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September 23, 2021

Jonathan Likeke Scheuer, Ph.D.
Chair, Hawai'i State Land Use Commission
P. O. Box 2359
Honolulu, Hawai'i 96804

Re: Request for Formal Publishable Opinion regarding City and County Important Agricultural Land Recommendation made pursuant to Section 205-47 Hawaii Revised Statutes and the Application of Section 205-44(c) criteria to its Recommendation

Dear Chair Scheuer:

This letter responds to your letter dated June 10, 2021, in which you requested a formal legal opinion regarding the Land Use Commission's ("LUC") consideration of the City and County of Honolulu's ("City") Important Agricultural Land ("IAL") recommendation made pursuant to Hawaii Revised Statutes ("HRS") section 205-47.

Our response is covered by the attorney-client privilege.[1] The privilege belongs to you as the client. If a waiver of the privilege is being considered, we recommend you consult with us prior to waiving the privilege so a full analysis and discussion can occur regarding the potential consequences of the waiver.

I. Questions Presented and Short Answers[2]

1. Whether the City (or any county) in making an IAL recommendation can rely on an application of only some of the criteria in 205-44(c) to lands in the agricultural district?

   Short Answer: The term "rely" does not entirely reflect how the criteria are to be considered. The City must weigh all eight standards and criteria in its process of identifying IAL lands but may base its identification and recommendation of IAL lands on only some or even just one of those standards and criteria.

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[1] This letter does not constitute a formal attorney general opinion issued pursuant to HRS § 28-3.

[2] Some of the questions have been re-worded for clarity.

2. Alternatively, must it apply all eight of the criteria contained in Section 205-44(c) to every individual parcel in the Agricultural District and formulate the recommendations on that basis?

   Short Answer: No. The City does not need to apply or weigh all eight standards and criteria on a parcel-by-parcel basis. Rather, it may do so on a county-wide or regional basis.

3. Whether a Commissioner would have personal liability if the LUC takes an action contrary to oral or written advice from deputy attorneys general on an interpretive, non-procedural issue.

   Short Answer: No, so long as a Commissioner does not act with a malicious or improper purpose. The LUC Commissioners have qualified immunity from State civil suits under HRS § 26-35.5 so long as (1) they do not act with a malicious or improper purpose and (2) the State is not a plaintiff in the civil suit. Therefore, whether qualified immunity could be lost if an LUC Commissioner takes an action contrary to legal advice from a deputy attorney general would depend on whether the facts and circumstances of a particular situation, as well as the legal advice given, demonstrate malicious or improper purpose by an LUC Commissioner. Moreover, LUC Commissioners also may have absolute immunity under Hawai'i case law for actions taken in a quasi-judicial capacity. We regret any misunderstanding of the advice given during executive session in response to statements made regarding personal liability of the LUC Commissioners.

II. Background

Article XI, section 3 of the Hawai'i State Constitution expresses the State's obligation to conserve and protect agricultural lands, and to identify IAL 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. <u>The legislature shall provide standards and criteria to accomplish the foregoing.</u>
>
> 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. It was not self-

executing, however, 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.[3] 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 HRS Chapter 205.

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 IAL, 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). Part III also provides a mechanism for the counties to propose lands for IAL designation (*see* HRS § 205-47). Separately, the State can submit a map of lands owned by the State for IAL designation (*see* HRS § 205-44.5).

The county IAL designation process has two steps. First, the respective county councils adopt maps of potential IAL lands recommended by the county planning department. The recommendations are based on statutory IAL criteria, land use plans, government and public input, viability assessments, and representations or position statements of potentially affected landowners. HRS § 205-47. Second, the LUC reviews the county council maps of recommended IAL lands (HRS § 205-48) and may designate IAL lands based on the following: (a) the proposed maps from the county; (b) prior declaratory orders designating IAL lands through the voluntary process; (c) landowner representations and position statements; and (d) "any other relevant information[.]" HRS § 205-49(a). The county process must also include an independent review by the LUC of the extent to which the proposed IAL lands meet the statutory criteria discussed below and a determination that the IAL designation is necessary to meet the broader objectives and policies for IAL. *Id.*

On April 21, 2021, the City was the first county to submit its recommendation for IAL designation. HRS § 205-47. A review of the City Council maps of recommended IAL lands is currently pending before the LUC. The LUC evaluation will assess the degree to which: (a) the City's recommendations result in an identified resource base that meets the IAL definition and broader IAL objectives and policies; and (b) the City has met the minimum standards and criteria for the identification and mapping of IAL lands. HRS § 205-48. This provides the context for addressing the foregoing questions from the LUC.

III. Analysis

A. Standards and Criteria Under HRS § 205-44

The county IAL process set out in HRS § 205-47 requires the county to "identify and

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

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). Section 205-44(c), HRS, lists eight standards and criteria and HRS § 205-44(a) provides clarification on the application of those standards and criteria. Specifically:

> (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. (Emphasis added).

The first question in your request states: "Whether the City (or any county) in making an IAL recommendation can rely on an application of only some of the criteria in 205-44(c) to lands in the agricultural district?" (Emphasis added). Based on our understanding of the issue, we rephrase your question into two parts. First, whether a county must weigh all eight standards and criteria. Second, whether a county, in identifying potential lands to be recommended for inclusion as IAL, may base its designation on fewer than all eight standards and criteria in HRS § 205-44(c). We answer both questions in the affirmative.

Our answers are based on a plain reading of the statutory language. Where a statute is clear and unambiguous, there is no reason to look beyond the statutory language. *State v. Reis*, 115 Hawai'i 79, 84, 165 P.3d 980, 985 (2007). Section 205-44(a), HRS, includes a proviso that the IAL designation be made by "weighing the standards and criteria with each other[.]" Our reading of the plain language of the statute, therefore, is that it requires all eight standards and criteria to be "weighed" with each other. The City was therefore required to consider all eight criteria. *See e.g.*, Appendices B, F, and G of the City and County's IAL Final Report.

After weighing the eight criteria, however, HRS § 205-44(a) also states that lands ultimately identified as potential IAL lands do not need to meet every standard and criteria. The statute further elaborates by stating that lands meeting any of the criteria will be given initial consideration. This clarifies the legislative intent that meeting just one criterion is sufficient for the City to include lands within its recommendation and mapping of potential IAL lands.

The LUC evaluation of the City's recommendations and maps should consider the degree to which the City has weighed the eight criteria. This evaluation will provide valuable information for the LUC in making its own assessment of the statutory criteria and ultimate designation of IAL lands. *See* HRS § 205-49, Hawaii Administrative Rules ("HAR") § 15-15-126(a). If the LUC, in its discretion, determines that the City has not adequately weighed certain criteria or that certain lands should be excluded from IAL designation, the LUC may remand the matter back to the City or conduct a more thorough inquiry of its own into whether IAL

designation is warranted. HAR § 15-15-125(d). The LUC ultimately determines whether to adopt the City's recommendations and maps to designate lands as IAL.

B. County-Wide/Regional or Parcel-by-Parcel Basis

In situations where the statutory language is unclear and ambiguous, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1). Additionally, "[t]he reason and spirit of the law, and cause which induced the legislature to enact it, may be considered to discover its true meaning." HRS § 1-15(2). Statutory construction, however, must not create an absurd or unjust result. HRS § 1-15(3); *Nihi Lewa, Inc. v. Dep't Of Budget and Fiscal Servs.*, 103 Hawai'i 163, 168, 80 P.3d 984, 989 (2003).

Here, an ambiguity exists as to whether the weighing of the eight standards and criteria required by HRS § 205-44(a) must occur on a county-wide/regional or parcel-by-parcel basis. Neither HRS chapter 205 nor the LUC's administrative rules clearly indicate the answer to this question. An examination of the context, however, makes it unlikely that a full parcel-by-parcel analysis was intended. This context includes consideration of the differences between IAL designation processes and the practical realities of the county IAL process.

Excluding State-owned lands, designation of land as IAL may occur by way of individual landowner designations under HRS § 205-45, or by way of the county's designation under HRS § 205-47. While both processes utilize the standards and criteria in HRS § 205-44(c), they are separate and distinct. When requested by an individual, the LUC is presented with a particular parcel or group of parcels often to be used for a particular purpose. The weighing of the standards and criteria for each separate landowner is necessarily done on a parcel-by-parcel basis as each landowner only presents a parcel or group of parcels for consideration. Under the county IAL designation process, however, the entirety of the county's agricultural lands could be under consideration for inclusion. The county and, subsequently, the LUC, therefore, must weigh the standards and criteria on a county-wide or regional basis.[4] We note that this methodology is not dissimilar to the consideration given for County General Plans and Community Plans, which are analyzed on a county-wide or regional basis respectively, with input from the public about individual parcels.

Construing HRS § 205-44(a) to require a parcel-by-parcel analysis for all eight standards and criteria in the county IAL process also would result in a significant burden that the drafters may not have intended. To gather the information for all eight criteria and standards for each individual parcel in a county and then to weigh all eight criteria and standards for each parcel with all eight criteria and standards for every other individual parcel could be so burdensome as to discourage any county from attempting the analysis. This would be inconsistent with the goal

[4] Stating that the standards and criteria are weighed on a county-wide or regional basis does not mean the statute does not also require the county to consider comments from the public, some of which may concern individual parcels. *See* HRS § 205-47.

of conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use and sustainability.

While HRS § 205-44(a) does not, as a matter of law, require a parcel-by-parcel analysis, the LUC may, as a discretionary policy decision, decide that further individualized analysis should nevertheless be completed for either some or all parcels in its evaluation and designation of IAL.

C. Liability of LUC Commissioners

There are different types of immunity that apply to actions taken by LUC Commissioners in the context of IAL designations—qualified immunity under HRS § 26-35.5 and quasi-judicial immunity under Hawai'i case law.[5]

Qualified immunity from civil suit under HRS § 26-35.5 is intended to protect members appointed to a State board or commission. The legislative history of HRS § 26-35.5 confirms the statute was passed to encourage people, such as LUC Commissioners, to contribute their knowledge and experience without pay, in the community interest, by protecting them from civil liability:

> The purpose of this bill is ... to exempt from civil liability members of state boards and commissions who serve without pay, unless the member acts with a malicious purpose, in bad faith, or a willful or wanton manner.
>
> Your Committee supports protecting "volunteer" boards and commission members from frivolous suits, suits extended as harassment, and more importantly, suits which may be intended to intimidate these persons to influence policies and decisions. *Such protection should encourage more people to contribute their valuable knowledge and experience in the community interest, and promote more open, deliberate policy and decision making in response to the general public.*

Sen. Stand. Comm. Rep. No. 538–84, in 1984 Senate Journal at 1267 (emphasis added).

There are two exceptions to this statutory immunity: first, where an LUC Commissioner has acted with malicious or improper purpose; and second, where the State is the plaintiff in the civil action. With respect to the first exception, the determination of whether an action was taken with a malicious or improper purpose is a question of fact. The phrase malicious or improper purpose is defined in its ordinary and usual sense. *See Awakuni*, 115 Hawai'i at 141, 165 P.3d at 1042 ("Black's Law Dictionary defines malicious as substantially certain to cause injury and

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[5] The qualified immunity provided under HRS § 26-35.5 is comparable to the qualified immunity for government officials acting in the course and scope of their employment, which is also subject to exceptions for malice or improper purpose, discussed supra. *See Awakuni vs. Awana*, 115 Hawai'i 126, 140 (2007).

without just cause or excuse. Malice is defined as the intent, without justification or excuse, to commit a wrongful act, reckless disregard of the law or of a person's legal rights, and ill will; wickedness of heart.") (internal citations and quotations omitted).[6]

In addition to statutory immunity under HRS § 26-35.5, the doctrine of quasi-judicial immunity may also apply to LUC Commissioners under Hawai'i case law. *See Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1074 (D. Haw. 2015), *aff'd sub nom. Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610 (9th Cir. 2020) ("*Bridge Aina Le'a*"). Under the doctrine of quasi-judicial immunity, absolute judicial immunity may be extended to individuals who perform functions closely associated with the judicial process. *See id.* In *Bridge Aina Le'a,* the United States District Court for the District of Hawai'i specifically held that quasi-judicial immunity applied to boundary amendment determinations by LUC Commissioners. The court further stated that even "grave procedural errors" and "allegations of bias, bad faith, malice, or corruption generally do not bar the application of quasi-judicial immunity." *Id.* at 1077. As discussed in Section D below, it is our advice that IAL determinations under a county process are treated as quasi-judicial in nature, in which case the same quasi-judicial immunity recognized in *Bridge Aina Le'a* would apply.

The Hawai'i Supreme Court has specifically noted that in the context of qualified immunity, malice can include reckless disregard of the law. *Awakuni*, 115 Hawai'i at 141. Thus, careful consideration of legal advice provided by counsel should occur. However, Commissioners may choose a course of action that differs from the advice provided by counsel if an issue of law is unclear or the matter involves a policy decision. The courts generally afford considerable latitude to Commissioners for their informed decisions.

D. <u>County Process IAL Determinations Are Quasi-Judicial Proceedings</u>

In connection with the discussion above regarding the standards and criteria for IAL designations under the county process, we also reviewed the procedural requirements for the pending IAL proceedings before the LUC. Section 15-15-125(d), HAR, states that IAL determinations under the county process shall be conducted as a rulemaking proceeding in accordance with section 15-15-109 (which pertains to the conduct of the public hearing). Hawai'i courts, however, are very likely to conclude that IAL determinations under the county process must be treated as quasi-judicial proceedings because they are adjudicatory in nature. Accordingly, we advise that the LUC conduct county IAL determinations pursuant to a quasi-judicial rather than a rulemaking proceeding.

In *Town v. Land Use Comm'n*, 55 Haw. 538, 524 P.2d 84 (1974), the Supreme Court examined the question of whether the adoption of district boundaries classifying lands into

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[6] As a separate matter, if a request is made by an LUC Commissioner, the Attorney General will make a factual determination as to whether the action taken is entitled to qualified immunity (i.e., the LUC Commission performed or failed to perform a duty which is required or authorized to be performed by an LUC Commissioner), and if a finding of immunity is made, then a deputy attorney general shall represent and defend the Commissioner in a civil suit. HRS § 26-35.5(e).

conservation, agricultural, rural, or urban districts, or the amendment to said boundaries was a rulemaking process or adjudicatory. In holding that the process was quasi-judicial in nature, the court explained that it was "adjudicative of legal rights of property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature." 55 Haw. at 548, 524 P.2d at 91.

Similarly, the IAL determination process contemplates the application of criteria that have already been promulgated by the legislature in HRS § 205-44 to the lands recommended on the maps submitted by the counties. As stated above, although the process may not involve the application of all eight criteria on an individualized basis, it still requires the application of some of the criteria to all of the recommended lands.

Treating the designation of IAL as a quasi-adjudicative process is reinforced by other requirements in the process. For example, section 205-49(a), HRS, provides, in part, that "[a]ny decision regarding the designation of lands as important agricultural lands and the adoption of maps of those lands pursuant to this section shall be based upon written findings of fact and conclusions of law." Findings of fact and conclusions of law are hallmarks of a quasi-judicial process. *See e.g.* HRS § 91-9(e).

Proceeding with IAL determinations by a rulemaking process under HAR § 15-15-125(d) presents other legal challenges. Section 15-15-109, HAR, which is specifically referenced in HAR § 15-15-125(d), only addresses the conduct of the public hearing in rulemaking proceedings. It does not address the entire rulemaking process. Hawai'i law outlines the role of the lieutenant governor and the governor in the rulemaking process. *See e.g.* HRS § 91-2.6 (rulemaking requires the posting of proposed rules on the lieutenant governor's website); HRS § 91-4 (rules require approval by the governor). Under the county IAL designation process, the LUC designates IAL land by issuing Findings of Fact and Conclusions of Law. However, the LUC's rules do not specify the role of the lieutenant governor and the governor in the process unlike the rulemaking process prescribed by statute. HRS §§ 91-2.6, 91-4.

In addition, the quasi-judicial proceedings for boundary amendments in *Bridge Aina Le'a* were applied because the Hawaii Supreme Court determined that rulemaking type proceedings for boundary amendments did not satisfy the due process rights of affected landowners. *Town*, 55 Haw. at 547-48, 524 P.2d at 90-91. The same rationale applies to involuntary IAL determinations through the county process. Landowners have testified in opposition to IAL designation of their lands. The degree to which property rights will be affected by IAL designation is in dispute. However, it is undisputed that property rights, however minimal, will be affected and those rights are entitled to some degree of due process.[7]

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[7] "The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. But some form of notice and hearing—formal or informal—is required before deprivation of a property interest that 'cannot be characterized as de minimis.'" *Fuentes v. Shevin*, 407 U.S. 67, 90 *fn.* 21 (1972) (citations omitted).

For these reasons, we advise that the LUC conduct the county IAL process as a quasi-judicial proceeding and **suspend** application of the portion of HAR § 15-15-125(d) that requires rulemaking as part of the process. Rulemaking in this area is problematic in the wake of recent case law expanding what constitutes a "property right," the infringement on which could give rise to standing in a contested case. *See, e.g., Matter of Hawaiian Electric*, 145 Hawai'i 1, 445 P.3d 673 (2019) (affirming a property right in a clean and healthful environment that conferred standing for a contested case in an agency action).

As discussed above, a quasi-judicial proceeding will require the LUC to: (a) conduct an independent review of the extent to which the proposed IAL lands meet the statutory criteria and determination that IAL designation is necessary to meet the broader objectives and policies for IAL (HRS § 205-49(a)); and (b) apply a quasi-judicial proceeding to provide an appropriate degree of due process protection for the property rights of affected landowners.

IV. Conclusion

For these reasons, we conclude that the City was required to weigh all eight standards and criteria in HRS § 205-44(c) on a county-wide or regional basis. The City did not need to conduct this weighing on a parcel-by-parcel basis. Following the weighing of standards and criteria, the City was permitted to base its IAL recommendation on fewer than eight of those standards and criteria.

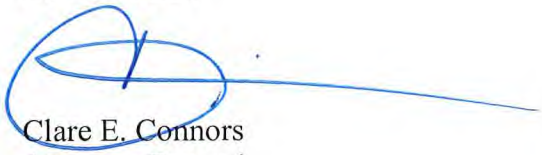
Further, we advise that LUC Commissioners are entitled to both qualified immunity from civil suit and quasi-judicial immunity for actions taken in the course and scope of their duties, unless they have acted with malice or improper purpose.

Finally, we recommend that the LUC conduct the IAL designation process based on county maps pursuant to a quasi-judicial process.

Respectfully,

Linda L.W. Chow
Julie H. China
Daniel A. Morris
Deputy Attorneys General

APPROVED:



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