approved be subsequently amended?

#### **Short Answer:**

No, although the agency may work with applicants to resolve details, or the agency may attach permit conditions. Agencies must require greater detail at the application stage, establish internal procedures to assess the completeness of applications, and take other measures to prevent or otherwise handle or dispose of vague applications.

#### **Discussion:**

What happens to intentionally vague proposals that are automatically approved? One commentator has explained the problem as follows: “More troubling is the question of exactly what is to be ‘deemed approved’. If the project is approved exactly as it was proposed, a number of problems arise, since the proposal may be intentionally vague. Developers often do not have a precise design in mind at the time of application, but wait to see what changes will be required after the project has been reviewed.”<sup>116</sup>

A piecemeal approach to permitting may be preferred to “front-loading” a project – where an applicant must include more information in the application up front – since the latter approach generally involves greater effort, expense, and risks for the applicant, and because applicants may simply not be prepared to provide all of the necessary information at the same time.<sup>117</sup>

A vague proposal that has been automatically approved most likely may not be subsequently amended, since the applicant would be required to go through the review process with respect to any project changes. However, to prevent the applicant from having to re-apply for the same project, and depending on how vague the original proposal was, the agency may negotiate with the applicant work out details, or the agency may attach conditions to specify details in project implementation.

Regulatory options. The automatic approval of vague proposals can be prevented if agencies take several actions, including the following:

- (1) Require greater detail at the application stage: “At the very least, public agencies can make sure that imprecise proposals do not receive automatic approval. More detail about requirements should be given in the information and criteria made available to prospective applicants.”<sup>118</sup> While section 91-13.5, HRS already requires agencies to “clearly articulate informational requirements for applications and review agencies for completeness in a timely manner”,<sup>119</sup> agencies must follow through by adopting rules that request greater details and specific information on key issues at the application stage to ensure that critical points are addressed for later review. An earlier version of the bill for section 91-13.5, HRS, for example, provided that the agency’s rules “shall provide a detailed description of all information required from an applicant for a business or development-related permit, license, or approval, before the application is deemed complete, including a provision for obtaining another agency’s approval, if required, to complete the application.”<sup>120</sup>
- (2) Establish internal procedures and controls to rapidly assess the completeness of applications. This will help to avoid situations later on in the review process in which agencies are faced with making a decision on an application close to a deadline for agency action.
- (3) Exclude certain submittals from the maximum review period. For example, the rules of the City and County of Honolulu Board of Water Supply state that the maximum time limits established in its rules do not apply, among other things, “[w]here submittals fail to meet the basic adequacy requirements ...; or ... [w]here the scope of work on subsequent submittals differs from the first submittal of plans...”<sup>121</sup>
- (4) Allow for the express written waiver of a maximum time period by applicants. As discussed in part C.2. of this chapter, if an application is vague to the point of being defective, but could be cured if the agency had additional time for review, allowing for a written waiver of the maximum time period would prevent the automatic approval of the defective application. If an implied or written waiver is not allowed, in order to cure the defective application, the applicant would be required to accept a denial of the original application and submit a new one and start the process over again, at additional time and expense.

#### 4. Mandatory Conditions

**Issue:**

May agencies adopt rules providing for the attachment of mandatory conditions to permits that have been automatically approved under section 91-13.5, HRS, or does the attachment of conditions exceed the statutory authority of that section?

**Short Answer:**

Agencies may provide for the attachment of mandatory conditions so long as the scope of those conditions is within the purview of section 91-13.5 and the agencies' implementing statutes.

**Discussion:**

Agencies have already adopted rules providing for the attachment of mandatory conditions to automatically approved permits, licenses, or approvals to implement section 91-13.5, HRS.<sup>122</sup> Is this permissible?

It has been argued that attaching conditions runs counter to the intent of section 91-13.5, HRS. For example, Hawaii's Governor has already stated his objections to rules attaching mandatory conditions under proposed rules of the Land Use Commission (which were subsequently adopted): "We disagree with provisions which would automatically apply a set of conditions to petitions which are automatically approved under section 91-13.5, HRS, SLH 1998. These proposed amendments are contrary to the intent of section 91-13.5, HRS, SLH 1998."<sup>123</sup>

The United States Supreme Court, in the case of Chevron v. Natural Resources Defense Council,<sup>124</sup> created the following two-step test to be applied in determining whether a rule is permissible under its implementing statute:

When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>125</sup>

Accordingly, a Hawaii court will presumably first seek to determine whether the section itself directly addresses this issue, which is one of policy that the Legislature has delegated to agencies.<sup>126</sup> Since section 91-13.5, HRS is silent on the issue of mandatory conditions, the question is "whether the agency's answer is based on a permissible construction of the statute." The attachment of mandatory conditions is a matter of policy to be resolved by the agencies



themselves, so long as the scope of the conditions is permissible under both section 91-13.5 and the agencies' implementing statutes.

One argument against attaching mandatory conditions to automatically approved permits is that conditions may "enlarge" the provisions of section 91-13.5, HRS. As discussed in the previous chapter on the subject of delegation of rulemaking authority, an agency's authority to adopt rules is limited to enacting rules that carry out and further the purposes of legislation and do not enlarge, alter, or restrict provisions of the statutes being administered.<sup>127</sup> Because section 91-13.5, HRS does not refer to the conditions, attaching mandatory conditions may therefore impermissibly "enlarge" the provisions of that section. Similar reasoning was used by Hawaii's Circuit Court in its decision in HELCO, as discussed in the previous chapter.<sup>128</sup>

Another argument against the attachment of mandatory conditions is that section 91-13.5, HRS states that "[a]ll such issuing agencies shall take action to grant or deny any application ..." (emphasis added), but does not specifically allow agencies to "grant with conditions" or "conditionally grant" applications. The rule of statutory construction "*expressio unius est exclusio alterius*" (the expression of one thing implies exclusion of the other) may be used to argue that when the Legislature expresses items in a list (the list in this case being the words "grant or deny"), it is assumed that what is not listed is excluded (namely, "grant with conditions"). However, as discussed earlier, the counter argument is that this maxim is "only as an aid to statutory interpretation and its application should be limited to ascertaining legislative intent which is not otherwise apparent."<sup>129</sup>

As discussed in chapter 3, the purpose of section 91-13.5, HRS is to assist in improving the State's business climate by providing "a greater level of certainty of the time required for review and final determination by an agency" on applications for business and development-related permits, licenses, or approvals by requiring agencies to act upon applications "within an established time frame, or application approval would be automatic".<sup>130</sup> It may be argued that adding conditions would defeat the legislative intent or political motivation underlying section 91-13.5, HRS, namely, to provide for a final decision within a definite period of time. Since applicants will be forced to return to the issuing agency to have those conditions removed that do not apply to the applicant's project, adding conditions will increase the time period for agency action.

However, although the attachment of conditions may result in a longer maximum time period, and although section 91-13.5 does not specifically use the language "grant with conditions", the attachment of conditions may be reasonably implied and authorized if the conditions are *required by other statutory or constitutional provisions*. In particular, it may be argued, agencies must protect their specific statutory and constitutional responsibilities, and must therefore impose conditions that attach to automatically approved permits to protect these responsibilities.

For example, the Land Use Commission must protect its responsibilities under chapter 205, Hawaii Revised Statutes, since chapter 205 is the more *specific* statute, while section 91-13.5, HRS is the more *general* statute.<sup>131</sup> While attaching conditions may arguably be contrary to the intent or spirit of section 91-13.5, HRS, by lengthening the overall maximum time period

and not providing for a definite period, in this case a Hawaii court may resolve the statutory conflict by using the rule of statutory construction that the more specific statute takes priority over the more general one, since the specific statutory intent for each agency – i.e., to protect specific interests or specific areas of public concern – will generally supersede the intent of a general law.

In particular, a court may find that it is permissible for an agency to attach conditions to an automatically approved permit even though the phrase “grant with conditions” is not included in section 91-13.5, HRS, provided that the attached conditions are reasonable and consistent with an agency’s specific statutory authority outside of that section. This would appear to be permissible given section 91-13.5, HRS’s broad grant of authority to agencies to adopt rules in the manner that they deem necessary, the fact that section 91-13.5, HRS does not prohibit the attachment of conditions, and the absence of legislative history prohibiting the attachment of conditions. Assuming that section 91-13.5, HRS’s delegation of rulemaking authority is itself permissible, that section gives agencies the flexibility to fashion their rules in the manner that meets the unique concerns of each particular agency, provided, however, that the agency’s conditions do not “subvert the legislative intent” of that section.<sup>132</sup>

Legislative options. The Bureau believes that no statutory amendments are required, since agencies may address this issue in rulemaking. However, the Attorney General has stated that the Legislature should clarify whether the attachment of special conditions to automatically approved permits is permissible.<sup>133</sup> If the Legislature does not want agencies to attach conditions, it should specifically amend section 91-13.5, HRS to specify that agencies shall “take action to grant without conditions or deny” applications for business or development-related permits, licenses, or approvals, or similar language.<sup>134</sup> Alternatively, the Legislature may specifically authorize agencies to adopt rules allowing for the attachment of mandatory conditions.

## **E. Denials**

### **1. Denial for Lack of Time**

#### **Issue:**

May agencies deny applications due to a lack of time to review an application?

#### **Short Answer:**

No, unless the inability to complete a review of an application is due to reasons not within the agency’s control.

#### **Discussion:**

In general, agencies may not simply deny permits if the maximum time period is about to expire because the agency simply did not have enough time to review the application. Hawaii’s

Attorney General, in response to a question from the Public Utilities Commission whether the Commission could deny an application because of its inability to meet the maximum time period deadline, stated that the Commission's denial of an application "would be subject to judicial review under existing standards. A denial that is issued solely because the Commission has not completed its review could be deemed to be arbitrary and unreasonable upon review, unless the inability to complete the review was due to reasons not within the Commission's control."<sup>135</sup>

While it has been argued that "the imposition of time limits would simply lead to the denial of permits by agencies that had not had adequate opportunity to review applications",<sup>136</sup> agencies that simply deny permits under these circumstances have little to gain if they do so; they would be subject to appeal if their decisions cannot be supported on the record, which consumes agency time and resources.<sup>137</sup> At least one state prohibits this type of denial in its statute: California's Permit Streamlining Act specifies that "[n]o public agency shall disapprove an application for a development project in order to comply with the time limits specified in this chapter. Any disapproval of an application for a development project shall specify reasons for disapproval other than the failure to timely act in accordance with the time limits specified in this chapter."<sup>138</sup>

## **2. Denial for Lack of Information**

### **Issue:**

May agencies deny applications due to a lack of information?

### **Short Answer:**

Yes, for example, when the applicant has failed to meet its burden of showing that it meets the agency's requirements for approval of the application.

### **Discussion:**

House Resolution No. 128, H.D. 1 (2000) argues that "a situation could arise where additional information is required by a department or agency to promote fully-informed decision making, but the deadline passes, denying the decisionmakers the opportunity to be fully informed in their deliberations..."

May the agency simply deny the application for lack of information before the maximum time period expires? Under certain circumstances, agencies may deny applications at the end of the maximum time period when the agency still lacks sufficient information to act. Generally, when there is insufficient information and the applicant fails to meet its burden of showing that it meets the agency's requirements for approval of the application, such as when there are genuine questions about the proposal's effects, a denial is justified: "Where information is lacking and the applicant has failed to meet its burden as to the relevant tests, denial of a permit application for lack of information ought to survive judicial scrutiny. This result is consistent with the purported purpose of automatic approval statutes: to require government to timely act within timetables, but not to change the substantive outcomes and not to force improper approvals of

land-use applications.”<sup>139</sup> Where, however, the agency fails to seek additional information as required by its own rules, it may not be justified in denying the petition.<sup>140</sup>

For example, section 205-4(h), Hawaii Revised Statutes, provides in part that “[n]o amendment of a land use district boundary shall be approved [by the Land Use Commission] unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17.” The Commission is statutorily prohibited from approving such a petition under this section if the Commission lacks the information necessary to make its decision because the applicant failed to carry its burden that the proposed boundary is reasonable and meets certain statutory criteria, such as conformance with the Hawaii State Plan and consistency with statutory decision making criteria. If the Commission, however, is found to have procrastinated in obtaining the required information, a court may find that the application should be automatically approved under section 91-13.5, HRS.

To avoid having to deny applications for lack of information, agencies should adopt internal controls and procedures to “rapidly assess the completeness of applications within any statutory deadlines”<sup>141</sup> and ensure that a permit, license, or approval is not about to be automatically approved without the necessary agency review.

### 3. Automatic Denial

#### Issue:

May agencies adopt rules that provide for automatic denials of applications under section 91-13.5, HRS under certain circumstances, or do automatic denials exceed the statutory authority of that section?

#### Short Answer:

Agencies may not provide for the *express* automatic denial of an applications in its rules. However, agencies would appear to be able to provide for the *de facto* automatic denial of an application under certain circumstances, similar to *de facto* extensions of the maximum time period discussed earlier, because of the broad authority given to agencies to adopt rules under section 91-13.5, HRS.

#### Discussion:

Section 91-13.5 provides for the automatic approval of applications for business or development-related permits, licenses, or approvals that are not granted or denied within the established maximum time period. An agency’s rules that provide for an “automatic denial” or a “deemed denial” would therefore appear to violate both the letter and intent of that section.<sup>142</sup>

However, agencies have already adopted rules under section 91-13.5, HRS that provide for *de facto* automatic denial under certain circumstances. For example, the Land Use

Commission has adopted rules stating that if the Commission's action on an application fails to garner the requisite number of affirmative votes, then findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the Commission.<sup>143</sup> Is this permissible?

Section 91-13.5, which is silent on this issue, would appear to allow this result, because of that section's broad grant of rulemaking authority to agencies. While this type of rule may be contrary to the intent or spirit of section 91-13.5, HRS, it nevertheless is permissible since that section gives agencies near *carte blanche* authority to adopt rules as they deem necessary or appropriate to implement that law, consistent with the agency's implementing statute. If the agency finds that the implementing statute, such as chapter 205, HRS, in the case of the Land Use Commission, requires *de facto* automatic denials to protect the agency's interests under that more specific law, it would appear to have the discretion to do so under section 91-13.5.

It is argued that the automatic approval law does not ensure automatic approvals; rather, it ensures that there will be a timely *decision* by an agency. An agency that adopts rules providing for *de facto* automatic denials, while arguably contrary to the intent or spirit of section 91-13.5, nevertheless ensures that there will be such a decision. While an *express* automatic denial provision would allow an agency "to avoid its obligation to make a clear-cut decision on [an application] within a reasonable timeline as required by [section 91-13.5, HRS]"<sup>144</sup> a *de facto* automatic denial provision that provides for the adoption of findings of fact, conclusions of law, and decision and order denying the application does, in fact, provide for a clear-cut decision.

Does section 91-13.5, HRS allow this result? Apparently so. As discussed in section B.3. of this chapter, while it may be argued that agencies should not be able to evade the requirements of that section by simply using different terminology for actions that are prohibited under that section, section 91-13.5 would nevertheless appear to allow this outcome. Given the broad discretion to adopt rules under section 91-13.5, HRS, agencies appear to have the authority to fashion rules that satisfy the requirements of their implementing statutes, which are the more *specific* statutes and which take precedence over section 91-13.5 as the more *general* statute. If the Legislature does not agree with this result, it should amend the law to produce a different result. In addition, the Legislature could amend section 91-13.5 to require the agency to reschedule another vote or defer the vote if a quorum is not obtained within the maximum time period set by the agency.

## **F. County Issues**

Issues relating to the counties raised by section 91-13.5, HRS include the following:<sup>145</sup>

### **1. Home Rule**

#### **Issue:**

Does a charter's quorum requirements for boards or commission supersede section 91-13.5, HRS under Article VIII, section 2 of the Hawaii Constitution?

**Short Answer:**

No.

**Discussion:**

Article VIII, section 2 of the Hawaii Constitution (“local self-government; charter”) provides in relevant part: “Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.” While certain charter provisions relating to a county’s departments having jurisdiction over water supply, police, and liquor control, for example, may be considered to be areas of local concern, this constitutional provision “did not grant to the political subdivisions complete home rule; such amendments ... only gave local governments limited freedom from legislative control.”<sup>146</sup> Section 91-13.5, HRS, which has statewide application, supersedes charter provisions on the same subject.<sup>147</sup>

**2. Moratoria**

**Issue:**

Does a moratorium on county developments imposed pursuant to county ordinance toll the automatic approval deadline imposed under section 91-13.5, HRS?

**Short Answer:**

Yes.

**Discussion:**

By adopting a moratorium provision, the county is in effect saying that it will not even receive applications during the period of the moratorium. Section 91-13.5, HRS is not triggered because no applications are technically before the agency: “a validly enacted moratorium prevents a planning agency from considering a development application and should, therefore, toll any deadline imposed by a general automatic approval statute.”<sup>148</sup> While courts have split over cases in which the moratorium was enacted after the submission of a development application, “[a]s long as a moratorium is not passed to prevent approval of a specific development, it represents a reasonable exercise of government power, because it preserves the planning process by allowing the government to study adequately certain land-use issues during a fixed period.”<sup>149</sup> Agencies, in adopting rules under section 91-13.5, HRS, may choose to state that maximum time limits shall not apply where the area of the proposed development is under a moratorium.<sup>150</sup>

### 3. County Mandates

**Issue:**

Is section 91-13.5, HRS a county mandate under Article VIII, section 5 of the Hawaii Constitution?

**Short Answer:**

No.

**Discussion:**

Article VIII, section 5 (“transfer of mandated programs”) provides that “[i]f any new program or increase in the level of service under an existing program shall be mandated to any of the political subdivisions by the legislature, it shall provide that the State share in the cost.” While section 91-13.5, HRS may add to county costs in such areas as requiring the expenditure of additional resources to increase staffing for those agencies that lack sufficient personnel to review and issue permits before an agency’s automatic approval deadline, section 91-13.5, HRS nevertheless does not add new programs or modify existing programs, and applies equally to both state and county agencies.

### 4. Ordinances vs. Rules

**Issue:**

May the counties adopt ordinances setting forth maximum time periods?

**Short Answer:**

Yes.

**Discussion:**

Section 91-13.5(c), HRS, requires agencies to “adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval” (emphasis added). However, at least one county – the City and County of Honolulu – has adopted ordinances specifying maximum time periods for agency action, thereby effectively preventing the county’s agency from establishing its own maximum time limits by rule, since these ordinances would supersede any rule to the contrary.<sup>151</sup> Problems may occur when a county agency prefers to establish longer maximum time periods than those established by ordinance, or seeks to establish other parameters that are controlled by ordinance. The existence of these ordinances may mean that county agencies may lose flexibility in drafting rules under section 91-13.5, HRS. Is this permissible?

Arguments can be made that section 91-13.5, HRS, refers to “rules”, rather than “ordinances”, and that ordinances are superseded by section 91-13.5 to the extent that that

section requires “agencies” to adopt rules specifying maximum time periods, since county councils are specifically excluded from the definition of “agency” in the Hawaii Administrative Procedure Act.<sup>152</sup> However, there is no law otherwise prohibiting the counties from establishing their own maximum time periods under section 91-13.5, since that section contains no other limiting language to that effect. The phrase “[u]nless otherwise provided by law” in subsection (a) of that section also “would probably suffice to legitimize Council-imposed time limits on departmental approvals.”<sup>153</sup> Moreover, the City and County of Honolulu “has long operated on the assumption that imposition of time limits for permits required by the zoning process is part of the zoning power, which power is exercised by the Council, by ordinance.”<sup>154</sup>

Legislative options. As a practical matter, however, the Corporation Counsel of the City and County of Honolulu has found this practice to be acceptable, so long as the rules contain a reference to the maximum time limits contained in other laws, and refer to automatic approval for failure to meet those time limits.<sup>155</sup> If the Legislature views this as a problem, it can amend section 91-13.5, HRS, to prohibit or limit the counties’ enactment of maximum time periods by ordinance. Alternatively, the Legislature may statutorily endorse the counties’ preemption of agency rules by ordinance by amending section 91-13.5 to provide that “nothing in this section shall prohibit the counties from establishing maximum time periods by ordinance”, or similar language.

## Endnotes

1. Gardens at West Maui Vacation Club v. County of Maui, 90 Haw. 334, 343, 978 P.2d 772 (1999), *quoting* Doe v. Staples, 706 F.2d 985, 988 (6th Cir. 1983).
2. Id. (citations omitted; emphasis added).
3. Flor v. Holguin, 93 Haw. 245, 252, 999 P.2d 843 (2000), *quoting* State v. Kotis, 91Haw. 319, 327, 984 P.2d 78, 86 (1999); *see also* Gray v. Administrative Director of the Court, 84 Haw. 138, 148, 931 P.2d 580, 590 (1997).
4. Id., *quoting* Haw. Rev. Stat. §1-15(2). Haw. Rev. Stat. §1-15 (“construction of ambiguous context”), states the following rules of statutory construction:
  - §1-15 Construction of ambiguous context.** Where the words of a law are ambiguous:
    - (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
    - (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
    - (3) Every construction which leads to an absurdity shall be rejected.
5. Another way to review the definition of “application for a business or development-related permit, license, or approval” is to apply the maxim of statutory construction known as “*ejusdem generis*”, in which specific words following general words are construed to embrace only objects that are similar in nature to those objects enumerated by the preceding specific words. *See* Peterson v. Hawaii Elec. Light Co., Inc., 85 Haw. 322, 328-329, 944 P.2d 1265 (1997), *citing* Sutherland Stat. Const. §47.17. Under this theory, it may be argued, applications for business or development-related permits, licenses, or approvals should be limited only to those identified in the specific sections and chapters referenced in that definition, namely, sections



46-4, 46-4.2, 46-4.5, 46-5, and chapters 183C, 205, 205A, 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G, 342H, 342I, 342J, 342L, and 342P. However, this argument is unpersuasive, in view of the word “or” separating the first and second half of the definition into business-related permits and development-related permits, respectively.

6. Haw. Rev. Stat. §39A-151 defines “project agreement” as “any agreement entered into under this part by the department with a project party to finance, construct, operate, or maintain a project from the proceeds of special purpose revenue bonds, or to lend the proceeds of special purpose revenue bonds to assist an industrial enterprise, including without limitation any loan agreement.”
7. Haw. Rev. Stat. §39A-151 defines “project party” as “a person, firm, or corporation qualified to do business in this State and conducting or proposing to conduct an industrial enterprise in this State.”
8. *See* Haw. Rev. Stat. §39A-154.
9. Haw. Rev. Stat. §39A-155 provides that no SPRBs shall be issued unless the department has first entered into a project agreement with respect to the project.
10. Haw. Rev. Stat. §91-13.5(e) (emphasis added). The term “approval” is defined in Haw. Rev. Stat. §§196D-3 (geothermal) and 343-2 (environmental impact statement law) as “a discretionary consent required from an agency prior to the actual implementation of the project.” (Emphasis added.) “Approval” is also defined in Black’s Law Dictionary, (5th ed. 1979), p. 94, as “[t]he act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another.”
11. Earlier versions of this definition contained few statutory references. For example, S.B. No. 2204, S.D. 1 (1998) defined an “application for a business or development-related permit, license, or approval” as “any application, petition, or any other form of a request for a permit, license, certificate, or an approval, to conduct any profession, vocation, or occupation requiring a license or certificate of registration issued by a board or commission pursuant to section 26H-4, or to change the intensity of the use of land, water, air, natural or cultural resources, or access thereto.”

In undated testimony submitted with respect to S.B. No. 2204, S.D. 1 (1998), the Office of Planning further sought to clarify this definition by proposing that the definition would affect the following agencies or programs:

- Chapter 436B-2 (DCCA professional and vocational licenses)
- Section 46-4 (county zoning)
- Section 46-4.2 (nonsignificant zoning changes)
- Section 46-4.5 (ordinances establishing historical, cultural, and scenic districts)
- Section 46-5 (planning and traffic commissions)
- Chapter 174C (State Water Code)
- Chapter 183C (Department of Land and Natural Resources)
- Chapter 205 (Land Use Commission)
- Chapter 205A (Coastal zone management/special management areas)

- Chapters 340A to F and 342B to P (Department of Health)
12. Questions relating to the overlap of state and federal programs are discussed in the next section (part A.2. of this chapter).
  13. Moreover, the apparent vagueness and ambiguities in section 91-13.5, as well as that section's apparent lack of meaningful standards, are not necessarily the result of an inability to convey clearer ideas in the statute itself, but more likely a result of the controversy surrounding the idea of automatic permit approval and the need to reach a consensus to obtain passage of the bill:

[T]he lack of meaningful standards in statutes which delegate power seldom stems from a draftsman's failure to put into words the objectives that have taken shape in the minds of legislators, of committee members, or of committee staffs. The lack of meaningful standards almost always results from one or more of three facts and usually from a mixture of all three:

- (1) Each legislator and each assistant to a legislator concerned with a bill has limited confidence in his own capacity in the time available to dig very far into the specialized subject matter, and such a state of mind produces general and vague formulations of objectives, not specific and precise ones.
- (2) Developing policies with respect to difficult subject matter often can best be accomplished by considering one concrete problem at a time, as an agency may do; generalizing in advance is often beyond the capacity of the best of minds.
- (3) Subject matter calling for delegation is often highly controversial; the more specific the statement of legislative objectives the more difficult the achievement of a consensus that can be supported by a majority of each house and win the signature of the executive; the more vague and general the statement of legislative objectives the more likely is the achievement of such a consensus; if bills are to be enacted, the legislative process must be allowed to make its own determination of what degree of specificity of generality is attainable.

One can read a hundred or even a thousand judicial opinions on the subject of delegation and never encounter any mention of such realities as these.

Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (Baton Rouge, LA: Louisiana State University Press, 1969), p. 46.

14. Letter from John P. Deller, Deputy Attorney General, to Paul Shigenaga, Administrative Director, Public Utilities Commission, March 29, 2000, regarding the implementation of Act 164 (Appendix J).
15. For example, a similarly broad definition of "permit" in Haw. Rev. Stat. §201D-1, which has not been challenged as being unconstitutionally vague, also does not list the statutory references covered under that definition. That section defines "permit" as "any license, certificate, registration, or any other form of authorization required by a federal, state, or county department or agency to engage in any business activity, excluding vocational and professional occupational licenses, certificates, or registration and environmental permits." However, the consequences of concluding that a particular statute falls under the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS will have far greater consequences (namely, the possibility that a permit under that statute will be automatically approved), than a similar finding under chapter 201D, which establishes the business action center within the Department of Business, Economic Development, and Tourism.
16. In addition, after sending out the Bureau's survey to state and county agencies for this report, the author received inquiries from two county agencies as to the applicability of section 91-13.5, HRS to their agency. These agencies were referred to their respective corporation counsels for clarification.

17. *See, e.g.*, Kevin Dayton, “Cayetano Seeks More Openness,” The Honolulu Advertiser, October 27, 2000, p. B1. Responding to concerns that the Attorney General’s Office had advised the state Department of Health not to release information concerning a patient who had earlier escaped from the Hawaii State Hospital in Kaneohe, Governor Cayetano informed reporters that deputy attorneys general “have been ‘basically controlling the way we give information out.... From now on, when you folks ask for information, we will ask the attorney general for his or her opinion, but it’s advisory....’”
18. *But see* 2A Sutherland Stat. Const. §47.07 (2000 Rev.), pp. 228-229: “[I]f the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion, it should not be used.” (footnote omitted).
19. *See* Appendix C, endnote 1 (paragraphs 1 and 2).
20. It has been noted that while “questions of interpretation will often be fewer if the statute is general in character than if it is burdened with excessive details”, litigation may still occur on this issue: “Nevertheless such drafting may lead to constitutional attack for the many decisions on the question of uncertainty have encouraged litigants to allege the unconstitutionality of statutes on this ground.” 1A Sutherland Stat. Const. §21.16 (5th ed.), p. 139.
21. Haw. Rev. Stat. §91-13.5(a). The language “state administered permit programs delegated, authorized, or approved under federal law” in Haw. Rev. Stat. §91-13.5, was apparently requested by the federal Environmental Protection Agency. Memorandum from Winfred Pong, Deputy Attorney General, approved by Margery S. Bronster, Attorney General, to Rick Egged, Director of Office of Planning, dated April 7, 1998, p. 4, submitted by Mr. Egged to Senate President Norman Mizuguchi and Speaker of the House of Representatives Joseph Souki on April 17, 1998.
22. *See also* “Automatic Approval, Waiahole Ditch Purchase Pass Legislature’s Muster,” Environment Hawaii, Vol. 9, No. 1 (July 1998), pp. 6-7 (*see* <http://www.planet-hawaii.com/environment/798auto.htm>).
23. Letter from Guy P. D. Archer, Deputy Attorney General, approved by Margery S. Bronster, Attorney General, to Bradley J. Mossman, Deputy Director, Department of Business, Economic Development, and Tourism, dated January 5, 1999.
24. Id. at pp. 5-6 (footnote omitted):

Some may argue that the definition of “development-related permit” contained in section 91-13.5(e) expressly includes the chapter 205A SMA [Special Management Area] permits; but looking at the law as a whole, it is clear that if the state program is federally approved, the development-related permit is exempt. Since the State legislature created a “state administered program ... approved under federal law” more than two decades ago, state and county agencies administering the SMA permits are not required to adopt special rules relating to “automatic approvals” under section 91-13.5.
25. Haw. Rev. Stat. §91-13.5(b).
26. Id., §91-13.5(c).
27. One example of agency completeness requirements is found in the Department of Health’s rules for underground storage tanks, which provides:

The director need not act upon nor consider any incomplete application for a permit. An application shall be deemed to be complete only when:

- (1) All required and requested information, including the application form, plans, specifications, and other information required by this subchapter have been submitted in a timely fashion;
- (2) All fees have been paid as prescribed in section 11-281-35; and
- (3) The director determines that the application is complete.

Haw. Admin. Rules §11-281-27(a) (“action on and timely approval of an application for a permit”).

28. Gregory G. Brooker and Karen R. Cole, “Automatic Approval Statutes: Escape Hatches and Pitfalls,” 29 The Urban Lawyer 439, 445 (Summer 1997) (footnote omitted).
29. Letter from Michael J. Matsukawa, Esq., to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, dated June 20, 2000, p. 1 of attachment entitled “Comments on Automatic Approval Legislation”: “Under existing ordinances, rules or practice, many agencies already process applications for non-discretionary approvals on an expedited basis for ‘small projects’ or for projects which are designated as ‘complex’ or ‘high-priority’ projects (including the use of third-party inspectors/plan reviewers at the applicant’s expense)... Act 164, however, treats all applications alike without reason.”
30. See Haw. Rev. Stat. §91-13.5(b) and (c), which refer to “[a]ll such issuing agencies”.
31. City and County of Honolulu Board of Water Supply rules, §1-113(2) (“Review of Construction Plans and Building Permit Applications”), as adopted by Resolution No. 699, 1999 (eff. Jan. 1, 2000).
32. California Gov’t Code §65950 (1986), cited in Palmer v. City of Ojai, 178 Cal.App.3d 280, 223 Cal.Rptr. 542, 545 (App. 2 Dist. 1986).
33. Bickel v. City of Piedmont, 68 Cal. Rptr.2d 758, 767 n. 2, 17 Cal.4th 1040, 946 P.2d 427 (1997) (Baxter, J., dissenting).
34. Conference Committee Report No. 143 to S.B. No 2204, S.D. 2, H.D. 2, C.D. 1, p. 2 (emphasis added).
35. Haw. Rev. Stat. §91-13.5(a) refers to “a maximum time period”. This issue overlaps with the issue of *de facto* or express *extensions* other than those specified in section 91-13.5, HRS, as discussed in the next section of this chapter.
36. City and County of Honolulu Board of Water Supply rules, §1-113(2), *supra* note 31, p. 5.
37. Kauai County Planning Commission’s rules on special permits, §13-7(b) (“maximum time period”) (emphasis added).
38. Ordinances specifying maximum time periods are discussed in part F.4. of this chapter.
39. Haw. Rev. Stat. §91-13.5(d) (emphasis added).
40. See also *infra* note 129 and accompanying text.
41. Letter from Randall S. Nishiyama, Deputy Attorney General, approved by Earl I. Anzai, Attorney General, to Paul Shigenaga, Administrative Director, Public Utilities Commission, December 28, 1999, p. 3 (Appendix J).
42. International Savings and Loan Ass’n v. Wiig, 82 Haw. 197, 201, 921 P.2d 117 (1996) (citation omitted).
43. See generally Brooker and Cole, *supra* note 28, at 462-466. Waivers are discussed in part C.2. of this chapter. For example, Brooker and Cole cite the following cases for the proposition that conflicts in

Connecticut case law provide an example of the “confusing state of the law on extensions and waivers.” Id. at 463. In Metropolitan Homes, Inc. v. Town Plan and Zoning Commission of Farmington, 202 A.2d 241 (Conn. 1964), the Connecticut Supreme Court denied automatic approval, holding that the applicant consented to an extension of the statutory deadline even though the consent was not in writing. The Connecticut Appeals Court in University Realty Inc. v. Planning Commission of Meriden, 490 A.2d 96 (Conn. App. Ct. 1985) held that an applicant’s oral request at a public hearing that a planning commission table its application was not consent to extend the deadline, since the continuance was an exercise of the commission’s power, even though done at the applicant’s request. That State’s Supreme Court subsequently held in Frito-Lay, Inc. v. Planning and Zoning Commission of Killingly, 538 A.2d 1039 (Conn. 1988), that an applicant implicitly consented to an extension when the applicant’s representative announced that the applicant would not be present at a planning commission meeting because of an emergency, and that the application should be postponed, ruling that the extension was a waiver of the applicant’s right to require the commission to render its decision under the statute. *See* Brooker and Cole, *supra* note 28, at 463-464.

44. Brooker and Cole, *supra* note 28, at 464 (footnote omitted; emphasis added): “When the rules for the granting of extensions are not laid out in the statutes, the courts are left to sort out the intentions of the parties based on a limited administrative record. Implying extensions or waivers based on the conduct of applicants appearing before planning commissions and boards is a judicial exercise fraught with pitfalls.”
45. Id. at 466 (footnote omitted; emphasis added). Brooker and Cole cite the Pennsylvania case of Rouse/Chamberlin Inc. v. Board of Supervisors of Charlestown Township, 504 A.2d 375 (Pa. Commw. Ct. 1986), in which the statute required extensions to be in writing and have no conditions attached. In that case, the court held that the township board did not abuse its discretion when it voted on a proposed subdivision at the end of a 120-day period, which included a 30-day extension of the deadline, since the applicant had failed to give the board a second written extension of time to make its decision. Id.
46. Sutherland Stat. Const. §4.18 (5th ed.), pp. 181-182 (footnotes omitted).
47. Id., §57.19 (5th ed.), pp. 47-48 (footnotes omitted):
 

It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory. However, if the time period is provided to safeguard someone’s rights, it is mandatory, and the agency cannot perform its official duty after the time requirement has passed.
48. 55 Haw. 538, 524 P.2d 84 (1974).
49. Haw. Rev. Stat. §205-4 (prior to its 1972 amendment) and the Land Use Commission’s State Land Use District Regulation 2.35.
50. Town, 55 Haw. at 545.
51. Id., 55 Haw. at 542; *but see* dissenting opinion of Ogata, J., joined by Richardson, C.J., noting that the failure on the part of the Land Use Commission to act on the petition within the specified time period “would not injuriously affect any one, and in this case no one has been adversely affected...”. Id., 55 Haw. at 552.
52. 62 Haw. 666, 619 P.2d 95 (1980).

53. Haw. Rev. Stat. §205-6 (prior to its 1978 amendment).
54. The Court in Perry distinguished its decision in Town as follows: “Where public interests and private rights are adversely affected by procedural irregularity or agency indiscretion, we would not hesitate to follow Town. But this is an inappropriate occasion for its application. The delay here occurred prior to the publication of notice of hearing, before any administrative action that might have been to the advantage of either applicants or adjoining landowners.” Perry, 62 Haw. at 678.
55. Id., 62 Haw. at 675 (footnote omitted).
56. Id., 62 Haw. at 675-676 (citations omitted; emphasis added). The Court further noted the following:
- Ironically, the harsh penalty of voidance of favorable agency action was visited upon applicants for a presumed dereliction of the planning department. This unfairness may explain why courts do not always ascribe mandatory effect to procedural provisions, though the relevant statutory language, as in this case, may be obligatory in form. For ‘shall’ has often been read in a non-mandatory sense, particularly where a statute’s purpose and the unjust consequences of a mandatory reading confute the probability of a compulsory statutory design. ...
- A crucial difference between statutes considered directory and those deemed mandatory arises from the consequences of noncompliance. A failure to follow the former is unattended by serious legal consequences; a neglect of the latter may invalidate a transaction or subject the transgressor to legal liabilities. ... Where there is a manifest necessity for strict compliance or a clear expectancy thereof, the provision is accorded mandatory status and the administrative agency’s power to act may hinge upon precise adherence to the law. ... Notice and hearing requirements are within the foregoing category because of obvious due process considerations. ... Seemingly absolute time periods for administrative action, on the other hand, are often considered mere guides for the conduct of business with dispatch and for orderly procedure.
57. Id., 62 Haw. at 676 (citations omitted); *see also* Cudal v. Sunn, 69 Haw. 336, 342, 742 P.2d 352 (1987); State v. Toyomura, 80 Haw. 8, 20, 904 P.2d 893 (1995), *quoting* Jack Endo Elec., Inc. v. Lear Siegler, Inc., 59 Haw. 612, 616-617, 585 P.2d 1265, 1269 (1978).
58. Id., 62 Haw. at 677.
59. 1998 Haw. Sess. Laws Act 164, section 2 (emphasis added).
60. City and County of Honolulu Department of Planning and Permitting’s Rules of Practice and Procedure, §1.1-2 (“extension of time period”), eff. Dec. 13, 1999, provides extensions in the following cases:
- (1) In the event of a national disaster, state emergency, or union strike, which would prevent the applicant or the department from fulfilling application or review requirements.
  - (2) An extension required to comply with section 21-2.40-2(d), ROH; and
  - (3) For permits specified as minor or major within chapter 21, ROH, as amended: one extension of up to 15 days for a minor permit or up to 30 days for a major permit, provided that an extension permitted under this paragraph shall not be combined with an extension permitted under paragraph (2).
61. Memorandum from Jane H. Howell, Deputy Corporation Counsel, to Jan Naoe Sullivan, Director, Department of Planning and Permitting, dated August 16, 1999, p. 2 (*see* Appendix L).

62. City and County of Honolulu Board of Water Supply, §1-113(2) (“Review of Construction Plans and Building Permit Applications”), as adopted by Resolution No. 699, 1999 (eff. Jan. 1, 2000) (“emphasis added”).
63. County of Maui, Department of Liquor Control, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui, §§08-101-27(d) (“permits”) and 08-101-30(k) (“application”) (“emphasis added”).
64. *See supra* note 46.
65. *See supra* note 59.
66. *See supra* note 47.
67. Manco of Fairmont, Inc. v. Rock Dell Tp., 583 N.W.2d 293, 295 (Minn. App. 1998).
68. Id., 583 N.W.2d at 296 (finding that the timing element of the applicable Minnesota statute was mandatory but the provision allowing an extension was directory in nature, and that the doctrine of substantial compliance was applicable to the extension provision).
69. Sutherland Stat. Const. §57.26 (5th ed. 1992), p. 67 (footnote omitted).
70. Appendix C, endnote 1 (paragraph 5).
71. This bill includes optional proactive amendments as discussed in chapter 7. A bill based on the Bureau’s recommendations in that chapter is attached as Appendix R.
72. Reasonable extension periods have been proposed where agencies cannot meet those deadlines for “legitimate reasons”, i.e., where delay is not the result of dilatory inaction:

Under present control systems, too many agencies can make a decision by making no decision. An applicant for a public permit should have the right to a decision, one way or another. Public agencies should be required to respond to permit applications within a reasonable time, following completion of all hearings. The length of time will vary with area circumstances, the nature of the development, the work load of permitting agencies, and other factors. A fixed time limit, written into law, may not allow agencies sufficient flexibility, but some provision should be made for establishing a deadline. Agencies that, for legitimate reasons, cannot meet a particular deadline can be given the opportunity to justify provision of a reasonably extended period.

Fred Bosselman, Duane A. Feurer, and Charles L. Siemon, The Permit Explosion: Coordination of the Proliferation (Washington, DC: The Urban Land Institute, 1976), p. 31 (emphasis added).

73. Sutherland Stat. Const. §4.19 (5th ed.), p. 183 (footnote omitted): “In practically every jurisdiction courts have permitted delegation of almost unlimited discretion to issue rules in the interest of public health, safety, and morals.”
74. Interview with Mr. Jeyan Thirugnanam, Office of Environmental Quality Control, August 23, 2000.
75. Appendix C, endnote 1 (paragraph 3).
76. *See, e.g.*, Sutherland Stat. Const. §56.02, “Statutory policy” (5th ed.), at 306 (footnotes omitted): “[P]olicy considerations dictate the interpretation according to what is conceived as the purpose, equity or spirit of

the statute. It is not uncommon for a statute to contain in most cases, a general section outlining what policy the legislation is supposed to serve. Provisions of this sort have often been helpful in resolving doubtful statutory meaning.” *See also id.*, §56.01, “Interpretive relevance of policy considerations”.

77. A “waiver” is an equitable principle involving the intentional or voluntary relinquishment of a known right. Waivers may be either express or implied, the latter occurring where “one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby.” Black’s Law Dictionary (West 1979, 5th ed.), p. 1417.
78. Brooker and Cole, *supra* note 28, at 466 (emphasis added):
 

The statutory framework governing extensions of deadlines can be confusing enough to the players in the planning game, without the courts applying general notions of waiver to the game rules. When courts start to interpret the subtle movements of the players for any evidence of implicit waiver of the deadlines, the purpose behind the automatic approval statutes is diminished. The temptation to apply waiver principles is great, because in many states the legislature has failed to adequately establish the rules for a valid extension of the prescribed time limits. Until the automatic approval statutes governing extensions are cleaned up, the case law will continue to be a messy conglomeration of implicit waivers and extensions, leaving little guidance for future planners and developers.
79. 68 Cal.Rptr.2d 758, 17 Cal.4th 1040, 946 P.2d 427 (1997); *see also* Daniel J. Curtin, Jr., “Waive Hello: Forgoing Rights Under the Permit Streamlining Act,” Los Angeles Daily Journal, Dec. 15, 1997, p. 7.
80. Id., 68 Cal.Rptr.2d at 763.
81. Id. (emphasis in original).
82. Id., 68 Cal.Rptr.2d at 764. The Court of Appeals majority in Bickel reasoned: “It takes no particular imagination to envision a commission not ready or willing to approve an application, but ‘up against’ the Act’s deadline, politely suggesting that perhaps more time might be the solution but that, because of the Act, such would have to come via a formal request from the applicant complete with a ‘waiver’ of the Act. Most applicants would, we venture, be under severe pressure to acquiesce in such a ‘suggestion.’” Id.
83. Id., 68 Cal.Rptr.2d at 764-765.
84. Id., 68 Cal.Rptr.2d at 768 (Baxter, J., dissenting).
85. Id. (emphasis in original).
86. Id., 68 Cal.Rptr.2d at 769 (emphasis added).
87. 1998 Statutes of California, c. 283, §5.
88. As discussed in part B.2. of chapter 4, where an applicant’s intentional delay instead occurs in a contested case hearing, the question arises whether the delay is a result of the applicant’s strategy, e.g., postponing major arguments until near the end of the hearing, or results from the applicant’s bad faith. When the applicant attempts to unreasonably delay the proceedings with the intended purpose of triggering the automatic permit approval provision by default, it may be argued that this situation can be handled internally by the agency at the hearings officer’s discretion, who needs to make rulings to prevent this



abuse. Moreover, if an applicant's bad faith can be proved, the remedy may be judicial review under the arbitrary and capricious standard of review, e.g., if the hearings officer allowed the applicant to introduce repetitive testimony and instigate delays. The court may remand the case to give the opposing party an opportunity to testify. Alternatively, the Legislature may amend the statute to impose penalties on an applicant's bad faith.

89. S.B. No. 2204, S.B. 2 (section 3); *see also* Ala. Code §11-19-14 (“approval of plats of subdivision before recordation — procedure for approval, etc.”), which provides that “[t]he county planning commission shall act to approve or disapprove a subdivision plat within 30 days after its submission; otherwise, such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the county planning commission on demand; provided, however, that the applicant for the commission's approval may waive this requirement and consent to an extension of such period.” (Emphasis added.)
90. Cal. Gov't Code §65957 (West 2000).
91. Minn. Stat. §15.99(3)(f): “An agency may extend the time limit ... before the end of the initial 60-day period by providing written notice of the extension to the applicant. The notification must state the reasons for the extension and its anticipated length, which may not exceed 60 days unless approved by the applicant.”
92. Kenneth Wilson, “Down Stream from Streamlining,” California Lawyer, vol. 7, no. 8, Aug. 1987, p. 70.
93. 285 Cal.Rptr. 699, 233 Cal.App.3d 1604, *review denied, on subsequent appeal*, 30 Cal.Rptr.2d 581, 25 Cal.App.4th 563 (App. 4 Dist. 1991); *see also* Daniel J. Curtin Jr. and Richard L. Crabtree, “Pitfalls Plague the Permit Streamlining Act,” Los Angeles Daily Journal, Oct. 30, 1991, p. 7.
94. Id., 285 Cal.Rptr. at 705.
95. Id., 285 Cal.Rptr. at 704.
96. Id., 285 Cal.Rptr. at 704-705.
97. California Attorney General Opinion No. 97-1209, dated May 28, 1998. The Attorney General also assumed that the approval had met constitutional requirements such as prior notice and hearing. Id., n.2.
98. *See* Wilson, *supra* note 92, at 70, noting that California Assemblyman Byron Sher had introduced AB 1486 to require “that a permit be issued ‘within 60 days after a development project has been deemed approved.’”
99. *See* Mass. Gen. Laws ch. 40A, §9, 15.
100. Daniel J. Curtin and Thomas C. Wood, “Ambit of Permit Streamlining Act Is Shrinking,” Los Angeles Daily Journal, Oct. 5, 1990, p. 7:  
  
As one court recently lamented: “Laid almost haphazardly upon a heap of existing rules, the [act] set up a chain reaction of statutory conflicts that continues today.” *Selinger v. City Council of Redlands*, 216 Cal.App.3d 259 (1989) (quoting a legal commentator.) The main problem is that the act is silent as to whether it requires automatic approval of a land development project despite noncompliance with other general plan, zoning, Subdivision Map Act or California Environmental Quality Act requirements.
101. Cal. Gov't Code §65920(b).

102. Prior to its amendment, California's Permit Streamlining Act (PSA) was found to be in conflict with the California Environmental Quality Act (CEQA). One commentator noted that the two laws clearly "operated at cross purposes":

CEQA insists upon thorough analysis of all environmental effects of a project, as well as consideration of the alternatives to the project; PSA insists upon a prompt decision on the application. The PSA was enacted as a sort of developers' backlash against CEQA which has been the safe harbor of the California environmental protection movement. The gaps and overlaps between the two laws, and the extreme difficulty of implementing the two harmoniously are generating important cases that the courts will have to resolve. Other states, which will doubtless feel the same pressures to enact PSA-type legislation as California did, should heed the warning signals and resolve the controversies before codifying the dispute. The California example is not impressive.

Linda Pinkerton, "Conflicting Statutes in No-Growth Environments: CEQA and the PSA," 4 UCLA J. of Env'tl. Law & Policy 173, 174 (Winter 1985).

103. Cal. Gov't Code §65950(a)(1), (3).
104. Meeting of the Permit Process Task Force, Subcommittee on County Building Permits, May 31, 2000, held at the Office of Planning; comments of Mr. Melvin Lee, Chief, Building Division, City and County of Honolulu Department of Planning and Permitting.
105. City and County of Honolulu Department of Planning and Permitting Rules Relating to the Administration of the Housing and Building Codes, §3-2(a), eff. Dec. 15, 1999, provides that "[a] written notice of violation may be issued by an inspector of the department of a violation of any code."
106. Id., §2-5(a) provides that if plans are not approved after a second plan review, the applicant may either request "a permit by appointment" or "self certify". Under the latter method,

[a] licensed architect or engineer may attest that the remaining deficiencies have been addressed and submit revised plans along with an automatic approval form to be provided by the department, that shall be executed by the architect/engineer and the owner. This alternative may not be used if the capacity of the City's infrastructure is inadequate. The department may require the architect/engineer for the project to be covered by professional liability insurance. The department may deny the use of this alternative if, in the opinion of the department, the applicant is not ensuring compliance with all applicable laws and regulations or is abusing this process.

§2-5(a)(1); *see also* §2-8(c) ("optional one time review process") and Appendix Q of this report (City and County of Honolulu Department of Planning and Permitting Automatic Approval Letter and Form).

107. Police power has been described as "the exercise of the sovereign right of a government to promote order, safety, health, morals and general welfare within constitutional limits and is an essential attribute of government." Black's Law Dictionary (West 1979, 5th ed.), p. 1041 ("police power").
108. Id., p. 1109 ("public welfare") (emphasis added).
109. City of Rutland v. McDonald's Corp., 503 A.2d 1138, 1143 (Vt. 1985) (citations omitted), cited in Brooker and Cole, *supra* note 28, at 461. Brooker and Cole noted, however, that the Vermont Supreme Court's "fear of 'harsh results' for notice violations has not made inroads elsewhere." Id.

110. Letter opinion from Deputy Attorney General Herbert B. K. Lau, approved by Attorney General Margery S. Bronster, to Ms. Lorraine H. Akiba, Director of Labor and Industrial Relations, December 17, 1998, p. 3 (emphasis added; *see* Appendix H).
111. Sutherland Stat. Const. §4.19 (5th ed.), p. 183 (footnote omitted).
112. *See, e.g.*, Haw. Rev. Stat. §321-15.6(b)(1) (“adult residential care homes”), which requires the Director of Health to adopt rules regulating these homes that are designed to “[p]rotect the health, safety, and civil rights of persons residing in facilities regulated...”; *see also* §396-4(a)(1) and (b)(2) and (3), requiring the Department of Labor and Industrial Relations to adopt rules as necessary to administer occupational safety and health standards throughout the State, including rules regarding the Department’s duty to “inspect places of employment and machines, devices, apparatus, and equipment for the purpose of insuring adequate protection to the life, safety and health of workers .... [and] inspect construction activities for the purpose of protecting the health and safety of employees and the general public...”.
113. City and County of Honolulu Board of Water Supply, Resolution No. 699, 1999, §1-113(3) (“review of construction plans and building permit applications”); *see also* City and County of Honolulu Department of Planning and Permitting Rules Relating to the Administration of the Housing and Building Codes, §2-2(c) (“maximum time limits”), eff. Dec. 15, 1999, which states that “[a]utomatic approval shall not be construed to be an approval of any violation of applicable codes, regulations, or ordinances.”
114. Minn. Stat. §15.992(4).
115. Haw. Rev. Stat. §201G-118(a)(1), (a)(2), and (a)(3)(C); *see also* §§166-4(3)(A) and (C) (“park development”) and 171-134(b)(3)(A) and (C) (“industrial park development”).
116. Wilson, *supra* note 92, at 70 [Cal. Lawyer].
117. *See, e.g.*, Mark J. Rosen, Waikiki Developments: Streamlining the Regulatory Process (Honolulu, HI: Legislative Reference Bureau, Report No. 4, 1998), p. 69 (footnotes omitted):

[M]any applicants prefer to use a piecemeal approach to permitting rather than putting everything up front (“front-loading”) a project, since the latter requires more effort and money to be spent up front and increases the risks of the applicant. For example, if an architect is used to draw up plans, the applicant must still pay the architect, even if the plans are not used because of subsequent changes in the plans. Applicants generally prefer minimum up-front costs. Applicants also have different levels of information at different times, and may not be prepared to provide all of the information on all points at the same time. Generally, if an applicant invests a significant amount of money in a project, the applicant seeks to ensure that approvals will be obtained for permit applications. Risking more money up front in a streamlined process, in which applications are filed concurrently and hearings may be held jointly, may be more costly to the applicant in the long run if the application is rejected, rather than drawing the process out and first obtaining a few approvals, and then seeking subsequent approvals from the State or county. Developers seek to ensure the predictability of obtaining permits to save both time and money.

118. Wilson, *supra* note 92, at 71.
119. Haw. Rev. Stat. §91-13.5(b).
120. S.B. No. 2204, S.B. 2 (1998), section 3.

121. City and County of Honolulu Board of Water Supply, §1-113(2) (“Review of Construction Plans and Building Permit Applications”), as adopted by Resolution No. 699, 1999 (eff. Jan. 1, 2000), p. 5 (“inapplicability”).
122. See Haw. Admin. Rules §15-15-90 (Land Use Commission rules); Kauai County Planning Commission Special Permit Rules, §13-7(c) (“The Planning Commission shall establish, among other conditions, a reasonable time limit suited to establishing a particular use, and if appropriate, a time limit for the duration of the particular use, which shall be a condition of the Special Permit.”)
123. Letter from Governor Benjamin J. Cayetano to Merle A. K. Kelai, Chairperson, Land Use Commission, dated April 28, 2000, p. 2.
124. 467 U.S. 837 (1984). “*Chevron* is one of the most important decisions in the history of administrative law. It has been cited and applied in over 1,000 cases in the last decade.” Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, Vol. I (New York, NY: Little Brown and Co., 3rd ed., 1994, and 1999 Supp.), at §3.2, p. 110.
125. Id., 467 U.S. at 842-843 (emphasis added).
126. See Davis and Pierce, *supra* note 124, at §3.3, pp. 112-113:

Congress cannot, and does not, resolve all policy disputes when it enacts a statute, however. For a variety of reasons – inadequate expertise, inadequate time, inadequate foresight, or problems inherent in collective decisionmaking – Congress leaves many policy issues open. When Congress drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in statutory interpretation. It is engaged in statutory construction. It is not resolving an issue of “law.” Rather, it is resolving an issue of policy. That is the situation governed by *Chevron* step two ... In other words, policy disputes within the scope of authority Congress has delegated an agency are to be resolved by agencies rather than by courts. Courts and agencies are instructed by *Chevron* to distinguish policy disputes from disputes with respect to issues of law by determining whether Congress resolved the dispute.

127. Puana v. Sunn, 69 Haw. 187, 189, 737 P.2d 867 (1987).
128. See Hawaii Electric Light Co., Inc. v. Dept. of Land and Natural Resources, et al., (Civil No. 96-131k (Kona)) (“Amended Findings of Fact, Conclusions of Law, and Decision and Order”), Conclusion of Law No. 20, pp. 14-15 (footnote omitted):

Hawaii Administrative Rules (“HAR”) Section 13-2-20 limits the automatic use provision set forth in HRS, Section 183-41, to all of the conditions of HAR 13-2-21. While this Court acknowledges that administrative interpretations of a statute will normally be given great weight, administrative rules may not enlarge, alter or restrict provisions of the statute being administered. Topliss v. Planning Commission, 9 Haw.App. 377, 842 P.2d 648 (1993). Because HRS, Section 183-41 does not refer to any condition precedent, the conditions set forth in HAR 13-2-20 enlarge the provisions of HRS Section 183-41.

Haw. Rev. Stat. §183-41 was repealed by 1994 Haw. Sess. Laws Act 270, section 3; title 13, chapter 2 of the Hawaii Administrative Rules was repealed by 2000 Haw. Sess. Laws Act 283, section 2(9)(A).

129. International Savings and Loan Ass’n v. Wiig, *supra* note 42, 82 Haw. at 201 (citation omitted).

130. 1998 Haw. Sess. Laws Act 164, section 2.
131. See discussion of this rule of statutory interpretation in part A.1. of chapter 4.
132. As one California commentator has noted: “Special ordinances could impose blanket conditions on projects deemed approved. These conditions would take the place of things like required environmental impact mitigation measures that should have been imposed before approval. As the whole history of the Permit Streamlining Act shows, however, care is needed in drafting blanket rules. They must be both specific enough to allow enforcement and broad enough to be generally applicable. Another caveat is that such an ordinance might be invalid if it works to subvert the legislative intent of the Permit Streamlining Act.” See Wilson, *supra* note 92, at 71.
133. Appendix C, endnote 1 (paragraph 6).
134. Presumably, however, if an agency is not permitted to attach mandatory conditions to automatically approved permits, it may nevertheless seek to require applicants to amend their applications to address these issues. If the applicant fails or refuses to amend the application, the agency may deem the application to be incomplete under the agency’s rules.
135. Letter from Randall S. Nishiyama, Deputy Attorney General, approved by Earl I. Anzai, Attorney General, to Paul Shigenaga, Administrative Director, Public Utilities Commission, December 28, 1999, pp. 2-3 (Appendix J).
136. Bosselman, Feurer, and Siemon, *supra* note 72, at 29.
137. See id. (emphasis added):
- While this [denial of permits for lack of opportunity to review] may occur in some situations, time limits may also encourage agencies to establish priorities, so that decisions can be made on time. In the utilities field, regulatory agencies often have fixed periods for reaching decisions on rate increases. There is little evidence that these agencies simply deny rate increases rather than try to make decisions prior to the time limits. Likewise, land use and environmental control agencies can be expected to comply with time limits by making appropriate decisions, since they will be subject to appeal if they fail to do so. Appeals consume agency time and resources. If a denial is likely to be reversed because it cannot be supported on the record, the agency gains little in making a negative declaration decision prior to the first deadline. It must defend its decision on appeal and then reconsider the application.
138. Cal. Gov’t Code §65952.2 (“prohibition against disapproval of application in order to comply with chapter time limits; specification of reasons for disapproval”).
139. Brooker and Cole, *supra* note 28, at 470.
140. See id. at 469 (footnotes omitted):
- Surprisingly, few cases address this question. Under basic principles of municipal and administrative law, the applicant bears the burden of showing it meets the requirements for any approval sought. When the applicant fails to do this because, for example, there are genuine and unresolved questions about the effects of a proposal, that burden is not met and denial would be justified. Municipal bodies should, however, proceed with caution if they intend to deny an application under a statute that provides a limited window of time for seeking additional information if the body did not timely seek the

additional information. Thus, a body that fails to seek additional information under a statutory provision expressly authorizing this probably should not deny an application for lack of information and the failure of the applicant to meet its burden of proof.

141. Id. at 469 n.131.
142. For example, prior to the adoption of the Land Use Commission's administrative rules on May 8, 2000, proposed Haw. Admin. Rule §15-15-13(b) read as follows: "If the Commission's action on a petition for a boundary amendment under section 205-4, HRS, fails to obtain six affirmative votes, the petition is deemed denied." (Emphasis added.) The Land Use Research Foundation of Hawaii, in its September 13, 1999 testimony to the Land Use Commission regarding proposed amendments to the LUC's administrative rules, stated its objections to this provision as contrary to the purpose and intent of section 91-13.5, HRS:

This appears to turn the law entirely on its head and punish the applicant if the Commission fails to do its job within the allotted time. Instead, the Commission should either approve or deny the petition in a timely manner. Otherwise, inconclusive action by the Commission can result in automatic denial. We see nothing in Chapter 205 which authorizes the Commission to employ a "deemed denied" approach to its decision-making. If anything, inconclusive votes should result in deferral of action until the next meeting. Another reason for concern about denials by default is the fact that there are restrictions on re-applications contained in Section 15-15-76 of the rules.

143. In particular, Haw. Admin. Rules §15-15-13(b) and (c) (Land Use Commission rules) provides the following:

(b) If the commission's action on a petition for boundary amendment under section 205-4, HRS, fails to obtain six affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the commission.

(c) If the commission's action on a special permit under section 205-6, HRS, fails to obtain five affirmative votes, findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the commission.

Similarly, Kauai County Planning Commission Special Permit Rules, §13-8(a)(1) ("action"), provide as follows:

(a) Pursuant to Section 205-6(c), HRS, a decision in favor of the applicant shall require a majority vote of the total membership of the County Planning Commission. For purposes of Section 91-13.5, HRS, a vote by the commission on a petition for Special Permit within the maximum time period specified in Section 13-7 of these Rules, shall be construed as the Commission having acted upon the petition.

- (1) If the Commission votes on an application, and the application fails to obtain a majority vote of the total membership of the Commission pursuant to Section 205-6(c), HRS, the matter may be continued to any subsequent regular meeting that is scheduled within the maximum time frame set forth in Section 13-7 of these Rules. If the application fails to obtain a majority vote of the total membership of the Commission by the expiration of the maximum time frame, a subsequent vote adopting findings of fact, conclusions of law, and decision and order denying the petition shall be filed by the Commission.

144. Testimony of David H. McCoy, Hawaii Business Roundtable, Inc., dated September 17, 1999, to Merle Kelai, Chair, Land Use Commission, relating to proposed amendments to Land Use Commission rules.

145. Another potential issue is that of county liability arising out of the implementation of Haw. Rev. Stat. §91-13.5. Haw. Rev. Stat. §663-10.5 abolished joint and several liability for government entities as tortfeasors. Government entities, which include state and county agencies, are liable for no more than that percentage share of the damages attributable to that entity. However, while section 662-16, HRS, allows the state Attorney General to defend state employees, there is no comparable statute requiring county corporation counsels to defend county employees for damages arising out of the automatic approval of an application. Presumably, however, the county counsel will represent county employees. One way to limit the liability of county employees would be amend Haw. Rev. Stat. §91-13.5 in a manner similar to language contained in section 201G-118(a)(3)(B), HRS: “No action shall be prosecuted or maintained against any county, its officials, or employees on account of actions taken by them in reviewing, approving, or disapproving the plans and specifications...”.
146. See HGEA v. County of Maui, 59 Haw. 65, 85, 576 P.2d 1029 (1978).
147. As a practical matter, to the extent that a county charter’s quorum requirements provide for a majority of the entire membership of a board or commission to take any action, *see, e.g.*, Maui County Charter §13-2.8, the same quorum is already required under Haw. Rev. Stat. §92-15 (“boards and commissions; quorum; number of votes necessary to validate acts”).
148. Brooker and Cole, *supra* note 28, at 449.
149. Id. at 450 (footnotes omitted).
150. *See, e.g.*, City and County of Honolulu Board of Water Supply, §1-113(2) (“Review of Construction Plans and Building Permit Applications”), as adopted by Resolution No. 699, 1999 (eff. Jan. 1, 2000), p. 5 (“inapplicability”).
151. In particular, as discussed earlier, the City and County of Honolulu’s Land Use Ordinance establishes certain maximum time periods for agency action. For example, Revised Ordinances of Honolulu (ROH) §21-2.40-1(c) (“minor permits”) and ROH §21-2.40-2(c) (“major permits”) of the Land Use Ordinance generally provide for a 45-day and a 90-day maximum time period for agency action, respectively. Similarly, ROH §20-3.3 (“approval or disapproval of plans”) of the City and County of Honolulu’s Fire Code requires the fire chief to “approve or disapprove plans and specifications within 20 days after their receipt; otherwise, the plans and specifications shall be deemed to be approved.”
152. “Agency” is defined in the Hawaii Administrative Procedure Act as “each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.” Haw. Rev. Stat. §91-1(1) (emphasis added). County councils function as the legislative branches in Hawaii’s counties.
153. *See* Memorandum from Jane H. Howell, Deputy Corporation Counsel, to Benjamin B. Lee, Acting Managing Director, dated September 14, 1998, p. 5 (*see* Appendix K).
154. *See* Memorandum from Jane H. Howell, Deputy Corporation Counsel, to Jan Naoe Sullivan, Director, Department of Planning and Permitting, dated August 16, 1999, p. 2 (*see* Appendix L) (emphasis in original):

The dilemma ... is that the Council prescribes, by ordinance, most of the time limits for actions by your Department and is unlikely to relinquish this authority. While “separation of powers” arguments might be made in an effort to persuade it to do so, the City has long operated on the assumption that imposition of time limits for permits required by the zoning process is part of the zoning power, which power is exercised by the Council, by ordinance. Hawaii Revised Statutes (“HRS”) §46-4; Revised Charter of

the City and County of Honolulu ("Charter") §6-907. On the other hand, the statute calls for adoption of the time limits by rule.

155. *See id.*: "[F]rom a substantive point of view the real requirement is that time limits be prescribed and that failure to meet them will yield approval of the project. We gather you have concluded that, so long as your rules contain a reference to time limits contained in other laws, and a reference to "automatic approval" in cases of failure to meet those limits, the statute is satisfied. We agree."



## Chapter 6

### SUMMARY

Act 164, Session Laws of Hawaii 1998, was enacted during an extended period of economic stagnation in Hawaii as a means to make structural changes in the way certain permits, licenses, and approvals are handled by state and county agencies. It was deemed to be necessary by the administration and leaders of the State's Economic Revitalization Task Force to help pull the State out of its recession by using automatic approvals to streamline the permitting process.

At the time Act 164 was enacted, many in the community believed there to be a need to take fairly drastic action by making systemic changes to the regulatory system. However, others believed that the harsh remedy of that law is not warranted, since it could result in unwise land use and other decisions that could adversely affect the community.<sup>1</sup> Moreover, it is argued that most agencies do not engage in dilatory inaction. Delays are more often the result of an unexpectedly large volume of permit applications received by an agency that exceeds the ability of the staff to process them.

As discussed in chapter 3 of this report, the idea of automatic approval is not new. Nearly half the states have adopted some form of automatic approval statute, most commonly applied to land subdivisions. Hawaii also has a number of other automatic approval provisions in addition to section 91-13.5, HRS, that are more narrow in scope, including a statutory automatic approval provision dating from 1957 relating to applications for certain nonconforming uses in the "forest reserve boundaries", later changed to the "conservation district". Aside from the quorum issue, there has apparently been little litigation arising out of these more narrowly focused automatic approval laws. The feature of section 91-13.5 that has apparently caused so much concern is the expansion of automatic approval to apply to all state and county "business and development-related permits, licenses, and approvals", as that term is broadly and ambiguously defined, without regard to the need for such a remedy in any particular case and without differentiating among different types of permits or agencies.

While many people agree with the intent behind Act 164, i.e., the need to ensure established deadlines in order to provide a greater level of certainty of the time required for the review and final determination of agency action, many of these same people do not agree with the method used by that law to achieve that intent. The better way to motivate agency action, it is argued, is through the use of "carrots", i.e., incentives, rather than "sticks", also known as "hammers" or disincentives. "Hammers", whether in the form of automatic approval or automatic denial, may be counterproductive in certain cases. For example, when hammers are used to encourage agencies to issue rules by a statutory deadline under the threat that an alternative regulatory standard will become effective automatically if the agency fails to do so, the hammer can produce "low quality" rules if the timetables are unrealistic: "Statutory deadlines with hammers are effective in the narrow sense that they impose intense pressure on agencies to resolve a matter expeditiously. They are almost certainly ineffective and counterproductive when they are evaluated more broadly, however."<sup>2</sup>

The difference between the use of deadlines with “hammers” in the preceding example, and the automatic approval provisions of section 91-13.5, HRS, however, is that agencies under section 91-13.5 may establish their own deadlines, based on their administrative expertise and experience. While the Governor or Mayor, as the case may be, may exert pressure on an agency to develop shorter deadlines than the agency may believe to be warranted, the Legislature cannot be accused of establishing deadlines that are unrealistically short.<sup>3</sup> By comparison, many of Hawaii’s other automatic approval statutes that are more narrow in scope contain deadlines within those statutes, as does, for example, California’s automatic approval law (the “Permit Streamlining Act”).

Although the idea of automatic approval in section 91-13.5, HRS, is similar to that underlying California’s Permit Streamlining Act, Hawaii’s automatic approval law was intended to motivate agency action to make timely decisions on permit and license applications but without the statutory deadlines imposed by California’s Act. It has been argued that California’s Permit Streamlining Act is an example of an automatic approval law that has been in effect for over twenty years; since California processes many more permits than Hawaii without much trouble, Hawaii should be able to do the same. However, the California Legislature has enacted a number of clarifying amendments to that Act to address conflicts with other laws and has formed a state agency (the Office of Permit Assistance in the Governor’s Office of Planning and Research) to administer that Act. Moreover, California’s courts have had difficulty in the past in determining how to enforce that Act.<sup>4</sup>

While California has subsequently addressed many of the statutory conflicts in its Permit Streamlining Act, Hawaii’s automatic approval law does not address potential conflicts in the statute itself, but instead delegates to the agencies the broad authority to resolve these conflicts in rulemaking. Compared to California’s law, Hawaii’s law offers little detail and minimal guidance to agencies as to how to go about resolving the inevitable conflicts created by that law and other laws, including the agencies’ own implementing statutes. In seeking to reconcile these laws, this report has noted in chapters 4 and 5 that the agencies’ more specific implementing statutes – such as chapter 205 with respect to the Land Use Commission – will usually take precedence over the more general section 91-13.5.

In attempting to resolve the conflicts created by section 91-13.5, HRS and these other statutes, several state and county agencies have adopted rules that include the following:

- *De facto* multiple maximum time periods (see chapter 5, part B.3.);
- *De facto* extensions (see chapter 5, part C.1.);
- *De facto* automatic denials (see chapter 5, part E.3.);
- Mandatory conditions that attach to automatically approved permits (see chapter 5, part D.4.); and
- Other techniques, including exclusions from the maximum time period and the inclusion of preconditions into the application completeness phase.

Section 91-13.5, HRS, appears to be sufficiently broadly worded to permit the adoption of these types of rules, and lacks statutory guidance or legislative history that would otherwise prohibit their usage. If the Legislature does not agree with this result, it should amend section 91-13.5 or agencies' implementing laws to give more guidance to agencies in rulemaking.

It is uncertain whether a Hawaii court will find these types of agency rules to be invalid as exceeding the authority of section 91-13.5. If a court finds that the operative automatic approval provisions of that section are mandatory and require strict compliance, the court may be less inclined to give as much leeway to agencies to resolve problems created by that law. If, on the other hand, the court finds that the application of section 91-13.5 produces an absurd result in a particular case, or jeopardizes the public's health and safety or violates constitutional rights, it may be inclined to look beyond the language of that section to the underlying intent of automatic approval laws generally, i.e., to address agencies' dilatory inaction. However, that underlying intent is not specifically addressed in the preamble to Act 164, Session Laws of Hawaii 1998.

In determining whether the rules adopted by agencies are admissible, a Hawaii court may also use the two-part test in Chevron v. Natural Resources Defense Council as discussed in chapter 5 of this report, looking first to the language of section 91-13.5 and, if the statute is silent or ambiguous with respect to a particular issue, determining whether the agency's answer is based on a "permissible construction of the statute", rather than substituting the court's own opinion in place of administrative agency expertise. Since most of the issues discussed in this report are not addressed in the statutory language, a court would likely review the legislative history of that section and use various rules of statutory construction to resolve the apparent ambiguities.

A court may also balance the needs expressed in Act 164 to streamline the permitting process and provide for definite time periods for agency action with the need to protect public health, safety, and welfare under the police power of the State. Accordingly, depending on the type of case before it, a Hawaii court may either uphold an automatic approval based on the express language of section 91-13.5, remand the case to address issues not adequately covered in the record, or strike down the automatic approval of a permit or license as not consistent with the intent of that law.

However, the Hawaii Supreme Court has shown its willingness to require agencies to adhere to judicially-created remedies in response to an agency's failure to address issues that the Court considers to be of great importance. For example, as discussed in chapter 4, in the case of Ka Pa'akai O Ka 'Aina v. Land Use Commission,<sup>5</sup> the Court adopted an analytical framework requiring the state Land Use Commission to make certain minimum findings and conclusions in its review of a petition for reclassification of district boundaries, to fulfill the Commission's duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible. Accordingly, where an agency has not taken appropriate measures to safeguard constitutional or other rights in rules adopted pursuant to section 91-13.5, the Court may establish those procedures for the agency on its own initiative in an appropriate case.

As a policy matter, it is wholly within the discretion of the Legislature to determine whether it is preferable to address the issues identified in this report on a statutory level to help promote the uniform and consistent application of section 91-13.5, HRS, or instead to allow agencies to address these issues at the rulemaking level, i.e., by allowing agencies to craft their own rules to meet their often unique circumstances, as already permitted under that section. In balancing these issues, it may be argued that issues of statewide concern, including constitutional issues, should be addressed at the statutory level, while other issues can be adequately handled at the rulemaking level.

The argument for including quorum or other legal or logistical provisions at the statutory level is that statutes provide for a more uniform state-wide application and consistency of the law.<sup>6</sup> The counter-argument is that each agency must address its own unique circumstances, and should be able to address these on a case-by-case agency level, rather than at the statutory level. Thus, for example, the quorum and other requirements for the approval of a waste water permit may be different from the requirements for the approval of a license to practice dentistry. While section 91-13.5 treats all permits, licenses, and approvals alike, regardless of the type of permit, license, or approval requested, that section allows agencies to differentiate between these permits by imposing different requirements as the agency deems to be necessary.

Another problem is the issue of agency discretion in implementing section 91-13.5, HRS. It is argued that section 91-13.5 is too vague in its implementing authority, since it leaves too much discretion to agencies to identify what the problems are, and there are too few standards for agencies to follow. By enacting general legislation, with very little guidance for agencies to adopt these rules, the Legislature is in a sense taking a “hands off” approach to agency rulemaking. This runs counter to the Legislature’s previous concerns over agencies adopting rules outside of the scope of their authority,<sup>7</sup> and would forestall the Legislature from micromanaging the agencies, for example, if agencies adopt rules that set lengthy time periods for agency action to account for anticipated contested case hearings (although the Governor or Mayor may refuse to approve the rules<sup>8</sup>), thereby increasing the time required for agency action.

However, section 91-13.5 shifts from the Legislature to the agencies the power to resolve these policy issues. For example, many agency delays are due to contested case hearings, some of which may take years to resolve. In setting a maximum time period, an agency needs to anticipate the length of time for completion of these hearings based on past experience. If, say, the average contested case hearing lasts two years, plus another year for additional hearings, decision making, and general processing time, the agency may choose to set the maximum time period at three years. The agency may even add on extra time, in case of unusual or exigent circumstances, greater complexity in certain cases, to allow for the possibility that essential permit review personnel are ill or on vacation, and so on, to prevent inadvertent automatic approvals. Conceivably, therefore, section 91-13.5 may result in the establishment of longer time periods for agency action than at present, as agencies seek to allow for unexpected contingencies.

Another area of concern in which agencies are perceived to be exceeding the scope of their authority is by attaching mandatory conditions to automatically approved applications. For example, the Land Use Commission’s rules attaching twenty-four mandatory conditions to

automatically approved boundary amendment petitions have been found to “undermine the automatic approval law”.<sup>9</sup> As discussed in chapters 4 and 5 of this report, however, the Commission’s more specific implementing statute (chapter 205, HRS) takes precedence over the more general section 91-13.5, which is drafted so broadly as to appear to allow this result.

Automatic approval has the potential to assist in the streamlining of “business and development-related permits, licenses, and approvals” by reducing delays in the permitting process, but it also has the potential to cause damage to the environment and public health and safety, depending upon how that law is applied. The Attorney General, however, has noted that “[n]othing in ... Act [164] or its legislative history suggests that the Legislature intended to enhance Hawaii’s business climate at the expense of employee or public safety.”<sup>10</sup> If agencies either do not adopt rules that address these areas, or if they inadvertently fail to comply with their own rules, the possibility exists that irreparable harm will result. If the Legislature finds this to be of particular concern, it can take the initiative to amend section 91-13.5 to add protections to that law to prevent inadvertent automatic approvals.

Concerns have also been expressed about the logistical effect of section 91-13.5, HRS on agency priorities, which must increasingly be shifted to permit review rather than proactively planning and managing resources.<sup>11</sup> This logistical concern may reach the level of constitutional importance in cases in which the Hawaii Constitution designates an agency as a primary guardian of public rights, such as the Commission on Water Resource Management.<sup>12</sup> As recently noted by the Hawaii Supreme Court, “the Commission must not relegate itself to the role of a mere ‘umpire passively calling balls and strikes for adversaries appearing before it’, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.”<sup>13</sup> These concerns are countered by the argument that section 91-13.5 will bring greater government accountability and predictability, which will enhance planning and environmental decision making by forcing agencies to operate more efficiently and make often difficult decisions in a timely manner.<sup>14</sup>

Another reason given for amending section 91-13.5, HRS is to statutorily overrule, or at least clarify the Legislature’s position, with respect to the Circuit Court’s decision in HELCO v. Dept. of Land and Natural Resources, which could be used as authority for automatically approving applications under section 91-13.5. As discussed in chapter 4 of this report, the Board of Land and Natural Resources’ 3-2 vote to deny a Conservation District Use Application to expand HELCO’s power plant at Keahole on conservation district land on the Big Island was deemed to be inaction due to lack of quorum, and consequently automatically approved under repealed section 183-41(a), HRS. It is further argued that agencies cannot be relied on to address concerns raised by this case in their rulemaking.

The counter-argument to this contention is that there is no reason why an agency activity undertaken without a quorum should be considered an agency “action” for purposes of the automatic permit approval law when it would not be an action for any other purpose. Others contend that the automatic approval law should simply be given a chance to work. When agencies have finally adopted their rules setting forth maximum time periods for agency action, that is the time to see if the law should be amended, not sooner.

What can the Legislature do if agencies fail to adopt rules that address constitutional, quorum, or other important issues discussed in this report, or if those rules do not adequately address those issues? Some options are as follows:

- Once agencies have adopted rules, if at any time the Legislature finds that agencies are not appropriately addressing the issues raised in this report, or that section 91-13.5 does not provide sufficient guidance on these issues, the Legislature could amend that section as necessary;
- The Legislature could amend the implementing statutes of particular agencies (or other laws as necessary, such as section 92-15, HRS) when agencies have not adopted rules addressing important issues, or have addressed them in ways that the Legislature finds to be counterproductive. For example, if the Legislature does not want the Land Use Commission to adopt rules requiring mandatory conditions to be attached to automatically approved permits, it could amend chapter 205, HRS (relating to the Commission) to provide for that result;
- The Legislature could do nothing, and allow the Judiciary to craft appropriate remedies for particular agencies in cases that come before the courts arising out of section 91-13.5, HRS. However, intentionally (by failure to act) shifting to the courts what are essentially policy decisions that should be made by an elected body may be unwarranted; or
- The Legislature could proactively enact amendments to section 91-13.5 or other laws to give greater guidance to agencies in how to resolve potential problems, in an effort to promote consistent approaches to these issues, reduce the risk of litigation, and possibly reduce the exposure of state and county agencies<sup>15</sup> to liability.

### Endnotes

1. For example, it has been noted that the “[a]utomatic approval of applications when that is unintended can result in unwise land-use decisions that may adversely affect neighboring landowners and the community. Inadvertent automatic approvals also may deny the government body the opportunity to impose conditions on an approval that may mitigate adverse effects.” Gregory G. Brooker and Karen R. Cole, “Automatic Approval Statutes: Escape Hatches and Pitfalls,” 29 *The Urban Lawyer* 439 (Summer 1997).
2. Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise*, Vol. II (New York, NY: Little Brown and Co., 3rd ed., 1994, and 1999 Supp.), §12.3, pp. 225-226.
3. Earlier drafts of the bill for Act 164, Session Laws of Hawaii 1998, provided for 90-day time limits “for the review and approval of all state business and development-related permits, approvals, and licenses”. See S.B. No. 2204, S.D. 2, H.D. 1 and H.D. 2 (1998). If statutory time limits are contemplated, however, care must be used in establishing deadlines to ensure that they are meaningful for all affected agencies; this may be difficult, given the fact that the automatic approval provision makes no distinction between different types of permits, licenses, or approvals: “A permit coordination process that does not really expedite review in a way that addresses developers['] needs is worse than no process at all because it will merely sit

in the statute books, as verbiage cluttering up the administrative landscape. However, a process that fails to allow adequate time for agency review is equally ineffective. Such a process will necessarily breakdown and fail to serve either the developer or general public.” Michelle Dick, Coordinated Approval Process: Streamlining Land Use Decision-Making (Honolulu, HI: Construction Industry Legislative Organization, March 1977), p. 7. The problem with unrealistic statutory deadlines is also a problem at the federal level:

Congress establishes so many deadlines for so many actions by the same agency that the agency cannot possibly use the presence of a deadline as an indication that Congress attaches a priority to one or a few actions. EPA typifies this problem. A 1985 study found that EPA was then subject to 328 statutory deadlines.... The Clean Air Act Amendments of 1990 added hundreds more. The statutory deadlines are totally unrealistic. The 1985 study found that EPA had been able to meet only 17 percent of the deadlines Congress had imposed on the agency. FDA illustrates the problem of unrealistic deadlines particularly well. In 1962, Congress required FDA to use trial-type hearings to determine the efficacy of 16,573 prescription drugs within two years. Not surprisingly, the agency still had not completed that daunting task 20 years after the deadline....

Davis and Pierce, *supra* note 2, §12.3 at 224; *see generally* Philip K. Howard, The Death of Common Sense (NY: Warner Books, 1994).

4. *See, e.g., Selinger v. City Council of Redlands*, 264 Cal.Rptr. 499, 503 n. 5, 216 Cal.App.3d 259 (1989): “As one commentator has cogently observed, “Laid almost haphazardly upon a heap of existing rules, the changes [of the Permit Streamlining Act] set up a chain reaction of statutory conflicts that continues today.” (quoting Wilson, *Down Stream from Streamlining* (Aug. 1987) Cal.Law. 67, 68.)
5. 94 Haw. 31, 7 P.3d 1068 (2000).
6. For example, Haw. Rev. Stat. §50-15 (“reserved powers”), expressly reserves to the state legislature “the power to enact all laws of general application throughout the State on matters of concern and interest...”
7. The proliferation of agency rules, particularly those that impact on small businesses and which may impede the State’s economic recovery, has been of particular concern to both the Lieutenant Governor’s office and the Legislature. The Lieutenant Governor’s “Slice Waste and Tape” (SWAT) project, a multi-year effort dealing with rules that burden Hawaii’s business community, sought to reduce the burden of rules and minimize the negative effect they have on residents, businesses, the economy, and government, in part by eliminating those rules that are no longer needed and revising rules that need updating through proposed legislation. *See* the Lieutenant Governor’s “SWAT” web site at: <http://swat.state.hi.us/>.
8. Agency inaction – whether through non-implementation of agency rules or because rules are held up by the Governor or Mayor – does not further the legislative intent of encouraging prompt agency action. If the Governor or Mayor refuses to approve the final rules for whatever reason, that would then become an executive problem, not a legislative one.
9. “Land Use Rules Nullify Automatic OK Law,” (Editorial), Honolulu Star-Bulletin, June 3, 2000 (online at <http://starbulletin.com/2000/06/03/editorial/editorials.html>). There has also been some confusion as to whether the Governor actually intended to approve those rules: “Adding to the confusion is the appearance that [Governor] Cayetano has contradicted himself. He seems to have signed the new rules accidentally. ... According to a letter sent to the commission in April, the governor objected to some of the proposed rules and had planned to reject them. He said he opposed the idea of placing conditions on projects that gain automatic approval. ... But by the time Cayetano wrote the letter he had reportedly already approved the rules by signing them. He may not have realized what he was signing.” *Id.* *See also* “Cayetano Praised for Approving Rules,” The Honolulu Advertiser, May 18, 2000, p. B4; Kevin Dayton, “Cayetano Accidentally Signs Tough Land Rules,” The Honolulu Advertiser, June 1, 2000, p. A1.

10. Letter opinion from Deputy Attorney General Herbert B. K. Lau, approved by Attorney General Margery S. Bronster, to Ms. Lorraine H. Akiba, Director of Labor and Industrial Relations, December 17, 1998, p. 3 (Appendix H).
11. *See, e.g.*, David Kimo Frankel, "Our Environment at Risk," The Honolulu Advertiser, June 19, 1998 (editorial page): "Increasingly, civil servants have come to view permit processing as their primary mission rather than protecting the environment. Automatic-approval provisions will exacerbate this tendency. Most staff time in all environmental agencies is already spent responding to permit applications. Too little effort is actually spent protecting our resources. Even less attention will be devoted to resource protection as agencies are forced to respond to developers' applications in order to avoid automatic approval."
12. As noted in part A.2. of chapter 4, however, the state Department of Land and Natural Resources has taken the position that section 91-13.5 does not apply to the Commission on Water Resource Management.
13. In re Water Use Permit Applications, 94 Haw. 97, 143, 9 P.3d 409 (2000), *quoting* Save Ourselves v. Louisiana Env't Control Comm'n, 452 So.2d 1152, 1157 (La. 1984).
14. Moreover, it is argued that section 91-13.5 contains sufficient safeguards to prevent abuse, including:
  - A requirement that an application is complete prior to the clock running.
  - Selection of a time limit that allows for public input and for the appropriate technical studies to be done.
  - Exceptions for emergency situations when decisions cannot be made (natural disasters, strikes, etc.). Agencies also may build a one-time extension of time into their systems.

Dan Davidson, "Should Governor Sign Permit-Deadline Bill? Yes: Bill Has Safeguards," The Honolulu Advertiser, June 28, 1998, p. B3.
15. Of course, there is no guarantee that there will not be litigation in any event, no matter how that law is or is not amended. Moreover, the avoidance of litigation should not be used as the sole reason to amend the law, since it makes the incorrect assumption that litigation is inherently "bad". Rather, litigation and other legitimate decision-making processes remain important options in clarifying that law.



## Chapter 7

### FINDINGS, RECOMMENDATIONS, AND CONCLUSION

#### A. Findings and Recommendations

House Resolution No. 128, H.D. 1 (2000) requested that the Bureau report findings and recommendations, including draft legislation, to the Legislature. As discussed previously in this report, the Legislature has already decided in favor of the issue of automatic approval as a policy choice by enacting section 91-13.5, HRS. The Legislative Reference Bureau will not substitute its own policy judgment for that of the Legislature. As noted in chapter 1 of this report, while repealing section 91-13.5 is always an option available to the Legislature as a policy alternative, the question addressed by this study, rather, is whether there are problems associated with the implementation of Act 164 and, if so, how to resolve them in keeping with the intent of that law, as requested by the House Resolution.

**Findings.** There is nothing about the automatic permit approval law that renders it inherently defective or that otherwise compels its amendment as a matter of law. Each of the legal and logistical problems identified in chapters 4 and 5 of this report relating to due process and other constitutional issues, quorum, rulemaking, and other areas may be addressed in rules adopted by each state and county agency. However, many agencies have not yet adopted rules to implement section 91-13.5, despite a December 31, 1999 deadline for the adoption of these rules as required by section 4 of Act 164, Session Laws of Hawaii 1998. Since section 91-13.5 is not self-executing and does not impose statutory time limits for anything other than the adoption of the respective agencies' implementing rules, a determination as to whether problems will arise once agencies have adopted rules to implement that section is mostly a matter of speculation.

**Recommendations.** The Bureau recommends the following:

1. **Definition.** Amend the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS to clarify legislative intent. Amending the definition to provide specific statutes to which the automatic permit approval law applies will help to ensure that agencies cannot undermine the implementation of section 91-13.5 by claiming that they are exempt from that section. It will also assist in reducing agencies' exposure to liability, and will provide greater consistency in the application of that law;
2. **Rulemaking deadline.** Amend Act 164, Session Laws of Hawaii 1998, to extend the date specified in that Act for agency rulemaking from December 31, 1999, to a more realistic date, such as December 31, 2003, and impose a statutory maximum automatic permit approval deadline of one year for those agencies that fail to comply with that deadline;
3. **Federal programs.** Require affected state and county agencies to review the statutory references specified in section 91-13.5(e), HRS to determine the specific

programs in those chapters to which section 91-13.5 applies, and require them to make recommendations to the Legislature as to whether all or portions of the affected chapters consist of “state administered permit programs delegated, authorized, or approved under federal law”. Upon receiving the agencies’ reports, the Legislature can take action, if necessary, to amend section 91-13.5 or other statutes accordingly; and

4. Model rules. Require the Attorney General to propose model rules that may be used by the administrative agencies to implement section 91-13.5. Rather than requiring each agency to “reinvent the wheel” to resolve potential issues, the Attorney General should be directed to take the lead in resolving these problems. Each agency may choose to adopt or reject portions of the model rules, depending on the experience and needs of each particular agency. County agencies may also choose to follow the model rules as applicable.

A bill based on the Bureau’s recommendations is included in Appendix R.

## **B. Optional Proactive Amendments**

While the Bureau has found that there is no legal requirement to amend section 91-13.5 and that there is nothing inherent in the automatic approval law itself that would likely result in a constitutional violation, problems may still arise due to a particular agency’s application of section 91-13.5, HRS. Accordingly, this report discusses optional amendments that the Legislature can take on its own initiative if it concludes that there is a need to address one or more of these issues before the affected agencies address them through rulemaking. There are a number of options that the Legislature can take, some of which are summarized below. Additional details on these options can be found in chapters 4 and 5. If problems arise with respect to specific agencies, the Legislature could amend that agency’s implementing statute as necessary to address constitutional, quorum, majority requirement, or other issues, as discussed in those chapters, or use the approaches of other states as outlined in chapter 3.

While the Bureau believes that these amendments are largely matters of policy and are not legally required, the adoption of one or more of these amendments may help to reduce the risk of litigation, and increase consistency and clarity in the application and implementation of section 91-13.5, HRS. Further, these amendments may help to ensure fairness and impartiality in administrative proceedings and increase uniformity in the application of the Hawaii Administrative Procedure Act, and will give greater statutory guidance to administrative agencies in adopting rules under section 91-13.5. In particular, the Legislature may amend section 91-13.5, HRS to address the following:

- State constitutional provisions (other than due process) (see chapter 4, part A):
  - (1) Permit additional extensions for the review of constitutionally mandated areas; or

- (2) Require agencies, in rulemaking, to include either:
  - (A) A mandatory review of constitutionally mandated areas and indicate its having done so in writing, in findings of fact and conclusions of law, so that a court may review the record of the agency's proceedings; or
  - (B) The attachment of mandatory conditions on automatically approved permits, which would require the applicant to return to the agency to have the condition removed if the conditions are not applicable.
- Due process (see chapter 4, part B):
  - (1) Permit additional extensions in cases in which notice and hearing has not already occurred, for contested case hearings, or to allow agencies to adopt findings of fact, conclusions of law, decisions, and orders for automatically approved applications;
  - (2) Add language similar to California's Permit Streamlining Act to specify that a project is deemed approved "only if the public notice required by law has occurred", and allow the applicant to compel the agency to provide the required notice and hearing or allow the applicant to itself provide that notice;
  - (3) Ensure that the public has advance notice of an impending automatic approval of an application, for example, by providing that "no application shall be approved by default until 30 days after public notice of the impending deadline shall have been published in the semimonthly Bulletin of the Office of Environmental Quality Control", and allow the applicant to request publication of such a notice if the agency fails to do so;
  - (4) Require the agency to include relevant notice and hearing provisions in adopting rules under section 91-13.5, HRS; or
  - (5) Specify that the maximum time period begins following the completion of all contested case hearings, or that the maximum time period is tolled by contested case hearings to protect the due process rights of parties and intervenors, or provide that section 91-13.5, HRS does not apply to contested case hearings;
  - (6) Add language similar to a Massachusetts' automatic approval statute requiring each agency to cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating that fact, and setting forth clearly the reason for its decision and of its official actions.

- Quorum and majority requirements (see chapter 4, part C):
  - (1) Define the term “action” as including “any timely vote by the agency to approve or deny a permit, whether or not effective under other applicable law to constitute an action of the agency.” Alternatively, amend the “deemed approved” provision to add: “provided that no such application which requires a decision by a board or commission shall be deemed approved by operation of law if the board or commission takes a vote on, and does not approve, the application within the specified time period.”;
  - (2) Amend section 92-15, HRS, or statutes concerning specifically designated agencies requiring a super majority vote or an affirmative vote of a majority of the entire board or commission to transact business, to address quorum and majority requirement issues, e.g., by specifying that those specific statutes supersede the more general section 91-13.5 when in conflict; or
  - (3) Require one or more alternate members to be appointed to boards and commissions, in the same manner as the appointment of the original members, to address the problem of members who are absent (due to illness, travel, or other reason) or otherwise unable to vote, such as those who recuse themselves due to a conflict of interest, similar to Connecticut law providing in certain instances for a “panel of alternates”.
  
- Other issues:
  - (1) Add additional statutory references to the definition of “application for a business or development-related permit, license, or approval” (as recommended earlier) (see chapter 5, part A(1));
  - (2) Allow agencies to adopt rules providing that the maximum time period begins to run following the certification of an environmental impact statement or the acceptance of a finding of no significant impact under chapter 343, HRS, similar to that provided under California’s Permit Streamlining Act (see chapter 5, part B(1));
  - (3) Allow for additional extensions in agency rules, listing the specific types of permissible extensions that may be added, including reasonable extensions as may be necessary to avoid harsh, unfair, or absurd consequences and to protect the public’s health, safety and welfare (see chapter 5, part C(1));
  - (4) Allow for emergency extensions of the maximum time period if automatic approval of an application will impinge on the constitutional rights of a

party or will otherwise result in a violation of any other law (see chapter 5, part C(1));

- (5) Amend the preamble (section 2 of Act 164) to outline legislative intent, similar to language originally included in Senate Bill No. 2204, S.D. 1 and S.D. 2 (1998): “The Act is intended to avoid prejudice to applicants for business or development-related approvals that are the result of an agency’s deliberate, dilatory, or inexcusable inaction, and is not intended to adversely affect the public’s health, safety, and welfare.” (see chapter 5, part C(1));
- (6) Allow for express written waivers to prevent situations in which an applicant intentionally delays proceedings to obtain an automatic approval, or where an applicant seeks to address substantial but curable defects that may result in an automatically approved defective application (see chapter 5, part C(2));
- (7) Specify that a permit shall be issued by the agency within a specified number of days after an application has been deemed approved, provided that the permit complies with all other applicable laws. For example, a Massachusetts automatic approval law allows applicants who have received an automatically approved application to receive a certificate from the city or town clerk indicating the date of approval, the fact that the agency failed to take final action, and that the approval resulting from that failure has become final (see chapter 5, part D(1));
- (8) Require an automatically approved permit or license to be consistent with applicable laws and health and safety standards, or provide, similar to Minnesota’s law, that an automatic approval “does not limit the right of an agency to suspend, limit, revoke, or change a license for failure of the customer to comply with applicable laws or rules” (see chapter 5, part D(2));
- (9) Allow agencies to adopt rules allowing for the attachment of mandatory conditions (see chapter 5, part D(4)); and
- (10) Allow counties to preempt agency rules by ordinance (see chapter 5, part F(4)).

A bill based on many of these amendments and incorporating some of the suggestions of the Attorney General is included in Appendix S.

### **C. Other Legislative Policy Options**

Other policy options open to the Legislature include the following:

- Amend section 91-13.5 as suggested by the Attorney General;<sup>1</sup>
- Target only certain agencies for automatic approval, such as the Land Use Commission<sup>2</sup> or other agencies;<sup>3</sup>
- Add judicial remedies for agency delay, including language based on the federal Administrative Procedure Act,<sup>4</sup> requiring orders to show cause,<sup>5</sup> and providing for an expedited appeals procedure;<sup>6</sup>
- Model automatic approval after the California Permit Streamlining Act;<sup>7</sup>
- Repeal section 91-13.5, HRS;<sup>8</sup> or
- Increase annual appropriations to state and county agencies as needed as a direct result of the enactment of section 91-13.5.<sup>9</sup>

#### **D. Agency Regulatory Options**

Chapters 4 and 5 of this report discuss a number of regulatory options to address the problems potentially raised by section 91-13.5, HRS. The following example is used to illustrate how one agency, in this case, the Public Utilities Commission (PUC), may adopt rules to address these issues, incorporating many of the techniques already used by agencies to address the conflicts raised by section 91-13.5. The PUC has raised a number of concerns about the applicability of section 91-13.5, HRS to the Commission in correspondence with the Attorney General (see Appendix J). The PUC has also noted several of these concerns in its response to the Bureau's survey on the automatic approval law (see Appendix C). Many of the arguments presented by the PUC are compelling and should be reviewed by the Legislature for a determination as to whether the Commission should be exempted outright from the purview of section 91-13.5, HRS.

However, assuming that the Legislature is not willing to amend section 91-13.5 to exempt the PUC (or, for that matter, any other agency), the Bureau believes that there are several regulatory options open to the Commission and other agencies to resolve many of these problems. While the following list is by no means comprehensive, it provides examples of the kinds of rules and other actions that agencies can take to resolve the problems it has identified and thereby implement section 91-13.5 more effectively:

**Problem 1:** The definition of “application for a business or development-related permit, license, or approval” in section 91-13.5(e) should not apply to entities that are already formed or operating, unless the entity is seeking permission to expand its existing operating authority.

**Problem 2:** Other types of applications do not necessarily involve Public Utilities Commission or other agency approval and should be excluded from section 91-13.5.

- ◆ **Proposed solution:** The Commission or other agency can amend its rules to provide exemptions from the maximum time limits.<sup>10</sup>

**Problem 3:** The Public Utilities Commission is required by law to find that an applicant seeking to operate as a public utility, motor carrier, or water carrier is fit, willing, and able to perform the proposed service, and that the service is required by the public convenience and necessity. Automatic approval may undermine the Commission's ability to make these and other findings and allow a person who does not meet the statutory criteria to nevertheless operate in the capacity requested.

- ◆ **Proposed solution:** The Commission or other agency can amend its rules regarding application completeness,<sup>11</sup> mandatory conditions,<sup>12</sup> public health and safety,<sup>13</sup> and exclusions.<sup>14</sup>

**Problem 4:** Section 91-13.5 does not take into account the realities of administrative agency proceedings, particularly quasi-judicial proceedings. For example, applicants may seek to unreasonably delay the docket with the intended purpose to trigger automatic approval by default. In addition, that section does not state when the maximum time period for review begins to run, and should authorize the extension of that period for findings of "good cause" or "exigent circumstances", as well as the applicant's voluntary waiver or extension of the time period and corresponding effective date of the automatic approval.

- ◆ **Proposed solution:** The Commission or other agency can amend its rules to include a longer maximum time period,<sup>15</sup> a provision tolling the maximum time period,<sup>16</sup> and provisions allowing for certain extensions and waivers.<sup>17</sup>

- ◆ **Other actions.** In addition, the PUC, as well as other state and county agencies, may wish to take other internal administrative measures (that may or may not involve rulemaking) to ensure application completeness and prevent inadvertent automatic approvals, including the following:

- Establish internal procedures and controls relating to completeness;<sup>18</sup>
- Allow for the concurrent processing of applications;<sup>19</sup>
- Develop other permit streamlining techniques;<sup>20</sup>
- Implement a monitoring system to prevent automatic approvals;<sup>21</sup>
- Document concerns and develop a balanced record;<sup>22</sup>
- Cross-train professional staff or borrow staff from other agencies to reduce backlog;<sup>23</sup>
- Contract out certain permitting functions to private vendors to the extent feasible; and<sup>24</sup>

- Establish a special unit within the agency for permit coordination and processing.<sup>25</sup>

## E. Conclusion

The Bureau believes that the Legislature is not required to amend section 91-13.5, HRS, because of the policy decision inherent in that section to give state and county agencies a free hand in implementing that law. The law allows agencies to resolve for themselves, in a way that best suits each state and county agency, the issues discussed in this report, both through the adoption of rules and the implementation of internal controls to prevent automatic approvals. At the same time, however, the Legislature should not expect too much consistency in agency rulemaking, since section 91-13.5, HRS, gives agencies broad flexibility to fashion their rules in the manner that meets the unique concerns of each particular agency, consistent with that section and the agencies' implementing statutes.<sup>26</sup>

Shifting to the agencies the power to resolve the issues discussed in this report has apparently left many agencies feeling themselves at the center of a battleground, particularly in the drafting of administrative rules, in which developers are often pitted against environmentalists. Agencies may feel caught between a rock (section 91-13.5) and a hard place (the agency's implementing statutes or ordinances), particularly since section 91-13.5 offers little guidance in resolving conflicts between these provisions. Nevertheless, the Bureau believes that section 91-13.5 is flexible enough to allow agencies to resolve each of the potential problems created by that section through agency rulemaking.

The Legislature needs to realize, however, that the broad flexibility and discretion given the agencies in adopting rules could result in different agencies adopting rules that produce results that are inconsistent, or that exceed what the Legislature believes to be the intent of section 91-13.5, unless the Legislature amends that section to provide additional guidance to agencies. In other words, the Legislature cannot have its cake and eat it, too. It must either allow agency flexibility, as under the current law, or amend that law to limit agency discretion. Agencies, on the other hand, must acknowledge the fact that automatic approval, however much that concept may be considered "an archaic holdover from simpler days,"<sup>27</sup> is the law of the State, and agencies must comply with that law to the best of their abilities.

A commentator reviewing California's Permit Streamlining Act noted that "[f]rom the time of its enactment, the law was resented both by planners who objected to the legislative invasion and by developers who stood to gain at best an 11<sup>th</sup>-hour disapproval or litigation."<sup>28</sup> However, "neither group took the act seriously" until a California court ruled that the time limits in that Act were mandatory.<sup>29</sup> To date, however, there have been few opportunities to test the effectiveness of Hawaii's automatic permit approval law, as most agencies have not yet adopted the necessary implementing rules. It may be necessary for Hawaii's courts to similarly enforce the maximum time limits established by agency rules under the automatic permit approval law before people in Hawaii also begin to take that law seriously.



## Endnotes

1. The Attorney General's comments regarding section 91-13.5, as contained in Appendix C, endnote 1, include the following suggestions for legislative action:
  - Clarify the definition of "application for a business or development-related permit, license, or approval" in section 91-13.5, HRS;
  - Clarify the purpose for enacting Act 164, Session Laws of Hawaii 1998, by identifying the specific interest it was attempting to promote;
  - Clarify whether a tie vote should result in an automatic approval of a license or permit under section 91-13.5, HRS;
  - Specify whether section 91-13.5, HRS includes extensions of the maximum time period under specific circumstances not related to dilatory inaction by an agency, and if so, what other extensions are permissible;
  - Specify whether agencies are authorized to impose specific conditions relating to the protection of public health and safety when an application has been automatically approved; and
  - Clarify whether section 91-13.5, HRS allows agencies to adopt rules stating that the maximum time period begins to run after the completion of a contested case hearing.
2. Currently, section 91-13.5, HRS, applies to nearly all business and development-related permits, licenses, and approvals, whether discretionary or ministerial. One option is to make that section apply only to certain agencies, rather than the existing across-the-board automatic approval. In particular, it has been argued that the real focus of concern of section 91-13.5 is on Land Use Commission district boundary amendments under chapter 205, HRS, and Coastal Zone Management Area-related discretionary permits under chapter 205A, HRS. Since the latter permits are tied to federal oversight and therefore exempt from automatic approval, section 91-13.5 should apply only to LUC district boundary amendments, rather than having that section apply to all agencies indiscriminately. Letter from Michael J. Matsukawa, Esq., to Wendell K. Kimura, Acting Director, Legislative Reference Bureau, June 20, 2000, p. 6 of attachment. *See also* note 8 in chapter 4 for a brief discussion of district boundary amendment petitions.
3. Alternatively, an advisory board could be established to review the average length of time taken to issue permits, licenses, and approvals by each state agency, and the Legislature could accordingly limit the application of section 91-13.5 to only those agencies that are perceived to unreasonably delay issuing those permits, licenses, or approvals. This determination should be based on agency delays that are not the result of limited resources, inadequate staffing, complex issues, changes in economic cycles (e.g., a housing boom), or a large workload, but rather from deliberate agency inaction. Since the automatic approval law is intended to address dilatory inaction by agencies, the rationale is to target only those agencies that have shown to have procrastinated in permit issuance or review. Once agencies have initiated reforms to address these inadequacies, the law could be subsequently amended to address only the most severe cases of agency delay. The law could be further amended to allow the counties to adopt ordinances to similarly address undue delay by specific county agencies.
4. Section 555(b) of the federal Administrative Procedure Act requires agencies to decide issues within a "reasonable time". 5 U.S.C. §555(b) provides in relevant part: "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." (Emphasis added.) 5 U.S.C. §706(1) of that Act specifically empowers a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed...".

Similar language could be added to Hawaii's Administrative Procedure Act to provide additional legal remedies for unreasonable agency delay, either in combination with section 91-13.5 or in place of that section. However, while federal courts "can impose their own time limits for agency action, even if no limits have been imposed by Congress or through agency rulemaking", federal court opinions interpreting section 706(1) have often made it difficult for petitioners to prevail in cases seeking remedies for unreasonable agency delay. See Stein, Mitchell, and Mezines, 4 Administrative Law §33.03[4][a] (Lexis Publ. 2000), pp. 33-57 (footnote omitted); Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, Vol. II (New York, NY: Little Brown and Co., 3rd ed., 1994), §12.3, at 217-226. In particular, Davis and Pierce cite Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*), which set forth the following six-part test for determining whether agency action has been unreasonably delayed:

- (1) [T]he time agencies take to make decisions must be governed by a "rule of reason" ...;
- (2) [W]here Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason ...;
- (3) [D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake...;
- (4) [T]he court should consider the effect of expediting delayed action on agency activities of a higher or competing priority...;
- (5) [T]he court should also take into account the nature and extent of the interest prejudiced by delay...; and,
- (6) [T]he court need not "find any impropriety lurking behind agency lassitude in order to hold the agency action is unreasonably delayed." *TRAC*, 750 F.2d at 78.

Davis and Pierce note that the holdings in *TRAC* have been followed in a number of cases and circuits, and that no court has rejected the *TRAC* reasoning. They note that while most petitioners do not prevail under this "deferential standard", agencies sometimes respond to pressure for action by "voluntarily" presenting a proposed timetable to the court, which is typically accepted by the court. Id. at 220.

In addition, judicial review often *increases* rather than decreases the time for project completion. In one Fourth Circuit case, seven of the eight years of delay "was attributable to the torpid judicial decisionmaking process rather than to the agency decisionmaking process." Davis and Pierce (1999 Supp.) §12.3, at 380, citing In re City of Virginia Beach, 42 F.3d 881 (4th Cir. 1994).

5. Alternatively, specific court action for unreasonable agency delay could be allowed as provided in section 668-7, HRS (partitions of real estate; powers of the court), which provides: "If action by the planning department on the proposed subdivision is unreasonably delayed, the court may order the planning department to appear and show cause why the subdivision should not be approved by the court." Similarly, for cases of unreasonable delay, section 91-13.5, HRS could be amended to allow the reviewing court to order the agency accused of unreasonable delay to appear and show cause why the application in question should not be approved by the court.
6. The final recommendations of the Economic Revitalization Task Force included an "administrative appeal process with specific time limits [that] would be available at [the] relevant level (e.g., Governor at State and Mayors at County)." Alternatively, section 91-13.5 could provide for the consolidation of contested case hearings and for expedited appellate review directly to the Hawaii Supreme Court.
7. California's Act contains a number of features not present in Hawaii's Act, including maximum time periods specified in the statute itself, statutory extension periods, and mandatory notice provisions. A Hawaii bill modeled after California's law could allow agencies that have already adopted rules specifying

maximum time limits under section 91-13.5, HRS to retain those limits; if other agencies failed to adopt rules setting maximum time limits by a certain date, the statutory default time limits would become operative for those agencies.

8. Without further amendment, it may be argued, section 91-13.5 will increase state and county exposure to litigation and liability, create additional confusion, and forestall projects rather than assist in streamlining the permitting process, thereby increasing delays in the permitting process. It has also been argued that section 91-13.5 "is unfair and one-sided in that it protects the (perfectly legitimate) interests of permit applicants in obtaining timely action on their applications while affording no protections whatsoever to the equally legitimate interest of the public in ensuring that agency action on such applications is the result of a reasoned decision-making process that provides an appropriate opportunity for public participation. Because [section 91-13.5, HRS] fails to provide such a balanced process, ... it will inevitably lead to the ill-advised and improper 'approval' of permit applications that are in fact procedurally or substantively unlawful." (Letter to the author from Carl C. Christensen, Staff Attorney, Native Hawaiian Legal Corporation, dated June 30, 2000, p. 1.)

Others argue that "the solution is not the threat of automatic approvals, which would be the height of arbitrariness, but leadership from the governor, department heads and supervisors in finding ways to deal with obstructionist tactics and speed up the processing of applications." Editorial, "Cayetano Should Veto Automatic Approvals," Honolulu Star-Bulletin, July 1, 1998, p. A18. Along the same lines, attorney William Tam has suggested that rather than use the threat of automatic approval the Governor could solve the timeliness problem by taking the following course of action:

- Telling department heads to devise realistic internal procedures to ensure compliance with existing deadlines.
- Monitoring permits that are past decision deadlines (just as creditors monitor accounts receivable).
- Help his Cabinet take remedial actions, recognizing that larger projects will require different solutions than minor permits.

William Tam, "Should Governor Sign Permit-Deadline Bill? No: Bill Denies Due Process", The Honolulu Advertiser, June 28, 1998, p. B3. Mr. Tam further noted that "[c]ourts manage case loads through status and settlement conferences, not with stop watches. In the court system, a plaintiff can win a default judgment if the defendant does not show up. But under SB 2204, the applicant would win because the judge could not show up. No system of justice would long survive under such a regime." Id. *Accord, see id.*, Maile Bay, "No: There Are Better Solutions"; *contra, see id.*, Dan Davidson, "Yes: Bill Has Safeguards," and Rick Egged, "Yes: It's Part of New Culture."

9. Upon a showing by the agency, increased funding could help the agency to meet increased pressure to meet the maximum time periods required by section 91-13.5. Appropriations to county agencies could be in the form of grants-in-aid for the hiring of additional staff to process permits.
10. For example, the Commission or other agency could include an applicability section such as the following:

Applicability. Maximum time limits shall not apply to the following:

- (1) Entities that are already formed or operating as of July 14, 1998 [the effective date of Act 164, Session Laws of Hawaii 1998], including public utilities, motor carriers, or water carriers that are already authorized to operate in the State, whether by charter, franchise, or commission authority, unless the entity is seeking permission to expand its existing operating authority;

- (2) Informational filings by a premises owner who provides shared tenant service, pursuant to chapter 6-76.1, Hawaii Administrative Rules (HAR);
  - (3) Registration information filed by an aggregator, pursuant to chapter 6-79, HAR;
  - (4) Complaints, both formal and informal, filed with the commission by consumers;
  - (5) Investigations opened upon the commission's own motion;
  - (6) Applications filed in accordance with or in compliance with commission order;
  - (7) Informational dockets or dockets where the commission intends to keep the docket open on a continuous basis; or
  - (8) Citations issued by the commission or its authorized representative, pursuant to HRS chapters 269, 271, or 271G.
11. For example, the rules can specify that an application will not be deemed to be complete until the Commission has first met its statutory obligation to make findings as to the fitness of the proposed public utility, motor carrier, or water carrier to operate in the manner requested, and the Commission has notified the applicant in writing that the application is complete. The rules could also include the Division of Consumer Advocacy's statutorily required review of applications filed with the PUC as one of the items that must be received for an application to be deemed complete.
  12. For example, the Commission's rules can require the attachment of reasonable conditions to an automatically approved permit, license, or approval for which the Commission has been unable, for whatever reason, to make its required statutory findings.
  13. The Commission's rules can specify that applications shall not jeopardize the public's health, safety, or welfare.
  14. The Commission's rules can state that an automatic approval shall not be construed to be an approval of a violation of applicable constitutional provisions, statutes (including chapters 269, 270, and 271G, HRS), ordinances, rules, procedures, standards, or orders, including:
    - (1) With respect to applications filed by persons seeking authority to operate as public utilities, motor carriers, or water carriers, a finding as required by law that the applicant is fit, willing, and able to perform the proposed service, and that the service is required by the public convenience and necessity; and
    - (2) With respect to applications filed by existing utilities or carriers seeking to expand their operating authority, a finding as required by law that the request is reasonable and in the public interest.
  15. The rules could extend the overall maximum time period to allow for various contingencies, such as an attempted manipulation of the docket.
  16. For example, the rules could provide that the maximum time period does not begin to run until the termination of a contested case hearing, rate hearing, or other quasi-judicial hearing, or that the maximum time period is tolled during such a proceeding or hearing.
  17. The rules could allow extensions for findings of good cause or exigent circumstances, and allow for an applicant's voluntary waiver of the maximum time period. As discussed in the previous chapter, however, the validity of extension and waiver rules is open to debate.
  18. Internal controls may be used to rapidly assess the completeness of applications in order to avoid a situation in which the Commission is faced with making a decision on an incomplete application close to a maximum time period for the Commission's action.
  19. For example, the rules of the Hawaii Community Development Authority allows for applicants to apply for some or all approvals concurrently when a proposed project requires more than one permit or approval, in

which case the maximum time period is based on the permit or approval with the longest review period. See Haw. Admin. Rules §§15-22-23(c) and 15-23-22(c).

20. To the extent the Commission or other agency has not already done so, various streamlining techniques could be used, including requiring pre-application conferences or conceptual reviews, allowing applicants to pay a premium for the expedited processing of applications, and providing for a permit facilitator or ombudsman. Hawaii's Economic Revitalization Task Force (ERTF), for example, recommended the following regulatory streamlining proposal: "Structure 'fast track' permitting/license, etc. Set up expedited process which for a fee will offer the client (business/public) an agreed short completion time. Offer as an alternative the option to client to provide in-kind services in place of fee for use of the fast track process." Hawaii, ERTF, Hawaii's Economic Future (Honolulu, HI: Oct. 1997), p. 5 (collected working group action item). The ERTF also encouraged the development and implementation of a system that "allows parties seeking licenses and permits to use an account executive who will be responsible for assisting and coordinating the 'customer' with the licensing or permitting process. This system must apply to inter-departmental processes as well as intra-departmental processes." Id.

Other techniques include requiring joint hearings where possible, providing for a master or consolidated application and "one-stop" permit procedures, increasing coordination with other federal, state, and county agencies, and making greater use of internet-based applications. For example, the New Jersey Department of Environmental Protection uses an online method of applying for air general permits on its web site, that has reduced processing delays from approximately six weeks to six minutes. See [www.governing.com/webwatch.htm](http://www.governing.com/webwatch.htm) and [www.state.nj.us/dep/aqpp](http://www.state.nj.us/dep/aqpp). In California, several Silicon Valley cities use a project called "Smart Permit" that uses "Internet technology to streamline and reduce costs in the building-permitting process". "Technology: More Innovative Sites," Governing, April 2000, p. 62; see [www.jointventure.org/initiatives/smartpermit/index.html](http://www.jointventure.org/initiatives/smartpermit/index.html).

21. The Commission or other agency should establish a system for monitoring compliance with section 91-13.5: "The need for this is self-evident, yet many public bodies do not utilize any formal monitoring system. It is clear from the case law that many (virtually all) automatic approvals are inadvertent. Simple monitoring systems may go a long way to avert inadvertent approvals." Gregory G. Brooker and Karen R. Cole, "Automatic Approval Statutes: Escape Hatches and Pitfalls," 29 The Urban Lawyer 439, 473 (Summer 1997).
22. The Commission or other agency should "systemize a way to identify concerns with a proposal and to develop record evidence documenting those concerns where appropriate" in order "to ensure that the record is balanced and the municipality is not boxed into proposals". Id. at 474.
23. For example, the Department of Health has made arrangements to borrow engineers from other departments to expedite the processing of water permits, and has reduced backlogs in ventilation permits by adding cross-trained professional staff. Hawaii Department of Business, Economic Development, and Tourism, Restoring Hawaii's Economic Momentum (Honolulu: 1996), p. 26. The Zoning Division of the City and County of Honolulu Department of Planning and Permitting has also made efforts to cross-train staff: "The most significant project undertaken was to 'cross-train' staff. Rather than specializing planners to handle specific types of permits, assignments have been broadened to allow staff a more diverse professional experience. Coupled with this was the initiation of the 'project manager' concept, wherein there would be a lead staff member assigned to a project requiring more than one zoning permit." City and County of Honolulu, Departmental and Agency Reports of the City and County of Honolulu for Fiscal Year July 1, 1998 – June 30, 1999 (Honolulu, HI: 1999), p. 296.
24. Contracting out can be used if the Commission or other agency lacks sufficient staff (due to illness or vacation) or other resources to handle an increase in applications, and the process is fairly straightforward and does not require substantial discretion on the part of the vendor. The Department of Health, for example, has hired several firms as consultants to reduce the backlog of clean air permits. Hawaii Department of Business, Economic Development, and Tourism, Hawaii's Economic Action Program

(Honolulu, HI: July, 1997), p. 26; Office of Planning, A Report to the Legislature on Act 127, SLH 1997 (Honolulu, HI: Jan. 1999), p. 4: "During the past two years and continuing today, the DOH will utilize contract services to augment efforts of permit staff with the CAB and CWB programs."

25. For example, Florida's Air and Water Pollution Control Act requires the state Department of Environmental Protection to establish "a special unit for permit coordination and processing to provide expeditious processing of department permits which the district offices are unable to process expeditiously and to provide accelerated processing of certain permits or renewals for economic and operating stability." Fla. Stat. §403.0876(3)(a) ("permits; processing") (1999).
26. For example, Representative Menor, the lead manager for the House conferees that reviewed S.B. No. 2204, S.D. 2, H.D. 2, C.D. 1 (1998) (the bill for Act 164, Session Laws of Hawaii 1998), argued in floor debates on the Conference Committee Draft that the bill gave agencies sufficient flexibility to adopt safeguards to address concerns relating to automatic approvals:

Moreover, to address the concern that through automatic approval, provisions of this bill would force agencies to rush approval of conflicts of applications. This bill would allow agencies flexibility to establish their own time periods, taking into account their existing man power, their intimate knowledge of the time it takes to process permits, as well as the understanding and experience of contested case procedures. In this regard, agencies would have the responsibility to establish realistic and achievable review on approval time periods.

This measure also gives agencies the flexibility to adopt safeguards, such as procedures to grant time extensions if it was felt necessary that the additional time was needed to review our complex application. And as an ultimate safeguard under this bill, agencies would retain the authority to deny applications that are deemed to be incomplete or inadequate. (Emphasis added.)

Journal of the House of Representatives of the Nineteenth Legislature, State of Hawaii, Regular Session of 1998, 64th Day, p. 875.

27. Carolyn W. Poulin, "Comment: Land Use Applications Not Acted Upon Shall Be Deemed Approved: A Weighing of the Interests," 57 UMKC L. Rev. 607, 634 (Spring, 1989).
28. Kenneth Wilson, "Down Stream from Streamlining," California Lawyer, vol. 7, no. 8, Aug. 1987, p. 71.
29. Palmer v. City of Ojai, 178 Cal.App.3d 280, 223 Cal.Rptr. 542 (App. 2 Dist. 1986).

## Appendix C

[Public Sector Survey]

### SURVEY

#### Automatic Permit Approval Law

The Legislative Reference Bureau would appreciate your assistance in its review of the legal and logistical questions pertaining to the automatic permit approval law (Act 164, Session Laws of Hawaii 1998). Please answer the following questions regarding your department's experiences in this area, if any. We ask that you submit a single, consolidated response from your department that includes all agencies that are in or attached to your department, whether or not those agencies are placed within your department solely for administrative purposes.

1. Your name and title: \_\_\_\_\_ (please print).  
Your department: \_\_\_\_\_ (state / county).  
Number of agencies in or attached to your department: \_\_\_\_\_.
2. Has your department, or any agency that is within your department or administratively attached to your department, adopted any administrative rules that establish maximum time limits for permit approval or denial in compliance with the automatic permit approval law? YES \_\_\_\_ NO \_\_\_\_\_. If "YES", please specify the rule or rules by section number (e.g., section 15-22-118, Hawaii Administrative Rules):

\_\_\_\_\_  
\_\_\_\_\_  
If "NO", please briefly discuss the reasons for not adopting these rules:

3. As applied to your department, including any agency that is either within your department or administratively attached to your department, do you find there to be any legal or logistical problems in the implementation or application of the automatic permit approval law? YES \_\_\_\_ NO \_\_\_\_\_. If "YES", please discuss actual or anticipated problems created by that law, as well as specific areas in which you believe the law should be amended to resolve the legal or logistical problems you identified (please include examples as applicable):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Thank you for taking the time to complete this survey. Please attach additional pages as needed. Please send your responses no later than **July 30, 2000**, to Mark Rosen, Legislative Reference Bureau, State Capitol, Room 446, Honolulu, Hawaii 96813, or by e-mail to Mr. Rosen at [rosen@capitol.hawaii.gov](mailto:rosen@capitol.hawaii.gov). Please feel free to call Mr. Rosen at 587-0666 or contact him by e-mail if you have any questions.

**PUBLIC SECTOR SURVEY RESPONSES –  
AUTOMATIC APPROVAL LAW**

**STATE OF HAWAII**

<b>DEPARTMENT</b>	<b>NO. OF AGEN.</b>	<b>RULES – ADOPTED/ PENDING</b>	<b>REASONS FOR NOT ADOPTING RULES</b>	<b>PROBLEMS</b>
Governor	2	None	“The office has no admin rules and no permits to issue.”	“There are no legal or logistical problems since there are no admin rules in the office to address.”
Lieutenant Governor	4	None	“We do not issue permits.”	N/A
Accounting and General Services	4	None	“The automatic permit approval law is not applicable to DAGS.”	N/A
Agriculture (No response)				
Attorney General	2	No	“No agencies administratively attached to the Department of the Attorney General are authorized or responsible for issuing permits.”	Various legal issues should be clarified by the Legislature. <sup>1</sup>
Budget & Finance	7			
Public Utilities Commission (the only agency affected)		Commission counsel has drafted proposed rules to implement Act 164, which are under informal review by the Division of Consumer Advocacy.		(1) “The definition of “application for a business or development-related permit, license, or approval” as set forth in HRS §91-13.5(e), is overbroad, vague, and ambiguous.” <sup>2</sup> (2) “The applications exempted from Act 164 should be expanded.” <sup>3</sup> (3) “The automatic approval law is inconsistent with the public interest.” <sup>4</sup> (4) “Act 164 should be amended to take into account the realities of administrative agency proceedings, in particular, quasi-judicial proceedings.” <sup>5</sup>
Business, Economic Devt., and Tourism	12			
Community-Based Econ. Devt. Program/ Enterprise Zone		None	No permits issued.	N/A
Business Devt. & Marketing		None	N/A	N/A
Energy, Res. & Technology		None	“This division has no rules which apply to permitting within its purview.”	No



DEPARTMENT	NO. OF AGEN.	RULES – ADOPTED/ PENDING	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Foreign-Trade Zone Division		None	“We process requests the same day they are received. It has never been an issue.”	No
Convention Ctr. Authority		None	No permits issued.	N/A
BPNAS Redevel. Comm.		None	No permits issued.	No
HI Community Devt. Authority		HAR §§ 15-22-23, 15-23-22	-----	No
High Technol. Devt. Corp.		None	No permits issued.	No
HCDCH		None	No permits issued.	N/A
Land Use Commission		Rules set time limits for processing requests for incremental redistricting. [HAR ch. 15-15.]	“The maximum time limits for boundary amendments and special permits were already codified into the statute prior to the enactment of the automatic permit approval law.”	(1) The term “action” is not clearly defined in Act 164; (2) Act 164 fails to address automatic approvals based on a lack of quorum; (3) Act 164 undermines the legislative intent and purpose of the LUC’s decision-making criteria and responsibilities. <sup>6</sup>
Natural Energy Laboratory of HI Authority		None	No permits issued	N/A
Admin. Serv. Office		None	No permits issued	N/A
Commerce and Consumer Affairs	36	HAR § 16-36-1.5(c) Pending: §§ 16-25-41, 16-28-29, 16-38-4.5	“Current statutes and rules for certain agencies had established maximum time periods for agency action.” <sup>7</sup>	Two divisions, the Division of Consumer Advocacy (DCA) and the Division of Financial Institutions (DFI), submitted comments. <sup>8</sup>
Defense	4	None	No permits issued.	N/A
Education	1	HAR ch. 8-101 (Licensing of Private Trade, Vocational or Technical Schools)	-----	“Presently, because we have not been able to monitor the licensing of Private Trade, Vocational or Technical Schools we have been able to meet automatic permit approval timelines. If, however, we were to implement this function to the full extent of the law, with present resources, we think it would be difficult to meet automatic timelines.”

DEPARTMENT	NO. OF AGEN.	RULES – ADOPTED/ PENDING	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Hawaiian Home Lands	1	None	“The department has very limited contact with the general business public in conducting affairs on Hawaiian Home Lands.” <sup>9</sup>	DHHL “anticipates a number of problems with this law.” <sup>10</sup>
Health	6	HAR chaps. 11-23, 11-62, 11-270, 11-281	(1) Many of the programs within the Env. Health Admin. are federally delegated, and therefore not subject to this law. (2) Some rules already contain provisions which are compliant, and therefore no further action was necessary. (3) Some programs are incorporating amendments within the larger context of comprehensive rulemaking, which has not yet been completed.	(1) Some programs were in the process of applying for federal delegation. <sup>11</sup> (2) Need extended time period in event of a contested case proceeding. <sup>12</sup>
Human Resources Development	2	None	No permits issued.	N/A
Human Services (No response)				
Labor and Industrial Relations	7	HAR §§ 12-25-23(c), 12-58-2, 12-220-15, 12-229-3	-----	The Boiler/Elevator Branch is understaffed. <sup>13</sup>
Land and Natural Resources	23			
Land Division <sup>14</sup>		“We have identified three programs for which rules will have to be adopted to conform to this Act.” <sup>15</sup>	-----	Various problems, including: (1) The interaction of the automatic approval law and the Board’s voting requirements; (2) Contested case proceedings should not be subject to mandatory timelines; (3) Public safety may be seriously compromised; (4) Forced denial of applications. <sup>16</sup>
State Parks		None	“Our parks permits [cater] to general public recreation rather than business/business development, unless BID/IFB issued soliciting park concession amenity.”	No.

DEPARTMENT	NO. OF AGEN.	RULES – ADOPTED/ PENDING	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Public Safety	7			
Narcotics Enforcement		HAR chaps. 23-200, 23-201	-----	“There is a possibility that this automatic permit approval law could cause problems with the automatic approval of controlled substance research applications that may require Federal and State approval of research protocol.”
Taxation	3	None	“[The] Attorney General advised that Act 164 does not apply to us because our tax licenses, permits, and certificates are revenue processes unrelated to Act 164's regulatory process.” <sup>17</sup>	N/A
Transportation	3	Pending. <sup>18</sup>	-----	No
Oahu Metropolitan Planning Org.	0	None	No permits issued.	No
Judiciary	0	None	“The Judiciary does not grant or deny business or development-related permits and/or licenses/approvals.”	No
OHA (No Response)				

**CITY AND COUNTY OF HONOLULU**

DEPARTMENT	NO. OF AGEN.	RULES – (ADOPTED/ PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Customer Serv. (No Response)				
Enterprise Serv. (No Response)				
Budget (No Response)				
Design & Construction	0	None	No permits issued.	N/A
Corporation Counsel	0	None	The department does not have “permit issuing” authority.	N/A. The Corporation Counsel noted concerns about the Planning Commission’s issuance of special permits and the potential conflict between Act 164 and HRS §205-6. <sup>19</sup>
Information Technology (No Response)				

DEPARTMENT	NO. OF AGEN.	RULES – (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Budget & Fiscal Services	5	None	“Processing deadlines (without automatic approval consequences) are already in rules, or are not an issue. Liquor Comm. permits and licenses issued under HRS and rules.”	No
Liquor Commission		None	Existing statute contains maximum time period. <sup>20</sup>	Concerns regarding circumvention of statutory public protest provisions, unfunded legislative mandates. <sup>21</sup>
Fire	0	Revised Ordinances of Honolulu (ROH), §20-3.3	-----	“20 days – presently it is 20 consecutive days. It would be more practical as 20 working days. All jobs are treated as ‘the same’ both major and minor. Major projects require a longer review window.”
Emergency Services	2	No.	No permits issued.	N/A
Community Services	0	None	No permits issued.	N/A
Planning & Permitting	3	Chap. 1.1 Regulatory Processes in DPP Part 1, Rules of Practice & Procedure; Chap.2 Permit Processing in DPP Rules Relating to Administration of the Housing & Building Code.	-----	Logistically (as an indirect consequence), our Building Division sometimes found it a strain to process permits within the established time limits because of lack of staff resources due to retirements and vacant positions not filled due to fiscal constraints.
Medical Examiner	1	None	No permits issued.	N/A
Parks & Recreation (No Response) <sup>22</sup>				
Human Resources	0	None	N/A	N/A

DEPARTMENT	NO. OF AGEN.	RULES – (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Police	20 Div.	No	“The police dept. issues permits for ‘shooting galleries’ and ‘Palmistry’. There have been no requests for new permits in the last ten years. There is only one (1) shooting gallery operating in the county.”	No. “A review of the Firearms Section MOP is being made and 91-13.5 will be included in regards to Palmistry permits and Shooting galleries. The Rules of the Chief also set procedures and guidelines for Palmistry and Shooting Gallery permits. These rules are being reviewed and updated to comply with [Act 164].”
Facility Maintenance	3 Div.	None	“Our dept. is responsible for operations and maintenance of City facilities and infrastructure. Adoption of rules would be under the jurisdiction of the Dept. of Planning & Permitting.”	No
Environmental Services	4 Div.	None	“Storm water quality permits are subject to NPDES Permit program which is state administered and delegated under federal law. The Refuse Division grants licenses to commercial refuse collection companies as long as applications are submitted on time each year and other requirements are met.”	No
Transportation Services (No Response)				
Civil Defense	1	None	No permits issued.	No
Water Supply	0	Resolution Number 699, amending Rules and Regulations of the Board of Water Supply (new §1-113); <sup>23</sup> Section 4-8(A) maximum time limit for review of development water system construction plans.	N/A	“At the expenses of public health, safety & welfare, construction plans could obtain automatic approval without proper agency review.”

**COUNTY OF HAWAII**

<b>DEPARTMENT</b>	<b>NO. OF AGEN.</b>	<b>RULES (ADOPTED/PENDING)</b>	<b>REASONS FOR NOT ADOPTING RULES</b>	<b>PROBLEMS</b>
Office of Aging	1	None	No permits issued.	No
Civil Service	0	None	No permits issued.	N/A
Corporation Counsel	1	None	“Corporation Counsel does not issue permits or adopt rules. Board of Ethics is attached to this office and does adopt rules but does not issue permits.”	No
Finance	5 Div.	None	No permits issued.	No
Fire (No Response)				
Housing & Community Devt. (No Response)				
Liquor Control	2	None	“Regarding applications for liquor licenses; Ch. 281 provides time limits, notice requirements to the public for the purpose of filing protests. Current commission rules permit the director to issue certain licenses (special one day, vessels) and permits upon receipt.”	“Re: Applications for liquor licenses; if an applicant fails to meet notice and mailing requirements it is cause for re-notice causing a delay in the hearing process thus taking it further out of the realm of the automatic permit approval law.”
Mass Transit Agency (No Response)				
Parks & Rec. (No Response)				
Planning (No Response)				
Police (No Response)				
Public Works	2			
Building Div.		“Rules of the Building Division governing the enforcement of codes and resolutions.”	-----	“If a permits receives automatic approval does that approval imply that a structure can be built according to the submitted plans even though it is found during constructions that the proposed design does not meet building code regulations?”

DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Engineering		Pending Council Adoption: Chap. 10 (Erosion and Sedimentation Control Code); Chap. 22 (Streets and Sidewalk Control Code)	-----	No
Research & Devt. (No Response)				
Industrial Safety	1	None	N/A	No
Water Supply (No Response)				
Hawaii Redevt. Agency (No Response)				

**COUNTY OF KAUAI**

DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
County Attorney	0	(1) Part 2, Section V, Dept. of Water Rules and Regs.; (2) Office assisted the Planning Dept. with drafting Special Permit rules.	-----	(1) "The complicated review process may take longer than the allowable evaluation time. The Department [of Water] will be left with no choice but to deny the application. Extensions are not permissible under the rule. There had been no complaints about the length of review time in the past. This rule may end up slowing down the process. New, we need to send notice to the consumer."  (2) "The automatic approval law posed a problem with HRS section 205-6 which requires a majority vote of the [planning] commission in order for a special permit to be issued." <sup>24</sup>
Finance	6	None	No permits issued.	"In general, some permit approvals can and should take longer than others for good reason." <sup>25</sup>

DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Fire	2	None	“For the issuing of licenses to sell fireworks and plan review and approval of commercial buildings and temporary structures, the time factor has not been an issue.”	No
Fire Prevention Bureau		None	“The Fire Prevention Bureau on Kauai does not have a full-time Plans Checker.” <sup>26</sup>	“We may have a logistical problem implementing the automatic permit approval law since we do not have full-time staff to review/approve plans.” <sup>27</sup>
Personnel Services	0	None	N/A	N/A
Planning		Chapter 13, Special Permit Rules. <sup>28</sup>	-----	Problems in implementation or application: (1) Conflict between chapter 205 and Act 164, <sup>29</sup> (2) No extension allowed, <sup>30</sup> (3) Application of Act 164 to discretionary permits. <sup>31</sup>
Police	1	None	“[HRS §134-4] requires registration of forms drafted by the Attorney General.” <sup>32</sup>	“If automatic permit approval takes place, individuals who are disqualified from possession/ownership of a firearm would automatically receive a permit.”
Public Works	0	None	“We already have rules for the issuance of permits and the only reason for non-issuance is non-compliance by the applicant with the rules.”	“The issuance of building permits by our Department is premised on approval also by other agencies/department[s] which we don't have control over, like Planning, Water & the State Health Department.”
War Memorial Convention Hall		None	“Current administrative rules do provide any time limits for permits.”	No
Transportation (No Response)				
Water	1	Part 2, Section V, Dept. of Water Rules	-----	“A potential problem would be if an incomplete application would ‘slip through’ to the automatic approval state. This was addressed by providing that the department is to notify the applicant in writing that the application is complete and accepted for filing.”
Civil Defense (No Response)				
Elderly Affairs	2	None	N/A	No



DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULES	PROBLEMS
Liquor Control	1	None	“[Chapter] 281 of the HRS specifies the time frame within which the Liquor Commission can hold a public hearing to grant or deny a liquor license.” <sup>33</sup>	“It is the opinion of this department that the Kauai Liquor Control Commission, as provided for in [chapter] 281 of the HRS, is the only body that, by affirmative vote, may grant or refuse an application for a liquor license or permit. Act 164 would essentially grant a liquor license by default, which would be inconsistent with the intent and spirit of [chap.] 281.”
Economic Development	1	None	“Permits take only one or two days to issue once space becomes available in farmers markets for which the permits are issued. The physical limitations of these markets and waiting lists determine when permits can be issued.”	“Permits are controlled by the availability of space, and automatic issuance would create serious problems of over-crowding.”
Community Assistance	3	None	No permits processed.	N/A

### COUNTY OF MAUI

DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/PENDING)	REASONS FOR NOT ADOPTING RULE	PROBLEMS
Economic Devt.		None	No response	No
Corporation Counsel	1	None	“The Dept. of the Corp. Counsel exists to provide legal advice to other County agencies. We have assisted other agencies in adopting the required rule change and we expect they will respond accordingly.”	“[I]t is not clear whether a permit applicant can waive the time limits by their own actions. For instance, an applicant may be asked to provide more information while the clock is running and not respond until after the time limit is expired. Or an applicant may request that their item be scheduled or deferred to a later date. The law should provide that a permit will not be automatically approved as a result of delay caused by the applicant.” <sup>34</sup>
Finance (No Response)				
Fire Control (No Response)				
Housing & Human Concerns	6	None	No permits issued.	No

DEPARTMENT	NO. OF AGEN.	RULES (ADOPTED/ PENDING)	REASONS FOR NOT ADOPTING RULE	PROBLEMS
Liquor Control	2	Sections 08-101-30(k) & 08-101-27(d) of the Rules of Liquor Comm.	-----	No
Parks & Recreation	1	None	“We do not issue business or development related permits.”	No
Personnel Services	1	None	No permits issued.	N/A
Planning (No Response)				
Police	1	None	“We consulted with our corporation counsel, ... and [were] informed that this law does not cover firearms or other police regulated permits.”	N/A
Public Works & Waste Mgmt. (No Response)				
Board of Water Supply	1	Pending	“Passed by the Board [but] not approved by the Mayor & Council.”	No

### Endnotes

**[Note: The endnotes consist of the departments' verbatim survey responses, unless otherwise specified in bracketed material.]**

1. [From the Attorney General's survey response:] Since the enactment of Act 164, numerous state agencies have requested our advice to interpret the definition of an “application for a business or development-related permit, license, or approval.” At this time, I am aware of eight opinion letters approved by the Attorney General that have responded to such a request for a written legal opinion. I am also aware of two requests to which a deputy attorney general had provided a written response that was not presented to the Attorney General for approval. We also believe that deputies have been frequently requested to provide oral opinions in response to similar numerous requests to interpret the definition. On occasions, a client agency would request the reconsideration of our opinion when we opined that the agency is subject to the requirements of Act 164.

During our legal analysis of Act 164, we offer the following legal issues that should be clarified by the legislature:

- [1] When the legislature defined “application for a business or development-related permit, license, or approval” to mean “request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise,” does Act 164 apply to all forms of commercial or industrial enterprises or only development-related commercial or industrial enterprises?

Generally, it is unclear as to what the legislature intended when it required Act 164 to apply to all “requests for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise.” Did the legislature intend a broad application of Act 164 to cover all permits or licenses “required by law” to be approved by an agency or did the Legislature intend a specific application to only licenses or permits related to the development of land or construction of improvements to the land?

- [2] The meaning of the words “formation,” “operation,” and “expansion” within the definition have also been presented to our office for legal analysis. Although a primary purpose for a license or permit “required by law” is to promote public health and safety, did the legislature specifically intend Act 164 to apply to the license or permit because the issuance of the license or permit would have the residual effect of enabling the licensee or permittee to form, operate, or expand a commercial or industrial enterprise.
- [3] The legislature should also further clarify the purpose for enacting Act 164 by identifying the specific interest it was attempting to promote. It may be argued that the legislature was attempting to balance two competing interests, to wit: the interest of the applicant to be protected from deliberate, negligent inaction, or dilatory inaction by an agency, or the interest to protect the public health, safety and welfare. By identifying the specific interest to be addressed, issues related to the application and remedies under Act 164 would be clarified.
- [4] There should also be a clarification as to whether a tie-vote should result in an automatic approval of a license or permit under Act 164. If the legislature intended to protect an applicant from dilatory inaction by an agency, it may be argued that an automatic approval should not result from a good-faith consideration of an application by an agency that resulted in a tie-vote. Moreover, it has been argued that when an applicant has the burden of proof, a tie-vote as a result of the applicant’s failure to garner the necessary majority or two-thirds votes should not result in a determination that the agency has failed to timely grant or deny an application and should, therefore, be automatically approved under Act 164.
- [5] It has been argued that the legislature should authorize an agency to extend the maximum time period under specific circumstances not related to dilatory inaction by an agency, such as the following:
  - a. If a specific state statute, federal law, or court order requires a process (e.g., environmental impact analysis) to occur before an agency can take action on an application and that process makes it impossible to act on the request within the established maximum time period, the time limit may be extended after completion of the last process required in the applicable state statute, federal law, or court order.
  - b. The inaction was the result of excusable neglect, inadvertence, ignorance, or misunderstanding, and not due to dilatory inaction by an agency.
  - c. A moratorium was imposed for the issuance of any license or permit.
  - d. The applicant has made a material or substantial change to the initial application after the agency had determined the application to be complete.
  - e. The applicant has requested an extension of the maximum time period.
  - f. The agency has determined that the due process rights of the applicant or any other party in a contested case hearing would be adversely affected by any time limitations that may arise as a result of the established maximum time period to grant or deny a license or permit.
- [6] In the absence of clear legislative intent or a specific statutory provision, an agency may impose specific conditions related to protecting the public health and safety whenever an application has been automatically approved. It has been argued that the imposition of the specific conditions is contrary to the spirit and intent of Act 164 to the extent that the conditions would authorize further deliberations by an agency after an automatic approval. For example, the Land Use Commission recently adopted

rules that would automatically incorporate conditions to any reclassification permit that would be automatically approved under Act 164.

[7] It has been argued that Act 164 may be interpreted to authorize the maximum time period to begin running after the completion of a contested hearing. Specifically, the maximum time period would be applicable to only the time period an agency would take to deliberate on a decision after the record for decision-making has been closed. The legislature may consider whether such an interpretation is consistent with the spirit and intent of Act 164.

2. Section HRS §91-13.5(e) defines application as: "...any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise..."

The definition should be clarified to make clear that: (1) Act 164 covers applications for the formation, operation, or expansion of a commercial or industrial enterprise; and (2) it does not apply to enterprises such as public utilities, motor carriers, and water carriers that are already authorized to operate in the State of Hawaii, whether by charter, franchise, or commission authority. In other words, it was not the legislative intent that Act 164 be applied to entities that are already formed and/or operating, such as public utilities, motor carriers, or water carriers, unless the entity is seeking permission to expand its existing operating authority. Examples of a current entity seeking to expand its existing operating authority include: (A) a motor carrier currently authorized to operate in the 1-to-7 passenger classification, requesting approval to expand its authority to include the 8-to-5 passenger classification; or (B) a public utility currently authorized to operate within the City and County of Honolulu, requesting approval to expand its authority to include the neighbor islands.

Under Act 164's broad interpretation, virtually all types of applications filed by existing public utilities, motor carriers, and water carriers fall within the purview of Act 164. These include applications seeking: (A) approval of a general rate increase; (B) approval of a capital investment project; (C) approval of property transfers, mergers, acquisitions, issuance of securities, or other financing arrangements; (D) approval for the construction of high-voltage transmission lines; (E) approval of a power purchase agreement, interconnection agreement, or other agreements with utilities; and (F) tariff transmittals.

The impact on the commission's daily operations, therefore, is great. For example, during the calendar year 1999, 414 applications were filed with the commission. For the year 2000, 172 applications were filed by the end of May.

3. Currently, HRS §91-13.5(a) only excludes applications that are "subject to state [administered] permit programs delegated, authorized, or approved under federal law."

This subsection should be expanded to specifically exclude other types of applications that are not subject to Act 164's purview, such as:

- (A) Informational filings by a premises owner who provides shared tenant service, pursuant to chapter 6-76.1, Hawaii Administrative Rules (HAR).
- (B) Registration information filed by an aggregator, pursuant to chapter 6-79, HAR.
- (C) Complaints, both formal and informal, filed with the commission by consumers.
- (D) Investigations opened upon the commission's own motion.
- (E) Applications filed in accordance with or in compliance with commission order.
- (F) Informational dockets or dockets where the commission intends to keep the docket open on a continuous basis.
- (G) Citations issued by the commission or its authorized representative, pursuant to HRS chapters 269, 271, or 271G.

These types of applications do not necessarily involve commission approval. Thus, the triggering of the automatic approval provision under these circumstances would be nonsensical.

4. The commission is responsible for regulating public utilities, motor carriers, and water carriers, consistent with the public interest. See HRS chapters 269, 271, and 271G. In addition, the Division of Consumer Advocacy is mandated by law to represent, protect, and advance the interests of all consumer of utility services. See HRS chapter 269.

For persons seeking authority to operate as public utilities, motor carriers, or water carriers, the commission, by law, must find that the applicant is fit, willing, and able to perform the proposed service, and that the service is required by the public convenience and necessity.

The triggering of the automatic approval provision by an applicant will undermine and detrimentally impact the commission's ability to make these findings, by allowing a person who may not necessarily meet the statutory criteria to nevertheless operate as a public utility, motor carrier, or water carrier. This unintended result is contrary to the public interest and usurps the commission's and Division of Consumer Advocacy's respective statutory mandates.

Likewise, for applications filed by existing utilities or carriers, the commission must find that a need exists or that the request is reasonable and in the public interest. The triggering of the automatic approval provision will detrimentally impact the commission's decision making in these areas.

5. Examples:
  - A. Act 164 should address the situation where an applicant attempts to unreasonably delay the docket or proceeding with the intended purpose of triggering the automatic approval provision by default.
  - B. Act 164 should state when the maximum time period for review will begin to run. For instance, does it begin even when a defective or incomplete application is filed?
  - C. Act 164 should specifically authorize the commission to extend the maximum time period and corresponding effective date of the automatic approval, upon a finding of "good cause" or "exigent circumstances."
  - D. Act 1 64 should specifically authorize the applicant's voluntary waiver or extension of the maximum time period and corresponding effective date of the automatic approval.

Without these changes, the commission's operations will be hampered. While the commission's resources are limited, it thoroughly reviews and analyzes each application. With an automatic approval provision, however, it is unclear if the commission will be able to respond to the situations set forth in paragraphs A - D, above, while also undertaking its thorough review.

6. The implementation of Act 164, SLH 1998 poses several legal and logistical issues/problems for the Land Use Commission and its approval process for boundary amendments and special permits.

First, although §91-13.5 (c), HRS, states that "[a]ll such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved," the term "action" relative to an application is not always clearly defined in the statute. For example, under §205-6, HRS, the Commission is required to take action to approve, approve with modification, or deny a special permit within 45 days after receiving the complete record from the county planning commission. However, it is unclear whether Act 164, SLH 1998, contemplates action in this context to mean a vote on the application, or the issuance of findings of fact, conclusions of law, and decision and order.

Second, Act 164, SLH 1998, fails to address a situation in which an automatic approval is granted based on a lack of quorum. For example, when a boundary amendment fails to obtain the required six affirmative votes, the Commission would be required to issue findings of fact, conclusions of law, and decision and order denying the amendment. Should the timeframe for action lapse before there could be a quorum to adopt the findings of fact, conclusions of law, and decision and order, the amendment would be automatically approved despite findings of fact to the contrary.

An amendment reflecting that a vote by a decision-making body shall constitute an action on an application or for adoption of findings of fact, conclusions of law, and decision and order for the purposes of §91-13.5, HRS, could address the current deficiencies of Act 164, SLH 1998, noted above.

Third, the implementation of Act 164, SLH 1998, places an undue burden upon the Commission by undermining the legislative intent and purpose of the Commission's decision-making criteria and responsibilities relating to the protection and maintenance of environmental, agricultural, cultural, historical, natural, and other resources of State interest, as provided in the State Constitution and in §§205-16 and 205-17, HRS.

Unlike other decision-making bodies, the Commission proceedings are quasi-judicial in nature in which the State and applicable county are mandatory parties. As such, all of its boundary amendment proceedings are contested cases, often involving complex land use issues and intervention by persons with direct interests that are clearly distinguishable from those of the general public. Act 164, SLH 1998, could potentially impact the ability of the Commission to allow all parties adequate due process to present their cases before rendering a decision on a petition based on review and consideration of all of the relevant facts. Intervenors who are not accorded their due process could then challenge an automatic approval in the circuit court.

Pursuant to Act 164, SLH 1998, the Commission has adopted amendments to its administrative rules, which address mitigation of potential impacts upon areas of State concern in situations where an approval is automatically granted. The amendments provide for the imposition of mandatory conditions in the event the Commission, for any reason, does not act within its statutorily prescribed timeframes for regular petitions, housing petitions, and special permits by issuing findings of fact, conclusions of law, and decision and order. The amendments became effective on May 8, 2000.

These amendments, however, do not ensure that due process will be accorded to all parties in a proceeding within the processing timeframe allowed. Short of repealing the automatic approval statute, it is unclear how it could be amended to safeguard the parties' right to due process, and allow for a complete and thorough examination of all issues before a decision is made.

7. (I.e., [HRS §] 436B-9(a) (general time limit on applications for professional or vocational licensing areas); [HRS §] 444-16 (contractor license applications); [HRS §] 484-8(a) (subdivision registration); [HAR §] 16-106-4(f) (timeshare registration); [HAR §] 16-133-16 (cable franchise transfers and new applications); [HAR §] 16-133-31 (cable franchise renewals)). Act 164 did not apply to certain DCCA divisions and offices because no business permits or licenses are issued.
8. Division of Consumer Advocacy (DCA): Although the Division of Consumer Advocacy is not directly affected by the automatic permit approval law—the Public Utilities Commission (PUC) issues the approvals—the agency is responsible for reviewing the applications filed with the PUC in order to make recommendation as to the reasonableness of the request and whether or not the request should be granted by the PUC. Thus, the automatic approval law indirectly affects the Division in that the Division's analysis must be completed in the time period allotted for the approval process. If the time period allotted for the review under the automatic review process is insufficient to complete the analysis required to reach a reasoned decision as to the merits of the request made by applicant [, or if] approval is granted under the existing automatic approval law because the review and analysis could not be completed, the Division would not be able to carry out its statutory mandate in protecting ratepayers interests. Furthermore, the analysis that must

be conducted requires an in-depth review and does not always address the same issues. Thus, the analysis requires time which is not always predictable.

Division of Financial Institutions (DFI): There are a number of problems created by the automatic permit approval law regarding financial institutions and escrow depositories. Generally, chartering a financial institution, such as a bank, is a complex, time-consuming and lengthy process that involves both the state and federal banking regulators. Further, as the financial services industry has become more and more complex and sophisticated, the applications submitted have reflected this sophisticated approach that often involves complicated issues, many of which frequently cannot be resolved easily or without legal advice from the Department of the Attorney General ("AG").

This mandated coordination with and/or [without the] cooperation of third parties often lengthens the time it takes to process applications. Flexibility is needed for the proper coordination with the federal regulatory agencies, such as the Federal Deposit Insurance Corporation which, by state law, must approve insurance coverage of deposits before a depository financial institution can be chartered by the State of Hawaii. Any issue raised by an application which requires resolution through another state agency, such as the AG, adds to the time required resolution through another state agency, such as the AG, adds to the time required to process the application. Automatic approval deadlines do not provide the flexibility necessary to deal with such situations and circumstances that cannot initially be foreseen and are beyond DFI's control.

Applications may also require additional time to process because complete information is not always provided by the applicant. In DFI's experience, the thoroughness of preparation of many of these complex applications varies dramatically from one institution to another. An application from one institution may require considerably more time to process than the same application prepared by a more thorough, diligent applicant. Such "less fully prepared" applications may need clarification of arguments and additional information in order to proceed with the analysis of the application and the applicant may not be able to provide the required information promptly, lengthening the processing time.

In order to provide the requisite consumer, depositor and other public interest protection as envisioned by the underlying policy of law, a denial of some applications before the automatic deadline could be necessary and would be costly and arduous for the applicant because it would then be required to begin the application anew or go through an administrative hearing process on any denial.

Lastly, due to limited resources and budget cuts, DFI has not had sufficient experienced staff to deal with the number of applications received. Although, additional funding has been budgeted for the next fiscal year, new staff will need training and the processing of applications will continue to take time.

DFI acknowledges that there is a balance to be maintained in discharging its public interest responsibilities and accommodating the financial services community that it regulates and DFI attempts to process the majority of applications in a prompt and orderly fashion. However, given the above experience, there will arise situations where a perceived conflict between these goals arises, and DFI must proceed on the cautious side of protecting the public, depositor, and consumer interest. DFI is in the process of amending its rules to allow a maximum one-year time period to approve or deny an application. We are hopeful that this time period will be sufficient for DFI to discharge its regulatory responsibilities adequately in order to assure the safety and soundness of the financial institutions and escrow depositories that it supervises, while accommodating industry concerns.

9. In the past three years, the DHHL has only processed a single application made by a homesteader for a business related venture on Hawaiian home lands. In that case, the business application was approved by the Hawaiian Homes Commission within 90 days. The infrequency of processing these types of business applications however, has left DHHL without an adequate assessment of time frames needed for [the] processing and handling of "applications" for business related approvals which are much more complex. In addition, the infrequency with which DHHL handles these types of approvals has limited our review of areas of operational inefficiency which would be improved by promulgating automatic approval rules.

While we understand that the law mandates that all administrative agencies promulgate administrative rules, the DHHL has additional individualized concerns about needless claims of breach of trust arising from the Commission or the DHHL's careful deliberation. If either should fail to act on a business related permit or commercial ventures within an arbitrarily conceived time frame, that application becomes "automatically" approved. DHHL will be subjected to individualized claims of breach of trust under Hawaii Revised Statutes Chapter 673. In addition, DHHL could be subjected to unnecessary lawsuits for damage to the Hawaiian Home Lands trust under trust law.

10. Those have already been identified in House Resolution 128 H.D. 1 and do not need to be reiterated. DHHL's approval of business related ventures is always conditioned upon satisfactory completion of various state and county approvals which must be obtained for any business enterprise. DHHL has concerns where approval for permits by the state, city or county were given automatically without concern for its merits.

DHHL has the following suggestions for automatic approvals:

- [1] Limit automatic approvals to those acts of agencies of the State or County which are ministerial in nature.
  - [2] Provide an interim time period for automatic approvals to be rescinded or revoked without having to conduct a chapter 91 contested case hearing.
  - [3] Exempt certain agencies from the application of this law, especially those agencies affected by the interest of native Hawaiian rights.
11. Some programs (Hazardous Waste) were in the process of applying for federal delegation when this law [was] enacted. They could not receive delegation if their Rules were Act 164 compliant. At the same time, they were subject to the Act since they had not yet received delegated status. In order to address this, a sunset provision was inserted into the Rules which provided that the automatic approval provision would sunset upon the receipt of delegated status.
  12. In our recent public hearing regarding the Wastewater and Underground Injection Control permits, it was pointed out that there [was] no provision for extending the time period in the event of a contested case proceeding. It was further indicated that it was not clear as to what, if any, conditions would apply to a permit which was automatically approved. In the absence of any legislative amendments which might remedy these situations, we will attempt to address them in our Rules.
  13. The Boiler/Elevator Branch is understaffed, there are currently only three boiler inspectors and six elevator inspectors (of these six inspectors-one will be leaving the division on 7/21/00, one is a trainee that still needs to pass a national test to qualify as an inspector and two are planning to retire in the near future), these positions have been in the past very hard to fill. Their amendment to the standards to satisfy Act 164 for permits gives the division 30 days to process the permit for new, renovated, or replacement boiler/elevators. With this added staff shortage they will not [be] able to devote the time needed for the review of the application (which includes the plans for the installation) for the new, renovated, or replacement boilers and elevators. The result of which could be catastrophic if the [installation] of the equipment is not done properly. Should consider exempting activities that deal with safety and health from Act 164.
  14. We (Land Division) have been asked to respond for the department as ... only our division is affected by this law.
  15. (1) [HAR chapter] 13-122, Shoreline Certifications – we have drafted rule amendments to incorporate the automatic approval provisions. This draft will be sent to the Department of the Attorney General shortly for their review. Following this review, the rule amendments will be submitted to the Board of Land and Natural Resources for their approval to submit for preliminary review and to conduct public hearings.



- (2) [HAR chapters] 13-183, Rules on Leasing and Drilling of Geothermal Resources and 13-184, Designation and Regulation of Geothermal Resource Subzones – permits under these two chapters already specify time frames within which the application must be acted upon.
  - (3) [HAR chapter] 13-190, Dams and Reservoirs – we have drafted revisions to establish timeframes to act on permit applications (none previously specified). However, these revisions have not yet undergone legal/public review.
16. One problem is the interaction of the automatic approval law and our Board's voting requirements. The following is an excerpt from the Department's testimony on SB 2204 to the Senate Committees on Commerce, Consumer Protection and Information Technology and on Health and Environment at their February 17, 1998 hearing:

The Department has had experience with an imposed timeframe for processing permits and would like to share the following information from this experience.

The Department is statutorily mandated to process Conservation District Use Applications (CDUA's) within 180 days. The current rules require certain kinds of applications to be approved by the Land Board while others may be considered by the Chairman alone. A Circuit Court has interpreted the time limitation and the Land Board voting requirements to mean that unless four of six Board members vote against a CDUA within the time limit, the CDUA is automatically approved. As a result, applicants have been able to proceed with their projects in situations where the Board voted 3-1 or 3-2 to deny the application. An issue has arisen whether any reasonable conditions, including the agency's general conditions, would then apply to the particular project. Therefore, if such timeframe mandates are imposed and voting by a board is required, the voting requirements should be examined carefully.

Also, the Department is responsible for administrations of geothermal resource subzones pursuant to chapter 205, HRS and chapter 13-184, HAR. For designation of geothermal resource subzones, the rules already contain a maximum 180-day limit to process applications and automatic approval otherwise. With regard to undesignating geothermal resource subzones, the Department of the Attorney General has opined that we are required to conduct contested case hearings on applications to withdraw a subzone designation. The Department has testified that contested case proceedings should not be subject to mandatory timelines due to its fact-specific nature.

For geothermal permits, the abolishment of the Mineral Resources program and limited staff resources (assigned part-time from other programs), permit applications may not be reviewed as comprehensively as they should be. Automatic approval may jeopardize public safety or not be in the public's best interests. Likewise, for dam safety permits, public safety may be seriously compromised if adequate review time is not allowed.

Another potential problem may be the forced denial of applications due to the automatic approval. As an example, our Division deems shoreline certification applications complete. (i.e., correct number of copies, shoreline clearly marked, photos attached, etc.) and transmits them to DAGS Survey Division for review. Using their expertise in surveying, DAGS determines the location of the shoreline. This determination often times requires DAGS staff to go back and forth with the private surveyor who conducted the shoreline survey. At times, the private surveyor does not respond promptly. Where an automatic approval timeline is imposed on such reviews, it is likely that such applications will be returned for denial, thus requiring the applicant to resubmit their application. This method may be viewed as bureaucratic and frustrating from the client's point-of-view.

Finally, in cases where the automatic approval is granted, ironically, it is not the non-responsive agency that is penalized, but rather the people and/or resources that the laws and rules were put in place to protect.

17. [See Appendix G.]
18. Our department is currently in the process of adopting rules relating to Act 164, by adding a new subchapter 5, entitled, "Application for a Business or Development-related Permit, License or Approval.
19. We do note that the City and County of Honolulu, like the Neighbor Island counties, does have a Planning Commission which, though largely advisory and without permit-issuing power, is authorized by State law (HRS §205-6) to issue special permits within Land Use Commission-designated agricultural districts (Honolulu has no rural districts). The Planning Commission's rules contain time limits which the Commission ordinarily has not difficulty meeting. We are informed that there have been very few special permit applications since Act 164 became law (perhaps as few as one), and that "automatic approval" concerns did not arise. However, we have been furnished with a copy of Maui County's well-written letter to the Attorney General concerning the arguable conflict between Act 164 and the provisions of HRS Section 205-6 which require a majority vote of the county planning commission to act upon a special permit application. We agree with Maui County that the issue is an interesting and important one as to which the Land Use Commission and the counties should certainly be consistent. [See Appendix P.]
20. Section 281-59, HRS, requires the Liquor Commission to give its decision granting or refusing a liquor license application within fifteen (15) days of the public hearing pertaining to such application, or any adjournment thereof, subject to the Commission's discretion to continue the matter for good cause. Rule 59-2, Rules of the Liquor Commission ("Rules"), provides that a request for consideration of the Commission's decision must be filed within fifteen (15) days of the applicant's notice of the decision, or the date of the hearing where no majority vote was taken.  
  
Rules 32.3-1 ("One-Day Special Licenses") and 32.5-1 ("Trade Shows and Exhibitions") permit the issuance of special licenses by the Administrator upon receipt, in accordance with the implied time limitations contained in Sections 281-32.3 and -32.5, HRS, respectively.
21. Application of the automatic permit approval law could circumvent the public protest provisions provided by Sections 281-58 and -59, HRS.  
  
County entities are sensitive to implementation costs of legislative enactments and are concerned that unfunded legislative mandates may violate the State Constitution Article VIII, Sec. 5.
22. [The City and County of Honolulu Department of the Corporation Counsel has opined that Act 164 does not apply to the processing of "park use permits" issued by the Department of Parks and Recreation, in that these are not permits "required by law prior to the formation, operation, or expansion of a commercial or industrial enterprise" as required by that Act. See Appendix M.]
23. Although the new Section 1-113 has been in effect only since January 1, 2000, we have not experienced any legal or logistical problems in the implementation or application of the new law. The law allows our staff sufficient time for most projects. There are also provisions for extension of the review time if additional information is requested from the applicant or if there is an emergency or union strike. Other projects may be deemed inapplicable to the maximum time limit due to special coordination requirements with other departments or have complex issues.
24. An automatically approved special permit is granted due to passage of time rather than a majority vote. Also, the automatic approval law did not provide for any extensions except for those mentioned in the law. Many of the large landowners indicated that they would prefer receiving an extension to work out problems or issues rather than have an automatically approved permit which may be challenged and cause delay to a particular project. Further, it was unclear whether the automatic approval law allowed for mandatory conditions to be attached to an automatically approved permit.

25. I hope the permit applicant will not take the strategy of complicating the permit application to build delays and obtain the approval in a form that is in their best interest and not [that of] the general [public]. I hope that the legislation passed has addressed this issue. Logistically, some departments and agencies involved in the permit process may not be equipped or appropriately staffed to process permits in as expeditious a manner as required by the legislation.
26. Instead, inspectors check whether there are commercial plans to review at the Building Division at least twice each week. The plans we review are normally processed within a day after we receive them.... "In Today, Out Today Policy!" If the plans are large (big project) OR if we have other priority duties to attend to, plans may take five or more working days to process.

Plans that have omissions or require correction are "pulled from the Building Permit Tracking System Timeline" (following notification of our Building Division) until revised sheets can be inserted into the primary plans set OR a completely revised plan set is submitted. This process can take two weeks or longer, but this would affect less than 1% of all the plans we review.

Over-the-counter plan reviews are generally taken care of on the spot provided an inspector is present to review such plans, however less than 10% of these plans take longer than two days to review/approve.

27. The problem that the law addressed and was to alleviate does not exist with the Kauai County Fire Prevention Bureau. Our "In Today, Out Today" policy works for the greater majority of the time, with limited instances where plans are kept longer than two days as stated in the paragraphs above. We have busy periods during the course of the year, some scheduled, others not. Fire investigations is our primary priority, with everything else being secondary. Implementation of this law may actually relax our internal policy so that we become in line (consistent) with the other counties.

I don't believe that each county should adopt different administrative rules from another. A single set of rules should apply to all counties to maintain consistency statewide.

28. The Planning Commission adopted rules to allow the processing of Special Permits, pursuant to HRS Sec. 205.6. Special Permits are required for uses and structures in the Agriculture State Land Use District, that are not specifically allowed in HRS Ch. 205. Per Ch. 205, the Land Use Commission is vested with the authority to issue Special Permits. However, the authority for issuing Special Permits that occur on areas of land less than 15 acres in size was delegated to the counties. In the case of the County of Kauai, the Planning Commission is the authority for issuing Special Permits.
29. Act 164 requires that permit applications be automatically approved if no action is taken within a specified time period. HRS Sec. [205-6] states that a decision in favor of the applicant requires a majority of the total commission. There is no specific statement that allows the provisions in Act 164 to take precedence over other sections in the HRS. In the case of special permits, conflicts could be anticipated in cases where:
- (1) A full commission is not present and a majority of the total commission did not vote in favor of the application; and
  - (2) When there is no quorum to hold a meeting.
30. The conflict described above is compounded by the provision in Act 164 that extensions of timeline would only be allowed in cases of extreme emergency.
31. Special Permits issued by the Planning Commission are discretionary permits, meaning that the application can be either approved or denied. A public hearing before the Planning Commission is required. The public hearing process should not be arbitrarily constrained by a time limit.

Strict application of time limits may not allow a full review of a permit application. The Planning Commission sometimes needs time to identify and resolve the issues in a special permit. An issue may be raised at the public hearing that could require months of research to clarify. At that point, pressed against the time limit, the Commission may be forced to deny an application based on inadequate documentation or the applicant may be forced to withdraw and start over when the research has been completed. This puts the Planning Commission in an awkward position and may be detrimental to the applicant. A vast majority of applicants for special permits are small businesses.

Perhaps timelines can and should be applied to ministerial permits, where conforming to regulatory procedures and standards are the only requirements. In the case of discretionary permits in general and special permits in particular, Act 164 works against its stated goal of improving the overall regulatory climate.

32. The Department has created its own forms which require applicant to provide certain information. For example, certification that applicant is not under treatment for mental illness. The Department cannot predict the time it will take for all documents to be received because the responsibility lies with the applicant. Therefore, it is impossible to predict how long the process will take.
33. For all applications for new liquor licenses and transfer of dispenser and cabaret licenses, the Commission may not hold a public hearing on the application sooner than forty-five days after the first public notification in a newspaper of general circulation and notice to those within a specified distance from the proposed premises. That time frame, coupled with the fact that the Kauai County Liquor Commission meets on the first and third Thursdays of the month, generally means that the minimum time within which the Commission can take action on an application is sixty days. Additionally, Section 281-59 requires that the Commission render a decision on an application within fifteen days of the close of the public hearing on that application. In the past five years, there has been only one instance that the Commission was not able to take action within the sixty-day time period. In that case, the application was met with strong opposition from the residents who had standing to file objections to the application. The residents filed for and were granted a contested case hearing regarding the application. That action added an additional thirty days to the process.

Regarding the various permits issued by the Commission:

Within the past five years, the Commission has not taken longer than twenty-one days to act on a request for a permit. Twenty-one days is the minimum time the Commission needs to act on a permit request.

Regarding the Kauai Liquor Control Commission, it does not appear that a rule is necessary to compel the Commission to take timely action.

34. [Note: The Maui Corporation Counsel has also requested a legal opinion from the Attorney General as to the application of the automatic approval law to special permit applications under section 205-6, Hawaii Revised Statutes; see Appendix P.]

## Appendix R

### Proposed Bill Based on the Bureau's Recommendations

**Report Title:**

Regulatory Processes; Automatic Approval

**Description:**

Amends the automatic approval law by amending the definition of "application for a business or development-related permit, license, or approval" and extending the deadline for agency rulemaking. Failure to adopt rules by the new deadline will result in a one-year statutory maximum time period.

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# A BILL FOR AN ACT

RELATING TO REGULATORY PROCESSES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Chapter 91, Hawaii Revised Statutes, is amended  
2 by adding a new section to be appropriately designated and to  
3 read as follows:

4           "§91-     Rulemaking to implement section 91-13.5. (a)  
5 Agencies that are subject to section 91-13.5 shall adopt rules  
6 to implement that section by December 31, 2003.

7           (b) The failure of an agency to comply with subsection (a)  
8 shall result in a maximum time period of three hundred and sixty  
9 five calendar days for each such agency for the purposes of  
10 section 91-13.5; provided that this maximum time period shall  
11 begin after:

12           (1) An agency has determined an application for a business  
13           or development-related permit, license, or approval to  
14           be complete; and

15           (2) Acceptance of a final environmental impact statement  
16           or a finding of no significant impact pursuant to

NO.

1 chapter 343, as applicable, or a finding by the agency  
 2 that the application is exempt from chapter 343.

3 (c) Agencies that are subject to the maximum time period  
 4 under subsection (b) may continue to adopt rules to implement  
 5 section 91-13.5 after the maximum time period under subsection  
 6 (b) becomes applicable; provided that the agency may not change  
 7 this maximum time period by rule."

8 SECTION 2. Section 91-13.5, Hawaii Revised Statutes, is  
 9 amended by amending subsection (e) to read as follows:

10 "(e) For the purposes of this section, [~~application for a~~  
 11 ~~business]~~ "business or development-related permit, license, or  
 12 approval" means any state or county application, petition,  
 13 permit, license, certificate, or any other form of a request for  
 14 approval required by [~~law to be obtained prior to the formation,~~  
 15 ~~operation, or expansion of a commercial or industrial~~  
 16 ~~enterprise, or for any permit, license, certificate, or any form~~  
 17 ~~of approval required under]~~ sections 46-4, 46-4.2, 46-4.5, 46-5,  
 18 and chapters 54, 149A, 150, 159, 161, 181, 183, 183B, 183C,  
 19 183D, 186D, 187A, 188, 189, 190D, 196D, 200, 205, 205A, 206E,  
 20 261, 261C, 262, 266, 269, 271, 271G, 273, 281, 286, 289, 321,  
 21 340A, 340B, 340E, 340F, 342B, 342C, 342D, 342E, 342F, 342G,  
 22 342H, 342I, 342J, 342L, [and] 342P[.], 346, 396, 397, 412, 415,  
 23 415A, 415B, 419, 420, 421, 421C, 421H, 421I, 421J, 423, 424,

NO.

1 425, 425D, 428, 429, 431, 431K, 432, 432C, 432D, 435E, 436E,  
2 436M, 437, 437B, 437D, 438, 439, 440, 440G, 441, 442, 443B, 444,  
3 445, 446, 446E, 447, 448, 448D, 448E, 448F, 448H, 449, 451A,  
4 451D, 451J, 452, 453, 454, 455, 456, 457, 457A, 457B, 457G, 458,  
5 459, 460, 460J, 461, 461J, 462A, 463, 463E, 464, 465, 466, 466J,  
6 466K, 467, 467B, 467E, 468E, 468L, 468M, 469, and 471."

7 SECTION 3. Act 164, Session Laws of Hawaii 1998, is  
8 amended by deleting section 4:

9 [~~SECTION 4. All agencies shall adopt rules as required by~~  
10 ~~section 3 of this Act on the first occasion that the agency's~~  
11 ~~rules are amended upon approval of this Act or by December 31,~~  
12 ~~1999, whichever is earlier."]~~

13 SECTION 4. Agencies that administer state permit programs  
14 delegated, authorized, or approved under federal law shall:

15 (1) Review the statutory references specified in section  
16 91-13.5(e), Hawaii Revised Statutes, to determine the  
17 specific programs in those chapters to which section  
18 91-13.5 applies;

19 (2) Make findings and recommendations as to whether all or  
20 portions of the affected chapters consist of "state  
21 administered permit programs delegated, authorized, or  
22 approved under federal law", as provided under section  
23 91-13.5(a); and



NO.

1 (3) Report findings and recommendations to the legislature  
2 no later than twenty days before the convening of the  
3 regular session of 2002.

4 SECTION 5. The attorney general shall:

5 (1) Develop and propose model rules for state and county  
6 agencies to implement section 91-13.5, Hawaii Revised  
7 Statutes;

8 (2) Make the model rules available to all state and county  
9 agencies, either by mail to each agency or on the  
10 attorney general's Internet website; and

11 (3) Assist agencies in finding solutions to problems  
12 involved in implementing section 91-13.5.

13 SECTION 6. Statutory material to be repealed is bracketed  
14 and stricken. New statutory material is underscored.

15 SECTION 7. This Act shall take effect upon its approval.

16

INTRODUCED BY: \_\_\_\_\_