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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 Answers²

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.

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. 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. 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

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