

STATE OF HAWAII

DEPARTMENT OF HAWAIIAN HOME LANDS

October 16, 2017

TO: Chairman and Members, Hawaiian Homes Commission

FROM: Hokulei Lindsey, Administrative Rules Officer
Office of the Chairman

SUBJECT: Approval of Recommended Changes to the Draft
Administrative Rules for the Planning System and to
Proceed with Rulemaking Under Chapter 91, Hawaii
Revised Statutes



RECOMMENDED MOTION/ACTION

That the Hawaiian Homes Commission approve the recommended changes to the draft administrative rules for the Planning System and to proceed with rulemaking under chapter 91, Hawaii Revised Statutes.

DISCUSSION:

In accordance with the Administrative Rules Development, Review, and Amendment Process adopted by the Hawaiian Homes Commission in July 2015, the Department of Hawaiian Home Lands conducts Beneficiary Consultation before initiating rulemaking under Ch.91, HRS.

The HHC approved the DHHL's request to proceed with beneficiary consultation regarding proposed amendments to Title 10, Hawaii Administrative Rules at its April 2017 meeting. The DHHL conducted beneficiary consultation meetings statewide from June 2017 to August 2017 and later presented the beneficiary consultation report to the HHC.

Based on comments received through the beneficiary consultation process and subsequent evaluation to determine the feasibility of incorporating beneficiary comments, the DHHL recommends the changes identified by the analysis of comments in the Beneficiary Consultation Report and a few additional changes that were identified by staff while reviewing and evaluating the proposal.

Recommended Changes to Draft Planning System Rules

Immediately below is a list of the recommended changes; the analysis chart from the Beneficiary Consultation Report is reproduced at the end of the list of recommendations. Attached as Exhibit A is the draft Planning System rules inclusive of all the recommended changes.

- a. **10-4-52 Definitions:** definition of "beneficiary consultation" add "direct" so that it reads, "the department's *direct* outreach . . ." and delete "and other interested persons."
- b. **10-4-52 Definitions:** definition of "implementing action" add "legislation" to the implementing actions that are included in the definition.
- c. **10-4-54(b) (2) Adoption and amendment procedures:** separate Tier 2 and Tier 3 plans into different subsections and renumber subsections accordingly. Shorten the comprehensive update timeframe for Tier 3 plans from eight years to four years; renumber as 10-4-54(b) (3).
- d. **10-4-54(c) Adoption and amendment procedures:** change "any plan" with "tier 1 and tier 2 plans" so that the section reads: "Between comprehensive updates, *tier 1 and tier 2 plans* may be amended upon beneficiary consultation . . ."
- e. **10-4-54(c) (2) Adoption and amendment procedures:** delete the content in its entirety; renumber subsections accordingly
- f. **10-4-54(c) (3) Adoption and amendment procedures:** delete "member of the public" as a party that can initiate an interim amendment; replace "any plan" with "tier 1 and tier 2 plans" for consistency with 10-4-54(c); renumber as 10-4-54(c) (2).
- g. **10-4-55(2) General Plan (tier 1):** delete provision for consistency with changes made to 10-4-54(c) (2); renumber subsections accordingly.
- h. **10-4-56(a) (5) Island and program plans (tier 2):** replace current draft language with, "Analyze state and county plans to identify potential impact on department land use and infrastructure."
- i. **10-4-56(b) Island and program plans (tier 2):** include "affordable housing, energy, disaster preparedness,

community resiliency, agriculture" as functional areas for program plans.

- j. **10-4-57(b) Development, regional, and special area plans (tier 3):** change "The chairman may initiate a regional plan by proposing the scope of the plan to the commission, which requires a majority vote of the commission to proceed with the preparation of the plan" to "The chairman may prepare a regional plan with the support of a majority vote of the commission."
- k. **10-4-57(c) Development, regional, and special area plans (tier 3):** change "the chairman may initiate a special area plan by proposing, in writing, the scope of the plan to the commission, which require a majority vote of the commission to proceed with the preparation of the plan" to "the chairman may prepare a special area plan with the support of a majority vote of the commission."
- l. **10-4-58(a) Implementation:** add "legislation" to the list of implementing actions for consistency with the definition in 10-4-52.

Change the last sentence in subsection (a) from, "At a minimum, the overall strategy shall: link budgets to policies, programs, and plans; establish homestead and revenue-generation development priorities; establish disposition strategies for unencumbered lands; and prioritize regional plan projects" to "The overall strategy should: link budgets to policies, programs, and plans; establish homestead and revenue-generation development priorities; identify disposition strategies for unencumbered lands; and identify high priority regional plan projects that are likely to be implemented within the timeframe covered by the strategy."

- m. **10-4-58(b) Implementation:** delete "reasonably" so that the second sentence reads: "The funded projects shall be consistent with the plans and overall strategy." Delete the third sentence.

Beneficiary Consultation Report analysis chart of Planning System:

Question	Draft Provision(s)	Beneficiary Comments	Response
<p>What kind of information should each plan include?</p>	<ul style="list-style-type: none"> 10-4-55 thru 10-4-57 provide the baseline of information that is to be included in each type of plan. 	<ul style="list-style-type: none"> There was a wide range of comments. The majority can be grouped in to themes: (1) <i>"holistic planning"</i> comments were about planning by ahupuaa not just DHHL lands, looking at state and county plans that impact DHHL plans or lands, generational planning for the future, and womb to tomb concepts of communities that have everything residents need for a lifetime lived; (2) <i>"quality of life"</i> comments were about considering housing costs, affordability and renewable energy to lower costs, traffic impacts, as well as looking at environmental conditions like sea level rise that can impact a community's life; (3) <i>"accountability"</i> comments suggested including timelines, evaluation of past plans, and updates that include status reports. There were also specific suggestions that 	<ul style="list-style-type: none"> This question initially caused some frustration for beneficiaries as they tried to think of technical land use and development considerations, and ultimately expressed an unsureness of how to respond. Because of this, staff modified the approach by providing more information about what kind of information is already included in a plan and turned the group away from technical aspects to focus on what <i>they</i> would like to see in a plan. This modified approach generated more meaningful conversation. Staff believes many of the concepts beneficiaries talked about are present in draft sections 10-4-55, 10-4-56, 10-4-57, 10-4-58, and 10-4-59. These sections cover information included in the plans, implementation, and evaluation. Based on comments received, staff recommends the

		<p>surfaced consistently: (1) identify lands that may be exchanged for other lands; and (2) link planning and budget.</p>	<p>following changes: (1) replace the current draft language of 10-4-56(a)(5) with, "Analyze state and county plans to identify potential impact on department land use and infrastructure"; and (2) include "affordable housing, energy, disaster preparedness, community resiliency, agriculture" as functional areas for program plans in 10-4-56(b). Staff believes the recommended changes more directly capture the suggestions from consultation than the original language.</p>
<p>Should interim changes be allowed? Who should initiate them? Under what circumstances should they be considered?</p>	<ul style="list-style-type: none"> • 10-4-54(c) allows for interim amendments upon beneficiary consultation. Interim amendments can be initiated (1) by the chairman, (2) concurrently with the adoption of a tier 2 plan, or (3) by a beneficiary or member of the public. • 10-4-54(b) provides the timeframes for comprehensive amendments: Tier 1 = 20 years; Tier 2 and 3 = 8 years. 	<ul style="list-style-type: none"> • Comments were supportive of interim changes to the plans. • A majority of comments wanted to limit the ability to initiate interim changes to the (1) chairman with the support of the commission; and (2) beneficiaries. Only a few comments wanted to include the public. When asked about "who" is included in the term "beneficiary" most responses included 	<ul style="list-style-type: none"> • Based on beneficiary comments, staff recommends "member of the public" be deleted from the draft provision. That those who have the greatest interest in the Hawaiian home lands trust should have greater input and greater influence in planning for the use of the trust's lands and resources is a point

		<p>lessees and applicants.</p>	<p>that resonated throughout the consultation process and across homestead communities statewide.</p>
		<ul style="list-style-type: none"> • There was broad consensus of the value of interim changes given changing environmental conditions, technologies, and emerging opportunities. This was tempered by the sentiment that beneficiary consultation be part of the process for adopting an interim change; many would focus the consultation to those beneficiaries who would be most impacted by the potential change. 	<ul style="list-style-type: none"> • Staff recommends not to include specific circumstances that would justify consideration of an interim amendment. Instead, the comments should be used to inform or guide implementation policies. Beneficiary consultation is included in the process for adopting interim amendments.
		<ul style="list-style-type: none"> • One commenter suggested a specific language change to 10-4-54(c)(2), which allows an interim change concurrently with adoption of a Tier 2 plan. The suggestion was that the concurrent change be allowed only if it was supported by comments from beneficiary consultation conducted with the Tier 2 plan. 	<ul style="list-style-type: none"> • Upon consideration, staff recommends deleting that specific provision because it could allow a Tier 2 plan to dictate the General Plan. Although the specific suggestion from beneficiary comments is not being recommended for adoption, consideration of the comment resulted in the staff recommendation to delete the provision,

			<p>which staff believes also addresses the underlying concern expressed by the suggestion.</p>
		<ul style="list-style-type: none"> • A lot of discussion surfaced about the timeframes for updates. Many thought the timeframes proposed were too long and should be shorter to allow increased flexibility and perhaps reduce the need for interim changes. 	<ul style="list-style-type: none"> • Staff recommends timeframes be adjusted in response to comments. (1) Tier 1 plans should remain at 20-year updates but the phrase locking the plan in place for the last three years of the 20-year period should be deleted; and (2) Tier 2 and Tier 3 plans be separated into different subsections. Tier 2 plans should maintain the 8-year timeframe because it would allow a two-term chairman the opportunity to work with a complete Tier 2 plan. Tier 3 should be shortened to 4 years, which would allow a chairman the opportunity to work with development plans and regional plans. The shorter timeframe also creates a more rigorous period within which to implement and evaluate Tier 3 plans, which could be beneficial for accountability and transparency of progress made.

<p>Who can request the commission to review a proposed or past action by the department for consistency with a plan?</p>	<ul style="list-style-type: none"> • 10-4-54(d)(2) is a “watchdog” provision whereby a commission member, beneficiary, or interested member of the public may request review of a proposed or past action for consistency with the applicable plan(s). 	<ul style="list-style-type: none"> • Feedback generally was wide ranging. The consistent responses were “beneficiary” and “commission member” should be able to request review. There was great diversity regarding “interested member of the public:” some thought the public should not be included; some thought, as a watchdog provision, more people watching is better; while still others thought general public should be categorized into interest groups such as “successors,” “lessee household,” “elected officials who represent a large number of native Hawaiians.” 	<ul style="list-style-type: none"> • Staff recommends the provision remain as drafted, listing the following parties as those who may request review of past or proposed action: “commission member, beneficiary, or interested member of the public.” This approach captures the diversity of comments and preserves the integrity of trust interests because “member of the public” is modified by “interested.” The use of “interested” is intended to include many of those non-beneficiary parties identified in the comments: successors, members of a lessee’s household, an elected official who represents a large homestead or beneficiary population, as well as a general lease holder, licensee, or those non-beneficiaries with an actual property or contractual interest in the implementation of the applicable plan(s).
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<p>Other comments & suggestions</p>	<ul style="list-style-type: none"> • 10-4-52 definition of “beneficiary consultation” 	<ul style="list-style-type: none"> • One written comment suggested deleting “and other interested persons” from the definition of “beneficiary consultation.” 	<ul style="list-style-type: none"> • Staff recommends adopting the suggestion. The suggestion is consistent with how beneficiaries understand the concept; as being an exclusive forum for the department to consult with beneficiaries of the trust. It is also consistent with the sentiment expressed in relation to the question of who should be able to request an interim change. “Beneficiaries” are those most impacted and as such should have the greatest input and the space to provide that input.
	<ul style="list-style-type: none"> • 10-4-52 definition of “implementing action” 	<ul style="list-style-type: none"> • One written comment suggested adding “legislation” to the definition of “implementing action.” 	<ul style="list-style-type: none"> • Staff recommends adopting the suggestion. The addition creates a definition that is inclusive of the major implementing actions, though more minor actions may also exist. Relatedly, staff recommends adding “legislation” to 10-4-58 Implementation for consistency.

RECOMMENDATION:

Staff requests approval of the motion as proposed.

§10-4-2 [General Plan.] Consistency with Plans.

The department shall ~~[develop and maintain a general plan providing]~~ be guided by the plans, policies, and strategies developed pursuant to subchapter 4 of this chapter for the development and use of land needed for the purposes of the act. [The general plan shall be based upon sociological, financial and economic considerations, among others. A public hearing shall be held before a general plan is adopted or amended.]
[Eff 7/30/81; am and comp 10/26/98; am and comp] (Auth: HHC Act §222) (Imp: HHC Act, all)

SUBCHAPTER 4

PLANNING SYSTEM

§10-4-51 Purpose. The purpose of the planning system is to further the objectives of the act by systematically coordinating the management of Hawaiian home lands and programs in a manner that is comprehensive, consistent, and collaborative.
[Eff and comp] (Auth: HHC Act §222)
(Imp: HHC Act, all)

§10-4-52 Definitions. As used in this subchapter, unless context clearly provides otherwise:
"Beneficiary consultation" means the department's direct outreach to lessees, applicants, and native Hawaiians as defined by the act as part of the department's or commission's decision-making process.
"Implementing action" means those actions that implement the plans and the overall planning strategy of the department, including but not limited to, budgeting, legislation, rulemaking, adoption of procedures, and land dispositions.

"Plans" mean the general plan, island plans, program plans, development plans, regional plans, and special area plans. [Eff and comp]
(Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-53 General framework. The planning system shall consist of a three-tier hierarchy of plans. Tier 1 is the top tier consisting of the general plan and shall establish overall policy. Tier 2 and Tier 3 are the lower tiers and shall be guided by the general plan. Tier 2 and Tier 3 focus with increasing specificity on programs or geographic areas. The planning system shall also include implementation mechanisms that link with the plans, as well as evaluation mechanisms to refine the plans and implementing actions. [Eff and comp]
(Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-54 Adoption and amendment procedures. (a) Adoption. All plans in each of the three tiers shall be adopted by a majority vote of the commission. Any comprehensive update or interim amendment requires a majority vote of the commission to be effective. Beneficiary consultation shall be required as part of any comprehensive update or interim amendment.

(b) Comprehensive update. Comprehensive updates to plans provide an opportunity to refine or refocus based on changes in conditions, new trends, emerging issues, or past performance. Unless otherwise specified, an adopted comprehensive update shall supersede and void the entire previous plan.

- (1) Tier 1. The general plan in tier 1 shall be updated at least every twenty years. The department at its discretion may initiate the update sooner than the twenty years;
- (2) Tier 2. The plans in tier 2 shall be reviewed every eight years and updated at

the discretion of the department if an update is justified.

- (3) Tier 3. The plans in tier 3 shall be reviewed every four years and updated at the discretion of the department if an update is justified.

(c) Interim amendments. Between comprehensive updates, tier 1 and tier 2 plans may be amended upon beneficiary consultation appropriate to the plan as set forth in section 10-4-60, and a majority vote by the commission. Initiation of the amendment shall be as follows:

- (1) The chairman may propose, in writing, interim amendments to any of the plans by first notifying the commission and then initiating beneficiary consultation appropriate to the plan as set forth in section 10-4-60; or

- (2) A beneficiary may submit an application form requesting the chairman to initiate an interim amendment. The application form shall include information prescribed by the department. Upon receipt of a completed application form, the department shall have ninety days to respond to the application. Should the department initiate an amendment, the department shall prepare a report of its recommendation and initiate beneficiary consultation appropriate to the plan as set forth in section 10-4-60.

(d) Consistency and conflicts.

- (1) Where conflicts exist among plans, the higher tier shall prevail over the lower tier.
- (2) Implementation actions set forth in section 10-4-58 shall be consistent with applicable plans. A commission member, beneficiary, or interested member of the public, may request the commission review a proposed or past action by the department for consistency. The request must detail the disputed action and describe why the petitioner believes

disputed action is inconsistent with a particular plan. The commission may direct the chairman to prepare a response to the request.

- (3) Upon declaration of an emergency by the governor or mayor, the department may proceed with an action that is inconsistent with a plan, provided that the chairman has notified the commission. The chairman shall propose an amendment to the relevant plan or plans at the earliest practicable time to restore consistency.

(d) Repository. The department shall make available to the public through its website all current adopted plans as may be amended. [Eff and comp] (Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-55 General plan (tier 1). Based on the act, the general plan shall establish statewide polices that guide land management and programs. At a minimum, the general plan shall:

- (1) Establish a uniform system of land use designations that all island plans shall use;
- (2) Establish the relationship between land use designations and the applicable types of land dispositions;
- (3) Establish criteria to identify suitable lands for homesteading;
- (4) Establish criteria to determine available lands not required for homesteading within the planning period;
- (5) Establish criteria to identify lands for revenue generation;
- (6) Establish criteria to identify lands for community use and policies to govern how the community could manage such lands for community building;
- (7) Establish level of service standards for

- infrastructure and community facilities, or specify a program plan or methodology to develop such standards; and
- (8) Specify indicators to measure progress and evaluate effectiveness in meeting policy goals. [Eff and comp]
(Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-56 Island and program plans (tier 2). (a)
Island plans. Island plans shall be prepared for islands where there are over one hundred acres of Hawaiian home lands. If the landholdings are less than one hundred acres, the department may initiate a tier 3 plan. At a minimum, island plans shall:

- (1) Apply the criteria from the general plan to identify suitable homestead lands, including areas for new development, infill, and redevelopment;
- (2) Apply criteria to determine available lands not required for homesteading, including areas for revenue generation, community use, and other non-homesteading uses designated in the general plan;
- (3) Prioritize the development or redevelopment of designated homestead lands based on defined criteria;
- (4) Identify infrastructure requirements; and
- (5) Analyze state and county plans to identify potential impact on department land use and infrastructure.

(b) Program plans. Program plans are statewide plans that inform or carry out general plan policies and priorities for specific functional areas, such as but not limited to affordable housing, native Hawaiian development, energy, disaster preparedness, community resiliency, agriculture, and water resources. Program plans may be specified in the general plan or initiated by the chairman. To initiate a program plan, the chairman shall propose the subject matter of the plan to the commission, and upon a majority vote

in favor, proceed with the preparation of the plan.
[Eff and comp] (Auth: HHC Act §222)
(Imp: HHC Act, all)

§10-4-57 Development, regional, and special area plans (tier 3).

(a) Development plans. Development plans provide more detail for specific projects identified in island plans for purposes of establishing feasibility, budget, and schedule. To assess feasibility, the development plan shall consider a diversity of housing types and prices appropriate for the target wait list, estimate development costs, and estimate the costs to be respectively borne by the department and the prospective lessees or licensees as the case may be. The budget presented in the adopted development plan shall be the basis for CIP budget requests. The chairman may select the projects identified in the island plan that require a development plan, and proceed with the preparation of the development plan upon notice to the commission.

(b) Regional plans. Regional plans build a sense of community and capacity, stimulate partnerships for development and improvements, facilitate beneficiary participation in issues and areas of concern, and identify priority projects within existing and planned homestead areas. The plan may focus on a particular homestead community or several homestead communities in the region. At a minimum, the regional plan shall document current conditions and trends, analyze state and county plans to identify potential impact on homestead areas, and identify a prioritized list of projects important to the community and the department. The chairman may prepare a regional plan with the support of a majority vote of the commission.

(c) Special area plans. Where an island plan designates special districts, the chairman may prepare a special area plan with the support of a majority vote of the commission. [Eff and

comp] (Auth: HHC Act §222) (Imp:
HHC Act, all)

§10-4-58 Implementation. (a) Budgets, legislation, rules, procedures, land dispositions and other implementing actions shall be guided by the plans. The chairman shall develop a rational overall strategy to prioritize and allocate resources and present this strategy to the commission in the first year of the chairman's term, which the chairman may amend and present to the commission as needed from time to time. The overall strategy should: link budgets to policies, programs, and plans; establish homestead and revenue-generation development priorities; identify disposition strategies for unencumbered lands; and identify high priority regional plan projects that are likely to be implemented within the timeframe covered by the strategy.

(b) Fiscal implementation. The department shall maintain a multi-year capital improvement program to be updated annually and approved by a majority vote of the commission. The funded projects shall be consistent with the plans and overall strategy. The budget shall identify existing and potential funding sources that would be considered. The operational budget shall be reasonably consistent with the plans and overall strategy.

(c) Legal implementation. Legal implementation mechanisms include, without limitation, legislative amendments to the act; adoption, amendment, or repeal of administrative rules; and adoption of internal procedures. The chairman may pursue any of these mechanisms guided by the plans and overall strategy, with final approval by a majority vote of the commission.

(d) Land dispositions. The land dispositions issued by the department and approved by a majority vote of the commission shall be guided by the general plan, island plans, overall strategy, and any other

applicable plan or policy adopted by the commission, and aligned with the land uses identified in the island lands. [Eff and comp] (Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-59 Evaluation. The purpose of an evaluation system is to improve the planning system and implementation effectiveness. The chairman shall present an evaluation report to the commission, which may be combined with the report required under section 222 of the act. The general plan shall specify evaluation indicators, and the department shall collect and analyze pertinent data in the evaluation report. The chairman may include other measures of performance and effectiveness. The evaluation report shall include recommendations for improvements as applicable. The chairman shall bring to the attention of the commission development plans that are completed or outdated, and a majority vote of the commission shall void or update such plans. [Eff and comp] (Auth: HHC Act §222) (Imp: HHC Act, all)

§10-4-60 Beneficiary Consultation. (a) Meaningful and timely consultation with beneficiaries promotes trust, partnership, and civic engagement. The type of consultation shall be appropriate to the potential impact of the decision or action.

(b) Types of consultation. The type of consultation is determined by the type of plan or implementing action:

- (1) Comprehensive. Comprehensive consultation is statewide. Notice shall be provided to all existing homesteaders, all waiting lists applicants, and other native Hawaiians who have registered with the department. The notice shall describe the proposed action and the date, time, and place of a public

meeting to be held on each island.
Comprehensive consultation shall apply to
the preparation and amendment of Tier 1
plans, preparation and amendment of program
plans, and promulgation of administrative
rules.

(2) Place-based. Place-based consultation is
geographically specific. Notice shall be
provided to existing homesteaders, waiting
lists applicants, and other native Hawaiians
who have registered with the department and
who are associated with a geographic area
impacted by the proposed action. The
chairman shall determine the appropriate
scope of the notice. The notice shall
describe the proposed action and the date,
time, and place of a public meeting to be
held within the geographic area. Place-
based consultation shall apply to the
preparation and amendment of island plans,
preparation and amendment of tier 3 plans,
and proposed projects that require an
environmental assessment or environmental
impact statement.

(3) Ad hoc. Ad hoc consultation consists of the
formation of an advisory body to provide
input to the department for the preparation
and amendment of any plan or implementing
action. The chairman may select the
advisory body, subject to consultation and
ratification by the commission, for the
preparation or amendment of any plans. Such
ad hoc consultation for the preparation and
amendment of plans shall supplement and not
replace comprehensive or targeted
consultation. The chairman may select an ad
hoc body for an implementing action and
provide a report to the commission.

(c) Consultation methods. The department shall
use its best effort to employ diverse and creative
notification and participation methods that reach the
intended audience in the most effective yet efficient

manner. [Eff. and comp
Act §222) (Imp: HHC Act, all)

] (Auth: HHC