Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 16, 2021 8:48 AM
To: Quinones, Natasha A
Cc: Orodenker, Daniel E; Derrickson, Scott A
Subject: FW: Objection to IAL Designation re: Linda Baptiste
Attachments: 210816 Baptiste Objection Letter.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

IAL

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Monday, August 16, 2021 7:40 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Linda Baptiste

Aloha,

Please find attached the objection to IAL designation letter on behalf of Linda Baptiste.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai'i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mrs. Linda Baptiste, trustee of the "LINDA BAPTISTE TRUST" and the "HOWARD BAPTISTE TRUST" (the "Baptiste Trusts" or the "Client"), owner of two parcels (the "Parcels") identified as Tax Map Key No. (1)41025006 ("Parcel A") and Tax Map Key No. (1)41025007 ("Parcel B"), (collectively the "Parcels") Parcel A is 6.64 acres and Parcel B is 2.21 acres. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these parcels would be a severe burden on Mrs. Baptiste. Thus, the Baptiste Trusts object to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's reasoning and recommendations that agricultural parcels less than 2 acres be excluded from IAL designation because such parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels that while larger than two acres, are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners adequate time to properly understand and weigh the impacts of IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly to properly determine if they meet the IAL criteria set forth in Hawai`i Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcels at this point and requests an opportunity to have a formal hearing whereby the LUC more closely reviews our Client's Parcels and individual circumstances.

Parcel B has a total land area of only 2.21 acres. This is barely larger than the two (2) acres the Hawaii Department of Agriculture posits as the minimum size required for viable agricultural

production. [1] Water access and soil quality issues on the property also likely render large portions of the parcel as virtually unusable for agricultural purposes in its present state, making the currently usable portions of the total parcel far less than two acres.

Parcel B's small size also does not contribute to maintaining a critical land mass important to agricultural operating productivity. As such, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS § 205-44(c).

In addition to the size concerns for Parcel B, significant portions of both parcels face conditions likely to hinder any reasonable form of agricultural production that would sufficiently be in concert with the criteria and goals of the Important Agricultural Lands Law.[2]

The vast majority of the total land area across both Parcels does not feature soil qualities sufficient to support agricultural production and significant portions of the Parcels cannot be reliably utilized for the production of food, fiber, or fuel and energy producing crops, as required by the IAL statute. Furthermore, the water currently being supplied to the property is inadequate for agricultural purposes.

It would be unreasonable to expect landowner to prepare sufficient portions of their properties for agricultural uses now, given the lack of clear notice, limited involvement in the IAL recommendation process, the improper timing and the stark lack of IAL incentives to consider, along with all the other challenges outlined above.

The condition of the land is not the only barrier to agricultural production on the parcels owned by the Baptiste Trusts. The current occupants of the land are themselves not able to actively engage in agricultural production. Mrs. Linda Baptiste is reaching an age and a physical condition where is not physically feasible for her to actively farm the land. Mrs. Baptiste's child and grandchildren also live on the property with her and they are similarly incapable of actively working in agricultural production on the land, particularly where they are required to pursue work and education in non-agricultural pursuits in order to make ends meet.

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[1] See the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed: "DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable." (Available under the "State Office of Planning Submittals" heading at: https://luc.hawaii.gov/city-county-ial/)

[2] Per HRS § 205-42. Important Agricultural Lands are those lands which:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

HRS § 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[3] As members of the Baptiste family are not able to farm the land, designation of the Parcels will render the Baptiste family's occupancy of their own land illegitimate and result in a de facto eviction of Ms. Baptiste and her family from a property that they live on, have developed, and invested their life's work and savings into. This potentiality is of profound concern to our Client.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security and predictability.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[4]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved and alarmed landowners whose lands have been identified for IAL designation. Only protection of their homes from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto eviction. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Baptiste's urgent fear that HRS § 205-45.5 will be applied to their home, which, regardless of any immediate restraint of enforcement efforts, will stand as a de facto eviction of the Baptistes and their loved ones from their own home and property.

Even if no enforcement actions are taken against the Baptiste's in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this recent use enforcement bill, will continually be a source of stress and concern for the Baptiste family and any future landowners or occupants. The current situation creates a threatening uncertainty that

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[3] HRS § 205-45.5(1) reads as follows:

> (1) The farm dwellings and employee housing units shall be ***used exclusively by farmers*** and their immediate family members ***who actively and currently farm*** on important agricultural land upon which the dwelling is situated

(emphases added).

[4] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

looms over the Baptiste's genuine hope of peacefully living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over their heads. The sad consequence of the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Baptiste family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Baptiste family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that would ultimately strip the Baptiste's and their loved ones of their most basic property rights: the right to occupy their own home.

Finally, Baptiste Trusts object to IAL designation of either of its Parcels on the grounds that the County did not meet the requirements outlined in HRS § 205-47. Mrs. Linda Baptiste was never informed by the County that her lands were being considered for IAL designation. As a result of the County's failure to notify her, Mrs. Baptiste did not have opportunity to attend any community meetings regarding IAL designation, meet with county officials, or investigate the restrictions IAL designation might impose on her property. Particularly concerning are the occupancy restrictions that are set to dramatically strip her of the ability to lawfully live in her own home and devalue the homestead she has invested her life's savings and work into.

Additionally, neither Mrs. Baptiste nor any representative of the Baptiste Trusts, were given the chance to consult with any government agency regarding the potential designation of their Parcels to determine whether they could satisfy any of the criteria set out in HRS 205-44(c). Neither were they able to consider whether any of the promised yet undelivered IAL incentives would make voluntary landowner designation under HRS § 205-45 a feasible alternative for protecting the Baptiste's right to peacefully live on their own property.

In their total lack of communication to Mrs. Linda Baptiste and the Baptiste Trusts, the County failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS § 205-47. Due to the County's nonfulfillment of its statutory obligations, the Baptiste Trusts was not afforded adequate time to consider options as a landowner amidst the process of recommendation and designation.

Furthermore, the County has thus far failed to enact any incentives or protections for IAL designated lands, as required by HRS §§ 205-46, and 205-49.

The County should have taken any steps to inform Mrs. Baptiste why her Parcels were being recommended, detail the restrictions associated with IAL designation, and enact incentives and protections in advance of the identification of the Parcel as IAL. This would have afforded the Baptiste family ample time, as promised by law, to consider and pursue voluntary designation of their lands and undertake any necessary upgrades and filings needed for partial IAL designation, pursuant to HRS § 205-45. All this would have allowed Ms. Baptiste and her family at least some possible options to avoiding the possibility of violating the law simply by living in their own home.

Designating the parcels as IAL now, without the cooperation of the Baptiste Trusts would constitute an endorsement of the County's failure to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated IAL incentives (which still need to be enacted and established), and to ensure cooperation and consultation with landowners by the County.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Baptiste Trusts' Parcels as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Thursday, August 26, 2021 9:05 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Arnold & Jerri Lum
Attachments: 210826-Lum Objection Letter.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Thursday, August 26, 2021 8:46 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Arnold & Jerri Lum

Aloha,

Please find attached the objection to IAL designation letter on behalf of Arnold & Jerri Lum.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawaii 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Arnold K. Lum, Jerri A. Lum, trustees of the "ARNOLD K. & JERRI A. LUM TRUST" ("the Trust" or the "Client"). The Lum Trust owns two parcels identified as Tax Map Key No. (1)41035020 ("Parcel A") and Tax Map Key No. (1)41035018 ("Parcel B"). Parcel A is .38 acre(s) and Parcel B is 2.685 acre(s). Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these parcels would be a severe burden on Arnold and Jerri Lum. Thus, The Lum Trust objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our clients agree with and support this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our clients have invested their livelihoods into agricultural parcels slightly larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners time to better understand the impact of such IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly if they meet the criteria of Hawaii Revised Statutes § 205-44. As such, our Clients object to IAL designation of their Parcels and requests an opportunity to have a formal hearing whereby the LUC more closely review our Clients' Parcels and individual circumstances.

Parcel A has a total land area of only .38 acres. This is considerably less than the two (2) acres that Hawaii's own Department of Agriculture maintains is the minimum size required for viable

agricultural production. [1] Additionally, it is our understanding that roughly 10% of the parcel faces growing conditions unsuitable to farming and as much as half is not currently engaged in agricultural production. Due to Parcel A's incredibly small size it does not contribute to maintaining a critical land mass important to agricultural operating productivity. As such, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this Parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

Significant portions of Parcel B face conditions likely to hinder any reasonable form of agricultural production that would sufficiently be in concert with the goals of the Important Agricultural Lands Law. Currently approximately one (1) acre of Parcel B is not in agricultural production. This is because a portion of the land is prone to flooding and another segment features soil that is of undesirable quality. These portions of the parcel cannot be reliably utilized in the production of food, fiber, or fuel and energy producing crops.

Additionally, Parcel B does not clearly appear to contribute to maintaining a critical land mass important to agricultural operating productivity. The total size of Parcel B is barely more than the 2 acres that HDOA identified as the minimum viable size for agricultural operation. The above mentioned environmental and soil condition issues make it so a portion of the parcel cannot be utilized in agricultural production without Arnold and Jerri Lum undertaking challenging alterations to the land, and it may remain inviable even then. The remaining portions of Parcel B might be suitable for agricultural production however these portions have a total land area below the two (2) acre threshold advanced by Hawaii Department of Agriculture. Therefore, the land is unlikely to support significant agricultural production as mandated by the IAL statute.[2]

It is our understanding that both of the Lum's parcels are partially abutted by an agriculture park established by the State of Hawaii in the 1980s. Extensive erosion and ponding has occurred on the Lum's parcels as a result of that park's development. This issue further complicates agricultural activity on the land. The Lum's report that the State is aware of the issue and has proposed a redirection of the runoff from the park. However, the State has yet to take any corrective action to restore the productive capacity of the Lum's land. Despite the State's direct role in rendering a portion of the Lum's land unusable, the County now recommends designation of the entirety of the land, divorced from any specific analysis of whether the Parcels meet the IAL criteria in HRS § 202-44(c).

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[1] See the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed: "DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable."

2 Per HRS § 205-42. Important Agricultural Lands are those lands which:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

The condition of the land is not the only barrier to agricultural production on the parcels owned by the Lum Trust. The current occupants of the land are themselves not able to engage in agricultural production. Mr. Arnold Lum is 64 years old. It is our understanding that Arnold experienced a heart attack in 2019 and underwent heart by-pass surgery. He also lives with diabetes and hypertension. Farm work is beyond his physical ability. Jerri Lum is 63 years old and is occupied full time with the responsibilities of caring for her mother who also resides on the parcels and requires constant assistance. As a result of these factors, Arnold and Jerri Lum are not able to farm. The Lum's have two adult children, Blaine and Jasmine, that also reside on the parcels owned by the Trust. Both Blaine and Jasmine are single parents, each raising and providing for three small children. It would be unreasonable to expect either Blaine or Jasmine to abandon these responsibilities in order to facilitate agricultural production on the parcels. HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[3] As no member of the Lum family currently occupying the parcels is in a position to farm the land, designation of the Parcels could render the Lum family's occupancy of their own land illegitimate and amount to a de facto eviction of the family from a property that they have developed and invested their life's savings into. This potentiality is of profound concern to the Lum Trust.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[4] Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

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3 HRS 205-45.5(1) reads as follows (emphasis added):
(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members who actively and currently farm on important agricultural land upon which the dwelling is situated; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Lum's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of the Lum's and their loved ones from their own home and property.

Even if no enforcement actions are taken against Arnold and Jerri Lum in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Arnold and Jerri Lum and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mr. Lum's genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties. The sad consequence of the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Lum family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Lum family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip the Lum's and their loved ones of their most basic property rights: the right to occupy their own home.

The Lum Trust also objects to IAL designation of either parcel on the grounds that the County did not meet the requirements outlined in HRS§ 205-47. Arnold and Jerri Lum were informed by mail of the possible designation of their parcels as IAL, but only received notice in March of this year. Due to the late nature of this notice, the Lum's did not have an opportunity to attend community meetings regarding IAL designation or investigate the restrictions IAL designation might impose on their property, particularly the occupancy restrictions that are set to dramatically affect the Lum's ability to live in their own home and devalue the homestead they have invested their life's savings and work into.

Additionally, no representative of the Lum Trust was given the chance to consult or cooperate with any government agency regarding the potential designation of their parcels to determine whether they satisfied the criteria set out in HRS 205-44(c) or whether any of the incentives offered would make a voluntary landowner designation under HRS 205-45 a feasible alternative for protecting the Lum's right to live on their own property.

In their communication to Arnold and Jerri Lum and the Lum Trust, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS§ 205-47. Due to the County's nonfulfillment of its statutory obligations, the Lum Trust was not afforded adequate time to consider their options as landowners before the process of designation got underway.

Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.

Had the County more promptly informed the Lum's that their lands were being considered for designation, detailed to them the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the Lum's parcel as IAL, The Lum's would have had appropriate time to consider and pursue voluntary designation of part of their lands and undertake any necessary upgrades and filings needed to prepare the Parcels for partial IAL designation, pursuant to HRS § 205-45.

Designating the parcel as IAL now, without the cooperation of The Lum Trust would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the City were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Lum Trust's parcels as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Thursday, August 26, 2021 9:07 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Lawrence Ito
Attachments: 210826-Ito Objection Letter .pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Thursday, August 26, 2021 8:27 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Lawrence Ito

Aloha,

Please find attached the objection to IAL designation letter on behalf of Lawrence Ito.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of our client Mr. Lawrence Ito ("The Client"). Mr. Ito is a registered owner of three parcels identified as Tax Map Key No. (1)41024012 ("Parcel A"), (1)41024013 ("Parcel B"), and (1)41024014 ("Parcel C") (collectively the "Parcels"). Parcel A is 0.59 acres, Parcel B, is 4.61 acres, and Parcel C is 4.62 acres. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these Parcels would be a severe burden on Mr. Ito and his family. Thus, Mr. Ito hereby objects to the Parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels slightly larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to IAL designation, to allow the landowners time to better understand the impact of such IAL designation and to afford the LUC a better opportunity to more closely review the individual circumstances for each of these parcels, particularly to determine if they meet the IAL criteria in Hawaii Revised Statutes (HRS) § 205-44. As such, our Client objects to IAL designation of his Parcels at this point and requests an opportunity to have a formal hearing whereby the LUC more closely reviews his Parcels and individual circumstances.

Parcel A has a total land area of only 0.59 acres. This is considerably less than the two (2) acres that Hawaii's own Department of Agriculture maintains as the minimum size required for viable agricultural production.[1] Due to Parcel A's incredibly small size it does not contribute to

[1] *See* the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed: "DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable."

maintaining a critical land mass important to agricultural operating productivity. As such, there is good reason for the LUC to consider the particular circumstances of this parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS § 205-44(c).

In addition to the specific size constraints of Parcel A, the entirety of the Ito's Parcels face some challenges to agricultural production. At present, approximately 80% of the land is engaged in limited agricultural production. The Ito's grow small crops of soybean, papaya, avocado, ginger, and ornamental plants. However, it is our understanding that more than half of the Ito's lands lack the kind of soil qualities sufficient to support ground crops. Overall, the soil quality is such that it may hinder the cultivation of food, fiber, fuel and energy producing crops in any significant quantities.

Considering the limited agricultural activity currently taking place on Mr. Ito's property it would be unreasonable to expect the Client to undertake significant improvements for the entire property to enable agricultural production that comports with the criteria and goals set forth in HRS §§ 205-41-205-52 (the "IAL Statute"). This is particulary so given the lack of notice, improper timing and lack of incentives, as well as the challenges outlined above.

The landowner's personal circumstances also present significant barriers to agricultural production that would comply with the occupancy restrictions in the IAL Statutes. HRS § 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[2] Mr. Lawrence Ito and his wife Carole reside on the Parcels as does Lawrence's brother, Mr. Paul Ito. Lawrence and Paul are the only registered owners who reside on the Parcels. Rochelle and Grant Ito also live on the property with their two children. Lawrence, Paul and Carole are all elderly, and the physical demands of agricultural work are now beyond their current abilities. It would be unreasonable to expect them to be involved in agricultural production on a scale appropriate to the goals of Hawaii's Important Agricultural Lands law.[3]

It is our understanding that their children Rochelle and Grant Ito are also engaged with other responsibilities and unable to actively farm the Parcels. Additionally, both are getting busier with caring for their aged parents, some of whom are already in their mid 80's. Despite these challenges, the Ito family has thus far been able to encourage and sustain limited agricultural

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2 HRS 205-45.5(1) reads as follows:

> (1) The farm dwellings and employee housing units shall be ***used exclusively by farmers*** and their immediate family members who ***actively and currently farm on important agricultural land*** upon which the dwelling is situated

(emphasis added).

[3] Per HRS § 205-42. Important Agricultural Lands are those lands which:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

activity on their Parcels. However, with no member of the Ito family able to actively and directly engage in agricultural production, it is unclear how designation of the Ito's parcels as IAL would serve the goals of the IAL Statute. Therefore, designation of the entirety of the Ito family's Parcels as IAL could render the Ito family's occupancy of their own homes illegitimate and amount to a de facto eviction of the Ito family from a property that they have developed, heavily invested in, and preserved for limited agricultural use. This potentiality is of profound concern for the Ito family.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[4]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. It appears that exclusion from IAL designation is needed assure the Ito's that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that they and many landowners are likely going to be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Ito's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any restraint on immediate enforcement efforts, will stand as a de facto eviction of the Ito's and their loved ones from their own home and property.

Even if no enforcement actions are immediately taken against the Ito's in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for the Ito family and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over the Ito's genuine

[4] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over their heads.

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Ito family.

In addition to the above, DPP also stated that where complaints are filed, DPP is obligated to enforce occupancy restrictions like those in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Ito family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that would ultimately strip the Mr. Ito and his loved ones of their most basic property rights: the right to occupy their own home.

Finally, the Ito family objects to IAL designation of their three parcels on the grounds that the City and County of Honolulu (the "County") did not meet the notice requirements outlined in HRS § 205-47. The Ito's were never informed by the County of the potential designation of their lands as IAL. As a result of the County's failure to notify, the Ito family had no opportunity to attend community meetings regarding IAL designation or to investigate the restrictions IAL designation might impose on their Parcels.

Additionally, neither Mr. Ito nor any member of the Ito family, was given the chance to consult or cooperate with any government agency regarding the potential designation of their Parcels, to determine whether they satisfied the criteria set out in HRS 205-44(c) or to weigh whether any of the incentives offered would make a voluntary designation under HRS § 205-45 a feasible alternative for protecting their family's right to live in their own home with threat of fines, eviction, or foreclosure.

In their communication to Mr. Lawrence Ito and his family, the County did not abide by the cooperation, consultation, consent, and reporting requirements in HRS § 205-47. As such, the Ito family was not afforded adequate time to consider their options as landowners before the process of recommendation and designation got underway.

Furthermore, the County has thus far failed to enact any incentives and protections for IAL designated lands and landowners, as required by HRS § 205-46.

Had the County informed the Ito's that their lands were being considered for designation, detailed to them the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the Ito's parcels as IAL, the Ito Family would have had appropriate time to consider and consider and pursue voluntary designation of part of their lands and undertake whatever filings would be necessary to for partial IAL designation of their Parcels, pursuant to HRS § 205-45.

Designating the Parcels as IAL now, without the cooperation of the Ito family would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample

time to consider the constitutionally and statutorily mandated incentives that the State and the City were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of Ito family's parcels as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Thursday, August 26, 2021 1:45 PM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Kolea & Simon Chong
Attachments: 210826 Chong Objection Letter Draft .pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Thursday, August 26, 2021 9:09 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Kolea & Simon Chong

Aloha,

Please find attached the objection to IAL designation letter on behalf of Kolea & Simon Chong.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai'i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mrs. Kolea F. Chong (the "Client"). Mrs. Chong and her husband, Simon T. Chong (the "Chong's"), are owners of the parcel identified as Tax Map Key No. (1)480050030 (the "Parcel"). The Parcel is 2.12 acres. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on the Parcel would be a severe burden on the Chong's and their family. Thus, the Chong's object to their Parcel being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's reasoning and recommendations that agricultural parcels less than 2 acres be excluded from IAL designation because such parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels that while larger than two acres, are similarly incapable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels two (2) acres or larger, whose owners object to the IAL designation.

The OP's letter reasons that objecting landowners should have adequate time to properly understand and weigh the impacts of IAL designation and the LUC should have the opportunity to more closely review the individual circumstances for such parcels, particularly to properly determine if they meet the IAL criteria set forth in Hawai`i Revised Statutes § 205-44. As such, the Chong's object to IAL designation of their Parcel at this point and request an opportunity to have a formal hearing whereby the LUC more closely reviews their Parcel and their individual circumstances.

As noted above, the Hawai`i Department of Agriculture recently advanced the opinion that agricultural production is only viable on plots two acres or more in size.[1] the Chong's parcel is barely larger than two acres. Additionally, the parcel features an existing home, a dirt and gravel path necessary to allow vehicle access to the road and several large trees which would be difficult to clear. The small portion of the Parcel actually usable for agricultural purposes is much smaller than two acres. Given these factors, Mrs. Chong's parcel does not appear able to support the significant agricultural production necessary to contribute to the goals of the IAL statute.[2]

As the Parcel is so small, it is also doubtful that designation of this parcel as IAL will serve to maintain a critical land mass important to agricultural operating productivity. Taking these factors together, the County's initial identification of the parcel for potential IAL designation appears to lack any reasonable justification. Rather, there is good reason for the LUC to consider the particular circumstances of the Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

It is important to note that the Chong's personal circumstances are also not suited to agricultural production. Both Mrs. Chong and her husband are engaged in full time non-agricultural work.[3] The Chong's also share a responsibility to care for their three children as well as Simon Chong's grandmother, who lives with them on the property. Since their Parcel is small and any agricultural yields drawn from it would be insufficient to constitute their livelihood, the Chong family has never been able to actively farm the Parcel. Additionally, Mr. and Mrs. Chong also do not possess any of the knowledge or skills necessary to maintain profitable agricultural production on the land.

HRS § 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[4] As no member of the Chong family occupying the Parcel is able to actively farm the land, designation of the parcel as IAL will render the Chong family's occupancy of their own land illegitimate. Indeed, IAL designation would result in a de facto eviction of the family from their land. Simon and Kolea Chong initially purchased the property to ensure that a

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[1] *See* the 5/20/21 letter from the Office of Planning to the Land Use Commission which observed:
"DOA states that from an agricultural perspective, two (2) acres is the minimum size at
which a farming operation can typically be viable." (available under the "State Office of Planning Submittals"
heading at: https://luc.hawaii.gov/city-county-ial/).

[2] Per HRS § 205-42. Important Agricultural Lands are those lands which:

(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;

(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or

(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

[3] Mrs. Chong works as a Charge Nurse in pediatric intensive care and her husband is a machinery mechanic at Peral Harbor Shipyard

[4] HRS § 205-45.5(1) reads as follows:

> (1) The farm dwellings and employee housing units shall be ***used exclusively by farmers*** and their immediate family members ***who actively and currently farm*** on important agricultural land upon which the dwelling is situated

(emphases added).

home which has historically belonged to the Chong family remained in the family's possession. They did so with the understanding that they would be able to live there. Four generations of Chong family members currently live on the property. As such, the potential for IAL restrictions to deprive the Chong family of continued occupancy rights is of profound concern to the Chong's.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security and predictability.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[5]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved and alarmed landowners whose lands have been identified for IAL designation. Only protection of their homes from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto eviction. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Chong's urgent fear that HRS § 205-45.5 will be applied to their home, which regardless of any immediate restraint of enforcement efforts, will stand as a de facto eviction of the Chong's and their loved ones from their own home and property.

Even if no enforcement actions are taken against the Chong's in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this recent use enforcement bill, will continually be a source of stress and concern for the Chong's and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over the Chong's genuine hope of peacefully living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over their head.

[5] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Chong family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Chong family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that would ultimately strip the Chong family and their loved ones of their most basic property rights: the right to occupy their own home.

The Chong's further object to IAL designation of the Parcel on the grounds that The City and County of Honolulu ("the County") did not meet the requirements outlined in HRS § 205-47. To our knowledge, Mrs. Chong received a communication many years ago in reference to the consideration of her lands for IAL designation. Neither Mrs. Chong nor any other member of the Chong family understood what the notice meant and received not further communication from the County about the IAL designation process. Only recently was the family informed that their Parcel was slated for designated by the LUC and only then were they notified of public hearings in April of 2021.

After receiving the initial communication from the County, the Chong's expected follow up communications and the opportunity to be involved in the selection process to some degree. Instead, the family was blindsided with the knowledge that their parcel had proceeded toward eventual designation without them being kept apprised of developments or having had the chance to speak with any County officials regarding their Parcel. As a consequence of the County's failure to properly notify the Chong family, the family was not able to fully investigate the restrictions IAL designation might impose on their land.[6] Neither were they able to investigate or consider what incentives my arise from such designation.

All told, the Chong's were not afforded a single opportunity to consult or cooperate with any government agency regarding the potential designation of their Parcel. Neither were the Chong's afforded a chance to help determine whether their Parcel could satisfy any of the criteria set out in HRS § 205-44(c). Finally, the Chong's had not chance to consider whether any IAL incentives were offered so as to make a voluntary landowner designation under HRS § 205-45 a feasible alternative for protecting their right to live on their own property.

In their sparse communication the Chong's, the County failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS § 205-47. Due to the County's

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[6] These restrictions include, but are not limited to:
(a) additional burdens of proof as to whether a person living on agricultural land, or members of their immediate household, are personally, actively farming the land in order to occupy the land without violation of the law, (HRS § 205-45.5(2));
(b) additional regulatory burdens to rezoning property designated as IAL to other state land use classifications, (HRS§ 205-4), and
(c) Additional approvals required for accessory agribusiness uses, (HRS§ 205-6(d)).

nonfulfillment of its statutory obligations, the Chong family was not afforded adequate time to consider their options as landowners.

Had the County more fully informed the Chong's about why their Parcel was being recommended, detailed the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the Parcel as IAL, the Chong family would have had appropriate time to consider and pursue voluntary designation of part of its lands and undertake any necessary upgrades and filings needed for partial IAL designation, pursuant to HRS § 205-45.

Given the remarkably small size of the parcel, a full vs. partial designation would do little if anything to contribute to the conservation and agricultural production objectives of Hawaii's Important Agricultural Lands Law. As such, we hope the LUC will chart a prudent course and completely exclude the Chong's Parcel, and others like it, from IAL designation pursuant to HRS § 205-49. However, should this exclusion not occur, the issue of the landowner being denied the opportunity to properly consider voluntary partial designation would still need to be addressed.

Designating the Chong's parcel as IAL now, without the Chong's cooperation would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the City was supposed to enact, and to ensure cooperation and consultation with landowners.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Chong's Parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mrs. Diana Young, trustee of the "GERALD Y. H. TRUST EST" (the "Trust" or the "Client"). The Trust owns the parcel identified as Tax Map Key No. (1)41018022 (the "Parcel"). The Parcel has a total land area of 5.45 acre(s). Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on the Parcels would be a severe burden on Mrs. Young. Thus, the Trust objects to the parcel identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's reasoning and recommendations that agricultural parcels less than 2 acres be excluded from IAL designation because such parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our Client have invested their livelihoods into agricultural parcels that, while larger than two acres, are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners adequate time to properly understand and weigh the impacts of IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly to properly determine if they meet the IAL criteria set forth in Hawai`i Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcel at this point and requests an opportunity to have a formal hearing whereby the LUC more closely reviews our Client's Parcel and individual circumstances.

As mentioned above, the parcel is 5.45 acres in size. While this may be larger than the two (2) acres that Hawaii's Department of Agriculture posits as the minimum size required for viable

agricultural production[1], the Parcel faces several conditions which complicate agricultural production. The primary source of water on the property is a creek which is contaminated with leptospirosis. Additionally, rocks and sand are mostly present throughout the soil on the property. These conditions render large portions of the parcel virtually unusable for agricultural purposes in their current state. For most types of crops, if planted on the parcel, heat will also diminish or wipe out any anticipated yields. Given the barriers to any significant production of food, fiber, or fuel and energy producing crops present on the parcel, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of the Parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

Some agricultural production is currently being accomplished on the property. The owners have laid down ground cover and constructed a system of PVC piping to bring water to the existing crops. The small-scale agricultural activity that does exist on the parcel is a testament to the commitment of the operators to meet existing challenges stemming from the nature of the Parcel. However, as explained above, those challenges preclude viable agricultural production of any market value or significance on much of the land area. Therefore, the Parcel does not contribute to maintaining a critical land mass important to agricultural operating productivity. Considering the existence of some limited agricultural activity on the Parcel, partial IAL designation may be appropriate. However, it would be unreasonable to expect the landowner to invest into preparing large portions of the property for agricultural use, particularly given the lack of notice, improper timing, and lack of incentives, as well as the challenges outlined above.

The condition of the land is not the only barrier to agricultural production on the parcels owned by the Trust. The current occupants of the land are themselves not able to engage in agricultural production. Mrs. Young is 65 years of age. As noted above, Mrs. Young presently cares for a number of potted plants. However, it is our understanding that any more extensive agricultural activity would present an impossible physical challenge for Mrs. Young.

HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands..[2] As Mrs. Young is not able to farm the land, designation of the Parcel could render Mrs. Young's occupancy of the land held by the Trust illegitimate and amount to a de facto eviction of Mrs. Young and her family from a property that they have developed, made habitable and productive, and invested their life's savings into. This eventuality is particularly concerning to Mrs. Young because the conditions of the Trust's ownership of the Parcel forbid Mrs. Young from selling the property during her lifetime. Given that, if Mrs. Young's occupancy of the parcel was to be jeopardized as a consequence of IAL designation, she would be left with little recourse and no feasible options for relocation.

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[1] See the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed: "DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable." (Available under the "State Office of Planning Submittals" heading at: https://luc.hawaii.gov/city-county-ial/)

[2] HRS 205-45.5(1) reads as follows (emphasis added):
(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members **who actively and currently farm on important agricultural land upon which the dwelling is situated**.

Given the high potential for injury to her own occupancy rights, disruption of her ability to peacefully live in her home constitutes a severe harm to the landowner that is not in keeping with the spirit of the IAL law and is not justifiable given the limited capacity of the land to contribute to conservation and agricultural production efforts statewide..[3]

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as some kind of benevolent protection of their rights to live in their own homes is offensive and disrespectful of landowners' basic occupancy rights and their basic need for security

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.4

Developments like this, and other similar legislative efforts, significantly undercuts the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen Mrs. Young's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of Mrs. Young from her own home and property.

Even if no enforcement actions are taken against Mrs. Young in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Mrs. Young and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mrs. Young's genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties.

[3] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

The sad consequences of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including Mrs. Young and her family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Young family or otherwise take advantage of them, then a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip Mrs. Young and their loved ones of their most basic property rights: the right to occupy their own home.

Finally, the Trust objects to IAL designation of either parcel on the grounds that the County did not meet the requirements outlined in HRS § 205-47. Mrs. Diana Young was never informed by the County that her lands were being considered for IAL designation. As a result of the County's failure to notify her, Mrs. Young did not have opportunity to attend community meetings regarding IAL designation, meet with county officials, or investigate the restrictions IAL designation might impose on her property. Particularly concerning are the occupancy restrictions that are set to dramatically strip her of the ability to lawfully live in her own home and devalue the homestead she has invested her life's savings and work into.

In addition to the above enumerated objections based on the nature of the land and Mrs. Young's personal circumstances, the Trust objects to IAL designation of its Parcel on the grounds that the City and County of Honolulu ("the County") did not meet the requirements outlined in HRS§ 205-47. The County did not inform Mrs. Young of the potential designation of the Parcel as IAL until April of this year.

As a result of the County's failure to notify her, Mrs. Young did not have opportunity to attend community meetings regarding IAL designation, meet with county officials, or investigate the restrictions IAL designation might impose on her property. Particularly concerning are the occupancy restrictions that are set to dramatically strip her of the ability to lawfully live in her own home and devalue the homestead she has invested her life's savings and work into. As Mrs. Young is not able to sell her property and resituate herself, these restrictions may force her to face old age without a guaranteed place of residence and preclude her from passing on to heirs the value contained within her property.

Additionally, neither Mrs. Young nor any representative of the Trust, was given the chance to consult or cooperate with any government agency regarding the potential designation of their parcel to determine whether they satisfied the criteria set out in HRS 205-44(c) or whether any of the incentives offered would make a voluntary landowner designation under HRS § 205-45 a feasible alternative for protecting her right to live on her own property.

In their total lack of communication to Mrs. Diana Young and the Trust, the County failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS § 205-47. Due to the County's nonfulfillment of its statutory obligations, the Trust was not afforded adequate time to consider their options as landowners before the process of recommendation and designation got underway. Furthermore, the County has thus far failed to enact any incentives, protections, and

reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.

Had the County more promptly informed Mrs. Young that her land was being recommended for IAL designation, detailed to her the significant occupancy restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the Mrs. Youngs's parcel as IAL, the Trust would have had appropriate time to consider and possibly pursue voluntary designation of part of their land and undertake whatever upgrades and filings might be necessary to prepare a petition for partial IAL designation, pursuant to HRS § 205-45, thus allowing Ms. Young and her family to avoid the possibility of violating the law simply by living in their own home.

Designating the parcel as IAL now, without the cooperation of the Trust would constitute an endorsement of the County's improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the County is still supposed to enact, and to ensure cooperation and consultation with landowners.

Lastly, The Parcel has been owned and passed down by the Young family for generations over the last 90 years. It is of utmost importance to Mrs. Diana Young to be able to pass the Young Parcel on and for the property to reside in the Young family and be fully usable as homestead and economic recourse for generations to come.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Trust's parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 30, 2021 7:40 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Yvonne Watarai
Attachments: 210828-Watarai Objection Letter.pdf

IAL

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Saturday, August 28, 2021 10:16 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Yvonne Watarai

Aloha,

Please find attached the objection to IAL designation letter on behalf of Yvonne Watarai.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

This office represents Mrs. Yvonne Watarai and her trust "YVONNE Y. WATARAI TRUST" (the "Watarai Trust" or the "Client"). The Watarai Trust owns the parcel identified as Tax Map Key No. (1)870180230 (the "Parcel"). The Parcel has a total land area of 5 acres. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on the Parcel would be a severe burden on Mrs. Yvonne Watarai and the Watarai Trust. Thus, the Watarai Trust objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels slightly larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners time to better understand the impact of such IAL designation and afford the LUC the opportunity to review the individual circumstances more closely for each of these parcels, particularly if they meet the criteria of Hawaii Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcel and requests an opportunity to have a formal hearing whereby the LUC more closely review our Client's Parcel and individual circumstances.

Despite the size of the Client's Parcel and its history of agricultural use, the Parcel is currently not suited to agricultural production. The entirety of the parcel is unplanted. Additionally, the parcel does not currently enjoy access to the quantities of water necessary to support largescale agricultural activity. In order for any viable agricultural production to occur, installation of a water line would be required. There is a well producing water on the property, however the water is too salty to be used for any agricultural production. Mrs. Watarai would need to seek loans to finance any installation project. As Mrs. Watarai is 72 years old, it would be unreasonable to expect her to take on debt to establish a new agricultural operation. Given these challenges, there is good reason

for the LUC to consider the circumstances of this Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

Considering the history of agricultural production on the Watarai's parcel, partial IAL designation of the land may be sensible at some future date. However, at present the Parcel cannot support agricultural production of food, fiber, or fuel and energy producing crops in concert with the objectives of the IAL statutes.[1]

The considerable issues with water access are not the only obstacles to farming operations on the parcel. The current occupants of the land are themselves not able to farm. As previously mentioned, Mrs. Yvonne Watarai is 72 years old and cannot be expected to farm as she is elderly and unable to engage in sustained farm labor or actively work on agricultural production tasks.

Over the years, Mrs. Watarai has entered into leases for portions of her acreage to be used in productive farming and other agricultural activities. Outside water is required for crops and the labor must be supplied by others for such operations to be viable. Thus, HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL lands. As such, designation of the Watarai Trust's Parcel could render Mrs. Yvonne Watarai's occupancy of her own land illegitimate and amount to a de facto eviction of Ms. Watarai from a property that she has developed and long invested in maintaining.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague promises of nonenforcement as benevolent protection of their rights to live in their own homes is offensive and disrespects landowners' basic occupancy rights.

Furthermore, such vague promises cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion. This bill mandates that DPP impose serious fines or even place liens on certain properties based in any non-conforming uses.[2]

This development significantly undercuts the veracity of DPP's statements to assuage aggrieved landowners whose lands have been identified for IAL designation, attempting to assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

It also underscores DPP's inability to promise or retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to farm their lands personally and actively.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen Mrs. Watarai's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of immediate enforcement efforts, will stand as a de facto eviction of the Mrs. Watarai from her own home and property.

Additionally, the strict limits on occupancy imposed in connection with IAL designation will significantly devalue Mrs. Watarai's property should she ever wish to sell the land. This is

especially true so long as legislation being advanced by the City Council continues to stoke legitimate fears on the part of buyers that enforcement (required or discretionary) of HRS § 205-45.5 may one day remove them from any IAL designated property they acquire. As such, even if no enforcement action is taken against Mrs. Watarai, the presence of restrictions will continually cast uncertainty over their future occupancy rights and severely limit the ability to secure the proper value of her lands.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to Mrs. Watarai or otherwise take advantage of her, a simple complaint would be all it would take to trigger a series of significant harms that will strip her of her most basic property rights: the right to occupy one's own home.

In addition to the issues raised above, The Watarai Trust objects to IAL designation of the parcel on the grounds that The City and County of Honolulu ("the County") did not meet the requirements outlined in HRS§ 205-47. Mrs. Watarai reports only having received one notice from the County regarding IAL, which was received many years ago regarding a community meeting Unfortunately, Mrs. Watarai was not able to attend this meeting. Neither Mrs. Watarai nor any member of her household received clear notification from the County that the Parcel had been identified for IAL designation. Mrs. Watarai had no opportunity to attend community meetings regarding IAL as the purpose of the meeting was unclear and there was no indication that occupancy restrictions might be applied to her lands.

In short, Mrs. Watarai had no idea that it would be important for her to investigate the restrictions that IAL designation might impose on her Parcel, or that the IAL laws were set to dramatically affect her ability to live in her own home and devalue the homestead she has invested her life's savings and work into.

Furthermore, no representative of the Watarai Trust was invited to consult or cooperate with any government agency regarding the potential designation of the Parcel and whether it satisfied the criteria set out in HRS 205-44(c). In its communication to the Trust, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS § 205-47 or whether any of the incentives offered would make a voluntary landowner designation under HRS 205-45 a feasible alternative for protecting Mrs. Watarai's occupancy rights.

In their communication to Mrs. Yvonne Watarai and the Watarai Trust, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS§ 205-47. Due to the County's nonfulfillment of its statutory obligations, the Watarai Trust was not afforded adequate time to consider their options as landowners before the process of designation got underway. Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.

Had the County informed the Watarai Trust that its parcel was being considered for designation, detailed the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the parcel as IAL, the Watarai family would have had appropriate time to consider and pursue voluntary designation of part of their lands and

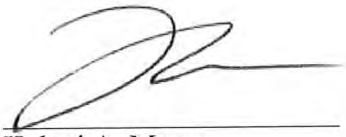
undertake whatever upgrades and filings would be necessary to prepare the Parcels for partial IAL designation, pursuant to HRS § 205-45.

Designating the whole parcel as IAL now, without the cooperation of Mrs. Watarai or The Watarai Trust would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the City were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Watarai Trust's parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP



Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 30, 2021 7:41 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Mark Afuso
Attachments: 210828-Afuso Objection Letter.pdf

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From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Saturday, August 28, 2021 9:58 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Mark Afuso

Aloha,

Please find attached the objection to IAL designation letter on behalf of Mark Afuso.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

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kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mr. Mark Afuso, trustee of the "87-711 Kaukama Road Trust" (the "Trust" or the "Client"). The Trust owns the parcel identified as Tax Map Key No. (1)87018009 (the "Parcel"), which is 8.96 acres in size. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on the Parcel would be a severe burden on Mr. Afuso and the Trust. As such, the Trust objects to the parcel identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's recommendation that small agricultural parcels be excluded from IAL designation. The stated reasoning in support of this proposal clarifies that smaller parcels are not conducive to support viable agricultural operations. While our client agrees with and supports this recommendation as it makes rational sense, many families, retired and disabled farmers, and others have invested their livelihoods into agricultural parcels that, despite their larger sizes, are still not capable of generating sufficient agricultural production for various unsurmountable reasons. Our client urges the LUC to adopt sensible protocols and procedures that will protect retirees, families, and others currently living on parcels zoned for agricultural use.

The OP's letter also recommends that the LUC defer designation for those parcels larger than two (2) acres there the owners formally object to IAL designation, in order to allow better understanding of the impact of such IAL designation and afford the LUC opportunity to closely review the individual circumstances of those owners and their lands. As such, our Client objects to IAL designation of its parcel and requests an opportunity to have a hearing whereby the LUC can closely review our Client's Parcel and individual circumstances.

In addition to inabilities to generate agriculture production on its property, our client strongly objects to any IAL designation of its Parcel before the City and County of Honolulu ("the County") has properly fulfilled its statutory obligations to identify lands for designation as IAL

without seriously harming landowner interests and before the enactment of incentives and protections for IAL lands.

The Trust observes that IAL designation has the potential to significantly harm Mr. Afuso and his family. The Afuso family maintains a small farming operation on the Parcel and the dwelling on the Parcel has historically been occupied by two generations of Afuso family members, some of whom were not directly involved with farming operations. HRS § 205-45.5 mandates that only those who "actively and currently farm" and their families can live in dwellings on IAL designated lands.

Conditioning occupancy on one's ability to engage in agricultural operations is troubling, as is the idea that designation of the Parcel as IAL could render illegitimate the occupancy of those who, for various understandable reasons, are unable to farm. This potentiality is of profound concern to Mr. Afuso and the Trust. Mr. Afuso does not wish to have the occupancy of his land limited and he finds the restrictions placed on who can live in the home his family has invested in extensively untenable, particularly as occupants grow older or encounter of issues in life that would prevent active farming.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as a benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[1]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions on IAL lands. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Trust's urgent fear that HRS § 205-45.5 will be applied to the Afuso home and

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[1] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

property, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of any who occupy the property based on an inability to actively farm.

Even if no enforcement actions are taken against the Trust in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Mr. Afuso and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over any genuine hope of passing that property down to heirs without the threat of eviction and foreclosure hanging over their heads.

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including Mr. Afuso.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Afuso family or otherwise take advantage of them, simple complaints would be all it would take to trigger a largely unavoidable series of significant harms that will significantly erode the Afuso's most basic of property rights: the right to peacefully occupy their own home.

Given the remarkable impact that IAL designation could have on the Afuso family, the Trust feels that the LUC must be apprised of and consider the failure of both the County and the State of Hawaii (the "State") to meet their statutory obligations in handling the identification of the Trust's parcel for IAL designation.

Firstly, the Trust objects to IAL designation of the Parcel on the grounds that the County did not meet the requirements outlined in HRS§ 205-47. To our knowledge, Mr. Afuso only received notification that his lands had been identified for potential IAL designation in May of this year.

As a result of the County's failure to promptly notify Mr. Afuso, the Afuso family did not have an opportunity to attend community meetings regarding IAL designation. Furthermore, Mr. Afuso was not able to investigate and ask County officials about the occupancy restrictions IAL designation would impose on his property, especially the occupancy restrictions which will dramatically impact the lives of any who live on the Parcel and devalue the lands held by the Trust.

Additionally, neither Mr. Afuso nor any representative of the Trust, was given the chance to consult or cooperate with any government agency regarding the potential designation of the Parcel to determine whether it satisfied the criteria set out in HRS § 205-44(c) or whether any of the incentives offered would make a voluntary landowner designation under HRS § 205-45 a feasible alternative for protecting the right to live on the Parcel unfettered.

In all their communication to Mr. Afuso and the Trust, the County failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS§ 205-47. Due to the

County's nonfulfillment of its statutory obligations, the Trust was not afforded adequate time to consider their options as landowners before the process of designation got underway.

Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51. Moreover, the State has also likely failed to fully and properly enact incentives and protections for IAL lands, as required by HRS § 205-46. Supportive incentives enacted by both the State and the County would likely be in their interest and it is entirely possible that once an incentives regime is enacted, the Trust will deem IAL designation beneficial and seek voluntary designation. However, the County's pursuit of IAL designation for the Trust's entire parcel before incentives have been properly enacted does nothing to aid the existing agricultural operations. Furthermore, such action is improper according to the standards set out in the IAL statutes.[2]

Had the County more promptly and verifiably informed Mr. Afuso that the Trust's lands were being considered for designation, detailed to him the restrictions associated with IAL designation, and identified the enacted incentives and protections in advance of the identification of the Trust's parcel as IAL, The Trust would have had appropriate time to consider and pursue voluntary designation of part of their lands and undertake whatever upgrades and filings would be necessary to petition for partial IAL designation, pursuant to HRS § 205-45.

Designating the Parcel as IAL now, without the cooperation of The Trust would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the City are still supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Trust's Parcel as IAL and ask for a hearing to consider the timely and appropriate application of applicable IAL criteria to the Parcel and the procedural validity of the LUC's proceedings under HRS § 205-49.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

[2] HRS § 205-48(a) reads:
a) The land use commission shall receive the county recommendations and maps delineating those lands eligible to be designated important agricultural lands **no sooner than the effective date of the legislative enactment of protection and incentive measures for important agricultural lands and agricultural viability, as provided in section 9 of Act 183**, Session Laws of Hawaii 2005.

Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 30, 2021 7:42 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Sandra Van
Attachments: 210828 - Van Objection Letter .pdf

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Saturday, August 28, 2021 7:53 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Sandra Van

Aloha,

Please find attached the objection to IAL designation letter on behalf of Sandra Van.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Ms. Sandra Carol Van, trustee of the "The Sandra Carol Van Trust" (the "Trust" or the "Client"). The Trust is the registered owner of two parcels identified as Tax Map Key No. (1)86008024 ("Parcel A") and Tax Map Key No. (1)86008023 ("Parcel B"). Parcel A is 1.56 acre(s) and Parcel B is 1.80 acre(s). Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these parcels would be a severe burden on Mrs. Van. Thus, The Trust objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others like our client who currently live on small parcels zoned for agricultural use. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners time to better understand the impact of such IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly if they meet the criteria of Hawaii Revised Statutes § 205-44. In the event that the LUC does not opt to exclude all small parcels from designation, our Client still objects to IAL designation of their parcel in particular and requests an opportunity to have a formal hearing whereby the LUC more closely review our Client's parcel and individual circumstances.

As mentioned above, The State of Hawaii Department of Agriculture maintains that two acres the minimum lot size required for viable agricultural production. [1] By this standard, both parcels are too small to support the profitable production of food, fiber, fuel or energy producing crops. Due to the parcels' small size, designation of these parcels would also not contribute to maintaining a

[1] See the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed: "DOA states that from an agricultural perspective, two (2) acres is the minimum size at which a farming operation can typically be viable."

critical land mass important to agricultural operating productivity. As such, there is good reason for the LUC to consider the particular circumstances of this parcel and determine that designation of the Parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c). Such action would be in accordance with the opinion of both the Office of Planning and the Department of Agriculture.

The size constraint on the parcels is compounded by several adverse conditions faced on the land. These conditions are significantly complicated and may preclude any agricultural activity. It is our understanding that the parcels do not currently enjoy sufficient water access to support agricultural production. Furthermore, both parcels are situated within an old river bottom and characterized by thin, sediment-filled soil. There are large rocks present throughout the soil which would hinder any tilling of the soil necessary to facilitate the planting and cultivation of crops. On parcels this small, it would be unreasonable to expect the landowner to purchase equipment such as a tractor with tilling attachments to confront the soil quality issues. While some limited agricultural activity may be possible on the parcels, it would necessitate significant effort on the part of the landowner. Also, any agricultural operations on these parcels would not be sufficiently productive to contribute to the goals of the Important Agricultural Lands law.[2]

In addition to the environmental and challenges and size constraints on the Trust's parcels, the members of the Van family currently occupying the parcels are not prepared to farm. Mrs. Sandra Van is nearly 65 years old. She has asthma as well as heart issues severe enough to necessitate an implanted heart monitor. Mrs. Van does not have the strength or stamina to engage in agricultural production. Mrs. Van 's son and daughter-in-law also reside on the parcels. However, both are engaged with non-agricultural work and other responsibilities. Given these circumstances, it is difficult to see how designating the Trust's parcels as IAL would accomplish the conservation and agricultural production goals outlined in the IAL statutes. Furthermore, HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[3] As no member of the Van family can reasonably be expected to farm the land, designation of the parcels as IAL could render the family's occupancy of their own land illegitimate and amount to a de facto eviction of Ms. Sandra Van and her relatives from a property that they have developed and invested in extensively. This potentiality is of profound concern to the Trust.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement

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[2] Per HRS § 205-42. Important Agricultural Lands are those lands which:
(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

[3] HRS 205-45.5(1) reads as follows (emphasis added):
(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members **who actively and currently farm on important agricultural land upon which the dwelling is situated**; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land

and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[4] Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands. The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Van 's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of the Van 's and their loved ones from their own home and property.

Even if no enforcement actions are taken against Mrs. Van in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Mrs. Van and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mrs. Van 's genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties. The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Van family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Van family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip the Van and their loved ones of their most basic property rights: the right to occupy their own home.

The Trust also objects to IAL designation of the parcel on the grounds that The City and County of Honolulu ("the County") did not meet the requirements outlined in HRS§ 205-47. It is our understanding that Mrs. Van was only informed of the possible designation of their parcels as IAL in April of this year. As a result of the County's late notice, Ms. Van did not have the chance to

[4] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

attend community meetings regarding IAL designation or fully investigate the restrictions IAL designation might impose on the Trust's lands.[5] Furthermore, neither Ms. Van, nor any other representative of the Trust, was afforded the opportunity to consult or cooperate with any government agency regarding the potential designation of the parcels to determine whether they satisfied the criteria set out in HRS 205-44(c) or whether any of the incentives offered would make a voluntary landowner designation under HRS 205-45 a feasible alternative for protecting the Van family's right to live on their own property.

In their communication to Mrs. Sandra Van and her Trust, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS§ 205-47. Due to the County's nonfulfillment of its statutory obligations, the Van family was not given adequate time to consider their options as landowners before the process of designation got underway.

Finally, The County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.
Had the County more promptly informed Mrs. Van and the Trust that their parcels were being considered for designation, detailed to them the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the parcels as IAL, Mrs. Van would have had appropriate time to consider and pursue voluntary designation of part of their lands and undertake whatever upgrades necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45. Given that neither parcel exceeds two acres in size, even partial designation may be inappropriate. It is our hope that the LUC will act in accordance with the recommendations made by both HDOA and the Office of Planning and exclude Mrs. Van 's parcels from consideration based on their size. However, should this exclusion not occur, the fact County's inattention to its statutory obligations and its disregard for Mrs. Van 's rights as a landowner and would still need to be addressed.

Designating the above identified parcels as IAL now, without the cooperation of the Trust would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the City were supposed to enact.

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[5] These restrictions include, but are not limited to:
(a) additional burdens of proof as to whether a person living on agricultural land, or members of their immediate household, are personally, actively farming the land in order to occupy the land without violation of the law, (HRS § 205-45.5(2));
(b) additional regulatory burdens to rezoning property designated as IAL to other state land use classifications, (HRS§ 205-4), and
(c) Additional approvals required for accessory agribusiness uses, (HRS§ 205-6(d)).

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Trust's parcels as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 30, 2021 7:43 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Barbara & Allen Nakata
Attachments: 210828 - Nakata Objection Letter.pdf

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Saturday, August 28, 2021 7:47 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Barbara & Allen Nakata

Aloha,

Please find attached the objection to IAL designation letter on behalf of Barbara & Allen Nakata.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

This office represents Mr. Allen M. Nakata and Mrs. Barbara J. Nakata (the "Clients"). Allen and Barbara Nakata own the 3.97-acre parcel identified as Tax Map Key No. (1)86019040 (the "Parcel"). Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on this parcel would place a severe burden on Allen and Barbara. Thus, the Nakata family object to the parcel identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our clients agree with and support this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our clients have invested their livelihoods into agricultural parcels larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners time to better understand the impact of such IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly if they meet the criteria of Hawaii Revised Statutes § 205-44. As such, our Client's object to IAL designation of their Parcel and request an opportunity to have a formal hearing whereby the LUC more closely review the Parcel as well as the Clients' individual circumstances.

To our knowledge, the vast majority of the Clients' Parcel (3.46 acres) is not currently utilized for agricultural production. In the past the agricultural yields on the land have been exceedingly small due to poor soil quality. This soil quality issue has made agricultural production on the property economically inviable for the Nakata's. Additionally, the Parcel does not have access to sufficient quantities of water to support agricultural production. While a small portion of the parcel is currently hosting limited agricultural activity, this portion is significantly smaller than the two acres that HDOA maintains is the minimum size required for true agricultural production. Provided

they receive proper support from the State and County, it may be possible for the Nakata's to prepare a portion of their lands for agricultural production on the scale necessary to meet the objectives and spirit of Hawaii's Important Agricultural Lands law.[1] However, considering the challenges enumerated above, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this parcel, especially in its entirety, would not be proper according to the criteria set out in HRS§ 205-44(c).

In addition to the challenges associated with agricultural production on the parcel due to soil quality and water access issues, the current occupants of the parcel are not able to farm. There are two homes on the Nakata's parcel. The first is occupied by Mr. Allen Nakata's parents. It is our understanding that Mr. Nakata's parents previously farmed on the land. However, they are now of advanced age and continuing to farm is far beyond their physical capabilities. The second home on the property is occupied by Allen and Barbara and their two children. Allen and Barbara are both engaged in non-agricultural work and have a responsibility to care not only for their children, but also for Allen's parents. No member of the Nakata family can reasonably be expected to farm on their Parcel. Therefore, it is difficult to imagine how designating the Nakata's parcel as IAL would accomplish the conservation and agricultural production goals outlined in the IAL statutes. Furthermore, HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[2] As such, designation of the Parcel as IAL could render the Nakata family's occupancy of their own land illegitimate and amount to a de facto eviction of the family from a property that they have developed and invested in for their whole lives. This potentiality is of profound concern to Allen and Barbara Nakata.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

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[1] Per HRS § 205-42. Important Agricultural Lands are those lands which:
(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

[2] HRS 205-45.5(1) reads as follows (emphasis added):
(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members **who actively and currently farm on important agricultural land upon which the dwelling is situated**; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[3]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Nakata's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of the Nakata's and their loved ones from their own home and property.

Even if no enforcement actions are taken against Mr. and Mrs. Nakata in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Mr. and Mrs. Nakata and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mrs. Nakata genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties.

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Nakata family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Nakata family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip the Nakata's and their loved ones of their most basic property rights: the right to occupy their own home.

The Nakata's also object to IAL designation of their parcel on the grounds that The City and County of Honolulu ("the County") did not meet the requirements outlined in HRS§ 205-47. To our knowledge, neither Allen nor Barbara received notification from the County that their land was being considered for IAL designation. Instead, the Nakata family only became aware of the

[3] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

possible designation of their lands via a notice sent very recently by the LUC itself. As a result of the County's insufficient attention to its notification responsibilities, the Nakata family did not have time to attend community meetings regarding IAL or investigate the restrictions that IAL designation might impose on their lands, including the incredibly concerning occupancy restrictions.

Furthermore, Allen and Barbara Nakata were not afforded any opportunity to consult or cooperate with any government agency regarding the potential designation of their parcel and whether it satisfied the criteria set out in HRS 205-44(c) or whether any of the incentives offered would make a voluntary landowner designation under HRS 205-45 a feasible alternative for protecting their right to live on their own property.

In their communication to the Nakata family, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS§ 205-47. Due to the County's nonfulfillment of its statutory obligations, Allen and Barbara Nakata were not afforded adequate time to consider their options as landowners before the process of designation got underway

Finally, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.

Had the County properly informed the Nakata's that their parcel was being considered for designation, detailed to them the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of their parcel as IAL, the Nakata family would have had appropriate time to consider and pursue voluntary designation for part of their lands and undertake any upgrades and filings necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45.

Designating the entire parcel as IAL now, without the cooperation of the landowners would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the City were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Nakata's parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Monday, August 30, 2021 7:44 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Cheri-Ann Guerrero
Attachments: 210828-Guerrero Objection Letter.pdf

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Saturday, August 28, 2021 7:42 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Cheri-Ann Guerrero

Aloha,

Please find attached the objection to IAL designation letter on behalf of Cheri-Ann Guerrero.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mrs. Cheri-Ann Guerrero, trustee of the "HOWARD L. GUERRERO TRUST" (the "Trust" or the "Client"). The Trust owns the parcel identified as Tax Map Key No. (1)86003190 (the "Parcel"). The Parcel has a total land area of 6.98 acres. Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these parcels would be a severe burden on Mrs. Guerrero and the Trust. Thus, the Trust objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommendations that agricultural parcels less than 2 acres be excluded from IAL designation because such parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners adequate time to properly understand and weigh the impacts of IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly to properly determine if they meet the criteria of Hawaii Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcels at this point and requests an opportunity to have a formal hearing whereby the LUC more closely review our Client's Parcels and individual circumstances.

Despite the size of the Guerrero's parcel and its history of agricultural use, the parcel is currently not suited to agricultural production. The entirety of the parcel is currently unplanted. It is our understanding that high levels of soil acidity have made it impossible to cultivate crops on the land for the past two years. While work is currently being done to reestablish soil pH levels suitable for farming, the acidic conditions are likely to persist for at least the next six months to a year. Additionally, the parcel does not currently enjoy access to the quantities of water necessary to support largescale agricultural activity. The Board of Water Supply is currently in the process of

replacing outdated mains that have serviced the area on which the Guerrero parcel is situated. Until the replacement project is complete, lack of water will continue to hinder agricultural operations in the area. Considering the history of agricultural production on the Guerrero's parcel, partial IAL designation of may be sensible at some future date. However, at present the parcel cannot support agricultural production of food, fiber, or fuel and energy producing crops in concert with the objectives of the IAL statute.[1] In light of these conditions, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS § 205-44(c). Rushing to designate the land now would place an unreasonable burden on the Guerrero family and the Trust.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[2]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Guerreros' urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of the Guerrero family and their loved ones from their own home and property.

Even if no enforcement actions are taken against Mrs. Cheri-Ann Guerrero in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will

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[1] Per HRS § 205-42. Important Agricultural Lands are those lands which:
(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

[2] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

continually be a source of stress and concern for Mrs. Cheri-Ann Guerrero and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mrs. Guerrero's genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties.

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Guerrero family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Guerrero family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip the Guerreros' and their loved ones of their most basic property rights: the right to occupy their own home.

In addition to the challenges listed above, the Trust objects to IAL designation of the parcel on the grounds that The City and County of Honolulu ("the County") did not meet the requirements outlined in HRS § 205-47. To our knowledge, no representative of the Trust received notification from the County that the parcel was being considered for IAL designation. Instead, the Guerrero family only became aware of the possible designation of their lands via a notice sent by the LUC itself, and only very recently. As a result of the County's failure to communicate, the Guerrero family was not able to attend community meetings on IAL designation or investigate the restrictions that IAL designation might impose on their property.[3]

Furthermore, no representative of the Trust was afforded any opportunity to consult or cooperate with any government agency regarding the potential designation of the Guerrero's parcel and whether it satisfied the criteria set out in HRS § 205-44(c) or whether any of the incentives offered would make a voluntary, partial landowner designation under HRS § 205-45 a feasible alternative to complete designation. In its communication to the Trust, the County has failed to abide by the cooperation, consultation, consent, and reporting requirements set by HRS § 205-47.

Finally, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51.

Had the County informed the Trust that its parcel was being considered for designation, detailed the restrictions associated with IAL designation, and enacted incentives and protections in advance of the identification of the parcel as IAL, the Guerrero family would have had appropriate time to consider and pursue voluntary designation of part of their lands and undertake whatever upgrades and filings necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45,

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[3] These restrictions include, but are not limited to:
(a) additional burdens of proof as to whether a person living on agricultural land, or members of their immediate household, are personally, actively farming the land in order to occupy the land without violation of the law, (HRS § 205-45.5(2));
(b) additional regulatory burdens to rezoning property designated as IAL to other state land use classifications, (HRS§ 205-4), and
(c) Additional approvals required for accessory agribusiness uses, (HRS§ 205-6(d)).

thus allowing Ms. Guerrero to avoid the possibility of violating the law simply by living in her own home.

Designating the whole parcel as IAL now, without the cooperation of the Trust and without regard for the circumstances facing the land, would constitute an endorsement of the County's improper refusal to abide by statutory obligations. The IAL statutes clearly allow for the identification and designation of only those lands which meet the criteria set out in HRS § 205-44, and designation can only occur after landowners have had ample time to consider the constitutionally and statutorily mandated incentives that the City were supposed to enact, and to ensure cooperation and consultation with landowners.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Trust's parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: DBEDT LUC
Sent: Tuesday, August 31, 2021 7:49 AM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Harris Ranch
Attachments: 210831-Harris Ranch Objection Letter.pdf

IAL

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Tuesday, August 31, 2021 4:42 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Harris Ranch

Aloha,

Please find attached the objection to IAL designation letter on behalf of Harris Ranch.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai'i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

This office represents Harris Ranch, LLC (the "Ranch" or the "Client"). The Ranch recently acquired two parcels identified as Tax Map Key No. (1)41024060 ("Parcel A") and Tax Map Key No. (1)41024061 ("Parcel B"). Parcel A is 5.12 acre(s) and Parcel B is 5.24 acre(s) (collectively the "Parcels"). Imposing the restrictions contemplated by an Important Agricultural Lands ("IAL") designation on either parcel would be a severe burden on the Ranch. As such, the Ranch objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

However, many families, retired and disabled farmers, and others have invested their livelihoods into agricultural parcels larger than two acres, but which are not capable of generating sufficient agricultural production. Like many others, our client strongly object to IAL designation because, among other reasons, the City and County of Honolulu ("the County") did not properly fulfill its statutory obligations when identifying lands for designation and that IAL designation stands to seriously harm landowner interests.

As the Parcels were recently acquired, the Ranch remains unsure of their suitability to agricultural production and notes that now unforeseen barriers to sufficient agricultural production are likely to become apparent in the near future based on reports and representations from other landowners in the area.

At no point in the real estate transaction process were the Ranch or its principals ever made aware of the potential or pending IAL designation or the occupancy restrictions concomitant with such a designation. The seller of the Parcels never disclosed the fact of pending designation or designation recommendations in place by the County and the sellers were: 1) never notified about the pending recommendation for IAL, 2) the resulting restrictions slated for their lands

were never explained to them, or 3) never provided with instructions to notify possible buyers of the occupancy and development restrictions slated for their lands.

Had the sellers been instructed to inform the Ranch of the inclusion of the Parcels for IAL designation recommendations by the County, the Ranch would not have purchased the Parcels. Either way, forcing IAL designation on the Ranch now, without its cooperation or consultation by the it or the prior landowner will only serve to further the harms initiated by the County's insufficient recommendation and seller disclosure processes. Due to those insufficiencies, the Ranch has now purchased and significantly overpaid for lands subject to undisclosed occupancy restrictions.

Having never received notice of the same, the Ranch could not be expected to understand its rights as a buyer or potential landowner or to grasp the potential impact of the restrictions contemplated by IAL designation of their lands. Most concerning among these are the occupancy restrictions which threaten to partially devalue the lands held by the Ranch and limit the future right of the Ranch to freely determine who can reside on their lands.[1]

As such, the Ranch objects to IAL designation of their parcels on the grounds that the City and County of Honolulu ("the County") did not meet the notice and recommendation process requirements outlined in HRS § 205-47.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust vague promises of nonenforcement as benevolent protection of their rights to live in their own homes is offensive and disrespects landowners' basic occupancy rights.

Furthermore, such vague promises cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion. This bill mandates that DPP impose serious fines or even place liens on certain properties based in any non-conforming uses.[2]

This development significantly undercuts the veracity of DPP's statements to assuage aggrieved landowners whose lands have been identified for IAL designation, attempting to assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

It also underscores DPP's inability to promise or retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to farm their lands personally and actively.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Ranch's urgent fear that HRS § 205-45.5 will be applied to their home, and

[1] Per HRS § 205-45.5(1): "The farm dwellings and employee housing units shall be **used exclusively by farmers and their immediate family members who actively and currently farm on important agricultural land upon which the dwelling is situated.**" (emphasis added).

regardless of immediate enforcement efforts, will stand as a de facto eviction of the Harris Ranch and their loved ones from their own home and property.

While the Ranch does not currently reside on the Parcel(s), they may one day want to live there as allowed by HRS § 205-4.5. The language of HRS § 205-45.5, however, combined with legislation like this bill, makes it unclear whether the Ranch will ever be able to freely to occupy the property in the future.

Additionally, the strict limits on occupancy imposed in connection with IAL designation will significantly devalue the Ranch's property should they ever wish to sell the land. This is especially true so long as legislation being advanced by the City Council continues to stoke legitimate fears on the part of buyers that enforcement (required or discretionary) of the HRS § 205-45.5 may one day remove them from any IAL designated property they acquire. As such, even if no enforcement action is taken against the Ranch, the presence of restrictions will continually cast uncertainty over their future occupancy rights and severely limit their ability to secure the proper value of land(s) that they have invested in extensively.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Ranch or otherwise take advantage of them, then a simple complaint would be all it would take to trigger a series of significant harms that will strip the Ranch and their loved ones' of their most basic property rights: the right to occupy one's own home.

Additionally, no parties were afforded an opportunity to consult or cooperate with any government agency regarding the potential designation of the Parcels and whether they satisfied the criteria set out in HRS § 205-44(c). Such a consultation would also have allowed exploration of whether any enacted incentives would make a voluntary landowner designation of a portion of the Parcels under HRS § 205-45 a feasible alternative. The County's failure to notify or consult with landowners contradicts the cooperation, consultation, consent, and reporting requirements set for the County by HRS § 205-47.

Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS § 205-46, and 51. Had the County properly informed The Ranch, LLC of the consideration of their lands for IAL designation and enacted incentives and protections in advance of the identification of said lands, The Ranch would have had appropriate time to consider and pursue voluntary designation of part of their parcels and undertake whatever upgrades and filings necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45.

Aside from remedies needed to address the lack of presale disclosures, the Ranch is at the very least entitled to the opportunity to decide about voluntary partial designation, in cooperation with State and County officials once the State and the County have seen to their statutory responsibilities regarding enacting established incentives for IAL lands and landowners. Designating the parcels belonging to the Ranch as IAL now, without their cooperation would constitute an improper refusal to abide by statutory obligations to provide landowners with

access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the County were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Ranch's Parcels as IAL and request a hearing to consider the timely and appropriate application of applicable IAL criteria to the Parcels and the procedural validity of the LUC's proceedings under HRS § 205-49.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: Hakoda, Riley K
Sent: Tuesday, August 31, 2021 2:59 PM
To: Quinones, Natasha A
Subject: FW: Re: Important Agricultural Lands
Attachments: 210831 Pueo Land Trust_Objection Letter.pdf

Follow Up Flag: Follow up
Flag Status: Completed

From: Marry Huynh <marry@dlmhawaii.com>
Sent: Tuesday, August 31, 2021 2:41 PM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Hakoda, Riley K <riley.k.hakoda@hawaii.gov>; Kalani Morse <kmorse@dlmhawaii.com>; Sierra Neves <sierra@dlmhawaii.com>
Subject: [EXTERNAL] Re: Important Agricultural Lands

Aloha,

On behalf of our office and Mrs. Erin Carruth, trustee of "THE PUEO LAND TRUST," please find attached correspondence regarding the Important Agricultural Lands.

Thank you,

Marry Huynh – Paralegal
Direct: (808) 792-1216
DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813
https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

This office represents Mrs. Erin Carruth, trustee of "THE PUEO LAND TRUST" (the "Trust" or the "Client"). The Trust owns the parcel identified as Tax Map Key No. 9-4-005-0100000 (the "Parcel"). The Parcel is 32.54 acres in size. Imposing the restrictions contemplated by an Important Agricultural Lands ("IAL") designation on the Parcel would place a severe burden on the Mrs. Carruth and the Trust. As such, the Trust objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawai`i ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels that while larger than two acres, are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners adequate time to properly understand and weigh the impacts of IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly to properly determine if they meet the IAL criteria set forth in Hawai`i Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcels at this point and requests an opportunity to have a formal hearing whereby the LUC more closely reviews our Client's Parcels and individual circumstances.

The Trust's parcel faces several conditions which severely limit the agricultural production possible on the property. While the parcel is large, it is situated within a large gulch and the bulk of the acreage is taken up with extremely steep topography inhospitable to crops. The soil is also very rocky and large portions of the land have not reliably grown crops for decades. Furthermore, the Kipapa Stream runs through the property and unpredictably floods the land. Much of the land will never be viable for planting and the portion of the land actually usable for agriculture depends on conditions such as the frequency of flooding. Therefore, it is

not clear that designation of the parcel would contribute to maintaining a critical land mass important to agricultural operating productivity. As such, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

Agriculture is being accomplished on the Trust's parcel at present in the form of a poultry farm. However, water access issues threaten the continued operation of the farm. The farm does not have control over its water supply. Water for the farm comes from a basal aquifer and is pumped from a well situated on a parcel owned and operated by another business. Farm operators have gone without water for days due to service issues with the pump. The well has also been contaminated in the past and it is our understanding that water from this well is considered unpotable. These water supply issues sometimes result in expensive and damaging mass die offs among the chickens raised on the property. The unpredictable and frequently interrupted water service to the property may make sustained production of food, fiber, or fuel and energy producing crops on the land as required by the IAL statutes impossible.[1]

At any point the challenging conditions faced on the property due to its suboptimal location and inconsistent water access could interrupt or indefinitely foreclose any agricultural production taking place on the land. However, HRS 205-45.5 mandates that only those who "actively and currently farm" and their families can live on IAL designated lands.[2] Should agricultural production ever become impossible or economically inviable on the Trust's parcel, designation of the parcel as IAL would make it impossible for Mrs. Erin Carruth and her loved ones to live on the land held by the Trust.

Furthermore, the occupancy will degrade the occupancy rights of Mrs. Erin Carruth or any other potential occupant in the inevitable event that the occupant eventually becomes physically unable to farm due to illness, disability, or old age. Therefore, IAL designation of the parcel will potentially render any occupancy of the Trust's land illegitimate and will likely force abandonment of a property that Mrs. Erin Carruth has developed and invested in extensively.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust vague promises of nonenforcement as benevolent protection of their rights to live in their own homes is offensive and disrespects landowners' basic occupancy rights.

---

[1] Per HRS § 205-42. Important Agricultural Lands are those lands which:
(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

[2] HRS § 205-45.5(1) reads as follows:
(1) The farm dwellings and employee housing units shall be ***used exclusively by farmers*** and their immediate family members ***who actively and currently farm*** on important agricultural land upon which the dwelling is situated (emphasis added).

Furthermore, such vague promises cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion. This bill mandates that DPP impose serious fines or even place liens on certain properties based in any non-conforming uses.[3]

This development significantly undercuts the veracity of DPP's statements to assuage aggrieved landowners whose lands have been identified for IAL designation, attempting to assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by. It also underscores DPP's inability to promise or retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to farm their lands personally and actively.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Trust's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of immediate enforcement efforts, will stand as a de facto eviction of the Trust from the property.

While the Carruth family does not currently reside on the parcel, they may one day want to live there as allowed by HRS § 205-4.5. The language of HRS § 205-45.5, however, combined with legislation like this bill, makes it unclear whether the Trust will be able to freely determine the occupancy of its parcel in the future.

Additionally, the strict limits on occupancy imposed in connection with IAL designation will significantly devalue the Trust's property should they ever wish to sell the land. This is especially true so long as legislation being advanced by the City Council continues to stoke legitimate fears on the part of buyers that enforcement (required or discretionary) of the HRS § 205-45.5 may one day remove them from any IAL designated property they acquire. As such, even if no enforcement action is taken against the Trust, the presence of restrictions will continually cast uncertainty over their future occupancy rights and severely limit their ability to secure the proper value of land(s) that they have invested in extensively.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to Mrs. Carruth or the Trust, then a simple complaint would be all it would take to trigger a series of significant harms that will strip the Trust of its occupancy rights.

Mrs. Carruth and the Trust further object to IAL designation of the parcel on the grounds that the City and County of Honolulu (the "County") did not meet the requirements outlined in HRS § 205-47. Neither Mrs. Carruth nor any representative of the Trust was afforded an opportunity to consult or cooperate with any government agency regarding the potential designation of the parcel and whether they satisfied the criteria set out in HRS § 205-44(c). Such a consultation would also have allowed exploration of whether any enacted incentives would make a voluntary landowner designation of a portion of the parcel under HRS § 205-45 a

[3] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

feasible alternative to full IAL designation. The County's failure to notify or consult with landowners contradicts the cooperation, consultation, consent, and reporting requirements set for the County by HRS § 205-47.

Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS § 205-46, and 51.

Had the County properly informed Mrs. Carruth and the Trust of the consideration of their lands for IAL designation and enacted incentives and protections in advance of the identification of said lands, The Trust would have had appropriate time to consider and pursue voluntary designation of part of their parcels and undertake whatever upgrades and filings necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45.

The Trust is at the very least entitled to the opportunity to decide about voluntary partial designation, in cooperation with State and County officials once the State and the County have seen to their statutory responsibilities regarding enacting established incentives for IAL lands and landowners. Designating the parcels belonging to the Trust as IAL now, without their cooperation would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the County were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of the Trust parcel as IAL and request a hearing to consider the timely and appropriate application of applicable IAL criteria to the Parcels and the procedural validity of the LUC's proceedings under HRS § 205-49.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Quinones, Natasha A

From: Hakoda, Riley K
Sent: Tuesday, August 31, 2021 4:08 PM
To: Quinones, Natasha A
Subject: FW: Re: Important Agricultural Lands
Attachments: 210831-Tokoro Objection Letter.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Marry Huynh <marry@dlmhawaii.com>
Sent: Tuesday, August 31, 2021 3:24 PM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Hakoda, Riley K <riley.k.hakoda@hawaii.gov>; Kalani Morse <kmorse@dlmhawaii.com>; Sierra Neves <sierra@dlmhawaii.com>
Subject: [EXTERNAL] Re: Important Agricultural Lands

Aloha,

On behalf of our office and Mrs. Dallas Tokoro, please find attached correspondence regarding the Important Agricultural Lands.

Thank you,

Marry Huynh – Paralegal
Direct: (808) 792-1216
DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813
https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of our client Mrs. Dallas Tokoro (the "Client"). Mrs. Tokoro is a registered owner of the parcel identified as Tax Map Key No. (1) 86011004. The parcel is 22.783 acre(s). Imposing the restrictions contemplated by an important agricultural lands ("IAL") designation on these parcels would be a severe burden on Mrs. Tokoro and her family. Thus, Mrs. Tokoro objects to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommendations that agricultural parcels less than 2 acres be excluded from IAL designation because such parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

However, many families, retired and disabled farmers, and others have invested their livelihoods into agricultural parcels that while larger than two acres, are also not capable of generating sufficient agricultural production. Still others like our client strongly object to IAL designation based on the knowledge that the City and County of Honolulu ("the County") did not properly fulfil its statutory obligations when identifying lands for designation and that IAL designation stands to seriously harm landowner interests. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners adequate time to properly understand and weigh the impacts of IAL designation and afford the LUC the opportunity to more closely review the individual circumstances of those owners and their lands, particularly to properly determine if they meet the IAL criteria set forth in Hawai'i Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcels at this point and requests an opportunity to have a formal hearing whereby the LUC more closely review our Client's Parcel and individual circumstances.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking

landowners to trust in vague informal promises of nonenforcement as benevolent protection of their rights to live in their own homes is disrespectful of landowners' basic occupancy rights and their basic need for security.

More importantly, such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[1]

Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Only protection from IAL designation will assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

Indeed, DPP and other agencies cannot viably promise enforceable protections from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen the Tokoro's urgent fear that HRS § 205-45.5 will be applied to their home, and regardless of any standdown of immediate enforcement efforts, will stand as a de facto eviction of the Tokoro and their loved ones from their own home and property.

Even if no enforcement actions are taken against Mrs. Dallas Tokoro in connection with IAL noncompliance, the language of HRS § 205-45.5, combined with legislation like this bill, will continually be a source of stress and concern for Mrs. Dallas Tokoro and any future landowners or occupants. The current situation creates a threatening uncertainty that looms over Mrs. Tokoro genuine hope of living out their days on their own property and passing that property down to their heirs without the threat of eviction and foreclosure hanging over the heads of their properties.

The sad consequence of these actions by the City and County and the IAL recommendation and designation process thus far is the injurious infliction of significant distress that negatively affects the health and well-being of landowners, including the Tokoro family.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to the Tokoro family or otherwise take advantage of them, a simple complaint would be all it would take to trigger a largely unavoidable series of significant harms that will ultimately strip the Tokoro and their loved ones of their most basic property rights: the right to occupy their own home.

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[1] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

Furthermore, Mrs. Tokoro had no opportunity to consult or cooperate with any government agency regarding the potential designation of their parcels and whether they satisfied the criteria set out in HRS § 205-44(c) or whether any of the incentives offered would make a voluntary, partial, landowner designation under HRS § 205-45 a feasible alternative. The County's omission of critical and material facts and failure to consult with the Mrs. Tokoro contradicts the cooperation, consultation, consent, and reporting requirements set for the County by HRS § 205-47.

Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS § 205-46, and 51. Limited agricultural activity is currently taking place on the Tokoro family's parcel. As such, a broad and substantially supportive incentives regime established by both the State and the County could be in the interest of the Tokoro family. It is possible that once an incentives regime is furnished the Tokoro family will deem IAL designation beneficial and seek voluntary designation. However, the County's pursuit of involuntary IAL designation for the Trust's entire parcel before incentives have been properly enacted does nothing to aid the existing agricultural activity. Furthermore, such action is improper according to the standards set out in the IAL statutes.[2]

Had the County communicated at all to Mrs. Tokoro or her family members regarding the restrictions associated with IAL designation and enacted incentives and protections in advance of the identification of Mrs. Tokoro' parcel as IAL, Mrs. Tokoro would have had appropriate time to consider and pursue voluntary designation of part of his land and undertake whatever upgrades necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45. Denying landowners this opportunity is clearly improper and as such designation of Mrs. Tokoro land should not be allowed to take place.

Designating Mrs. Tokoro' parcel as IAL now, without her cooperation would constitute an endorsement of the County's improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the City were supposed to enact, and to ensure cooperation and consultation with landowners.

For the reasons stated above, we hereby respectfully submit these objections to the designation of Mrs. Jan K. Tokoro' parcel as IAL.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM

Quinones, Natasha A

From: DBEDT LUC
Sent: Tuesday, August 31, 2021 4:12 PM
To: Quinones, Natasha A
Subject: FW: Objection to IAL Designation re: Jamlin LLC
Attachments: 210831 Jamlin LLC_Objection Letter.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

From: Sierra Neves <sierra@dlmhawaii.com>
Sent: Tuesday, August 31, 2021 1:22 PM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Kalani Morse <kmorse@dlmhawaii.com>
Subject: [EXTERNAL] Objection to IAL Designation re: Jamlin LLC

Aloha,

Please find attached the objection to IAL designation letter on behalf of Jamlin LLC.

Please do not hesitate to contact us should you have any questions.

Mahalo,

Sierra Neves – Admin Assistant

Direct: (808) 792-1214

DURRETT LANG MORSE, LLLP
ATTORNEYS AT LAW

Davies Pacific Center 841 Bishop Street Suite 1101 Honolulu, Hawai`i 96813

https://www.durrettlang.com/

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

KALANI A. MORSE, ESQ.
Direct: 808.792.1213
kmorse@dlmhawaii.com

(Via email to: dbedt.luc.web@hawaii.gov)

State of Hawaii Land Use Commission
Department of Business, Economic Development & Tourism
c/o Chairman Jonathan L. Scheuer
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Re: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We write on behalf of Mr. James Kobatake and his company Jamlin, LLC (the "Client"). Jamlin, LLC is the owner of the parcel identified as Tax Map Key No. (1)94005095. The parcel is 23.76 acres. Imposing the restrictions contemplated by an Important Agricultural Lands ("IAL") designation on this parcel would be a severe burden on Mr. Kobatake. Thus Jamlin, LLC objects to the parcel identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission ("LUC"), the Office of Planning of the State of Hawaii ("OP") adopts the Department of Agriculture's reasoning and recommends that agricultural parcels less than 2 acres be excluded from IAL designation because such smaller parcels are not conducive to support viable agricultural operations. Our client agrees with and supports this recommendation as it makes rational sense and protects retirees, families, and others currently living on small parcels zoned for agricultural use.

Nevertheless, many families, retired and disabled farmers, and others like our client have invested their livelihoods into agricultural parcels significantly larger than two acres but which are also not capable of generating sufficient agricultural production. The OP's letter also recommends that the LUC defer designation for those parcels of two (2) acres or more, whose owners object to the IAL designation to allow the owners time to better understand the impact of such IAL designation and afford the LUC the opportunity to more closely review the individual circumstances for each of these parcels, particularly if they meet the criteria of Hawaii Revised Statutes § 205-44. As such, our Client objects to IAL designation of its Parcels and requests an opportunity to have the LUC more closely review our Client's Parcels and individual circumstances.

The nature of large portions of Jamlin, LLC's parcel are likely to hinder any reasonable form of agricultural production that would sufficiently be in concert with the goals of the Important Agricultural Lands Law. The parcel does not currently enjoy direct access to sufficient quantities of usable water in order to support meaningful agricultural production. As we understand, Mr. Kobatake must truck in portable water vessels if he wants to undertake any kind of agricultural irrigation activity on the parcel.

Jamlin, LLC's parcel also does not clearly appear to contribute to maintaining a critical land mass important to agricultural operating productivity. While the land is significantly larger than two acres, steep topography dominates the parcel. This steeply sloped land may be suitable for some type of agricultural production. However, it is not possible for the types of crops Mr. Kobatake typically grows to survive on this land. Establishing production in these areas would require significant guidance to the landowner as well as support from the State and County, which has yet to materialize. Production of food, fiber, or fuel and energy producing crops on much of the existing land area would pose significant logistical challenges. What remaining portions are potentially viable for agricultural production are considerably small and unlikely to support significant agricultural production, as defined by the Hawaii Department of Agriculture[1] and as mandated by the IAL statute.[2] As such, there is good reason for the LUC to consider the particular circumstances of this Parcel and determine that designation of this parcel as IAL would not be proper according to the criteria set out in HRS§ 205-44(c).

The occupancy restrictions imposed by IAL designation would invalidate Mr. Kobatake's right to ever reside on the parcel unless he is actively and continually engaged in agricultural production on the property. This is especially troubling to Mr. Kobatake because the water access issues and steep topography of the land may someday make sustained agriculture impossible. Furthermore, the occupancy restrictions would degrade the right of any occupant to reside on Mr. Kobatake's parcel in the inevitable event that they eventually become physically unable to farm due to illness, disability, or old age. Therefore, IAL designation will potentially render any occupancy of Mr. Kobatake's land illegitimate and will likely force abandonment of a property that Mr. Kobatake and Jamlin, LLC. have developed and invested in extensively.

DPP officials and other government agency officials have often responded to landowner concerns over the occupancy restrictions in HRS § 205-45.5 by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Asking landowners to trust vague promises of nonenforcement as benevolent protection of their rights to live in their own homes is offensive and disrespects landowners' basic occupancy rights. Furthermore, such vague promises cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion. This bill mandates that DPP impose serious fines or even place liens on certain properties based in any non-conforming uses.[2]

This development significantly undercuts the veracity of DPP's statements to assuage aggrieved landowners whose lands have been identified for IAL designation, attempting to assure them that they have nothing to worry about with respect to the significant occupancy restrictions in HRS § 205-45.5 that many landowners will be unable to abide by.

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[1] See the letter from the Office of Planning to the Land Use Commission dated 5/20/21 which observed:
"DOA states that from an agricultural perspective, two (2) acres is the minimum size at
which a farming operation can typically be viable."

[2] Per HRS § 205-42. Important Agricultural Lands are those lands which:
(1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
(2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
(3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

It also underscores DPP's inability to promise or retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to farm their lands personally and actively.

The advancement of this legislation and other efforts to dispossess occupancy rights only serve to deepen Jamlin, LLC's urgent fear that HRS § 205-45.5 will be applied to their land, and regardless of immediate enforcement efforts, will stand as a de facto eviction of Mr. Kobatake or any future occupant from the property. While Mr. Kobatake does not currently reside on the Parcel(s), they may one day want to live there as allowed by HRS § 205-4.5. The language of HRS § 205-45.5, however, combined with legislation like this bill, makes it unclear whether Jamlin, LLC will be able to freely determine the occupy of the property in the future.

Additionally, the strict limits on occupancy imposed in connection with IAL designation will significantly devalue Mr. Kobatake's property should he ever wish to sell the land. This is especially true so long as legislation being advanced by the City Council continues to stoke legitimate fears on the part of buyers that enforcement (required or discretionary) of the HRS § 205-45.5 may one day remove them from any IAL designated property they acquire. As such, even if no enforcement action is taken against Mr. Kobatake and Jamlin, LLC., the presence of restrictions will continually cast uncertainty over their future occupancy rights and severely limit their ability to secure the proper value of land(s) that they have invested in extensively.

In addition to the above, DPP also stated that where complaints are filed, DPP would be obligated to enforce the occupancy restrictions in HRS § 205-45.5. As such, if any person or entity sought to do harm to Mr. Kobatake or otherwise take advantage of him, then a simple complaint would be all it would take to trigger a series of significant harms that will strip Mr. Kobatake and his loved ones' of their most basic property rights: the right to occupy one's own home.

Jamlin, LLC also objects to IAL designation on the grounds that the City and County of Honolulu (the "County") did not meet the requirements outlined in HRS§ 205-47. The County informed Mr. Kobatake by mail of the possible designation of his parcel as IAL. However, to our knowledge the County specifically communicated to Mr. Kobatake that IAL designation would have no implications for the use or future development of his parcel.[3] In fact, IAL designation would result in several restrictions being applied to Jamlin, LCC's parcel which clearly limit its use and threaten to significantly devalue the land.[4]

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[3] Instances of County officials offering incomplete or mistaken information in communication to landowners concerning IAL have been observed before and are clearly documented in the record of the County's public meetings. An enumeration of some of those instances is as follows:

DPP officials characterized IAL designation as an "opportunity" to take advantage of incentives, despite the responsibility to create incentives being as yet unfulfilled.

DPP Deputy Director Apuna acknowledging that information passed to landowners in public hearings was incorrect – See: https://www.civilbeat.org/2021/05/the-fight-over-hawaiis-important-agricultural-lands/
DPP Officials wrongly claimed that IAL designation would not impact "existing ownership or development rights" – See pgs. 50 - 51 of https://luc.hawaii.gov/wp-content/uploads/2021/02/IAL-Final-Appendices-C-F.pdf.

The County also failed to extend Jamlin, LLC any opportunity to consult or cooperate with any government agency regarding the potential designation of its parcel to determine whether the parcel satisfied the criteria set out in HRS 205-44(c) or whether any of the incentives offered would make a voluntary, partial, landowner designation under HRS 205-45 a feasible alternative to complete designation. The County's failure to consult, along with the above recorded omissions and misrepresentations of critical and material facts fail to support the cooperation, consultation, consent, and reporting requirements set for the County by HRS§ 205-47. Furthermore, the County has thus far failed to enact any incentives, protections, and reduced infrastructure requirements for IAL designated lands, as required by HRS §§ 205-46, and 51. Moreover, the State has likely also failed to fully and properly enact incentives and protections for IAL lands, as required by HRS § 205-46.

Had the County communicated honestly Mr. Kobatake regarding the restrictions associated with IAL designation and enacted incentives and protections in advance of the identification of Jamlin, LLC's parcel as IAL, Mr. Kobatake would have had appropriate time to consider and pursue voluntary designation of part of his land and undertake whatever upgrades and filings necessary to prepare the land for partial IAL designation, pursuant to HRS § 205-45. Designating the parcel as IAL now, without Jamlin, LLC's cooperation, would constitute an improper refusal to abide by statutory obligations to provide landowners with access to and ample time to consider the constitutionally and statutorily mandated incentives that the State and the City were supposed to enact.

For the reasons stated above, we hereby respectfully submit these objections to the designation of Jamlin, LLC's parcel as IAL and request a hearing to consider the timely and appropriate application of applicable IAL criteria to Mr. Kobatake's parcel and the procedural validity of the LUC's proceedings under HRS § 205-49.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

[4] For example, HRS 205-45.5(1) mandates that only active farmers and their families live on IAL lands, which is not a standard currently applied to agricultural land generally. See the text (emphasis added):
(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members **who actively and currently farm on important agricultural land upon which the dwelling is situated**; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

JONATHAN S. DURRETT
DIRECT: 808.792.1211
JDURRETT@DLMHAWAII.COM

KALANI A. MORSE
DIRECT: 808.792.1213
KMORSE@DLMHAWAII.COM

August 31, 2021

Via email to: dbedt.luc.web@hawaii.gov

State of Hawai`i Land Use Commission
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Dear Chair Scheuer and Commissioners:

This firm represents a number of farmers and landowners whose lands have been recommended by the City and County of Honolulu ("the County") for designation as "Important Agricultural Lands," ("IAL") as that phrase has been defined by the State Legislature in HRS §§ 205-41 – 205-52 (the "IAL Statutes"). These and many other landowners are collectively concerned that designation of their lands as IAL will adversely affect their use and enjoyment of their lands. Additionally, they are uniformly aggrieved by the process utilized thus far for identifying and recommending all or significant portions of their lands as IAL.

As part of our work on behalf of these landowners, our office has been engaged in a review of the processes for implementation of the IAL Statutes, including the procedures employed thus far to identify and recommend potential lands to the State of Hawai`i Land Use Commission (the "LUC") for IAL designation.

We understand that the LUC has requested the Attorney General for the State of Hawai`i (the "AG") to provide the commissioners with a legal opinion advising them on "threshold" questions, the answers to which would determine whether the IAL selection and designation proceedings thus far are legally sufficient to justify the LUC proceeding with its constitutional and statutory obligations to accept the recommendations and map submitted by the County and then proceed with designating those lands as IAL.[1]

One threshold question cited by the LUC in its motion to seek a legal opinion from the AG is the oft-asked question about the legal sufficiency of the County's selection of lands for IAL recommendation based on just one of the eight statutory criteria for IAL lands set forth in HRS § 205-44 (c). While that threshold question unquestionably warrants an opinion, other serious threshold questions should also be addressed.

[1] At the LUC's May 26, 2021 hearing, the following motion from Commissioner Wong passed unanimously:

> I would like to move that the Commission request a formal publishable Attorney General's opinion on whether or not the County, in developing its' Important Agricultural Land Recommendation is required to apply all eight of the criteria contained in §205-44(c) to each individual parcel or whether it may make a general determination as to what criteria should or should not be applied to formulate its' Recommendation. Further that the Chair works with the Executive Officer to further refine the specific question or questions to be directed to the Attorney General.

For example, procedural insufficiencies with the process thus far have been pointed out by landowners and commentators who are concerned that the process currently appears to be moving toward results that will violate basic property and due process rights. The process also remains incomplete in that it cannot yet comply with the statutorily required steps and procedures designed to protect against such violations.

More specifically:

> (1) The LUC should not receive and adopt the County's IAL map and recommendations until the County enacts statutorily required IAL incentives. Only then should the LUC receive the County's IAL recommendations, in compliance with HRS § 205-48(a) (LUC shall not receive the County's recommended maps no sooner than the legislative enactment of incentives.
>
> (2) As required by HRS §§ 205-49 (d)(2) and 205-46, the LUC needs to allow landowners at least three years to consider County-enacted incentives before designating as IAL those lands recommended for the same by the County.[2]
>
> (3) The County's reporting of its communication, cooperation, and consultation with landowners during its IAL identification and recommendation process, as required by HRS §§ 205-47(b) and 205-47(d)(5), does not satisfy the basic standards required by any governmental process that results in erosion of legal rights otherwise guaranteed by the Constitution, and falls far short of basic standards of due process.[3]

The details of these deficiencies are further outlined below. We request that the LUC counsel with and direct questions to the AG's office, asking them to consider and analyze these issues and address in its opinion the threshold questions as to whether:

a) The County's process for IAL recommendations is adequate,

b) The County's submission to the LUC is timely and appropriate,

c) The County needs to:

   a. Provide adequate and verifiable notice to, and cooperation and consultation with, actual landowners whose lands will be significantly affected by County IAL recommendations, and enact County ordinances establishing IAL incentives, and

d) Given the answers to the above, will the LUC comply with all IAL Statutes if it proceeds with IAL designation proceedings at this time.

I. The County still needs to enact incentives for IAL lands.

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[2] HRS § 205-49(d)(2) (emphasis added) states: "The land use commission may designate lands as important agricultural lands and adopt maps for a designation pursuant to: [...] the county process for identifying and recommending lands for important agricultural lands under section 205-47 ***no sooner than three years, after the enactment*** of legislation ***establishing incentives*** and protections contemplated under section 205-46..."

[3] Per HRS § 205-45.5(1): The farm dwellings and employee housing units shall be ***used exclusively by farmers*** and their immediate family members who ***actively and currently farm*** on important agricultural land upon which the dwelling is situated." (emphasis added). *See* our separate memo of the same date to the Attorney General's office and the LUC detailing the harms arising from the occupancy restrictions in HRS § 205-45.5 and detailing how application of those restrictions to IAL parcels will violate due process and landowner rights.

HRS § 205-46 requires each county to legislatively enact incentives and protections related to IAL. HRS 205-48(a) mandates the ***legislative enactment*** of incentives by each county before the LUC can "receive" the County's IAL recommendations and maps.[4] Additionally, HRS § 205-51 also requires that the counties first "adopt ordinances that reduce infrastructure requirements" for IAL lands.[5]

Regarding the County's statutory obligation to enact IAL incentives, the City and County of Honolulu Department of Planning and Permitting's Deputy Director Dawn Takeuchi Apuna affirms on the record that the City has "put the cart before the horse" with its IAL recommendations to the LUC because the County still needs to craft incentives for IAL.[6] A comprehensive review of all ordinances and resolutions passed by the City Council since 2005 confirms Apuna's conclusion: since enactment of the IAL Statutes requiring the counties to enact incentives and protections for IAL lands, no such incentives or protections have been enacted and established.[7]

In a 2018 resolution, the City Council explicitly acknowledged the still-unsatisfied requirement for the County to provide specific incentives for IAL lands, stating:

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[4] (a) The land use commission ***shall receive*** the county recommendations and maps delineating those lands eligible to be designated important agricultural lands ***no sooner*** than the effective date of the ***legislative enactment of protection and incentive measures*** for important agricultural lands and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawai`i 2005 (emphasis added).

[5] HRS 205-51 states:

> (a) Each ***county shall*** adopt ordinances that reduce infrastructure standards for important agricultural lands no later than the effective date of the legislative enactment of protection and incentive measures for important agricultural lands and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawaii 2005.

[6] See quote from end of recent news article:

> "Ultimately, Apuna said, the IAL designation is meant to help and not hinder owners of ag land. One challenge, she said, is that the city hasn't yet crafted incentives, as it is supposed to do, to benefit the landowners. In that sense, she said, the city has put the cart before the horse."

See CIVIL BEAT, THE FIGHT OVER HAWAII'S IMPORTANT AGRICULTURAL LANDS', *Stewart Yerton*, 25 May 2021, available at: https://www.civilbeat.org/2021/05/the-fight-over-hawaiis-important-agricultural-lands/

[7] County records for all ordinances and resolutions that reference "Important Agricultural Lands", or otherwise feature the term "agriculture" or its derivatives do not enact any legislation that "establishes" incentives, protections, or reduced infrastructure requirements for IAL lands or landowners. From 2005 to the present, the City Council passed 43 ordinances and resolutions related to agriculture; none of which established IAL incentives. Of those 43 enactments, nine related to ag dedication procedures, ag tax burdens, or other regulation of agricultural lands generally (*see*: RES05-307, ORD07-004, RES08-008, ORD11-026, ORD12-016, ORD13-025, RES13-034, ORD15-032, ORD17-002). None specifically apply to IAL designated lands. Neither do they contain any references to the County's IAL incentive obligations. Finally, none referenced any of the relevant IAL Statutes or the County incentive requirements therein.

Six pieces of legislation enacted by the City Council do specifically mention the County's obligation to create and enact County incentives for Important Agricultural Lands. *See* RES07-374, RES12-023, RES16-288, RES17-281, RES18-201, and RES18-233. None, however, actually enact any established incentives, protections, or reduced infrastructure requirements for IAL lands and/or landowners:

- RES07-374: Acknowledges that IAL incentives must be created and urges the DPP, not the City Council itself, to establish incentives. The resolution is listed as "deferred in committee"
- RES12-023: Urges expediency in mapping for IAL. Mentions County incentive obligations only once, but only in relation to state-level incentives created by Act 233 in 2008. Does not enact any incentives by the County.
- RES16-288: Allocates State funding for IAL mapping to the counties as part of broad a package of State legislation. The resolution mentions that IAL designation comes along with access to County incentives; does not discuss or enact any incentives or allocate any funding for County incentives.
- RES17-281: Same as RES16-288, carried over one year.
- RES18-201: Requests that the County's Agricultural Development Task Force advise on IAL mapping and report on what possible county-level incentives could be created for IAL designated lands. Specifically articulates that the County is required to enact incentives but does not enact any protections or incentives.
- RES18-233: Articulates the Council's judgement that County mapping of IAL was done in accordance with HRS 205-47. Places County IAL maps and associated tax map key numbers in appendix; does not discuss or enact any incentives or protections for IAL lands.

> WHEREAS, HRS Chapter 205, Part III, also mandates the counties to develop incentives to promote the viability of agricultural enterprise on IAL and to assure the availability of IAL for long-term agricultural use.

See RES18-201.[8] The City Council then resolved that the City Council's Agricultural Development Task Force be "requested to suggest possible incentives ***for enactment by the Council*** to promote the viability of agricultural enterprise on Important Agricultural Lands." *See id.* (emphasis added). The City Council, however, has yet to enact incentives or protections for IAL lands, or any other IAL-specific legislation. *See* FN 5 and FN 6, *supra*.

In addition to the City Council's awareness of the County's still unmet IAL incentive obligations (as evidenced in the text of RES18-201), County level inaction on incentives has long been a source of concern for State agencies involved in the implementation of the IAL Statutes. In 2007, the State of Hawai`i Department of Agriculture ("HDOA") combined with the State of Hawai`i Department of Taxation and other stakeholders to produce a statutorily required Final Report to the State Legislature on IAL incentives. That report starkly observed:

> Noticeably absent from the [proposed] IAL incentives are incentives provided by the counties. While the county planning departments were a part of the Forum, they did not engage to the extent of developing county level incentives. The Forum strongly encourages the counties to join with the State in making a commitment to the long-term viability of agriculture by providing incentives for IAL.

See REPORT TO THE TWENTY-FOURTH STATE LEGISLATURE STATE OF HAWAII: FINAL REPORT ON THE INCENTIVES FOR IMPORTANT AGRICULTURAL LANDS, Act 183, SLH 2005 *DEPARTMENT OF AGRICULTURE* (the "***HDOA Report***").[9] The HDOA Report specifically calls out the lack of County-enacted incentives, offering their judgment that the lack of County action rendered "incomplete" the entire proposed incentives package:

> While some members of the Forum strongly believe that without county incentives the incentives 'package' is incomplete, HDOA recommends that the incentives process continue to move forward. New or modified incentives, including ***county incentives, can be added in the future.***

Id. (emphasis added). Also, as discussed in more detail in Part II of this memo below, the HDOA Report noted how the lack of County action on incentives rendered infeasible a number of critical incentives that would have been especially beneficial to landowners and thus were removed from consideration due to the lack of County participation.

Section 9 of Act 183 and the IAL Statutes each mandate timely establishment of a robust set of incentives, to ensure landowners have adequate time to consider ALL the implications of IAL designation, including County-enactments that establish incentives and protections, before the LUC embarks on its process for designating County-recommended lands as IAL. Only by incentivizing and protecting farming will the agricultural goals articulated by our State Constitution be realized, and each landowner should be provided adequate opportunity, as

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[8] *See also* https://honolulu.granicus.com/MetaViewer.php?view_id=3&clip_id=852&meta_id=67757
[9] *See* https://hdoa.hawaii.gov/wp-content/uploads/2013/07/IAL-Final-Report-07.pdf

promised by the IAL Statutes, to choose incentives designed to encourage and support food production.[10]

As such, the LUC should comply with the IAL Statute by voting to "receive" the County's IAL maps and recommendations only AFTER County enactment of laws establishing IAL incentives and protections. Thereafter, the LUC's IAL designation of County-recommended lands, should only proceed after the subsequent waiting period is first clearly signaled to landowners and then concludes three years later, per the requirements in HRS § 205-49(d)(2).

II. The State Still Needs to Enact Established IAL Incentives and Protections.

Unlike the County, the Hawai`i State Legislature has attempted to enact IAL incentives. Those incentives enacted or identified by the State, however, have been intermittently funded, inconsistently maintained and fallen far short of being robust and "established" which is the clearly stated standard in Section 9 of Act 183 and the IAL Statutes.

a. The only material incentive enacted thus far has now lapsed

Even assuming the State Legislature somehow partially satisfied the IAL incentives mandate when it passed HRS § 235-110.93 to fund the Important Agricultural Lands Qualified Agricultural Cost Tax Credit (the "***IAL Tax Credit***"), that incentive is now defunct and thus not "established" as required by HRS § 205-49(d)(2). *See* FN 1, *supra.* In its recent report to the State Legislature, HDOA elucidated the fleeting and unestablished nature of the IAL Tax Credit and the need to better establish it for those whose lands may be slated for IAL designation:

> "The Department notes that the sunset date for this tax credit is at the end of tax year 2021. The Department will be submitting a bill during the 2021 Legislative Session to extend the tax credit. This extension is necessary to … allow landowners/farmers to claim IAL tax credits for their agricultural lands that are designated by the Land Use Commission as IAL pursuant to Section 205-49."[11]

Despite HDOA reporting on the IAL Tax Credit's importance, and the nearly universal testimony in support, all IAL Tax Credit renewal bills introduced in the 2021 session died and the IAL Tax

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[10] Food security experts in Hawaii agree that increased incentives for farmers (as opposed to wielding coercive state action against landowners) is the key to greater sustainability and self-reliance:

> Without changing some of the policies here, I don't see how we're going to move the needle on local food production. Today less than 1% of the state budget is committed to agriculture, whereas the plantations that were so profitable in their heyday had the support of generous government incentives. Reinstating agricultural tax breaks could be key to ratcheting up food security, Mathews said. "If the state is serious about improving local food production, then we have to realize that most food around the world is to some extent subsidized," To make that happen, Hawaii needs to invest in agricultural parks, irrigation systems and distribution facilities with the same gusto that it developed infrastructure and amenities to support tourism, said Glenn Teves, a University of Hawaii extension agent [...] "It's not enough to make land available for agriculture," Teves said. "If you're serious about developing agriculture, you need to look at the big picture and create infrastructure similar to what was done for tourism: airport, convention center, hotels, scenic vistas."

See https://www.civilbeat.org/2021/04/how-hawaii-squandered-its-food-security-and-what-it-will-take-to-get-it-back/ Imposing harmful and demotivating occupancy restrictions on landowners before they have a chance to weigh such incentives does not comport with the robust incentive-based approach contemplated by the IAL Statutes and as advocated by those who help craft and pass Section 9 of Act 183.

[11] *HAWAII DEPARTMENT OF AGRICULTURE* – REPORT ON THE STATE'S PROGRESS TOWARS MEETING THE MILESTONES AND OBJECTIVES OF THE IMPORTANT AGRICULTURAL LAND TAX CREDIT PROGRAM TO THE 31ST LEGISLATURE, 2021 REGULAR SESSION, available at: https://hdoa.hawaii.gov/wp-content/uploads/2020/12/DOA-IAL-Tax-Credit-Report-2019_final.pdf

Credit is now expired.[12] Without legislative renewal of the IAL Tax Credit, the State cannot meet its obligation to provide established incentives for IAL designated lands throughout the three-year waiting period mandated by HRS § 205-49(d)(2), during which time landowners must be able to consider and weigh material incentives and protections enacted and established by both the State AND the County.

The preambles for the proposed IAL Tax Credit renewal bills in 2021 (HB 830 and SB 339) also specifically assert the need for landowner to consider and claim the incentive: "[e]xtending the important agricultural land qualified cost tax credit will provide ***additional time*** to allow landowners and farmers to claim the tax credit ***in the event that their agricultural lands are*** identified as potential important agricultural lands and ***designated*** as such by the land use commission."[13]

Thus, even if the City Council proceeded to enact laws establishing IAL incentives, the LUC's designation of lands as IAL, pursuant to HRS § 205-49, will still lack the constitutionally and statutorily required incentives and protections. Thus, in addition to waiting for the City Council to enact IAL incentives, the LUC should also defer action until the State legislature renews and sufficiently establishes the IAL Tax Credits in HRS § 235-110.93.

b. The other listed "incentives" are not "established"

In its February 10, 2021 letter to the LUC, HDOA identified seven provisions of state law[14] they assert as providing incentives for IAL designated lands. While some of those provisions may discuss and refer to the IAL incentive mandate, they fail to ***establish*** incentives or protections to satisfy the statutory incentive requirements in Section 9 of Act 183, HRS §§ 205-46, and 205-49(d).

As explained above, the expired IAL Tax Credit in HRS § 235-110.93 cannot establish an incentive that can be properly weighed and relied upon by landowners contemplating IAL designation, until it is adequately re-funded by the State Legislature such that the IAL Tax Credit remains available for at least the three-year waiting period mandated by HRS § 205-49(d)(2).

In terms of the other "incentives" listed by the HDOA's February 10, 2021 letter to the LUC, each fails to meet the basic standard of providing an established incentive or protection to IAL lands

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[12] The following bills were introduced in the 2021 legislative session with the intent of extending the IAL Tax Credit:

HB830 & SB339 SD2:	The Committee on Agriculture recommended deferral of both bills.
HB1241 & SB985:	Both were referred to The Committee on Ways and Means and The Committee on Agriculture and the Environment. Neither bill passed.
HB874 HD1 & SB1028:	HB874 was referred to the Finance Committee and SB1028 was referred to Ways and Means and Agriculture and the Environment. Neither bill passed

[13] Available at: https://www.capitol.hawaii.gov/session2021/bills/HB830_.HTM

[14] *See* letter at https://luc.hawaii.gov/wp-content/uploads/2021/04/DOA-Comments-on-City-IAL-petition-to-LUC-2021.pdf which lists:

- Section 155-5.6 IAL agricultural and aquacultural loan guaranty
- Section 174C-31 State agricultural water use and development plan
- Section 205-44.5 Public lands as IAL
- Section 205-45.5 IAL farm dwellings and employee housing
- Section 205-46.5 Priority given to permits for agricultural processing facilities
- Section 235-110.93 IAL qualified agricultural cost tax credit
- Section 321-10.5 Priority given to permits for agricultural processing facilities

and/or landowners:

i. HRS § 205-44.5 relates to the identification and designation of public lands as IAL. Nothing in the text of that statute applies to privately held IAL lands and no incentive is offered to private landowners in § 205-44.5 and as such cannot be considered an incentive for IAL landowners.

ii. Section 321-10.5 merely restates the general and aspirational incentive language found in Section 205-46.5[15], asserting only that owners of IAL designated lands should receive the exact same benefits cited in Section 205-46.5: the ***possibility*** of a priority permitting process. This statute merely directs the agencies responsible for processing permit applications for agricultural processing facilities to work on granting priority and low costs to those applications submitted for facilities located on IAL designated lands. There is no evidence, however, that the agency responsible for approving and processing those permits has actually established this potential incentive.[16] Neither HRS § 205-46.5 nor HRS § 321-10.5 should be claimed as existing IAL incentives until such time as a separate permitting process is established such that it is clearly defined and unambiguously mandated such that landowners with lands recommended for IAL designation are able to fully consider and rely on such incentives.

iii. HRS § 174C-31 merely directs the State to ***identify*** the status of water and related land development and water use needs and water sources for IALs when creating agricultural water use and development plans. It does not actually extend any specific benefits, incentives, or protection to IAL designated lands (i.e.: no discounted rates for water, no guarantee of certain supply levels to IAL lands, etc.). Therefore, this section cannot be considered an established incentive or protection for IAL designated lands until specific incentives and protections are enacted and established such that they are clearly defined and unambiguously mandated so landowners with lands recommended for IAL designation are able to fully consider and rely on such incentives.

Finally, the only provision that HDOA lists that might qualify as a fully enacted and established incentive would be the agricultural and aquacultural loan guaranty in HRS § 155-5.6, which the State Legislature passed in 2008 as part of Act 233. This provision alone, however, is inadequate to meet the incentive standards set forth by the IAL Statutes. Act 183 directs HDOA to specifically consider a number of enumerated incentives, including dedicated funding, GET exemptions for farm produce sales, and changes to existing property tax systems.[17]

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[15] The sections have the same title and HDOA's own letter refers to the language as "similar".

[16] HDOA's website contains the following language (emphasis added):

> "HDOA **will be working** with the Department of Health (DOH) **to develop** a referral system and to assist in expediting the permits by making information available to potential permit applicants. DOH is aware of Act 233 and this incentive. The DOH staff has been directed to give priority to these permit applications. HDOA **will still need to work out a way** to confirm to DOH that the applicant has met the eligibility criteria."

As such, any planned streamlined permitting processes contemplated for IAL facilities have yet to fully materialize.

[17] See the following text from Act 183 (emphasis added):

> "(c) Incentives and other programs to promote agricultural viability, sustained growth of the agricultural industry, and the long-term use and protection of important agricultural lands for agricultural use in Hawaii by farmers and landowners ***to be considered by*** the department of agriculture ***shall include*** but not be limited to the following:

It is not clear that consideration of any of these specific incentive categories took place. Section C of HDOA's final report to the legislature comments on the range of incentives considered and specifically mentions that eminent domain protection and changes to land use determinations or zoning could have been considered as incentives, but that "the types of incentives that would have the greatest appeal to landowners and farmers and would result in true agricultural viability would be those that provide financial benefits, regulatory relief and dependable sources of water." Such incentives, however, lay in the power of the counties to consider and enact, which clearly has not happened yet for Oahu's IAL lands.

Some of the incentive categories specifically required to be considered by Act 183 were mentioned in the HDOA's final report. Others, however, were never mentioned and as such it cannot be determined that they were *considered* for implementation by the State, let alone by the County.

Indeed, consideration of important incentives as required by Act 183, such as the creation of advantageous property tax systems, failed to proceed due to the lack of County involvement and action.[18] Insofar as the County's nonparticipation barred consideration of needed incentives and protections, the State's otherwise commendable efforts to consider incentives remain stunted and inadequate. Authors of the HDOA's report shared that view in dubbing the incentives regime as "incomplete" due to County inaction (see above).

c. Unfulfilled County Responsibilities

HRS § 205-46 requires that the State ***and each county*** enact incentive programs for IAL lands[19] while HRS § 205-48(a) requires that enactment of such incentives and protections ***precede*** the

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(1) Assistance in identifying federal, state, and private grant and loan resources for agricultural business planning and operations, assistance with grant and loan application processes, and the processing of grants and loans;
(2) **Real property tax systems** that support the needs of agriculture, including property tax assessment of land and improvements used or held only for use in agriculture based on agricultural use value rather than fair market value;
(3) Reduced infrastructure requirements and facilitated building permit processes for the construction of dedicated agricultural structures;
(4) Tax incentives that include but are not limited to:
(A) Tax credits for the ***sale or donation of agricultural easements*** on important agricultural lands; and
(B) ***General excise tax exemption for retail sales of farm produce***;
(5) Incentives that promote investment in agricultural businesses or value-added agricultural development, and other agricultural financing mechanisms;
(6) Incentives and programs that promote long-term or permanent agricultural land protection, and the ***establishment of a dedicated funding source*** for these programs;
(7) Establishment of a permanent state revolving fund, escalating tax credits based on the tax revenues generated by increased investment or agricultural activities conducted on important agricultural lands, and dedicated funding sources to provide moneys for incentives and other programs;
(8) Establishment of a means to analyze the conformity of state-funded projects with the intent and purposes of part I of this Act [sections 205-41 to 52], and a mechanism for mitigation measures when projects are not in conformance;
(9) Institution of ***a requirement for the preparation of an agricultural impact statement*** that would include ***mitigation measures for adverse impacts for proposed state or county rulemaking*** that may affect agricultural activities, operations, and agricultural businesses on important agricultural lands; and
(10) Other programs to carry out the intent of part I of this Act [sections 205-41 to 52]."

[18] The HDOA report notes that [Property Tax credits for IALs] "had the support of farmers and landowners, it was given a very low priority by the counties."

[19] HRS § 205-46(b) States: "State and **county incentive programs shall** provide preference to important agricultural lands and agricultural businesses on important agricultural lands." (emphases added).

LUC's receipt of County IAL maps and recommendations.[20] Finally, HRS § 205-49(d)(2) specifically requires that the LUC ***wait to proceed*** with designating County-recommended lands as IAL until landowners have had three years to consider incentives enacted and established by the County.

Even if the State Attorney General's office somehow finds that State efforts to roll out incentives thus far have adequately established the same in compliance with the IAL incentive mandate, it cannot ignore the County's inaction on IAL incentives. Moreover, the County must take action to validate State efforts by properly and genuinely establishing significant and effective incentives like property tax changes, as required by the IAL Statutes. Indeed, a handful of partially rolled-out State-level incentives and pronouncements about other possible incentives, many of which still require and lack County involvement, enactment, and establishment cannot fulfill the IAL incentives mandate placed on both the State and the County.

III. *The County failed to adequately notify consult with or properly notify landowners during the IAL identification process.*

HRS 205-47(b) mandates that the County must ***cooperate and consult*** with landowners in identifying possible IAL lands for designation by the LUC under HRS § 205-49. It further states that the County has a responsibility to take "reasonable action" to notify landowners if their lands are identified for potential IAL designation.[21] The County's process thus far in identifying and recommending IAL lands has not properly satisfied either of these obligations.

At every step of its identification process, the County has not reasonably consulted with landowners. The twenty-six-member Technical Advisory Committee ("TAC") formed by the County to determine criteria for the identification of IAL lands included just one member to represent property owners in any capacity: David Arakawa, executive director of the Land Use Research Foundation, ("LURF") which predominantly represents large landowners.[22] LURF is not itself a landowner and no landowners who would be potentially impacted by IAL designation and the resulting occupancy limitations were included on the County's TAC. Thus, the more than 1000 smaller landowners who would be significantly impacted by IAL designation had zero input in developing the City's selection and recommendation criteria.[23]

Many smaller landowners report having been afforded ZERO notice and ZERO opportunity to consult with any County officials prior to selection of their lands for County recommendation, even in cases where their lands' suitability for agricultural purposes is doubtful. Proper notice to and consultation with these landowners would have conveyed invaluable information to County officials about the conditions faced on their lands.

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[20] HRS § 205-48(a) states: "(a) The land use commission ***shall receive*** the county recommendations and maps delineating those lands eligible to be designated important agricultural lands **no sooner than the effective date of the legislative enactment** of protection and incentive measures for important agricultural lands…"

[21] Selected text from HRS 205-47(b) (emphasis added): "Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in ***consultation and cooperation*** with landowners"
"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."

[22] *See* http://www.lurf.org/members/

[23] *See* City IAL Petition p.5. available at: https://luc.hawaii.gov/wp-content/uploads/2021/04/DR-CC-HNL-IAL-003.pdf

Many of our clients report having never been made aware by any government entity of the selection of their lands for future IAL designation. Some became aware only recently. Those few who did receive communication from the County regarding identification of their lands have expressed that the information provided by the County was misleading and, in some cases, factually inaccurate. These sentiments have been echoed by a great many aggrieved landowners who attended and testified at the recent public hearings held by the LUC in late April of 2021.

The large number of impacted landowners testifying they were not provided advance knowledge of the identification of their lands as IAL affirms the inadequacy of the County's notification and consultation efforts. When taken in combination with the knowledge that the County took zero action to attempt any form of verification that landowners received their IAL recommendation notices, widespread landowner frustration and dissatisfaction is unsurprising and underscores the County's still pending obligation to take "reasonable action to notify each owner."

Per HRS § 205-47(d), "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." As the occupancy restrictions in HRS § 205-44.5 amount to a *de facto* eviction for landowners who are aged, disabled, retired, or otherwise unable to actively farm their IAL designated parcels, the "by mail" standard in HRS § 205-47(d) is a wholly inadequate and unreasonable form of notice and would never be considered sufficient in any other proceeding involving an eviction or other alteration/diminishment of occupancy rights.[24] As such, the LUC should refrain from endorsing the County's self-admitted "bare minimum" approach to utilize the improper "by mail" standard is unlikely to pass constitutional muster where the occupancy restrictions in HRS § 205-45.5 apply.

Rather, the long list of deficiencies in the County's compliance with the consultation, cooperation, and notification requirements of HRS § 205-47 should be rectified before the LUC's designation process proceeds any further.

IV. Conclusion

Thus far, the process of identifying, recommending, and designating private lands on O`ahu as IAL has yet to satisfy the applicable statutory requirements and obligations imposed on the various agencies or otherwise required by basic due process considerations. The outstanding need for enactment of established IAL incentives and protections are long-acknowledged and well documented in agency reports, news reports, public testimony, bills before and reports to the State Legislature, and even in City Council resolutions.

Indeed, the robust, incentive-based approach State lawmakers envisioned and crafted for the IAL statutory regime should be judiciously implemented to actually incentivize landowners such that they have full notice and adequate opportunity to consider established incentives before making decisions regarding the actual value and risks of IAL designation, weighing the incentives against the divestment of occupancy and future development rights.

Given the clear statutory intent to provide landowners with an inclusive process for identifying and recommending potential IAL lands, the process thus far has accomplished the exact opposite,

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[24] *See* our other memo re: the IAL Statutes' tangible derogation of basic property rights and lack of due process and need for additional protections for basic due process rights in the IAL recommendation and designation proceedings.

eschewing the prospect of cooperating and consulting with landowners. Step one in meeting that intent would be properly notifying landowners of the statutes and processes that will directly and significantly impact their property rights and opportunities.

Many landowners, especially smaller ones, report having had zero notice and zero opportunity to engage with the County identification and recommendation process. The County's budget-restricted process for notifying landowners has created legions of unnotified, confused, frustrated, and fearful landowners who still have had no opportunity to consider State and County incentives, which have yet to be established.

The LUC should not take steps to validate or endorse the County's heedless processes that have thus far deprived landowners of basic notice and consultation. Rather, the LUC should uphold their statutory rights to fully evaluate established incentives, explore partial designation, and otherwise participate in and/or object to the IAL recommendation processes at the County level, as mandated by HRS § 205-47(a).[25]

As such, the LUC should direct questions to the Attorney General asking for a formal opinion on whether the IAL recommendation and designation processes thus far have adequately satisfied all other procedural, legal, statutory, public notice, and basic due process requirements. More specifically, the Attorney General's opinion should analyze the proper triggering of the required three-year period for incentive consideration such that landowners' received notice and adequate opportunity to weigh the value of a full package of properly established State AND County incentives and protections.

In light of these many unresolved issues and inadequate compliance with the IAL Statutes and basic due process requirements, we hope this memo helps the LUC and the Attorney General clarify why the LUC must remand the County's IAL recommendations and maps back to the County. After such a remand, the County and State can enact legislation that firmly establishes IAL incentives and protections.

Thereafter, the County can provide proper notice to and consultation with landowners whose lands are recommended for IAL designation. The LUC can then properly receive the County's map and recommendations and ensure proper passage of the three-year consideration period pursuant to HRS § 205-49(d)(2). Then and only then should the LUC commence its statutorily mandated IAL designation proceedings.

Sincerely,

Kalani A. Morse, Esq.
Jonathan S. Durrett, Esq.
Shauna L. S. Bell, Esq.

Cc: Office of the Attorney General, State of Hawai`i;
Deputy Attorney General Julie H. China, Esq. at: julie.h.china@hawaii.gov.

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[25] The legions of parcels recommended for designation by the County which have clear issues and barriers to satisfying the IAL criteria (ie: poisoned soil/water, too small, no access, steep slopes, other permitted uses precluding farming, etc.) further illustrates the inadequacy of the County's processes.

ATTORNEYS AT LAW
DURRETT LANG MORSE, LLLP

JONATHAN S. DURRETT
DIRECT: 808.792.1211
JDURRETT@DLMHAWAII.COM

KALANI A. MORSE
DIRECT: 808.792.1213
KMORSE@DLMHAWAII.COM

Via email to: dbedt.luc.web@hawaii.gov

State of Hawai`i Land Use Commission
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawai`i 96804-2359

Dear Chair Scheuer and Commissioners:

This firm represents a number of farmers and landowners whose lands have been recommended by the City and County of Honolulu ("the County") for designation as "Important Agricultural Lands," ("IAL") as that phrase has been defined by the State Legislature in HRS §§ 205-41 – 205-52 (the "IAL Statutes"). These and many other landowners are collectively concerned that designation of their lands as IAL will adversely affect the use and enjoyment of their lands. Additionally, they are uniformly aggrieved by the process utilized thus far for identifying and recommending all or significant portions of their lands as IAL. These landowners insist that they be granted adequate opportunities to protect of their interests through contested case hearings.

As part of our work on behalf of these landowners, our office has been engaged in a review of the processes for implementation of the IAL Statutes, including the procedures employed thus far to identify and recommend potential lands to the State of Hawai`i Land Use Commission (the "LUC") for IAL designation.

We understand that the LUC has requested the Attorney General for the State of Hawai`i (the "AG") to provide the commissioners with a legal opinion on critical issues related to IAL implementation. In assessing the legality of IAL designation, both the LUC and the AG's office must consider the procedural issues outlined below and determine the necessity of contested case hearings as a mechanism for protecting landowners' rights.

In its May 20th, 2021 letter to the Land Use Commission, the State of Hawai`i's Office of Planning ("the OP") asserted that contested case hearings[1] were not necessary to ensure due process for landowners objecting to lands being designated as Important Agricultural Lands without their cooperation, consultation, or consent. OP's letter states that:

[1] HRS 91-1 defines a contested case as a "proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

> "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."[2]

This letter brief examines: (1) the vested interests being deprived; and (2) the process of consideration thus far undertaken. As is demonstrated below, designating as IAL those lands of objecting landowners will result in significant damage to the vested rights of affected landowners, and doing so without a contested case hearing will constitute an improper denial of their due process rights.

As such, contrary to OP's contention, contested case hearings are legally required to guarantee due process to all landowners who have objected to the designation of their lands as IAL, and all those who may object in the future upon receiving proper notice of the impact of and the restrictions on property rights imposed by the IAL designation on their lands.

A. Contested Case hearings are required where the LUC's rulings affect Property Rights

The Hawai'i Constitution clearly provides that "[n]o person shall be deprived of life, liberty or property without due process of law". Haw. Const. art. I, § 5. Due process "calls for such procedural protections as the particular situation demands." *Sandy Beach Def. Fund v. City Council*, 70 Haw. 361, 378, 773 P.2d 250, 261 (year) (citations and internal quotations omitted). The requirements of due process are flexible and depend on many factors, but "there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding[,]" including those before administrative agencies. *Sifagaloa v. Bd. Of Trstees of the Empl. Rtmnt. System of the St. of Hawai`i*, 74 Haw. 181, 189, 840 P.2d 367, 371 (*quoting Sussel v. City & Cnty. of Honolulu Civil Serv. Comm'n*, 71 Haw. 101, 107, 784 P.2d 867, 870 (1989)).

Moreover, "[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *Pele Def. Fund v. Puna Geothermal Venture,* 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994); *see* HRS § 91–1(5). An agency hearing that is required by law "may be required by (1) agency rule, (2) statute, or (3) constitutional due process." *Kaniakapupu v. Land Use Comm'n,* 111 Hawai'i 124, 132, 139 P.3d 712, 720 (2006).

In determining whether a contested case hearing is required by constitutional due process, the following issues must be resolved: (1) whether the landowner seeks to protect an interest which qualifies as "property", and (2) if so, whether a contested case hearing is required to protect such an interest. The landowners whose occupancy and development rights (i.e.: "property rights") will be further restricted by proposed IAL designations clearly have property interests entitled to constitutional protection.

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[2] *See* City IAL OP Recommendation to LUC, contained under the subheading "OP Submittals" at https://luc.hawaii.gov/city-county-ial/ (emphasis added).

First,"[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Sandy Beach Def. Fund*, 70 Haw. at 377, 773 P.2d at 260 (*quoting Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)). Such claims of entitlement that constitute property interests "are created and their dimensions are defined by existing rules or understanding[s] that stem from an independent source such as state law—rules or understanding[s] that secure certain benefits and that support claims of entitlement to those benefits." *In re Maui Elec. Co.*, 141 Hawai'i at 260, 408 P.3d at 12 (*quoting In re 'Īao*, 128 Hawai'i at 241, 287 P.3d at 142).

Indeed, the Hawaii Supreme Court has recognized more ephemeral "property" rights such as the interest in accessing state lands in order to engage in traditional Native Hawaiian cultural practices[3], the interest in receiving low-cost public housing benefits[4], and the interest in continued employment.[5]

Courts would be hard pressed to find a more concrete and clear "property" right than the right to live in your own home, regardless of your daily activities or physical abilities.

Thus, in considering whether contested case hearings are required to protect clear property interests, courts will consider and balance three factors: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." *Sandy Beach Def. Fund*, *supra*. at 378.

Analysis across all three of these factors clearly reveals that contested case hearings are required in the present situation. Sections B through E below all highlight how IAL designation will seriously injure landowners' private property interests. As such, the following paragraphs will be limited to assessing factors 2 and 3 from the test set forth by the Hawai`i Supreme Court in *Sandy Beach Defense Fund*.

1. The Procedures Employed in IAL Identification and Designation Are Inadequate and Pose High Risk of Error

At just about every step of its identification and recommendation process for IAL lands, the City and County of Honolulu (the "County") utilized inadequate and fundamentally flawed procedures that have proven ill-suited to properly promote the State's interests in safeguarding agricultural production capacity while also minimizing injury to basic private property interests.

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[3] *See Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 379, 390, 363 P.3d 224, 238 (Haw. 2015).
[4] *See Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 4965, 522 P.2d 1255, 1267 (1974).
[5] *See Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972).

HRS § 205-44 established eight criteria for the identification of Important Agricultural Lands.[6] The statute allows for initial consideration of those lands which met just one of the eight criteria. Nevertheless, HRS § 205-44 mandates that a more complete weighing of all criteria take place prior to any land being recommended for IAL designation, in order to determine the likelihood of any particular parcel contributing to the IAL objectives.[7]

In its role as recommender, the County's investigations appear to have not gone beyond merely reviewing lists of parcels with agricultural water rates and agricultural dedication recordings. Landowners almost uniformly report and testify that they their parcels were not inspected and they were not consulted as to the evaluation and application of the IAL criteria in HRS § 205-44 to their lands. As a result, the County's recommendations do not provide the LUC with the kind of information needed by the LUC so it can properly weigh all criteria as it may or may not apply to each recommended parcel, as required by statute.[8]

Moreover, to comply with the requirements in HRS § 205-47, the County's recommendation process should have included landowner cooperation and consultation, and likely (given the statute's underlying purpose) their consent as well. Instead, the County has made recommendations supported by hastily rendered generalities of agricultural suitability which even the most cursory investigative efforts have already shown to be in error.

Consider for example, many parcels recommended for IAL designation by the County are revealed, upon basic initial inquiry, to be demonstrably inadequate to serve the goals of the IAL law. In many instances, only small-scale, above ground, nursery style agriculture is possible due to the prevalence of non-arable top soils, poisoned wells/unusable water sources, and other critical factors that renders such parcels unusable for the production of food, fiber, or fuel and energy producing crops, as required by the IAL statute.[9]

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[6] *See* HRS § 205-44(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. [L 2005, c 183, pt of §2; am L 2008, c 233, §18]

[7] *See* the following text from HRS 205-44 (emphasis added):

> 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."

[8] *See* FN 7 above.

[9] See the objection letters filed with the LUC on behalf of various landowners. A great many landowners have seen their lands recommended to the LUC for IAL designation despite glaring insufficiencies making any reasonable level agricultural production

Even if one is not inclined to review individual parcels, the criteria applied by the County to determine which parcels would be recommended does not provide a clear picture of how a given parcel may or may not holistically satisfy the IAL criteria and goals, as must be shown via a weighing of all factors in order to justify IAL designation. For example, simply having agricultural water rates on a parcel does not indicate that adequate soils and other conditions exist to ensure feasible agricultural production. Conversely, simply having an adequate soil rating does not ensure that the parcel has adequate water. Finally, the filing of an agricultural dedication for tax purposes does not provide any kind of indication of adequate water, soil, or satisfaction of any other IAL criteria.

Where land conditions are clearly not compatible with the goals of IAL designation, they should never have been recommended and likely would not have been had the County made any effort to consult and cooperate with landowners, as required by HRS § 205-47. Even the most rudimentary inquiry into individual landowner and/or parcel circumstances would have revealed widespread unsuitability for IAL purposes, as is currently reflected in many of the parcels currently recommended for IAL designation by the County.

Given the many harms to private interest resulting from IAL designation, (*see* Sections B-E) proceedings to designate lands absent basic inquiry into their actual potential to further state interests would constitute an erroneous depravation of landowners' private interests and basic rights.

In addition to inadequate inquiry and identification, the County's landowner notification procedures were also lacking and will lead to erroneous deprivation of private interests. A significant number of landowners report having received no timely or clear communication from the County informing them that their lands had been identified for IAL designation. Some landowners received no notification at all.[10] The County has no proof of such notice to each affected landowner.

OP's letter asserts but does not substantiate how the County's procedure of notifying landowners through two attempted mailings was "highly successful and more than 'reasonable.'" Reasonable notice would not have resulted in the widespread landowner surprise, frustration, and dissatisfaction with the County's process as has been the current result.

Failing to properly notify landowners creates further risk of erroneous harm to their interests. Without notification from the County, landowners could not possibly advocate for their own interests or communicate to the County any circumstances faced by their land which might be relevant to an IAL designation decision.

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impossible on their lands. Landowners have chosen to object to IAL designation due to their properties being: situated entirely in dried riverbeds, too steep, to rocky, and/or too dry to grow anything substantial, impacted by contaminated soil and/or water, too small, landlocked, or otherwise irretrievably inadequate for commercially viable levels of agricultural production.

[10] Can we broadly cite our own objection letters? Can we cite public comments from the LUC as a batch?

The County had other notice options available to them that could have significantly bolstered the integrity of the process. One option available to the County for a reasonable cost would have been the use of certified mail in notifying affected landowners. Sending mailings to landowners via certified mail rather than standard mail would have allowed the County to track receipt of their communication and provide confidence that they were progressing in a transparent manner. This simple precaution was even suggested by an aggrieved landowner in public comments before the LUC. The additional cost of employing certified mail to inform each landowner would likely have been only around $5,000[11] Such a de minimus cost is well within the range of reasonability for implementing a policy of the size and importance of IAL.

Per HRS § 205-47(d), "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." The occupancy restrictions applied to IAL lands in HRS § 205-44.5 amount to a *de facto* eviction for landowners who are aged, disabled, retired, or otherwise unable to actively farm their IAL designated parcels (see sections B-E).

The "by mail" standard in HRS § 205-47(d) is a wholly inadequate and unreasonable form of notice and would never be considered sufficient in any other proceeding involving an eviction or other alteration/diminishment of occupancy rights. As such, the LUC should refrain from endorsing the County's self-admitted "bare minimum" approach to utilize the improper "by mail" standard is unlikely to pass constitutional muster where the occupancy restrictions in HRS § 205-45.5 apply.

The restrictions contemplated by IAL designation will do grievous harm to the interests and rights of landowners, including landowners that the IAL laws were intended to assist. The potential for great harm if occupancy restrictions are imposed on many of the parcels presently recommended for IAL designation without prior landowner cooperation and consultation makes contested case hearings vital to ensuring basic due process for landowners.

2. **The Governmental Interest and the Burden of Additional Safeguards**

Permitting contested case hearings would be the ultimate procedural safeguard for the protection of affected landowners. In their letter, the OP argues that allowing contested case hearings would be overly burdensome. The OP articulates 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." They further claim that "...to address this compelling State interest, the process must be moved forward in this already overlong journey towards IAL designation."

[11] When the County was sending IAL mailings in 2017, the cost to employ Certified Mail was $3.35 per mailing. Roughly 1800 parcels and landowners saw their lands impacted in the most recent round of recommendations. The County sent two mailings to each landowner. Therefore, the total cost of employing certified mail would have been around ***$5,148*** more than using First Class mail alone ($0.49/ea. in 2017). If the County had chosen to utilize physical return receipts (as opposed to standard electronic proof of receipt) the total certified mail expense would still have been well within the limits of reasonability. For cost data see the Revenue, Prices, and Weights reports organized by fiscal year and accessible on the "financials" section of the Postal Service website at: https://about.usps.com/what/financials/

Pleading for an expedited designation process based on bureaucratic expediency illustrates exactly the kind of due process violations that the Constitution aims to protect against. The journey toward IAL designation having been "overlong" is not the fault of private landowners. The fact that the County lacked any sense of expediency in implementing the IAL law up until this point should not now be held up as a reason that landowners should be stripped of essential protections and basic property rights without proper due process. The fact that the County is now insisting on proceeding improperly, inadequately, and prematurely further underscores the impropriety of state action at this time and to validate the County's shortcomings by proceeding further without contested case hearings will only add further insult to injury.

Moreover, while it is undeniable that the administration of contested case hearings for those affected landowners may slow the process of IAL designation, this action would benefit rather than contravene the governmental interest. According to OP's own letter, the government's objective in designating land as IAL is to conserve important lands and safeguard agricultural productivity. However, the County's hasty identification and recommendation process, which did not include consultation with landowners or any investigation of the individual parcels being recommended for designation, has resulted in the widescale selection of parcels for designation which cannot possibly contribute to these goals. An truncated process is not in the State's interest if the end result of that process is a new crop of IAL lands that are not agriculturally productive or large enough to meaningfully further state interests.

Contested case hearings will allow for specific judgements which will properly exclude from designation those parcels that do not meet the criterial and goals of IAL. This crucial safeguard will likely stand as the only due process protection landowners receive in the whole IAL process. Partially correcting the County's procedural mistakes through the mechanism of contested case hearings will at least provide some measure of due process to landowners. As to the State, such a process will also help ensure that any incentives provided for IAL lands or any future action for the benefit of IAL lands will be targeted to a class of lands that are truly important to the state's interests in safeguarding Hawaii's agricultural lands and incentivizing agriculture.

Even if the County process had provided adequate notice and incorporated landowner cooperation and consultation as required, contested case hearings are still a required procedural safeguard. Such hearings are the one process providing the greatest ability to guarantee landowners are not unfairly subjected to the deprivations of their interests, as detailed in the following sections of this memo. Promotion of state agricultural interests cannot be allowed to supersede state obligations to protect landowners' basic property and due process rights through contested case hearings, especially when the IAL process thus far does little to specifically serve the state interests identified by the IAL law.

B. IAL designation violates the clearly vested interests and rights of landowners

In an attempt to downplay the adverse impacts of IAL designation on landowner interests, OP focused instead on purported yet unestablished incentives:

> 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.

These provisions, however, are inadequate to satisfy unfulfilled statutory obligations to enact established incentives and protections for IAL designated lands, pursuant to HRS §§ 205-46. Neither the State nor the County have enacted an established regime of incentives, protections, and reduced infrastructure requirements for IALs, as required by the IAL Statute.[12]

Additionally, the State Legislature this year allowed The Qualified Agricultural Cost Tax Credit to expire, despite its importance as the one material IAL incentive. This has led landowners to be justifiably concerned that incentives are presently unavailable and that going forward, incentives which are not adequately established will only be inconsistently available and thus inadequate to reasonably rely on the same.

C. The bald assertion that no harm will come to landowners via IAL designation has not and cannot be substantiated.

Landowner concern over the lack of established incentives and protections is exacerbated by the seriousness of the restrictions imposed by IAL designation. OP's letter simply asserts, without clarity or comment, that these IAL-imposed restrictions are "minor" and that they somehow do not infringe on landowner interests. OP's letter then claims that because the IAL restrictions are "minor", contested case hearings for landowners are not required to ensure due process.

In actuality, however, the restrictions imposed by IAL designation will in effect significantly curtail and diminish the property rights and ownership interests that are otherwise clearly afforded landowners and zealously protected by law, the chief of which is the right to protect and preserve a landowner's possessory interest in their own real property.

For example, OP's letter erroneously asserts that "[IAL designation] ***does not dictate use*** or require anyone to farm where they previously were not required to." OP acknowledges that "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." However, they then erroneously assert that this restriction is "***no different from existing law*** that requires all farm dwellings to be ***used in connection with a farm***. 205-4.5(a)(4)" (All quoted text is contained within the above cited letter, emphasis added).

[12] For more details on insufficiencies of State and County action related to incentives see previous memos authored by this firm for the LUC and the AG's office:

Contrary to OP's claim, the standard set by HRS § 205-4.5(a)(4)[13] relating to the occupancy of farm dwellings on agriculturally zoned land is ***materially different*** than the standard imposed on IAL designated lands by HRS 205-45.5.[14] HRS § 205-4.5 clearly permits families to live in "farm dwellings" on agricultural lands so long as they derive some income from agricultural operations on the land. In contrast, HRS § 205-45.5 mandates that families can only live in a farm dwelling on Important Agricultural Lands if some member of the family is themselves "actively and currently" farming the land (See footnoted the text of each statute, highlighted to identify the clear differences between the two).

In hearings in front of the Land Use Commission, agency officials characterized this significant gap between the existing ag land standard and the IAL standard as a "distinction without a difference." Despite such unfounded and misleading editorializing, a vast difference of considerable importance looms large for all affected landowners and cuts to the heart of their most basic property rights.

Consider, for example, the common and stereotypical circumstances of landowners[15] who live on agricultural lands that have been in their families for generations, some of whom are aged widows unable to actively farm their lands, though they do derive income from agricultural operations on their lands, in compliance with current agricultural land use laws and ordinances.

Under HRS 205-4.5(a)(4), such landowners and legions of other similarly aged, infirm, disabled, and retired agricultural landowners and their families are free to occupy their dwellings and pass their homelands down to their heirs and decedents to continue occupying and keeping their homelands productive, regardless of any impairments or other life circumstances and responsibilities that might reasonably prevent them from actively farming their lands.

Under the IAL restrictions in HRS § 205-45.5, all such basic property rights will be stripped from every landowner when inevitable life and health circumstances arise that will

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[13] HRS § 205-4.5 **Permissible uses within the agricultural districts.** (a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:[...]

(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, ***or*** where agricultural activity provides income to the family occupying the dwelling;

[14] HRS § 205-45.5 **Important agricultural land; farm dwellings and employee housing.** A landowner whose agricultural lands are designated as important agricultural lands may develop, construct, and maintain farm dwellings and employee housing for farmers, employees, and their immediate family members on these lands; provided that:

(1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members who actively and currently farm on important agricultural land upon which the dwelling is situated; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land;

(2) Employee housing units shall be used exclusively by employees and their immediate family members who actively and currently work on important agricultural land upon which the housing unit is situated; provided further that the immediate family members of the employee shall not live in separate housing units and shall live with the employee;

(3) The total land area upon which the farm dwellings and employee housing units and all appurtenances are situated shall not occupy more than five per cent of the total important agricultural land area controlled by the farmer or the employee's employer or fifty acres, whichever is less;

[15] *See* https://www.civilbeat.org/2021/05/small-oahu-landowners-say-they-were-blindsided-by-ag-land-plan/

prevent them from actively farming. In the event the State designates their lands as IAL, landowners unable to farm will be subject to a de-facto eviction from their own homes, finding themselves in violation of the law and needing to transition out of their own homes in order to continue living in a law-abiding manner. Such a de facto eviction scheme that harms the aged and disabled in agricultural communities cannot stand, let alone be applied without due process.

A great many small landowners on Oahu are currently or soon to be in these exact circumstances and they now face the threat of grave harm due to IAL designation. Imposing IAL designations without the cooperation and consent of the landowner, will unquestionably strip occupancy rights from landowners. While agency officials may testify ad nauseam about "distinctions without difference" or "minor" changes to the current law, such dismissive statements cannot erase or obscure the stark and significant nature of the harms the State will impose on landowners via IAL designation of their homelands.

In cases where they have acknowledged the significance of the new occupancy restrictions attached to IAL designation, agency officials have often responded to landowner concerns by citing to DPP's discretion over enforcement and by promising that nobody would employ the law to unfairly dispossess landowners. Such informal promises offer no comfort as they cannot stand. Indeed, the City Council just recently advanced Bill 17, which limits DPP's enforcement discretion and mandates that DPP impose serious fines or even place liens on properties based on the resident/owners' non-conforming uses.[16] Developments like this, and other similar legislative efforts, significantly undercut the veracity of DPP's statements and undermines any attempts to assuage aggrieved landowners whose lands have been identified for IAL designation. Indeed, DPP and other agencies cannot viably promise protection from de facto evictions. Neither can they retain control of enforcement in a manner that would protect retired, disabled, and other landowners whose household family members are unable to personally and actively farm their lands.

Moreover, it is untenable and unfair to require these homeowners to live in their own homes with the knowledge that their occupancy is illegal and could at any point be subject to complaints, investigations, liens, and even possible foreclosure. Even if such events never happen, living under the possible threat of the same is distressing and a harmful interference with the quiet enjoyment of one's property, which should otherwise be firmly protected by law.

As it stands, IAL designation will inflict serious injury on the occupancy rights of many small, historical landowners, many of whom have taken significant steps to ensure their lands and homes comply with the state and county land use statutes and ordinances by maintaining actively productive agriculture. Sadly, these are the exact kinds of people that the IAL laws were supposed to be incentivizing, protecting, and assisting!

In light of the harm threatened by IAL designation, contested case hearings likely represent a bare minimum due process requirement for affected landowners. OP's claim that the rulemaking process currently contemplated is sufficient to satisfy due process fails to recognize any of the

[16] Bill 17 can be viewed at the Honolulu City Council website: https://hnldoc.ehawaii.gov/hnldoc/measure/1816

above considerations. Moreover, their recommendation that LUC only consider the objections of those landowners who most promptly expressed their dissatisfaction with IAL designation, posits a "homeowner beware" or caveat emptor approach to depriving people of their property rights.

Such an approach is wholly inconsistent with basic notions and principles of due process. Hopefully basic property rights and the perspectives of disenfranchised landowners will be considered by LUC when it chooses to provide opportunities for owner input into what will otherwise be a process likely to inflict significant violence on the basic property rights of agricultural landowners, particularly upon the disabled, aged, otherwise infirm members of the agricultural community who are unable, for a variety of medical, legal, financial, and other legitimate and legally-protected reasons, are unable to actively perform farm labor.

D. How IAL Designation will Violate Landowners' Basic Property Rights

A private property owner's legal rights are treated not as a solitary right to a "thing," but rather as a collection of disaggregated entitlements, or a "bundle of sticks" that has been "the dominant legal paradigm for the courts and the theory of property."[17] US Supreme Court Justices have historically invoked the "bundle of sticks" metaphor to describe the fullest possible conception of property rights.[18] In all of the various discussions regarding the "sticks" in the bundle, it is generally accepted that property ownership grants the following to landowners:

1. The right to possess — the right to physical and legal control over the property
2. The right to use — the right to personal enjoyment and use of owned property.
3. The right to manage — the right to decide how and by whom a thing shall be used
4. The right to capital — the power to alienate the thing, meaning to sell or give it away, and to consume, waste, modify, or destroy it.
5. The right to security — immunity from expropriation, that is, the land cannot be taken from the right-holder.
6. The absence of term — the indeterminate length of one's ownership rights, that is, that ownership is not for a term of years, but forever. [19]

The IAL designations currently being contemplated by the LUC stand to deny many landowners the right to use their lands insofar as, following IAL designation, many will be unable to satisfy farming requirements and will be legally barred from occupying their own homes located on their own lands.

Additionally, as the primary value conferred to landowners by ownership of these parcels is in many cases rooted in the ability to occupy an onsite dwelling, IAL designation amounts to a regulatory taking of the use and occupancy rights otherwise afforded to landowners. In another fit of sad irony, oftentimes the onsite occupancy is required to ensure that continued agricultural

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[17] *See* VERMONT LAW REVIEW, *Denise R. Johnson,* Reflections on the Bundle of Rights, at https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/johnson2.pdf

[18] *See* "Two Cheers for the Bundle-of- Sticks Metaphor, Three Cheers for Merrill and Smith" at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4601&context=fss_papers

[19] *See* A. M. Horoné's 1960's essay "Ownership," enumerating the rights that extend from property ownership, at http://fs2.american.edu/dfagel/www/OwnershipSmaller.pdf

production on the land remains economically feasible. Such a taking also violates a landowner's right to security over their land.

Landowners whose rights may be denied by agency rulemaking are at the very least, entitled to contested case hearings.

E. Basic Principles of Equity and Fairness Establish the Harms and Damages Arising from IAL Designation

A party generally has the right to recover and/or seek relief from damages arising from reliance on representations and rules they should be able to trust and depend on. Here, agricultural landowners have long relied upon the occupancy standards established by HRS 205-4.5(a)(4), which permits owners of agricultural land to build, occupy, and raise their families in dwellings situated on their lands, so long as they derived an income from agricultural operations or otherwise utilize their dwellings in connection with the agricultural production on the land.

These standards set by the State have been relied on by countless landowners who long ago made life altering decisions to invest their life's work and savings into a home that they believed they and their families would be able to live in regardless of their age, physical condition, other responsibilities or any of the myriad of other inevitable life circumstances that might preclude active farming during occupancy.

Had these landowners known the State would impose, via rule making and without notice or a hearing, laws stripping occupancy rights from those unable to actively farm, many would have understandably chosen to invest their time, savings, and sweat into a residential property rather than an agricultural one. Again, involuntary imposition of IAL laws will genuinely harm the very agricultural proponents the IAL law is supposed to help and will sadly disincentivize the kind of investment into agricultural properties and operations that are desperately needed in the State of Hawai`i.

Landowners had zero reason to know or expect that state law would one day impose strict physical, health-dependent, and economic requirements and conditions on their occupancy rights. Neither did they know that the State law would serve to partially devalue their lands by limiting who can live on their own property based on their physical condition and job choices.

As such, a full accounting of the harm to landowners that would be realized as a result of involuntary IAL designation must include not only those damages presently being felt, but also the remarkable damages and devaluation that will accrue from removing the opportunity to accumulate and bequeath property in a manner that would otherwise have safeguarded their livelihoods and that of their heirs.

Such fundamental property rights cannot be summarily dismissed and eroded via singular and blanketed rulemaking proceedings. Basic due process dictates otherwise.

F. Conclusion

The Office of Planning's May 20th letter to the LUC alleged that "few if any [landowner] interests [are] being deprived" by IAL designation. OP noted that the process of IAL designation has already been "overlong," encouraged the LUC to embrace expediency, and argued that contested case hearings are not necessary to guarantee due process to affected landowners.

Landowners' property and due process rights cannot be unceremoniously sacrificed for the sake of bureaucratic expediency, ideological land use aims, or any other utilitarian goal. Given the significant harms to basic property rights triggered by IAL designation, contested case hearings represent the bare-minimum essential to ensure substantive due process rights for agricultural landowners.

We trust that the Land Use Commissioners will appropriately consult with the Attorney General's office and ensure that the LUC avoids violations of due process rights as suggested by the OP's letter asserting that contested case hearings are not required.

Sincerely,

Kalani A. Morse, Esq.
Jonathan S. Durrett, Esq.
Shauna L. S. Bell, Esq.

Cc: Office of the Attorney General, State of Hawai`i;
Deputy Attorney General Julie H. China, Esq. at: julie.h.china@hawaii.gov.

5. If our agricultural land becomes IAL, landowners will have to navigate the City and County's arduous petition processes and will be forced to deal with the State's already overburdened Land Use Commission. This will hinder the growth of future agriculture diversification by increasing the cost of maintaining and expanding the use of agricultural land.

6. If properties were purchased within the last three years, the new owners have had no prior notice of IAL.

7. The voluntary process for IAL allows landowners to employ a thorough, on-the-ground review process to identify important agricultural lands for designation. In contrast, for example, the City's proposed IAL lands were determined through mass analysis of GIS data and include lands that are currently paved or otherwise encumbered with improvements, lands that border residential neighborhoods, have steep slopes, poor soil conditions, or are unable to support infrastructure conducive to agricultural productivity (water, power, transportation to markets, etc.).

8. Kauai, Maui, and Hawaii counties chose not to submit IAL maps and force this on their citizens.

If there is an opportunity to speak to the LUC privately or at a meeting Malia and I would be happy to speak to the LUC regarding our concerns. We appreciate the help and support of the landowner.

Sincerely,

Michael B. Pietsch

Malia Pietsch