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October 8, 2021

Via First Class Mail, Certified Mail with Return Receipt and email: dbedt.luc.web@hawaii.gov

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

State of Hawaii Land Use Commission
State Office Tower
Leiopapa A Kamehameha
235 South Beretania Street, Room 406
Honolulu, Hawai`i 96813

Re: ***Important Agricultural Lands Designation***

To whom it may concern:

This firm represents a number of farmers and landowners whose lands have been recommended by the City and County of Honolulu ("the County") for designation as "Important Agricultural Lands," ("IAL") HRS §§ 205-41 – 205-52 (the "IAL Statutes").

Enclosed is our firm's Memorandum to the Attorney General and Contested Case Memorandum that we would like to be considered by the Land Use Commission ("LUC") and published as public testimony for the Land Use Commission Meeting that will be held on October 13, 2021 at 9:00 a.m.

When our firm previously submitted this testimony, we did not receive any acknowledgment confirming receipt of the same and they were not published on the LUC's website alongside the other written testimony submitted.

If you have any questions, please contact me at (808) 792-1213.

Sincerely,

DURRETT LANG MORSE, LLLP

Kalani Morse

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

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August 31, 2021

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

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

Dear Chair Scheuer and Commissioners:

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

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

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

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

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

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

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

More specifically:

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

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

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

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

c) The County needs to:

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

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

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

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

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

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

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

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

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

[5] HRS 205-51 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and/or landowners:

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Unfulfilled County Responsibilities

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

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

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

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

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

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

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

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

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

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

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

[21] Selected text from HRS 205-47(b) (emphasis added): "Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in ***consultation and cooperation*** with landowner**s**"
"Upon identification of potential lands to be recommended to the county council as potential important agricultural lands, the counties **shall take *reasonable action to notify* each owner** of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands."

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

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

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

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

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

Sincerely,

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Jonathan S. Durrett, Esq.
Shauna L. S. Bell, Esq.

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

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

Dear Chair Scheuer and Commissioners:

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

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

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

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

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

> "In analyzing whether due process requires a contested case hearing, one must look at ***the vested interest being deprived*** and the process used to consider it."[2]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[6] *See* HRS § 205-44(c):

> The standards and criteria shall be as follows:
> (1) Land currently used for agricultural production;
> (2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
> (3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
> (4) Land types associated with traditional native Hawaiian agricultural uses, such as taro cultivation, or unique agricultural crops and uses, such as coffee, vineyards, aquaculture, and energy production;
> (5) Land with sufficient quantities of water to support viable agricultural production;
> (6) Land whose designation as important agricultural lands is consistent with general, development, and community plans of the county;
> (7) Land that contributes to maintaining a critical land mass important to agricultural operating productivity; and
> (8) Land with or near support infrastructure conducive to agricultural productivity, such as transportation to markets, water, or power. [L 2005, c 183, pt of §2; am L 2008, c 233, §18]

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

> the designation of important agricultural lands shall be made by **weighing the standards and criteria with each other** to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43."

[8] *See* FN 7 above.

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

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

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

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

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

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

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

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

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

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

Per HRS § 205-47(d), "the counties shall take reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands." The occupancy restrictions applied to IAL lands in HRS § 205-44.5 amount to a *de facto* eviction for landowners who are aged, disabled, retired, or otherwise unable to actively farm their IAL designated parcels (see sections B-E).

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

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

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

Permitting contested case hearings would be the ultimate procedural safeguard for the protection of affected landowners. In their letter, the OP argues that allowing contested case hearings would be overly burdensome. The OP articulates that there is a "compelling State interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use and agricultural sustainability." They further claim that "…to address this compelling State interest, the process must be moved forward in this already overlong journey towards IAL designation."

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

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

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

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

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

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

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

> IAL designation provides significant incentives in identifying which lands to direct State investments in irrigation infrastructure, State funds or grants for agricultural support facilities like agricultural processing plants, expedited permitting for agricultural structures, and agricultural loans and outreach programs.

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

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

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

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

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

For example, OP's letter erroneously asserts that "[IAL designation] ***does not dictate use*** or require anyone to farm where they previously were not required to." OP acknowledges that "the incentive enacted in HRS 205-45.5 ***may require that the farm dwelling be occupied by the farmer or farmer's employee*** who are working the land." However, they then erroneously assert that this restriction is "***no different from existing law*** that requires all farm dwellings to be ***used in connection with a farm***. 205-4.5(a)(4)" (All quoted text is contained within the above cited letter, emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] *See* VERMONT LAW REVIEW, *Denise R. Johnson,* Reflections on the Bundle of Rights, at https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/johnson2.pdf
[18] *See* "Two Cheers for the Bundle-of- Sticks Metaphor, Three Cheers for Merrill and Smith" at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4601&context=fss_papers
[19] *See* A. M. Horoné's 1960's essay "Ownership," enumerating the rights that extend from property ownership, at http://fs2.american.edu/dfagel/www/OwnershipSmaller.pdf

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

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

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

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

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

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

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

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

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

F. Conclusion

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

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

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

Sincerely,

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