

Delegation of Certain Legislative Matters to TOD Council Co-chairs

FACTS

The Hawaii Interagency Council for Transit-Oriented Development (TOD Council) is subject to the Sunshine Law of Chapter 92, Hawaii Revised Statutes, which in part, requires timely notice prior to conducting an open meeting to decide on or deliberate toward a decision upon a matter.

On January 6, 2015, the Office of Information Practices (OIP) issued an advisory as to how Boards can and should submit legislative testimony on a timely basis while still following the Sunshine Law (see attached). The Sunshine Law provides options to address State legislative issues and measures. The First Option, Delegation to Staff, suggests that the TOD Council delegate the authority to staff (e.g., Co-chairs) to submit legislative testimony on behalf of the TOD Council, in accordance with positions and policy directives adopted by the TOD Council. Such delegation to the Co-chairs provides a practical way to timely address legislative matters while complying with the Sunshine Law.

The Co-chairs would continue to report to the TOD Council on all legislative measures at the Council's regularly scheduled meetings and may seek confirmation or clarification of testimony that will or has been presented to the Legislature.

DISCUSSION

- A. Under HRS §226-63(a), the TOD Council is tasked with coordinating and facilitating state agency transit-oriented development planning, and facilitating consultation and collaboration between the State and the counties on transit-oriented development initiatives.
- B. Under HRS §226-63(b), the TOD Council is required to:
 - (1) Serve as the State's transit-oriented development planning and policy development entity with representation from state and county government and the community;
 - (2) Formulate and advise the governor on the implementation of a strategic plan to address transit-oriented development projects, including mixed use and affordable and rental housing projects, on state lands in each county;
 - (3) Facilitate the acquisition of funding and resources for state and county transit-oriented development programs, including affordable and rental housing projects, on state lands;
 - (4) Monitor the preparation and conduct of plans and studies to facilitate implementation of state transit-oriented development plans prepared pursuant to this section, including but not limited to the preparation of site or master plans and implementation plans and studies;
 - (5) Review all capital improvement project requests to the legislature for transit-oriented development projects, including mixed use and affordable and rental housing projects, on state lands within county-designated transit-oriented development zones or within a one-half-mile radius of public transit stations, if a county has not designated transit-oriented development zones;

- (6) Recommend policy, regulatory, and statutory changes, and identify resource strategies for the successful execution of the strategic plan;
 - (7) Assemble accurate fiscal and demographic information to support policy development and track outcomes;
 - (8) Consider collaborative transit-oriented development initiatives of other states that have demonstrated positive outcomes; and
 - (9) Report annually to the governor, the legislature, and the mayor of each county on the progress of its activities, including formulation and progress on the strategic plan no later than twenty days prior to the convening of each regular session.
- C. Under HRS §226-63(c), the TOD Council is required to develop a strategic plan which shall:
- (1) Coordinate with the counties on transit-oriented development;
 - (2) For each county, compile an inventory of state, county, and private sector transit-oriented development projects lacking infrastructure, identifying the type of infrastructure each project lacks, and the approximate time frame when additional capacity is needed;
 - (3) Prioritize the development of transit-oriented development projects, including mixed use and affordable and rental housing projects, on state lands;
 - (4) Identify financing and prioritize state financing for the public infrastructure, facility, and service investments required to support transit-oriented development, mixed use, and affordable and rental housing project plans; and
 - (5) Encourage and promote partnerships between public and private entities to identify, renovate, and secure affordable housing options on state lands within county-designated transit-oriented development areas or within a one-half-mile radius of public transit stations, if a county has not designated transit-oriented development zones.
- D. There are numerous TOD-related measures that are taken up by the State Legislature, and to a lesser extent, County Councils that affect TOD and the TOD Council. A general summary of the types of legislative measures, along with the proposed TOD Council positions follows.
- 1. Strategic plan, annual report and annual CIP report.
Position: Support the actions of the TOD Council taken in approving the strategic plan (and any updates), the annual report and the annual CIP report.
 - 2. Administration bills.
Position: The TOD Council, through the Co-chairs, should provide supporting testimony on administration bills related to TOD and the duties and administration of the TOD Council.
 - 3. Measures which propose to give the TOD Council additional resources or powers.
Position: Support the intent provided that its passage does not replace or adversely impact

priorities indicated in the Executive Budget; and/or support expanded capacity or powers provided they are in line with the TOD Council's mission and do not impair existing programs.

4. Measures which propose to revise the TOD Council's existing programs.
Position: Oppose revisions that impose restrictive requirements that negatively impact the financial feasibility of projects or the program itself. Support revisions that provide greater flexibility in meeting the TOD Council's mission.
5. Measures which propose to diminish the TOD Council's resources or powers.
Position: Oppose.
6. Measures which relate to TOD.
While the TOD Council generally does not testify on measures that do not impact the TOD Council, legislators may ask the TOD Council for testimony on other transit-oriented development measures.
Position: None; however, provide information.

- E. OIP provided Sunshine Law options to address State legislative issues and measures. The Second Option, Delegation to no more than two board members, suggests that the TOD Council delegate the authority to the two Co-chairs to submit legislative testimony on behalf of the TOD Council, in accordance with positions and policy directives previously adopted by the TOD Council. Such delegation to the Co-chairs provides a practical way to timely address legislative matters while complying with the Sunshine Law.
- F. The Co-chairs would continue to report to the TOD Council on all legislative measures at the TOD Council's regularly scheduled meetings and may seek confirmation or clarification of testimony that will or has been presented to the Legislature.

RECOMMENDATION

That the TOD Council:

- A. **Adopt the aforementioned positions and general policy directives on legislative matters and measures in conformity with the provisions of HRS §226-63.**
- B. **Delegate authority to the Co-chairs and authorized staff designated by the Co-chairs to track legislative measures and provide testimony in accordance with the above positions and statutory directives.**
- C. **Authorize the Co-chairs to undertake all tasks necessary to effectuate the purposes of this delegation.**

QUICK REVIEW: Sunshine Law Options to Address State Legislative Issues and Measures July 2018

As the Hawaii State Legislature's opening day approaches, Sunshine Law boards that track legislation and submit testimony on legislative issues or measures are faced with the annual question: how can they keep up with the legislative calendar and submit testimony on a timely basis while still following the Sunshine Law? The state Office of Information Practices has prepared this Quick Review to provide several options.

When dealing with legislative matters, one major hurdle that boards face is the Sunshine Law's six-day notice requirement prior to conducting a meeting to discuss a legislative measure when legislative committees often give less than six days' notice of their hearings. Since most boards typically meet on a monthly or less frequent basis, their meeting schedule together with the notice requirement leave them with limited options to timely notice a meeting and discuss the adoption of legislative testimony or positions prior to the legislative hearing.

The Sunshine Law, however, allows board members to discuss board business outside a meeting in limited circumstances, as set forth in the "permitted interactions" section of the law. HRS § 92-2.5. These permitted interactions are not considered to be "meetings" of a board or subcommittee subject to the Sunshine Law's six-day advance notice requirements. HRS §92-2.5(h).

Generally, among the various types of permitted interactions authorized under section 92-2.5, HRS, the most useful in developing or adopting positions on legislative measures are the three described in: (1) section 92-2.5(a), HRS, which allows two members of a board to discuss board business between themselves so long as no commitment to vote is made or sought; (2) section 92-2.5(b), HRS, which allows a board to assign less than a quorum of its membership to present, discuss, or negotiate any board position that the board had previously adopted at a meeting; and (3) section 92-2.5 (e), HRS, which allows less than a quorum of board members to attend a legislative hearing (or other "informational meeting") and report their attendance at the next board meeting.

Permitted interactions are discussed in greater detail in OIP's three-part Quick Review series on "Who Board Members Can Talk To and When," which may be viewed on OIP's [Training page at oip.hawaii.gov](http://oip.hawaii.gov).

Besides permitted interactions, other options for a board to address legislative matters are through emergency or limited meetings or delegation to staff. The various options or practical approaches that a board could take to discuss and submit timely testimony on legislative issues or measures are discussed below.

First Option: Delegation to Staff

At the outset of the legislative session, a board may file a notice of a public meeting with an agenda indicating that the board will consider the adoption of a position or the general policy

direction it will take on specific legislative topics, subject matters and legislative measures, including the relevant bill numbers, if available, which the board desires to present in testimony during a legislative session. (A board may contact OIP's Attorney of the Day to discuss whether the notice of an agenda item is legally sufficient.)

The board could then delegate to staff (e.g., executive director) the authority to track legislative measures and provide testimony in accordance with the positions and policy directives previously adopted by the board. The members of a board's staff (assuming they are not board members) can freely discuss legislative measures the board is tracking among themselves without implicating the Sunshine Law. Likewise, discussions involving staff and a single board member would not raise Sunshine Law concerns, unless the discussions comprise a serial communication between staff and individual board members to solicit a commitment to vote on a specific matter.

The board's staff would report to the board on all legislative measures at the board's regularly scheduled meetings conducted during the legislative session and could seek confirmation or clarification of testimony that it planned to or had presented to the legislature. Alternatively, if the board has delegated legislative authority to two board members as discussed in the second option below, or to a permitted interaction group as in the third option below, then the staff could report to those groups at any time without having to notice a Sunshine Law meeting.

Second Option: Delegation to No More Than Two Board Members

If a board has no staff or if its members wish to take a more active role in legislative matters, then a board may delegate to two board members the authority to prepare and submit any legislative testimony in accordance with the position or policy direction the board had previously adopted. Under the permitted interaction authorized in section 92-2.5(a), HRS, two board members may discuss between themselves official board business, including testimony being presented to the Legislature, provided that no commitment by the board members to vote on board business is made or sought and the two members do not constitute a quorum of the board.

The two board members working on a legislative issue or measure can provide reports at any meeting of the board when the issue is on the agenda. Moreover, different combinations of members may be assigned to work on different legislative issues or measures. However, the two board members assigned to a legislative measure or issue must be careful to avoid involving additional members in discussions of that matter outside a board meeting because these additional discussions could constitute a serial discussion among three or more members in violation of the Sunshine Law.

Discussions by all members may take place at duly noticed board meetings. The full board can continue to oversee the implementation of the general policy direction by the two board members and address any new issues that arise during the legislative session at its regularly scheduled meetings. If necessary, the full board may also hold emergency meetings, as described in the sixth option below.

Third Option: Permitted Interaction Group under Section 92-2.5(b)(2), HRS

Some boards may prefer to have more than two members involved in legislative matters. If so, a board may consider the establishment of permitted interaction group (“PIG”) under section 92-2.5(b)(2), HRS, which could consist of more than two members, so long as it is less than a quorum of the board.

Initially, the board should adopt its position or establish policy directives at a public meeting duly noticed under the Sunshine Law. The agenda item in the public meeting notice would describe the specific topic, subject matter, or legislative measure, including any bill number, if known, that the board desires to adopt a position upon or to set a policy directive in response to any legislative measure the board anticipates could be discussed during a legislative session. An additional agenda item for the public meeting should describe the PIG to be established under section 92-2.5(b)(2), HRS, including the assignment of specific board members to the PIG and the establishment of the scope of each member’s authority to present, discuss, or negotiate any position that the board had previously adopted.

A legislative PIG established under section 92-2.5(b)(2), HRS, and acting within the scope of each member’s previously defined authority, would not be subject to the investigative PIG’s requirements under section 92-2.5(b)(1), HRS, to initially report its findings at a public meeting before the full board could discuss or act on the report at a subsequent meeting. Nor would a legislative PIG established under section 92-2.5(b)(2), HRS, be subject to the reporting requirements of section 92-2.5(e), HRS, for attending informational meetings described in the fourth option below.

Fourth Option: Informational Meeting or Presentation

Section 92-2.5(e), HRS, allows two or more members of a board, but less than a quorum, to attend and participate in discussion at an informational meeting or presentation on matters relating to official board business, including meetings of another entity or a legislative hearing. The meeting or presentation, however, must not be specifically and exclusively organized for or directed toward board members, and a commitment by board members relating to a vote on a matter cannot be made or sought. At the next duly noticed board meeting, the board members must report their attendance at the informational meeting or presentation and the matters relating to official board business that were discussed during the meeting or presentation.

Under this permitted interaction, it would not be necessary for the full board to have previously created a permitted interaction group authorized under section 92-2.5(b), HRS, or to have established a position or policy on a legislative measure or issue.

Fifth Option: Limited Meeting by County Council as Guests of Another Group

Any number of county councilmembers may attend a limited meeting that is open to the public, as guests of a board or community group holding its own meeting, provided that the following requirements of section 92-3.1(b), HRS, are met: (1) six days’ advance notice of the limited meeting must be provided to indicate whose board or community group the council is attending, but no agenda is necessary as it is not the council’s own meeting; (2) if the other board

or community group is subject to the Sunshine Law, then that board or group must still meet the Sunshine Law's notice requirements; (3) no more than one limited meeting per month may be held by the County Council involving the same board or community group; (4) no limited meetings may be held outside the State; and (4) the limited meeting shall not be used to circumvent the purpose of the Sunshine Law. Additional requirements under section 92-3.1(c), HRS, for limited meetings apply, such as prior OIP approval and videotaping of the limited meeting, as well as the general meeting requirements, such as keeping minutes.

This option would allow more than a quorum of a county council to meet with constituents or community groups regarding their legislative concerns, but would not be a preferred way for the council itself to address legislative matters. If a quorum or more of a board wanted to attend a specific legislative hearing together, however, this form of limited meeting would be the only option for doing so, other than noticing the hearing as a regular board meeting.

Sixth Option: Emergency Meeting

If an unanticipated legislative issue or measure arises that requires the full board's action, an emergency meeting could be noticed under section 92-8(b), HRS. An emergency meeting requires the board to meet the following conditions. The board must state in writing the reasons for its finding that an unanticipated event has occurred and that an emergency meeting is necessary, and must obtain the Attorney General's concurrence. Two-thirds of all members to which the board is entitled must agree that the conditions necessary for an emergency meeting exist. Although six days' advance notice is not required, the written finding that an unanticipated event has occurred and that an emergency meeting is necessary, and an emergency meeting agenda, must be electronically posted in the same way as for a regular meeting notice and agenda, and copies provided to the office of the Lt. Governor or appropriate county clerk's office and made available in the board's office. Persons requesting notification of board meetings on a regular basis must be contacted by postal mail, email, or telephone as soon as practicable. The board's action must be limited to only action that which must be taken within six days due to the unanticipated event.

Because of the additional requirements for noticing an emergency meeting, as well as the logistical challenges of frequently gathering a quorum of a board's membership on short notice, this option is not one that would be used on a regular basis to deal with legislative issues or measures.

In closing, there are various options available to a Sunshine Board to deal with legislative matters in a timely fashion. For additional guidance, please feel free to contact OIP's Attorney of the Day at 586-1400 or oiip@hawaii.gov.