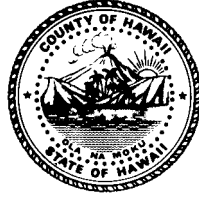


Aaron S. Y. Chung
Chair and Presiding Officer



Susan L.K. Lee Loy
*Public Works and Mass Transit
Committee Chair*

HAWAI'I COUNTY COUNCIL
25 Aupuni Street, Hilo, Hawai'i 96720

October 20, 2020

The Honorable Governor David Y. Ige
Governor, State of Hawai'i
Executive Chambers
State Capitol
Honolulu, Hawai'i 96813

**RE: REQUEST FOR A TEMPORARY SUSPENSION OF HAWAI'I REVISED
STATUTES, SECTION 107-28**

Dear Governor Ige:

Allow this letter to provide a measured rationale to request a temporary suspension of Hawai'i Revised Statutes ("HRS") Section 107-28. Our request has been outlined in a manner to assist the Office of the Governor and the Attorney General to evaluate the request with other associated factors and various underpinning anomalies that are currently or will, in the near future, begin to place a strain on meeting the timelines set forth in HRS §107-28 and its consequences, whether intended or otherwise unintended, unforeseen and/or unknown.

EMERGENCY PROCLAMATION HISTORY:

HRS §127A-14(c) allows for the Governor or the Mayor of a county to "be the sole judge" of the existence of conditions creating a state of emergency for their respective jurisdictions.

Mayor Harry Kim's first COVID-19-related emergency proclamation for Hawai'i County was issued on February 28, 2020. Mayor Kirk Caldwell of the City and County of Honolulu, Mayor Derek Kawakami of Kaua'i County, and Mayor Mike Victorino of Maui County issued their respective emergency proclamations on March 4, 2020, and the Governor issued a proclamation for the State on March 5, 2020.

The Governor's Supplementary Proclamation on March 16, 2020, invoked HRS §127A-12 and §127A-13 to suspend certain statutes and any related administrative rules "as allowed by federal law ... in order for state and county agencies to more effectively provide emergency relief and engage in emergency management functions, including, by not limited to, implementing social distancing measures, as a result of the COVID-19 pandemic."

In addition, the Governor’s current Fourteenth Proclamation dated October 13, 2020, in line with previous proclamations, suspends “Chapter 46, HRS, county organization and administration, with respect to any county ordinance, rule, regulation, law or provision which applies to any county permitting, licensing, zoning, variance, processes, procedures, fees, or any other requirements that hinder, delay, or impede the purpose of this proclamation.” The proclamation, among many other things, also waives or suspends any deadlines for administrative hearings not subject to Chapter 91.

BACKGROUND INFORMATION ON HRS §107-28:

Pursuant to HRS §107-28(a) “...*Each county shall use the model codes and standards listed in section 107-25, as the referenced model building codes and standards for its respective county building code ordinance, no later than **two years** after the adoption of the state building code.*” {Emphasis added}

The persistent uncertainty presented by COVID-19 and the response needed from government agencies are causing significant disruption and the realignment of government time, energy, and resources. The cumulative intent of the aforementioned proclamations, rules and orders was developed to extend grace periods for deadlines that were established prior to the interruption of regular government activity due to social distancing measures imposed in order to stop the spread of COVID-19. It appears to be an oversight that HRS §107-28 was not included in this enumeration of waived rules, and one that is being currently requested for inclusion and temporary suspension.

The State Building Code Council (“SBCC”) approved amendments to the 2012 edition of the International Building Code and the 2012 International Residential Code on November 13, 2018, starting the two-year clock for the counties to amend and adopt them by November 13, 2020.

At that time Hawai‘i County was looking at beginning an overhaul of its construction code framework, responding to a devastating lava flow, was already in default of approving its energy conservation code, and was undergoing a reorganization in the Department of Public Works¹. Despite these challenges, Hawai‘i County was making good progress to overcome all of them, and remained optimistic it would meet the November 13, 2020, deadline until non-emergency County offices had to close in compliance with the Stay at Home order in the Governor’s Third Supplementary Proclamation for COVID-19 dated March 23, 2020. While this is a snapshot of Hawai‘i County’s challenges, a common thread all counties are encountering is the radical interruption and uncertainty COVID-19 is presenting and the redistribution of resources and personnel adjustments.

¹ Minutes of the State Building Code Council, Nov. 13, 2018.

ANALYSIS:

A preliminary analysis of other governing regulations was considered prior to this request. The SBCC is guided by HRS §107-21 through §170-31 and further analysis to suspend HRS §107-28 was measured against the Title II §203, Predisaster Hazard Mitigation, of the Stafford Act (42 U.S.C. 5133) to ensure a pathway of compliance between the state and federal regulations.

Section 406 of the Stafford Act² requires that any building restorations funded by FEMA be in accordance with “applicable codes, specification and standards.” In a largely unsuccessful effort to persuade local government to increase their disaster resilience and upgrade their building codes before disasters, FEMA adopted a regulation about 20 years ago defining an “applicable code, specification and standard” as one adopted in writing before the disaster. However, following the many large-scale disasters that have occurred since, it became clear that many jurisdictions have not upgraded these requirements.³

In September 2016, FEMA issued Recovery Policy FP-104-009-4, Public Assistance Required Minimum Standards. This new policy requires that, when using FEMA Public Assistance funds to repair, replace or construct a building located in a hazard-prone area, applicants must use, at minimum, the hazard resistant design standards of the International Building Code, the International Existing Building Code, and/or the International Residential Code. The policy confirms that costs associated with meeting these standards will be eligible for Public Assistance funding.

Section 323 of the Stafford Act⁴ requires applicants for Public Assistance grant funding to carry out any repair or new construction to be funded by the grant in conformity with applicable codes, specification and standards, and FEMA’s regulations still define an “applicable code, specification or standard” as one adopted in writing prior to the disaster. However, Section 406 gives FEMA authority to fund restoration of facilities in accordance with “Mitigation standards required by the President (FEMA).” Policy FP-104-009-4 has the authority to fund more resilient reconstruction of damaged facilities. It will ignore local government codes (unless they are more stringent) and essentially implement a minimum federal standard for facilities that are being repaired or replaced using FEMA Public Assistance fund following a disaster declaration. This provides assurances that entities impacted by federally declared disaster events have the resources available to rebuild stronger, safer facilities.

No Action/De Facto Alternative

To provide further analysis of this request, exploration of a “No Action/De Facto Alternative” was also considered. The SBCC does not include administrative rules and makes allowances to the respective counties to incorporate amendments to address their needs such as fees and construction permit costs. If the 2012 IBC/IRC were adopted by default, (de facto) a

² 42 U.S.C. 5172(e)(1)(A)(ii): Repair, restoration, and replacement of damaged facilities.

³ <https://www.bakerdonelson.com/fema-requires-compliance-with-national-standard-building-codes-for-restoration-of-facilities-funded-through-public-assistance-grant-program>

⁴ 42 U.S.C. 5165(a): Minimum standards for public and private structures.

completely new set of technical provisions would be enacted and would be inconsistent with other portions of the county code causing potential conflicts and confusion, and agitate all involved in the building industry. In short, a new code at this time could disrupt the building industry just when we need all the means to mitigate the devastating economic effects of COVID-19. Should the counties, at minimum, adjust the 2012 IBC/IRC to maintain the administrative provisions contained in the 2006 IBC/IRC, the current pandemic has presented additional challenges and are further recognized and discussed in the following sections.

Stakeholder Input

In addition to careful consideration to other governing regulation and scenarios, equal weight was given to input from the electorate, stakeholders, and subject matter experts regarding the state building code adoption timeline. The current pandemic has presented barriers to engage the public process for the legislation of critical policies and regulation.

ECONOMIC TRENDS AND OTHER FACTORS:

Economic trends

The State has struggled with the high cost of housing and has an intrinsic relationship to the supply and demand of construction materials outside the State. COVID-19 has caused pandemic-induced lumber mill shutdowns in the Pacific Northwest, creating a shortage of lumber supplies, and the *“price of lumber has increased in recent months, rising roughly 80% since mid-April to an average price above \$600 per thousand board feet.”*⁵ Compounding the high cost of lumber supplies is the recent Public Utilities Commission decision issued on August 17, 2020⁶, whereby Hawai‘i, Kaua‘i and Maui counties will be subject to a 46% increase in shipping costs from this decision. In addition, wildfires in Oregon and California in August and September have burned 4.1 million acres and destroyed 9,200 structures. The need to rebuild communities on the West Coast will also place additional strain on lumber supplies which will, undeniably, impact the supply chain and cast more uncertainty in the State.

Public/Legislative Process

Maintenance of the current building codes and postponing the adoption of the state model code at the county level would not present any adverse economic impact. As demonstrated above, economic forecasts and business decisions made by other private and public entities will have financial impacts. A temporary suspension would allow counties, especially Hawai‘i, Kaua‘i and Maui, those with fewer than 250,000 people, time to adjust to the economic trends and factors and provide an economic safety net and lifeline to the construction industry while these trends adjust to more stable stages.

The suspension of HRS Chapter 92 as it relates to meeting requirements under the current emergency proclamation deprives the public the ability to provide meaningful input prior to the enactment of the updated building codes. Earlier this year in Hawai‘i County, members of the

⁵https://www.builderonline.com/money/prices/nahb-soaring-lumber-costs-could-push-new-home-prices-higher_c
<https://www.marketwatch.com/story/lumber-prices-have-skyrocketed-and-thats-bad-news-for-home-buyers-11594850533>

⁶ <https://puc.hawaii.gov/transportation/youngbrothers/>

public raised concern about the shortened public comment period for an early draft of a bill to update several provisions of its construction code. If not suspended, the two-year deadline imposed by HRS §107-28 does not provide the appropriate time for a thorough public vetting of a proposed update of the building codes in Hawai‘i County. Due to social distancing requirements and the expected significant interest in this code update, topic-focused workshops for the public to provide comments to the Building Division cannot be held. An extended public comment period may be an appropriate substitute, but if Hawai‘i County does this it cannot meet the statutory deadline requirement of November 13, 2020, under HRS §107-28.

Again, while this information is framed around the County of Hawai‘i’s public interest, the challenges and uncertainties related to COVID-19 continue to emerge and supports a pause in proceeding as usual in these unprecedented times.

Public Welfare and Safety

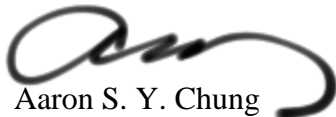
The temporary suspension of the statutory requirements would not compromise or present any adverse impact to public safety. The counties currently maintain compliance with the existing building codes and that ensures safe building construction and occupancy. The current code has been in place for eight years and an extended use would not jeopardize the health and welfare of any resident or visitor. Although the migration to the most current code is desired and will continue to be pursued, the current code is not antiquated or obsolete and provides sufficient regulatory control for public safety.

CONCLUSION:

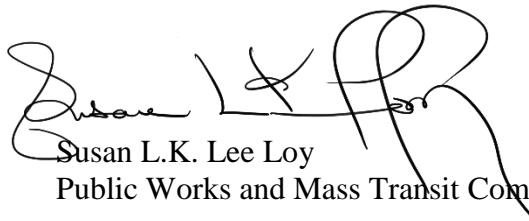
For the reasons stated above, we request the Governor, no later than November 13, 2020, to join in the understanding of the analysis provided above, and we request that enforcement of the timelines set forth in HRS §107-28 are suspended and in abeyance for 12 months

This request has been shared with the SBCC, members of their executive committee, members of the Kaua‘i and Maui county councils, the Hawai‘i State Energy Office, and the Kim administration. We look forward to your support and please feel free to contact us, should the Governor, the Attorney General, or any other public, private, labor, or community organization require additional information or further evaluation of any element regarding this request to suspend HRS §107-28.

Sincerely,



Aaron S. Y. Chung
Council Chair



Susan L.K. Lee Loy
Public Works and Mass Transit Committee Chair

CC: Howard Wiig, Chair, State Building Code Council
Scott J. Glenn, Chief Energy Officer, Hawai‘i State Energy Office
Arryl Kaneshiro, Chair, Kaua‘i County Council Chair, and Council members

Alice Lee, Chair, Maui County Council Chair, and Council members
Harry Kim, Mayor, Hawai'i County
Toby Taniguchi, President, Hawai'i Island Chamber of Commerce
Mark Leong, Chair, Kona-Kohala Chamber of Commerce