HB 3440
RELATING TO PLANNING

House Committees on
Water and Land Use Planning and
Ocean Recreation and Marine Resources

Joint Public Hearing - February 9, 1996
8:30 A.M., Room 312, State Capitol

By
John T. Harrison, Environmental Center
Hazel Beh, School of Law
Kern Lowry, Urban and Regional Planning
Jacquelin Miller, Environmental Center
Peter Rappa, Sea Grant
Ira Rohter, Political Science
John Van Dyke, School of Law

HB 3440 would abolish the Office of State Planning, transferring its functions under Chapter 205A HRS to the Department of Land and Natural Resources and its powers and duties under Chapter 226 HRS to the Department of Business, Economic Development and Tourism.

Our statement on this measure is compiled from voluntarily submitted opinions of the listed academic reviewers, and as such does not constitute an institutional position of the University of Hawaii.

This measure appears to be the centerpiece of the administration’s legislative agenda, and its implications are indeed far-reaching. Three particular elements of the measure warrant consideration: 1) legal arguments pertaining to State Constitutional provisions regarding executive offices and departments; 2) comparative operational efficiencies of alternative planning organizational structures; and 3) environmental considerations of proposed structural changes. Our review will address each of these
areas, with respective incorporation of the opinions of the senior faculty with appropriate expertise.

1. Constitutional Considerations.

The substantive underpinning of the Attorney General’s opinion that the present Office of State Planning (OSP) is Constitutionally inappropriate derives from Article V, Section 6, which states,

All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions.

By itself, this language would appear to bolster the AG’s position. However, the next sentence provides for an important class of exceptions:

Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Unfortunately, the intent of this latter statement is somewhat clouded by ambiguity. Does the adjectival modifier, “temporary”, apply to commissions only or to special purpose agencies as well? For that matter, exactly what constitutes a “special purpose”? Case law only provides that words of the Constitution are presumed to be used in their natural sense. Additional questions are raised in the context of provisions of §1-18, HRS, which provides for the interchangeable use of “or” and “and”. If these words were interchanged, an intended application of “temporary” to special purpose agencies would be more evident. A “temporary commission” is more fully considered in §26-41, HRS, specifically with regard to the duration of its existence. However, while this section expressly considers temporary commissions and boards, it makes no reference to temporary agencies.

As with other areas of legal interpretation, it seems most judicious to examine prior practice. With due respect to the present Attorney General, it is evident that over the course of many years, other people entrusted with the interpretation of Hawaii’s Constitution have allowed, not just OSP, but numerous agencies to exist in the Governor’s office (e.g., the Office of Children and Youth; the Office of Affirmative Action; the Office of Information; the Office of Statewide Volunteer Services; the Office of Collective Bargaining; the Executive Office on Aging, the Agriculture Coordinating Committee; and the Office of International Relations.)

Unquestionably, the structure of the Executive is the prerogative of the Governor, and the proposed dismantling of OSP is a matter for this Governor’s discretion. The Constitution provides that broad instrumentalities of government shall be housed in
principal departments, with good reason: it is entirely appropriate that there be some legislative oversight of the appointment of heads these agencies, and that they be accountable. However, the state also must have the flexibility to address special purposes as needed, and the Constitution expressly provides that flexibility. In light of prior practices, assertion of a Constitutional proscription of the existence of an agency like OSP in the Governor’s office would appear more a fiat of political intent than a clear provision of law.

2. Comparative Operational Efficiencies.

The principal effect of this measure is to separate OSP into discrete functional subunits and to distribute those parts of the former whole into three separate administrative homes. Leaving aside for the moment the compatibility of the individual subunits with their prospective new homes, consider the following comparison of the effectiveness of the whole organization with one which is partitioned.

In establishing the Hawaii State Planning Act, the 1978 legislature found,

... there is a need to improve the planning process in this State, to increase the effectiveness of public and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii’s resources and to guide the future development of the State (Act 100 SLH, Ninth State Legislature.)

This legislative intent spoke to the need for balance and coordination in the charting and implementation of a course for Hawaii’s future. The same intent was advanced by the legislature through the coalescing of planning functions from various departments into the Office of State Planning in 1987. Placement of OSP in the Governor’s office offered the practical advantages of overseeing planning coordination with the full range of line agencies and acting as a referee when individual agency goals clashed. Moreover, collection of planning and management functions related to all realms, including land, coastal and ocean resources, provided for integration of the full range of perspectives into a broad overview.

In contrast, what now is proposed is the functional segregation of coastal and ocean resource, land use, and overall policy functions. Instead of a centralized, cohesive planning unit, three separate offices arise. Where once was integration of purpose, now there emerges compartmentalization. The likelihood that the legislature’s intended improvement of coordination among different agencies and levels of government will be advanced by breaking OSP apart indeed seems remote.
3. Environmental Concerns.

A reasonable correspondence exists between the functional purview of DLNR and that of the CZM program. The defined coastal zone management area largely encompasses land and natural resource elements within the realm of responsibility of DLNR. However, there remains a problem of authority, to the degree that the CZM program is entrusted with the responsibility of overseeing all agencies to ensure adherence to CZM guidelines. Enforcement in situations when the goals of DLNR may conflict with CZM guidelines may prove unfeasible.

A more serious concern surrounds allocation of land use planning functions to the DBEDT, an agency with deliberate competence and focus in the area of economic growth, but not widely recognized for a balanced approach to land use management, particularly with regard to environmentally responsible developments. It is noteworthy that in a recent report entitled, “Restoring Hawaii’s Economic Momentum - 1996”, the DBEDT spoke of

...removing government barriers to economic activity ... by reforming the current structure of land use regulation.”

The addition of a new departmental responsibility to

Develop and present the position of the State in all boundary change petitions and proceedings before the land use commission ... (page 13, line 19)

ably provides for representation of economic perspectives, at the conspicuous expense of social, cultural, physical or natural environmental considerations.

Our concerns are not solely the province of an academic perspective. We direct attention to §341-1, HRS:

The legislature finds that the quality of the environment is as important to the welfare of the people of Hawaii as is the economy of the State. The legislature further finds that the determination of an optimum balance between economic development and environmental quality deserves the most thoughtful consideration, and that the maintenance of the optimum quality of the environment deserves the most intensive care.

In conclusion, we fully support the Governor’s right to structure his office as he wishes. However, the public’s interest is best served by an organizational structure which fairly represents all interests in a balanced, thoughtful planning process. If OSP is to be moved, it should be moved with all of its physical planning functions intact, and it should be moved to an agency with a somewhat more well-rounded perspective than DBEDT.