

April 26, 2021

**VIA E-MAIL ONLY**

State of Hawaii, Land Use Commission  
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Dear Chair Scheuer and Commissioners:

We write on behalf of The Edmund C. Olson Trust No. 2 (the "Trust") to object to the City and County of Honolulu's ("C&C") proposed designation of certain Trust property in the West Oahu mountains above Makakilo as Important Agricultural Lands ("IAL"). The land proposed for designation consists of AG district portions of two parcels totaling approximately 2,060 acres identified as TMK Nos. (1) 9-2-045-007 and (1) 9-2-004-008 (hereafter, the "Palehua Property").

The Palehua Property consists primarily of steep slopes, ravines and rocky terrain covered by non-native Guinea grass. The land is still recovering from a large 2014 fire that burned over a thousand acres and destroyed many *Wiliwili* trees. The Trust has been working on preserving Native fauna and revitalizing the natural ecosystem through dedication of land for a Native-plant nursery. Agricultural activity (unrelated to conservation) is limited to cattle grazing for fire suppression. The topography, poor soils and lack of infrastructure make productive farming impractical and unsustainable.

Throughout this IAL designation process, the Trust has received two form letters: one letter from C&C noticing the proposed designation ("IAL Notice") and a second letter from the State Land Use Commission ("LUC") noticing this April 28-29, 2021 meeting ("LUC Notice"). See Exs. 1 & 2, attached. The Trust has never been consulted, interviewed or even asked to complete a survey to determine if sustainable productive agriculture exists, is possible, or is even desirable at the Palehua Property.

Contrary to State law requiring a "weighing" of criteria, C&C relied upon a single criterion to designate the Palehua Property, i.e., that the lands are currently in agricultural production. Even with this overly broad definition of IAL, C&C's process has not produced evidence establishing that the Palehua Property meets the criterion.<sup>1</sup> Rather than waste this Commission's time with dozens of meetings and hearings to analyze the C&C's flawed process, this matter should be remanded with directions to "consult and cooperate" with all affected landowners (including the Trust), to designate only those lands that meet the State law's definition and the intent of IAL and to establish an evidentiary record that is at least as robust as those for voluntary IAL petitions brought before the LUC.

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<sup>1</sup> While limited cattle grazing—for fire suppression—is an agricultural activity, C&C's expansive redefining of State IAL would support designating all eligible Oahu AG land as IAL.

## I. FACTUAL BACKGROUND

On or about April 15, 2021, the Trust received the LUC Notice for the April 28-29, 2021 meeting to consider whether C&C's recommendations for designation of IAL on the Island of Oahu complies with the requirements of Hawaii Revised Statutes ("HRS") §§ 205-47 and 205-49 and whether the proper procedural, legal, statutory and public notice requirements were met in developing the recommendations. Ex. 2. The LUC Notice stresses that the "Commission will not be considering or determining at this meeting the legal rights, duties, or privileges of specific landowners or issues relating to particular properties."<sup>2</sup> The Trust, therefore, understands that this meeting is not intended to be a hearing and that no action will be taken to impact the rights (whether substantive or procedural) of any affected land owners, including the Trust.

### A. C&C's IAL Mapping Process

According to C&C's August 2018 "O'ahu Important Agricultural Land Mapping Project" Report ("Report") prepared by the Department of Planning and Permitting ("DPP"), "IAL refers to a State land use designation ... for an exclusive sub-set of high-quality farm land within the State Land Use Agricultural District." Ex. 3 (emphasis added). "The [IAL] recommendations articulate a long-term vision for the high quality farm land on O'ahu most suited for farming." *Id.*

The Report states that the IAL designation will not affect the range of permitted land uses or impose a higher level of protection from future development but, rather, will benefit landowners by granting access to incentives and support to reduce the cost of farming. Ex. 4. C&C has consistently taken the position that the IAL designation does not impact landowner property rights, despite the designation enshrining the lands within the restrictions and protections established by Article XI, Section 3 of the State Constitution and HRS, Chapter 205, which protect IAL from the encroachment of nonagricultural activities and effectively precludes any future reclassification and/or rezoning.

In determining the informational sources and weighting criteria used for C&C's mapping project, DPP set up a technical advisory committee ("TAC") comprised of a single landowner organization making up 4% of the vote of a 25-member committee. Ex. 5.<sup>3</sup> Apparently, this was done to satisfy the requirement of "consultation and cooperation" with landowners pursuant to HRS § 205-47 even though the statute requires reporting of the "[r]epresentations or position statements of the owners whose lands are subject to the potential designation." HRS § 205-47(d)(5). Through a series of invitation only meetings and three publicly noticed community meetings (all on Oahu), C&C claims it satisfied the requirement to consult and cooperate with landowners affected by the potential designation. According to Table 2-1 of the Report, the process consisted of TAC meetings, focus group meetings, community meetings and landowner notification after lands were determined eligible and recommended to the city council for designation. Ex. 6.

In determining whether land was currently in agricultural production (Criteria 1), DPP used 2011 aerial imagery, a 2012 Ko'olau Poko Watershed Management Plan (covering windward Oahu), an Island of O'ahu Agricultural Land Use Map, 1978-1980 ("ALUM") and a 2011 Real Property Taxation Database.

<sup>2</sup> The Notice, itself includes conflicting dates (referencing a meeting on March 24-25, 2021 as well as April 28 and 29, 2021) and refers to the action as both a meeting and a hearing at which "any member of the public may provide public testimony on this matter." If the LUC intends to conduct a hearing, then the LUC Notice must be clarified and reissued.

<sup>3</sup> The single landowner organization was the Land Use Research Foundation ("LURF"), consisting primarily of large-scale developers, some of whom voluntarily designated their lands as IAL to avoid being subject to the C&C mapping process.

Ex. 7. The 2011 imagery was compared to the ALUM to identify active and fallow agricultural lands. Any parcels receiving AG exemptions according to tax records were included in the data set as "currently used for agricultural production." *Id.* The standards for claiming an AG exemption for tax purposes, however, have nothing to do with designating "an exclusive sub-set of high-quality farm land within the State Land Use Agricultural District." Ex. 3 (emphasis added).

To identify IAL, the TAC determined that three of the statutory criteria should be prioritized (Criteria 1, 2 and 5) concerning current AG production, soil and growing conditions and sufficient quantities of water. Ex. 8. TAC members discussed using the Top 3 or 4 criteria and one member commented that the TAC would lose credibility if they recommended all of the AG lands for IAL, without considering the quality of the land. Ex. 9. Another member stated his preference for using the top 3 criteria because designating all AG lands would defeat the intent of the law, which is to preserve and protect the best AG lands. *Id.* Despite these initial misgivings by TAC members, C&C adopted an "inclusive" approach including land with attributes of any one of the 3 priority criteria as eligible for IAL designation. Ex. 8. Apparently, this was a result of community sentiment that "all AG land should be IAL." Ex. 10, pp. 5-6. TAC members noted that:

Requiring multiple criteria be met could have the effect of limiting the pool of lands eligible for IAL designation, when the goal is to be inclusive as possible. The community has expressed a strong opinion that "all AG land should be IAL." It would be contradictory for the TAC to require multiple criteria be satisfied if it limits the pool of IAL-eligible lands, given the community's sentiment...

"There is a desire to be as inclusive as possible while at the same time identifying the best candidate lands. As such, landowners should be required to prove that their land cannot be farmed. This approach requires landowners to decide that they do not want to be included in IAL, and ask to be omitted. *Id.* (emphasis added).

During the second phase of the C&C mapping project, the TAC members participated in public outreach. A comment made by the sole member representing landowners (the LURF) was that "consultation and cooperation with landowners" needed to come before public involvement as it would provide a better/fuller record for the general public. Ex. 10, pp. 1-2. It was further noted that the IAL legislation was framed around the concept of agricultural viability, not land use and preservation. *Id.* DPP staffer, Scott Ezer, confirmed that DPP intended to notify landowners before recommendations are transmitted to the city council but that budgetary restraints did not allow for individual meetings with landowners. *Id.*

At the last TAC meeting on November 14, 2017, LURF noted 10 concerns about the C&C mapping process. Ex. 11. Included in the concerns was C&C's use of "one criteria" as a basis for IAL designation as well as the failure of C&C to consult and cooperate with landowners. *Id.* Indeed, C&C essentially adopted the approach that the burden was on landowners to object to the IAL designation rather than on the C&C to establish and present a record in support of designation.

As part of public outreach, focus groups were created by invitation only. In the focus groups, environmental interest groups outnumbered landowners even though HRS § 205-47 does not call for cooperation and consultation with environmental groups but does expressly call-out landowners. Ex. 12. Even with limited representation, it is not clear whether the landowner representatives such as the Agribusiness Development Corporation (an attached agency to the Department of Agriculture) had any

lands subject to IAL designation.<sup>4</sup> *Id.* During the focus group discussions, there were many questions about restrictions placed on IAL designated lands. It was noted that "IAL will provide a hierarchy within the State's Agricultural District to ensure that the most valuable agricultural lands are protected. Speculation to urbanize agricultural lands should disappear once lands are designated IAL, since it is more difficult to urbanize land that has an IAL designation." Ex. 13. DPP confirmed that "[o]nce the inventory of IAL is identified, DPP is hopeful that the regulatory mechanisms that promote agricultural use of the land will follow...it should ultimately result in future regulatory mechanisms to better manage the use of lands identified as IAL." Ex. 14 (emphasis added). This is not what was presented in the IAL Notice or during public meetings; IAL designation was presented as a way to qualify for valuable incentives.

#### B. C&C's Consultation and Cooperation With The Trust

C&C mailed the Trust a single form communication dated November 8, 2017 entitled "Notice to Affected Landowner Important Agricultural Lands (IAL) Project." Ex. 2. This letter was sent well after the TAC and Focus Groups crafted C&C's over-inclusive definition of IAL and put the burden on landowners to prove their land cannot be farmed. This notice was also after the Community Meetings held in April 2015, January 2017 and a mere 12 days before the third and final Community Meeting on November 20, 2017. The IAL Notice states that:

Your property is recommended for inclusion in IAL based on selected state criteria defined under Chapter 205, Hawaii Revised Statutes. Enclosed is a map of proposed land to be recommended as IAL by the DPP and a "Frequently Asked Questions" handout. More detailed maps and information can be found on the project website: [www.mapoahuagland.com](http://www.mapoahuagland.com).

We encourage you to come to the final community meeting to view the final Draft IAL Map and the IAL process on November 20, 2017, 6:00 p.m. to 8:00 p.m. at the Aiea Intermediate School Cafeteria, 99-600 Kulaweia Street, Aiea, Hawaii 96701...

Thereafter, the DPP will send the draft IAL Map to the City Council for endorsement in the spring of 2018. Additional information is available at: [www.honoluluapp.org/Planning/ImportantAgriculturalLands\(IAL\).aspx](http://www.honoluluapp.org/Planning/ImportantAgriculturalLands(IAL).aspx). Click on the link under "Documents" for the IAL Phase I Report. Should you have any questions, please contact Raymond Young of our staff, at (808) 768-8049. *Id.*

In sum, after approximately five years of planning and meetings, DPP finally got around to notifying the Trust that its approximately 2,000 acres of AG lands were part of the final Draft IAL Map being sent to the city council.

In summarizing the "Mandatory County Designation" process, the IAL Notice identifies the following steps:

1. The County Planning Department (for Oahu, it is the Department of Planning and Permitting) prepares draft IAL maps and an accompanying report and notifies affected landowners.
2. The County Council review and adopt the IAL maps via resolution.
3. The County transmits its IAL recommendations to the LUC.

<sup>4</sup> Similarly, Castle and Cooke and other large owner representatives voluntarily petitioned for IAL designation thereby exempting their remaining lands from the C&C mapping process.

4. The State Department of Agriculture (DOA) and the State Office of Planning reviews the County's recommendations and provides comments to the LUC within 45 days of receipt of the County's recommendations.
5. The LUC issues a written decision to designate the County's IAL recommendations after a two-thirds majority vote by the LUC.

This is the exact process C&C followed. Absent from that process is any actual "consultation and cooperation" with affected landowners. LUC Rules § 15-15-125(b)(1). The only involvement of the Trust in this process has been receipt of the after-the-fact, vague and misleading IAL Notice.

Had C&C conducted basic outreach with the Trust, it would be apparent that the Palehua Property has never supported and is not capable of producing high agricultural yields, does not contribute to the State's economic base or produce agricultural commodities for export or consumption and is not necessary to the expansion of agricultural activities and income for the future. The Palehua Property is steeply sloped, rocky with extremely poor soil, insufficient access to water or related infrastructure and home to many historic resources that would be significantly impacted by productive agriculture.<sup>5</sup> The Trust is prepared to present this evidence against the designation should a hearing go forward, however, this would reward C&C for not satisfying the most basic requirements for IAL designation. Due to C&C's noncompliance, the evidentiary record is woefully inadequate and the proper course is to remand the matter to C&C for further proceedings and actual consultation and cooperation with affected landowners. The burden is on C&C—not the affected landowners—to develop the necessary record to support IAL designation.

## II. COUNTY IAL MAPPING PROCESS UNDER HRS § 205-47

HRS § 205-47 sets forth the process each county must follow in mapping IAL. Each county is directed to "map potential important agricultural lands within its jurisdiction based on the standards and criteria in section 205-44 and the intent of this part..." HRS § 205-47 (a). Under subparagraph (b), "[e]ach county shall develop maps...in consultation and cooperation with landowners..." (Emphasis added.) Upon identification of potential IAL, the counties shall take reasonable action to notify each landowner. HRS § 205-47(d). And, the planning departments shall report on the manner in which the important agricultural lands mapping relates to, supports and is consistent with "... (5) Representations or position statements of the owners whose lands are subject to the potential designation." HRS § 205-47(d)(5). Under State law, therefore, landowners are integral to the mapping process.

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<sup>5</sup> Soil Quality: Approximately:

- 97% of the soils are rated "Poor" (D) and "Very Poor" (E) under the Land Study Bureau (LSB) Detailed Land Classification System
- 65.5% is "Unclassified" under the Agricultural Lands of Importance to the State of Hawai'i (ALISH) classification system; 32.2% is classified as "Other;" and only 2.3% is classified as "Prime"

Topography: Over 72% of the land is comprised of slopes of 20% or greater.

Availability of Water: Approximately 90% of the land does not have a sufficient amount of water to support agricultural uses.

Current Agriculture Production: The capacity of the land to support cattle grazing is limited; the small number of cattle grazing on the land is largely for fire load suppression rather than active cattle ranching and production.

HRS § 205-44 sets forth the criteria for IAL designation which does not permit a "one criteria" approach:

(a) The standards and criteria in this section shall be used to identify important agricultural lands. Lands identified as important agricultural lands need not meet every standard and criteria listed in subsection (c). Rather, lands meeting any of the criteria in subsection (c) shall be given initial consideration; provided that the designation of important agricultural lands shall be made by weighing the standards and criteria with each other to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43...

(c) The standards and criteria shall be as follows:

- (1) Land currently used for agricultural production;
- (2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
- (3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
- (4) Land types associated with traditional native Hawaiian agricultural uses, such as taro cultivation, or unique agricultural crops and uses, such as coffee, vineyards, aquaculture, and energy production;
- (5) Land with sufficient quantities of water to support viable agricultural production;
- (6) Land whose designation as important agricultural lands is consistent with general, development, and community plans of the county;
- (7) Land that contributes to maintaining a critical land mass important to agricultural operating productivity; and
- (8) Land with or near support infrastructure conducive to agricultural productivity, such as transportation to markets, water, or power. (Emphasis added.)

The clear intent of the State law is for all IAL criteria to be considered and weighed to meet the constitutional purpose and statutory objectives and policies for IAL. The intent is not to be over-inclusive to placate public sentiment but to actually identify and select high-quality AG land so that incentives can be directed to viable agribusiness.

Critical to the entire process is the definition of IAL, i.e.: (1) lands capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology; (2) lands contributing to the State's economic base and producing agricultural commodities for export and local consumption; or (3) lands needed to promote the expansion of agricultural activities and income for the future, even if currently not in production. HRS § 205-42. The objective for identifying these important agricultural lands is "to identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations. *Id.* (emphasis added). In other words, IAL is not simply land upon which agricultural activities may be conducted but the highly productive lands that can support profitable and sustainable agricultural businesses.

Over designating IAL lands to include marginal lands unsuitable for intensive agricultural operations not only misdirects incentives intended for truly productive AG lands but also prevents ancillary uses that are