OFFICE OF PLANNING
STATE OF HAWAII

DAVID Y. IGE
GOVERNOR

MARY ALICE EVANS
DIRECTOR
OFFICE OF PLANNING

235 South Beretania Street, 6th Floor, Honolulu, Hawaii 96813
Mailing Address: P.O. Box 2359, Honolulu, Hawaii 96804

Telephone: (808) 587-2846
Fax: (808) 587-2824
Web: http://planning.hawaii.gov/

DTS 202105180606FU

May 20, 2021

TO: Daniel Orodenker, Executive Officer
State Land Use Commission

FROM: Mary Alice Evans, Director
Office of Planning

Mary Alice Evans

SUBJECT: Petitioner: City and County of Honolulu
City Council Resolution No. 18-233, CD1, FD1
Important Agricultural Lands on Oahu

Action: Designate Important Agricultural Lands for the City and County of Honolulu

The Office of Planning (OP) strongly recommends that the Land Use Commission (LUC) proceed expeditiously to adopt the City and County of Honolulu's (City) recommendations for lands to be designated as Important Agricultural Lands (IAL)—**in part**—for the reasons set forth herein.

1. Introduction

Article XI, Section 3 of the Hawaii State Constitution expresses the State's obligation to conserve and protect agricultural lands, and to identify Important Agricultural Lands needed to fulfill these purposes, as follows:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.
>
> Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action. (emphasis added)

This constitutional provision was approved by the voters of Hawai'i in 1978, following the passage of this language in the 1978 State Constitutional Convention. However, it was not self-executing and required the enactment of legislation to set the standards and criteria for how to accomplish the State's agricultural lands and agricultural self-sufficiency objectives.[1] In 2005, the Hawai'i State Legislature enacted Act 183 to implement Article XI, Section 3; and what is now Part III, Important Agricultural Lands, in Chapter 205, Hawaii Revised Statutes (HRS).

Part III declares that there is a compelling State interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use and agricultural sustainability. Part III also sets out IAL policy objectives, standards, and criteria for the identification and designation of important agricultural lands, and provisions for incentives for agricultural production on lands designated as IAL.

Part III allows private landowners to voluntarily designate their lands as IAL (see HRS § 205-45). After private landowners had at least three years to voluntarily propose their lands for IAL, the counties could propose maps of lands recommended for designation as IAL (see HRS § 205-47). Through the county process, more lands could be designated and protected for future generations. Separately, the State could submit a map of lands owned by the State for designation as IAL (see HRS § 205-44.5).

It is worth noting that almost 16 years after Act 183 was passed and 43 years after the 1978 Constitutional Convention, the LUC now has its first opportunity to move forward on county recommendations for IAL to complete the designation of IAL lands Statewide. No other county has submitted recommendations for IAL designation to the LUC; the City is the first.

IAL is defined in HRS § 205-42(a) as those lands:

- Capable of producing sustained high yields when treated and managed according to accepted farming methods and technology;
- Contribute to the State economic base and produce agricultural commodities for export or local consumption; and
- Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

To date, 136,489 acres Statewide have been designated as IAL by private landowners through the voluntary designation process (15,205 acres on O'ahu). This comprises about 37% of the lands Statewide rated as A, B, or C by the Land Study Bureau (LSB), and 22% of lands

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[1] See Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawaii 465, 476, n.22, 78 P.3d 1, 12, n.22 (2003).

Statewide rated as Prime, Unique, or Other by the Agricultural Lands of Importance in the State of Hawai'i (ALISH).

Designation of lands with agricultural production value is key to conserving and maintaining a resource base for agricultural, energy, and food sustainability for current and future generations of Hawai'i residents. OP has been charged by the Legislature with updating the State's 2050 Sustainability Plan for 2020 to 2030, and integrating sustainable development into land use planning. Sustainability means, in part, using Hawai'i's limited resources wisely in the present, while preserving those resources for future generations. One of those limited resources is highly productive agricultural land. IAL designation is a tool for protecting those lands for future generations who will be living with climate change and the need for a locally grown food supply as natural disasters threaten to isolate Hawai'i from imported food. O'ahu is especially vulnerable because almost 75% of Hawaii's residents live on O'ahu. Food grown on O'ahu does not need to be transported by air or water in the event of a natural disaster that could block access to State harbor and airports.

Accordingly, to address this compelling State interest, the process must be moved forward in this already overlong journey towards IAL designation. To achieve this, it is important to encourage counties to identify and propose lands for inclusion as IAL by providing a clear and expeditious process for them to do so.

To this end, OP recommends that the LUC act affirmatively to consider and adopt a portion of the City's recommendations for IAL designation. OP recommends as follows:

(1) At the hearing scheduled for May 26, 2021, the LUC:
   a. Determine that the City has met the statutory procedural requirements for submitting its plan; and
   b. Direct a public hearing be scheduled for the LUC to consider and adopt the City recommendations for IAL designation--in part--based on OP and DOA recommendations submitted to the LUC and public testimony; and

(2) At that next public hearing, OP recommends that the LUC exclude:

   (a) parcels less than two (2) acres from IAL designation, and

   (b) lands acquired by the State subsequent to completion of the City IAL project, as these lands are subject to a separate State lands IAL designation process in HRS Chapter 205.

Further, the LUC should defer action on those parcels whose landowners have submitted oral or written objections as of the date of this testimony.

Finally, the LUC should approve for rulemaking the remainder of those parcels recommended for IAL designation by the City.

2. The City has Met the Statutory Procedural Requirements for Submitting Its IAL Recommendations/Maps to the LUC.

In the process created by the LUC, the current hearing is for the purpose of determining whether the City's application has complied with the statutory procedural requirements. The answer to that question is clearly "**yes**."

The statutory requirements for drafting the City's IAL maps are set forth in HRS § 205-47, which sets forth two requirements: (1) the county must develop an "inclusive process for public involvement"; and (2) after identification of the lands to be recommended to the county council for inclusion as IAL, the county must "take reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands."

A. An Inclusive Process.

In this case, the City established and convened a Technical Advisory Committee of stakeholders including landowners, agencies, and agricultural interest groups to assist in reviewing and advising the City on the criteria and methodology for identifying and mapping IAL. The City then held three rounds of publicly-advertised community meetings, created a website with an interactive mapping application to explore the lands being recommended for designation, and held focus group meetings in the community with interested individuals and organizations.

B. Reasonable Action to Notify.

With respect to public notice, after identification of the lands to be recommended to the county council for inclusion as IAL, the statute requires the City to "take reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands." The standard for this notification is that it be reasonable, not perfect or ideal. Furthermore, the contents of the notification need only inform the owners "of the potential designation of their lands." Nothing more.

In this case, the City sent a letter to an owner for each TMK submitted to the City Council for inclusion as IAL. If a letter was returned, the City made a second effort after researching the owners and addresses. In this case, the two attempts at mailings were highly successful and more than "reasonable." The City then took it a step further beyond what was required and published a half-page advertisement and map regarding the possible inclusion of lands for IAL designation in the Honolulu Star-Advertiser on October 7, 2018.

The City, therefore, has met its statutory obligations on process. The LUC, while it retains broad authority to determine whether individual parcels meet or do not meet the eight criteria established in HRS § 205-44, does not have the authority to reject the City's proposed IAL recommendations because their process was not conducted in a manner that went beyond the plain requirements in State law in HRS § 205-47.

3. The LUC Consider State Recommendations for Exclusion or Deferral of Certain Lands from IAL Designation.

A. Exclusion of Lands.

OP strongly recommends that the LUC exclude two types of parcels proposed by the City for designation as IAL: (1) Lands owned by the State, as these are subject to a separate State lands IAL designation process under HRS § 205-44.5; and (2) Parcels of less than two (2) acres in size.

During the project, the City did remove lands owned by the State. But given the length of time between the adoption of the maps by the City Council and this hearing, the State has acquired other lands, and these lands should also be removed. Removal would be consistent with the intent in the City's Report. OP can obtain and provide those TMKs upon request.

OP strongly recommends that the LUC remove parcels of less than two (2) acres in size, pursuant to the comments and recommendation of DOA. The two-acre recommendation conforms to the minimum lot size of the City's AG-2, General Agricultural District zone, which is two (2) acres. The AG-2 zoning designation is one of the less restrictive of the City's agricultural zones, and generally applies to lands that are not as highly rated for agricultural productivity as those with AG-1, Restricted Agricultural District zoning.

DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable. OP notes that land areas with small lots under separate ownership have dimished resource value for long-term agricultural use due to significant barriers to the realization of widespread investment in commercial farming in these areas. These barriers cascade from individual landowner decisions to farm or not to farm, which

(1) create holes in the agricultural use pattern, (2) increase the likelihood of non-agricultural uses and investments, and (3) increase the potential for conflicts between farming and non-farming interests over perceived farming nuisances. OP thus concurs with DOA's recommendation to exclude all lots less than two (2) acres in area.

The elimination of parcels of less than two (2) acres will remove a number of parcels and landowners currently proposed for designation, including a number of people who have testified in this LUC proceeding. Enclosed is the list of TMK numbers approved by the City Council, with those parcels less than two acres highlighted. Of the 1,781 parcels recommended by the City in its Exhibit B, 709 parcels are proposed for deletion for being less than two acres.[2] This still leaves, however, over 40,000 total acres for inclusion into IAL, the designation of which will be a significant step forward in protecting lands for future agricultural use.

We acknowledge that not all remaining IAL parcels will be contiguous. HRS § 205-44, which contains the standards and criteria for the identification of important agricultural lands, does not require that the City parcel recommendations be contiguous for inclusion as IAL. Spot zoning is not a concern in this situation. Given the advances in GIS technology, the mapping of lands with individual parcels removed is not difficult, and the appearance of gaps in the resulting map should not be a factor in the LUC's decision. Consequently, the deletion of these smaller parcels is an appropriate use of the LUC's authority in determining which lands should be included in IAL.

B. Deferral of Lands

There are some parcels two acres or larger for which the owner continues to object to its inclusion. Some of these parcels are in agricultural production or otherwise worthy of designation. So, OP is not prepared to agree with every objection. But decision-making on these parcels for which oral or written objections have been submitted as of the date of this testimony should be deferred, and excluded from the LUC's rulemaking proceeding at this time in order to provide the owners additional time to better understand the limited impact of an IAL designation, and potential benefits from an IAL designation on their property. It also allows for a closer review of the individual circumstances for each parcel, and the number of these additional cases will be reduced by the elimination of parcels less than two acres. A deferral will give more time for all of this. Perhaps most importantly, deferral of these parcels allows the LUC to focus its attention on approval of those parcels for which there is no objection. It will allow the LUC to move this process forward, and to identify at least some lands that should be protected for future generations.

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[2] OP is willing to work with the City to verify and confirm the specific parcels based on size.

C. Action Hearing.

OP recommends that the LUC next schedule a hearing in which it will approve a part of the City IAL recommendations for rulemaking as described above. This will provide time for the LUC to review the additional information provided by OP as to exclusion of parcels less than two (2) acres and the exclusion of State lands. The hearing notice may also inform the public whether their specific parcels will be excluded from rulemaking, potentially alleviating their anxiety before any rulemaking hearing. Any additional concerns can be dealt with in the context of the rulemaking hearing itself.

OP recommends that the LUC then schedule a rulemaking hearing on the adoption of the City IAL recommendations in part, in conformance with LUC rules, HAR § 15-15-125(c):

> "Any hearing under this section . . . shall be conducted as a rulemaking proceeding in accordance with section 15-15-109 and held in the relevant county."

4. A Contested Case Hearing is Not Required.

In analyzing whether due process requires a contested case hearing, one must look at the vested interest being deprived and the process used to consider it.

A. There are few if any interests being deprived.

IAL is a resource overlay. It identifies for policy makers those lands of agricultural production value for which conservation would help assure the availability of good agricultural lands for agricultural use now and into the future. IAL designation provides significant incentives in identifying which lands to direct State investments in irrigation infrastructure, State funds or grants for agricultural support facilities like agricultural processing plants, expedited permitting for agricultural structures, and agricultural loans and outreach programs.

IAL is not a district classification. It is not zoning. It does not dictate use or require anyone to farm where they previously were not required to. There have been suggestions that the IAL designation will require a change in the allowable uses. That is incorrect. If renewable energy is allowed on the land now, it will still be allowed after the IAL designation. The incentive enacted in HRS § 205-45.5 may require that the farm dwelling be occupied by the farmer or farmer's employee who are working the land. [3] But from a regulatory perspective, this

[3] Contrary to public testimony, a farmer's two-year old child is not required to work on the farm in IAL. As long as the farmer is working on the land, the farmer's immediate family may also reside within the farm dwelling. In fact,

is no different from existing law that requires all farm dwellings to be used in connection with a farm.

See HRS § 205-4.5(a)(4). For people who want to live in the Agricultural District in the absence of a farm, that is a violation of law regardless of whether the land is designated IAL or not. [4] The allowable uses do not change.

Because the allowable uses do not change, there are no impacts to other rights (e.g., native Hawaiian gathering rights), a significant distinguishing characteristic from other land use petitions. Furthermore, there cannot be any consideration of Urban District lands for designation as IAL. See HRS § 205-47(a) ("except lands that have been designated . . . for urban use").

There are perhaps two minor limitations on IAL lands. The first is that houses may not occupy more than 5% of the total land area controlled by the farmer. On two (2) acres of agricultural zoned property, the house could be as large as 4,356 square feet, which is more than enough for any farm family.

The second limitation is that any State reclassification or county rezoning requires a two-thirds majority vote to change the agricultural classification or zoning. On the State level, a two-thirds majority is already required for reclassification. See HRS § 205-4(h). But it will require an affirmative vote of two-thirds of county council members to change the county agricultural zoning of IAL land. See HRS § 205-50(f). There is not, however, a vested constitutional interest in future process.

With these small limitations, there are significant potential tax credits and other benefits available to farmers working on IAL-designated agricultural lands. See HRS § 205-46, 205-46.5, and 205-51. Incentives include agricultural loan guarantees, IAL qualified agricultural tax credits, and priority given to permits for agricultural processing facilities. Consequently, there are few if any vested rights affected by the IAL designation.

B. Rulemaking provides substantial process.

The LUC deliberates and acts on the county recommendations for IAL only after the LUC conducts a public hearing on the matter as it would with rulemaking. Consequently, the LUC holds a meeting at which it decides to set the matter for a public hearing. Public comment can be made at this first publicly noticed meeting. The second decision-making hearing on the

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the immediate family members can even live in a different unit. See HRS § 205-45.5(1) ("the immediate family members of a farmer may live in separate dwelling units situated on the same designated land").

[4] Even if the IAL designation changed the allowable uses, which it does not, existing legal uses may continue as non-conforming uses. HRS § 205-8.

mapping recommendations itself must also go through a separate and extensive notice requirement, public testimony must be taken, and upon request the LUC is required to provide a concise statement of the principal reasons for the decision. See HRS § 91-3. Following that, the decision itself must be made at a publicly noticed meeting, where public comment is again allowed.

Given the little if any vested interest from the recognition of this resource overlay, these procedures for rulemaking will meet any due process challenge.

C. The *Town* decision does not apply.

The 1974 Hawaii Supreme Court decision in *Town v. Land Use Commission* found that a proposed district boundary amendment classification dealt with the change of a classification for a landowner's particular parcel and impacted particular parties. Pursuant to statute, this required a specific case analysis of the particular parcel as to its impacts on affected parties. Unlike the *Town* decision, the county IAL mapping designation is a regional resource overlay done for the county as a whole, and does not confer entitlements or major restrictions on any specific parcel. Rather the mapping process looks at agricultural land productivity value for the entire county, and pursuant to its statutory criteria, identifies the best lands to conserve so that the State can meet its constitutional mandate to promote agricultural sustainability and the future availability of agriculturally suitable lands.

Like the county general plans and community development plans that regionally identify lands that should be placed into various land use categories, the IAL designation regionally identifies lands that provide an important agricultural resource to the State. Like general plans and community development plans, these regional decisions cannot be made through an individual, parcel-by-parcel contested case process, and there is nothing in the Constitution or the *Town* decision that requires a different conclusion.

5. Conclusion

OP believes that the designation of IAL lands Statewide provides the LUC with an important resource map—an agricultural land plan if you will—to guide the LUC in its deliberations on petitions for district boundary amendments and special permits. A comprehensive IAL map enables the LUC to consider the impact of proposed reclassifications and permits on the resource base in the surrounding region, and allows the LUC to make an informed decision as to the potential consequences of that decision on agricultural viability and the sustainability of farming in a region or island as a whole.

For all these reasons, OP strongly recommends that the LUC determine that the City mapping process and IAL submittal meets the procedure requirements in Part III, HRS Chapter 205, and order the City's proposed IAL recommendations be set for adoption, in part, pursuant to a public LUC hearing to be scheduled as soon as possible. This would enable the LUC to move the State forward in fulfilling the constitutional mandate to designate IAL in support of long-term agricultural sustainability and increased resilience for Hawai'i's residents and communities. For the upcoming LUC hearing on May 26, 2021, OP respectfully requests an opportunity to provide an oral presentation of our supplemental comments and recommendations expressed in this Memorandum

c: City and County of Honolulu Council Services
City and County of Honolulu Department of Planning and Permitting
Department of Agriculture

Enclosure: City Council Resolution No. 18-233, Exhibit B, Parcels Less Than Two Acres