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May 21, 2021

State of Hawaii Land Use Commission
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Subject: Meeting of May 26, 2021, Agenda Item V. - City and County of Honolulu Important Agricultural Lands ("IAL") Designation

Dear Chair Scheuer and Members of the Land Use Commission ("Commission"):

Waihonu North, LLC ("Waihonu North") and Waihonu South, LLC ("Waihonu South") (collectively "Waihonu") appreciate the opportunity to provide written comments regarding the Commission's continued hearing on the City and County of Honolulu's ("County") recommendation ("Recommendation") regarding its proposed designations for Important Agricultural Lands ("IAL"). Waihonu North and South currently own and operate photovoltaic ("PV") renewable energy projects on TMK 9-5-1:86 (North) and TMK 9-5-1:87 (South) ("Solar Projects") in Mililani, Oahu. The Solar Projects include a 5,000 kilowatt ("kW") PV System (North) and a 1,500 kW PV System (South), both of which have been operational since July of 2016. The projects provide clean, renewable energy through Hawaiian Electric Company's ("HECO") Feed-In Tariff Program, which was enacted to encourage the addition of more renewable energy projects by providing an essential way for individuals, small businesses, governmental entities, and other developers to sell renewable energy to HECO to achieve the state's Renewable Portfolio Standards mandate.

We are in receipt of a notice from the Commission that parcel TMK 9-5-1:86 is included in the County's proposed IAL designations. While we do not believe that we received a similar notice for parcel TMK 9-5-1:87, we believe this second parcel is also proposed to be designated as IAL. Waihonu North and South are long-term sublessees of the land on which the Solar Projects are situated and, along with the landowner Honbushin which has already documented its objections to the Commission, have significant concerns regarding the proposed IAL designation on the Solar Projects and other renewable energy projects in the State.

The County's filings with the Commission demonstrate that the County did not consider renewable energy projects in the State and the reality that such projects are sited on agricultural land ("Ag Land") when preparing its Recommendation. This oversight could seriously hamper the State and County's efforts to fulfill their policy goals of divestment from fossil fuels for energy generation and the reduction of greenhouse gas ("GHG") emissions to combat global warming. We believe this oversight was caused, in part, through the County's truncated and insufficient

landowner consultation and public participation processes and a fundamental misunderstanding of the burdens and uncertainty that an IAL designation will cause for all landowners and, specifically, for renewable energy projects. In summary, Waihonu objects because:

- The County failed to consider the critically important need for renewable energy projects that often are allowed to be sited on Ag Land, to reach the State's mandated 100% renewable portfolio standard and carbon neutrality by 2045 and to balance these mandates with IAL designations;
- The County failed to consider and weigh each of the standards and criteria required under HRS § 205-44(c);
- The County failed to consider that the IAL designation currently imposes burdens and restrictions upon landowners and their use of their property;
- The County failed to consider that the IAL designation will very likely involve future restrictions upon landowners not yet adopted by the County;
- The County failed to meaningfully consult and cooperate with landowners and other groups under HRS § 205-47(b);
- The County's notices sent to landowners did not provide sufficient information to allow the landowner to meaningfully engage in the IAL designation process;
- The County did not send notices to all long-term lessees and did not post notices on the land proposed to be designated as IAL to notify long-term lessees of the potential IAL designation;
- The County failed to meaningfully respond to individual landowners' objections to the IAL designation; and
- The County did not include any renewable energy developer or owner in the TAC or otherwise meaningfully consult with renewable energy developers in the IAL designation process as required under HRS § 205-47(c).

The Renewable Energy Mandate in Hawaii.

The State of Hawaii has adopted ambitious and vitally important targets which direct the State to increase the amount of renewable energy in its energy portfolio with the goal of reaching a one hundred percent (100%) renewable portfolio standard ("RPS") and achieving carbon neutrality by 2045.[1] Achieving these targets requires the cooperation and coordination of the federal and state governments, counties, utilities, and the private sector. Currently, one of the primary mechanisms through which these policy objectives can be achieved are renewable energy projects like Waihonu's Solar Projects that displace traditional GHG-emitting fossil fuel energy generation.

[1] See HRS §§ 225P-5 and 269-92.

Renewable energy solar projects are vital to the State's reaching its RPS and carbon neutrality mandates. In HECO's most recent request for proposals for new renewable energy generation last year, the projects chosen were dominated by solar energy projects and included:

- On Oahu, eight solar-plus-storage projects and one standalone storage project totaling approximately 287 MW of generation and 1.8 GWh of storage;
- On Maui Island, three solar-plus-storage projects and one standalone storage project totaling approximately 100 MW of generation and 560 MWh of storage; and
- On Hawaii Island, two solar-plus-storage projects and one standalone storage project totaling approximately 72 MW of generation and 492 MWh of storage.[2]

Simply stated, Hawaii must continue to invest in and support renewable energy projects like the Waihonu projects if the State is going to achieve its RPS and carbon neutrality mandates.

Renewable energy projects are regularly, if not primarily, sited on land classified as Ag Land given the specific land attributes required to support a successful and cost-effective renewable energy project. Such projects are often large - spanning tens if not hundreds of acres - and cannot be easily sited within residential or urban land use districts. Solar projects specifically require large and relatively level parcels of land upon which to place solar panels, and they also require unobstructed access to intense sunlight. Given these and other practical constraints, Ag Land is often the best and only option for siting these important projects. The State Legislature has recognized the necessity for siting renewable projects on Ag Land in recent years, and particularly after the 2005 adoption of the IAL statute, through amendments to the permissible uses on Ag Land contained in Hawaii Revised Statutes ("HRS") § 205-4.5, which currently permits solar energy, cultivation of crops for bioenergy and biofuel processing, wind energy, geothermal, and hydroelectric facilities on Ag Land. It is undeniable, as recognized by the Legislature through its amendments to HRS § 205-4.5, that the State has a compelling interest in permitting renewable energy projects to be sited on Ag Land and that IAL designations need to be in sync with this compelling interest.

The IAL Designation and Policy Goals.

In 2005, the State Legislature created the IAL designation and processes through which such a designation could be granted or imposed upon land, which was codified at HRS Chapter 205-41, *et seq.* ("IAL Subchapter"). The intent of the IAL Subchapter is to serve the State's interest in,

> conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of:
>
> (1) Conserving and protecting agricultural lands;

[2] See Hawaiian Electric selects 16 projects in largest quest for renewable energy, energy storage for 3 islands, at https://www.hawaiianelectric.com/hawaiian-electric-selects-16-projects-in-largest-quest-for-renewable-energy-energy-storage-for-3-islands (last accessed 5/20/21).

(2) Promoting diversified agriculture;

(3) Increasing agricultural self-sufficiency; and

(4) Assuring the availability of agriculturally suitable lands,

pursuant to article XI, section 3, of the Hawaii State Constitution.

HRS § 205-41. The objective of the identification of IAL 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." HRS § 205-42(b). To achieve this objective, the State must, among other things, "[p]romote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses." HRS § 205-42(b)(1).

The IAL Subchapter also establishes policies which the state and counties must promote through their own "agricultural policies, tax policies, land use plans, ordinances, and rules." HRS § 205-43. The counties must adopt policies, ordinances, and rules that, among other things:

(2) <u>Discourage</u> the fragmentation of important agricultural lands and <u>the conversion of these lands to nonagricultural uses</u>;

(3) <u>Direct nonagricultural uses and activities from important agricultural lands to other areas</u> and ensure that uses on important agricultural lands are actually agricultural uses;

(4) <u>Limit physical improvements on important agricultural lands</u> to maintain affordability of these lands for agricultural purposes;

HRS § 205-43 (emphasis added).

<u>The County's Process Failed to Recognize or Consider the Balance between the State's Interest in its RPS, Carbon Neutrality, and IAL</u>.

While secondary agricultural activities can sometimes occur on lands where renewable energy projects are sited, it is apparent that a stark tension exists between the IAL Subchapter's policy directive that IAL should be used for agricultural uses only and that nonagricultural uses and activities should be directed to other lands, on the one hand, and the State's renewable energy and carbon neutrality policies, on the other. Unfortunately, the County utilized a truncated review process to develop its Recommendation that failed to follow the process required by law and that has resulted in a Recommendation that ignores the significant interest of the State, the County and renewable energy development in siting renewable energy projects on Ag Land.

The law directs the County to "identify and 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). HRS § 205-44 establishes the standards and criteria that the County must use to identify proposed IAL. HRS § 205-44(a) states that "[t]he standards and criteria in this section shall be used to identify important agricultural lands" and "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." The standards and criteria that must be considered and weighed before the County can make its IAL recommendation include:

> (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;
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> (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
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> (8) Land with or near support infrastructure conducive to agricultural productivity, such as transportation to markets, water, or power.

HRS § 205-44(c).

The County explains in its Recommendation, without further explanation or support, that it had the discretion to deviate from the process established by the Legislature by statute. Rather than consider each of the eight criteria required by statute, the County decided to use three "priority criteria," and the existence of only one of the priority criteria was sufficient to merit an IAL designation. Recommendation at 14-16. This procedure is plainly inconsistent with what the statute requires, which is that the County must consider and weigh each of the eight criteria established by statute. The County's choice to require only one priority criteria is also contrary to the spirit and intent of the IAL Subchapter which recognizes that multiple factors are relevant and must be considered and weighed before a decision can be made to recommend land as IAL.

At the Commission's previous meeting on April 28-29, 2021 ("April Meeting"), the County appears to have indicated that it wished to cast a wide net and capture as much potential land for IAL to provide small landowners the opportunity to have their land designated as IAL without significant expense given the various incentives available to IAL. The County maintained at the April Meeting that there were only benefits and no attendant burdens associated with the IAL designation and that nothing regarding the permissible use of such land would change for the landowner as a result of the IAL designation. Respectfully, this position is untenable, directly contrary to the IAL Subchapter, and potentially very harmful to Waihonu and other renewable energy projects on Oahu.

The IAL Designation was Designed to Impose Restrictions on the Permissible Use of IAL.

The County's claim that it cast a wide net for its IAL recommendation because of the associated incentives for such a designation and the absence of any burdens upon the landowners is not supportable. The April Meeting established that there are already statutory burdens placed upon IAL through the designation itself and without further County action. These existing additional burdens include further restrictions on farm dwellings that are not currently imposed by the County's Land Use Ordinance ("LUO") (HRS § 205-45.5) and standards and criteria for reclassification or rezoning of IAL that must be performed by the Commission (HRS § 205-50).

Just as critical, there is great uncertainty regarding what future restrictions the County will impose on IAL to comply with the IAL Subchapter. Currently, insofar as Waihonu has been able to discern, the County's LUO does not specifically address IAL except for a reference in the County's AG-1 zoning classification. See LUO § 21-3.50(b).[3] As recognized in Honbushin's written comments, it is unclear whether AG-2 zoning will change to AG-1 land upon IAL classification, which would impact the permitted uses of the property.

Just as important, an IAL designation, once imposed, will subject IAL to future regulation by the County that will undoubtedly be adopted to comply with the Legislature's policy directives in HRS § 205-43. As already discussed, the policies direct the counties to avoid the use of IAL for anything but agricultural uses, to discourage the fragmentation of such lands, and limit improvements upon such lands. See HRS § 205-43. We cannot know now what future changes will occur to the County's LUO to protect IAL as directed by the Legislature. However, we must assume that the County will comply and impose further restrictions on the use of such land as indicated in the IAL Subchapter, which will only make the operation and development of renewable projects that much more difficult. The current unclarity regarding what those restrictions will be, does not negate that the IAL designation is designed to further restrict non-agricultural uses from such IAL. The polices and directives that the Legislature has instructed

[3] LUO § 21-3.50(b) states that "[t]he intent of the AG-1 restricted agricultural district is to conserve and protect important agricultural lands for the performance of agricultural functions by permitting only those uses which perpetuate the retention of these lands in the production of food, feed, forage, fiber crops and horticultural plants. Only accessory agribusiness activities which meet the above intent shall be permitted in this district."

must be applied to IAL through the County's LUO and other regulatory pathways places at risk current and future renewable energy projects sited on Ag Land.

Landowners Due Process Rights are Impacted by the IAL Designation and the Process Followed by the County Did Not Provide Reasonable Notice or a Meaningful Opportunity to be Heard.

Having established that the IAL designation currently restricts and will certainly in the future further restrict a landowner's ability to use his or her land, due process requires that the landowner be provided sufficient notice and an opportunity to be heard before any such designation may be imposed. "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

The IAL Subchapter has thorough procedural requirements that must be followed by the County before the County can submit its proposed IAL designations to the Commission. HRS § 205-47 provides the following:

> (b) Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in consultation and cooperation with landowners, the department of agriculture, agricultural interest groups, including representatives from the Hawaii Farm Bureau Federation and other agricultural organizations, the United States Department of Agriculture--Natural Resources Conservation Service, the office of planning, and other groups as necessary.
>
> (c) Each county, through its planning department, shall develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process. The planning departments may also establish one or more citizen advisory committees on important agricultural lands to provide further public input, utilize an existing process (such as general plan, development plan, community plan), or employ appropriate existing and adopted general plan, development plan, or community plan maps.
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> …
>
> Upon identification of potential lands to be recommended to the county council as potential important agricultural lands, the counties shall 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.
>
> In formulating its final recommendations to the respective county councils, the planning departments shall report on the manner in which the important agricultural lands mapping relates to, supports, and is consistent with the:

> (1) Standards and criteria set forth in section 205-44;
>
> (2) County's adopted land use plans, as applied to both the identification and exclusion of important agricultural lands from such designation;
>
> (3) Comments received from government agencies and others identified in subsection (b);
>
> (4) Viability of existing agribusinesses; and
>
> (5) Representations or position statements of the owners whose lands are subject to the potential designation.

(Emphases added). The County's consultation processes were wholly insufficient to protect the significant interest of landowners in the land use restrictions imposed upon their properties.

Consultation and Cooperation with Landowners and Public Involvement.

The County was required to draft its IAL Recommendation "in consultation and cooperation with landowners … and other groups as necessary." HRS § 205-47(b). The Commission has in its record the notices sent out by the County to affected landowners through regular US mail, which were apparently intended to satisfy this requirement. The notices include (1) Landowner Notice and map of Proposed IAL, dated December 29, 2016 ("2016 Notice");[4] (2) Final Landowner Inclusion Notice, dated November 8, 2017 ("2017 Notice");[5] and (3) Postcard Reply.[6] The 2016 Notice solicits written comments from landowners, but does not explain why the County has found that the landowner's land merits an IAL designation. The 2016 Notice does not inform landowners they can seek an exemption or how to seek an exemption. The 2017 Notice is a final notice that does not solicit comments; rather, the postcard indicates that the maps are final and implies that there is no further recourse. The postcard reply is apparently an automatic response mailed by the County if a comment from a landowner was received and does not address the landowner's specific comments or concerns. The County cannot plausibly claim that this process constitutes "consultation and cooperation with landowners" required by HRS § 205-47(b).

The landowner from which Waihonu leases its land is Religious Corporation Honbushin and Honbushin International Center ("Honbushin"). Honbushin's experience with the County is illustrative of this fundamentally flawed and inadequate process utilized by the County. Honbushin submitted its own written testimony to the Commission, dated April 27, 2021, in which Honbushin objected to the proposed IAL designation and explained its previous interactions with the County during the IAL designation process.[7] Honbushin explains in its

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[4] See https://luc.hawaii.gov/wp-content/uploads/2021/04/Landowner-Notice-and-Map-of-Proposed-IAL-12-16.pdf
[5] See https://luc.hawaii.gov/wp-content/uploads/2021/04/Final-Landowner-Incl-Notice-2.pdf
[6] See https://luc.hawaii.gov/wp-content/uploads/2021/04/2018-04-04-Postcard-Reply.pdf
[7] See Honbushin's written comments, dated April 27, 2021, at https://luc.hawaii.gov/wp-content/uploads/2021/04/IAL-public-testimony-Honbushin-Interational-Corp.pdf

written comments that it objected to the IAL designation in 2017 and was told that it would receive a response, but no response was provided by the County.

Because the County did not engage in a meaningful consultation and cooperation process required by statute, the County cannot satisfy its obligation to the Commission under HRS § 205-47(d). HRS § 205-47(d) instructs:

> In formulating its final recommendations to the respective county councils, the planning departments shall report on the manner in which the important agricultural lands mapping relates to, supports, and is consistent with the:
>
> (1) Standards and criteria set forth in section 205-44;
>
> (2) County's adopted land use plans, as applied to both the identification and exclusion of important agricultural lands from such designation;
>
> (3) Comments received from government agencies and others identified in subsection (b);
>
> (4) Viability of existing agribusinesses; and
>
> (5) Representations or position statements of the owners whose lands are subject to the potential designation.

(Emphasis added). The County's consultation processes did not adequately solicit representations or positions statements of affected landowners (or long-term lessees) of proposed IAL. Appendix E to the Recommendation is what the County claims satisfies the requirement that its Recommendation relates to, supports or is consistent with representations or positions statements of owners. See Recommendation at 12. Appendix E shows that Honbushin submitted an objection to the IAL designation because Honbushin "fears that the City will impose stricter requirements for AG use on AG properties with an IAL designation." The only response indicated in the chart is "No change; due to context and critical mass." See Appendix E at 10. It is unclear to Waihonu what this means. The County failed to engage meaningfully with Honbushin, and Honbushin never received any explanation or clarification from the County regarding its concerns and objections to the proposed IAL designation. Further, Honbushin was never afforded an opportunity to respond to the County's disagreement with its objection. At the very least, landowners had to be provided a meaningful opportunity to consult and cooperate with the County in its decision-making, which is what is required by HRS § 205-47(b), and is something that the County never provided.

In addition, to its knowledge, Waihonu never received notices from the County that the land upon which it is a long-term lessee was proposed to be designated as IAL. Waihonu's lease term for the land upon which its Solar Projects are situated began in April of 2014 and will run for at least twenty years. The first notice Waihonu received was the notice from the Commission, dated April 12, 2021, informing landowners of the Commission's April 28-29 meeting. Waihonu

submits that long-term lessees like Waihonu that have significant projects sited on agricultural land is a group with whom consultation and cooperation was necessary under HRS § 205-47(b). Similarly, to its knowledge, Waihonu never received any invitation to a public meeting regarding the County's IAL designation process. It is also unclear why Waihonu only received notice from the Commission regarding TMK 9-5-1:86 and received no such notice regarding TMK 9-5-1:87.

These oversights by the County were compounded by the County's failure to include any renewable energy project developer, owner, or operator in its Technical Advisory Committee ("TAC"), which appears to have included only one non-renewable energy landowner. See Recommendation at 5. As previously noted, renewable energy projects represent a critically important industry that uses Ag Land. The County's failure to consult with such stakeholders has resulted in a Recommendation to the Commission for designation of IAL that could have disastrous consequences for the State's renewable energy sector and that will undermine the State's carbon neutrality goals. Waihonu respectfully submits that consultation with renewable energy developers through the TAC and through other public consultation processes could have helped the County to avoid a Recommendation to the Commission that is fundamentally flawed. The Recommendation is fundamentally flawed because it was developed without significant landowner consultation and cooperation, without any input from renewable energy developers, and without sufficient opportunities for other engagement by the public, which were both required by law.

Waihonu does not believe the Commission can or should accept the County's Recommendation as the County has not satisfied the important and rigorous landowner and public consultation processes required by law. Waihonu respectfully suggests that the Commission remand this matter back to the County and instruct the County to meaningfully engage and consult with landowners and make whatever revisions necessary to its proposed IAL designations that result from this further consultation with landowners, renewable energy developers, and additional opportunities for public involvement.

Thank you for the opportunity to provide these comments.

Sincerely,

Laurent Nassif

Laurent Nassif, Senior Director Waihonu North, LLC & Waihonu South, LLC

cc: Chief Clerk Riley Hakoda (riley.k.hakoda@hawaii.gov)