Kwan, Ariana L

From: Quinones, Natasha A
Sent: Tuesday, January 4, 2022 4:33 PM
To: Kwan, Ariana L
Subject: Fw: C&C IAL Petition LUC Agenda Jan. 6, 2022 Testimony on behalf of Garber
Attachments: J.Lim Esq testimony for Garber re C&C IAL 2022-01-04.pdf

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From: Jennifer Lim <JenniferLim@jenniferlimlaw.com>
Sent: Tuesday, January 4, 2022 3:03 PM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>; Quinones, Natasha A <natasha.a.quinones@hawaii.gov>
Cc: Hakoda, Riley K <riley.k.hakoda@hawaii.gov>; Alexander Garber <alexandercgarber@gmail.com>; Vanessa Kaneshiro Garber <vanessa.kaneshiro@gmail.com>
Subject: [EXTERNAL] C&C IAL Petition LUC Agenda Jan. 6, 2022 Testimony on behalf of Garber

Dear Ms. Quiñones

Attached please find testimony to the Chair and members of the Commission related to agenda item II for the Commission meeting of 1/6/2022.

Please let me know if you have any trouble with the attachment.
Many thanks
Jennifer

Jennifer A. Lim, Esq.

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January 4, 2022

Via Email: dbedt.luc.web@hawaii.gov
State of Hawaii Land Use Commission
P.O. Box 2359
Honolulu, HI 96814-2359

Re: 1/6/2022 Agenda Item II:
The City & County of Honolulu IAL Petition Does Not Comply With the Law
To the Detriment of Potentially Affected Landowners

Dear Chair Scheuer and Members of the Land Use Commission:

This firm represents the owners of 6.5 acre parcel of land located at Waialua, designated by TMK No. (1) 6-6-027: 011, being Alexander C. Garber and Vanessa K. K. Garber, as Trustees of the Alexander C. Garber Revocable Living Trust, and the Vanessa K. K. Garber Revocable Living Trust (the "**Garbers**"). The City and County of Honolulu ("**C&C**") through the Department of Planning and Permitting ("**DPP**") wants to designate all of the Garber's property as IAL.

The Garbers submitted objections to the C&C Petition[1] for involuntary IAL designation by letters dated April 24 and May 11, 2021. To be clear, the Garbers are in favor of maintaining their property for agricultural purposes. The Garber property includes a small family farm and orchard that produces various crops (e.g., avocado, mango, acerola cherry, Surinam cherry, Meyer lemons, pink lemons, limes, oranges, tangerines, tangelos, starfruit, longan, ulu, lychee, and fig). The Garbers use those crops for personal consumption, as well as for barter within the farming community, and also modest sales to local vendors and small grocery stores. However, the extraordinarily defective process that DPP has employed in preparation and furtherance of the C&C Petition has left them bewildered, confused, and worried about their family's future on their own land.

[1] The Commission's agenda refers to "the C&C's IAL petition," and reports that the lands recommended for involuntary designation are listed in Appendix H of that "petition." None of the documents posted to the LUC website are designated as a "petition." Therefore, we interpret this reference to a C&C "petition" to mean the *City and County of Honolulu's Recommendation of Important Agricultural Lands*, which was filed with the Commission on 4/21/2021, as corrected by the C&C's *Errata* filed on 4/27/2021 (collectively, the "**C&C Petition**").

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DPP deserves recognition for attempting to apply the mess that is Part III of Hawaii Revised Statutes Chapter 205. We acknowledge that it cannot be easy to be the first County to pursue an involuntary IAL designation. Likely, many of the shortcomings in DPP's efforts are due to ambiguities within Part III of HRS Chapter 205. However, DPP has an obligation to provide coherent, correct, and consistent information to the public (and the Commission) regarding the impact of involuntary IAL designation. That has not been done, and as a result affected landowners have not been provided adequate and accurate notice. The entire DPP exercise highlights the overwhelming need for legislative action at the State level, to rectify ambiguities and errors within Part III of Chapter 205, HRS, and also the need for legislative action at the C&C letter, in order to comply with Part III and the spirit and intent of the IAL law to promoting diversified agriculture and increasing Hawaii's agricultural self-sufficiency.

The pending DPP involuntary designation process is premature, and by improperly prioritizing the involuntary process over other more immediate and compelling mandates in Part III of Chapter 205, HRS, this designation process is arbitrary and capricious. The IAL laws call for the C&C to enact incentives, infrastructure reduction ordinances, and agricultural and tax policies, land use plans, ordinances, and rules, all to promote IAL. *See* HRS §§ 205-46, 51, 43. Yet the C&C has not taken any of these actions.

Under HRS § 205-51(a), the infrastructure reduction laws were required to be in place by July 2008 ("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."). But the C&C has not enacted any IAL-specific laws to promote agricultural viability on IAL lands. The mandate for C&C incentives under HRS § 205-46 does not have as explicit of timeline. However, that section of the law requires C&C/DPP to review the C&C's IAL incentive measures "at least every five years." *See* HRS § 205-46(d). This shows the legislature's intent that Counties enact and apply IAL incentives quickly, and monitor and revise those measures as needed to further encourage IAL purposes.

If the C&C focused on enacting laws/plans/policies, etc. that provided special incentives and benefits to owners of IAL designated lands, especially smaller landowners, it is likely there would be little need for DPP to pursue an extensive involuntary designation that has generated considerable opposition and outrage from landowners. With the right incentives in place, as the legislature envisioned, more landowners would pursue voluntary designation. However, rather than following a logical and orderly process of first pursuing laws to further IAL purposes, the C&C and DPP leapt headfirst into the involuntary designation process, and in so doing have provided the public with conflicting and unclear information about the impacts of an IAL designation. Involuntary IAL designations should not go forward until all parties involved, including the Commission, understand the benefits and burdens of involuntary IAL designation, and the public is fully informed on what an IAL designation means to affected landowners.

The Commission's agenda states that the Commission will not be considering or determining the legal rights, duties, or privileges of specific landowners or issues relating to particular properties at this hearing. Although the purpose of this testimony is to alert the Commission to several legal defects related to the C&C Petition, we reiterate that the Garbers are opposed to the designation of their property as IAL. Due to the conflicting positions articulated by DPP regarding the effects of IAL, this involuntary designation process entails too much risk and lacks

any genuine disclosure to the public. Therefore, this testimony also serves to provide the Garber's formal notice to the Commission of their intent to pursue all legal remedies, including a contested case hearing, and all other appropriate relief, should the Commission move forward with the C&C Petition without exempting the Garber's property from involuntary IAL designation.

For the record, the Garbers are not opposed to IAL designation in concept. In fact, the Garbers have seriously considered filing a petition for voluntary IAL designation. In that petition they would identify the appropriate (and majority) portion of their land for IAL designation, and thereby eliminate the possibility of involuntary designation on the remainder of the land. Under HRS § 205-45, a farmer or landowner may file its petition for IAL designation "at any time in the designation process." Therefore, the pending C&C Petition does not preclude such a filing or Commission action on a voluntary petition. In the interest of fairness and consistent with the IAL laws, the pending C&C Petition should not be allowed to move forward to completion (i.e., designation) unless and until all landowners who have submitted testimony against the C&C Petition have been removed from the designation process and/or provided an opportunity to present their IAL petitions to the Commission for action.

1. STATUS OF THE CURRENT PROCEEDINGS IS UNCLEAR.

Procedurally, the record is not clear on whether the Commission has made the fundamental initial determination of completeness pursuant to Hawaii Administrative Rules ("**HAR**") § 15-15-125(c), which states that a county-submission "shall not be deemed complete unless all of the evidence set forth in section 15-15-125(b) has been transmitted and accepted by the commission."[2] The record does not reflect whether the Commission made the required determination of completeness and acceptance of the C&C Petition. Therefore, the public cannot ascertain the current stage of these proceedings, and cannot determine whether or how to meaningfully participate.

The Commission has not issued any written orders informing the public on the status of these proceedings and the C&C Petition. What materials are considered part of the DPP submittal? Is DPP's Supplemental Brief, which DPP filed last week (12/29/2021), part of that submission that the Commission must accept and deem complete? If so, presumably the Commission has ***not*** yet made the requisite completeness determination, because HAR § 15-15-125 does not contemplate additional and subsequent submittals by the Counties. The C&C had to provide all of the information called for under HAR § 15-15-125(b) in order for the Commission to initiate this process. The C&C cannot attempt to shoehorn in additional information to address defects in its C&C Petition.

Moreover, the Commission had to make its determination of acceptance and completeness before the C&C Petition was circulated to the State Department of Agriculture ("**DOA**") and the Office

[2] This initial requirement for a County-driven involuntary IAL process is similar to the Commission's requirement for petitions for district boundary amendment, in that before any other steps can be taken on a petition for district boundary amendment, the Commission's executive officer must determine whether the petition is a proper filing and whether it is accepted for processing. *See* HAR § 15-15-50(e), (f).

of Planning and Sustainable Development ("**OP**"). Therefore, if the Commission never made its acceptance and completeness determinations, any filings made by the DOA and OP should be disregarded as improper.

HRS § 205-48(b) requires DOA and OP to "review the county report and recommendations and provide comments to the land use commission ***within forty-five days of the receipt of the report and maps by the land use commission***." This raises two additional flaws in the proceedings. First, the record does not reflect any transmittal from the Commission was made to DOA or OP. Second, the submissions by DOA and OP were made months after the C&C Petition was submitted to the Commission.

Assuming *arguendo* that the Commission has made the necessary completeness determination, pursuant to HAR § 15-15-125(e), the Commission should remand the matter back to DPP for further review or clarification. The Commission should not be cowed by DPP's assertion that "the Commission must move to accept the City's recommendation for IAL" (*see* DPP Supplemental Brief, filed 12/29/2021, at 17). The Commission has the authority to reject the DPP submission and remand the matter back to the C&C. The Commission also has the authority to amend or revise the C&C/DPP recommendation and proposal to exclude properties from this involuntary IAL designation. HAR § 15-15-125(e)(3); *see also* DPP Supplemental Brief at 18.

2. **PRIOR TO INVOLUNTARY DESIGNATION, LANDOWNERS ARE ENTITLED TO DUE PROCESS – HERE, THE ABUNDANCE OF CONFLICTING, INCONSISTENT, AND INCORRECT INFORMATION PROVIDED BY DPP CREATES A SIGNIFICANT DEFECT IN NOTICE.**

We agree with the Commission's Deputy Attorneys General that involuntary IAL designation will affect the property rights of such designated landowners. We further agree that those landowners are entitled to due process protections.[3] *See* Letter from L. Chow, J. China, D. Morris, Deputy Attorneys General, to Chair Scheuer (9/23/2021) re the C&C IAL recommendation, posted on the Commission's website, at 8 - 9.

"Due process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach Def. Fund v. City Council of the City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). However, certain fundamental requirements, such as notice and an opportunity to be heard, at a meaningful time and in a meaningful manner, must always be satisfied.

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[3] No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Haw. Const. art. I, § 5.

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citations omitted).

In Hawaii, an "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Minton v. Quintal*, 131 Hawai'i 167, 189, 317 P.3d 1, 23 (2013), citing authority. Adequate notice "must inform affected parties of the action about to be taken against them as well as of procedures available for challenging that action."

A. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE IMPACT OF IAL FAILS TO PROVIDE ADEQUATE NOTICE.

DPP has given so many mixed and conflicting messages regarding the impact of IAL designation, it is impossible for any landowner to have received adequate notice reasonably calculated to inform them of the action proposed to be taken with regard to their land.

In its *Report on the O'ahu Important Agricultural Land Mapping Project* (August 2018) ("**DPP's IAL Report**"), posted to the Commission's website, DPP took the position that IAL designations do not change existing land use classifications or affect the range of permitted uses. *Id.* at 1. DPP's statements conflict with statute, and such informational defects fail to provide adequate notice to potentially affected landowners.

HRS § 205-43 provides a list of IAL policies. It directs the C&C to enact laws that are consistent with these policies, i.e., laws that prevent physical improvements and nonagricultural uses on Agricultural District lands. This mandate is contrary to the range of improvements and uses currently permitted on Agricultural District lands.

> State and ***county*** agricultural policies, tax policies, ***land use plans, ordinances, and rules*** shall promote the long-term viability of agricultural use of important agricultural lands and ***shall be consistent with and implement the following policies***:
> * * *
> (3) ***Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;***
>
> (4) ***Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;***
>
> * * *

We also note that at page 5 of the C&C's "Frequently Asked Questions" document (September 2018), posted on the Commission's website, the public was incorrectly informed that IAL designation will not preclude landowners from using their land "for purposes allowed or permitted under current LUC rules and regulations and the City's zoning requirements."

Numerous uses permitted within the Agricultural District under HRS §§ 205-2(d) and 205-4.5(a) are not considered "actually agricultural uses." Therefore, under HRS § 205-43 the C&C must enact laws and policies to prohibit those uses. A few currently permitted uses within the Agricultural District that do not appear to fit the IAL policies of reserving the land for actual agricultural use include (i) commercial wind-generated energy production, (ii) biofuel processing facilities, (iii) solar energy facilities, (iv) agricultural-based commercial operations, (v) hydroelectric facilities, (vi) public and private open area recreational uses, (vii) utility lines, roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, (viii) mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems, and (ix) wireless communication antennas. *See* HRS §§ 205-2(d) and 205-4.5(a). DPP has misinformed the public regarding the impacts of IAL.

In fact, DPP continues to take the position that "IAL designation creates little if any changes in a landowner's use of their property, and rather, is intended to provide opportunities and benefits for landowners." DPP Supplemental Brief at 2. Inaccuracies of this magnitude are not consistent with due process. The land use plans, ordinances, and rules that the C&C must enact to fulfill the IAL policies should be presented to the public and vetted through hearings and the normal legislative process before any involuntary IAL designations are made. This involuntary IAL designation process cannot be permitted to move forward when such crucial information remains unknown, and under the control of the very entity that is seeking to impose the involuntary designation.

B. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE IMPACT ON FARM DWELLINGS FAILS TO PROVIDE ADEQUATE NOTICE TO AFFECTED LANDOWNERS.

DPP's Supplemental Brief devotes several pages to addressing the impacts of an IAL designation on a landowner's ability to have a farm dwelling. However, respectfully, DPP seems to assert inconsistent positions on this topic. DPP claims that "the designation of IAL has no effect on a landowner's ability to use their land for currently permitted agricultural purposes[.]" DPP Supplemental Brief at 8. DPP also asserts that there is no significant difference between the farm dwelling requirements on IAL land under HRS § 205-45.5 and the farm dwelling requirements for non-IAL land under HRS § 205-4.5. DPP Supplemental Brief at 3. This position is not supported by statute. Moreover, if it were, DPP would have no reason to present its other theory - that the designation of IAL has no impact on existing farm dwellings, but only applies to newly constructed farm dwellings on IAL. *Id.*

Farm dwellings in the Agricultural District must satisfy one of two requirements. It must be either "a single-family dwelling located on and accessory to a farm, . . . ***or*** [a dwelling] where agricultural activity provides income to the family occupying the dwelling." HRS § 205-

4.5(a)(4) (emphasis added). This language does not mandate dwelling occupants actively engage in farming. The farming could be done by others as long as farming remained the principal use of the land. For example, a disabled landowner with limited mobility could still satisfy the farm dwelling requirement by engaging an agricultural contractor to farm the land on the owner's behalf. This definition of farm dwelling also takes into account situations where the dwelling is not accessory to a farm, but the family occupying the dwelling earns income from agricultural activities (thus the "or" separating the two clauses).

In contrast, for IAL designated land, the requirement is that the farm dwelling must 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." HRS § 205-45.5(1) (emphasis added). It is difficult to see how the hypothetical disabled landowner could satisfy the requirement to "actively and currently" farm the land, yet the law would forbid him from living in the farm dwelling because the dwelling must be "used exclusively" by those who actively and currently farm the land.

The differences between these two provisions of the law are dramatic. Yet DPP has misinformed the public on this point from the start. *See e.g.*, Minutes of Community Meeting 2, Kapolei Middle School, 1/10/2017 (Appendix D to DPP's IAL Report):

> 41. Can you give examples of what uses will be more difficult to get permission for?
>
> RESPONSE: The only difficulty really would be to try and urbanize your land. If your land is zoned AG at the county level - again I repeat myself - but you are entitled to take advantage of all the benefits that agricultural zoning allows you. As long as you are pursuing a legal use or a use that's identified in the zoning code, you're good to go.
>
> 42. What uses are permitted on lands designated as IAL?
>
> RESPONSE: The same uses that are currently allowed by County zoning or under the State Chapter 205.
>
> 49. Could you please list again what are the benefits to the landowner of having the land designated IAL and how these benefits differ from having AG land not designated IAL?
>
> RESPONSE: The benefits are basically access to the incentives that have already been adopted by the State, and you suffer no other consequence.

And see Community Meeting 2, Hale'iwa Elementary School, 1/17/2017:

> 15. How will the IAL designation affect farm dwelling permitting for land already designated for AG?

> RESPONSE: It would be the same process. You have to get a building permit for a farm dwelling, and you would be held to the responsibility of the law that says your unit is a farm dwelling. That's for both county and state law.
>
> 16. What am I able to construct on my IAL property?
>
> RESPONSE: Anything that's allowed. If you're zoned AG-1, whatever's allowed in AG-1. If you're zoned AG-2, anything that's allowed in AG-2. If you're zoned Country, whatever's allowed in Country. The same rules apply even with the IAL designation.

DPP made false and misleading statements throughout the IAL process. This is not to imply that DPP had any nefarious intent. No doubt DPP representatives did not intend to mislead the public, but the statutory language is clear. The standard for a farm dwelling on IAL land is different from that on non-IAL land. Not only in terms of who must be engaged in the physical act of farming, but also by virtue of the fact that a farming dwelling cannot be permitted on IAL land unless the DOA approves an agricultural plan for that property. *See* HRS § 205-45.5(7).

In the Supplemental Brief, DPP asserts that the farm dwelling requirements under HRS § 205-45.5 only apply prospectively, i.e., to farm dwellings constructed after IAL designation. Setting aside that fact that the cited Conference Committee Report offers weak justification for this position, if DPP is correct that farm dwellings are permitted equally on IAL and non-IAL lands, there would be no rationale for the legislature to establish a pre-IAL carve out.

DPP appears to have a shaky understanding on this issue and has disseminated misinformation to the public about the impacts of IAL designation on farm dwellings. Such erroneous statements by DPP failed to provide landowners with accurate notice and therefore prevented landowners from having an opportunity to be heard at a meaningful time and in a meaningful manner.

C. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE TMK PARCELS PROPOSED FOR INVOLUNTARY DESIGNATION FAILS TO PROVIDE ADEQUATE NOTICE TO AFFECTED LANDOWNERS

Information provided by the Commission, presumably obtained from DPP, conflicts with information provided by the C&C and DPP. Therefore, it is impossible for a member of the public to know for certain whether its property is proposed for designation. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). Government has an obligation to be clear and precise when seeking to take action on private property, and cannot leave members of the public guessing as to whether their properties are at risk. The conflicting information on the TMK parcels proposed for involuntary designation is misleading and fails to provide notice, and therefore violates due process rights of landowners.

The C&C Petition expressly relies upon a list of supporting submittals, including "A list of the Tax Map Key . . . parcels being recommended for IAL is presented in Appendix H of the

Report."[4] C&C Petition at 3. However, the C&C Petition list conflicts with the list of TMK parcels that was approved by the Council.

Appendix H to the DPP's IAL Report is a list of ***1,800 TMK parcels*** and is dated August 2018. These are not the TMK parcels that were approved by the City Council. City Council Resolution No. 18-233, CD1, FD1, at Exhibit B, lists the parcels the Council approved for IAL designation. The listing is dated May 2019 and lists ***1,767 TMK parcels***.[5] DPP has an obligation to be precise when informing the Commission and the public what parcels it wants this Commission to designate as IAL and DPP has not met its burden.

Compounding the confusion, neither of these conflicting lists of TMK parcels are consistent with the information provided to and relied upon by the Commission. The Commission's "Updated list of TMKs City recommended for IAL Designation as of 02/25/21 (used for LUC's mail notifications to landowners) Mar, 2021" which is posted to the Commission's website lists ***2,388 TMK parcels***, and is titled "Inventory of City Recommendations for IAL Designation by TMK and HPR Parcel Number February 2021."

If the City Council proposed 1,767 TMK parcels for IAL designation, and the C&C Petition seeks to designate 1,800 TMK parcels (contrary to the Council Resolution), why was the Commission provided an inventory that lists 2,388 TMK parcels proposed for IAL designation? There are numerous parcels on the LUC's list that are not on the Council's list. Yet the LUC used that list to prepare its 4/12/2021 notification informing landowners that their properties had been proposed for IAL designation by the C&C.

Conflicting and unclear information means it is impossible for a landowner to determine with certainty whether its property is proposed for involuntary designation. So many people have devoted extensive amounts of time to this C&C Petition, and yet the fundamental requirements of an accurate and consistent listing of the properties proposed for involuntary designation has never been provided. Clearly these defects constitute a lack of notice.

3. DPP PRESENTED IAL DESIGNATION AS A MEANS OF ACCESSING INCENTIVES, BUT HAS FAILED TO ENACT ANY SUCH INCENTIVES.

In 2018, DPP told the public that the premise of an IAL designation is to grant landowners access to incentives to support farming, and that IAL designation is not a means of protecting land from future development.

> Contrary to popular belief, the IAL designation does not impose a higher level of permanent protection from future development, and it does not simply ensure that agricultural land is preserved in

[4] The "report" cited is the DPP's IAL Report.

[5] 1,767 parcels are listed on Ex. B to Resolution No. 18-233. Yet inexplicably page 1 of Ex. B states "A total of 1,781 TMK parcels are listed. In addition to the TMK parcel number, the inventory presents the size of the parcel (in acres) and the acreage being recommended for IAL designation." This statement is clearly refuted by the actual listing of the TMK parcels, which provides no TMK parcel numbers for the last 14 rows.

> perpetuity. Rather, the premise of the IAL designation is to grant landowners access to incentives and supportive measures that reduce the cost of farming, which in turn promotes the economic viability of farming and makes it possible for landowners to keep agricultural lands active, ultimately leading to the long-term preservation and protection of productive agricultural land (Chapter 205-42, HRS).

DPP's IAL Report at 1.

HRS § 205-46 requires the C&C to establish incentives that benefit IAL designated lands, requires the C&C/DPP to "review the protection and incentive measures enacted for [IAL] and agricultural viability pursuant to this chapter at least every five years[.]" HRS § 205-46(d). These incentives are specific to IAL designated lands, and incentives applicable to all Agricultural District lands are not sufficient.

In 2018, DPP acknowledged that the C&C had failed to establish any IAL-specific incentives, but reported that "[t]he feasibility of offering benefits specific for IAL-designated properties is being addressed by the City administration." DPP's IAL Report at 17. Apparently, no progress has been made. In the C&C Petition, DPP again admitted that it did not have any IAL-specific incentives in place. Furthermore, "[n]o new incentive programs appear to be feasible at this time. Nevertheless, the City continues to explore methods to incentivize the productive farming of its agricultural lands." *Id.* at 20. Landowners cannot possibly understand the impact of an IAL designation when the C&C has effectively ignored these key and fundamental requirements.

4. LACK OF C&C IAL-SPECIFIC INFRASTRUCTURE REDUCTION LAWS CREATES A LEGAL DEFECT THAT MUST BE CORRECTED BEFORE ANY INVOLUNTARY IAL DESIGNATIONS

HRS § 205-51(a) requires the C&C to adopt ordinances that reduce infrastructure standards for lands designated as IAL. These measures must be enacted specific to IAL: the C&C cannot rely on laws that apply to all Agricultural District lands to satisfy this obligation.

> 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.

The C&C has blown its deadline for enacting these laws. The effective date of the operative legislation was July 8, 2008. That is the date that Act 233, Session Laws of Hawaii 2008, became effective, and no C&C IAL-specific ordinances have been enacted.[6]

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[6] Section 13 of Act 233 provides "The legislature declares that this Act establishes incentives for the designation of important agricultural lands in satisfaction of section 205-46, Hawaii Revised Statutes, and section 9 of Act 183, Session Laws of Hawaii 2005."

It does not appear that DPP addressed, or even acknowledged, this requirement in the C&C Petition or in DPP's Supplemental Brief. The C&C is more than a decade late in complying with this requirement, and rather than following this mandate, inexplicably DPP elected instead to pursue involuntary IAL designations. This approach appears arbitrary and capricious, as well as violative of the law. In fact, the is no reason under the law for DPP to have rushed first into the involuntary IAL process while ignoring the incentive requirements under Part III of Chapter 205.

HRS § 205-48(a) provides that the Commission shall receive County-recommend IAL maps "***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." (emphasis added). In contrast to the mandate put upon the C&C under HRS § 205-51(a), which requires the C&C to adopt infrastructure relaxation ordinances "***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." (emphasis added).

The Commission should reject the C&C Petition and instruct the C&C to engage in the important and numerous legislative processes required under Part III of HRS Chapter 205 before it attempts to designate private lands as IAL over the objections of landowners.

* * * * *

Thank you very much for this opportunity to provide testimony. We urge the Commission to remand this matter back to DPP, and to encourage DPP and the C&C to engage in a truly inclusive process for public involvement in crafting legislation to promote the goals of IAL before making further attempts to force designation upon objecting landowners. In the alternative, if the Commission moves forward with the C&C Petition, we respectfully request that the Commission exclude the Garber property from this involuntary and erroneous IAL designation.

Sincerely,

LAW OFFICE OF JENNIFER A. LIM, LLLC

By: _____
Jennifer A. Lim

cc:
Riley Hakoda, via email
Vanessa Garber, via email
Alexander Garber, via email

From:	Jennifer Lim
To:	DBEDT LUC; Quinones, Natasha A
Cc:	Hakoda, Riley K; Alexander Garber; Vanessa Kaneshiro Garber
Subject:	[EXTERNAL] C&C IAL Petition LUC Agenda Jan. 6, 2022 Testimony on behalf of Garber
Date:	Tuesday, January 4, 2022 3:08:29 PM
Attachments:	image001.png J.Lim Esq testimony for Garber re C&C IAL 2022-01-04.pdf

Dear Ms. Quiñones

Attached please find testimony to the Chair and members of the Commission related to agenda item II for the Commission meeting of 1/6/2022.

Please let me know if you have any trouble with the attachment.
Many thanks
Jennifer

Jennifer A. Lim, Esq.

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January 4, 2022

Via Email: dbedt.luc.web@hawaii.gov
State of Hawaii Land Use Commission
P.O. Box 2359
Honolulu, HI 96814-2359

Re: 1/6/2022 Agenda Item II:
The City & County of Honolulu IAL Petition Does Not Comply With the Law
To the Detriment of Potentially Affected Landowners

Dear Chair Scheuer and Members of the Land Use Commission:

This firm represents the owners of 6.5 acre parcel of land located at Waialua, designated by TMK No. (1) 6-6-027: 011, being Alexander C. Garber and Vanessa K. K. Garber, as Trustees of the Alexander C. Garber Revocable Living Trust, and the Vanessa K. K. Garber Revocable Living Trust (the "**Garbers**"). The City and County of Honolulu ("**C&C**") through the Department of Planning and Permitting ("**DPP**") wants to designate all of the Garber's property as IAL.

The Garbers submitted objections to the C&C Petition[1] for involuntary IAL designation by letters dated April 24 and May 11, 2021. To be clear, the Garbers are in favor of maintaining their property for agricultural purposes. The Garber property includes a small family farm and orchard that produces various crops (e.g., avocado, mango, acerola cherry, Surinam cherry, Meyer lemons, pink lemons, limes, oranges, tangerines, tangelos, starfruit, longan, ulu, lychee, and fig). The Garbers use those crops for personal consumption, as well as for barter within the farming community, and also modest sales to local vendors and small grocery stores. However, the extraordinarily defective process that DPP has employed in preparation and furtherance of the C&C Petition has left them bewildered, confused, and worried about their family's future on their own land.

[1] The Commission's agenda refers to "the C&C's IAL petition," and reports that the lands recommended for involuntary designation are listed in Appendix H of that "petition." None of the documents posted to the LUC website are designated as a "petition." Therefore, we interpret this reference to a C&C "petition" to mean the *City and County of Honolulu's Recommendation of Important Agricultural Lands*, which was filed with the Commission on 4/21/2021, as corrected by the C&C's *Errata* filed on 4/27/2021 (collectively, the "**C&C Petition**").

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DPP deserves recognition for attempting to apply the mess that is Part III of Hawaii Revised Statutes Chapter 205. We acknowledge that it cannot be easy to be the first County to pursue an involuntary IAL designation. Likely, many of the shortcomings in DPP's efforts are due to ambiguities within Part III of HRS Chapter 205. However, DPP has an obligation to provide coherent, correct, and consistent information to the public (and the Commission) regarding the impact of involuntary IAL designation. That has not been done, and as a result affected landowners have not been provided adequate and accurate notice. The entire DPP exercise highlights the overwhelming need for legislative action at the State level, to rectify ambiguities and errors within Part III of Chapter 205, HRS, and also the need for legislative action at the C&C letter, in order to comply with Part III and the spirit and intent of the IAL law to promoting diversified agriculture and increasing Hawaii's agricultural self-sufficiency.

The pending DPP involuntary designation process is premature, and by improperly prioritizing the involuntary process over other more immediate and compelling mandates in Part III of Chapter 205, HRS, this designation process is arbitrary and capricious. The IAL laws call for the C&C to enact incentives, infrastructure reduction ordinances, and agricultural and tax policies, land use plans, ordinances, and rules, all to promote IAL. *See* HRS §§ 205-46, 51, 43. Yet the C&C has not taken any of these actions.

Under HRS § 205-51(a), the infrastructure reduction laws were required to be in place by July 2008 ("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."). But the C&C has not enacted any IAL-specific laws to promote agricultural viability on IAL lands. The mandate for C&C incentives under HRS § 205-46 does not have as explicit of timeline. However, that section of the law requires C&C/DPP to review the C&C's IAL incentive measures "at least every five years." *See* HRS § 205-46(d). This shows the legislature's intent that Counties enact and apply IAL incentives quickly, and monitor and revise those measures as needed to further encourage IAL purposes.

If the C&C focused on enacting laws/plans/policies, etc. that provided special incentives and benefits to owners of IAL designated lands, especially smaller landowners, it is likely there would be little need for DPP to pursue an extensive involuntary designation that has generated considerable opposition and outrage from landowners. With the right incentives in place, as the legislature envisioned, more landowners would pursue voluntary designation. However, rather than following a logical and orderly process of first pursuing laws to further IAL purposes, the C&C and DPP leapt headfirst into the involuntary designation process, and in so doing have provided the public with conflicting and unclear information about the impacts of an IAL designation. Involuntary IAL designations should not go forward until all parties involved, including the Commission, understand the benefits and burdens of involuntary IAL designation, and the public is fully informed on what an IAL designation means to affected landowners.

The Commission's agenda states that the Commission will not be considering or determining the legal rights, duties, or privileges of specific landowners or issues relating to particular properties at this hearing. Although the purpose of this testimony is to alert the Commission to several legal defects related to the C&C Petition, we reiterate that the Garbers are opposed to the designation of their property as IAL. Due to the conflicting positions articulated by DPP regarding the effects of IAL, this involuntary designation process entails too much risk and lacks

any genuine disclosure to the public. Therefore, this testimony also serves to provide the Garber's formal notice to the Commission of their intent to pursue all legal remedies, including a contested case hearing, and all other appropriate relief, should the Commission move forward with the C&C Petition without exempting the Garber's property from involuntary IAL designation.

For the record, the Garbers are not opposed to IAL designation in concept. In fact, the Garbers have seriously considered filing a petition for voluntary IAL designation. In that petition they would identify the appropriate (and majority) portion of their land for IAL designation, and thereby eliminate the possibility of involuntary designation on the remainder of the land. Under HRS § 205-45, a farmer or landowner may file its petition for IAL designation "at any time in the designation process." Therefore, the pending C&C Petition does not preclude such a filing or Commission action on a voluntary petition. In the interest of fairness and consistent with the IAL laws, the pending C&C Petition should not be allowed to move forward to completion (i.e., designation) unless and until all landowners who have submitted testimony against the C&C Petition have been removed from the designation process and/or provided an opportunity to present their IAL petitions to the Commission for action.

1. STATUS OF THE CURRENT PROCEEDINGS IS UNCLEAR.

Procedurally, the record is not clear on whether the Commission has made the fundamental initial determination of completeness pursuant to Hawaii Administrative Rules ("**HAR**") § 15-15-125(c), which states that a county-submission "shall not be deemed complete unless all of the evidence set forth in section 15-15-125(b) has been transmitted and accepted by the commission."[2] The record does not reflect whether the Commission made the required determination of completeness and acceptance of the C&C Petition. Therefore, the public cannot ascertain the current stage of these proceedings, and cannot determine whether or how to meaningfully participate.

The Commission has not issued any written orders informing the public on the status of these proceedings and the C&C Petition. What materials are considered part of the DPP submittal? Is DPP's Supplemental Brief, which DPP filed last week (12/29/2021), part of that submission that the Commission must accept and deem complete? If so, presumably the Commission has ***not*** yet made the requisite completeness determination, because HAR § 15-15-125 does not contemplate additional and subsequent submittals by the Counties. The C&C had to provide all of the information called for under HAR § 15-15-125(b) in order for the Commission to initiate this process. The C&C cannot attempt to shoehorn in additional information to address defects in its C&C Petition.

Moreover, the Commission had to make its determination of acceptance and completeness before the C&C Petition was circulated to the State Department of Agriculture ("**DOA**") and the Office

[2] This initial requirement for a County-driven involuntary IAL process is similar to the Commission's requirement for petitions for district boundary amendment, in that before any other steps can be taken on a petition for district boundary amendment, the Commission's executive officer must determine whether the petition is a proper filing and whether it is accepted for processing. *See* HAR § 15-15-50(e), (f).

of Planning and Sustainable Development ("**OP**"). Therefore, if the Commission never made its acceptance and completeness determinations, any filings made by the DOA and OP should be disregarded as improper.

HRS § 205-48(b) requires DOA and OP to "review the county report and recommendations and provide comments to the land use commission ***within forty-five days of the receipt of the report and maps by the land use commission***." This raises two additional flaws in the proceedings. First, the record does not reflect any transmittal from the Commission was made to DOA or OP. Second, the submissions by DOA and OP were made months after the C&C Petition was submitted to the Commission.

Assuming *arguendo* that the Commission has made the necessary completeness determination, pursuant to HAR § 15-15-125(e), the Commission should remand the matter back to DPP for further review or clarification. The Commission should not be cowed by DPP's assertion that "the Commission must move to accept the City's recommendation for IAL" (*see* DPP Supplemental Brief, filed 12/29/2021, at 17). The Commission has the authority to reject the DPP submission and remand the matter back to the C&C. The Commission also has the authority to amend or revise the C&C/DPP recommendation and proposal to exclude properties from this involuntary IAL designation. HAR § 15-15-125(e)(3); *see also* DPP Supplemental Brief at 18.

2. **PRIOR TO INVOLUNTARY DESIGNATION, LANDOWNERS ARE ENTITLED TO DUE PROCESS – HERE, THE ABUNDANCE OF CONFLICTING, INCONSISTENT, AND INCORRECT INFORMATION PROVIDED BY DPP CREATES A SIGNIFICANT DEFECT IN NOTICE.**

We agree with the Commission's Deputy Attorneys General that involuntary IAL designation will affect the property rights of such designated landowners. We further agree that those landowners are entitled to due process protections.[3] *See* Letter from L. Chow, J. China, D. Morris, Deputy Attorneys General, to Chair Scheuer (9/23/2021) re the C&C IAL recommendation, posted on the Commission's website, at 8 - 9.

"Due process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach Def. Fund v. City Council of the City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). However, certain fundamental requirements, such as notice and an opportunity to be heard, at a meaningful time and in a meaningful manner, must always be satisfied.

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[3] No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Haw. Const. art. I, § 5.

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citations omitted).

In Hawaii, an "elementary and fundamental requirement of due process" is "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Minton v. Quintal*, 131 Hawai'i 167, 189, 317 P.3d 1, 23 (2013), citing authority. Adequate notice "must inform affected parties of the action about to be taken against them as well as of procedures available for challenging that action."

A. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE IMPACT OF IAL FAILS TO PROVIDE ADEQUATE NOTICE.

DPP has given so many mixed and conflicting messages regarding the impact of IAL designation, it is impossible for any landowner to have received adequate notice reasonably calculated to inform them of the action proposed to be taken with regard to their land.

In its *Report on the O'ahu Important Agricultural Land Mapping Project* (August 2018) ("**DPP's IAL Report**"), posted to the Commission's website, DPP took the position that IAL designations do not change existing land use classifications or affect the range of permitted uses. *Id.* at 1. DPP's statements conflict with statute, and such informational defects fail to provide adequate notice to potentially affected landowners.

HRS § 205-43 provides a list of IAL policies. It directs the C&C to enact laws that are consistent with these policies, i.e., laws that prevent physical improvements and nonagricultural uses on Agricultural District lands. This mandate is contrary to the range of improvements and uses currently permitted on Agricultural District lands.

> State and ***county*** agricultural policies, tax policies, ***land use plans, ordinances, and rules*** shall promote the long-term viability of agricultural use of important agricultural lands and ***shall be consistent with and implement the following policies***:
> * * *
> (3) ***Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;***
>
> (4) ***Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;***
>
> * * *

We also note that at page 5 of the C&C's "Frequently Asked Questions" document (September 2018), posted on the Commission's website, the public was incorrectly informed that IAL designation will not preclude landowners from using their land "for purposes allowed or permitted under current LUC rules and regulations and the City's zoning requirements."

Numerous uses permitted within the Agricultural District under HRS §§ 205-2(d) and 205-4.5(a) are not considered "actually agricultural uses." Therefore, under HRS § 205-43 the C&C must enact laws and policies to prohibit those uses. A few currently permitted uses within the Agricultural District that do not appear to fit the IAL policies of reserving the land for actual agricultural use include (i) commercial wind-generated energy production, (ii) biofuel processing facilities, (iii) solar energy facilities, (iv) agricultural-based commercial operations, (v) hydroelectric facilities, (vi) public and private open area recreational uses, (vii) utility lines, roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, (viii) mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems, and (ix) wireless communication antennas. *See* HRS §§ 205-2(d) and 205-4.5(a). DPP has misinformed the public regarding the impacts of IAL.

In fact, DPP continues to take the position that "IAL designation creates little if any changes in a landowner's use of their property, and rather, is intended to provide opportunities and benefits for landowners." DPP Supplemental Brief at 2. Inaccuracies of this magnitude are not consistent with due process. The land use plans, ordinances, and rules that the C&C must enact to fulfill the IAL policies should be presented to the public and vetted through hearings and the normal legislative process before any involuntary IAL designations are made. This involuntary IAL designation process cannot be permitted to move forward when such crucial information remains unknown, and under the control of the very entity that is seeking to impose the involuntary designation.

B. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE IMPACT ON FARM DWELLINGS FAILS TO PROVIDE ADEQUATE NOTICE TO AFFECTED LANDOWNERS.

DPP's Supplemental Brief devotes several pages to addressing the impacts of an IAL designation on a landowner's ability to have a farm dwelling. However, respectfully, DPP seems to assert inconsistent positions on this topic. DPP claims that "the designation of IAL has no effect on a landowner's ability to use their land for currently permitted agricultural purposes[.]" DPP Supplemental Brief at 8. DPP also asserts that there is no significant difference between the farm dwelling requirements on IAL land under HRS § 205-45.5 and the farm dwelling requirements for non-IAL land under HRS § 205-4.5. DPP Supplemental Brief at 3. This position is not supported by statute. Moreover, if it were, DPP would have no reason to present its other theory - that the designation of IAL has no impact on existing farm dwellings, but only applies to newly constructed farm dwellings on IAL. *Id.*

Farm dwellings in the Agricultural District must satisfy one of two requirements. It must be either "a single-family dwelling located on and accessory to a farm, . . . ***or*** [a dwelling] where agricultural activity provides income to the family occupying the dwelling." HRS § 205-

4.5(a)(4) (emphasis added). This language does not mandate dwelling occupants actively engage in farming. The farming could be done by others as long as farming remained the principal use of the land. For example, a disabled landowner with limited mobility could still satisfy the farm dwelling requirement by engaging an agricultural contractor to farm the land on the owner's behalf. This definition of farm dwelling also takes into account situations where the dwelling is not accessory to a farm, but the family occupying the dwelling earns income from agricultural activities (thus the "or" separating the two clauses).

In contrast, for IAL designated land, the requirement is that the farm dwelling must 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." HRS § 205-45.5(1) (emphasis added). It is difficult to see how the hypothetical disabled landowner could satisfy the requirement to "actively and currently" farm the land, yet the law would forbid him from living in the farm dwelling because the dwelling must be "used exclusively" by those who actively and currently farm the land.

The differences between these two provisions of the law are dramatic. Yet DPP has misinformed the public on this point from the start. *See e.g.*, Minutes of Community Meeting 2, Kapolei Middle School, 1/10/2017 (Appendix D to DPP's IAL Report):

> 41. Can you give examples of what uses will be more difficult to get permission for?
>
> RESPONSE: The only difficulty really would be to try and urbanize your land. If your land is zoned AG at the county level - again I repeat myself - but you are entitled to take advantage of all the benefits that agricultural zoning allows you. As long as you are pursuing a legal use or a use that's identified in the zoning code, you're good to go.
>
> 42. What uses are permitted on lands designated as IAL?
>
> RESPONSE: The same uses that are currently allowed by County zoning or under the State Chapter 205.
>
> 49. Could you please list again what are the benefits to the landowner of having the land designated IAL and how these benefits differ from having AG land not designated IAL?
>
> RESPONSE: The benefits are basically access to the incentives that have already been adopted by the State, and you suffer no other consequence.

And see Community Meeting 2, Hale'iwa Elementary School, 1/17/2017:

> 15. How will the IAL designation affect farm dwelling permitting for land already designated for AG?

> RESPONSE: It would be the same process. You have to get a building permit for a farm dwelling, and you would be held to the responsibility of the law that says your unit is a farm dwelling. That's for both county and state law.
>
> 16. What am I able to construct on my IAL property?
>
> RESPONSE: Anything that's allowed. If you're zoned AG-1, whatever's allowed in AG-1. If you're zoned AG-2, anything that's allowed in AG-2. If you're zoned Country, whatever's allowed in Country. The same rules apply even with the IAL designation.

DPP made false and misleading statements throughout the IAL process. This is not to imply that DPP had any nefarious intent. No doubt DPP representatives did not intend to mislead the public, but the statutory language is clear. The standard for a farm dwelling on IAL land is different from that on non-IAL land. Not only in terms of who must be engaged in the physical act of farming, but also by virtue of the fact that a farming dwelling cannot be permitted on IAL land unless the DOA approves an agricultural plan for that property. *See* HRS § 205-45.5(7).

In the Supplemental Brief, DPP asserts that the farm dwelling requirements under HRS § 205-45.5 only apply prospectively, i.e., to farm dwellings constructed after IAL designation. Setting aside that fact that the cited Conference Committee Report offers weak justification for this position, if DPP is correct that farm dwellings are permitted equally on IAL and non-IAL lands, there would be no rationale for the legislature to establish a pre-IAL carve out.

DPP appears to have a shaky understanding on this issue and has disseminated misinformation to the public about the impacts of IAL designation on farm dwellings. Such erroneous statements by DPP failed to provide landowners with accurate notice and therefore prevented landowners from having an opportunity to be heard at a meaningful time and in a meaningful manner.

C. CONFLICTING, INCORRECT, AND MISLEADING INFORMATION REGARDING THE TMK PARCELS PROPOSED FOR INVOLUNTARY DESIGNATION FAILS TO PROVIDE ADEQUATE NOTICE TO AFFECTED LANDOWNERS

Information provided by the Commission, presumably obtained from DPP, conflicts with information provided by the C&C and DPP. Therefore, it is impossible for a member of the public to know for certain whether its property is proposed for designation. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). Government has an obligation to be clear and precise when seeking to take action on private property, and cannot leave members of the public guessing as to whether their properties are at risk. The conflicting information on the TMK parcels proposed for involuntary designation is misleading and fails to provide notice, and therefore violates due process rights of landowners.

The C&C Petition expressly relies upon a list of supporting submittals, including "A list of the Tax Map Key . . . parcels being recommended for IAL is presented in Appendix H of the

Report."[4] C&C Petition at 3. However, the C&C Petition list conflicts with the list of TMK parcels that was approved by the Council.

Appendix H to the DPP's IAL Report is a list of ***1,800 TMK parcels*** and is dated August 2018. These are not the TMK parcels that were approved by the City Council. City Council Resolution No. 18-233, CD1, FD1, at Exhibit B, lists the parcels the Council approved for IAL designation. The listing is dated May 2019 and lists ***1,767 TMK parcels***.[5] DPP has an obligation to be precise when informing the Commission and the public what parcels it wants this Commission to designate as IAL and DPP has not met its burden.

Compounding the confusion, neither of these conflicting lists of TMK parcels are consistent with the information provided to and relied upon by the Commission. The Commission's "Updated list of TMKs City recommended for IAL Designation as of 02/25/21 (used for LUC's mail notifications to landowners) Mar, 2021" which is posted to the Commission's website lists ***2,388 TMK parcels***, and is titled "Inventory of City Recommendations for IAL Designation by TMK and HPR Parcel Number February 2021."

If the City Council proposed 1,767 TMK parcels for IAL designation, and the C&C Petition seeks to designate 1,800 TMK parcels (contrary to the Council Resolution), why was the Commission provided an inventory that lists 2,388 TMK parcels proposed for IAL designation? There are numerous parcels on the LUC's list that are not on the Council's list. Yet the LUC used that list to prepare its 4/12/2021 notification informing landowners that their properties had been proposed for IAL designation by the C&C.

Conflicting and unclear information means it is impossible for a landowner to determine with certainty whether its property is proposed for involuntary designation. So many people have devoted extensive amounts of time to this C&C Petition, and yet the fundamental requirements of an accurate and consistent listing of the properties proposed for involuntary designation has never been provided. Clearly these defects constitute a lack of notice.

3. DPP PRESENTED IAL DESIGNATION AS A MEANS OF ACCESSING INCENTIVES, BUT HAS FAILED TO ENACT ANY SUCH INCENTIVES.

In 2018, DPP told the public that the premise of an IAL designation is to grant landowners access to incentives to support farming, and that IAL designation is not a means of protecting land from future development.

> Contrary to popular belief, the IAL designation does not impose a higher level of permanent protection from future development, and it does not simply ensure that agricultural land is preserved in

[4] The "report" cited is the DPP's IAL Report.

[5] 1,767 parcels are listed on Ex. B to Resolution No. 18-233. Yet inexplicably page 1 of Ex. B states "A total of 1,781 TMK parcels are listed. In addition to the TMK parcel number, the inventory presents the size of the parcel (in acres) and the acreage being recommended for IAL designation." This statement is clearly refuted by the actual listing of the TMK parcels, which provides no TMK parcel numbers for the last 14 rows.

> perpetuity. Rather, the premise of the IAL designation is to grant landowners access to incentives and supportive measures that reduce the cost of farming, which in turn promotes the economic viability of farming and makes it possible for landowners to keep agricultural lands active, ultimately leading to the long-term preservation and protection of productive agricultural land (Chapter 205-42, HRS).

DPP's IAL Report at 1.

HRS § 205-46 requires the C&C to establish incentives that benefit IAL designated lands, requires the C&C/DPP to "review the protection and incentive measures enacted for [IAL] and agricultural viability pursuant to this chapter at least every five years[.]" HRS § 205-46(d). These incentives are specific to IAL designated lands, and incentives applicable to all Agricultural District lands are not sufficient.

In 2018, DPP acknowledged that the C&C had failed to establish any IAL-specific incentives, but reported that "[t]he feasibility of offering benefits specific for IAL-designated properties is being addressed by the City administration." DPP's IAL Report at 17. Apparently, no progress has been made. In the C&C Petition, DPP again admitted that it did not have any IAL-specific incentives in place. Furthermore, "[n]o new incentive programs appear to be feasible at this time. Nevertheless, the City continues to explore methods to incentivize the productive farming of its agricultural lands." *Id.* at 20. Landowners cannot possibly understand the impact of an IAL designation when the C&C has effectively ignored these key and fundamental requirements.

4. LACK OF C&C IAL-SPECIFIC INFRASTRUCTURE REDUCTION LAWS CREATES A LEGAL DEFECT THAT MUST BE CORRECTED BEFORE ANY INVOLUNTARY IAL DESIGNATIONS

HRS § 205-51(a) requires the C&C to adopt ordinances that reduce infrastructure standards for lands designated as IAL. These measures must be enacted specific to IAL: the C&C cannot rely on laws that apply to all Agricultural District lands to satisfy this obligation.

> 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.

The C&C has blown its deadline for enacting these laws. The effective date of the operative legislation was July 8, 2008. That is the date that Act 233, Session Laws of Hawaii 2008, became effective, and no C&C IAL-specific ordinances have been enacted.[6]

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[6] Section 13 of Act 233 provides "The legislature declares that this Act establishes incentives for the designation of important agricultural lands in satisfaction of section 205-46, Hawaii Revised Statutes, and section 9 of Act 183, Session Laws of Hawaii 2005."

It does not appear that DPP addressed, or even acknowledged, this requirement in the C&C Petition or in DPP's Supplemental Brief. The C&C is more than a decade late in complying with this requirement, and rather than following this mandate, inexplicably DPP elected instead to pursue involuntary IAL designations. This approach appears arbitrary and capricious, as well as violative of the law. In fact, the is no reason under the law for DPP to have rushed first into the involuntary IAL process while ignoring the incentive requirements under Part III of Chapter 205.

HRS § 205-48(a) provides that the Commission shall receive County-recommend IAL maps "***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." (emphasis added). In contrast to the mandate put upon the C&C under HRS § 205-51(a), which requires the C&C to adopt infrastructure relaxation ordinances "***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." (emphasis added).

The Commission should reject the C&C Petition and instruct the C&C to engage in the important and numerous legislative processes required under Part III of HRS Chapter 205 before it attempts to designate private lands as IAL over the objections of landowners.

* * * * *

Thank you very much for this opportunity to provide testimony. We urge the Commission to remand this matter back to DPP, and to encourage DPP and the C&C to engage in a truly inclusive process for public involvement in crafting legislation to promote the goals of IAL before making further attempts to force designation upon objecting landowners. In the alternative, if the Commission moves forward with the C&C Petition, we respectfully request that the Commission exclude the Garber property from this involuntary and erroneous IAL designation.

Sincerely,

LAW OFFICE OF JENNIFER A. LIM, LLLC

By: _____
Jennifer A. Lim

cc:
Riley Hakoda, via email
Vanessa Garber, via email
Alexander Garber, via email

From:	Jesi K. Onaga
To:	DBEDT LUC
Cc:	Hakoda, Riley K; Jodi Yamamoto; Bradley S. Dixon
Subject:	[EXTERNAL] Written Public Testimony of Jodi Yamamoto on behalf of Kahuku Wind Power, LLC Regarding IAL Recommendation and City"s Supplemental Brief, for January 6, 2022 LUC Meeting
Date:	Tuesday, January 4, 2022 8:31:09 AM
Attachments:	Ltr fr YC to LUC re IAL Recommendation and City"s Supplemental Brief w- Attachment A (dated 1-4-2022).pdf

Good Morning,

Please find attached the written public testimony of Ms. Jodi Yamamoto regarding the Important Agricultural Lands Recommendation and City and County of Honolulu's Supplemental Brief, dated December 29, 2021. The written testimony is being submitted in advance of the Land Use Commission's upcoming meeting on January 6, 2022.

Please let us know if you have any questions.

Sincerely,

Jesi K. Onaga
Paralegal

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January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Conformance of C&C of Honolulu Important Agricultural Lands Recommendation to Applicable Statutory and Procedural Requirements – Comments regarding City and County of Honolulu's Supplemental Brief dated December 29, 2021

Land Use Commission Hearing dated January 6, 2022

Chair Scheuer and Members of the Commission,

My name is Jodi Shin Yamamoto, and my firm represents Kahuku Wind Power, LLC ("Kahuku Wind"). Kahuku Wind operates a 30-megawatt renewable energy wind project in Kahuku, Oahu, Hawaii ("Project"), which is located on lands proposed to be designated as Important Agricultural Lands ("IAL") by the City and County of Honolulu ("City"). Kahuku Wind's renewable energy wind project was constructed in 2011 and has been providing Oahu with clean, renewable energy for the past ten years.

On May 20, 2021, Kahuku Wind submitted its comments regarding the Conformance of the County's Important Agricultural Lands Recommendation to Applicable Statutory and Procedural Requirements. **We submitted these written comments for the Commission's consideration as we believe the Commission should reject the County's recommendation ("Recommendation") for its proposed designation of IAL because the County has failed to satisfy the procedural steps required by law.** Our previous testimony is attached hereto as Attachment A for your reference and convenience.

Kahuku Wind's concerns with the City's process can be briefly summarized as follows:

1. The City's process in developing its Recommendation was seriously flawed and did not comply with the law because the City failed to properly notify and meaningfully consult with landowners, including those upon whose lands renewable energy projects are or may be sited.

2. The City's public participation process was perfunctory and fundamentally flawed.

3. The IAL designation impacts landowners' due process rights and the notice and hearing procedures utilized by the City were legally insufficient.

4. The City failed to properly consider all the standards and criteria, as required by the Legislature, in developing its Recommendation.

We have reviewed the City's Supplemental Brief to its Recommendation of Important Agricultural Lands, filed with the Land Use Commission ("LUC") yesterday on December 29, 2021. Much of what is stated in the Supplemental Brief simply restates arguments previously made by the City. **Kahuku Wind's concerns and strong objection to the City's Recommendation remain despite the Supplemental Brief.** In particular, the City represents that the IAL designation will not affect the right of a landowner to use their land for agriculturally permitted purposes as allowed under HRS § 205-2 and 205-4.5(a). However, this argument does not address the ability of the City or State to impose future burdens on land that is classified as IAL, which the IAL law indicates is part of its purpose. Further, under HRS § 205-4.5(a), some renewable energy project uses may be permitted uses in the agricultural district but require a permit. The City's argument fails to address the instances where uses are permitted under the statute but require a permit, and projects will be subject to an argument that a permit should not be granted because of an IAL designation.

Kahuku Wind does support one portion of the City's Supplemental Brief. Specifically, Kahuku Wind would support the City's suggestion that the Commission could remove parcels from IAL designation where the landowner has registered an objection to the IAL designation.

Kahuku Wind appreciates your time and attention to this matter and respectfully submits that the Commission should either end this proceeding and send this matter back to the County for processing in compliance with applicable law or permit objecting landowners to opt out of the IAL designation for their lands.

Thank you for the opportunity to provide these comments.

Very truly yours,

Jodi S. Yamamoto
for
YAMAMOTO CALIBOSO
A Limited Liability Law Company

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

Yamamoto Caliboso
A LIMITED LIABILITY LAW COMPANY

May 20, 2021

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Conformance of C&C of Honolulu Important Agricultural Lands Recommendation to Applicable Statutory and Procedural Requirements

Chair Scheuer and Members of the Commission,

My name is Jodi Shin Yamamoto, and my firm represents Kahuku Wind Power, LLC ("Kahuku Wind"). Kahuku Wind operates a 30-megawatt renewable energy wind project in Kahuku, Oahu, Hawaii ("Project"), which is located on lands proposed to be designated as Important Agricultural Lands ("IAL") by the City and County of Honolulu ("County").[1] Kahuku Wind's renewable energy wind project was constructed in 2011 and has been providing Oahu with clean, renewable energy for the past ten years. The Project can generate enough energy to power 7,700 homes and prevent 39,000 metric tons of carbon dioxide emissions annually,[2] and it contributes critically towards the State's mandate of achieving a 100% Renewable Portfolio Standard ("RPS") and carbon neutrality by 2045. See HRS §§ 225P-5 and 269-92. Hawaiian Electric Company, Inc. noted in its current Power Supply Improvement Plan that the RPS mandate will likely not be met only through solar, and that additional renewable resources including onshore wind will be necessary.

We submit these written comments for the Commission's consideration and believe the Commission should reject the County's recommendation ("Recommendation")[3] for its proposed designation of IAL because the County has failed to satisfy the procedural steps required by law. Kahuku Wind has serious concerns that:

> (1) The County's process in developing its Recommendation was seriously flawed and did not comply with the law because the County failed to properly notify and meaningfully consult with landowners, including those upon whose lands renewable energy projects are or may be sited;

[1] The Project is located on two parcels of land, TMK 5-6-005:007 ("Parcel 007") and TMK 5-6-5:014 ("Parcel 014") (collectively, "Project Site"). Kahuku Wind is the owner of Parcel 007 and it or an affiliated entity has owned the land since 2007. Kahuku Wind is the registered owner of the property and has timely paid its real estate property taxes. Kahuku Wind is a sublessee of Parcel 014 and has leased this parcel since 2009. Both parcels are included in the County's Recommendation as warranting IAL designation.
[2] See "Hawaii Renewable Energy Projects" at www.energy.ehawaii.gov (last accessed 5/20/21).
[3] See https://luc.hawaii.gov/wp-content/uploads/2021/04/DR-CC-HNL-IAL-003.pdf (last accessed 5/20/21).

(2) The County's public participation process was perfunctory and fundamentally flawed;

(3) The IAL designation improperly impacts landowners' due process rights; and

(4) The County failed to properly consider all the standards and criteria, as required by the Legislature, in developing its Recommendation.

A. Notice and Consultation with Landowners.

In adopting Hawaii Revised Statutes ("HRS") Chapter 205, Part III (Important Agricultural Lands), the State Legislature mandated that the counties develop their IAL recommendation after a robust public consultation process, which, unfortunately, did not occur here. Specifically, HRS § 205-47 sets out a step-by-step process the counties must follow in developing their recommendations. HRS § 205-47(b) states:

> (b) Each county **shall** develop maps of potential lands to be considered for designation as important agricultural lands in consultation and cooperation with landowners, the department of agriculture, agricultural interest groups, including representatives from the Hawaii Farm Bureau Federation and other agricultural organizations, the United States Department of Agriculture--Natural Resources Conservation Service, the office of planning, and other groups as necessary.

(Emphasis added). Critically, the Legislature required that the counties develop their maps "in consultation and cooperation with landowners." Id. In formulating its final Recommendation, the County is required to report on, *inter alia*, the "manner in which the important agricultural lands mapping relates to, supports, and is consistent with the… (5) Representations or position statements of the owners whose lands are subject to the potential designation." HRS § 205-47(d).

At the Commission's April 28-29, 2021 meeting ("April Meeting"), the County's complete failure to follow this first and foundational requirement of consultation and cooperation with landowners in developing its Recommendation was clear. To satisfy this requirement, the County stated that it sent two "notices" through regular mail to registered landowners of affected properties on December 29, 2016 ("2016 Letter")[4] and November 8, 2017 ("2017 Letter").[5] See Recommendation at 9. Both the 2016 and 2017 Letters were identical form letters that do not appear to have individually identified the affected landowners or provided notice or other information to the individual landowners regarding the specific property proposed to be designated as IAL. Neither letter provided

[4] See https://luc.hawaii.gov/wp-content/uploads/2021/04/Landowner-Notice-and-Map-of-Proposed-IAL-12-16.pdf (last accessed 5/20/21).
[5] See https://luc.hawaii.gov/wp-content/uploads/2021/04/Final-Landowner-Incl-Notice-2.pdf (last accessed 5/20/21).

any explanation or justification regarding why the landowners' unspecified property was included in the IAL Recommendation. The letters could have been easily mistaken as junk mail. There is also a discrepancy between the number of notices sent by the County and the notices sent by the Commission. The County's Recommendation states that notices were sent to approximately 1,800 landowners. See Recommendation at 9. The Commission sent notices for its April Meeting to approximately 2,388 TMKs. The discrepancy may be caused by single landowners owning multiple parcels, but the record is unclear, and apparently the County failed to keep track of the mailing of the 2016 Letter, which compounds the confusion.

Kahuku Wind has reviewed its records and is not able to locate any notice from the County regarding its proposed IAL designation for the Project Site. The Commission's notice, dated April 12, 2021, was the first notice received by Kahuku Wind that its Project Site would be recommended by the County to receive an IAL designation.

The 2016 Letter informs the landowner regarding the proposed designation as IAL of his or her property, invites the landowner to two public meetings "to learn more about the Draft IAL Maps and the IAL process," and solicits comments to be sent to the County's consultant. The 2016 Letter provides no notice or other information to the individual landowner regarding the specific property that is proposed to be included in the IAL designation or the justification for his or her specific property to be included in the Recommendation. The landowner had no meaningful way to address the County's inclusion of his or her property as IAL as there was no indication as to why the property was included. Further, the 2016 Letter does not even suggest the possibility that the landowner could object or advocate for exclusion from the IAL designation.

The 2017 Letter similarly informs the landowner that his or her property is included in the Recommendation and invites the landowner to one public meeting "to view the final Draft IAL Map and the IAL process." This notice does not solicit comments or input but is a final notice telling the landowner that his or her land is being designated as IAL. A copy of the postcard in the record, sent to landowners who did present objections to their land's proposed IAL designation, failed to respond to the landowner's specific concerns or objections and contained no further indication regarding how a landowner could provide meaningful input on the proposed IAL designation.[6] The process followed by the County made it impossible for the County to comply with HRS § 205-47(d) that requires the County to report to the Commission on the "[r]epresentations or position statements of the owners whose lands are subject to the potential designation" because the County never solicited representations or position statements from landowners.

At its April Meeting, the Commission also emphasized that over three years and six months have passed since the County apparently last notified landowners that their

[6] See https://luc.hawaii.gov/wp-content/uploads/2021/04/2018-04-04-Postcard-Reply.pdf (last accessed 5/20/21).

properties could be designated as IAL. Since that time, the County has provided no notice or opportunity to comment to individuals who acquired their properties after the November Letter and several years have passed for those who did receive notice but likely thought the process was stalled or abandoned given the passage of time.

On these bases alone, the Commission should reject the County's Recommendation and instruct the County to develop an inclusive process for meaningful landowner engagement and cooperation that is required by law.

B. Public Participation and the Technical Advisory Committee.

In addition to individual landowner consultation and cooperation, the law also requires the County to solicit additional public engagement. HRS § 205-47(c) provides that each County's planning department

> shall develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process. The planning departments may also establish one or more citizen advisory committees on important agricultural lands to provide further public input, utilize an existing process (such as general plan, development plan, community plan), or employ appropriate existing and adopted general plan, development plan, or community plan maps.

(Emphasis added).

It appears the County held a total of three public meetings in 2017 for the public to consider the draft IAL maps prepared by the County. Three public meetings are completely deficient where the County's Recommendation directly impacts at least 1,800 individual landowners and approximately 2,388 TMKs.

Per HRS § 205-47(c), the County established a Technical Advisory Committee ("TAC") in the initial stage of planning, which surprisingly included only one landowner and apparently only met six times in 2013. See Recommendation at 5. Despite the importance of the 100% RPS mandate to both the State and the County, the County failed to include any landowners with lands being utilized or considered for renewable energy projects. Renewable energy projects are primarily sited on agricultural land due to the land attributes required for successful renewable energy projects, which are often able to operate in conjunction with secondary agricultural activities. The legislature has mandated that the State must achieve a 100% renewable portfolio standard by 2045. See HRS § 269-92(a). As explained in more detail below, the IAL designation would likely negatively impact the ability of current and future renewable energy projects to obtain permits from the County and other state approvals. Access to suitable land that can host renewable energy projects (e.g., taking accessibility, topographical characteristics,

proximity to transmission lines with available capacity, land availability, conformance with state and county land regulations, avoidance of sensitive environmental, cultural and historic resources, and community acceptance into consideration) is already a significant obstacle to successful development of renewable energy projects. The County's proposed designation of IAL would potentially take a significant portion of the land available to host renewable energy projects and impose additional restrictions upon the land for uses that are not primarily agricultural in nature. See HRS § 205-43.

This issue is more critical now than ever given that the AES Coal Plant must currently cease operations in 2022, which the State's Public Utilities Commission has indicated will leave Oahu's electricity grid unstable, could potentially lead to blackouts, and significantly increase energy prices for customers.[7] The State should not be working at cross purposes. Hawaii consumers already have the highest energy bills in the nation, which particularly impact farmers given the significant energy required by farmers to plant, harvest, and process agricultural products. Intensifying the burdens and obstacles that are imposed on renewable energy projects will only drive energy prices even higher. As discussed at the Commission's April Meeting, the County made no effort to engage local neighborhood associations or any other civic organization. Including only one landowner in the TAC and excluding all other interests, including renewable energy interests, is simply insufficient.

Finally, the processes followed by the County and other state agencies have further confused this process. Pursuant to HRS § 205-48(a), the Commission shall receive the County recommendations and maps and, pursuant to HRS § 205-48(b), the department of agriculture ("DOA") and the office of planning ("OP") must "review the county report and recommendations and provide comments to the land use commission within forty-five days of the receipt of the report and maps by the land use commission." State agency review must be based on an evaluation of the degree that:

> (1) County recommendations result in an identified resource base that meets the definition of important agricultural land and the objectives and policies for important agricultural lands in sections 205-42 and 205-43; and
>
> (2) County has met the minimum standards and criteria for the identification and mapping process in sections 205-44 and 205-47.

HRS § 205-48(c).

OP and the DOA submitted their comments and recommendations on February 10, 2021. OP states it reviewed the County's "transmittal to our office regarding Important Agricultural Lands (IAL) on Oahu, Resolution 18-233 CD1, FD1 dated September 22,

[7] See Pacific Business News, State, HECO scrambling to ready for shutdown of AES coal plant in 2022 https://www.bizjournals.com/pacific/news/2021/03/23/aes-coal-plant-scramble.html (last accessed 5/20/21).

2020 ("Resolution")."[8] It's unclear from the record whether the Resolution dated September 22, 2020 and any attachments thereto comprised the County report upon which OP and DOA were required to comment within forty-five days. This Resolution consists only of the City Council's Resolution accepting the maps and TMKs proposed to be designated as IAL.[9] It appears DOA reviewed the same transmittal and provided comments thereon as well.[10] It is unclear whether OP and DOA fulfilled their duty, required by statute, to review the County's "report and recommendations" to ensure they complied with the objectives and policies for IAL and the minimum standards and criteria for identification and mapping prior to the County's filing of its Recommendation on April 21, 2021.

II. THE COUNTY'S INCLUSION OF A LANDOWNER'S PROPERTY WITHIN THE RECOMMENDATION WITHOUT NOTICE AND A MEANINGFUL OPPORTUNITY TO BE HEARD VIOLATES THE LANDOWNER'S DUE PROCESS RIGHTS.

Kahuku Wind disagrees with the County's position asserted at the April Meeting that due process issues are not implicated by the County's proposed IAL designation. Kahuku Wind and each landowner subject to the IAL designation has a property interest in the underlying zoning of their property that cannot be changed without the protections of procedural due process, which require reasonable notice and a meaningful opportunity to be heard.

The current zoning status of a landowner's property is a property interest that would be indisputably impacted by the County's IAL designation. The Hawaii Supreme Court has recently explained that

> "[c]onstitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately entitled." Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). We apply a two-step analysis to claims of a due process right to a hearing: "(1) is the particular interest which claimant seeks to protect by a hearing 'property' within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is 'property,' what specific procedures are required to protect it." Sandy Beach Def. Fund v. City Council of Honolulu, 70 Haw. 361, 376, 773 P.2d 250, 260 (1989) (citing Aguiar v. Haw. Hous. Auth., 55 Haw. 478, 495, 522 P.2d 1255, 1266

[8] See OP's Submittal at https://luc.hawaii.gov/wp-content/uploads/2021/02/Citys-IAL-Recommendations-to-LUC-OP-comments-Signed.pdf (last accessed 5/20/21).
[9] See Resolution at https://luc.hawaii.gov/wp-content/uploads/2021/02/RES18-233-CD1-FD1.pdf (last accessed 5/20/21).
[10] See DOA Submittal at https://luc.hawaii.gov/wp-content/uploads/2021/04/DOA-Comments-on-City-IAL-petition-to-LUC-2021.pdf (last accessed 5/20/21).

(1974)).

In re Application of Maui Elec. Co., Ltd., 141 Haw. 249, 260, 408 P.3d 1, 12 (2017). The claimed property interest need not be tangible; rather, a protected property interest exists in a benefit to which a party has a "legitimate claim of entitlement." Id. (citation omitted).

> The legitimate claims of entitlement that constitute property interests are not created by the due process clause itself. Instead, "they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law-rules or understanding that secure certain benefits and that support claims of entitlement to those benefits."

Id. (quoting In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Haw. 228, 241, 287 P.3d 129, 142 (2012)). Landowners have a due process property interest in the zoning classification of their property. See e.g., DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC, 134 Haw. 187, 218, 339 P.3d 685, 716 (2014) (analyzing whether landowners procedural due process rights were violated where the Commission reverted property to former land use classification).

Finally, once a property interest is found to exist, "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citation omitted).

The County maintains that the IAL designation does not implicate due process because the designation does not impact current permissible uses on the designated properties. The County also maintained this position in an FAQ released in September of 2018. In response to the question, "How am I affected if the City is recommending all of my land for IAL?", the County's response was:

> The City has completed its recommendations for lands proposed for IAL designation. No decisions on IAL are made until action is taken by the State LUC. Until action is taken, there is no effect on ownership and development rights. Land that is ultimately designated as IAL by the LUC does not preclude the landowner from using his or her land for purposes allowed or permitted under current LUC rules and regulations and the City's zoning requirements.[11]

We disagree. As an example, this is inconsistent with the County's own admission at the April Meeting that the IAL designation does change the rules for IAL regarding farm dwellings and employee housing. See HRS § 205-45.5 and Land Use Ordinance ("LUO")

[11] See Frequently Asked Questions, Oahu Important Agricultural Lands Mapping Project (September 2018) at https://luc.hawaii.gov/wp-content/uploads/2021/05/CC-HNL-IAL-FAQs.pdf (last accessed 5/20/21) (emphasis added).

§§ 21-5.250 (Farm dwellings); 21-10.1 (Definitions). The LUO currently defines a "[f]arm dwelling" as "a dwelling located on and used in connection with a farm where agricultural activity provides income to the family occupying the dwelling." LUO § 21-10.1. In the AG-1 district, one farm dwelling is permitted for each five acres of lot area and must be contained within an area not to exceed 5,000 square feet of the lot. LUO § 21-5.250. The IAL restrictions require that the farm dwellings "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" and the dwelling cannot exceed five percent (5%) of the total IAL land controlled by the farmer. See HRS § 205-45.5(1), (3). Further, the designation of property as IAL also imposes additional burdens and required expense on the landowner with respect to any reclassification or rezoning of IAL pursuant to HRS § 205-50 and requires any such request to meet specific standards and criteria applicable specifically to IAL. See HRS § 205-50. The County's position that the rights of landowners are not negatively impacted by the IAL designation is unsupportable.

Further, the IAL designation will have an impact on the rights of the landowner regarding current and future uses of his or her property. The IAL designation was specially created by the legislature to both restrict and provide incentives for IAL because the Legislature decided "[t]here 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…." HRS § 205-41. The Legislature adopted specific policy directives that the County must implement to achieve these legislative purposes. For example, HRS § 205-43 requires that "[s]tate and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands" and must be consistent and implement a number of policies, including *inter alia*,

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

An IAL designation once imposed will make affected properties subject to future land use regulations adopted by the County to implement the Legislature's policy directives for IALs, including those listed above. Further, it is also uncertain how the IAL designation will affect the County's decision-making for permits on IAL. These uncertain impacts specifically impact Kahuku Wind and other similarly positioned renewable energy projects - both current projects and future projects. The confusion is only compounded by the significant delay between the Legislature's creation of the IAL system in 2005 and

the County's Recommendation being considered now by the Commission over fifteen years later. Renewable energy projects like Kahuku Wind are often sited on agricultural lands and, where possible, engage agricultural activity to occur in parallel with the primary use of the property for the generation of renewable energy. After 2005, the Legislature amended Chapter 205 to permit the siting of certain renewable energy projects on agricultural land which supports the State's RPS and carbon neutrality goals. For example, HRS § 205-4.5(a) was amended in 2007 to allow biofuel production on Agricultural land.[12] The statute was again amended in 2011 to permit solar energy facilities on certain classes of Agricultural land and in 2012 to permit geothermal resources exploration.[13] Hydroelectric facilities became permissible uses after the statute's amendment in 2015.[14] Renewable energy developers have developed and continue to develop renewable energy projects on Agricultural land as permitted by current land use law.

For an existing renewable energy project like the Kahuku Wind Project, being sited on IAL that is subject to the directives and policies of HRS § 205-43, including the directive that the County should "[d]irect nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses," is dangerous at best. A policy that "discourages … the conversion of these [important agricultural] lands to nonagricultural uses" is detrimental to new renewable projects and the State's 100% RPS and carbon neutrality mandates.

The County's position that due process is not implicated because the County has not yet adopted rules to which IAL will be subject avoids the important fact that the IAL designation was designed by the Legislature to create a category of agricultural lands in the state subject to special protections and regulations that are not currently imposed on normal agricultural lands. This position is also fundamentally misleading as it avoids mentioning the significant likelihood of the future adoption of rules and regulations by the County to comply with the Legislature's directives in HRS § 205-43. Kahuku Wind submits that landowners' due process rights are affected by the County's Recommendation. The failure of the County to take reasonable steps to notify landowners and to provide them a meaningful opportunity to be heard before their property is included in the County's Recommendation violates the landowners' right to due process. See Sandy Beach Def. Fund, 70 Haw. at 378, 773 P.2d at 261.

III. THE COUNTY'S FAILURE TO CONSIDER ALL OF THE STANDARDS AND CRITERIA IDENTIFIED BY THE LEGISLATURE TO IDENTIFY IAL DID NOT COMPLY WITH THE LAW.

Finally, the County's process by which it selected proposed IAL failed to comply

[12] See 2007 Hawaii Laws Act 159 (S.B. 1943).
[13] See 2011 Hawaii Laws Act 217 (S.B. 631); 2012 Hawaii Laws Act 97 (S.B. 3003).
[14] See 2015 Hawaii Laws Act 228 (H.B. 1273).

with the law. The IAL designation was designed to identify lands that:

> (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 § 205-42(a). HRS § 205-44 governs the standards and criteria that the County was required to utilize in developing its Recommendation. HRS § 205-44(a) provides that "[t]he standards and criteria in this section shall be used to identify important agricultural lands" and "shall be made by weighing the standards and criteria with each other to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43." The standards and criteria identified by the Legislature, all of which must be considered, include:

> (1) Land currently used for agricultural production;
>
> (2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
>
> (3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
>
> (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.

HRS § 205-44(c). In developing its Recommendation, the law instructs the County that it "shall identify and map potential important agricultural lands within its jurisdiction based on the standards and criteria in section 205-44 and the intent of this part…." HRS § 205-

47(a).

In developing its Recommendation, the County failed to consider each of these eight criteria[15] and did not even attempt to weigh the standards and criteria to determine whether the properties proposed to be designated as IAL merited such a designation. Rather, the County cut corners and identified and considered only three "priority" criteria, and then proceeded to determine that the existence of only one "priority" criteria was required to merit the IAL. See Recommendation at 15. The County compounded its error by failing to engage with individual landowners who have actual knowledge regarding their lands and their characteristics. The County's apparent explanation for this approach to require only one priority criteria to merit an IAL designation at the April Meeting was that the County wanted to be over-inclusive in its Recommendation for the benefit of landowners. This justification fails to take into account the current and future burdens placed on landowners of IAL described above in Section II and the significant expense, time, and uncertainty involved regarding the process to de-designate IAL under HRS § 205-50.

By failing to follow the process established by the Legislature to identify potential IAL, which requires the weighing of all eight of the standards and criteria in HRS § 205-44(c), the County ignored its legislative mandate under HRS § 205-47 and left these important determinations to the Commission. Kahuku Wind respectfully submits that the Commission should send this matter back to the County for processing in compliance with applicable law.

Thank you for the opportunity to provide these comments.

Very truly yours,

Jodi S. Yamamoto
for
YAMAMOTO CALIBOSO
A Limited Liability Law Company

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

[15] Perplexingly, a ninth criteria was added by the Count for "Government programs to protect AG lands in perpetuity that are recorded" that was not a criteria identified by the Legislature. See Appendix G at 2. It is unclear why the County believes it had the authority to add this criteria. Regardless, the issue appears to be moot because the County failed to consider any of the non-priority criteria and conducted no weighing of the criteria as required by HRS § 205-44(a).

From:	Jesi K. Onaga
To:	DBEDT LUC
Cc:	Hakoda, Riley K; Jodi Yamamoto
Subject:	[EXTERNAL] Written Public Testimony on behalf of Villa Rose, LLC and JCD Solar Consulting, LLC Regarding IAL Recommendation, for January 6, 2022 LUC Meeting
Date:	Tuesday, January 4, 2022 11:32:03 AM
Attachments:	Ltr fr JCD Solar Consulting to LUC re IAL - Potential Impacts on CBRE (dated 1-4-2022).pdf Ltr fr Villa Rose to LUC re Request to Reject IAL Designation Recommendation (dated 1-4-2022).pdf

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Good Morning,

Please find attached the following written public testimonies:

1. Letter from Villa Rose, LLC to the Land Use Commission regarding the Request to Reject the Important Agricultural Lands Designation Recommendation, dated 1-4-2022; and
2. Letter from JCD Solar Consulting, LLC to the Land Use Commission regarding Important Agricultural Lands - Potential Negative Impacts on Community Based Renewable Energy Programs, dated 1-4-2022.

Please let us know if you have any questions or difficulties saving the attachments.

Sincerely,

Jesi K. Onaga
Paralegal

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January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Important Agricultural Lands – Potential Negative Impacts on Community Based Renewable Energy Programs

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

I am writing to you as a partner in JCD Solar Consulting, LLC ("JCD") with respect to the proposed designation as Important Agricultural Lands ("IAL") of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"). The Property is owned by Villa Rose, LLC ("Villa Rose"), which operates a local egg farm on the Property. JCD currently has an agreement with Villa Rose regarding the use of approximately sixty to eighty acres of the Property to build and operate a renewable energy solar facility alongside the egg farm if JCD's proposed solar project is accepted by the utility and/or the Hawaii State Public Utilities Commission ("PUC") as a Community Based Renewable Energy ("CBRE") Phase 2 project on Oahu. As explained below, JCD has serious concerns regarding the potential impact an IAL designation could have on plans to develop a solar project on the Property and requests, as did Villa Rose, that the Commission reject the pending IAL recommendation.

I. THE CBRE PROGRAM IS VITAL TO HAWAII'S RENEWABLE ENERGY POLICY AND ENERGY JUSTICE.

The State of Hawaii has established critical renewable energy targets which direct the State to increase the amount of renewable energy for electricity generation and consumption with the goal of reaching a 100% renewable portfolio standard ("RPS") by 2045. See HRS §§ 225P-5 and 269-92. One important contribution to the State's renewable energy goals has been the establishment of rooftop solar on individual homes and businesses, often referred to as "distributed generation". The most recent data shows that cumulative installed solar systems currently contribute 752 megawatts of capacity to Oahu's electric utility.[1]

The CBRE program, also called "shared renewables", is a vital program in Hawaii that more broadly distributes the benefits of renewable energy generation to individuals who are not able to install solar energy systems on their own properties. Such individuals include, but are not limited to, renters, inhabitants of apartments and condominiums, and others who cannot afford the upfront capital costs of installing their own renewable energy systems. A CBRE project allows

[1] See hawaiianelectric.com/documents/clean_energy_hawaii/clean_energy_facts/pv_summary_3Q_2021.pdf

such individuals to participate directly in off-site renewable energy projects through a bill credit arrangement with the electric utility. As such, the CBRE program is a vital component of the State's effort to broaden participation in self-generation and distribute the benefits of renewable energy generation to individuals who were previously excluded from participation. The benefits to Hawaii residents include: (1) increasing the amount of renewable energy available to the utility; (2) decreasing the use of fossil fuels for electricity production and associated greenhouse gas emissions; (3) decreasing ratepayers' exposure to the volatility of fossil fuel process and energy insecurity; and (4) decreasing electricity costs to CBRE participants.

JCD has partnered with Nexamp Solar, LLC ("Nexamp") in the development of a CBRE solar project for Phase 2 of the program that we intend to site on a portion of the Property that will not be utilized by the egg farm. To protect the health and environment of the chickens, the egg farm must avoid crops that would attract wild animals and other pests and thus potentially endanger the chickens. The solar farm will be sited on this unused portion of the Property. Nexamp develops, builds, owns, and operates solar and storage projects and is a leader in the community solar space. The proposed CBRE project will be a 6-megawatt solar photovoltaic system with battery storage capable of providing discounted electricity to approximately 1,100 homes. Priority subscription to the project will be given to low-to-moderate income families on the North Shore of Oahu. We are looking to graze sheep, to be sold for consumption, among the solar panels to ensure that the land is placed to its most productive use. We expect that Phase 2 of the CBRE program will commence soon upon the approval of Phase 2 by the PUC. Unfortunately, the proposed IAL designation for the Property places this project at risk.

II. THE IAL DESIGNATION AND LEGISLATURE'S POLICY GOALS.

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

> conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of:
>
> (1) Conserving and protecting agricultural lands;
>
> (2) Promoting diversified agriculture;
>
> (3) Increasing agricultural self-sufficiency; and
>
> (4) Assuring the availability of agriculturally suitable lands[.]

HRS § 205-41.

The IAL process is intended to "identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations." HRS § 205-42(b). In support of these objectives,

governmental agencies are instructed to "[p]romote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses." HRS § 205-42(b)(1).

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

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

HRS § 205-43 (emphases added). It appears the City and County of Honolulu ("C&C") has to date failed to adopt or clarify what policies are or will be adopted to further the above directives from the Legislature, which has resulted in great uncertainty.

HRS § 205-4.5 currently permits solar energy, cultivation of crops for bioenergy and biofuel processing, wind energy, geothermal, and hydroelectric facilities in the agricultural districts. Although solar projects are permitted uses in the agriculture district under HRS § 205-4.5, with applicable permits, it is currently unclear whether the C&C will treat solar and other renewable energy projects as an "agricultural use or activity" under the IAL Subchapter. If the C&C were to treat renewable energy projects as non-agricultural uses or activities under the IAL Subchapter, it is also unclear what policies the C&C will adopt to "[d]iscourage the fragmentation of [IAL]", to "[d]irect nonagricultural uses and activities from [IAL]", and to "[l]imit physical improvements on [IAL]". See HRS 205-43. As such, the IAL designation creates great uncertainty as it is currently unclear what impact this would have on permitting for proposed renewable energy projects sited on agricultural land.

Landowners and long-term lessees cannot determine whether the IAL designation is appropriate and compatible for their land without any indication from the C&C regarding the impact of such a designation. As such, JCD respectfully suggests that the C&C should be required to determine what impacts the IAL designation will have on landowners, particularly with respect to the impacts the designation would have on uses of agricultural land currently permitted by HRS § 205-4.5 and whether all such uses are considered agriculture uses or activities under the IAL Subchapter. After these determinations are made, the C&C should be required to provide notice to landowners for further engagement so the C&C and landowners can make fully informed decisions regarding whether the IAL designation is appropriate. This would require the Commission to remand this matter back to the C&C for further action.

We are excited about this CBRE project and the synergy it creates between agricultural activities and renewable energy in the State because both are critical to a healthy and sustainable economy, and such synergies will be necessary if the State is to achieve its ambitious renewable energy goals. We look forward to working with the C&C and the Commission in support of Hawaii and its renewable energy future.

Sincerely,

Jeremy Chapman, Partner
for
JCD Solar Consulting, LLC
d/b/a Melink Solar Development

Enclosure
cc:

January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Request to Reject Important Agricultural Lands Recommendation from the C&C of Honolulu as a Violation of Landowners' Due Process Rights

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

I am writing to you on behalf of Villa Rose, LLC ("Villa Rose"), the owner of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"). Villa Rose has owned the Property, which is approximately 317 acres, since 2013 and currently operates the Waialua Egg Farm at the Property. The Waialua Egg Farm has been in development and construction for the past ten years and made its first sales in November of 2021. The farm has 200,000 chickens on site, is cage-free and solar-powered, and currently supplies local markets with 900 dozen (10,800) eggs per week. The water for the farm comes directly from Villa Rose's own well, and the chicken manure from the farm is turned into biochar to be returned as nutrients to the earth for farmers across the State.

Villa Rose intends to add various facilities and structures to eventually house one million cage-free chickens and to host farm tours to promote local agritourism. However, the potential for further agricultural development of the Property is limited due to the need to protect the health and environment of the chickens and to avoid crops that would attract wild animals and other pests. Rather than have a portion of the Property remain unproductive, Villa Rose has partnered with JCD Solar Consulting, LLC ("JCD") to develop a solar energy project on a portion of the Property that will help support Villa Rose's agricultural activities.

We recently discovered the City and County of Honolulu's Department of Permitting and Planning ("DPP") has recommended that the Property be designated as Important Agricultural Lands ("IAL"). Villa Rose strongly objects to the Property's designation as IAL and to the designation process followed by DPP, which failed to provide affected landowners a meaningful opportunity for notice and to be heard prior to DPP's IAL recommendation. DPP's insufficient procedures violated the due process rights of landowners and should not be ratified by the Commission. Villa Rose fears that the IAL designation may have unintended and negative impacts on landowners and, as such, any process to collectively designate IAL should strictly follow the Legislature's mandated notice and consultation processes. We respectfully suggest that the Commission should require DPP to strictly adhere to the notice and consultation

processes require by law before any collective designation of IAL by the Commission may proceed.

I. DPP'S PROCEDURES TO DESIGNATE IAL FAILED TO FOLLOW THE STATUTORY PROCESS ESTABLISHED BY THE LEGISLATURE AND VIOLATES THE DUE PROCESS RIGHTS OF LANDOWNERS.

With respect to the entirety of the IAL designation process, Villa Rose has only received one notification from DPP over four years ago regarding the proposed IAL designation of the Property. The notice is dated November 8, 2017, and is attached to this letter as Attachment A ("November 2017 Letter"). The November 2017 Letter notified Villa Rose that the Property was included in DPP's IAL recommendation. The letter did not provide Villa Rose the opportunity to object, comment, or otherwise be involved in the designation process. Villa Rose has received no subsequent notifications from DPP or any other governmental entity, including the Commission, regarding the IAL designation process. Villa Rose only recently happened to learn third hand that the IAL process was ongoing before the Commission and made further inquiries itself regarding the ongoing Commission IAL proceeding.

DPP's IAL designation process violated both (1) the Legislature's statutory procedure by which the counties may designate IAL and (2) the fundamental requirements of due process.

HRS Chapter 205, Part III ("IAL Subchapter") provides both an individual and a collective mechanism to designate IAL. An individual farmer or landowner may petition to voluntarily designate his or her own land as IAL under HRS § 205-45. The counties can also seek to collectively designate lands as IAL pursuant to the procedures contained in HRS § 205-47. Given the potential impact on the rights of affected landowners, the Legislature required a comprehensive process of engagement with landowners and the public before a collective designation could be recommended to the Commission. HRS § 205-47(b) provides:

> Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in consultation and cooperation with landowners, the department of agriculture, agricultural interest groups, including representatives from the Hawaii Farm Bureau Federation and other agricultural organizations, the United States Department of Agriculture--Natural Resources Conservation Service, the office of planning and sustainable development, and other groups as necessary.

(Emphasis added). The first instruction from the Legislature to DPP regarding how to conduct the collective designation of IAL is that it must be done "in consultation and cooperation with landowners." The Legislature further instructed that DPP must

> develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process.

HRS § 205-47(c) (emphasis added). "[A]n inclusive process for public involvement" is required by the Legislature to both identify potential IAL lands and to develop DPP's IAL map.

However, the DPP failed to consult and cooperate with Villa Rose in the IAL designation process and failed to include the public in the identification of potential IAL lands and the development of maps of IAL lands. The only notification received by Villa Rose from DPP notified Villa Rose the Property had been included in the IAL recommendation. The November 2017 Letter did not evidence any "consultation or cooperation" with Villa Rose before DPP had made its decision to include the Property in the recommendation, and DPP did not involve Villa Rose in the identification of potential IAL and the development of the IAL maps. The November 2017 Letter also did not include any explanation regarding why Villa Rose's Property was included in the IAL recommendation, resulting in the complete inability of Villa Rose to evaluate DPP's process and decision making or to engage with DPP regarding the basis for the Property's inclusion. Having reviewed the record before the LUC, it appears that Villa Rose's experience with DPP was the norm and not the exception. The process used by DPP, either by design or negligence, failed to follow the mandated and foundational consultation processes with affected landowners required by the Legislature.

Furthermore, even if DPP's actions complied with the bare minimum required by statute, DPP's procedures with respect to the notification and involvement of affected landowners is grossly inadequate given the due process implications of the IAL designation. The Attorney General has provided her opinion that the property rights of landowners will be affected by the IAL designation and, as such, landowners are entitled to due process.[1] The Attorney General continued to advise that the Commission treat this proceeding as a "quasi-judicial" proceeding as the infringement of affected landowners' property rights could give rise to standing in a contested case.[2]

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)

[1] See Letter from the Department of the Attorney General of the State of Hawaii, dated September 23, 2021, available at https://luc.hawaii.gov/wp-content/uploads/2021/10/DAG-Formal-Legal-Opinion-regarding-IAL.pdf at p.8 ("Attorney General Opinion").
[2] Id. at 9.

(citation omitted). DPP is the agency charged with developing a factual record to support its IAL recommendation which is to be accepted or rejected by the LUC. See HRS § 205-47. DPP failed to fulfill both its notice obligations and failed to provide any meaningful opportunity for landowners to participate in the IAL process. The Commission is charged with determining whether DPP complied with its obligations under the IAL Subchapter and has the authority to require DPP to take further steps to ensure that landowners' due process rights are respected.

II. THE IAL DESIGNATION MAY HAVE UNINTENDED NEGATIVE CONSEQUENCES FOR LANDOWNERS.

Villa Rose is also concerned that the IAL designation may have unintended negative consequences for affected landowners. As stated above, the Property is currently used as an egg farm to produce local eggs for Hawaii. The potential for further agricultural development of the Property is limited due to the need to protect the health and environment of the chickens as additional crops on the Property could attract wild animals and other pests that would negatively impact the egg farm. Villa Rose has partnered with JCD to host on site a community based renewable energy ("CBRE") solar project on a portion of the Property, which would put this additional land to productive use and would help support the additional agricultural activities on site.

If imposed upon the Property, the IAL designation would place this CBRE project at risk. For example, HRS § 205-43 provides that "[s]tate and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands" and must be consistent and implement a number of policies, including, *inter alia*,

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

Accordingly, an IAL designation could jeopardize the ability to host a renewable energy project on site given the policy directives for IAL lands established by the Legislature and which have yet to be implemented by the City and County of Honolulu. Villa Rose finds this looming uncertainty extremely unsettling and unproductive.

Villa Rose respectfully submits that the Commission should remand this matter back to DPP to remedy DPP's deficient notice and consultation processes with affected

landowners. Villa Rose would like the opportunity for genuine engagement with DPP regarding the IAL process, which unfortunately has not yet occurred. I expect that such a proactive process, already mandated by the Legislature, would save landowners, DPP, and the Commission significant investments of time and expense.

Thank you for the opportunity to provide these comments.

Sincerely,

Donald L. Lawsen
for
Villa Rose, LLC

Enclosure
cc:

From:	Jesi K. Onaga
To:	DBEDT LUC
Cc:	Hakoda, Riley K; Jodi Yamamoto
Subject:	[EXTERNAL] Supplemental Written Public Testimony on behalf of Villa Rose, LLC and JCD Solar Consulting, LLC Regarding IAL Recommendation, for January 6, 2022 LUC Meeting
Date:	Tuesday, January 4, 2022 12:30:20 PM
Attachments:	Ltr fr Villa Rose to LUC re Supplement to Request to Reject IAL Designation Recommendation (dated 1-4-2022).pdf Ltr fr JCD Solar to LUC re Supplemental Testimony on IAL - Impacts on CBRE (dated 1-4-2022).pdf

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Good Afternoon,

Please find attached the following **supplemental** written public testimonies:

1. Letter from Villa Rose, LLC to the Land Use Commission regarding Supplemental Testimony to Request to Reject the Important Agricultural Lands Designation Recommendation, dated 1-4-2022; and
2. Letter from JCD Solar Consulting, LLC to the Land Use Commission regarding Supplemental Testimony on Important Agricultural Lands - Potential Negative Impacts on Community Based Renewable Energy Programs, dated 1-4-2022.

Note that these testimonies are in addition to the testimonies that I recently submitted to you around 11:30 AM this morning. Please let us know if you have any questions or difficulties saving the attachments.

Sincerely,

Jesi K. Onaga
Paralegal

Yamamoto Caliboso
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January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Supplemental Testimony Regarding Important Agricultural Lands – Potential Negative Impacts on Community Based Renewable Energy Programs

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

I am writing to you as a partner in JCD Solar Consulting, LLC ("JCD") with respect to the proposed designation as Important Agricultural Lands ("IAL") of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"), which is owned by Villa Rose, LLC ("Villa Rose"), and a portion of which is being developed by JCD for a solar renewable energy project. The City and County of Honolulu ("C&C") has recommended the Property be designated as Important Agricultural Lands ("IAL") in its Recommendation to the Commission.

I previously submitted testimony to the Commission, dated January 4, 2022 ("Previous Testimony"), which explained: (1) JCD's and Nexamp Solar, LLC's ("Nexamp") work to develop a Community Based Renewable Energy ("CBRE") project on the Property for low-to-moderate income families on Oahu and the many attendant benefits of such a project to the people of the State of Hawaii and to the environment, and (2) that the C&C's decision to collectively designate IAL before the C&C has adopted or clarified what policies are or will be adopted to comply with the Legislatures IAL law creates great uncertainty for affected landowners.

Consequently, I learned that the C&C filed its Supplemental Brief to its Recommendation of Important Agricultural Lands ("Supplemental Brief"), which touches upon some of the points made in my Previous Testimony. I would like to briefly address the C&C's arguments in its Supplemental Brief that are relevant to my Previous Testimony.

First, it is clear that the intent of the IAL law is both (1) to provide incentives to landowners to continue agriculture uses on IAL and (2) to place additional limitations upon the uses of IAL beyond the limitations that currently exist on agricultural land. See HRS §§ 205-1 and 205-43. The C&C's Supplemental Brief essentially argues that because there are no current further limitations on the use of agricultural land that result from the IAL designation, landowners have no justifiable concern regarding the imposition of the IAL designation.[1] Unfortunately, this argument provides little comfort for landowners and renewable energy developers – once the IAL designation is imposed, IAL land will be subject to any future additional limitations imposed on such lands by the C&C or the State. Contrary to the C&C's apparent belief that such concerns are unwarranted, HRS § 205-43 explicitly directs the counties to impose additional limitations on uses

[1] See Supplemental Brief at 2-7.

of IAL. HRS § 205-43 instructs the counties to adopt policies, ordinances, and rules that:

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

HRS § 205-43 (emphasis added). If the Legislature believed that the current restrictions on uses of agricultural land were sufficient, HRS § 205-43 would have been unnecessary. The C&C's claim that landowners have no legitimate concern because the C&C has not yet adopted such policies is little comfort and may create unintended consequences in the ability to obtain equity partners and project financing, which will hinder the state's goal of 100% renewable energy by 2045.

The situation here is further exacerbated by the C&C's approach to collectively designating IAL for the County in its Recommendation. The C&C decided to be as "inclusive as possible"[2] in its Recommendation, did not believe that landowners had due process rights with respect to the IAL designation, and apparently did the bare minimum to provide notice to landowners and to consult and cooperate with landowners in developing its Recommendation. This has resulted in a fundamentally flawed process that the Commission should reject.

Finally, I note that one solution recommended by the C&C in its Supplemental Brief to rectify its failure to notify and meaningfully engage landowners (if such is found by the Commission) would be "to remove parcels from IAL designation" for "landowners [who] have objected to IAL designation."[3] If the Comm`ission were inclined to accept the Recommendation, I agree that permitting landowners to opt out of the IAL designation by submitting a request to the Commission would go a long way toward rectifying what was a fatally flawed notice and consultation process with landowners.

Thank you for your consideration of these additional comments.

Sincerely,

Jeremy Chapman

Jeremy Chapman, Partner
for
JCD Solar Consulting, LLC
d/b/a Melink Solar Development

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[2] Supplemental Brief at 16.
[3] Id. at 12.

January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Supplemental Testimony to Request Rejection of Important Agricultural Lands Recommendation from the C&C of Honolulu as a Violation of Landowners' Due Process Rights

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

I am writing to you on behalf of Villa Rose, LLC ("Villa Rose"), the owner of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"), which is recommended to be designated as Important Agricultural Lands ("IAL") by the City and County of Honolulu's Department of Planning and Permitting ("DPP"), to supplement my previously submitted testimony, dated January 4, 2022 ("Prior Testimony"), which described why the Commission should reject DPP's IAL Recommendation.

On December 29, 2021, DPP filed its Supplemental Brief to its Recommendation of Important Agricultural Lands with the Commission ("Supplemental Brief"), in which DPP again presents its arguments regarding why the Commission should accept the Recommendation. Given the late filing of the Supplemental Brief, my Prior Testimony did not address DPP's Supplemental Brief. I have reviewed the Supplemental Brief and would like to affirm that the objections raised in my Prior Testimony either remain unaddressed or remain despite DPP's further arguments.

Briefly stated, Villa Rose's Prior Testimony first argued that DPP's procedures to designate IAL failed to follow the mandatory statutory process established by the Legislature in Hawaii Revised Statutes ("HRS") § 205-47(b) because DPP failed to develop its Recommendation in "consultation and cooperation" with landowners and did not create an "inclusive process for public involvement in the identification of potential" IAL. Second, Villa Rose's Prior Testimony argued that DPP's insufficient notice to landowners and its failure to provide landowners a meaningful opportunity to be heard before their properties were recommended for IAL designation violates the due process rights of landowners - due process rights to which the Attorney General of the State of Hawaii has affirmed landowners are entitled despite DPP's previous mistaken belief and acts to the contrary. DPP's Supplemental Brief presents no new evidence or arguments regarding the process it followed to develop its Recommendation and whether that process complied with the IAL statutory requirements or due process. The Commission should reject DPP's arguments that it complied with both the letter and spirit of the

procedural requirements of the IAL law as the evidence presented to the Commission in the proceeding and the public's engagement in this proceeding both demonstrate the contrary.

Third, Villa Rose's Prior Testimony argued that the IAL designation may have unintended negative consequences for landowners, in particular for owners of land upon which renewable energy projects are or may be sited, given the Legislature's instruction to the counties regarding the restrictive policies that the counties should adopt to protect such lands under HRS § 205-43. I would like to specifically address DPP's argument in its Supplemental Brief that it is a "misconception" that the IAL designation "deprives or severely restricts a landowner's property rights."[1] DPP argues that the "IAL designation creates little if any changes in a landowner's use of their property" and that "[t]he right of a landowner to use their land for agriculturally permitted purposes as allowed under [HRS §§ 205-2 and 205-4.5(a)], remains unaffected by an IAL designation."[2] I note that DPP inserts the caveat, and only argues, that the IAL designation does not affect "***current*** agricultural uses".[3] Assuming this is true, DPP's argument does not address the primary concern that once the designation is imposed, the State or County may take further action to further restrict permissible uses on IAL beyond those that already exist for any land in the agriculture district.

The further restriction of uses of IAL is, in fact, what the Legislature appears to have intended pursuant to HRS § 205-43, which provides that "[s]tate and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands" and must be consistent and implement a number of policies, including, *inter alia*,

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

(Emphasis added). If the current policies applicable to all agricultural land were sufficient, the IAL designation would not have been created. DPP's argument that current uses will not be restricted because legislative bodies have not yet created them provides no comfort to landowners. Once the IAL designation is imposed upon landowners, landowners will automatically be subject to any future regulations imposed upon IAL. Further, DPP's argument does not address how the IAL designation would impact

[1] Supplemental Brief at 2.
[2] Id.
[3] Id.

instances where uses are permitted under HRS § 205-4.5 but require a permit – for example certain types of solar energy projects. Such proposed used could be subject to discretionary decisions that a permit should not be granted because of the IAL designation. Finally, as recognized by DPP in its Supplemental Brief, once the IAL designation is imposed, it will be more difficult for landowners to reclassify and rezone their properties that are designated IAL because additional standards and criteria must be considered before such reclassification and rezoning can occur under HRS § 205—50.[4]

Villa Rose respectfully submits that the Commission should remand this matter back to DPP to remedy DPP's deficient notice and consultation processes with affected landowners. Villa Rose would like the opportunity for genuine engagement with DPP regarding the IAL process, which unfortunately, has not yet occurred. I expect that such a proactive process, already mandated by the Legislature, would save landowners, DPP, and the Commission significant investments of time and expense.

Alternatively, if the Commission were to accept the Recommendation, Villa Rose agrees with DPP's suggestion in its Supplemental Brief that landowners who have registered an objection to an IAL designation should be able to automatically opt out of the IAL designation.[5]

Thank you for the opportunity to provide these supplemental comments.

Sincerely,

Donald L. Lawson
for
Villa Rose, LLC

[4] Id. at 7-8.

[5] Supplemental Brief at 12 ("[I]f the Commission remains unpersuaded that sufficient due process of public notice and hearing has been achieved thus far, the Commission may seek consultation with its Attorney General for further analysis, it may provide additional public notice and hearing, including contested case hearings for individual landowners, and/or it could remove parcels from IAL designation that its landowners have objected to IAL designation." (Emphasis added)).

Kwan, Ariana L

Subject: FW: Written Public Testimony on behalf of Villa Rose, LLC and JCD Solar Consulting, LLC Regarding IAL Recommendation, for January 6, 2022 LUC Meeting
Attachments: Ltr fr JCD Solar Consulting to LUC re IAL - Potential Impacts on CBRE (dated 1-4-2022).pdf; Ltr fr Villa Rose to LUC re Request to Reject IAL Designation Recommendation (dated 1-4-2022).pdf

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From: Jesi K. Onaga <jonaga@ychawaii.com>
Sent: Tuesday, January 4, 2022 11:31:52 AM
To: DBEDT LUC <dbedt.luc.web@hawaii.gov>
Cc: Hakoda, Riley K <riley.k.hakoda@hawaii.gov>; Jodi Yamamoto <jyamamoto@ychawaii.com>
Subject: [EXTERNAL] Written Public Testimony on behalf of Villa Rose, LLC and JCD Solar Consulting, LLC Regarding IAL Recommendation, for January 6, 2022 LUC Meeting

Good Morning,

Please find attached the following written public testimonies:

1. Letter from Villa Rose, LLC to the Land Use Commission regarding the Request to Reject the Important Agricultural Lands Designation Recommendation, dated 1-4-2022; and
2. Letter from JCD Solar Consulting, LLC to the Land Use Commission regarding Important Agricultural Lands - Potential Negative Impacts on Community Based Renewable Energy Programs, dated 1-4-2022.

Please let us know if you have any questions or difficulties saving the attachments.

Sincerely,

Jesi K. Onaga
Paralegal

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January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Request to Reject Important Agricultural Lands Recommendation from the C&C of Honolulu as a Violation of Landowners' Due Process Rights

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

I am writing to you on behalf of Villa Rose, LLC ("Villa Rose"), the owner of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"). Villa Rose has owned the Property, which is approximately 317 acres, since 2013 and currently operates the Waialua Egg Farm at the Property. The Waialua Egg Farm has been in development and construction for the past ten years and made its first sales in November of 2021. The farm has 200,000 chickens on site, is cage-free and solar-powered, and currently supplies local markets with 900 dozen (10,800) eggs per week. The water for the farm comes directly from Villa Rose's own well, and the chicken manure from the farm is turned into biochar to be returned as nutrients to the earth for farmers across the State.

Villa Rose intends to add various facilities and structures to eventually house one million cage-free chickens and to host farm tours to promote local agritourism. However, the potential for further agricultural development of the Property is limited due to the need to protect the health and environment of the chickens and to avoid crops that would attract wild animals and other pests. Rather than have a portion of the Property remain unproductive, Villa Rose has partnered with JCD Solar Consulting, LLC ("JCD") to develop a solar energy project on a portion of the Property that will help support Villa Rose's agricultural activities.

We recently discovered the City and County of Honolulu's Department of Permitting and Planning ("DPP") has recommended that the Property be designated as Important Agricultural Lands ("IAL"). Villa Rose strongly objects to the Property's designation as IAL and to the designation process followed by DPP, which failed to provide affected landowners a meaningful opportunity for notice and to be heard prior to DPP's IAL recommendation. DPP's insufficient procedures violated the due process rights of landowners and should not be ratified by the Commission. Villa Rose fears that the IAL designation may have unintended and negative impacts on landowners and, as such, any process to collectively designate IAL should strictly follow the Legislature's mandated notice and consultation processes. We respectfully suggest that the Commission should require DPP to strictly adhere to the notice and consultation

processes require by law before any collective designation of IAL by the Commission may proceed.

I. DPP'S PROCEDURES TO DESIGNATE IAL FAILED TO FOLLOW THE STATUTORY PROCESS ESTABLISHED BY THE LEGISLATURE AND VIOLATES THE DUE PROCESS RIGHTS OF LANDOWNERS.

With respect to the entirety of the IAL designation process, Villa Rose has only received one notification from DPP over four years ago regarding the proposed IAL designation of the Property. The notice is dated November 8, 2017, and is attached to this letter as Attachment A ("November 2017 Letter"). The November 2017 Letter notified Villa Rose that the Property was included in DPP's IAL recommendation. The letter did not provide Villa Rose the opportunity to object, comment, or otherwise be involved in the designation process. Villa Rose has received no subsequent notifications from DPP or any other governmental entity, including the Commission, regarding the IAL designation process. Villa Rose only recently happened to learn third hand that the IAL process was ongoing before the Commission and made further inquiries itself regarding the ongoing Commission IAL proceeding.

DPP's IAL designation process violated both (1) the Legislature's statutory procedure by which the counties may designate IAL and (2) the fundamental requirements of due process.

HRS Chapter 205, Part III ("IAL Subchapter") provides both an individual and a collective mechanism to designate IAL. An individual farmer or landowner may petition to voluntarily designate his or her own land as IAL under HRS § 205-45. The counties can also seek to collectively designate lands as IAL pursuant to the procedures contained in HRS § 205-47. Given the potential impact on the rights of affected landowners, the Legislature required a comprehensive process of engagement with landowners and the public before a collective designation could be recommended to the Commission. HRS § 205-47(b) provides:

> Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in consultation and cooperation with landowners, the department of agriculture, agricultural interest groups, including representatives from the Hawaii Farm Bureau Federation and other agricultural organizations, the United States Department of Agriculture--Natural Resources Conservation Service, the office of planning and sustainable development, and other groups as necessary.

(Emphasis added). The first instruction from the Legislature to DPP regarding how to conduct the collective designation of IAL is that it must be done "in consultation and cooperation with landowners." The Legislature further instructed that DPP must

> develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process.

HRS § 205-47(c) (emphasis added). "[A]n inclusive process for public involvement" is required by the Legislature to both identify potential IAL lands and to develop DPP's IAL map.

However, the DPP failed to consult and cooperate with Villa Rose in the IAL designation process and failed to include the public in the identification of potential IAL lands and the development of maps of IAL lands. The only notification received by Villa Rose from DPP notified Villa Rose the Property had been included in the IAL recommendation. The November 2017 Letter did not evidence any "consultation or cooperation" with Villa Rose before DPP had made its decision to include the Property in the recommendation, and DPP did not involve Villa Rose in the identification of potential IAL and the development of the IAL maps. The November 2017 Letter also did not include any explanation regarding why Villa Rose's Property was included in the IAL recommendation, resulting in the complete inability of Villa Rose to evaluate DPP's process and decision making or to engage with DPP regarding the basis for the Property's inclusion. Having reviewed the record before the LUC, it appears that Villa Rose's experience with DPP was the norm and not the exception. The process used by DPP, either by design or negligence, failed to follow the mandated and foundational consultation processes with affected landowners required by the Legislature.

Furthermore, even if DPP's actions complied with the bare minimum required by statute, DPP's procedures with respect to the notification and involvement of affected landowners is grossly inadequate given the due process implications of the IAL designation. The Attorney General has provided her opinion that the property rights of landowners will be affected by the IAL designation and, as such, landowners are entitled to due process.[1] The Attorney General continued to advise that the Commission treat this proceeding as a "quasi-judicial" proceeding as the infringement of affected landowners' property rights could give rise to standing in a contested case.[2]

"The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)

[1] See Letter from the Department of the Attorney General of the State of Hawaii, dated September 23, 2021, available at https://luc.hawaii.gov/wp-content/uploads/2021/10/DAG-Formal-Legal-Opinion-regarding-IAL.pdf at p.8 ("Attorney General Opinion").
[2] Id. at 9.

(citation omitted). DPP is the agency charged with developing a factual record to support its IAL recommendation which is to be accepted or rejected by the LUC. See HRS § 205-47. DPP failed to fulfill both its notice obligations and failed to provide any meaningful opportunity for landowners to participate in the IAL process. The Commission is charged with determining whether DPP complied with its obligations under the IAL Subchapter and has the authority to require DPP to take further steps to ensure that landowners' due process rights are respected.

II. THE IAL DESIGNATION MAY HAVE UNINTENDED NEGATIVE CONSEQUENCES FOR LANDOWNERS.

Villa Rose is also concerned that the IAL designation may have unintended negative consequences for affected landowners. As stated above, the Property is currently used as an egg farm to produce local eggs for Hawaii. The potential for further agricultural development of the Property is limited due to the need to protect the health and environment of the chickens as additional crops on the Property could attract wild animals and other pests that would negatively impact the egg farm. Villa Rose has partnered with JCD to host on site a community based renewable energy ("CBRE") solar project on a portion of the Property, which would put this additional land to productive use and would help support the additional agricultural activities on site.

If imposed upon the Property, the IAL designation would place this CBRE project at risk. For example, HRS § 205-43 provides that "[s]tate and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands" and must be consistent and implement a number of policies, including, *inter alia*,

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

Accordingly, an IAL designation could jeopardize the ability to host a renewable energy project on site given the policy directives for IAL lands established by the Legislature and which have yet to be implemented by the City and County of Honolulu. Villa Rose finds this looming uncertainty extremely unsettling and unproductive.

Villa Rose respectfully submits that the Commission should remand this matter back to DPP to remedy DPP's deficient notice and consultation processes with affected

landowners. Villa Rose would like the opportunity for genuine engagement with DPP regarding the IAL process, which unfortunately has not yet occurred. I expect that such a proactive process, already mandated by the Legislature, would save landowners, DPP, and the Commission significant investments of time and expense.

Thank you for the opportunity to provide these comments.

Sincerely,

Donald L. Lawsen
for
Villa Rose, LLC

Enclosure
cc:

January 4, 2022

VIA ELECTRONIC MAIL: dbedt.luc.web@hawaii.gov

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

Re: Important Agricultural Lands – Potential Negative Impacts on Community Based Renewable Energy Programs

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

I am writing to you as a partner in JCD Solar Consulting, LLC ("JCD") with respect to the proposed designation as Important Agricultural Lands ("IAL") of TMK No. (1) 6-5-002-005 in Waialua, Oahu ("Property"). The Property is owned by Villa Rose, LLC ("Villa Rose"), which operates a local egg farm on the Property. JCD currently has an agreement with Villa Rose regarding the use of approximately sixty to eighty acres of the Property to build and operate a renewable energy solar facility alongside the egg farm if JCD's proposed solar project is accepted by the utility and/or the Hawaii State Public Utilities Commission ("PUC") as a Community Based Renewable Energy ("CBRE") Phase 2 project on Oahu. As explained below, JCD has serious concerns regarding the potential impact an IAL designation could have on plans to develop a solar project on the Property and requests, as did Villa Rose, that the Commission reject the pending IAL recommendation.

I. THE CBRE PROGRAM IS VITAL TO HAWAII'S RENEWABLE ENERGY POLICY AND ENERGY JUSTICE.

The State of Hawaii has established critical renewable energy targets which direct the State to increase the amount of renewable energy for electricity generation and consumption with the goal of reaching a 100% renewable portfolio standard ("RPS") by 2045. See HRS §§ 225P-5 and 269-92. One important contribution to the State's renewable energy goals has been the establishment of rooftop solar on individual homes and businesses, often referred to as "distributed generation". The most recent data shows that cumulative installed solar systems currently contribute 752 megawatts of capacity to Oahu's electric utility.[1]

The CBRE program, also called "shared renewables", is a vital program in Hawaii that more broadly distributes the benefits of renewable energy generation to individuals who are not able to install solar energy systems on their own properties. Such individuals include, but are not limited to, renters, inhabitants of apartments and condominiums, and others who cannot afford the upfront capital costs of installing their own renewable energy systems. A CBRE project allows

[1] See hawaiianelectric.com/documents/clean_energy_hawaii/clean_energy_facts/pv_summary_3Q_2021.pdf

such individuals to participate directly in off-site renewable energy projects through a bill credit arrangement with the electric utility. As such, the CBRE program is a vital component of the State's effort to broaden participation in self-generation and distribute the benefits of renewable energy generation to individuals who were previously excluded from participation. The benefits to Hawaii residents include: (1) increasing the amount of renewable energy available to the utility; (2) decreasing the use of fossil fuels for electricity production and associated greenhouse gas emissions; (3) decreasing ratepayers' exposure to the volatility of fossil fuel process and energy insecurity; and (4) decreasing electricity costs to CBRE participants.

JCD has partnered with Nexamp Solar, LLC ("Nexamp") in the development of a CBRE solar project for Phase 2 of the program that we intend to site on a portion of the Property that will not be utilized by the egg farm. To protect the health and environment of the chickens, the egg farm must avoid crops that would attract wild animals and other pests and thus potentially endanger the chickens. The solar farm will be sited on this unused portion of the Property. Nexamp develops, builds, owns, and operates solar and storage projects and is a leader in the community solar space. The proposed CBRE project will be a 6-megawatt solar photovoltaic system with battery storage capable of providing discounted electricity to approximately 1,100 homes. Priority subscription to the project will be given to low-to-moderate income families on the North Shore of Oahu. We are looking to graze sheep, to be sold for consumption, among the solar panels to ensure that the land is placed to its most productive use. We expect that Phase 2 of the CBRE program will commence soon upon the approval of Phase 2 by the PUC. Unfortunately, the proposed IAL designation for the Property places this project at risk.

II. THE IAL DESIGNATION AND LEGISLATURE'S POLICY GOALS.

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

> conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of:
>
> (1) Conserving and protecting agricultural lands;
>
> (2) Promoting diversified agriculture;
>
> (3) Increasing agricultural self-sufficiency; and
>
> (4) Assuring the availability of agriculturally suitable lands[.]

HRS § 205-41.

The IAL process is intended to "identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations." HRS § 205-42(b). In support of these objectives,

governmental agencies are instructed to "[p]romote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses." HRS § 205-42(b)(1).

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

> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;

HRS § 205-43 (emphases added). It appears the City and County of Honolulu ("C&C") has to date failed to adopt or clarify what policies are or will be adopted to further the above directives from the Legislature, which has resulted in great uncertainty.

HRS § 205-4.5 currently permits solar energy, cultivation of crops for bioenergy and biofuel processing, wind energy, geothermal, and hydroelectric facilities in the agricultural districts. Although solar projects are permitted uses in the agriculture district under HRS § 205-4.5, with applicable permits, it is currently unclear whether the C&C will treat solar and other renewable energy projects as an "agricultural use or activity" under the IAL Subchapter. If the C&C were to treat renewable energy projects as non-agricultural uses or activities under the IAL Subchapter, it is also unclear what policies the C&C will adopt to "[d]iscourage the fragmentation of [IAL]", to "[d]irect nonagricultural uses and activities from [IAL]", and to "[l]imit physical improvements on [IAL]". See HRS 205-43. As such, the IAL designation creates great uncertainty as it is currently unclear what impact this would have on permitting for proposed renewable energy projects sited on agricultural land.

Landowners and long-term lessees cannot determine whether the IAL designation is appropriate and compatible for their land without any indication from the C&C regarding the impact of such a designation. As such, JCD respectfully suggests that the C&C should be required to determine what impacts the IAL designation will have on landowners, particularly with respect to the impacts the designation would have on uses of agricultural land currently permitted by HRS § 205-4.5 and whether all such uses are considered agriculture uses or activities under the IAL Subchapter. After these determinations are made, the C&C should be required to provide notice to landowners for further engagement so the C&C and landowners can make fully informed decisions regarding whether the IAL designation is appropriate. This would require the Commission to remand this matter back to the C&C for further action.

We are excited about this CBRE project and the synergy it creates between agricultural activities and renewable energy in the State because both are critical to a healthy and sustainable economy, and such synergies will be necessary if the State is to achieve its ambitious renewable energy goals. We look forward to working with the C&C and the Commission in support of Hawaii and its renewable energy future.

Sincerely,

Jeremy Chapman, Partner
for
JCD Solar Consulting, LLC
d/b/a Melink Solar Development

Enclosure
cc:

From: Sophie Manansala
To: DBEDT LUC
Cc: Sophie Manansala
Subject: [EXTERNAL] IAL Hearing - 01/06/2022 - Testimony
Date: Tuesday, January 4, 2022 10:01:37 AM

Mikilua One, LLC

TMK: 1870188048000

Address: 87-1117 Paakea Rd. Waianae, HI 96792

Email: sophiem144@gmail.com

sophiem@hawaii.rr.com

I believe the City and County of Honolulu did not follow the process required by law to allow the LUC to properly evaluate and thus designate my land as IAL. I still have yet to hear how this IAL designation will affect me as a property owner with mixed use zoning designation. Furthermore;

The City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,
2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,
4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before re-submitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Sophie F Manansala - Mikilua One, LLC

From: Sophie Manansala
To: DBEDT LUC
Cc: Sophie Manansala
Subject: [EXTERNAL] IAL Hearing - 01/06/2022 - Testimony
Date: Tuesday, January 4, 2022 10:01:37 AM

Mikilua One, LLC

TMK: 1870188048000

Address: 87-1117 Paakea Rd. Waianae, HI 96792

Email: sophiem144@gmail.com

sophiem@hawaii.rr.com

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Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

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B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Sophie F Manansala - Mikilua One, LLC

From: Sophie Manansala
To: DBEDT LUC
Subject: [EXTERNAL] IAL Hearing - 01/06/2022 - Testimony
Date: Tuesday, January 4, 2022 12:48:16 PM

Margaret Isaacs Trust
Address: 87-1109 Paakea Rd. Waianae, HI 96792
TMK 1-8-7-018-043-0000-000
Email: hamocide808@yahoo.com

I believe the City and County of Honolulu did not follow the process required by law to allow the LUC to properly evaluate and thus designate my land as IAL. Furthermore;

The City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,
2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,
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4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before re-submitting the City and County's maps and recommendations to the LUC.
B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.
C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Margaret Isaacs

From: April K
To: DBEDT LUC
Subject: [EXTERNAL] Written Testimony 1/5/2022-1/6/2022
Date: Tuesday, January 4, 2022 11:32:22 AM
Attachments: FINAL Written Testimony 2_1_4_22.pdf

Aloha,

Please see the attached written testimony submitted on behalf of my family for the 1/5/22-1/6/22 hearing regarding IAL item.

Mahalo,
April Kalt

Edith Teixeira, Etal.
86-346 Hālona RD
Waiʻanae, HI 96792
TMK: 8-6-011-004

January 04, 2022

RE: ACTION-CONFORMANCE OF C & C OF HONOLULU IMPORTANT AGRICULTURAL LANDS (IAL)RECOMMENDATION TO APPLICABLE STATUTORY AND PROCEDURAL REQUIREMENTS

This letter is written to express our family's OPPOSITION to the proposed IAL designation of our family property; TMK 8-6-011-004. We strongly believe that the work the City has done on the maps and recommendations that were submitted to the Land Use Commission is inadequate and unethical.

The meetings on January 5-6, 2022 intend to discuss whether the County has complied with legal requirements regarding the proper procedural, legal, statutory and public notice requirements that were met in developing the recommendations.

On behalf of our family and it's shared landowners, we believe that:

The City's IAL mapping and recommendation process:

1. Failed to provide our family landowners, with adequate notice and due process, as required by the statute and the constitution,
2. Misled or failed to accurately inform our family landowners about the restrictions IAL designation would put on their basic property rights,
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,
4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about our family land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, our family landowners were not properly notified or informed about the City and County's recommendation process.

Moreover, the information provided to the LUC about our family land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like our family landowners regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Our land has been in our family for 100 years and we continue to stand strong in keeping it that way for future generations. Let us reiterate as we stated in our letter to the C&C of Honolulu on March 30, 2017 to **OPT OUT** ... our Matriarch and her five offspring along with several of her grand and great grandchildren are resting in our private family cemetery. To desecrate her legacy with this bureaucracy is **NOT PONO!**

Thank you for your time and consideration of our written testimony.

With Love and Aloha,

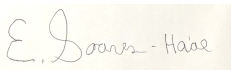
Edith Teixeira Edith L. Teixeira

Rosemary Awong Rosemary L. Awong

Orlando Soares POA Janet Soares-Kong POA Orlando Soares

Clement Soares

Eva Santos *Eva Santos*

Eassie Soares-Haae 

Leianne Farrelly 

Jesse Lindley 

Koreen Perry 

Dalmacia Aldeguer 

Walterbea Aldeguer 

Juan Aldeguer 

Herbert Aldeguer Herbert Aldeguer

Homelani Kozeniewski 

Maysana Lopes 

Ronald Lopes Ronald Lopes

Gavin Aldeguer Gavin Aldeguer

Walter Aldeguer Walter Aldeguer

Jesus Molina 

Willima Molina William Molina

Rose Molina Rose Molina

Darlene Soares Darlene Soares

From:	Bradley S. Dixon
To:	DBEDT LUC
Cc:	Hakoda, Riley K; Jodi Yamamoto; Jesi K. Onaga
Subject:	[EXTERNAL] Written Public Testimony of Julie Yunker on behalf of Waihonu North, LLC and Waihonu South, LLC Regarding IAL Recommendation and City"s Supplemental Brief, for January 6, 2022 LUC Meeting
Date:	Tuesday, January 4, 2022 4:24:34 PM
Attachments:	Ltr fr Waihonu North and Waihonu South to LUC re Additional Comments (1-4-22).pdf

Good Afternoon,

Please find attached the written public testimony of Julie Yunker on behalf of Waihonu North, LLC and Waihonu South, LLC regarding the Important Agricultural Lands Recommendation and City and County of Honolulu's Supplemental Brief, dated December 29, 2021. This written testimony is being submitted in advance of the Land Use Commission's upcoming meeting on January 6, 2022.

Please let us know if you have any questions.

Bradley S. Dixon
Counsel

Yamamoto Caliboso
A Limited Liability Law Company
1100 Alakea Street, Suite 3100
Honolulu, Hawaii 96813
Main: (808) 540-4500
Direct: (808) 540-4508
Fax: (808) 540-4530
Email: bdixon@ychawaii.com
Website: www.ychawaii.com

WAIHONU NORTH, LLC & WAIHONU SOUTH, LLC

745 Fort Street Suite 1800, Honolulu HI 96813

January 4, 2022

State of Hawaii Land Use Commission
P.O. Box 2359
Honolulu, HI 96814-2359
Email: dbedt.luc.web@hawaii.gov

Subject: Meeting of January 6, 2022, Agenda Item IV – Evaluation of C&C of Honolulu Important Agricultural Lands Recommendations and Conformance to Applicable Statutory and Procedural Requirements

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

Waihonu North, LLC ("Waihonu North") and Waihonu South, LLC ("Waihonu South") (collectively "Waihonu") appreciate this opportunity to provide supplemental written comments regarding the Commission's continued hearing on the City and County of Honolulu's ("County") recommendation ("Recommendation") regarding its proposed designations for Important Agricultural Lands ("IAL"). Waihonu submitted previous testimony to the Commission, dated May 21, 2012, which is attached hereto for your reference as Exhibit A ("2021 Testimony"). Since Waihonu submitted its 2021 Testimony, the Attorney General for the State of Hawaii has provided her opinion on the questions submitted to her by the Commission[1] and the County has submitted its Supplemental Brief to its Recommendation.[2] Waihonu would like to succinctly remind the Commission regarding the substance of Waihonu's 2021 Testimony and address the County's Supplemental Brief. Unfortunately, Waihonu's position remains that the Commission should reject the Recommendation and require the County to perform the statutorily mandated notice and consultation processes required by the IAL law.

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

In its 2021 Testimony, Waihonu objected to the County's Recommendation for the following reasons:

[1] See https://luc.hawaii.gov/wp-content/uploads/2021/10/DAG-Formal-Legal-Opinion-regarding-IAL.pdf ("Attorney General Opinion").
[2] See https://luc.hawaii.gov/wp-content/uploads/2021/12/DPP-Supplemental-Brief-stamped-1.pdf.

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

Waihonu's 2021 Testimony argued that the County failed to consider that the IAL designation imposes burdens and restrictions upon landowners and their use of their lands and will likely involve future restrictions upon landowners not yet adopted by the County. The County's Supplemental Brief argues that the IAL designation does not impose any additional restrictions upon the use of land beyond those already imposed by virtue of the land already being classified as agricultural land. First, this argument completely ignores that the IAL designation will immediately make it more difficult for landowners to reclassify or rezone their lands pursuant to HRS § 205-50, which imposes additional standards or criteria upon any such requests. Second, the County's argument also ignores that once the IAL designation is imposed, governmental bodies with discretionary permitting authority over the development of such lands may use the IAL designation to restrict uses, or imposes additional conditions upon proposed uses, of IAL land. Pursuant to HRS § 205-43, the Legislature has developed policies that are intended to guide the State and counties regarding the use of IAL land, which could be interpreted to limit renewable energy development on such lands. Finally, the County's Supplemental Brief ignores that once the IAL designation is imposed, IAL will be immediately subject to any further restrictions or changes in policy by the State and counties with respect to IAL land.

At the Commission's previous hearings, the County explained that its belief throughout its development of the Recommendation was that there would be no burden upon landowners but only benefits and, therefore, landowners were not entitled to due process prior to the involuntary imposition of the IAL designation on their lands. This assumption was incorrect. The Attorney General has found that the IAL designation would burden landowners' due process property interests and, accordingly, the IAL designation cannot be imposed upon a landowner without due process of law.[3] Due process includes, of course, notice and a meaningful opportunity to be heard.

Waihonu's 2021 Testimony also argued that the County's notice and consultation procedures for landowners and the public at large were inadequate and did not sufficiently protect the due process rights of landowners or long-term lessees of land proposed to be designated as IAL. For example, the landowner from which Waihonu leases its land is Religious Corporation Honbushin and Honbushin International Center ("Honbushin"). Honbushin's experience with the County is illustrative of this fundamentally flawed and inadequate process utilized by the County. Honbushin submitted its own written testimony to the Commission, dated April 27, 2021, in which Honbushin objected to the proposed IAL designation and explained its previous interactions with the County during the IAL designation process.[4] Honbushin explains in its written comments that it objected to the IAL designation in 2017 and was told that it would receive a response, but no response was provided by the County. Further, Waihonu, as the long-term lessee of the property proposed to be designated as IAL, never received any notice from the County during the development of its Recommendation.

The County's Supplemental Brief again recites the minimal effort made by the County to provide notice and to engage potentially impacted landowners and argues it has performed the bare minimum required under the IAL law.[5] The County maintains that even a simple step like sending notices through certified mail would be prohibitively expensive and could not have been done because the IAL law was an unfunded mandate. That the Legislature passed the IAL law without allocating funding to the counties is not a valid reason to deny landowners due process of law. Such arguments should be taken to the Legislature by the County and not to the Commission. Rather than recognize that the County's initially flawed understanding regarding the impact of the IAL designation resulted in a legally deficient notice and engagement process with landowners, the County deflects responsibility to the Commission. The only potentially acceptable solution offered by the County is the suggestion that the Commission permit

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[3] Attorney General Opinion at 7-9.

[4] See Honbushin's written comments, dated April 27, 2021, at https://luc.hawaii.gov/wp-content/uploads/2021/04/IAL-public-testimony-Honbushin-Interational-Corp.pdf

[5] Supplemental Brief at 8-12.

landowners to decide to opt out of the Recommendation.[6] This solution at least allows landowners to avoid the involuntary IAL designation and the resulting violation of their due process rights.

Finally, Waihonu would like to reiterate that the Commission's decision on the Recommendation could have a significant negative impact on Oahu's ability to make a successful transition to clean and renewable energy. Renewable energy solar projects are vital to Oahu's contribution to the State in reaching its Renewable Portfolio Standard and carbon neutrality mandates under HRS §§ 225P-5 and 269-22. Renewable energy projects are regularly, if not primarily, sited on land classified as agricultural given the specific land attributes required to support a successful and cost-effective renewable energy project. Such projects are often large - spanning tens if not hundreds of acres - and cannot be easily sited within residential or urban land use districts. Solar projects specifically require large and relatively level parcels of land upon which to place solar panels, and they also require unobstructed access to intense sunlight. In recent years, the Legislature has recognized the compelling interest that the State has in siting renewable energy projects on agricultural land by considering them as permitted uses on agricultural land pursuant to HRS § 205-4.5. The County and the Commission should ensure that the actions it takes with respect to the IAL law do not unjustifiably hinder renewable energy development.

Unfortunately, the County's process to develop its Recommendation failed to consider its potential negative impact on the renewable energy industry. Had the County more robustly engaged landowners and developers in the renewable energy industry in its consultation processes, perhaps these conflicts could have been avoided. Waihonu does not believe the Commission can or should accept the County's Recommendation as the County has not satisfied the important and rigorous landowner and public consultation processes required by law. Waihonu respectfully suggests that the Commission remand this matter back to the County and instruct the County to meaningfully engage and consult with landowners and make whatever revisions necessary to its proposed IAL designations that result from this further consultation with landowners, renewable energy developers, and additional opportunities for public involvement. Alternatively, if the Commission is inclined to accept the Recommendation, Waihonu suggests that allowing landowners to opt out of the IAL designation would address many of Waihonu's concerns.

Thank you for the opportunity to provide these supplemental comments.

[6] Supplemental Brief at 12.

Sincerely,

Julie Yunker

Julie Yunker, Director of Sustainability, Government and Community Affairs

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

WAIHONU NORTH, LLC & WAIHONU SOUTH, LLC
745 Fort Street Suite 1800, Honolulu HI 96813

May 21, 2021

State of Hawaii Land Use Commission
P. O. Box 2359
Honolulu, HI 96814-2359
Email: dbedt.luc.web@hawaii.gov

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

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

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

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

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

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

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

The Renewable Energy Mandate in Hawaii.

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

[1] See HRS §§ 225P-5 and 269-92.

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

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

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

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

The IAL Designation and Policy Goals.

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

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

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

(2) Promoting diversified agriculture;

(3) Increasing agricultural self-sufficiency; and

(4) Assuring the availability of agriculturally suitable lands,

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

HRS § 205-41. The objective of the identification of IAL is to "identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations." HRS § 205-42(b). To achieve this objective, the State must, among other things, "[p]romote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses." HRS § 205-42(b)(1).

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

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

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

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

HRS § 205-43 (emphasis added).

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

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

The law directs the County to "identify and map potential important agricultural lands within its jurisdiction based on the standards and criteria in section 205-44 and the intent of this part…." HRS § 205-47(a). HRS § 205-44 establishes the standards and criteria that the County must use to identify proposed IAL. HRS § 205-44(a) states that "[t]he standards and criteria in this section shall be used to identify important agricultural lands" and "shall be made by weighing the standards and criteria with each other to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43." The standards and criteria that must be considered and weighed before the County can make its IAL recommendation include:

> (1) Land currently used for agricultural production;
>
> (2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
>
> (3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
>
> (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.

HRS § 205-44(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consultation and Cooperation with Landowners and Public Involvement.

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

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

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

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

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

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

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

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

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

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

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

Thank you for the opportunity to provide these comments.

Sincerely,

Laurent Nassif

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

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

From: Steve Hoag
To: DBEDT LUC
Subject: [EXTERNAL] Testimony for January 6, 2022 LUC Hearing
Date: Tuesday, January 4, 2022 3:47:17 PM
Attachments: HRI-LUC re IAL (4-Jan-2022).pdf

Please find attached written testimony for the January 6, 2022 hearing of the State of Hawaii Land Use Commission.

Thank you,
Steve

Steve Hoag, Esq.
Vice President

www.hawaiireserves.com
808.293.9201

Hawaii Reserves, Inc.
A Land Management Company

January 4, 2022

Via dbedt.luc.web@hawaii.gov
State of Hawaii Land Use Commission

Re: Comment on City & County of Honolulu's IAL Recommendations

Dear Chair Scheuer and Land Use Commission members:

Aloha and thank you for the opportunity to submit comments regarding the City & County of Honolulu's (C&C) Important Agricultural Lands (IAL) Recommendations in relation to Hawaii Revised Statutes (HRS) chapter 205. This testimony is submitted on behalf of Hawaii Reserves, Inc., a land management company with responsibility for approximately 7,000 acres of land in agricultural, residential and commercial uses.

HRS Chapter 205, section 47(a) states in pertinent part: "Each county shall identify and map potential important agricultural lands within its jurisdiction...except lands that have been designated, through the state land use, zoning, or county planning process, for urban use by the State or county." The April 2014 Oahu Important Agricultural Lands Phase 1 Study, referencing HRS 205- 47(a), states that "several categories of land are not eligible for IAL consideration under the county designation process, including: ...lands within the State Urban District or designated by county land use plans or zoning mechanisms for urban use" (page 1-6). Note that HRS 205-48 (c)(2) specifically mentions the criteria in HRS 205-47.

We manage agricultural land in Laie that the C&C recommended for designation as IAL in 2018-2019. At the time, the land in question fell outside of the county planning urban use boundary. However, in January and February of 2021 the Honolulu City Council and Honolulu Mayor Blangiardi amended the Ko'olau Loa Sustainable Communities Plan (KLSCP).

The amended KLSCP expanded the C&C urban growth boundary for the Ko'olau Loa district, and our land that was previously eligible under HRS 205-47(a) for consideration as IAL, is now located within the county's urban use boundary and should therefore no longer be eligible for designation as IAL. As a result, the C&C's 2018-2019 IAL recommendation map should be updated to conform with state law. We have been in contact with the C&C Department of Planning & Permitting regarding this issue, and have requested that it update its IAL recommendation map accordingly.

Please note that there may be other lands on Oahu where county planning urban use boundaries have been updated between 2018 and the present, rendering the C&C IAL recommendation map out of conformance with state law as found in HRS 205-47.

We thank you for the opportunity to provide comment and testimony on this matter.

Sincerely,

Steve Keali'iwahamana Hoag, Esq.
Vice President

55-510 Kamehameha Highway, Laie, Hawaii 96762-1193 • Telephone: (808) 293-9201 • Fax: (808) 293-6456 • www.hawaiireserves.com

From: Bonnie Grossi
To: DBEDT LUC
Subject: [EXTERNAL] Triple G Stables written testimony for LUC January 6, 2022 IAL meeting
Date: Tuesday, January 4, 2022 2:47:05 PM

Triple G Stables, LLC
87-1161 Iliili Road
Waianae, Hawaii 96792
TMK: 87019023 0000

To the Land Use Commission Chair and Members,

As the owner of the above referenced TMK, Triple G Stables (The Stables) has previously provided written testimony objecting to the property being designated as an Important Agricultural Land (IAL). At this time testimony is being submitted as to why the City's maps and recommendations to the Land Use Commission (LUC) are inadequate and should not be approved.

The City's IAL mapping and recommendation process:
1. Failed to provide The Stables adequate notice and due process as required by statute and the constitution.
2. Failed to provide The Stables with information regarding restrictions that an IAL designation puts on basic property rights.
3. Inappropriately submitted IAL recommendations prior to enacting county incentives and protections for all IAL lands and landowners.
4. The City choose to rely on generalizations and short cut methods. No consideration was given to individual property rights or how the City's IAL designation process will severely impact the owner's of agricultural property.
By doing so the City failed to provide adequate information about The Stables property to enable the Chair and Members of the LUC to properly do your job as required by HRS 205-44.

For the above mentioned reasons the LUC should remand the IAL Maps back to the City to do the following:
1. Enact incentives and protections for all IAL landowners required by HRS Statutes before resubmitting maps and recommendations back to the LUC.
2. To gather and provide the LUC with information on how and whether individual parcels met any, some or all eight of IAL criteria before designating any lands as IAL.
3. Should take into consideration the consequences of IAL recommendations for landowners specific lands. To actually consult with us, to work with us and to provide clear and verifiable notification as to how IAL designation will affect each and every owner of agricultural zoned properties.

In closing, when looking at the large parcels of property that represents the City's IAL lands I ask that you stop and think about all the thousands of individual land owners that the City lumped together to create them.
Respectfully
Bonnie Costa Grossi
Triple G Stables,LLC

From: Zachary McNish
To: DBEDT LUC
Subject: [EXTERNAL] Testimony Opposing City Designation of IAL
Date: Tuesday, January 4, 2022 3:29:48 PM
Attachments: Ltr. from McNish Law to LUC re Proposed IAL 1.4.2022.pdf

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Chair Scheuer and Members of the Commission:

Please find attached public testimony regarding the Commission's consideration of the City and County of Honolulu's proposed designation of important agricultural lands.

Regards,

Zachary A. McNish, Esq.
McNish Law, a limited liability law company
www.mcnishlaw.com
PO Box 1598, Makawao, HI 96768
808.348.3942

McNish Law
a limited liability law company

Zachary A. McNish, Esq.
PO Box 1598, Makawao, HI 96768
zach@mcnishlaw.com
(808) 348-3942

January 4, 2022

Sent via U.S. Mail and email: dbedt.luc.web@hawaii.gov
State of Hawaii Land Use Commission
PO Box 2359
Honolulu, HI 96804-2359

Re: **Objection to City and County Designation of Important Agricultural Lands**

Chair Scheuer and Members of the Commission:

I am the attorney for Hawaii FIT Four LLC, owner of TMK 1-5-004-0071, a 7.5 acre parcel located at 85-1383B Waianae Valley Road. The property hosts a photovoltaic solar farm that generates electricity for Hawaiian Electric's Feed-in-Tariff program and a single-family residence. This testimony supplements Hawaii FIT Four's prior testimony to the Commission on May 26, 2021, which objected to the methods that the City and County of Honolulu (the "City") used to designate the parcel as Important Agricultural Land ("IAL"). Hawaii FIT Four continues to believe, for the reasons set forth in its May 26th testimony, that the City failed to provide meaningful notice and consultation with affected landowners and, accordingly, believes that the City's proposed IAL designation should be rejected.

In the event that the Commission accepts the City's proposed IAL designation, Hawaii FIT Four assumes that landowners who objected to the IAL designation for their properties will have an opportunity to submit additional evidence to the Commission that explains why their properties have incorrectly been designated as IAL and should therefore be excluded from the final IAL list. This process would be consistent with the steps outlined in the "Hearings And Step By Step To a Final Decision" slide in the "County IAL Designation Process" powerpoint on the Commission's website. It also accords with the Opinion issued by the State of Hawai'i Department of Attorney General on September 23, 2021, which recommends on page 9 that the Commission "apply a quasi-judicial proceeding to provide an appropriate degree of due process protection for the property rights of affected landowners." In order for Hawaii FIT Four and similarly situated landowners to have sufficient due process, the Commission must give them the opportunity to be heard and to present specific evidence as to whether

IAL designation is appropriate for their respective properties. The City itself, on page 18 of its supplemental brief dated December 29, 2021, acknowledges such a right, saying that "[t]he Commission has the authority, to which the City will defer to, to further address concerns of due process and to exclude specific parcels as it sees fit in officially designating IAL." If the Commission is not currently contemplating providing landowners with an opportunity to be heard with respect to their specific parcels, Hawaii FIT Four requests that it be provided with such an opportunity.[1]

For the reasons set forth above, Hawaii FIT Four respectfully asks that the Commission either reject the City's proposed IAL designation and require the City to adopt a process that involves actual consultation with landowners or instead allow landowners such as Hawaii FIT Four who object to their properties' designation to present evidence for review by the Commission as to why their specific property should not be designated as IAL.

If there are any additional steps that Hawaii FIT Four should take at this time to formally request an opportunity to present specific evidence regarding its property, please let us know.

Sincerely,

Zachary McNish

Zachary McNish, Esq.

[1] Allowing landowners to present evidence related to their specific properties and to request the property's exclusion from the final IAL list is not only required by due process, it also makes practical sense given the City's argument in its supplemental brief that "IAL designation … is intended to provide opportunities and benefits for landowners" (emphasis added). If the primary purpose of the IAL designation is to provide a benefit to landowners, then those landowners who determine that IAL designation does not in fact benefit their property should be allowed to "opt out" of the designation as there will be little harm to anyone other than the landowner.

From: Clarence
To: DBEDT LUC
Subject: [EXTERNAL] IAL Testimony for LUC Meeting Jan 6 2022
Date: Tuesday, January 4, 2022 1:56:43 PM
Attachments: Nakata TMK 41008016 IAL Testimony for 1-6-22.pdf

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Aloha LUC,

Please accept my testimony, attached, for the LUC meeting IAL agenda item on Jan 6, 2022.

Mahalo!

Clarence Nakata
858-752-5025

Clarence Nakata
3986 Montefrio Ct., San Diego, CA 92130
Phone: 858-752-5025
Email: clarence_nakata@yahoo.com

Land Use Commission
PO Box 2359, Honolulu, HI 96814-2359
Email: dbedt.luc.web@hawaii.gov

Aloha Land Use Commission,

Please accept this testimony and request that my property be removed from being considered for IAL designation for the reasons described below.

My property in Waimanalo (TMK 4-1-008:016) has five houses on 1.1 acres, abuts Kalanianaole Hwy, and is surrounded on two sides by other residential properties.

I do not believe my property fits the following criteria, according to HRS 205-44. Please see my reasoning in italics below for each criteria;

(1) Land currently used for agricultural production;
- *My property has been used for our family residence and four single-family rentals for nearly seven decades.*
- *My property is not currently and has never been used for agricultural production.*
- *The City and County of Honolulu Property Class is "Residential".*

(2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
- *My property has the productivity rating of C and E grade determined by the Land Study Bureau. An E designation is the lowest productivity quality.*

(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;
- *I could not locate records that my property was identified under ALISH, however in reviewing the classification criteria I am confident my property does not qualify for any of the three classes of agricultural land: Prime, Unique, Other Important. Does the LUC have a recent ALISH assessment of my property?*

(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;
- *My 1.1 acre property with 5 homes do not have the area for any agricultural use.*

(5) Land with sufficient quantities of water to support viable agricultural production;
- *Approximately 142 ft of the property is adjacent to a 50 ft wide, concrete-lined canal built for flood control. Most of the year the water level is about an inch and due to the concrete structure and cannot be pumped from my property. This water source cannot support any agricultural production.*

(6) Land whose designation as important agricultural lands is consistent with general, development, and community plans of the county;
    - *My property would not be suitable for agriculture and has rental homes that provide affordable housing that the community needs. I have (and had) tenants that have lived on the property for over 10 years.*
(7) Land that contributes to maintaining a critical land mass important to agricultural operating productivity; and
    - *My property is 1.1 acres with 5 single family houses and is bordered by a highway, a walled canal and other residential (non-agricultural) properties. There is no possible agricultural use for my property nor the surrounding properties.*
(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]
    - *As described in (5), there is no access to water sufficient to support agricultural production.*

As described above, I believe my property is not qualified for IAL under HRS 205-44 and I request my property to be removed from consideration from the IAL map. I will request LUC records of how my property meets each of the above eight criteria for further steps if required.

In addition to the issue of my property not meeting the IAL criteria, I have the following concerns the LUC has not followed the process required by law, including:

- Inadequate Notice: The first notice I received of my property being considered for IAL was from the April 12, 2021 LUC letter notifying me of the meeting on April 28-29, 2021. I have not received notification of this process prior to this letter, and I am notifying the LUC in this testimony that the required notice was not followed in my case.
- Failure of Due Process: The LUC has not provided me any information on how my property was assessed to meet the criteria outlined in HRS 205-44. An IAL determination cannot be fairly assessed without specific evidence for each property under consideration.
- There is general appearance of government overreach and mismanagement due to non-compliance to laws and processes, failure of transparency to property owners of IAL impact to property rights, and shortcuts taken that puts the burden on property owners to defend their basic property rights.

My 1.1-acre property provides vital, long-term, and affordable rental housing and is a much better use for this purpose than for agriculture. Please remove my property at 41-1702 Kalanianaole Hwy, Waimanalo (TMK is 41008016) from IAL consideration.

Mahalo,

Clarence Nakata
Phone: 858-752-5025
Email: clarence_nakata@yahoo.com
TMK 4-1-008:016

From: April K
To: DBEDT LUC
Subject: [EXTERNAL] Fwd: TMK 8-6-011-004 Criteria
Date: Tuesday, January 4, 2022 8:54:53 AM
Attachments: 01_04_2022 Written Testimony.pdf

Aloha,

Sending written testimony on behalf of Eassie Soares-Haae related to the 1/4/22 IAL agenda item. Written testimony attached.

01/04/2022
Dear Land Use Commission,

My name is Eassie A. Soares-Haae, a shared landowner whose property has been selected as part of the city‘s proposed IAL designations. My property TMK 8-6-011-004 is located in Wai‘anae, on Halona Rd and does not fit any of the 8,3, or 1 Criteria that would allow it to be placed and be recommended for IAL consideration.

1. Adequate soil. Our property is the lower part of a Mountain which has a lot of boulders, rocks, trees, bushes. The soil is dry, hard and is coral based. We have a family cemetery on the property and after digging a foot down it is all coral and lime.

2. Adequate water. There is no water coming from this dry Mountain, no river or stream. When it rains, which is rare, the property floods. There is no irrigation system, number 3 will have an explanation as to why.

3. Previous farming, there was none. During the 100 years of this property the only usage was for pastoral. A cow dairy was subleased on our property for 30 years and ended in 1982. At the present time each family is doing their own farming. Either pastoral or plants.

The City‘s IAL mapping and recommendation process failed to provide the Land Use Commission with enough basic information about my land individually and how it does not meet any of the criteria. Further preventing the LUC from "weighing the standards and criteria with each other" as required before designating my land as IAL.

Thank you for your consideration.

Mahalo,

Eassie A. Soares-Haae

From: Jeff Bloom
To: DBEDT LUC
Subject: [EXTERNAL] Testimony for Jan 6 Hearing re IAL Process - Jeff Bloom
Date: Tuesday, January 4, 2022 2:48:04 PM
Attachments: Waimanalo Blooms Letter to LUC - Oppose IAL Process 1-4-2022.pdf

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Please find my testimony for Jan 6 Hearing re IAL Process (attached).

Jeff Bloom

SENT VIA E-MAIL: dbedt.luc.web@hawaii.gov
Honorable Jonathon Scheuer
Chair
Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96814-2359

SUBJECT: Opposition to Proposed Important Agricultural Lands Designation and Process

Dear Chair Scheuer and Members of the Commission,

My name is Jeff Bloom, and I am a landowner/farmer in Waimanalo and own 2 acres, zoned AG2. Last year I received a letter from the Land Use Commission informing me that my property has been designated by the City and County of Honolulu as Important Agricultural Lands (IAL). Further, I was informed on April 12, 2021 that the Land Use Commission may be taking action to accept the City and County of Honolulu's Important Agricultural Lands designation which includes my property in Waimanalo.

I object to the designation of my property as IAL for the following reasons: the process for the IAL designation was flawed and did not fully inform me of the designation's impact; the LUC process did not provide adequate information as to how the acceptance of these maps would impact my property; I was never given the opportunity to meet with City & County and other officials to ask questions or fully understand the impact of this law; clear guidance on how I could opt out of the IAL designation hasn't been provided; and lastly the process was rushed and has left my family and I confused and perplexed.

I believe the City and County have not followed the process required by law so as to allow the LUC to properly evaluate and thus designate my property as IAL.

I think the City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,

2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,

3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.

5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like me regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Please consider my concerns and reject the City and County of Honolulu's representation that it has followed all procedures with respect to state statute. The IAL designation process needs more vetting. The City and County has not followed the process required by law so as to allow the LUC to properly evaluate and thus designate my property as IAL.

Mahalo for your consideration.

Sincerely,

Jeff Bloom

Jeff Bloom
TMK 41024086

From: Chamaine Mossman
To: DBEDT LUC
Subject: [EXTERNAL] DBEDT LUC (IAL)
Date: Tuesday, January 4, 2022 8:19:54 PM

From: Blade & Chamaine Mossman
To: DBEDT LUC
Subject: [EXTERNAL] IAL DESIGNATION
Date: January 6, 2022

Blade & Chamaine Mossman
87-1040 Hakimo Road
Waianae, Hawaii 96792
TMK 87019018

RE: Conformance of C&C of Honolulu Important Agricultural Lands (IAL) Recommendations Land Use Commission Meeting January 6, 2022

To The Land Use Commission Members,

We at the above referenced TMK is hereby registering a formal objection to being included in the IAL designation for the following reasons:

My wife and I are in our 50's, and we bought this 1.85 acres of land over 20 years ago so that we could raise the animals and fruit trees to enjoy for our own consumption along with sharing with our Ohana and friends not to have to sustain the state of Hawaii, we are sadden that the C&C of Honolulu would come up with their own agenda after all these years for how we should use our land that we worked so hard for and are still working hard for, so please we asked that you stop this from going through.

Mahalo,
Blade & Chamaine Mossman
(808) 554-4681 or (808) 668-4596
Bonehead551@yahoo.com

Sent from my iPad

From:	Chris Hong
To:	DBEDT LUC
Subject:	[EXTERNAL] Written Testimony for LUC Meeting on January 6th, 2022 regarding IAL designation
Date:	Tuesday, January 4, 2022 6:17:34 PM
Attachments:	image001.png Savio - Canyon - Testimony Letter re IAL Designation (1-2022) 1-4-22 (00516857xE1647).PDF

Aloha,
On behalf of Peter Savio I would like to submit the attached as a written testimony for January 6, 2022 Lan Use Commission Meeting.

Please let me know if there are any questions or if you need any other information from us.

Thank you in advance.

CHRIS HONG, AIA
PRINCIPAL

D 808.341.3781
E CHRIS@EHA.DESIGN

735 BISHOP STREET, STE 230
HONOLULU, HI 96813
www.eha.design

January 4, 2022

Via e-mail: dbedt.luc.web@hawaii.gov

Chair Jonathan Scheuer
Land Use Commission
P.O. Box 2359
Honolulu, Hawaii, 96814-2359

Re: January 6, 2022 Land Use Commission Meeting
Agenda Item II – IAL Lands
Waikele Canyon; Tax Map Key No. (1) 9-4-172-003 ("**Property**")

Dear Chair Scheuer and Commission Members:

My name is Peter Savio, and I am the principal of Savio Waikele Canyon Company LLC ("**SWCC**"), the fee owner of the above-referenced Property. I am testifying in strong opposition to the designation of the Property as Important Agricultural Land ("**IAL**"). Specifically, I respectfully submit that I was not provided appropriate notice, nor does the Property meet the criteria to be designated as IAL.

I have noted this in prior letters to the City & County of Honolulu Department of Planning and Permitting (the "**City**"), but I am including it here in order to provide background information to the Land Use Commission (the "**Commission**"). SWCC acquired the Property in late December of 2015. The City's notice of IAL designation for the Property was sent prior to our acquisition, and was presumably received by SWCC's predecessor in interest to the Property. Unfortunately, that notice was not provided to SWCC. While the City informed me that it is not their responsibility to ensure that notices are passed on to subsequent land owners, the fact of the matter is that SWCC was never provided written notice of the initial designation.

Once I become aware of the potential IAL designation for the Property, my legal team wrote to the City in 2016 to request that the Property be removed from the recommended lands and not designated as IAL because the Property does not meet the criteria for designation as IAL and inclusion of the Property as IAL would not further the objectives for the identification of IAL. Thereafter, I and my consultants had several lengthy discussions with Mr. Raymond Young at the City; however, Mr. Young informed me that the City would not be removing the Property from the designation at that time, despite the past and current uses of the Property.

Notwithstanding the City's response, I respectfully direct your attention to the below for a brief background of the Property which clearly demonstrates that the Property does not meet the criteria for designation as IAL.

From 1889 until 1998, the Property was owned and occupied by related entities; the company formerly known as Amfac, Inc. and the Oahu Sugar Company ("**OSC**"). OSC used the Property for various purposes to support its sugar operations, but the Property itself was not in sugar production. The U.S. Army used portions of the Property during World War II, and the U.S. Navy used one of the railway lines that ran through the Property from the 1940s to the

1950s to transport bombs and other munitions to the former Waikele Branch of the Lualualei Naval Magazine, which is located north of the Property. Records dating from 1987 indicate that portions of the Property were utilized by OSC as a dumping ground for rocks and other material generated by the cane sugar production process. OSC ceased operations in 1995 and sold the Property in 1998.

SWCC's predecessor in interest acquired the Property in 2011 and mined the Property for blue rock for building materials. An environmental report conducted at that time concluded that the Property had been subject to agricultural and industrial activities and operations, and, as a result, may have been, and may continue to be, exposed to organic waste, herbicides and other agricultural chemicals. The same report noted that portions of the Property were used as a dump site for mud, rock and other waste and fill material from OSC's agricultural and/or industrial operations, and therefore, the Property may be subject to unstable soil conditions and other adverse effects. SWCC has not conducted any activities on the Property since acquiring it in December of 2015.

As I know the Commission is aware, the statutory criteria used to identify IAL are 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; (4) Land types associated with traditional native Hawaiian agricultural uses; (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. Pursuant to HRS 205-42(b), "[t]he objective for the identification of important agricultural lands is to identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations."

The Property is not currently used for agricultural activities. In fact, the Property has not been actively used for anything for over twenty years. Prior to 1995, the Property served as ancillary land to OSC's agricultural operations on neighboring properties, and portions of the Property were used briefly to support military activities in the neighboring Waikele Gulch, but the Property was not used for agricultural production. Pursuant to the above referenced 2011 environmental report, the soil quality on the Property is likely poor as the result of being a dumping ground for OSC's agricultural and industrial activities and operations. The Property is not associated with traditional native Hawaiian agricultural uses, and does not have sufficient power or infrastructure to support viable agricultural production. Simply put, the Property does not fit the criteria used to identify and designate IAL.

Designating the Property as IAL is not consistent with the Oahu Sustainable Communities Plan, which designates portions of the Property for residential use. Designating the Property as IAL is also not consistent with county zoning, as portions of the Property are zoned for R-5, Single Family Residential Use. Moreover, the majority of the land surrounding the Property is used for residential purposes. To utilize the Property for agricultural production, with the attendant dust, chemicals, and debris, would create a significant nuisance to those homes. Designating the Property as IAL would not contribute to growing a "strategic agricultural land resource base," the stated objective for designating IAL.

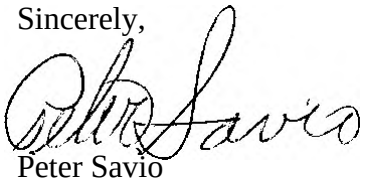
I am also attaching a letter my legal team received from the State of Hawaii Department of Agriculture, which confirms that "the properties' characteristics with respect to the eight IAL identification criteria suggests that the properties would be very poor candidates for designation as IAL."

With all due respect, the City's identification of the Property as IAL was inappropriate and has resulted in my land (and what appears to thousands of others) being improperly designated.

In consideration of the above, I respectfully submit that the Property is not suited for IAL designation and that I strongly oppose this designation.

Thank you for this opportunity to testify.

Sincerely,



Peter Savio
President

DAVID Y. IGE
Governor

DOUGLAS S. CHIN
Lt. Governor

SCOTT E. ENRIGHT
Chairperson, Board of Agriculture

PHYLLIS SHIMABUKURO-GEISER
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512
Phone: (808) 973-9600 FAX: (808) 973-9613

November 7, 2018

Ms. Karen Piltz
Director, Government Affairs
Chun Kerr LLP
999 Bishop Street, Suite 2100
Honolulu, HI 96813-3815

Dear Ms. Piltz:

Subject: Waikele Gulch
Savio Waikele Canyon Company LLC
TMK: 9-4-02: 8, 2, 7, 15 and 72 Waikele, Oahu
Area: 13.022 acres

The Department of Agriculture has reviewed the copy of the letter from Mr. Danton S. Wong (dated June 26, 2017) to Ms. Kathy K. Sokugawa, Acting Director of the City Department of Planning and Permitting, requesting that the subject property be removed from the list of lands to be designated as Important Agricultural Lands (IAL). Our cursory review of the properties' characteristics with respect to the eight IAL identification criteria suggests that the properties would be very poor candidates for designation as IAL.

We were able to identify two of the five parcels listed – 7 (8.982 acres) and 72 (4.083 acres). From the City's plat map for 9-4-02, parcels 2, 8 and 15 were dropped.

Neither parcel is currently nor has historically been dedicated to agricultural activity according to the City Department of Budget and Fiscal Services, pursuant to Section 8-7.3 (dedication of lands for agricultural use) of the Revised Ordinances of Honolulu.

The 2002 Central Oahu Sustainable Communities Plan (December 2002, Urban Land Use Map (Map A-2)), identifies the properties as "Agriculture and Preservation Areas". The proposed revised Central Oahu plan (October 2016) retains the same designation.

The City zoning designation for parcel 7 is R-5 (Residential District) and P-2 (General Preservation). Likewise, the zoning for parcel 72 is P-2 (General Preservation). All properties outside of the gulch are zoned R-5. There are no AG-1 (Restricted

Agricultural) or AG-2 (General Agricultural) zones abutting or near parcels 7 and 72, south of the freeway.

Both parcels are within the State Urban District, as is all surrounding land south of the H-1 Freeway.

The parcels have an Overall Productivity Rating and Land Type of E105 (Map 193, "Detailed Land Classification – Island of Oahu". L.S.B. Bulletin No. 11, December 1972). It appears that both parcels are on the eastern bank of Waikele Stream. There could be some "D30" soil on the properties nearest to the stream. Both soil types have poor to very poor productivity potential for most agricultural uses.

The properties do not appear to be classified according to the "Agricultural Lands of Importance to the State of Hawaii" (ALISH) system.

We are not able to determine the slope of the property however, it is clearly not level. To reiterate, the properties' characteristics with respect to the eight IAL identification criteria suggests that the properties would be very poor candidates for designation as IAL.

Should you have any questions, please contact Earl Yamamoto at 873-9466, or email at earl.j.yamamoto@hawaii.gov.

Sincerely,

Scott E. Enright, Chairperson
Board of Agriculture

From: Mark Harris
To: DBEDT LUC
Subject: [EXTERNAL] Opposition to Proposed Important Agricultural Lands Designation (EMAIL #2)
Date: Tuesday, January 4, 2022 5:43:11 PM

January 4, 2022

Harris Ranch LLC
Attn: Mark Harris
2343 N. King St.
Honolulu, HI 96819

SENT VIA E-MAIL: dbedt.luc.web@hawaii.gov
Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96814-2359

SUBJECT: Opposition to Proposed Important Agricultural Lands Designation

Property reference: 41-450 Hihimanu St. Waimanalo, HI 96795
TMK: 1 4 1 024 060 0061 000

Dear Chair Scheuer and Members of the Commission,

My name is Mark Harris, owner of Harris Ranch LLC located at 41-450 Hihimanu St. Waimanalo, HI 96795 and mailing address 2343 N. King St. Honolulu, HI 96819. I am a landowner/farmer in Waimanalo and recently purchased 10.3 acres of AG-5 zoned farm land on March 21, 2021 for $1,950,000.00. Since purchasing my property 9 months ago I have invested over $400,000.00 in the following:

1. Removing and disposing of 20 abandoned vehicles legally
2. Removing unsafe building structures and a dilapidated residential home
3. Repairing a dilapidated "plant laboratory" and converting it into a legal permitted residential dwelling (still waiting on permits)
4. Clearing and cleaning approximately 7 acres of overgrown jungle
5. Grading and conditioning over 5 acres of soil to plant fruit trees and turf grass
6. Installing over 3500' of brand-new irrigation lines and valves to provide water to the entire 10 acres
7. Installing over 6000' of brand-new sprinkler lines to provide water for grass and fruit trees
8. Planted over 1000 bamboo, Hau, Lime, Lemon, Calamansi, Lychee, Mango, Pomegranate, Avocado trees and 3.5 acres of grass, all to be farmed
9. Installed over 600' of 2' underground drainage lines to ensure my neighbors do not get flooded during heavy rains
10. Repairing and cleaning over 1000 sq ft of state-owned drainage ditch at the rear of my property and fixing an earthen berm to protect my property as well as my neighbor's property
11. installed security fencing and gates

I have hired over 10 different local companies/neighbors to perform work on my ranch/farm all in an effort to get our operations up and running so that we can eventually start making revenue in order to recoup all of these investments listed above. As a local entrepreneur and

businessman on Oahu for the past 20 years I am extremely frustrated that all of the investments and job creation, current and forthcoming, will be jeopardized because of this designation of IAL on my property. This property was meant to be a "new beginning and new venture" for my wife and 4 children so that they would have the option to live and work on this property in the future should they so desire and to keep our family legacy on a piece of land that we own, that we work on and we live on - for this generation and for many more generations to come.

I submitted testimony on May 26, 2021 stating my opposition to the designation of my property as IAL for the following reasons:

1. I recently purchased my property on March 21, 2021. At no time did the sellers of this property, their agent or the title company ever notify me, my family, my attorney or my realtor that this IAL issue existed during the escrow process.
2. Since purchasing this property, I was not informed of this IAL issue, in fact, if I had not run into a neighbor, I would NEVER have known it existed.
3. In what little time I have had to research the IAL issue, I feel the process for the IAL designation was flawed and did not fully inform landowners of the designation's impact; the LUC process did not provide adequate information as to how the acceptance of these maps would impact our property; there was not clear guidance on how I could opt out of the IAL designation; and lastly the process was rushed and has left my family and I confused and perplexed.

Furthermore, the City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,
2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,
4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.
B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS

205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Please consider my concerns and reject the City and County of Honolulu's representation that it has followed all procedures with respect to state statute. The IAL designation process needs more vetting and landowners must be better informed about their options, how such designation will impact their lands, and whether or not they have the ability to "opt out" of such designation.

Thank you for your consideration.

Respectfully,

Mark Harris
Owner
Harris Ranch LLC

From:	Jodi Yamamoto
To:	DBEDT LUC
Cc:	Hakoda, Riley K; Bradley S. Dixon; Jesi K. Onaga
Subject:	[EXTERNAL] Written Public Testimony of Jodi Yamamoto on behalf of EE Waianae Solar LLC - January 6, 2022 LUC meeting
Date:	Tuesday, January 4, 2022 4:41:23 PM
Attachments:	Ltr fr YC to LUC re Supplemental Testimony re IAL Designation - EE Waianae Solar, dtd 1-4-2022.pdf

Good Afternoon,

Attached please find written supplemental testimony from myself on behalf of EE Waianae Solar LLC, regarding the City and County of Honolulu's Important Agricultural Lands Recommendation and City and County of Honolulu's Supplemental Brief, dated December 29, 2021. This written testimony is being submitted in advance of the Land Use Commission's upcoming meeting on January 6, 2022. Please let me know if you have any questions. Thanks, Jodi.

Jodi Shin Yamamoto

Yamamoto Caliboso
A Limited Liability Law Company
1100 Alakea Street, Suite 3100
Honolulu, Hawaii 96813
Main: (808) 540-4500
Direct: (808) 540-4503
Fax: (808) 540-4530
Email: jyamamoto@ychawaii.com
Website: www.ychawaii.com

Yamamoto Caliboso
A LIMITED LIABILITY LAW COMPANY

January 4, 2022

Via Email: dbedt.luc.web@hawaii.gov

State of Hawaii Land Use Commission
P. O. Box 2359
Honolulu, HI 96814-2359

Writer's Direct Dial: (808) 540-4503
Writer's Email: jyamamoto@ychawaii.com

Re: Supplemental Testimony regarding Conformance of City and County of Honolulu's Important Agricultural Lands Recommendation to Applicable Statutory and Procedural Requirements – Hearing January 6, 2022

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

My name is Jodi Yamamoto, and my firm represents EE Waianae Solar LLC ("EWS"), which developed and currently owns and operates a 27.6 photovoltaic ("PV") facility in Waianae, Oahu ("Solar Facility") on land identified by Tax Map Key ("TMK") Nos. 8-5-2:22 and 8-5-3:30 ("Property"). The Solar Facility has been operational since January 2017 and generates roughly 72,900 MWH annually, which powers the equivalent of approximately 12,000 homes on Oahu every year.

I previously submitted testimony to the Commission dated May 25, 2021, in which I noted my client's strong opposition to the City and County of Honolulu's ("County") recommendation ("Recommendation") for Designation of Important Agricultural Lands ("IAL") for Oahu, which currently recommends EWS's Property be designated as IAL. A copy of this testimony is attached as Exhibit A. EWS's objections are based upon the following:

- The County's IAL Designation Process was Fundamentally Flawed and Fails to Protect Landowners' Due Process Rights; and
- The County's IAL Designation Process Undermines the State's Renewable Energy Goals

EWS has received and reviewed a copy of the City and County of Honolulu, Department of Planning and Permitting's ("DPP") Supplemental Brief to its Recommendation of Important Agricultural Lands dated December 29, 2021 ("Supplemental Brief"). Despite the arguments set forth in the Supplemental Brief, EWS's concerns remain unaddressed and objections to the Recommendation remain firm.

With respect to due process, the Recommendation offers no additional information to assuage EWS's concerns that proper notice was not provided, statutory requirements were ignored, and no renewable energy developers and few landowners were included in the consultation process.

With respect to the State and County's renewable energy goals, the use of agricultural land to site solar projects is critical given the land attributes required by these projects and land constraints on Oahu. Section 205-4.5, Hawaii Revised Statutes ("HRS"), specifically permits solar energy projects on agricultural land. While DPP asserts in its Supplemental Brief that the "IAL designation creates little if any changes in a landowner's use of their property" and that "[t]he right of a landowner to use their land for agriculturally permitted purposes as allowed under [HRS §§ 205-2 and 205-4.5], remains unaffected by an IAL designation,"[1] two serious problems remain.

First, DPP is silent regarding the fact HRS § 205-43 mandates that,

> State and county agricultural policies, tax policies, land use plans, ordinances, and rules **shall** promote the long-term viability of agricultural use of important agricultural lands and shall be consistent with and implement the following policies:
>
> (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
>
> (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses; and
>
> (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes.

(Emphasis added). This Legislative mandate that State and County rules shall promote agricultural uses on IAL creates uncertainty regarding the long-term viability of renewable projects on Oahu. Landowners whose land is designated as IAL will be subject to future regulations yet to be adopted. Further, the language of HRS § 205-43(2) could be interpreted to contemplate the relocation of existing nonagricultural uses and activities from IAL to non-IAL, which is particularly alarming for EWS and its Project that has been operating for the past five years.

Second, the Supplemental Brief does not address the fact that certain permitted uses on agricultural land under HRS §§ 205-2 and 205-4.5 require permits. The danger is that a permitting agency may use the policies enumerated in HRS § 205-43 as a basis for denying permits required for projects to move forward. This will have a chilling effect on renewable projects and will further limit the lands available to site renewable energy projects. This in turn will negatively impact the State and County's ability to reach its goals of 100% renewable energy by 2045.

[1] See Supplemental Brief, 2.

The County noted in its Supplemental Brief that, "if the Commission remains unpersuaded that sufficient due process of public notice and hearing has been achieved thus far … it could remove parcels from IAL designation that its landowners have objected to IAL designation."[2] My client would support this option and would support its Property's removal from the Recommendation for IAL designation.

In closing, while EWS supports the County's goals for preserving opportunities for future agricultural land uses, it believes that such goals must also be implemented in a way that does not unnecessarily interfere with renewable energy projects and pre-existing investment-backed expectations. My client looks forward to a resolution that works for all parties.

Thank you for the opportunity to provide these comments regarding the County's IAL Recommendation.

Very truly yours,

Jodi S. Yamamoto
for
YAMAMOTO CALIBOSO
A Limited Liability Law Company

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

Enclosure

[2] Id., 12.

Yamamoto Caliboso
A LIMITED LIABILITY LAW COMPANY

May 25, 2021

Via Email: dbedt.luc.web@hawaii.gov

State of Hawaii Land Use Commission
P. O. Box 2359
Honolulu, HI 96814-2359

Writer's Direct Dial: (808) 540-4503
Writer's Email: jyamamoto@ychawaii.com

Re: Conformance of City and County of Honolulu's Important Agricultural Lands Recommendation to Applicable Statutory and Procedural Requirements – Hearing May 26-27, 2021

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

My name is Jodi Yamamoto, and my firm represents EE Waianae Solar, LLC ("EWS"), which developed and currently owns and operates a 27.6 photovoltaic ("PV") facility in Waianae, Oahu ("Solar Facility") on land identified by Tax Map Key ("TMK") Nos. 8-5-2:22 and 8-5-3:30 ("Property"). The Solar Facility has been operational since January 2017. It generates roughly 72,900 MWH annually, which powers the equivalent of approximately 12,000 homes on Oahu every year, and offsets substantial carbon emissions and petroleum demand.

On May 19, 2021, EWS received a notice from the Commission dated May 11, 2021 ("May Notice"), informing EWS for the first time that the Commission is considering the City and County of Honolulu's ("County") recommendation ("Recommendation") for Designation of Important Agricultural Lands ("IAL") for Oahu at the Commission's May 26-27, 2021 meeting and that EWS's property is recommended for designation as IAL. For the reasons stated below, EWS respectfully requests that the Commission reject the County's Recommendation and require the County to reasonably notify and work with landowners to revise the Recommendation before the County's Recommendation is considered by the Commission.

I. The County's IAL Designation Process was Fundamentally Flawed and Fails to Protect Landowners' Due Process Rights.

With respect to the County's power to propose land to be designated as IAL, the IAL Subchapter requires, *inter alia*, the County's "consultation and cooperation with landowners" and an "inclusive process for public involvement in the identification of potential" IAL. Hawaii Revised Statutes ("HRS") §§ 205-47(b) & (c). Further, given the significant due process concerns involved in the designation of property as IAL, the IAL Subchapter requires the County to "take reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands." HRS § 205-47(d).

However, EWS never received any notice from the County regarding the IAL process, and the Commission's May Notice was the first notice that EWS received regarding the County's proposed IAL designations and was the first notice informing EWS that its Property is being proposed to be designated as IAL.

The County also failed to follow the IAL identification process outlined in Chapter 205, Part III (IAL) ("IAL Subchapter"). HRS §§ 205-44(a) and -47(a) require the County to consider and weigh eight criteria established by the Legislature at HRS § 205-44(c) for the identification of IAL. The County did not conduct this full analysis and instead considered only three "priority criteria" to justify an IAL designation. According to the County, the existence of only one of the following three criteria merited an IAL designation: (1) land currently used for agricultural production; (2) land with soil qualities and growing conditions that support agricultural production; or (3) land with sufficient quantities of water to support viable agricultural production. HRS §§ 205-44(c)(1), (2) and (5).

First, the County's abbreviated system is contrary to statute. Second, in this case, the Property meets none of these criteria and is a poor candidate for IAL. The Property is surrounded by urban uses, is not currently used for agricultural production and had been vacant for many years before EWS acquired it. The Property is also designated as low in agricultural value and is LSB Class E and Unrated. Moreover, the Property has no irrigation system and no current access to water. In short, the County's proposed designation of the Property as IAL is inappropriate, contrary to statute, and needs to be revisited.

Had the County actually conducted the robust landowner consultation process envisioned by the IAL Subchapter, EWS would have gladly worked with the County to ensure that the County's Recommendation was based on sufficient and accurate information. Instead, the County's abbreviated process, which could significantly burden landowners and affect their due process rights, has resulted in a Recommendation that includes for IAL designation land that is wholly unsuited for it. Rather than hear piecemeal the concerns of hundreds of individual landowners who were not able to participate in the initial consultation processes with the County, the Commission should reject the Recommendation and require the County to reasonably notify and work with landowners to revise the Recommendation before the County's Recommendation is taken up by the Commission.

II. The County's IAL Designation Process Undermines the State's Renewable Energy Goals.

The State is undertaking a transformative and critically important mission to reduce the State's reliance on fossil fuels through the achievement of ambitious renewable portfolio standard ("RPS") targets and through the reduction of greenhouse gas ("GHG") emissions, as recognized by statute at HRS § 269-92 (Renewable Portfolio Standard) and HRS § 225P-5 (Carbon Neutrality). The County's decision to mass designate potential IAL because only one "priority criteria" on any piece of land is presumably present could potentially undermine these clean energy goals and will make the development of renewable energy projects more difficult. The use of agricultural land to site renewable energy projects is critical given the land attributes necessary for a successful project and the limited space on Oahu. The Legislature has recognized the need for the use of agricultural land for renewable energy projects in HRS § 205-4.5, which permits different types of renewable energy activities, including solar energy projects, on agricultural land. However, the Legislature has adopted policy goals and directives for IAL that instruct that non-agricultural uses (e.g., renewable energy projects) should be diverted away from IAL, *see* HRS §

205-43, which will inject uncertainty into renewable project development and could undermine the State's clean energy goals. The County's IAL designation process runs afoul of both the explicit procedural requirements and the intent of the IAL Subchapter, while also severely undermining renewable energy policy goals.

EWS would like the County to restart the process following the landowner and public consultation required by the IAL Subchapter. The process should include renewable energy developers in the Technical Advisory Committee and other public consultation efforts. Otherwise, we are left with a piecemeal adjudication by the Commission of the propriety of the County's proposed IAL designation for the hundreds of landowners who have concerns about the County's Recommendation. EWS therefore respectfully requests that the Commission reject the Recommendation and require the County to undertake the landowner and public consultation processes required under the IAL Subchapter and to revise the maps accordingly.

Thank you for the opportunity to provide these comments regarding the County's IAL Recommendation.

Very truly yours,

Jodi S. Yamamoto
for
YAMAMOTO CALIBOSO
A Limited Liability Law Company

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

From:	Linda Baptiste
To:	DBEDT LUC
Subject:	[EXTERNAL] Opposition to Proposed Important Agricultural Lands Designation with attachments
Date:	Tuesday, January 4, 2022 8:28:32 PM
Attachments:	210831 Baptiste LUO Letter.pdf Important Agricultural Lands.eml.msg IAL # 2 51721-2 .pdf

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SENT VIA E-MAIL: dbedt.luc.web@hawaii.gov

Honorable Jonathon Scheuer, Chair
Land Use Commission

P.O. Box 2359
Honolulu, Hawaii 96814-2359

Email: dbedt.luc.web@hawaii.gov

Written Testimony

RE: 4-1-025-006 & 4-1-025- 007 (My Property)
41-849 Kakaina Street, Waimanalo, Hawaii 96795

SUBJECT: Opposition to Proposed Important Agricultural Lands Designation and another request to "opt out."

Dear Mr. Scheuer and Members of the Commission,

My name is Linda Baptiste and I am the owner of the parcels referenced above. I have written letters stating my opposition to my property being designated under the IAL. I am sure you have them on file, however I am attaching copies for your reference again. I also testified directly regarding my opposition concerns.

My position has not changed. I do not want this designation on my property and I want to "opt out." I was never informed about this designation and only found out about it through a mass mailing from Durett Lang Morse, LLLP.

I believe that my due process has been denied. I further believe the City and County have not followed the process required by law so as to allow the LUC to properly evaluate and thus designate my lands as IAL.

This property has been our family home since 1968 and we have complied with the agriculture zoning on the property. My husband and I have raised children, grandchildren and great grandchildren - generations on our property. We want our family to have generations to follow.

I believe that the City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,
2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to

inaccurately describe and recommend many parcels as satisfying the IAL criteria,

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.
B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.
C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

It is apparent that far too many landowners are representing the same issues:
1. Lack of transparency.
2. Lack of proper and timely notifications or any notifications at all.
3. Mis-information and incorrect information propagated from officials either intentionally or accidentally, none the less, wrong information and representations.
4. Harmful and wrongful reckless disregard of a landowners' legal rights.
5. People, law abiding land owners and community members will be negatively and adversely affected.
6. I believe that having the facts that have been presented in prior testimonies (written and verbal), would mean that moving forward is quite simply wrong.
7. I also believe it would be unethical knowing that such a decision adversely affects not only my legal rights but also the legal rights of so many other land owners.

There is no justification allowing this to move forward that overrides so many land owners rights. It would simply be morally and ethically wrong. I sincerely believe that members knowing that there are so many issues of contention regarding the IAL stated above should, in good conscience, end this here and now and the LUC should remand the map back to the City and County with instructions for the City and County to comply with the law.

Please, let me "opt out" of this overreaching and flawed designation.

Once again, thank you for your kind consideration in this matter.

Sincerely,

Linda Baptiste
Linda R. Baptiste

Linda Baptiste
baptiste.linda@gmail.com
Cell Phone: 808 259-9648

ATTORNEYS AT LAW

DURRETT LANG MORSE, LLLP

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

(Via email to: info@honoluludpp.org; CC: lee@code-studio.com)

City and County of Honolulu Planning Commission
c/o Department of Planning and Permitting
650 South King Street, 7th Floor
Honolulu, HI 96813

Re: Proposed Revisions to the Land Use Ordinance

Dear Chair Brian Lee and Commissioners:

Proposed changes to article five the City and County of Honolulu's Land Use Ordinance ("LUO") will soon be put before the Planning Commission and possibly the City Council. Our office represents Mrs. Linda Baptiste. Through her trust, Mrs. Baptiste owns two parcels identified as Tax Map Key No. (1)41025006 and Tax Map Key No. (1)41025007. Both parcels are presently zoned for agricultural use. Mrs. Baptiste is urgently worried that she will lose the right to live in her own home due to the stricter occupancy restrictions looming in article five of the proposed revisions to the LUO.

Under the standard set by HRS § 205-4.5, individuals and their families are free to live in their homes on agricultural land if their home is "used in connection with a farm" or "agricultural activity provides income to the family" living on the agriculturally zoned land.[1] The proposed revisions for Article Five of the LUO threaten to codify a much harsher and discriminatory restriction for living on agricultural lands.[2] Contrary to the broader occupancy rights established in HRS § 205-4.5, the proposed LUO amendment would mandate that anyone living on agricultural land must be actively farming. This suggested revision to the LUO specifically articulates that "leasing land, managing labor, or managing a business are not considered performance of an agricultural activity."[3]

These new occupancy restrictions appear to be intended to prevent gentleman farms and ensure the productive use of O`ahu's agricultural land.[4] Despite this laudable intent to protect Oahu's agricultural lands from luxury housing developments, these occupancy restrictions will have a discriminatory impact that will dramatically harm the most vulnerable in our agricultural communities.

The disparate harms visited on those who are physically and economically vulnerable are reason enough to send the LUO amendment authors back to the drawing board with instructions

[1] Quoted text is taken from HRS 205-4.5

[2] The proposed changes to the LUO can be viewed in their entirety on the Department of Planning and Permitting's own website homepage (http://www.honoluludpp.org) under the "News" heading

[3] *See* Section 21-5.40(d) of the proposed draft article five

[4] A summary of the proposed changes provided by the Department of Planning and Permitting for the benefit of neighborhood boards specifically identifies the new restrictions as being targeted at gentleman farms.

to devise protections for agricultural lands that do not strip disadvantaged homeowners of the right to live in their own homes. Indeed, implementing this new occupancy standard will amount to a de facto eviction for Mrs. Baptiste and other individuals and families residing on agricultural land who are unable to actively farm their lands, either due to health conditions, advanced age, retirement, finances, caregiving responsibilities, or other personal circumstance that may preclude active farming.

Additionally, others may be unable to farm actively simply because their land is too small, too rocky, to dry, etc., such that it is not conducive to the kind of substantial agricultural production that would make farming a viable option for economic survival. Disabled, retired, and elderly farmers and their families are especially likely to suffer severe disruptions to their lives and livelihoods if the new provisions are allowed to proceed.

Mrs. Baptiste's parcels face several conditions which complicate any effort to sustain agricultural production. In addition to the size concerns for the small parcel, significant portions of both parcels are subject to barriers likely to hinder any reasonable form of agricultural production. The vast majority of the total land area across both Parcels does not feature soil qualities sufficient to support agricultural production. Furthermore, the water currently being supplied to the property is inadequate for agricultural purposes.

The condition of the land is not the only barrier to agricultural production on the parcels owned by Mrs. Linda Baptiste. The current occupants of the land are themselves not able to actively engage in farm labor and agricultural production. While she presently draws some income from limited agricultural activity on her lands, Mrs. Linda Baptiste is reaching an age and a physical condition where is not feasible for her to actively farm. Mrs. Baptiste's child and grandchildren live on the property with her. 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.

Mrs. Baptiste's lands are unsuitable for largescale agriculture and Mrs. Baptiste will soon be totally unable to engage in farm work due to her old age and poor health. Therefore, it would be unreasonable to apply a new occupancy standard to Mrs. Baptiste's land which only allows her to live on the land when she is actively engaged in farm labor. The proposed new occupancy restrictions for agricultural land would render the Baptiste family's occupancy of their own land illegitimate and amount to a de facto eviction of Mrs. Linda Baptiste and her relatives from a property that they have developed and invested in extensively over the years. This potentiality is of profound concern to Mrs. Baptiste.

Even if no immediate enforcement actions are taken against the Mrs. Baptiste in connection with the LUO revision, the new occupancy restrictions will continually be a source of stress and concern for the Baptiste family and any future landowners or occupants of the parcel. The passage of the revised LUO will create a threatening uncertainty which will loom over Mrs. Baptiste's genuine desire to peacefully live out her days on her own property and pass that property down to her heirs without the threat of eviction and foreclosure. Degrading Ms. Baptiste's occupancy rights and disrupting her life in this manner simply because she is not physically able to operate a substantial farm would be unjust, blatantly discriminatory, and

senseless. Furthermore, application of the new occupancy standard to Mrs. Baptiste's land will fail to meaningfully protect O'ahu's agricultural industry or discourage in any meaningful way the establishment of gentlemen farms.

Mrs. Baptiste strongly objects to the proposed changes to the LUO. Should the LUO revision proceed, Mrs. Baptiste would request a contested case hearing to ensure due protection of her interests in the face of unreasonable harm. Imposing overly strict occupancy restrictions across O'ahu's nearly 128,000 acres of agricultural land will violate the basic property rights of legions of small landowners, many of whom have invested their life's work and savings into their homes on agricultural lands over decades and generations.

Mrs. Baptiste asks that the Planning Commission cautiously approach any actions or decisions that would disproportionately harm those disabled and elderly members living in Oahu's agricultural communities. Indeed, Mrs. Baptiste hopes the Planning Commission will require agency officials to work on devising mechanisms that can help safeguard agricultural lands and production on O'ahu, without stripping agricultural landowners of their basic property rights and evicting people like Mrs. Baptiste and her relatives from their longtime homes. Mrs. Baptiste implores the planning commission to require the exploration of alternative paths rather than approving the deeply flawed and harmful restrictions currently proposed for agricultural dwellings in the revised LUO.

Very truly yours,

DURRETT LANG MORSE, LLLP

Kalani A. Morse

KAM
Enclosure

Linda R. Baptiste
41-849 Kakaina Street
Waimanalo, Hawaii 96795

May 17, 2021

Mr. Daniel E. Orodenker
Executive Officer
Land Use Commission
P. O. Box 2359
Honolulu, Hawaii 97804-2359

Email: dbedt.luc.web@hawaii.gov

Subject: C&C of Honolulu - Important Agricultural Lands (IAL) Designation

RE: 4-1-025-006 & 4-1-025- 007 (My Property)

Dear Mr. Orodenker:

I am opposed to the planned IAL program which will adversely affect my property, and respectfully request that my property be excused and excluded. I am "opting out" from any IAL designation. This option was denied me because the City and County (C&C) lacked transparency and proper property owner notification. Certified Return Receipt letters at the onset to all owners should have been the very minimum.

This is a followup to my letter dated April 25, 2021.

It has become even more apparent since your zoom hearings in April 2021, that the notification to owners was incomplete, insufficient, confusing and poorly executed.

Not only was I never informed or notified about the IAL, but in checking with many of my neighbors, most of them had no knowledge of this IAL designation or that their properties were affected. The number of uninformed, misled or misinformed property owners is disturbing and shameful in light of the fact the City and County is representing that they complied with procedures.

Overwhelming evidence exposes that proper notification to owners was not complied with. If the City and County is representing that they complied with procedures, the procedures were flawed, incomplete and insufficient to keep the property owners informed. The lack of transparency and non-disclosure from the City and County opens many legal questions at the very minimum. City and County owes an explanation of when this IAL morphed from optional to mandatory!

Additionally, my neighbors that had "some Idea" about the IAL did not believe that it affected them. Neighbors who were members Waimanalo Agricultural Association (WAA) were led to believe that this was an optional designation and that there was a choice as to whether one wanted to participate. I am attaching documentation from the WAA dated 3/9/17, indicating that this was an optional program. Please refer to attachment stating that the option to OPT out was available.

I was not a member of WAA in March 2017, so I was not privy to this information. As I stated in my last letter:

"**I was NEVER informed of this IAL Designation affecting my property**. Had I been informed, my husband and I would have immediately formally objected to this change and taken all legal measures to protect our property from this."

I did attend a WAA meeting on Thursday, May 13, 2021, where the IAL was discussed. I was appalled that most of my neighbors and friends had no idea that their properties were involved with the IAL designation. The lack of transparency and full disclosure, the fact that the C&C has not completed the "incentives" and other obligations is all the more compelling that this is flawed on multiple levels.

Full disclosure to the affected owners in this matter is non existent. I believe that full disclosure isn't possible because all incentives from the county have not been met or completed.

Again, I will state , because I have not been informed properly and in a timely manner from any governmental entity, I firmly believe that my due process under the law as been denied.

I am officially requesting that my property indicated above be excluded and exempt from the IAL and I be allowed to OPT out.

In my opinion, this IAL designation is poorly planned, incomplete and regarding owner notification poorly executed. It appears to encompassed a broad sweep, poorly though out, and adversely affecting many law abiding land owners. There is a serious problem in that there are so many land owners indicating that they also were not or have not been informed of this.

Thank you in advance for your time and consideration of these issues.

Sincerely,

Linda Baptiste

Linda R. Baptiste
Phone 808 259-9648

WATARAI, YVONNE Y. TRUST TMK 87018023

PROPERTY ADDRESS: 87-969 PAAKEA RD., WAIANAE, HI 96789

MY WRITTEN TESTIMONY FOR LUC HEARING (SCHEDULED FOR JANUARY 6, 2021)

To Whom It May Concern,

Before I state my reasons as to why I disagree with this entire IAL, I would like to say that this IAL seems to be another RAIL DEBACLE! I feel it's not throughly planned, there are issues that have not been thought out.... like the rail where the wheel on the train no fit the tracks!

1. I feel that throughout this YEARS and YEARS long process, I was not given adequate notice and due process as required by the statute and the constitution. I always thought the government was here to protect us, not harm us.

2. I was not notified of the restrictions the IAL designation would put on my basic property rights. How can the government FORCE me and tell me what to do with property that has been in my family for generations?

3. It seems as the planners relied on inaccurate mapping and inaccurate records to satisfy the IAL criteria. I feel that each individual property needs to be examined on it's own. Also in my own searching of properties on Paakea Rd, I found that some properties are deemed residential. I always thought that area was agriculture. I would like to know how that came to be?

4. As for issues not thought of...the IAL recommendations were submitted without concrete definitions of what kind of incentives the landowners will be given. Is it in writing or is it like that Mr. James Nakatani who said at a meeting, "it's all in my head?".

5. Enough information was not provided to the LUC regarding my property and other INDIVIDUAL properties as to whether it/they meet the criteria before designating my land as IAL. My property does not have running water! If someone had come to my property and gotten it's history, they would know I can't farm the land without water.

6. I feel I was not properly notified about the City and County's notification process.

Because of all that I have stated, the LUC should remand the map back to the City and County with instructions for the City and County to:

1. Provide clearer and verifiable notifications to, and actual cooperations and consultation with landowners regarding the fact and consequences of IAL recommendations and designation of their lands as required by HRS 205-47.
2. Gather and provide the LUC with information about each parcel to enable the LUC to perform the proper weighing of all standards and criteria as required by HRS 205-44.

TO SUMMARIZE, I BELIEVE THE CITY AND COUNTY HAS NOT FOLLOWED THE PROCESS REQUIRED BY LAW AS TO ALLOW THE LUC TO PROPERLY EVALUATE AND DESIGNATE OUR LANDS AS IAL. I DON'T UNDERSTAND HOW THE GOVERNMENT CAN DICTATE WHAT I CAN OR CANNOT DO TO MY PROPERTY.

THANK YOU,

Yvonne Watarai

WATARAI, YVONNE Y. TRUST TMK 87018023

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THANK YOU,

Yvonne Watarai

WATARAI, YVONNE Y. TRUST TMK 87018023

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THANK YOU,

Yvonne Watarai

Dorene Cooper

Email: dorene1950@gmail.com

TMK: RP 1-8-7-018-018-0000-000

On behalf of my husband and I, who are the registered owners of parcel identified as Tax Map Key No. 187018018. I am strongly opposed to the IAL designation to my property, 87-630 Kaukama Rd, Waianae Hi 96792. My husband and I bought this property in 1996 as agriculture use, that was 26 years of blood, sweat, and tears that was put into this land. By changing my land to IAL, you are basically saying that I cannot live on my own property without actively farming. I am 71 years old and cannot physically continue farming without the help of my children. This issue has been causing unneeded stress upon me and my family.

I also believe that the city's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,

2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,

3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.

5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

In closing, this issue is currently and will continue to cause me unhealthy stress, worrying, and lack of sleep thinking about if I will lose my right as a homeowner to live on my own property that I and my husband bought 26 years ago as agriculture use, which allows me to live on, with no active farming requirements of the owners. I believe the City and County have not followed the process required by law so as to allow the LUC to properly evaluate and thus designate my land as IAL. I STORNGLY OBJECT TO THE PROPOSED CHANGES TO THE LUO.

Thank you,

Dorene Cooper

Land Owner

Ronald J. and Mary Tubbs
41-950 Kakaina St.
Waimanalo, HI 96795
TMK 4-1-010-018
Email: rtubbs@hawaii.rr.com

Jan. 4, 2022

RE: Oahu C&C Non-compliance with required IAL Identification Processes

Honorable Land Use Commission Chair Orodenker & Members,

The City and County have not followed processes required by law to allow the LUC to properly evaluate and recommend parcels for IAL designation, and they mislead us at their meeting.

1. The C&C used an expedient, **superfluous method of recommending properties**. They used existing maps, with no attempt to coordinate the data from two or more maps, or better yet, to triangulate data from three maps to identify properties meeting more than one IAL criteria. The Dept. of Planning and Permitting's (DPP) self-described procedure of "casting a wide net" using only one criteria was inadequate and did not identify the best, most important agricultural lands. They basically "kicked the can down the road," calling their IAL recommendations a "Work in Progress," to be "refine[d]…when it reaches the City Council and LUC." (See DPP Notice to Affected Landowner, dated 12/29/16, p.5, FAQ item 13.)

2. **They did not communicate to the LUC, which of the (8) IAL criteria each property met** so that the LUC could perform the required weighting of all of the eight IAL criteria specific to a parcel as required by law, and then evaluate each one and designate the most Important ones. The information provided to the LUC about our land, and all of those recommended was inadequate to enable the LUC to properly do its job as required by HRS 205-44.

3. The **DPP's gave misleading communication during meetings. They left out key information regarding the impact of IAL designation on our basic property rights.** Instead they stated incorrectly during meetings "There would be no change to the value of the property."

The process the C&C used to identify IAL lands was flawed. It lacked depth to create meaningful IAL recommendations, did not communicate criteria met by each parcel so as to allow the LUC to do their job, and their meetings to owners lacked transparency. The LUC should remand the recommended lands back to the City and County with instructions to a) clearly communicate the full impact of IAL designation on one's property rights and to b) gather and provide the LUC with information about which of the eight IAL criteria parcels met, so as to enable the LUC to perform their job as required by HRS 205-44.

Sincerely,

Ronald and Mary Tubbs

From:	John McCauslin
To:	DBEDT LUC
Cc:	Joanna Miranda
Subject:	[EXTERNAL] TMK 85 019054 - McCauslin Testimony re Jan 5-6 2022 State of Hawaii LUC Meeting
Date:	Tuesday, January 4, 2022 7:31:36 PM

TMK 85 019 054

John McCauslin

Waianae Valley Ag Property

john.mccauslinu1960@gmail.com

808 927-2250

Let this notice serve as my testimony for the Jan 5-6, 2022, 9am, Land Use Commission (LUC) zoom meeting.

I am against my property being designated as IAL IAW the City and County of Honolulu recommended mapping requirement.

First dispute and disagreement is being that the square footage designated by the Real Property Property Assessment Division for Ag use is less than an acre.

Secondly, I as the landowner and farmer in particular is submitting written testimony to the LUC weighing in on the fact that I am a 100% Disabled Combat Veteran for which farming is therapeutic for my livelyhood according to my medical condition as recognized by the DOD Department of Veterans Affairs, the State of Hawaii and soon IAW the Social Security Disability.

My major disputes with the City and County IAL program, processes and procedures are outlined in the five areas to follow to include proposals/recommendations as remedy towards thier findings and conditions.

The City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as require by the statute and the constitution,

2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,

3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.

5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Alone with many other farmers and landowners, I was not properly notified or informed about the City and County's recommendations process. Nor are they able to provide proof that such notice was properly delivered as they have no recording or registration confirming receipt of notice(s). Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

In closing, the City and County has not followed the process required by law so as the to allow the LUC to properly evaluate and thus designate my land as IAL as my property does not meet the criteria of the square footage requirement that the City and County failed to research, review and report its entirety to the LUC.

I will make myself available to discuss, deliberate, propose and work with the City and County. However disagree with the City and County program, process and procedures.

Mahalo

TMK 85 019 054

85-508 Waianae Valley Road, Waianae

John McCauslin

From: Laura Johnson
To: DBEDT LUC
Subject: [EXTERNAL] IAL Objection Loren and Laura Johnson
Date: Tuesday, January 4, 2022 3:35:40 PM
Attachments: JohnsonObjectionIAL1_4_22.pdf

To Whom It May Concern:

Attached is a letter regarding the Import Agricultural Lands designation with our objection and request as landowners for a formal hearing for the three parcels listed below my phone number . I am submitting this today, Tuesday the 4th, for the meeting on January 6th, 2022. Thank you for your time.

Sincerely,

Laura Johnson- Landowner
(808) 342-0019

86007010 ("Parcel A"), Tax Map Key No. (1) ("Parcel B") 86007042 and Tax Map Key No. (1) 86010003 ("Parcel C").

Below is a copy of the attached letter in case there are issues in opening the attachment.

January 4th, 2022

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

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

Re.: Important Agricultural Lands

Dear Chair Scheuer and Commissioners:

We are writing on our own behalf regarding the Important Agricultural Lands proposed designation and regarding our three properties. We are the registered owners of the properties that have the following Tax Map Keys: Tax Map Key No. (1) 86007010 ("Parcel A"), Tax Map Key No. (1) 86007042 ("Parcel B") and Tax Map Key No. (1) 86010003 ("Parcel C"). Imposing the restrictions contemplated by an Important Agricultural Lands ("IAL") designation on these parcels would be a severe burden on us. We hereby object to the parcels identified above being designated as IAL.

In its May 20, 2021 letter to the State Land Use Commission, the Office of Planning of the State of Hawaii 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. Each of these parcels, A, Band C, stated above are not more than one acre each. In the event that the LUC does not opt to exclude all small parcels from designation, we still object to IAL designation of our parcels and **request an opportunity to have a formal hearing whereby the LUC can more closely review our parcels and their individual circumstances.**

Moreover, we object the IAL designation by the State of Hawaii Land Use Commission because the IAL mapping and recommendation process:
1. Failed to provide us as a landowners, with adequate notice and due process, as require by the statute and the constitution,
2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,
4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.
5. Failed to provide the Land Use Commission with enough basic information about our land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating our land as IAL.

Along with many other farmers and landowners, we were not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205- 46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like myself regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

We, Loren D. and Laura D. Johnson, rightfully owners of said parcels mentioned above, do not believe the City and County have not followed the process required by law so as to allow the LUC to properly evaluate and thus designate our lands as IAL. And furthermore, such a designation of IAL is not only of a severe burden to us but also unviable for sustaining worthwhile agricultural endeavors. Again, **we object to IAL designation of our parcels and requests an opportunity to have a formal hearing whereby the LUC can more closely review our parcels and their individual circumstances.**

Crystal Posiulai

Email: crissycooper79@gmail.com

Regarding: TMK: RP 1-8-7-018-018-0000-000

I am submitting my testimony to STRONGLY OBJECT TO THE CHANGING OF MY PARENTS LAND TO IAL. This change from agriculture to IAL will plain and simple evict my parent who is 71 years old and have lived and developed this small 2.5-acre property for the past 26 years. Their dreams of owning their own land to farm was abruptly disturbed by this notice that they received. They bought this land 26 years ago as agriculture use, now if changed to IAL, they will need to physically work the land which at 71, is not possible with the current health conditions. I also live on this property with 6 kids of my own. This will displace my family as well as I have my own job to tend to and cannot actively farm. This issue has put worry on my, my parents, and my kids minds, and it shouldn't. My parents spent their hardworking money to pay off this property in full and the threat of losing a place to live, a place that is fully and legally theirs is unheard of and unlawful.

I also believe that the city's IAL mapping and recommendation process:

1. Failed to provide my parents, with adequate notice and due process, as require by the statute and the constitution,

2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights,

3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria,

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.

5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Along with many other farmers and landowners, my parents was not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

As such, the LUC should remand the map back to the City and County with instructions for the City and County to:

A. First enact incentives and protections for IAL lands, landowners, and farmers, as required by HRS 205-46, 205-48, and 205-49, before resubmitting the City and County's maps and recommendations to the LUC.

B. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like my parents regarding the fact and consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

C. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

I STORNGLY OBJECT TO THE PROPOSED CHANGES TO THE LUO.

Thank you,

Crystal Posiulai

Daughter of Land Owner

January 4, 2022

To: dbedt.luc.web@hawaii.gov

From: Diana Young, /Gerald YH Young Trust

Re : TRK# 41018022 Our Property

41-655 #A Kumuhau Street Box 2

Waimanalo, Hawaii 96795

Subject: IAL Hearings Land Use Commission Filing a formal Objection of the IAL Project

Written Testimony by Diana Young

Dear Mr. Scheuer and Members of the Commissions:

My name is Diana Young trustee of the above property my husband is Gerald Young. I have written letters of testimony and they are on file with LUC.

Along with many landowners and farmers, I was not properly notified or informed about the City and County IAL designation regarding the new guidelines. The City's IAL inaccurately mapping to date there's no guidelines put in place to help understand this process.

Requesting to be removed from the IAL Project doing Agriculture on our property already. They have failed to provide the Land Commission with basic information about my land and how it does or does not meet all criteria. They have failed to provide me as a landowner, with adequate notice and due process, as require by statue and the constitution. Along with may other farmers and landowners, I was not properly notified or informed about the Citys and County's recommendation process. Moreover, the information provided to the LUC about my land is inadequate to enable the LUC to properly do its job as required by HRS 205-44.

We have been doing Agricultural on our land for many years we are already zoned for agriculture use. Changing our zoning again does not make any sense. For the reasons stated above, we hereby respectfully submit these objects to the designation of the Trust's parcel as IAL.

Please let me "Opt Out" of this program overreaching and flawed designation this program is not clear and communication on many levels are not understandable.

Regarding these issues I have mailed 4 letters into the land commission asking to be opt out. I would like to attach all letters to this opt out process. April 25, 2021, May 20, 2021, and letter from Durrett Lang Morse August 26 2021 these letters are on file from the past hearings with LUC.

Thank you for your understanding in this matter.

Sincerely,

Diana Young

Diana Young

From:	Harrison K. Goo
To:	DBEDT LUC
Cc:	Scott Settle
Subject:	[EXTERNAL] Written Testimony for January 6, 2022 Land Use Commission Meeting re: Important Agricultural Lands for the Island of Oahu
Date:	Tuesday, January 4, 2022 10:54:47 PM
Attachments:	[FINAL] Written Testimony to Land Use Commission re. IAL Designation (00423461-2xD39ED).pdf

To Whom It May Concern:

Please find attached hereto, written testimony that is being submitted on behalf of my client NSR Farms, LLC and its affiliates (collectively, "NSR") in advance of the January 6, 2022 Land Use Commission Meeting regarding Important Agricultural Lands for the Island of Oahu. NSR is one of several landowners affected by the County's recommendation for Important Agricultural Land designation, and is submitting the attached for purposes of objecting to the same. If you have any questions or comments in advance of the hearing, please do not hesitate to let me know.

Thank you.

Kind regards,
Harrison

SettleMeyer Law

Harrison K. Goo | Associate

Main 808.540.2400 | *Direct* 808.599.9439 | *Fax* 808.694.3050
Pioneer Plaza – Suite 1800 | 900 Fort Street Mall |
Honolulu, HI 96813
hgoo@settlemeyerlaw.com | *www.***settlemeyerlaw***.com*

SettleMeyer Law

Scott W. Settle
MANAGING PRINCIPAL

Main 808.540.2400
Direct 808.534.4435
Fax 808.694.3051

ssettle@settlemeyerlaw.com

Via Email and U.S. Mail

January 4, 2022
State of Hawaii Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96814
dbedt.luc.web@hawaii.gov

Re: Important Agricultural Lands Designation in Kahuku

Dear Land Use Commission:

Thank you for the opportunity to comment on the recent recommendation made by the City and County of Honolulu (the "City") to designate certain real property owned by my client, NSR Farms, LLC and its affiliates (collectively, "NSR") in Kahuku as Important Agricultural Lands ("IAL").

Such designated property, more specifically identified as (TMK No. (1) 5-6-3-11, 19-24, 26, 30, & 46), sometimes called the "Mahina Kai Property" (the "Property"), consists of approximately 170 acres, covers 10 different TMK parcels and is located makai of Kamehameha Highway with access provided by Marconi Road. The City has excluded some of the subject parcels from its IAL recommendation, but the vast majority of the Property (approximately 165 acres) has been recommended for IAL designation. The Property is currently zoned AG-2 and P-1. Of the 165 acres recommended for IAL designation, only about four acres are actually used for limited "crop" farming and only about twenty acres are currently used for aquaculture farming. More importantly, none of the farming activity generates sufficient farm products or revenue to sustain a commercially viable farming operation, without current landlord subsidies in the form of below-market rents and water use rates, all of which are subject to change. Simply put, based on the lack of availability of good water, and the poor and unproductive soil, the entirety of the Property is unsuitable and unable to support perpetual or long term economically feasible agricultural operations and is not appropriate for IAL designation. Accordingly, we respectfully request your assistance in removing the Property from IAL consideration.

I. Background.

As you know, all land in Hawaii is classified by your Commission (the "LUC") into four (4) land use districts on the state level: Urban, Agricultural, Rural and Conservation. The IAL designation is an exclusive sub-set of lands within the State Agricultural Land Use District intended to overlay onto existing state and county land use classifications.[1]

[1] *See* HRS § 205-42 ("important agricultural lands" means those lands, identified pursuant to this part, that: (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").

Our understanding of the law, is that land is designated as IAL through either a voluntary or involuntary process. One of the involuntary mechanisms, known as the "County Initiated" method, mandates that all four (4) counties identify and map lands within their respective jurisdictions that have potential for designation as IAL. The planning department for each county (in this case, the City's Department of Planning and Permitting (the "DPP")) is responsible for making IAL designation recommendations to the respective county councils pursuant to HRS § 205-47. The county councils, in turn, will review the recommendations and, if approved, submit maps identifying the proposed IAL designations to the LUC by the summer of 2023.

After the City originally designated the Property as IAL and the LUC began its initial consideration of the same, on June 10, 2021 it sought an opinion from the State of Hawaii's Department of the Attorney General (the "AG") relative to issues and arguments raised by numerous parties, including NSR, vehemently objecting to the same. A copy of NSR's objections (the "Objections"), and the reasons therefore that were drafted by my office and emailed to Councilmember Ikaika Anderson's office on December 27, 2018 is enclosed herewith as Exhibit "A".

On September 23, 2021 the AG's office issued an opinion letter in response to the LUC's request (the "Opinion") concluding, among other things, that the LUC must "conduct an independent review of the extent to which the proposed IAL lands meet the statutory criteria and determination that IAL designation is necessary to meet the broader objectives and policies for IAL", as well as to "apply quasi-judicial proceeding to provide an appropriate degree of due process protection for the property rights of affected landowners". A copy of the Opinion is enclosed herewith as Exhibit "B".

II. The Property Does Not Satisfy the LUC's Standards for IAL Designation.

As noted in the Objection, and in addition to the City's procedural failings as set forth therein, the LUC should not adopt the City's recommendation because the Property does not sufficiently meet any of the standards that have been established by the LUC and which were required to be scrutinized by the same as noted in the Opinion. HRS §205-49 states, in relevant part:

> In designating important agricultural lands in the State, pursuant to the recommendations of individual counties, the commission shall consider the extent to which:
>
> 1. The proposed lands meet the standards and criteria under section 205-44[2];

[2] HRS § 205-44(c) sets forth eight separate criteria that the LUC must consider when evaluating whether land should be designated as IAL including, specifically:

1. Land currently used for agricultural production;
2. Land with soils qualities and growing conditions that support agricultural production of food, fiber or fuel- and energy-producing crops;

2. The proposed designation is necessary to meet the objectives and policies for important agricultural lands in sections 205-42[3] and 205-43[4]; and

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3. Land identified under agricultural productivity rating systems; such as the State's Agricultural Lands of Importance to the State of Hawaii (ALISH) system [...];
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 IAL is consistent with county general, development, and community plans of the county;
7. Land that contributes to maintaining a critical 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.

[3] HRS § 205-42 sets forth the following:

(a) As used in this part, unless the context otherwise requires, "important agricultural lands" means those lands, identified pursuant to this part, that:

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.

(b) The objective for the identification of important agricultural lands is to identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase agricultural self-sufficiency for current and future generations. To achieve this objective, the State shall:

1. Promote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses; and

2. Establish incentives that promote:

A. Agricultural viability;

B. Sustained growth of the agriculture industry; and

C. The long-term agricultural use and protection of these productive agricultural lands.

3. The commission has designated lands as important agricultural lands, pursuant to section 205-45; provided that if the majority of landowners' landholdings is already designated as important agricultural lands, excluding lands held in the conservation district, pursuant to section 205-45 or any other provision of this part, the commission shall not designate any additional lands of that landowner as important agricultural lands except by a petition pursuant to section 205-45.

Any decision regarding the designation of lands as important agricultural lands and the adoption of maps of those lands pursuant to this section shall be based upon written findings of fact and conclusions of law, presented in at least one public hearing conducted in the county where the land is located in accordance with chapter 91, that the subject lands meet the standards and criteria set forth in section 205-44 and shall be

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[4] HRS § 205-43 sets forth eight (8) separate criteria that all state and county agricultural policies, tax policies, land use plans, ordinances and rules must follow relative to IALs including:

1. Promote the retention of important agricultural lands in blocks of contiguous, intact, and functional land units large enough to allow flexibility in agricultural production and management;
2. Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
3. Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
4. Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;
5. Provide a basic level of infrastructure and services on important agricultural lands limited to the minimum necessary to support agricultural uses and activities;
6. Facilitate the long-term dedication of important agricultural lands for future agricultural use through the use of incentives;
7. Facilitate the access of farmers to important agricultural lands for long-term viable agricultural use; and
8. Promote the maintenance of essential agricultural infrastructure systems, including irrigation systems.

> approved by two-thirds of the membership to which the commission is entitled.

Here, and as set forth more fully below, as well as in the report prepared by PBR Hawaii ("PBR") (the "Report")[5], the City's current designation fails to meet many of the criteria required pursuant to HRS § 205-49, and the statutes referenced therein.

First, the City made an error in concluding that the Property has "sufficient quantities of water to support viable agricultural production". As further detailed below, the Property simply does not have sufficient water rights (or other necessary factors) to support viable agricultural production.

The Property is served by a private water system that is owned and operated by the Kahuku Water Association ("KWA"). As the Property's only potable water source for both farming and for personal usage, KWA allocates the Property just 44,000 gallons of potable water per day. While this may be sufficient to support the approximately four acres of very limited crop farming currently on the Property, the KWA water cannot support more than 15–30 total acres of crop farming, a far cry from the 165 acres that has been recommended for IAL designation. It is unreasonable to find that a water source capable of supporting farming on only 9–18% of the Property's 165 acres constitutes "sufficient quantities of water to support viable agricultural production" on the entire land. Furthermore, the Property lacks water storage and distribution infrastructure to support or sustain agricultural usage. This very limited potable water resource must also be utilized by families currently living in farm dwellings on the Property, further limiting the availability of water for farming purposes.

Aside from the limited amount of potable water from KWA (the Board of Water Supply does not service the Property), the only available water on the Property is brackish. And, while the City previously advised NSR that the existence of one brackish water well on the Property alone was enough to justify the IAL recommendation, in fact the brackish well is insufficient to support even the existing aquaculture farms (covering less than twenty acres) on its own. The City did not consider and may not have been aware that the majority of the brackish water used for aquaculture on the Property comes from the neighboring state wildlife reserve, which provides such water gratuitously and is not guaranteed for future usage. Moreover, even if there was sufficient brackish water on site, the quality of such brackish water is ill-suited for the viable production of agricultural crops and the capital and operating cost needed to treat the same would be impossible for a farm owner to bear over the long term. Finally, its prolonged presence in the soil would eventually render it unusable for any agricultural production, thereby rendering the Property ill-suited to large-scale, prolonged commercial production. The City was ultimately incorrect in determining that the brackish water well constitutes "sufficient quantities of water to support viable agricultural production" on the land.

In addition to insufficient water resources on the Property, the soil on the Property is unable to support sustained agricultural usage and is part of what limits crop farming to only four acres on the Property. The Property has very little topsoil and much of the surface is exposed coral. According to the Land Study Bureau, the Property has a soil rating of "E", which is the lowest productivity rating. The limited and poor soils are further exacerbated by minimal rainfall

[5] A copy of which is enclosed herewith as Exhibit "C".

and their unprotected exposure to the salt-laden trade winds. What this means for large-scale, sustained commercial production is that a farm operator would need to purchase and have delivered large quantities of topsoil, compost and amendments every year to supplement the bad soils, all of which would be financially infeasible in both the short, as well as long term.

Finally, it is worth noting that the aquaculture farms have little bearing on the agricultural viability of this particular Property. The aquaculture farms on the Property could be built almost anywhere as they are man-made ponds that are lined on the bottom and pumped-filled with brackish water via long pipes. Aside from the roughly four acres currently used for crop agriculture, the remainder of the Property has never been used for sustained agricultural farming. It is for good reason, therefore, the Property owners have never received any proposal by a prospective agricultural tenant for widespread agricultural operations.

Had the City considered all, or even some, of these facts, supported by the findings in the Report, it could not have found that the Property satisfies any of the criteria necessary for an IAL recommendation. Accordingly, the LUC should decline to adopt the City's recommendations with respect to this Property.

III. The Property Should Not be Recommended for IAL Designation Without a Clear Articulation of all Restrictions and Benefits Associated with the Designation.

An IAL designation attaches certain restrictions and benefits to the designated lands. However, at this juncture, it is unclear exactly what these restrictions and benefits will entail. It is unfair, and an affront to due process, for the government to involuntarily classify the Property as IAL without allowing the landowner to fully understand the consequences of the designation and be given a reasonable opportunity to respond.

Some restrictions are already in place (e.g., requests for special permits on IAL property will be more difficult to obtain, plans for dwellings on IAL property will require special approval), and in June 2018, NSR was advised that there may be additional restrictions unilaterally placed on IAL designated property in the future. Given the difficulty of removing an IAL designation under HRS § 205-50, it seems unconscionable to cast aside a landowner's position and burden their property with a classification that is nearly impossible to remove and could someday impose additional and unknown restrictions to which the landowner may be unable to object.

HRS § 205-46 further requires the State of Hawaii and each county to establish "[i]ncentives and protection programs" to support lands that are qualified and designated as IAL. To date, the City and County of Honolulu has not announced what these incentives will be and NSR cannot assume that they will be sufficient to change NSR's position on the IAL designation. Without more information about the impact that the IAL designation will have on the Property and NSR's interests thereto, it is clearly a violation of due process and inappropriate for the City and County of Honolulu to impose the IAL designation against the landowner's will.

IV. Conclusion.

The LUC should not approve the City's recommendation to designate the Property as IAL because the recommendation was made without consultation with NSR and due consideration of the relevant facts and criteria. As noted above, the Property is simply not a viable site for sustained agricultural usage, and to somehow convert the Property into a

sustained agricultural operation would require an exorbitant amount of money, time and effort that no rational commercial farmer could or would undertake. These efforts should be applied to far more appropriate sites where such sites can readily and economically be put to productive agricultural use. NSR did not have a meaningful opportunity to present its findings and consult with the City as required under the statute. We believe that if the City had the Report, for example, it would have determined that the Property does not sufficiently meet any of the statutory criteria for IAL designation.

Thank you for your time and attention to this matter. Please let me know if you have any questions or would like any additional information.

Very truly yours,

Scott W. Settle, Esq.
Harrison K. Goo, Esq.
for
SETTLE MEYER LAW
A Limited Liability Law Company

Enclosures
cc: client (w/encls.)

From: Scott Settle
Sent: Thursday, December 27, 2018 5:44 PM
To: 'AAndrew Malahoff - Office of Council Member Ikaika Anderson (amalahoff@honolulu.gov)'
Subject: IAL Designation

Hi Andrew, thank you for speaking with me today. Attached please find a letter to Councilmember Anderson regarding my client's property in Kahuku that we believe has been inappropriately included on the list for IAL designation. Please let me know if the Councilmember has any questions or needs further information. Thank you!

Kind regards,
Scott

SettleMeyer Law

Scott W. Settle | MANAGING PRINCIPAL

Main 808.540.2400 | *Direct* 808.534.4435 | *Mobile* 808.722.7735
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ssettle@settlemeyerlaw.com | *www.***settlemeyerlaw.com**

EXHIBIT "A"

SettleMeyer Law

Scott W. Settle
MANAGING PRINCIPAL

Main 808.540.2400
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Fax 808.694.3051

ssettle@settlemeyerlaw.com

Via Email

December 28, 2018
Councilmember Ikaika Anderson
530 S. King Street, Room 202
Honolulu, Hawaii 96813

Re: Important Agricultural Lands Designation in Kahuku

Dear Councilmember Anderson:

Thank you for the opportunity to comment on the recent recommendation to the City Council made by the Department of Planning and Permitting ("DPP") to designate certain property in Kahuku as Important Agricultural Lands ("IAL"). As mentioned, DPP's proposed designation includes real property owned by my client, NSR Farms, LLC and its affiliates (collectively, "NSR").

NSR's property (TMK No. (1) 5-6-3-11, 19-24, 26, 30, & 46), sometimes called the "Mahina Kai Property" (the "Property"), consists of approximately 170 acres, covers 10 different TMK parcels and is located makai of Kamehameha Highway with access provided by Marconi Road. DPP has excluded some of the subject parcels from its IAL recommendation, but the vast majority of the Property (approximately 165 acres) has been recommended for IAL designation. The Property is currently zoned AG-2 and P-1. Of the 165 acres recommended for IAL designation, only about four acres are actually used for limited "crop" farming and only about twenty acres are currently used for aquaculture farming. More importantly, none of the farming activity generates sufficient farm products or revenue to sustain a commercially viable farming operation, without current landlord subsidies in the form of below-market rents and water use rates, all of which are subject to change. Simply put, based on NSR's experience as landowner, the Property is unsuitable and unable to support perpetual or long term economically feasible agricultural operations and is not appropriate for IAL designation. Accordingly, we respectfully request your assistance in removing the Property from IAL consideration.

1) Background.

The IAL designation is a supplemental state-wide (versus county-wide) land use classification administered by the State of Hawaii Land Use Commission ("LUC").[1] As you know, all land in Hawaii is classified into four (4) land use districts on the state level: Urban, Agricultural, Rural and Conservation. The IAL designation is an exclusive sub-set of lands within the State Agricultural Land Use District intended to overlay onto existing state and county land use classifications.[2]

[1] *See* Hawaii Revised Statutes ("HRS") Chapter 205, Part III.

[2] *See* HRS § 205-42 ("important agricultural lands" means those lands, identified pursuant to this part, that: (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

Under the law, land is designated as IAL through either a voluntary or involuntary process.[3] One of the involuntary mechanisms, known as the "County Initiated" method, mandates that all four (4) counties identify and map lands within their respective jurisdictions that have potential for designation as IAL. The planning department for each county (in this case, DPP) is responsible for making IAL designation recommendations to the respective county councils pursuant to HRS § 205-47. The county councils, in turn, will review the recommendations and, if approved, submit maps identifying the proposed IAL designations to the LUC by the summer of 2023.[4]

2) DPP Failed to Consider the Landowner's Position in Violation of HRS § 205-47.

When designating IAL property through the County Initiated method, HRS § 205-47(b) provides that "[e]ach county shall develop maps of potential lands to be considered for designation as important agricultural lands **in consultation and cooperation with landowners** [...]." (Emphasis added). HRS § 205-47(c) further provides that "[e]ach county, through its planning department, shall develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process."

We understand that DPP held public meetings and engaged with some members of the public before issuing its recommendation to City Council. However, DPP did not consult with NSR or consider NSR's position, as required by HRS § 205-47, prior to submitting NSR's property to the council for IAL designation. When NSR first learned of the proposed IAL designation, NSR engaged PBR Hawaii ("PBR") to advise on the Property's eligibility for IAL designation. After a thorough review, PBR prepared a report for DPP requesting that the Property be excluded from the IAL designation map and explaining the justifications for such exclusion.

NSR understood from DPP's notice to affected landowners that DPP would transmit its recommendations regarding IAL designation in the Fall of 2018. In reliance thereon, PBR arranged to meet and submit its report to DPP prior to the end of the Summer and then met with DPP representatives on September 21, 2018. Unbeknownst to NSR and PBR, however, DPP transmitted its recommendations to the City Council in August, 2018 without any notice to NSR or PBR as to the accelerated timeline. Consequently, this effectively denied NSR a meaningful opportunity to consult with DPP regarding the Property's IAL designation in violation of HRS § 205-47 and in disregard of affected landowners' due process rights.

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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] In 2009, Alexander & Baldwin (A&B) voluntarily petitioned the LUC to designate a portion of their lands (approximately 27,104 acres on Maui and 3,773 acres on Kauai) as IAL. Both petitioned areas met all eight of the IAL criteria set forth in HRS § 205-44. *See Voluntary Long-Term Protection of Agricultural Land in Hawaii*, University of Hawaii at Manoa (https://www.ctahr.hawaii.edu/AgLand/ial.html#faq).

[4] *See Frequently Asked Questions*, DPP, September 2018 (http://www.honoluludpp.org/Portals/0/pdfs/planning/IAL/2018-09IALFAQ.pdf).

3) The Property Does Not Satisfy the LUC's Standards for IAL Designation.

In addition to setting aside DPP's recommendation for failure to consider the landowner's input, the City Council should not adopt DPP's recommendation because the Property does not sufficiently meet any of the standards that have been established by the LUC. HRS § 205-44(c) sets forth eight criteria that the LUC must consider when evaluating whether land should be designated as IAL.[5]

The enabling legislation does not require that all the criteria be satisfied in order to designate a property as IAL. Rather, HRS § 205-44 provides that lands meeting any of the criteria shall be given initial consideration, and then the standards and criteria are to be weighed against each other to determine whether the land will be designated as IAL. The enabling legislation does not specify which criteria are most important or what methodology should be used. We acknowledge that this gives county planning departments some discretion and flexibility when choosing what criteria to use and how such criteria is weighed. However, the eight standards set forth by the statute clearly set forth the legislature's intent on what criteria the legislature determined is important to consider, and therefore, it is reasonable to expect that all eight factors be duly and reasonably considered.

Here, DPP only considered three of the eight criteria set forth in HRS § 205-44 in establishing its recommendation process, and then further determined that land satisfying any one of the three criteria should be recommended for IAL designation.[6] In other words, DPP decided meeting just one of eight criteria was sufficient, and the rest could be ignored. At a meeting with PBR on September 21, 2018, DPP verified that the Property was included in the IAL designation recommendation because it had determined (incorrectly) that the Property had "sufficient quantities of water to support viable agricultural production," satisfying one of the three criteria identified by DPP.

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[5] HRS § 205-44(c) provides:

(1) Land currently used for agricultural production;
(2) Land with soils 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 State's Agricultural Lands of Importance to the State of Hawaii (ALISH) system [...];
(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 qualities of water to support viable agricultural production;
(6) Land whose designation as IAL is consistent with county general, development, and community plans of the county;
(7) Land that contributes to maintaining a critical 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.

[6] Of the eight criteria set forth in HRS § 205-44(c), DPP only considered criteria number one, two, and five ((1) land currently used for agricultural production; (2) land with soils qualities and growing conditions that support agricultural production of food, fiber or fuel- and energy-producing crops; and (5) land with sufficient quantities of water to support viable agricultural production). *See Oah'u Important Agricultural Land Mapping Project*, DPP, August 2018 (http://www.honoluludpp.org/Portals/0/pdfs/planning/IAL/IALReport2018-08-31.pdf).

a. *The Property does not satisfy any of DPP's criteria.*

Unfortunately, DPP made an error in concluding that the Property has "sufficient quantities of water to support viable agricultural production". As further detailed below, the Property simply does not have sufficient water rights (or other necessary factors) to support viable agricultural production.

The Property is served by a private water system that is owned and operated by the Kahuku Water Association ("KWA"). As the Property's only potable water source for both farming and for personal usage, KWA allocates the Property just 44,000 gallons of potable water per day. While this may be sufficient to support the approximately four acres of very limited crop farming currently on the Property, the KWA water cannot support more than 15–30 total acres of crop farming, a far cry from the 165 acres that has been recommended for IAL designation. It is unreasonable to find that a water source capable of supporting farming on only 9–18% of the Property's 165 acres constitutes "sufficient quantities of water to support viable agricultural production" on the entire land. Furthermore, the Property lacks water storage and distribution infrastructure to support or sustain agricultural usage. This very limited potable water resource must also be utilized by families currently living in farm dwellings on the Property, further limiting the availability of water for farming purposes.

Aside from the limited amount of potable water from KWA (the Board of Water Supply does not service the Property), the only available water on the Property is brackish. At the meeting on September 21, 2018, DPP advised PBR that the existence of one brackish water well on the Property alone was enough to justify the IAL recommendation. In fact, the brackish well is insufficient to support even the existing aquaculture farms (covering less than twenty acres) on its own. DPP did not consider and may not have been aware that the majority of the brackish water used for aquaculture on the Property comes from the neighboring state wildlife reserve, which provides such water gratuitously and is not guaranteed for future usage. Moreover, even if there was sufficient brackish water on site, the quality of such brackish water is ill-suited for the viable production of agricultural crops, and its prolonged presence in the soil would eventually render the soil unusable for any agricultural production. DPP was ultimately incorrect in determining that the brackish water well constitutes "sufficient quantities of water to support viable agricultural production" on the land.

In addition to insufficient water resources on the Property, the soil on the Property is unable to support sustained agricultural usage and is part of what limits crop farming to only four acres on the Property. The Property has very little topsoil and much of the surface is exposed coral. According to the Land Study Bureau, the Property has a soil rating of "E", which is the lowest productivity rating. The limited and poor soils are further exacerbated by minimal rainfall and their unprotected exposure to the salt-laden trade winds.

Finally, it is worth noting that the aquaculture farms have little bearing on the agricultural viability of this particular Property. The aquaculture farms on the Property could be built almost anywhere as they are man-made ponds that are lined on the bottom and pumped-filled with brackish water via long pipes. Aside from the roughly four acres currently used for crop agriculture, the remainder of the Property has never been used for sustained agricultural farming. It is for good reason, therefore, the Property owners have never received any proposal by a prospective agricultural tenant for widespread agricultural operations.

Had DPP considered all, or even some, of these facts, it could not have found that the Property satisfies any criteria for an IAL recommendation. Accordingly, the City Council should decline to adopt DPP's recommendation with respect to this Property.

b. Even if the water requirement is satisfied, the LUC is not likely to approve the proposed IAL designation.

Even if the brackish well is somehow found to be a sufficient water source, on balance the LUC is not likely to approve the IAL designation on the Property. Assuming satisfaction of just one criteria is found to be legally sufficient for IAL consideration, the LUC's previous IAL designations demonstrate that proposals must meet a much higher standard in order to be approved by the LUC. PBR conducted a thorough analysis of the Property as applied to the LUC standards for evaluating IAL petitions submitted by over ten large landowners, including Kamehameha Schools, Kualoa Ranch, Hartung Brothers, and Monsanto. Based on PBR's direct involvement with these petitions, PBR concluded that the agricultural lands on the Property do not meet the LUC standards and the LUC is not likely to approve the proposed IAL designation thereof. We believe the City should be similarly circumspect and cautious in determining IAL designations that will have a permanent effect, particularly when imposing this effect on landowners without their consent.

In light of the fact that DPP did not to take into account all necessary information and follow prudent procedures in recommending the IAL designation, and considering the inevitable (and appropriate) rejection from the LUC, NSR requests that City Council remove the Property from the recommended IAL map.

4) The Property Should Not be Recommended for IAL Designation Without a Clear Articulation of all Restrictions and Benefits Associated with the Designation.

An IAL designation attaches certain restrictions and benefits to the designated lands. However, at this juncture, it is unclear exactly what these restrictions and benefits will entail. It is unfair, and an affront to due process, for the government to involuntarily classify the Property as IAL without allowing the landowner to fully understand the consequences of the designation and be given a reasonable opportunity to respond.

Some restrictions are already in place (e.g., requests for special permits on IAL property will be more difficult to obtain, plans for dwellings on IAL property will require special approval), and in June 2018, NSR was advised that there may be additional restrictions unilaterally placed on IAL designated property in the future. Given the difficulty of removing an IAL designation under HRS § 205-50, it seems unconscionable to cast aside a landowner's position and burden their property with a classification that is nearly impossible to remove and could someday impose additional and unknown restrictions to which the landowner may be unable to object.

HRS § 205-46 further requires the State of Hawaii and each county to establish "[i]ncentives and protection programs" to support lands that are qualified and designated as IAL. To date, the City and County of Honolulu has not announced what these incentives will be and NSR cannot assume that they will be sufficient to change NSR's position on the IAL designation. Without more information about the impact that the IAL designation will have on the Property and NSR's interests thereto, it is clearly a violation of due process and inappropriate for the City and County of Honolulu to impose the IAL designation against the landowner's will.

5) Conclusion.

The City Council should not approve DPP's recommendation to designate the Property as IAL because the recommendation was made without consultation with NSP and due consideration of the relevant facts and criteria. As noted above, the Property is simply not a viable site for sustained agricultural usage, and to somehow convert the Property into a sustained agricultural operation would require an exorbitant amount of money, time and effort that no rational commercial farmer could or would undertake. These efforts should be applied to far more appropriate sites where such sites can readily and economically be put to productive agricultural use. NSR did not have a meaningful opportunity to present its findings and consult with DPP as required under the statute. We believe that if DPP had PBR's report, it would have determined that the Property does not sufficiently meet any of the statutory criteria for IAL designation. We further believe that in light of the circumstances, it would be inappropriate and likely a violation of due process for the government to impose this burden on NSR against NSR's wishes.

Thank you for your time and attention to this matter. Please let me know if you have any questions or would like any additional information.

Very truly yours,

Scott W. Settle
for
SETTLE MEYER LAW
A Limited Liability Law Company

cc: client

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September 23, 2021

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

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

Dear Chair Scheuer:

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

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

I. Questions Presented and Short Answers[2]

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

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

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

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

EXHIBIT "B"

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

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

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

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

II. Background

Article XI, section 3 of the Hawai'i State Constitution expresses the State's obligation to conserve and protect agricultural lands, and to identify IAL needed to fulfill these purposes, as follows:

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

(emphasis added).

This constitutional provision was approved by the voters of Hawai'i in 1978, following the passage of this language in the 1978 State Constitutional Convention. It was not self-

executing, however, and required the enactment of legislation to set the standards and criteria for how to accomplish the State's agricultural lands and agricultural self-sufficiency objectives.[3] In 2005, the Hawai'i State Legislature enacted Act 183 to implement article XI, section 3, and what is now Part III, Important Agricultural Lands, in HRS Chapter 205.

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

Part III allows private landowners to voluntarily designate their lands as IAL (*see* HRS § 205-45). Part III also provides a mechanism for the counties to propose lands for IAL designation (*see* HRS § 205-47). Separately, the State can submit a map of lands owned by the State for IAL designation (*see* HRS § 205-44.5).

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

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

III. Analysis

A. Standards and Criteria Under HRS § 205-44

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

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

map potential important agricultural lands within its jurisdiction based on the standards and criteria in section 205-44 and the intent of this part[.]" HRS § 205-47(a). Section 205-44(c), HRS, lists eight standards and criteria and HRS § 205-44(a) provides clarification on the application of those standards and criteria. Specifically:

> (a) The standards and criteria in this section shall be used to identify important agricultural lands. Lands identified as important agricultural lands need not meet every standard and criteria listed in subsection (c). Rather, lands meeting any of the criteria in subsection (c) shall be given initial consideration; provided that the designation of important agricultural lands shall be made by weighing the standards and criteria with each other to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43. (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Liability of LUC Commissioners

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

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

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

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

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

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

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

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

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

D. County Process IAL Determinations Are Quasi-Judicial Proceedings

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

Respectfully,

Linda L.W. Chow
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APPROVED:

Clare E. Connors
Attorney General

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8/28/2018

AGRICULTURAL LANDS ASSESSMENT
FOR
MAHINA KAI
KAHUKU, OAHU, HAWAII

Introduction/Purpose

The subject property is approximately 170 acres and located about 1.5 mile north of Kamehameha Highway with access provided by Marconi Road. Refer to Exhibit 1: Location Map Exhibit 2A: City Proposed IAL Lands (with Tax Map Keys), and Exhibit 2B: TMK. Tax Map Key parcels include:

TMK: (1) 5-6-3-11 -	0.400 Ac.
TMK: (1) 5-6-3-19 -	0.250 Ac.
TMK: (1) 5-6-3-20 -	0.250 Ac.
TMK: (1) 5-6-3-21 -	0.250 Ac.
TMK: (1) 5-6-3-22 -	0.250 Ac.
TMK: (1) 5-6-3-23 -	0.545 Ac.
TMK: (1) 5-6-3-24 -	0.400 Ac.
TMK: (1) 5-6-3-26 -	165.077 Ac.
TMK: (1) 5-6-3-30 -	0.250 Ac.
TMK: (1) 5-6-3-46 -	2.190 Ac.
Total:	169.862 Ac.

To comply with the State's mandate to identify and propose lands within the City and County of Honolulu (City) to be designated as Important Agricultural Lands (IAL), the City is in the process of identifying and recommending candidate lands to be considered for IAL designation. Considered an 'overlay' land use disposition to both State and County land use classifications, the IAL designation is intended to promote the active use of agricultural lands and provide access to financial incentives and other incentives and benefits to reduce the cost of farming and promote the profitability of farming on IAL. Although some of the smaller parcels have been excluded from the City's proposed candidate lands to be recommended for IAL, this assessment addresses the entire land holding.

Under existing land use designations, the subject lands are zoned AG-2 General Agriculture District and Preservation (P-1) by the City and County of Honolulu (refer to Exhibit 3). The Ko'olau Loa Sustainable Communities Plan (Exhibit 4) also identifies the subject lands for Agriculture and Preservation use. Excluding the approximately 6.5 acres of conservation lands along the shoreline, the study area of this assessment includes approximately 63.5 acres of agricultural designated lands.

The purpose of this Agricultural Assessment is to evaluate Mahina Kai lands in greater detail to determine how the lands measure up to the State's eight (8) criteria for IAL. Since the City's IAL analysis has identified almost all of these lands to be recommended for IAL under their draft maps, this assessment also focuses the assessment on the three criteria the City choose to select candidate IAL; existing agriculture use, soil quality and available water. Under the City's IAL analysis and

EXHIBIT "C"

methodology, if the subject agricultural lands meet any one of these criteria, they have been included in the lands proposed to be designated IAL.

STATE IAL CRITERIA

Under State Statutes (Section 205-44, HRS), there are eight criteria to be considered in determining IAL. By law, land does not have to meet all eight criteria to be considered IAL. For each of the eight (8) criteria, the Mahina Kai lands are evaluated below:

1. Lands currently used for Agricultural Production. The property currently used extensively for agricultural use as illustrated in Exhibit 5 Current Agricultural Use and Related Infrastructure. However, the agricultural uses are very marginal economically and would not be considered "important under the IAL statute criteria.

   Hawaii's State Department of Agriculture and University of Hawaii at Hilo undertook the inventory and mapping of current commercial agricultural land use activity during 2015. As shown in Exhibit 6, no commercial agricultural uses were identified for the subject lands.

2. Land with Soil Qualities and Growing Conditions. Although the land has excellent solar exposure (refer to Exhibit 7), the soils are classified by the Land Study Bureau as 'E'; the lowest productivity Rating. Refer to Exhibit 8: LSB Soil Classification. Annual rainfall is minimal (refer to Exhibit 9), and these lands are exposed to the prevailing northeast trade winds that are typically salt laden due to the proximity to the shoreline and high surf during the winter months (see Exhibit 10).

3. Lands Identified under the State's Agricultural Lands of Importance to the State of Hawaii (ALISH). Approximately 21 acres were designated as "Other" under ALISH. Refer to Exhibit 11. Under the ALISH classifications, the evaluation identify lands as Prime, Unique, or Other. As defined under the ALISH classification system, other lands are discussed as follows:

   > *OTHER IMPORTANT AGRICULTURAL LAND is land other than PRIME or UNIQUE AGRICULTURAL LAND that is of state-wide or local importance for the production of food, feed, fiber and forage crops. The lands in this classification are important to agriculture in Hawaii yet they exhibit properties, such as seasonal wetness, erodibility, limited rooting zone, slope, flooding, or droughtiness, that exclude them from the PRIME or UNIQUE AGRICULTURAL LAND classifications. Two examples are lands which do not have an adequate moisture supply to qualify as PRIME AGRICULTURAL LAND and lands which have similar characteristics and properties as UNIQUE AGRICULTURAL LAND except that the land is not currently in use for the production of a "unique" crop. These lands can be farmed satisfactorily by applying greater inputs of fertilizer and other soil amendments, drainage improvement, erosion control practices, flood protection and produce fair to good crop yields when managed properly.*

   The portion of the property designated "other" appear to related primarily to the lands excluded (not owned) from the subject property.

4. Land identified with Native Hawaiian Agricultural Uses. There is no known evidence that the lands were used for Native Hawaiian agricultural uses.

5. Lands with Sufficient Quantities of Water. The property is not served by the City's Board of Water Supply. The property is served by a private water system owned and operated by the Kahuku Water Association (KWA). From the KWA water system, these lands are allocated 44,000 gallons per day (GPD). Depending on the types of crops to be irrigated, the available water would only support approximately 15 to 30 acres of intensive farming. The existing prior and current aquaculture uses utilize shallow sumps to access brackish water. In general, the water resources serving the property are limited and there is currently minimal water storage or distribution infrastructure to support agricultural use.

6. Consistent with the City's Sustainable Communities Plan. As noted, the property is primarily zoned Agriculture (AG-2) City and designated Agriculture on the City's Ko'olau Loa Suitable Communities Plan. Conservation lands along the shoreline are zoned Preservation (P-1) and includes approximately 6.5 acres. Refer to Exhibits 3 and 4.

7. Land that contribute to maintaining a Critical Mass Important to Agricultural Operating Productivity. The subject lands are remote and are not adjacent to any other productive agricultural lands.

8. Lands with or near Support Infrastructure, such as transportation to markets, water and power. The property is remote with no municipal water service is provided to the property. Access to the property is provided via a privately owned roadway.

Conclusion: Based on recent State Land Use Commission hearings and decisions regarding the designation of IAL, the Mahina Kai lands would not sufficiently meet the State Land Use Commission's criteria, standards and intent of the IAL to the considered candidate lands for IAL designation.

CITY AND COUNTY OF HONOLULU PROPOSED IAL

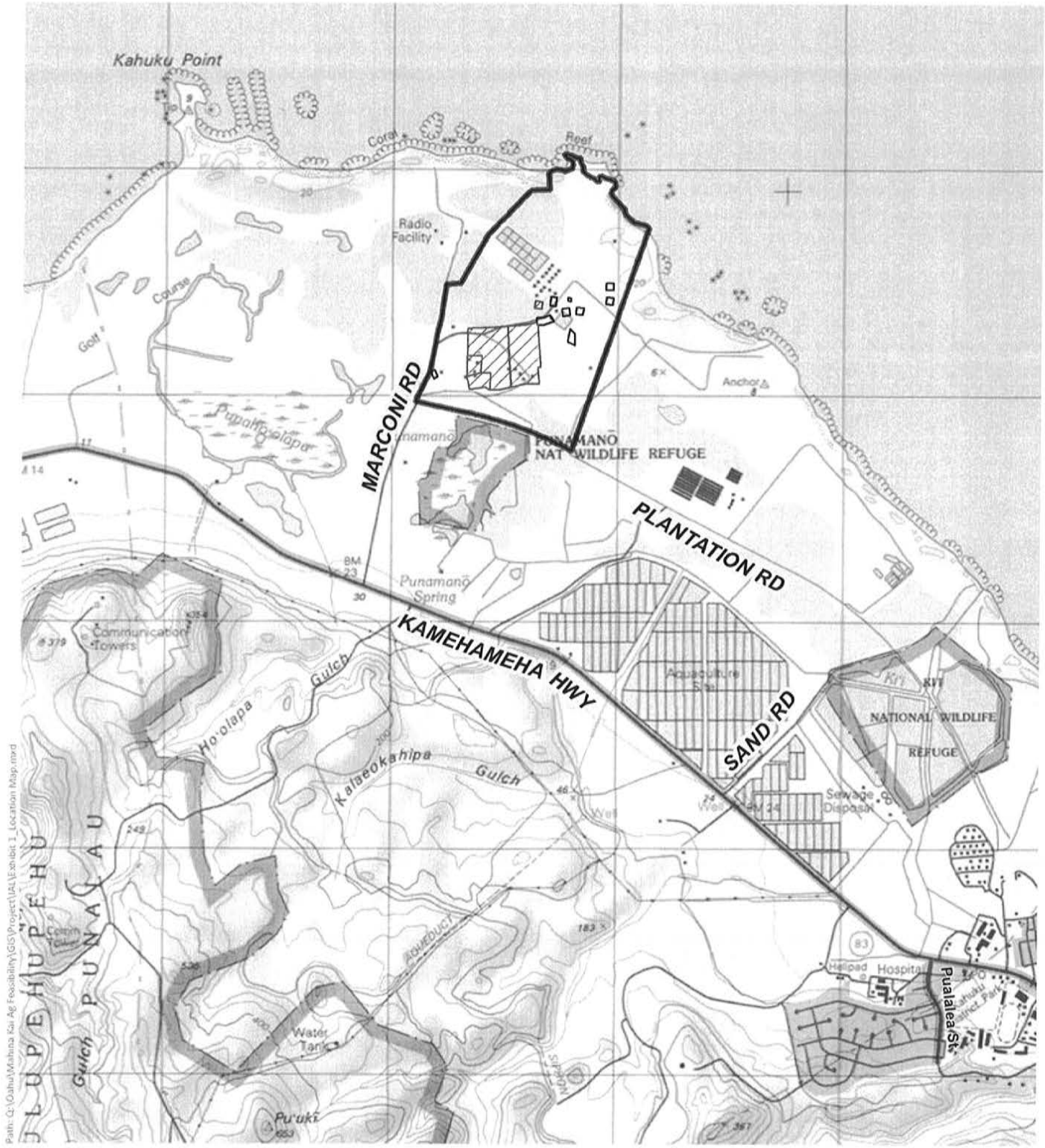
Under the City's process to identify IAL on Oahu, only three of the State's criteria were utilized to determine the selection of candidate lands for IAL. As shown on Exhibit 2, approximately 163 acres of the subject property are mapped under the draft IAL 1/6/17. In summary, the three criteria and applicability to the subject lands are as follows:

1. Land currently used for Agricultural Production. As noted above, the lands have extensive current agricultural production, but have not been economically successful, due to the property limitations noted.

2. Lands with Soil Quantities and Growing Conditions. Under the Land Study Bureau ratings, the lands are classified as "E" soils with lowest productivity rating. In addition, the salt laden trade winds make any crop agriculture very challenging.

3. Land with Sufficient Quantities of Water. The lands are not served by municipal water system and only has shallow wells (brackish water) that support the limited aquaculture uses on the property.

Conclusion: Specific to the City's three selected IAL criteria to determine IAL eligibility, the subject lands do not generally meet any of the criteria and thus should not be included for as candidate lands for IAL designation.



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel

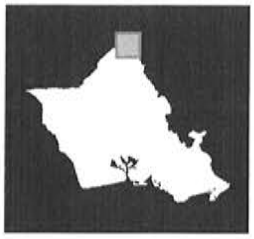


EXHIBIT 1
Location Map

Mahina Kai
Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

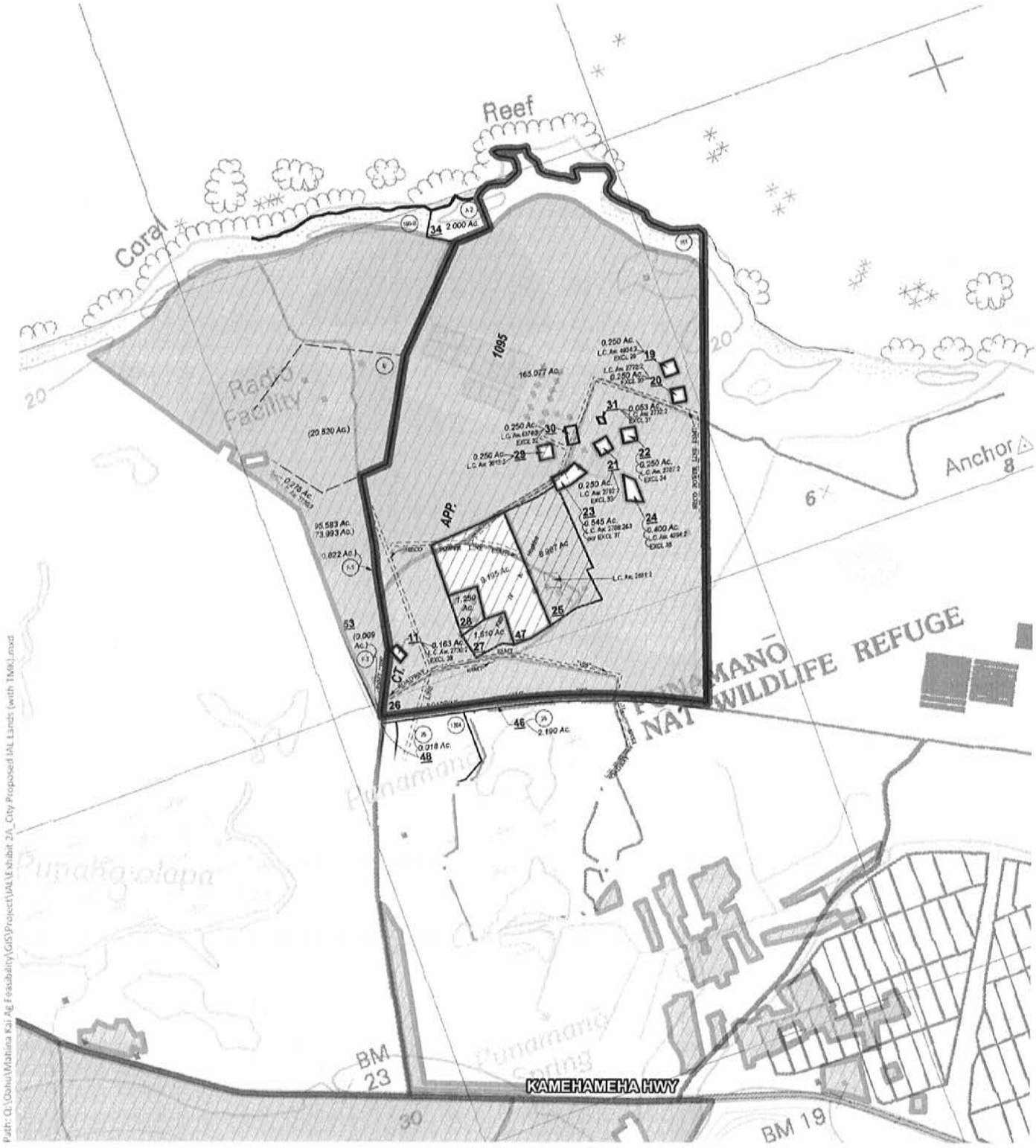
North

Linear Scale (feet)
0 500 1,000 2,000

PBR HAWAII

Source: City and County of Honolulu, 2017. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis



Path: Q:\Oahu\Mahina Kai Ag Feasibility\GIS\Project\IAL\Exhibit 2A_City Proposed IAL Lands (with TMK).mxd

LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- City Proposed IAL Lands
- Land - Currently in Production
- Lands - Suitable Soil Qualities and Growing Conditions
- Land - Sufficient Quantities of Water

EXHIBIT 2A

City Proposed IAL Lands (with Tax Map Keys)

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

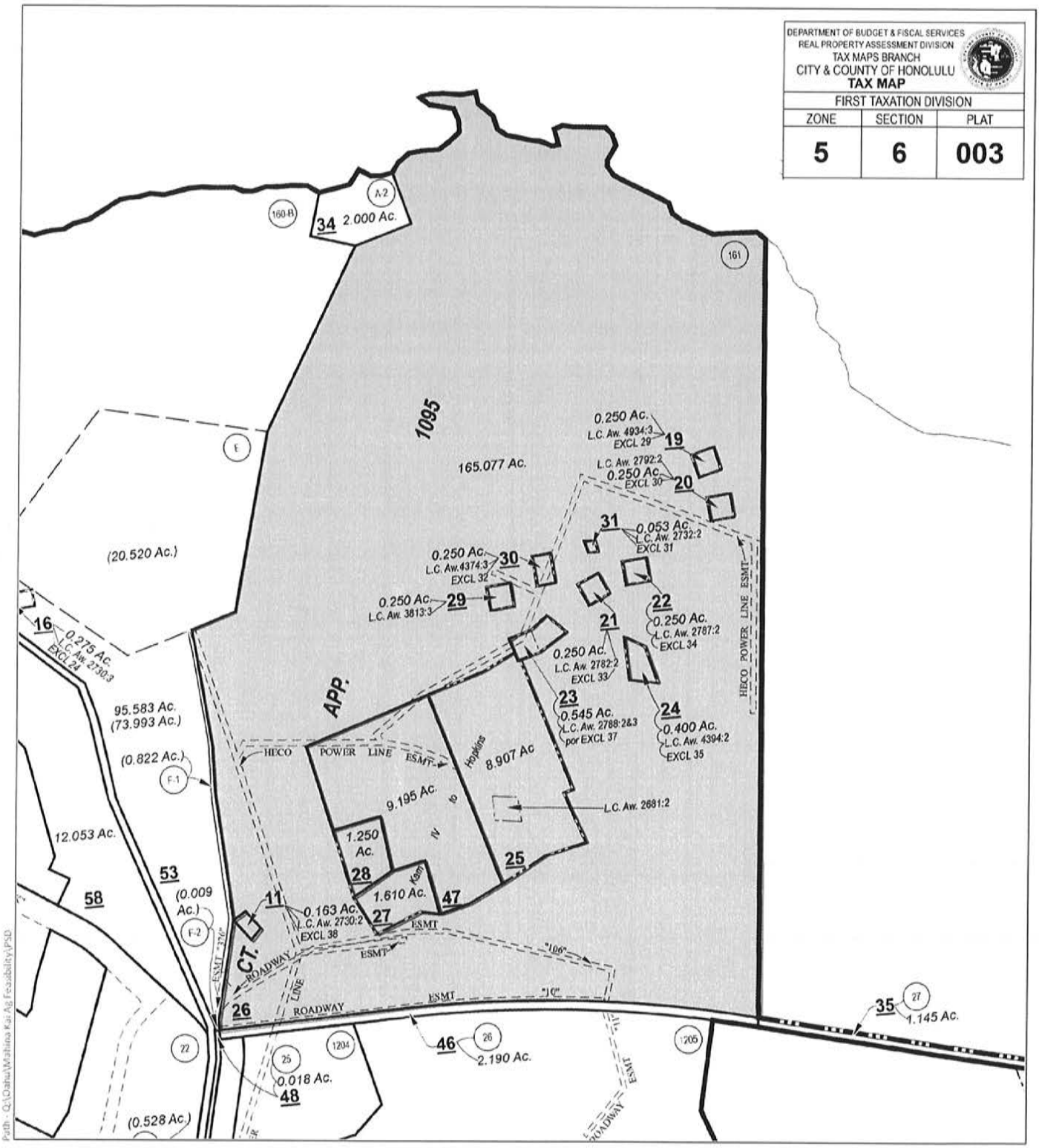
Linear Scale (feet)

0 250 500 1,000

PBR HAWAII

Source: City and County of Honolulu, 2017. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



Path - Q:\Oahu\Mahina Kai Ag Feasibility\PSD

LEGEND

Project Site

EXHIBIT 2B
TMK

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

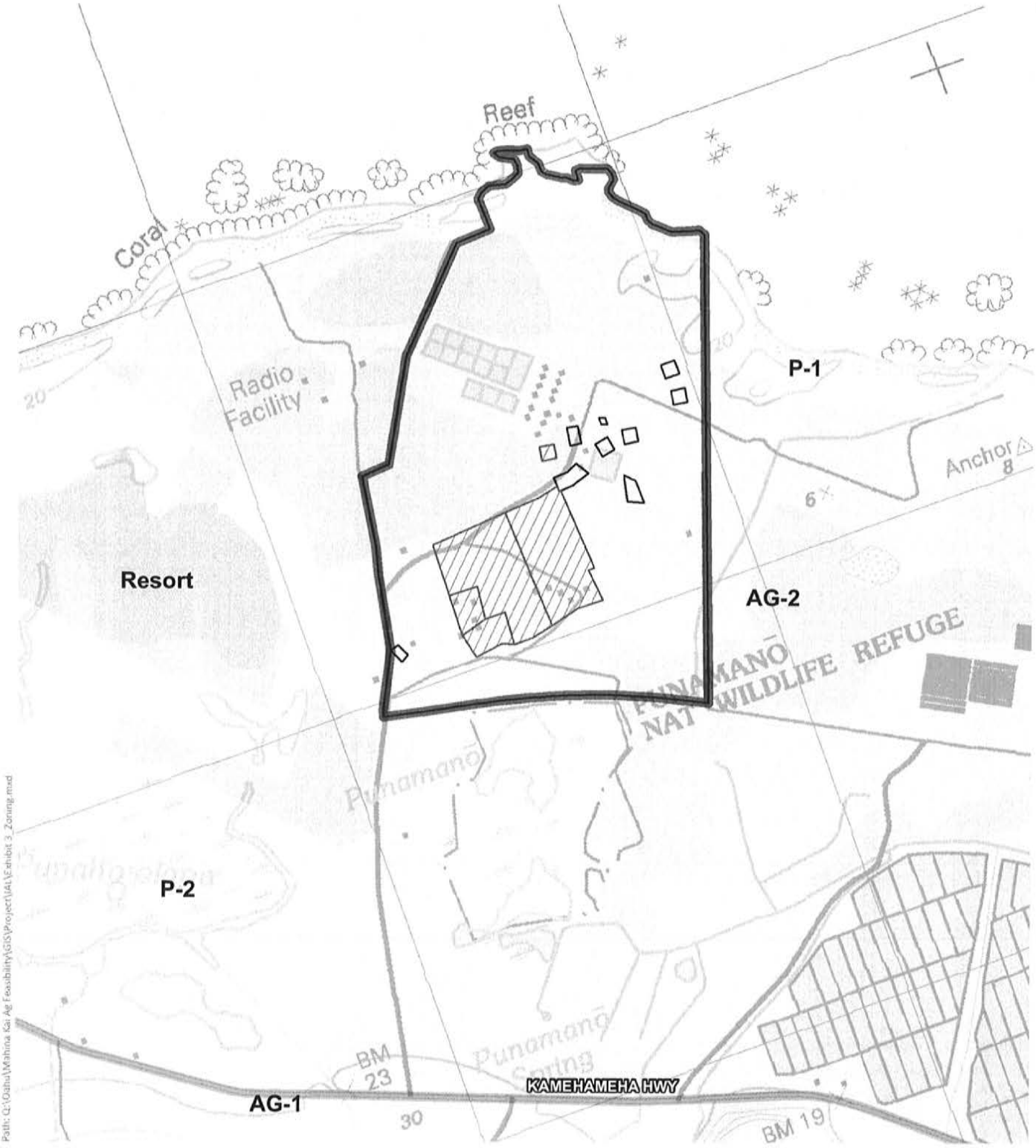
Island of O'ahu

North

Linear Scale (feet)
0 150 300 600

PBR HAWAII

Source: City & County of Honolulu, 2017.



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- P-1
- P-2
- AG-1
- AG-2
- RESORT

EXHIBIT 3

City and County of Honolulu Zoning

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

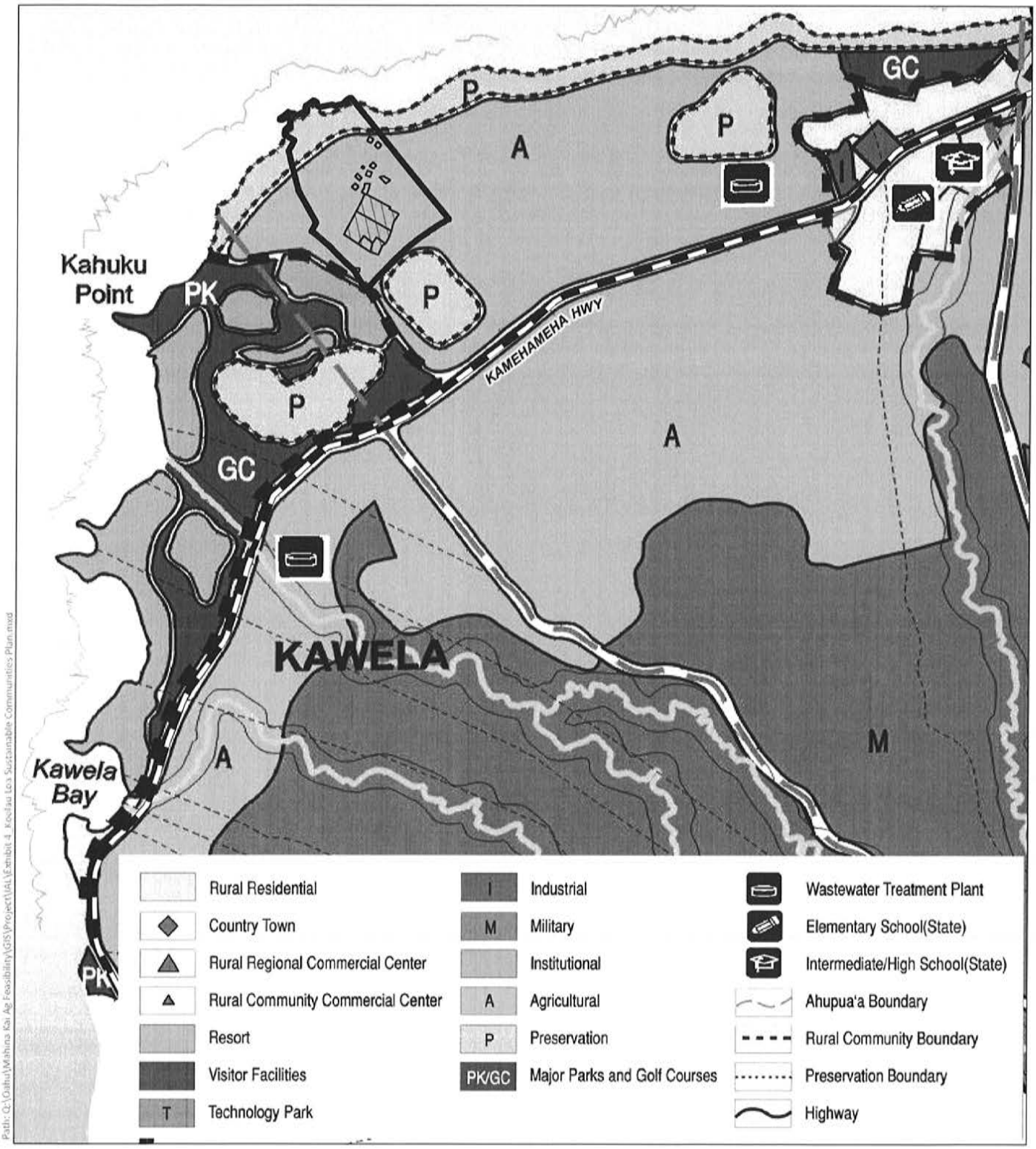
Linear Scale (feet)

0 250 500 1,000

PBR HAWAII & ASSOCIATES, INC.

Source: Honolulu Land Info System (HoLIS), Department of Permit and Planning, City and County of Honolulu, 2017, 2018. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



Path: Q:\Oahu\Mahina Kai Ag Feasibility\GIS\Project\UAL\Exhibit 4 Koolau Loa Sustainable Communities Plan.mxd

LEGEND

- Project Site
- TMK Parcels
- Excluded TMK Parcel

EXHIBIT 4

Ko'olau Loa Sustainable Communities Plan

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

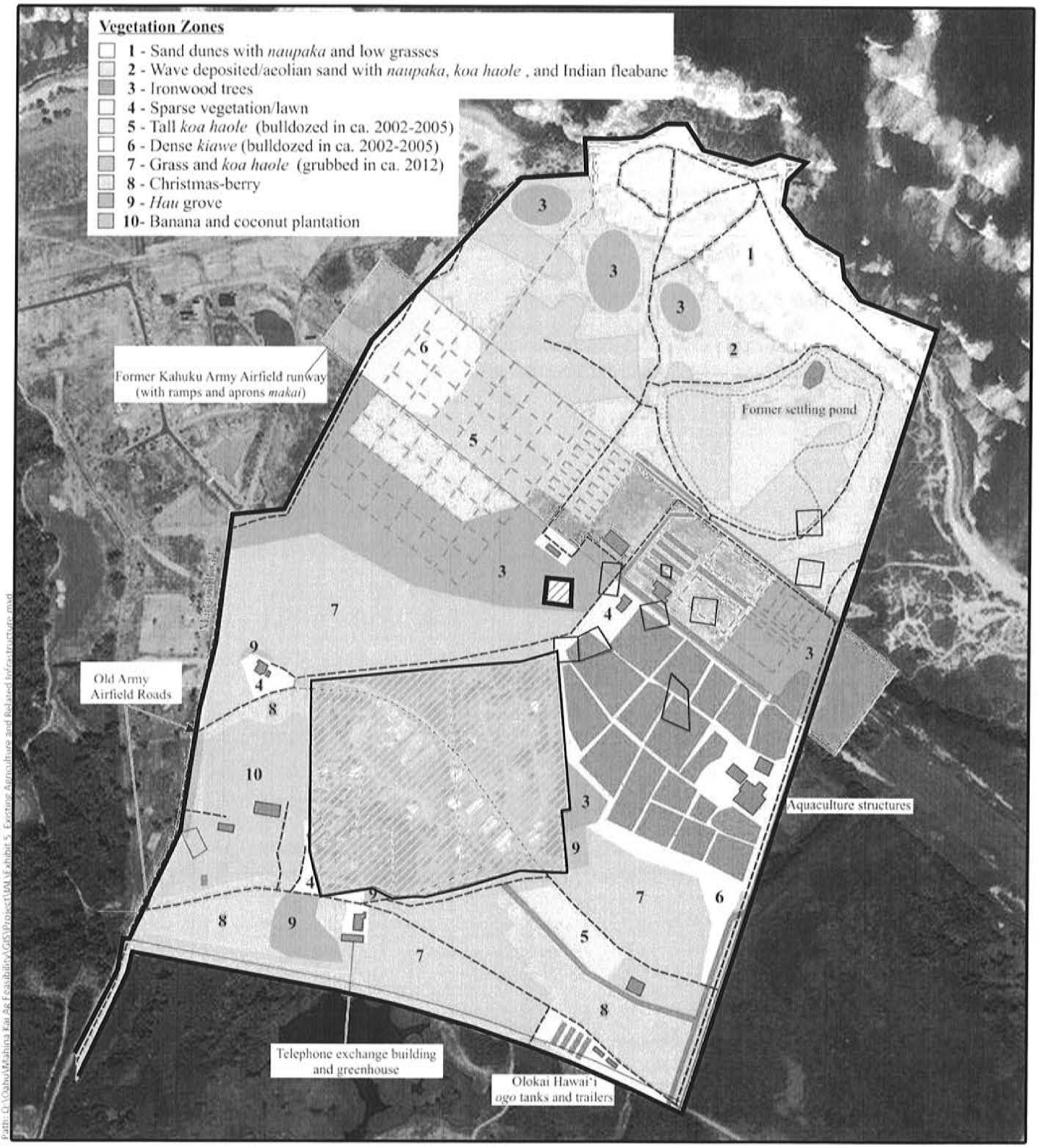
Linear Scale (feet)

0 750 1,500 3,000

PBR HAWAII

Source: City and County of Honolulu, 1999. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



Path: O:\Oahu\Mahina Kai Ag Feasibility\GIS\Projects\EIS\Exhibit 5_Existing Agriculture and Related Infrastructure.mxd

LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- Roads
- Existing Pond/Ditch
- Former Pond/Ditch
- Existing Structure
- Asphalt Surface

EXHIBIT 5

Existing Agriculture and Infrastructure

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

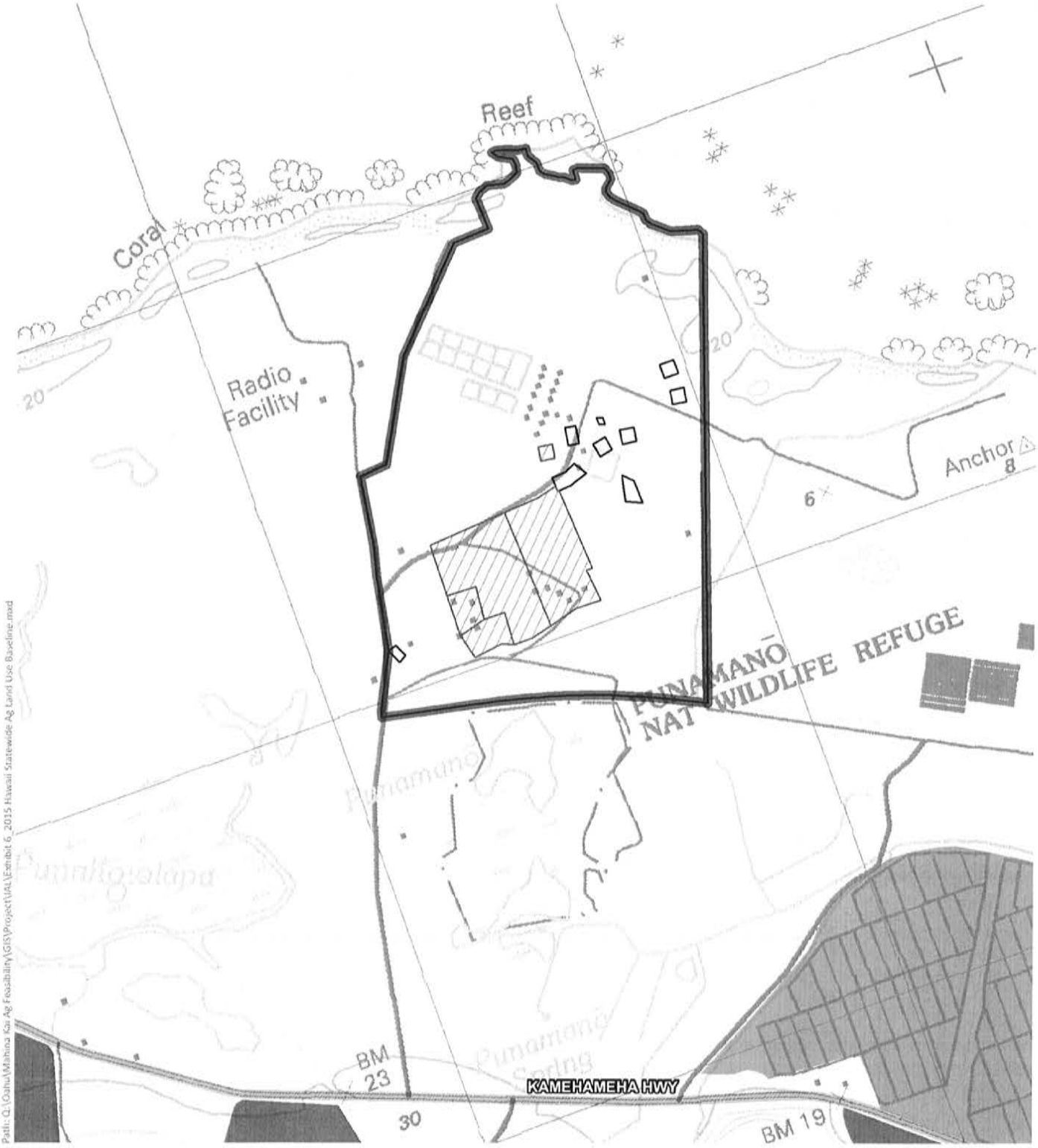
Linear Scale (feet)

0 150 300 600

PBR HAWAII & ASSOCIATES, INC.

Source: NSR Farms, LLC Soil and Water conservation Plan, 2017. Pictometry, 2018.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- Aquaculture
- Diversified Crop

EXHIBIT 6

2015 Hawaii Statewide Agricultural Land Use Baseilne

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

Linear Scale (feet)

0 250 500 1,000

PBR HAWAII

Source: Spatial Data Analysis and Visualization Lab at UH Hilo, 2015. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.

Path: Q:\Oahu\Mahina Kai Ag Feasibility\GIS\Project\AAL\Exhibit 7_Mean Annual Solar Radiation.mxd

LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel

Mean Annual Solar Radiation (W/m2)

- 220 - 235
- 235 - 250

EXHIBIT 7
Mean Annual Solar Radiation

Mahina Kai
Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

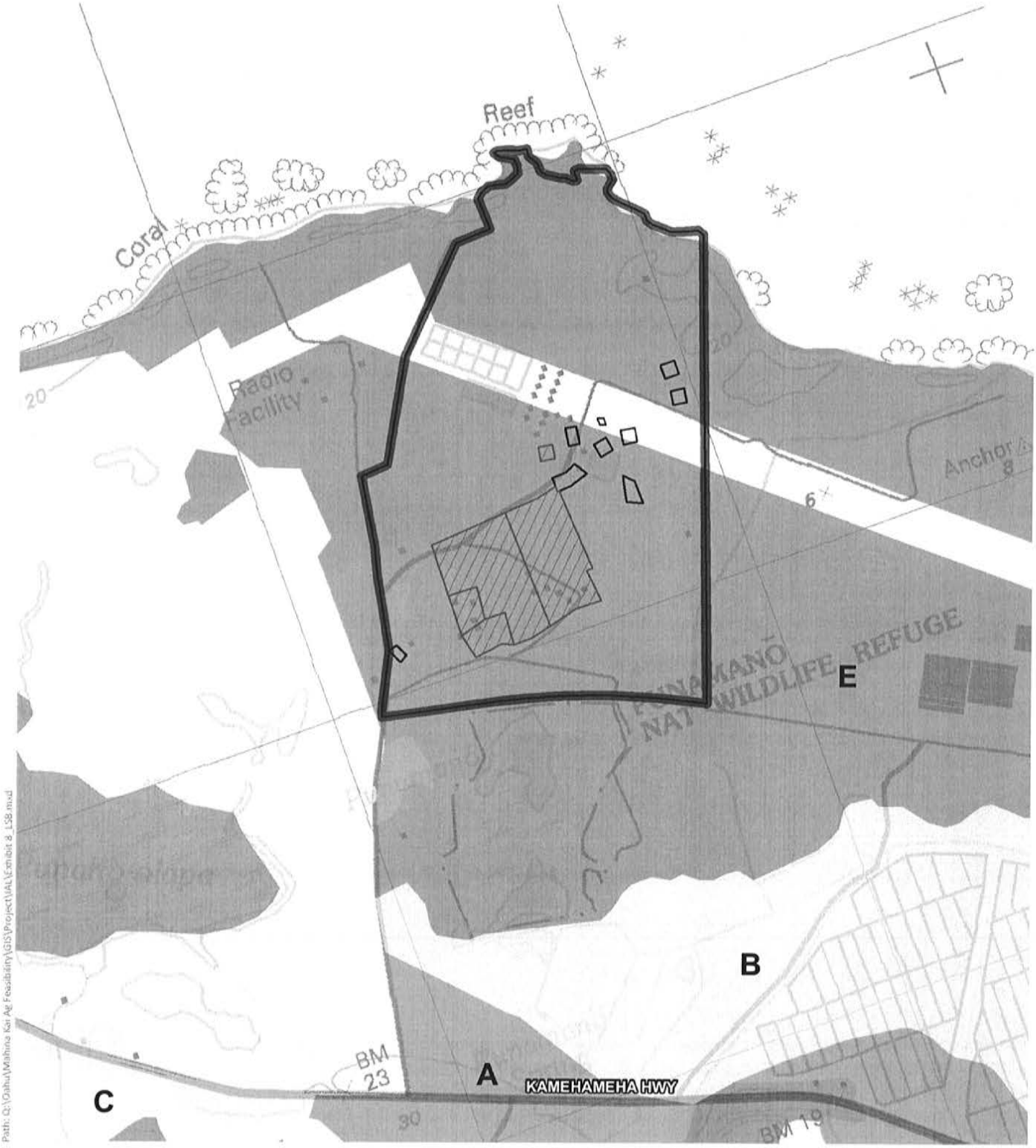
North

Linear Scale (feet)
0 250 500 1,000

PBR HAWAII

Source: Solar Radiation of Hawaii, 2014. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- A - Very Good
- B - Good
- C - Fair
- D - Poor
- E - Very Poor

EXHIBIT 8
Land Study Bureau

Mahina Kai
Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

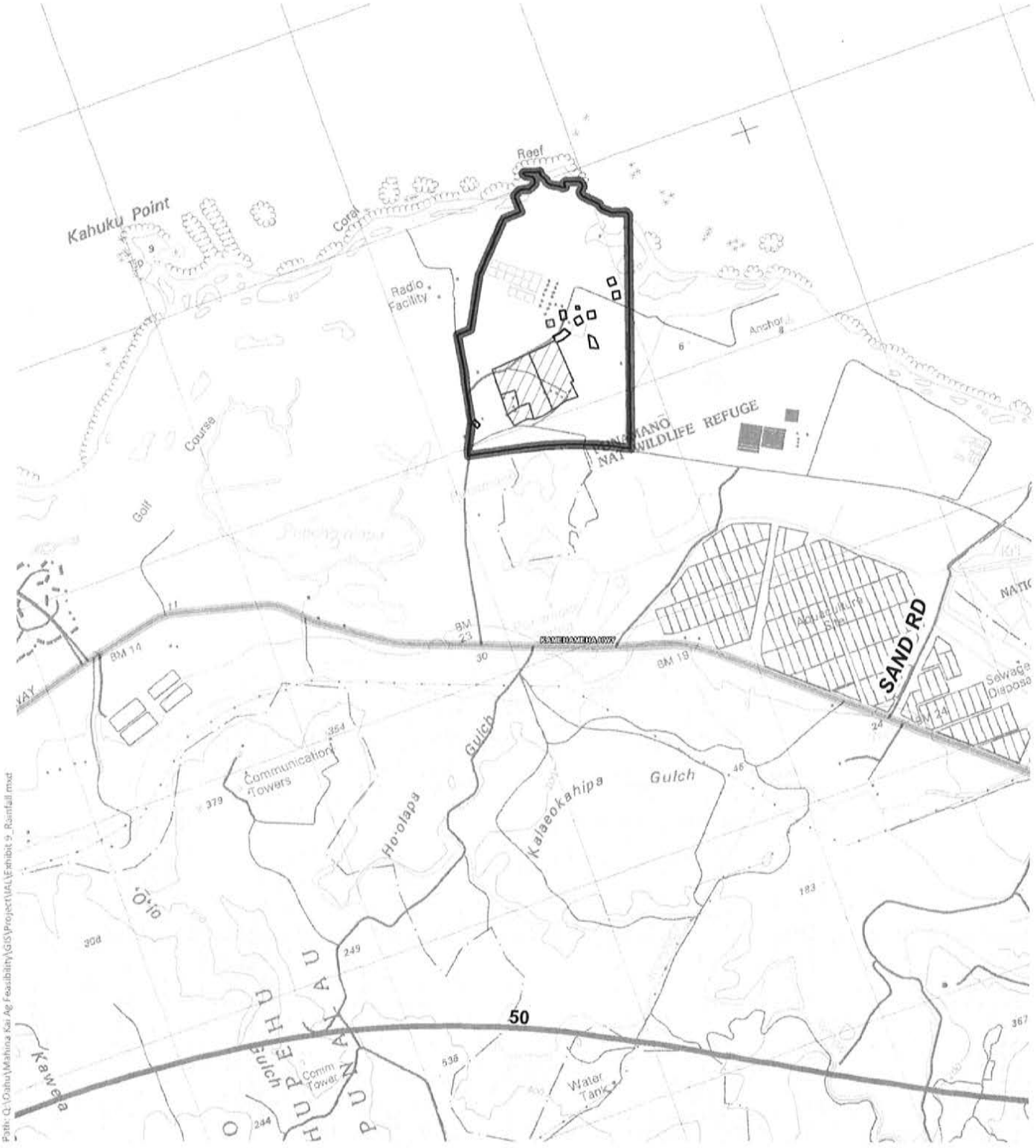
Linear Scale (feet)
0 250 500 1,000

PBR HAWAII

Source: University of Hawaii Land Study Bureau, 1972. City and County of Honolulu, 2017. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.

Path: Q:\Oahu\Mahina Kai Ag Feasibility\GIS\Project\MAL\Exhibit 8_LSB.mxd



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel

Annual Rainfall (inches)

~ 50

EXHIBIT 9
Annual Rainfall

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

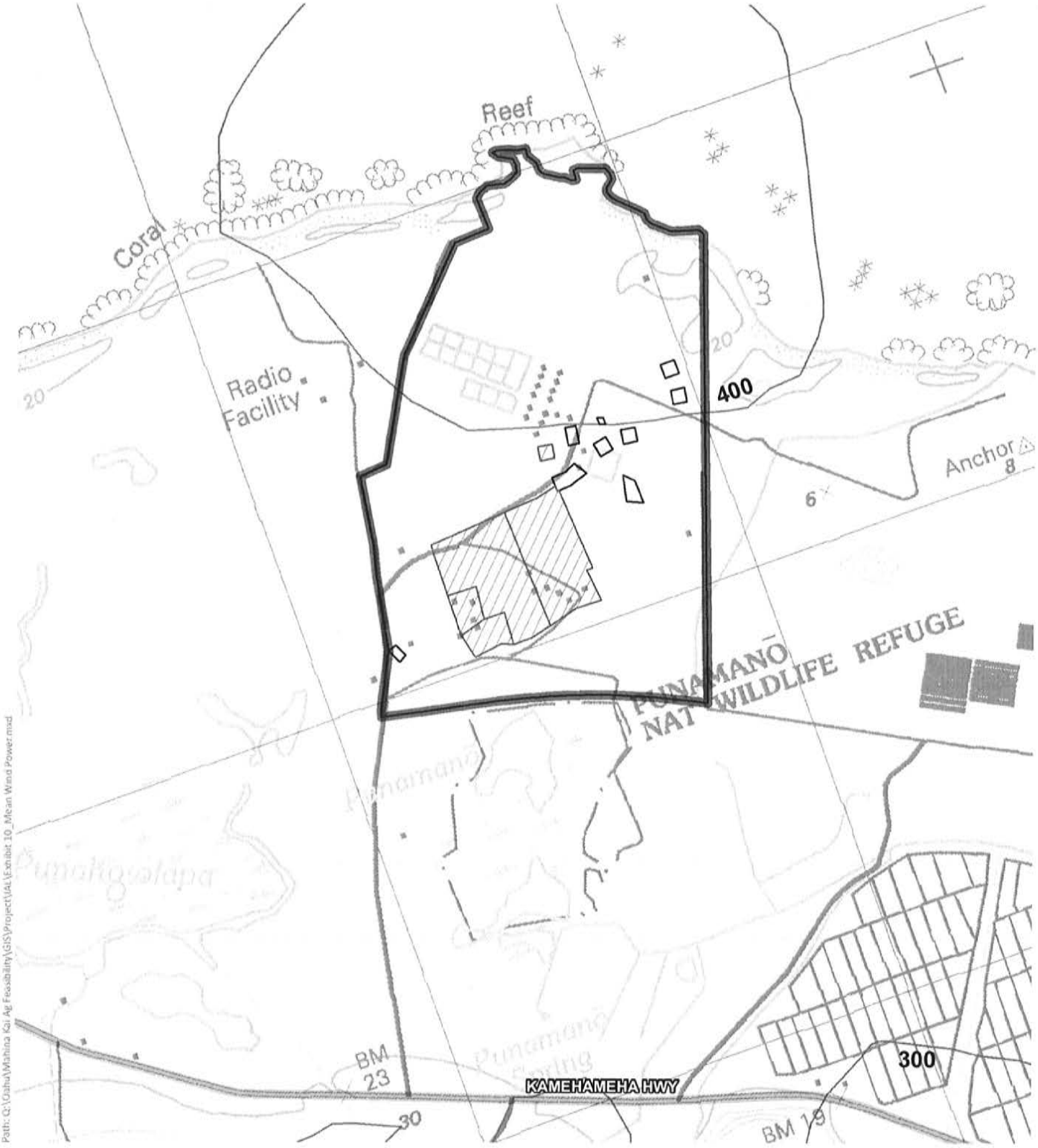
North

Linear Scale (feet)
0 500 1,000 2,000

PBR HAWAII

Source: Rainfall Atlas of Hawaii, 2011. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis



Path: Q:\Oahu\Mahina Kai Ag Feasibility\GIS\Project\JAL\Exhibit 10_Mean Wind Power.mxd

LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel

Mean Wind Power (50 m. above ground)

- 300
- 400

EXHIBIT 10
Mean Wind Power

Mahina Kai
Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

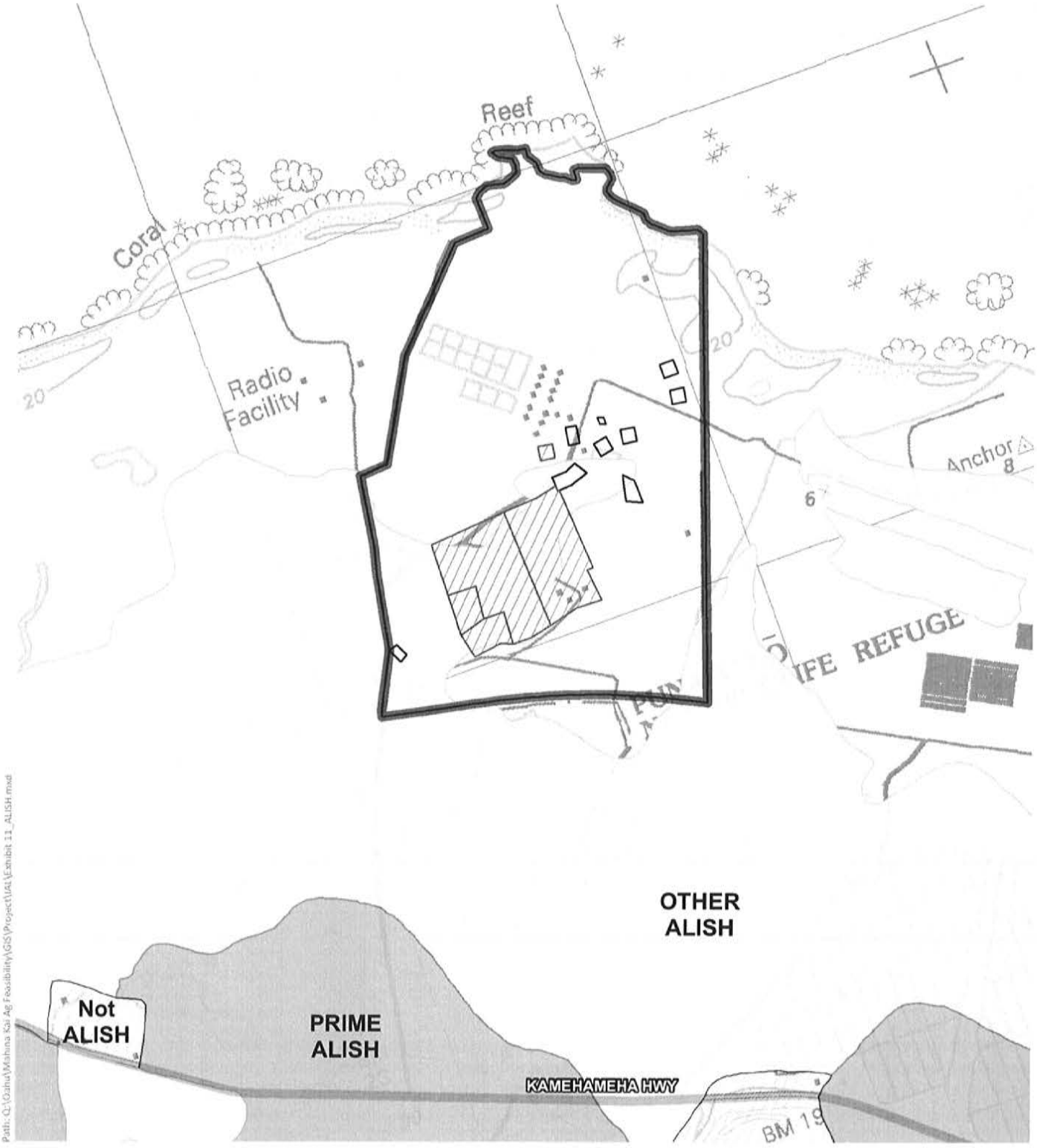
North

Linear Scale (feet)
0 250 500 1,000

PBR HAWAII & ASSOCIATES, INC.

Source: Solar Radiation of Hawaii, 2014. ESRI Base Maps, 2016.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.



LEGEND

- Project Site
- TMK Parcel
- Excluded TMK Parcel
- Prime ALISH
- Other ALISH
- Unique ALISH
- Not ALISH

EXHIBIT 10

Agricultural Lands of Importance to the State of Hawaii

Mahina Kai

Agricultural Lands Assessment

NSP Farms LLC / NSR Farms LLC / NSH Farms LLC

Island of O'ahu

North

Linear Scale (feet)

0 250 500 1,000

PBR HAWAII

Source: State Department of Agriculture, 1977. City and County of Honolulu, 2017. ESRI Base Maps, 20166.

Disclaimer: This graphic has been prepared for general planning purposes only and should not be used for boundary interpretations or other spatial analysis.

From: Nodie Namba-Hadar
To: DBEDT LUC
Subject: [EXTERNAL] Testimony letter for Nodie Namba-Hadar
Date: Tuesday, January 4, 2022 7:41:13 PM
Attachments: Namba-Hadar IAL testimony letter 1.4.22.pdf

Aloha,

Attached is my letter of testimony for the LUC meeting on Jan. 6.

Mahalo,
Nodie Namba-Hadar

Testimony of Nodie Namba-Hadar
with regard to the Conformance of C&C of Honolulu
in the Evaluation and Designation of Important Agricultural Land (IAL) Parcels

Jan. 4, 2022

Commissioners and Board Members of the LUC,

Thank you for this opportunity to again address the Commission in this hearing. My name is Nodie Namba-Hadar, and I am one of the owners of a property that is being proposed for designation as IAL by the City and County of Honolulu (TMK 1-5-9-005-040, Street address: 59-680 Pupukea Rd. Haleiwa, HI 96712).

I oppose this designation because the C&C of Honolulu:
- did not give me adequate notice or due process as required by the statute and constitution, resulting in insufficient time to research what it was about and to respond appropriately.
- did not inform me as to the implications and limitations that an IAL designation would impose on my basic property rights.
- used incomplete, inaccurate, and misleading methods to inappropriately recommend many parcels of land, including my own, for IAL designation. Many of the parcels that are being recommended as IAL are unfit for agricultural cultivation, indicating that the C&C did not properly research or survey the land.
-did not propose a program of incentives or protections for IAL landowners, farmers, and parcels.
-did not provide either myself or the LUC with adequate information about my parcel and why it should be designated as IAL. Had it tried to do so, it would be fairly obvious that my plot is not a suitable IAL designation, meeting very few of the necessary eight criteria and definitely not enough to "weigh against each other".

As such, I would strongly encourage that the LUC instruct the C&C that prior to it approving any IAL designations, the C&C must first:
- be in better communication with landowners for the purposes of informing them of the implications of such an IAL designation, as well as to help develop a program of incentives and protections for IAL lands.
- develop accurate profiles of potential IAL parcels so that the LUC can conduct a proper weighing of all the criteria prior to designating any parcel IAL. Again, to work with the landowners would be absolutely necessary in this matter and both useful and helpful to advance agriculture.

Based on these considerations and the fact that the C&C of Honolulu has not complied with legal requirements in connection with the designation of IAL, I respectfully ask that you deny the C&C of Honolulu's recommendation at this time.

I appreciate your efforts on behalf of the landowners of Hawaii, and thank you for your time and attention.

Aloha and Mahalo,

Nodie Namba-Hadar
email: NodieNamba@gmail.com

From: Peter Opdahl
To: DBEDT LUC
Cc: peter@opdahls.com
Subject: [EXTERNAL] Testimony for LUC IAL Hearing, January 6-7, 2022
Date: Tuesday, January 4, 2022 9:40:46 PM
Attachments: Jan-6-2022 LUC IAL Hearing.pdf

Please find attached a document I would like to submit as testimony for the LUC IAL hearings on January 6-7, 2022.

Best Regards,

Peter J. Opdahl
Stanhope LLC
TMK 6-7-002-038

Jonathan Likeke Scheur, PhD.
Chair, Hawai'I State Land Use Commission
PO Box 2359
Honolulu, HI 96804

Dr. Scheur:

I am writing to submit my opinions and concerns regarding the hearing tomorrow, January 6, 2022, and the following day, January 7, 2022, on the Important Agricultural Land (IAL) recommendation by the City of Honolulu.

I purchased an agricultural property in December 2020 that is one of the many parcels being considered, TMK 6-7-002-038. I lease part of another, TMK 6-7-002-039, that is also affected. To this date, I have yet to receive even one notification regarding hearings or other activity regarding this IAL recommendation process. I have been kept informed by neighbors who have received some, but not all, City notifications, but it strikes me as extraordinary that more than a year can go by without any update to whom the City is sending notifications. This is my second written attempt – the first was submitted at the previous hearing – to get on an updated notification list. I would appreciate your assistance in getting the following address added.

Stanhope LLC
PO Box 968
Laie, HI 96762

Dereliction of their statutory duty to keep landowners informed aside, I have multiple concerns about the City's IAL mapping and recommendation process. Specifically, I have the following concerns:

1. The City has misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights. This affects future usability of the land and therefore value. By not providing accurate information, sellers cannot provide adequate disclosure to buyers such as myself, leading to purchases of land which may not be able to be used as intended.
2. The City has submitted its IAL recommendations to the Land Use Commission prior to enacting county incentives and protections for IAL lands, landowners, and farmers. I am not fundamentally against the IAL designation, but if the City insists on reducing my ability to use my land as planned, then there must be offsetting incentives or other protections to compensate landowners such as myself for their loss of rights.
3. The City has failed to provide the LUC with enough basic information about my land – actually, they have failed for every parcel in their list -- and how it does or does not meet all of the eight IAL criteria. This prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating any land as IAL.

Given the failure of the City to provide these legally required notices and criteria, the Land Use Commission has no choice but to deny the City's request and remand their proposal back to them with strict instructions that it:

1. Follow HRS 205-46, 205-48, and 205-49 and first enact incentives and protections for IAL lands, landowners, and farmers.
2. Provide clear communications to landholders by using the latest title and other databases to obtain owner addresses.
3. Have, as required by HRS 205-47, actual contact with landowners so that the purpose, impact, and timelines of an IAL designation can be communicated and discussed in a cooperative manner so that landowner input can be included.
4. Compile a complete matrix of each parcel and how each of the eight IAL criteria have been evaluated against them. Before this is submitted to the LUC, as required by HRS 205-44, it would be ideal if it were made public or otherwise shared with landowners so that they could see how their land was being evaluated and provide correction or additional information if required.

Thank you for considering my testimony. Should the LUC or the City have any questions or desire to contact me directly, they may do so at the mailing address above, at my email at stanhopellc@outlook.com, or by phone at 480-359-9965. Once again, I also request that this mailing address be added to the notification database for TMK 6-7-002-038.

Sincerely,

Peter J. Opdahl
Stanhope LLC

From:	Monica Kamaka-Cooper
To:	DBEDT LUC
Subject:	[EXTERNAL] IAL Opposition Testimony Letter - Property Address: 87-630 Kaukama Rd, Waianae, Hi 96792
Date:	Tuesday, January 4, 2022 9:53:34 PM

My name is Raynald Cooper Jr, my property address is 87-630 Kaukama Rd, Waianae, HI 96792, TMK: 1-8-7-018-018-0000. I strongly oppose any IAL designation upon my AG land property. Below I have detailed my informed response to proposed IAL designation.

Under Hawaii Revised Statute §205-47, the Hawaii State government through the Land Use Commission (LUC), is attempting to force agricultural lands owned by Oahu local residents into a new classification of land, Imported Agricultural Lands ("IAL"). I believe that this proposed law isunconstitutional and a wrongful taking of land.This undertaking may force Kupuna, residents, and renters from living on their land. The process executed by the City and County of Honolulu did not follow the legal statute; and in addition did not include all landowners. This law will put private agricultural lands into government control while restricting the use of our lands for current and future generations.

Additional deficiencies in the State and City and County process:

1. IAL may prevent future conservation easements, which has been a great vehicle to conserve land on the North Shore.
2. City and County of Honolulu did not contact landowners adequately to conduct an agricultural economic feasibility analysis on each property proposed in the map. This requirement is outlined in the LUC 15-15 admin-Rules10.19.19. Under 15-15-125"B" "5" "D" Viability of existing agribusinesses.
3. IAL is trying to limit occupancy in dwellings to "actively farming" tenants only. This could profoundly

affect the cost of leases and land and will limit Kupuna and other retired farmers from living on their land.

4. Large landowners like Kamehameha Schools, Castle and Cooke, etc. have designated 51% of their lands to be IAL while preserving the other 49%. Over 1800+ small landowners have not had the proper notification, understanding, or financial resources to navigate this process due to Covid and the complexity of §205-47. These landowners will be forced to contribute 100% of their land into IAL.

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.

I petition that the State of Hawaii and City and County of Honolulu make IAL a voluntary process and allow the Hawaii citizens and landowners to rightfully choose if they desire their land to become IAL. IAL should not be forced on us.

Sadly, these tactics has been used throughout the history of the United States. Manipulating laws, looking for loopholes, and garnering the support of elected officials, big money and even law enforcement. The difference between past and present is that the news of attempted land grabs are broadcast far and wide. Illegal actions like this will not go unnoticed and the collective "WE" are saying NO MORE! We hope that those involved will recognize this is a bad idea.

Regards,
Raynald W. Cooper JR
Property Owner: 87-630 Kaukama Rd, Waianae, HI 96792

From: rito1@hawaii.rr.com
To: DBEDT LUC
Cc: "Lawrence Ito"; "Kalani Morse"; "Marry Huynh"
Subject: [EXTERNAL] Ito Testimony for 6 Jan 2022 Hearing
Date: Tuesday, January 4, 2022 3:37:37 PM

To Whom It May Concern:

My name is Rochelle Ito and I am submitting testimony to the Land Use Commission ("LUC") on behalf of my father-in-law, Lawrence Ito, and his siblings, Paul Ito, Irene Chung, Mary Gehrke and David Ito ("Landowners") as to why they feel the City and County hasn't followed the process required by law so as to allow the LUC to properly evaluate and thus designate their land as IAL regarding the following parcels/TMKs:

1. 41024012
2. 41024013
3. 41024014
4 41024115

The reasons for the Landowners' objection is that they feel the City's IAL mapping and recommendation process:

1. Failed to provide Landowners with adequate notice and due process as required by the statute and the constitution.
2. Misled or failed to accurately inform Landowners about the restrictions IAL designation would put on their basic property rights.
3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria.
4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners and farmers.
5. Failed to provide the LUC with enough basic information about our land and how it does or does not meet all or of the eight IAL criteria thus preventing the LUC from properly "weighing the standard and criteria with each other" as required before designating our land as IAL.

Along with many other farmers and landowners, we were not properly notified or informed about the City and County's recommendation process. Moreover, the information provided to the LUC about our land is inadequate to enable the LUC to properly do its job as required by HRS 205-44. As such, we feel the LUC should remand the map back to the City and County with instructions for the City and County to:

1. First enact incentives and protections for IAL lands, landowners and farmers as required by HRS 205-46, 205-48, and 205-49 before resubmitting the City and County's maps and recommendations to the LUC.
2. Provide clearer and verifiable notification to, and actual cooperation and consultation with, landowners and farmers like ourselves regarding the fact and

consequences of IAL recommendations and designation of their specific lands as the same, as required by HRS 205-47.

3. Gather and provide the LUC with information about how and whether parcels recommended for IAL designation meet any, some, or all of the eight IAL criteria, so as to enable the LUC to perform the proper weighing of all standards and criteria required before the designation of any lands as IAL, as required by HRS 205-44.

Thank you in advance for your review and consideration of our testimony. Should you have questions or concerns, please feel free to reach out to us at the contact info listed below.

Sincerely,

Rochelle Ito
Cell: (808) 348-9744
Email: rito1@hawaii.rr.com

From: Lulik Hadar
To: DBEDT LUC
Subject: [EXTERNAL] letter for Jan. 6 LUC meeting
Date: Tuesday, January 4, 2022 7:43:02 PM
Attachments: Sam Hadar IAL testimony letter 1.4.22.pdf

Dear Sir,

Attached is my letter.

Thank you,
Sam Hadar

Testimony of Sam Hadar
with regard to the Conformance of C&C of Honolulu
in the Evaluation and Designation of Important Agricultural Land (IAL) Parcels

Jan. 4, 2022

Commissioners and Board Members of the LUC,

Thank you for this opportunity to again address the Commission in this hearing. My name is Sam Hadar, and I am one of the owners of one of the properties that is being proposed for designation as IAL by the City and County of Honolulu (TMK 1-5-9-005-040, Street address: 59-680 Pupukea Rd. Haleiwa, HI 96712).

I absolutely oppose this recommendation because:
- The C&C did not give us adequate notice or due process as required by the statute and constitution. The C&C did not notify us at all and we only heard about it through a law firm that was involved. Apparently, the designation process had already been going on for years and most landowners only became aware of it just prior to the LUC meeting of April, 2021 when the DPP made its recommendation to them. Thus, we did not have time to research what it was about and respond appropriately.
- During the entire process, the C&C did not inform us as to the implications and limitations that an IAL designation would impose on our basic property rights. Recently, when asked about the restrictions imposed by this designation, the C&C literally misinformed us about these implications and only discussed potential benefits. We only heard about the probable restrictions from the lawyers and are still not sure of their extent and limitations.
-The C&C used incomplete, inaccurate, and misleading methods to inappropriately recommend many parcels of land, including our own, for IAL designation. We are personally familiar with much of the land that is being recommended as IAL and are sure that it is utterly unfit for agricultural cultivation, indicating that the C&C did not appropriately research or survey the land.
-The C&C did not put protective measures in place or offer any incentives for IAL lands and landowners prior to making its recommendations. Recently we heard the actual testimony of the government officers who initiated this idea and it was clear that it was supposed to be voluntary and advance by offering incentives to landowners and not one-sidedly impose restrictions on them as it is done in authoritarian nations. Such impositions will never receive their help or cooperation and will never achieve the goal of increasing agricultural land and agricultural cultivation. It will only increase their opposition, cost the taxpayer a fortune in legal fees, and create a basic opposition to agriculture where it is most needed and by those who can help it most.

-The C&C did not provide us or the LUC with enough information about our parcel to show why it should be designated as IAL. Had it done so, it would be fairly obvious that our parcel is not a suitable IAL designation, hardly meeting any of the necessary eight criteria and certainly not enough to "weigh against each other".

As such, we would strongly suggest that the LUC instruct the C&C that prior to approving any IAL designations, the C&C must first:
- be in better communication with landowners for the purposes of informing them of the implications of such an IAL designation, as well as to help develop a program of incentives and protections for IAL lands.
- develop accurate profiles of potential IAL parcels so that the LUC can conduct a proper weighing of all the criteria prior to designating any parcel IAL. Again, to work with the landowners would be absolutely necessary in this matter and both useful and helpful to advance agriculture.

Based on these considerations and the fact that the C&C of Honolulu has not complied with legal requirements in connection with the designation of IAL, we respectfully but strongly ask that you deny the C&C of Honolulu's recommendation at this time.

Thank you for your time and attention.

Sam Hadar
Email: lulikhadar@gmail.com

From:	myguja@aol.com
To:	DBEDT LUC
Cc:	b.wilkerson@honolulu.gov
Subject:	[EXTERNAL] Testimony for January 6, 2022 LUC hearing
Date:	Tuesday, January 4, 2022 8:14:29 PM
Attachments:	Opt out of IAL letter to LUC 010322.pdf

Please see the attached letter as our testimony for the January 6, 2022 LUC hearing on the IAL.
Please email us if you have any questions.
Thank you.

Wes and Karen Wong

January 3, 2022

Land Use Commission meeting for January 6, 2022

SUBJECT: Opt out request Designation of Important Agriculture Land (IAL)

Property tax map key: 870210150000, approximately 2.5 acres

Address: 87-1659 Kapiki Road, Waianae, Hawaii 96792

This is our fourth letter requesting that our property to not be designated as IAL. We would like this introduced as our testimony for the January 6, 2022, Land Use Commission meeting.

We first learned that our land was considered to be designated as IAL in November 2017. We responded to the City and County of Honolulu requesting to opt out from the IAL, but the City did not respond to our request. In 2021, we were made aware of the IAL designation by a letter sent by the law firm of Durrett Lang morse, LLLP. During this time, we did not receive any information from the City. The virtual meetings with the Land Use Commission provided the information to us.

We became fully aware of the IAL in April of last year when we participated in a virtual meeting. We submitted a letter to opt out of the IAL as this is not what we want with our property. We submitted letters of testimony to opt out of the IAL for meetings in June 2021 and October 2021.

The City's IAL mapping and recommendation process:

1. Failed to provide me as a landowner, with adequate notice and due process, as required by the statute and the constitution

The City has not done an adequate and complete review of our property with what appears to be a blanket designation. The City has not given us any notifications on the IAL and we have only received information from the Land Use Commission meetings and the law firm of Durrett Lang Morse, LLLP.

2. Misled or failed to accurately inform landowners about the restrictions IAL designation would put on their basic property rights

In a past meeting, attorney David Arakawa testified that landowners cannot rent or live on their property if the land is designated as IAL and not used for agriculture. Our property at 87-1659 Kapiki Road was formerly a pig farm that was operated by our parents. They are both deceased, and the land was transferred to us. Our parents stopped farming in the 1990s and the farm structures are no longer standing. Our property is mostly coral, with no functioning water lines and not suitable for crop growing.

Learning all of this from the virtual meetings, we realized that the city failed to provide any information and the restrictions that would be imposed upon us and our property.

3. Relies on inaccurate mapping, shortcut methods, and other erroneous records to inaccurately describe and recommend many parcels as satisfying the IAL criteria.

We reviewed the Land Use Commission website, City and County IAL and specifically looked at the map under Figure 4.5 Recommended IAL, Waianae. (Land Use Commission | City & County IAL (hawaii.gov)) This blanket designation covers the area of our property, but our land cannot be used for crop growing. We feel that this contributed to inaccurate mapping and shortcut methods to not inspect each parcel. This shortcut method made it easier and less labor intensive for the City to not inspect each individual property for the IAL criteria.

4. Inappropriately submitted its IAL recommendations to the LUC prior to enacting county incentives and protections for IAL lands, landowners, and farmers.

The City submitted its IAL recommendations to the Land Use Commission and did not notify us about any county incentives and protections for our land.

5. Failed to provide the Land Use Commission with enough basic information about my land and how it does or does not meet all or of the eight IAL criteria. Thus prevents the LUC from properly "weighing the standard and criteria with each other" as required before designating my land as IAL.

Without the inspection of our property (and other properties), the City has failed to provide the Land Use Commission with any information about our land. As a former pig farm, our property does not meet all the eight IAL criteria. The blanket designation of IAL lands failed to provide accurate information to the LUC for each parcel that is covered.

As property owners, we would like to make the decision on the designation of IAL. We are both retired and could not farm on the land, especially since the land is not suitable for growing crops. The size of our parcel is approximately two and one-half acres and would not have a major impact should the land not be designated as IAL. It would only be of great concern for our family as we will not be able to use our land.

We hope you will take our request into consideration to not have our property designated as IAL.

Regards

Wesley and Karen Wong

94-1143 Pohu Place

Waipahu, Hawaii 96797