

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of
KEKAHA AGRICULTURE
ASSOCIATION,
a Hawaii agricultural cooperative,

DOCKET NO. DR21-76

For Declaratory Order to Designate
Important Agricultural Lands for
approximately 12,123 acres at Kekaha,
Kauai;
TMK 4-1-2-002:001 Por.

**KEKAHA AGRICULTURE ASSOCIATION'S BRIEF IN RESPONSE TO
COMMISSION'S LETTER DATED FEBRUARY 2, 2022**

AND

CERTIFICATE OF SERVICE

SCHLACK ITO
A Limited Liability Law Company

DOUGLAS A. CODIGA 6261-0
Fort Street Tower, Suite 1500
Topa Financial Center
745 Fort Street
Honolulu, Hawai'i 96813
Telephone: (808) 523-6040
Facsimile: (808) 523-6030
dcodiga@schlackito.com

Attorney for
KEKAHA AGRICULTURE ASSOCIATION

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of
KEKAHA AGRICULTURE
ASSOCIATION,
a Hawaii agricultural cooperative,

DOCKET NO. DR21-76

For Declaratory Order to Designate
Important Agricultural Lands for
approximately 12,123 acres at Kekaha,
Kauai;
TMK 4-1-2-002:001 Por.

**KEKAHA AGRICULTURE ASSOCIATION’S BRIEF IN RESPONSE TO
COMMISSION’S LETTER DATED FEBRUARY 2, 2022**

Petitioner Kekaha Agriculture Association (“Petitioner” or “KAA”), by and through its attorneys Schlack Ito, A Limited Liability Law Company, and pursuant to the Commission’s letter to the parties in the above-referenced proceeding dated February 2, 2022 (“Feb. 2 Letter”) respectfully submits its Brief (“Brief”) in response to the Feb. 2 Letter concerning KAA’s Petition for Declaratory Order to Designate Important Agricultural Lands filed December 2, 2021 (“Petition”), as follows.¹

I. INTRODUCTION

By filing its Petition to designate over 12,000 acres of farmland as Important Agricultural Lands (“IAL”), KAA seeks to align itself not only with the Commission’s role in ensuring productive and sustainable land uses, but also with critically important agricultural policy mandates enshrined in the Hawaii Constitution since 1978. These constitutional mandates

¹ This Brief is timely submitted on or before the due date of March 30, 2022 set forth in the Feb. 2 letter. *See id.* at 1. This Brief is based upon and supports Commission approval of the pending Petition. Unless otherwise noted, this Brief is intended to support any amendments to the Petition as may be necessary or permitted by the Commission.

– established over four decades ago – include the necessity to conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.² KAA respectfully submits that its Petition for designation of thousands of acres as IAL presents an incremental but important opportunity for the Commission to contribute toward the fulfilment of these longstanding constitutional mandates, for the benefit of Hawaii agriculture and the communities it serves.

In further support of its Petition, KAA appreciates the opportunity to address and clarify certain issues identified by the Commissioners during the December 23, 2021 Commission meeting concerning this matter, as set forth in the Feb. 2 letter. KAA understands that its Petition is the first, or among the first, to seek to designate land that is not privately owned, but is owned by the state, and to be brought not by a private landowner but by farmers who farm the land and whose agricultural operations will directly benefit from the support afforded by IAL designation.

It is suggested that the relevance and importance of the Petition to promoting agriculture in Hawaii is reflected in part by the record in this proceeding, which includes written comments in support of the Petition submitted by the State of Hawaii Agribusiness Development Corporation (“ADC”), the State of Hawaii Office of Planning & Sustainable Development (“OPSD”), the State of Hawaii Department of Agriculture (“DOA”), and the County of Kauai Planning Department (“Planning Department”), as well as Kekaha farmers and a community group. In addition, the Kauai Island Utility Cooperative (“KIUC”) recently submitted a letter to ADC in support of the ADC Board reauthorizing KAA to file the Petition.

² Haw. Const. Art. XI § 3.

In response to a key question from the Commission set forth in the Feb. 2 letter, KAA submits that ADC properly authorized KAA to file the Petition and approval from the Board of Land and Natural Resources (“BLNR”) was not required. As explained in detail below, under relevant statutory provisions and administrative rules KAA must establish consent of the landowner, and the term landowner is defined as having a fee interest in the land. Based on a review of the executive order granting management and control of the lands proposed for IAL designation, and the applicable provisions of Hawaii Revised Statutes (“HRS”) chapter 171, ADC has a fee interest in the land sufficient for it to authorize KAA to file the Petition, and BLNR approval is not required. Indeed, the ADC Board of Directors concluded in 2018, and again in March 2022, that ADC may properly be deemed the landowner for purposes of authorizing KAA to file the Petition.

The Feb. 2 letter also requests briefing on three other issues. In response to these three issues, KAA submits that it properly filed the Petition as a farmer applicant and it was not required for the Petition to be filed by ADC, or by KAA and ADC jointly. KAA also submits that it was not barred from filing the Petition based on a statutory provision requiring state agencies to collaborate on designating public lands as IAL, because the lands sought to be designated by the Petition do not fall under the statutory definition of public lands. Finally, with regard to intervention or participation in this proceeding, KAA is not aware of any motions to intervene or participate pending before the Commission at this time. If and when such requests arise in the future, KAA anticipates evaluating its position based on the facts and law at that time.

II. COMMISSION'S STATEMENT OF ISSUES

The Feb. 2 letter sets forth six issues to be briefed, which are stated as follows. In this Brief, these issues are referred to respectively as Issue Nos. 1, 2, 3, 4, 5 and 6.

1. Who is the appropriate applicant in this matter – ADC or KAA or another organization?

2. In the ADC's Supplemental Testimony and references: ADC 1.31.2018 board meeting minutes filed with the LUC on 12.17.2021 – it was stated:

“ . . . although the ADC manages these lands, the fee simple interest in and to the lands remain the State of Hawai'i through its Board of Land and Natural Resources, therefore simultaneous with this request that the ADC has requested that the Land Board also approve the KAA'S proposal action”

(a) Since BLNR holds the fee interest of the land, is it required that BLNR provide written approval of the IAL petition?

(b) Is the characterization of the fee interest contained in this paragraph still accurate?

3. The Executive Order number 4007 signed by acting governor James Aiona, filed with the LUC on 12/17/21 which delegates various public land used for Agriculture to be under the control and management of Agribusiness Development Cooperation. What powers or authority over the land are thereby granted to ADC.

4. What is the distinction between management authority granted on state lands vs. fee simple ownership?

5. Does the State have an obligation to designate its lands that qualify as Important Agricultural Land (IAL) all at once, or if it can be done in piecemeal manner?

6. Is there a right to intervention in IAL proceedings for individual parcels and/or for State designation of its lands [as] IAL?

Each of these issues is discussed and responded to below.

III. RELEVANT BACKGROUND

In 1978 (which should be emphasized was over four decades ago), the identification and designation of IAL was proposed at the Constitutional Convention and approved by voters, resulting in the enactment of Article XI, Section 3, of the Constitution of the State of Hawaii, which states:

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.³

In 1994, the Hawaii Legislature passed Act 264, Session Laws of Hawaii, codified as HRS chapter 163D, which established ADC. ADC is attached to DOA for administrative purposes and is governed by a Board of Directors consisting of three ex-officio and eight private citizens appointed by the Governor (“ADC Board”).⁴ ADC describes its mandate as follows:

Our mandate is to develop an aggressive and dynamic agribusiness development program to facilitate the transition of agricultural lands and infrastructure from plantation operations into other agricultural enterprises, to carry on the marketing analysis necessary to direct the evolution of the agricultural industry, and to provide the leadership for the development, financing, improvement, and enhancement of the agricultural industry.⁵

³ *Id.* (emphasis added).

⁴ HRS §§ 163D-3(a), -3(b).

⁵ See Agribusiness Development Corporation, “Aloha from the Agribusiness Development Corporation,” available at <https://hdoa.hawaii.gov/ad/>

In 2003, KAA was formed as an agricultural cooperative pursuant to HRS chapter 421, “Agricultural Cooperative Associations.” KAA was incorporated by “bona fide producers of agricultural products” and KAA members are “bona fide producers of agricultural products.”⁶ In describing its purpose in its Articles of Incorporation, KAA states that it was formed in part to “promote effective and compatible agricultural/aquacultural business uses” of the Kekaha Ag Lands.⁷ Pursuant to § 421-9, “Powers,” subsection (a), an association formed under HRS chapter 421 “shall have the capacity to act possessed by natural persons”; and under subsection (b)(1) the association shall have the authority to act as an agent on behalf of its members. At present, KAA members include Hartung Brothers, Inc., Corteva Agriscience, Kauai Shrimp, and Wines of Kauai (collectively, “KAA members”).⁸ Collectively, these KAA members currently license from ADC a total of approximately 3,623 acres of the Kekaha Ag Lands.

The KAA IAL comprises lands that either are currently in agricultural use or historically have been used for agricultural purposes. Current agricultural operations on the KAA IAL include the cultivation of diversified crops, aquaculture, research crops, and traditional native Hawaiian agricultural crops. Diversified crops include alfalfa, melon, squash, papaya, avocado, banana, mango and other fruits and vegetables. Diversified crops grown on the KAA IAL vary based on growing cycles and market conditions. Research crops and seed

⁶ See HRS §§ 421-3, 10(a). Under HRS chapter 421, “agricultural products” include “floricultural, horticultural, viticultural, forestry, nut, coffee, dairy, livestock, poultry, bee, farm or plantation products, and fish and aquacultural commodities.” HRS § 421-3.

⁷ As explained in the Petition, the Kekaha Ag Lands comprise approximately 12,762.26 acres along the leeward side of West Kaua‘i abutting the town of Kekaha to the south and east. The Kekaha Ag Lands are within all, or portions of, the following ahupua‘a: Pōki‘ikauna, Waiawa, Niu, Mana, and Ka‘ula‘ula. All the Kekaha Ag Lands are within the State Agricultural District (Agricultural District). The Kekaha Ag Lands are a single Tax Map Key (“TMK”), which is TMK 4-1-2-002:001, as more particularly depicted on the map attached to the Petition as Exhibit A.

⁸ See “Agricultural Land Assessment For The Kekaha Agriculture Association Proposed Important Agricultural Land, Island of Kaua‘i, November 2021,” prepared by PBR Hawaii (“ALA”), attached as Exhibit B to the Petition, at 4. Given that pursuant to HRS § 421-9(a) and (b) KAA has the capacity to act on behalf of its members, the terms “KAA” and “KAA members” are generally used interchangeably in this Brief.

production are mostly used for cultivation of corn. Along the makai portions of the KAA IAL, there are various aquaculture ponds used for production of shrimp. In addition, traditional Hawaiian crops such as dryland taro are grown within the KAA IAL with plans to develop lo‘i for wetland taro cultivation as well.⁹

On September 16, 2003, Acting Governor James Aiona signed Executive Order No. 4007, “Setting Aside Lands for Public Purposes (“EO 4007”).¹⁰ EO 4007 states that it is executed by virtue of the authority vested in the Governor by HRS § 171-11; that the lands are set aside “for agriculture and related purposes”; that the lands are to be “under the control and management of ADC”; that the lands contain a “gross area” of 12,680.642 acres and a “net area” of 12,592.133 acres; and that EO 4007 is subject to the condition that upon cancellation of EO 4007, or “non-use or abandonment” of the premises for more than one year, or for “any reason whatsoever,” ADC shall “restore the premises to a condition satisfactory and acceptable to” the Department of Land and Natural Resources (“DLNR”).

In 2005, the Hawaii Legislature passed Act 183, Session Laws of Hawaii, which was codified as Part III to HRS chapter 205, “Important Agricultural Lands.” According to a Hawaii Legislature report, HRS chapter 205 Part III:

provides the standards, criteria, and processes to fulfill the intent and purpose of Article XI, Section 3 [of the Hawaii Constitution] and recognizes that viable agricultural operations are the key to preserving agricultural lands in Hawaii. Thus Act 183 focuses on providing farmers with needed support to spur and assist agricultural viability and activity on agricultural lands.¹¹

⁹ See Petition at 6.

¹⁰ A copy of EO 4007 is included in the ADC letter to the Commission dated December 17, 2021 in this proceeding, available at <https://luc.hawaii.gov/>.

¹¹ Hawaii Legislature, “Report to the Twenty-Fourth State Legislature, State of Hawaii, Final Report on the Incentives for Important Agricultural Lands, Act 183, SLH 2005,” available at <https://hdoa.hawaii.gov/wp-content/uploads/2013/07/IAL-Final-Report-07.pdf>.

In 2008, KAA and ADC entered into the Restated and Amended Memorandum of Agreement By and Between the State of Hawaii Agribusiness Development Corporation and the Kekaha Agriculture Association dated August 29, 2008 (“RMOA”). Pursuant to the RMOA, KAA manages and operates the agricultural infrastructure located on the Kekaha Ag Lands that is utilized by the KAA members and the other farmers farming the Kekaha Ag Lands, including irrigation water, drainage, electric power, and roadways (collectively “agricultural infrastructure”). The RMOA has a term of twenty years.

On January 31, 2018, ADC staff submitted a recommendation to the ADC Board concerning the Petition (“Jan. 31 ADC staff submittal”). The Jan. 31 ADC staff submittal affirms that the “ADC lands”¹² are “by definition, excepted from the inventory of State public lands”; a petition to the Commission for a declaratory order is the “only state route available to achieve IAL status for the ADC lands”; KAA has “historically expended millions of dollars for infrastructure operational, maintenance and repair costs”; these are “precisely the types of activities and expenditures that the IAL tax credits are intended to incentivize”; that although ADC manages the ADC lands, “the fee simple interest in and to the lands remains with the State of Hawaii, through its Board of Land and Natural Resources” and therefore “simultaneous with this request, the ADC has requested that the Land Board also approve KAA’s proposed action”; it is recommended that the ADC Board authorize KAA to seek a declaratory order to designate the KAA IAL; and it is recommended that ADC “[i]f appropriate, certify or otherwise consent, as the landowner or land manager, to KAA’s forthcoming petition as the landowner[.]”¹³

¹² The term “ADC lands” as used in the Jan. 31 ADC staff submittal appears to be generally synonymous with the term Kekaha Ag Lands used in this Brief.

¹³ See Jan. 31 ADC staff submittal at 1-3. A copy of the Jan. 31 ADC staff submittal is attached to the supplemental comments filed by ADC in this proceeding on December 17, 2021 and available on the Commission’s website.

On January 31, 2018, the ADC Board considered the Jan. 31 ADC staff submittal and related matters. According to the minutes from that meeting, which the ADC Board approved on February 28, 2018 (“Jan. 31 ADC minutes”), the motion to approve the Jan. 31 ADC staff submittal recommendations “carried unanimously”; “[a]though the ADC manages these lands, the fee simple interest in and to the lands remains with the State of Hawaii, through its Board of Land and Natural Resources” and therefore “simultaneous with this request, the ADC has requested that the Land Board also approve the KAA’s proposed action.”

On December 2, 2021, KAA filed its Petition to issue a declaratory order designating as IAL approximately 12,123 acres of land at Kekaha, Kauai (“KAA IAL”).¹⁴ Through the Petition, KAA proposes to designate the vast majority of the Kekaha Ag Lands (approximately 95 percent, or 12,123 acres) as IAL. The Remainder Land that KAA is not proposing to designate as IAL totals approximately 639 acres (approximately 5 percent of the Kekaha Ag Lands). KAA seeks designation as IAL to secure future use of the KAA IAL for agriculture and to enable KAA members to take advantage of the benefits offered now or in the future in connection with use of the KAA IAL. The Petition does not seek to reclassify land in the agricultural district to rural, urban or conservation district and voluntarily waives its right to claim or exercise any credits to reclassify the Kekaha Ag Lands.¹⁵

On December 6, 2021, ADC submitted written comments on the Petition (“Dec. 6 ADC comments”).¹⁶ The Dec. 6 ADC comments state that ADC is in “STRONG SUPPORT” of

¹⁴ Available at <https://luc.hawaii.gov/>. Throughout this Brief, “KAA IAL” refers to the Kekaha Ag Lands that KAA proposes to designate as IAL and “Remainder Land” refers to Kekaha Ag Lands the KAA is not proposing to designate as IAL.

¹⁵ See Petition at 20-21.

¹⁶ Available at <https://luc.hawaii.gov/>.

the Petition and “urges this Commission to GRANT the Petition and declare the Kekaha land as Important Agriculture Lands in accordance with HRS Chapter 205, Part III.”¹⁷

On December 15, 2021, OPSD submitted written comments on the Petition (“Dec. 15 OPSD comments”).¹⁸ The Dec. 15 OPSD comments state that OPSD recommends that the Commission approve the Petition.

On December 15, 2021, the Planning Department submitted written comments on the Petition (“Dec. 15 Planning Department comments”).¹⁹ The Dec. 15 Planning Department comments state that the Planning Department’s comments are submitted in support of the Petition.

On December 15, 2021, DOA submitted written comments on the Petition (“Dec. 15 DOA comments”).²⁰ The Dec. 15 DOA comments state that all eight IAL criteria have been satisfactorily met and the “petitioned area merits consideration for designation as IAL.”²¹

On December 17, 2021, ADC submitted supplemental comments (“Dec. 17 ADC comments”).²² The Dec. 17 ADC comments state:

It is our understanding that this is the first petition requesting a declaratory order designating lands owned by the State of Hawaii as important agricultural lands. If the purpose of the Important Agricultural Lands (“IAL”) statute is to conserve and protect agricultural lands, ensure the availability of sufficient suitable lands for agricultural production, increase agricultural sustainability, and promote the development and expansion of diversified agriculture production through incentives, ADC suggest the statute should be broadly construed to facilitate these purposes. If there is a “compelling state interest” in achieving these purposes,

¹⁷ *Id.* at 2.

¹⁸ Available at <https://luc.hawaii.gov/>.

¹⁹ Available at <https://luc.hawaii.gov/>.

²⁰ Available at <https://luc.hawaii.gov/>.

²¹ *Id.* at 6.

²² Available at <https://luc.hawaii.gov/>.

ADC suggests that State lands should be openly embraced as IAL once the requisite standards and criteria are met.²³

The Dec. 17 ADC comments attached copies of the Jan. 31 ADC staff submittal, the Jan. 31 ADC minutes, and EO 4007.

On December 17, 2021, OPSD submitted supplemental comments (“Dec. 17 OPSD comments”).²⁴ The Dec. 17 OPSD comments state that “a question arose” as to whether the KAA IAL must be designated pursuant to HRS § 205-44.5, “Important agricultural lands; public lands” because the KAA IAL is owned by the State of Hawaii, and whether this precludes designation pursuant to HRS § 205-45, “Petition by farmer or landowner,” as requested in the Petition;²⁵ that the KAA IAL are not “public lands” pursuant to HRS § 171-2; HRS § 205-44.5 is “inapplicable”; and the Petition is appropriately brought under HRS § 205-45.

On December 17, 2021, KAA member Kauai Shrimp submitted a letter in support of the Petition, stating that it has been in business since 1997, has over forty employees, donated over 10,000 pounds of product during the COVID-19 pandemic, and benefits from IAL designation will help address rising costs and attract more agriculture.²⁶

On December 19, 2021, E Ola Maui Na Leo O Kekaha, a nonprofit organization that promotes community activities in Kekaha, submitted a letter in support of the Petition stating that approval of the Petition will stimulate investment in the community, help attract additional farmers, and increase stability and productivity in support of “our beloved agricultural life style.”²⁷

²³ *Id.* at 2 (emphasis added).

²⁴ Available at <https://luc.hawaii.gov/>.

²⁵ See, e.g., Petition at 1, 4 (Petition brought pursuant to HRS § 205-45).

²⁶ Available at <https://luc.hawaii.gov/>.

²⁷ Available at <https://luc.hawaii.gov/>.

On December 23, 2021, the Commission held a hearing on the Petition (“Dec. 23 hearing”). At the conclusion of the Dec. 23 hearing, the Commission approved a motion to defer this proceeding and to have the parties “brief the specific issues raised in this hearing as set forth in a letter to be prepared by staff[,]” i.e., the Feb. 2 letter.²⁸

On March 14, 2022, KIUC submitted a letter to ADC in support of ADC reauthorizing KAA to file the Petition (“March 14 KIUC letter”). The letter states that KIUC is developing the West Kauai Energy Project (“WKEP”); that the WKEP will include a solar facility, an electric substation, and a power house and will have an “agricultural component”; “[a]creage for these critical components of WKEP is included in this request”; and KIUC encourages the ADC Board to approve the request to reauthorize KAA to file the Petition.²⁹

On March 16, 2022, ADC staff issued a staff submittal which recommended that the ADC Board reauthorize KAA to file the Petition (“March 16 ADC staff submittal”).³⁰ The March 16 ADC staff submittal concludes “[a]fter extensive research, it would appear that ADC, by virtue of the Executive Order [i.e., EO 4007] stands in the shoes of the State for purposes of fee simple ownership.”³¹

On March 18, 2022, ADC sent a letter to KAA concerning the March 16 ADC Board meeting (“March 18 ADC letter”).³² The March 18 ADC letter states that at the March 16, 2022 ADC Board meeting the Board “re-considered and approved authorization” for KAA to file the Petition; that the Board certified “ADC’s authorization as the landowner . . . rather than [DLNR]” and that it “[c]onsented and certified, on behalf of the State of Hawaii as the

²⁸ Transcript of Dec. 23, 2021 Hearing on DR21-76 (“Tr.”) at 91 lines 7-25.

²⁹ A copy of the March 14 KIUC letter is attached as Exhibit A.

³⁰ A copy of the March 16 ADC staff submittal, excluding the exhibits, is attached as Exhibit B. Copies of all exhibits to this staff submittal are available on the ADC website. *See* ADC, Meetings, March 22, 2016 Meetings/Submittals, *available at* <https://hdoa.hawaii.gov/adc/meetings/>.

³¹ *Id.* at 3 (emphasis added).

³² A copy of the March 18 ADC letter is attached as Exhibit C.

landowners authorized under Executive Order no. 4007, ADC’s approval and support” for the Petition.³³

On March 29, 2022, OPSD filed its Statement of No Position, pursuant to which OPSD “would urge the LUC,” if there are “alternate reasonable constructions of the law,” to select that construction which effectuates the purpose of the IAL statutes and the Hawaii Constitution, namely to ‘conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.’”³⁴

IV. ADC PROPERLY AUTHORIZED KAA TO FILE THE PETITION (Issue Nos. 2, 3 and 4)

As explained below, the conclusion that ADC, rather than BLNR, properly authorized KAA to file the Petition is supported by past and recent ADC Board action authorizing the Petition, review and analysis of applicable provisions of HRS chapter 171, and the express language of EO 4007. The following addresses Issue Nos. 2, 3 and 4 in the Feb. 2 letter and concludes with a summary of the responses below.

ADC properly authorized KAA to file the Petition because ADC has “a fee simple interest in the land.”³⁵ The Petition is made pursuant to HRS § 205-45, “Petition by farmer or landowner.”³⁶ Under subsection 205-45(c)(1), the petition must include authorization from the “applicable landowners[.]” Similarly, under Hawaii Administrative Rules (“HAR”) § 15-15-121, “Petition by Farmer or Landowner,” subsection (b)(1), the petition shall include “authorization from the applicable landowners.”³⁷ Under HAR § 15-15-03, “Definitions,” the

³³ *Id.* (emphasis added).

³⁴ *Id.* at 2 (citations omitted).

³⁵ See HAR § 15-15-03 (definition of “Landowner”).

³⁶ See Petition at 1, 4.

³⁷ *Id.*; see also HAR § 15-15-122(c)(2) (landowner authorization for petition for reclassification).

term “Landowner” is defined as a party that has a “fee interest in the land.”³⁸ Thus, the legal standard is whether ADC has a fee interest in the Kekaha Ag Lands (and KAA IAL). KAA submits the following clarifies and establishes that ADC has a “fee interest in the land” for purposes of authorizing KAA to file the Petition.³⁹

A. The ADC Board Has Twice Properly Authorized KAA to File the Petition Without BLNR Prior Approval.

As an initial matter, the ADC Board properly authorized KAA to file the Petition at its January 2018 Board meeting, and recently clarified and confirmed at its March 2022 Board meeting that ADC is not required to obtain BLNR approval before authorizing KAA to file the Petition.

1. January 2018 ADC Board meeting.

The ADC Board properly authorized KAA to file the Petition at its January 2018 meeting. The Jan. 31 ADC staff submittal recommended that the ADC Board authorize KAA to file the Petition. In support, it affirms that the “ADC lands” are “by definition, excepted from the inventory of State public lands”; a petition to the Commission for a declaratory order is the “only state route available to achieve IAL status for the ADC lands”; KAA has “historically expended millions of dollars for infrastructure operational, maintenance and repair costs”; and these are “precisely the types of activities and expenditures that the IAL tax credits are intended to incentivize.”⁴⁰ The staff submittal also recommended that ADC “[i]f appropriate, certify or otherwise consent, as the landowner or land manager, to KAA’s forthcoming petition as the

³⁸ *Id.* (emphasis added).

³⁹ It is noted that the State of Hawaii may properly be considered as a distinct entity from BLNR thus allowing ADC, rather than BLNR, to have a fee interest in the Kekaha Ag Lands. For example, in *Honolulu Construction and Draying Co. v. State of Hawaii, et al.*, 130 Haw. 306, 310 P.3d 301, (Hawaii 2013) (“*Honolulu Construction*”) the Hawaii Supreme Court noted that in an underlying Land Court proceeding there were six respondents to the petition, and two of the respondents were the State of Hawaii and DLNR, i.e., they were separate and distinct entities in that proceeding. *Honolulu Construction*, 130 Haw. at 311, n. 10. This separate status reinforces that the State of Hawaii may grant to ADC – rather than BLNR – an interest in the fee.

⁴⁰ *Id.* (emphasis added).

landowner[.]⁴¹ The Jan. 31 ADC minutes confirm that the ADC Board approved the staff submittal recommendation to authorize KAA to file the Petition, and the motion to approve the Jan. 31 ADC staff submittal recommendations was carried unanimously.

Although the ADC Board approved that it certify or consent to the Petition as the “landowner,” it also refers to BLNR approval which resulted in the need for further clarification. For example, the Jan. 31 ADC staff submittal states that although ADC manages the ADC lands, “the fee simple interest in and to the lands remains with the State of Hawaii, through its Board of Land and Natural Resources” and therefore “simultaneous with this request, the ADC has requested that the Land Board also approve KAA’s proposed action.”⁴² The references to ADC seeking approval from BLNR prior to authorizing KAA to file the Petition were discussed by the Commission during the Dec. 23 hearing.⁴³

2. March 2022 ADC Board meeting.

Because the foregoing references to BLNR approval resulted in the need for additional clarity concerning whether and to what extent BLNR approval is or is not required for the ADC Board to authorize KAA to file the Petition, the ADC Board subsequently clarified that, upon further review and consideration, such BLNR approval is not required and that ADC effectively has a fee interest in the Kekaha Ag Lands for purposes of authorizing KAA to file the petition.

Accordingly, the March 16 ADC staff submittal concludes “[a]fter extensive research, it would appear that ADC, by virtue of the Executive Order [i.e., EO 4007] stands in

⁴¹ *Id.* at 3 (emphasis added).

⁴² *See* ADC Jan. 31 staff submittal at 3. Similarly, the ADC Jan. 31 minutes state that “[a]lthough the ADC manages these lands, the fee simple interest in and to the lands remains with the State of Hawaii, through its Board of Land and Natural Resources” and therefore “simultaneous with this request, the ADC has requested that the Land Board also approve the KAA’s proposed action.” *Id.* at 5.

⁴³ *See, e.g.*, Tr. at 60 lines 6-12.

the shoes of the State for purposes of fee simple ownership.”⁴⁴ The March 18 ADC letter further affirms that at the March 16, 2022 ADC Board meeting the Board “re-considered and approved authorization” for KAA to file the Petition; that the Board certified “ADC’s authorization as the landowner . . . rather than [DLNR]” and that it “[c]onsented and certified, on behalf of the State of Hawaii as the landowners authorized under Executive Order no. 4007, ADC’s approval and support” for the Petition.⁴⁵

B. HRS Chapter 171 Supports the Conclusion that ADC Was Not Required to Seek BLNR Approval to Authorize KAA to File the Petition.

As explained below, the applicable provisions of HRS chapter 171, “Public lands, management and disposition of” either support, or do not provide a basis for opposing, the overarching conclusion that the ADC Board was not required to obtain approval from BLNR prior to authorizing KAA to file the Petition because ADC has “a fee interest in the land” sufficient to authorize KAA to file the Petition. The following discusses HRS §§ 171-2, 3, 11 and 64.7 in turn to demonstrate that they lend support to Commission approval of the Petition.

1. HRS § 171-2, “Definition of public lands.”

Under HRS § 171-2, the KAA IAL are not located on HRS chapter 171 public lands:

“Public lands” means all lands or interest therein in the state classed as government or crown lands . . . except:

. . .
(11) Lands that are set aside by the governor to the agribusiness development corporation, lands leased to the agribusiness development corporation by any department or agency of the state, or lands to which the agribusiness development corporation in its corporate capacity holds title.⁴⁶

⁴⁴ *Id.* at 3 (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* (emphasis added).

The KAA IAL is located on the Kekaha Ag Lands which were set aside to ADC through EO 4007 and therefore constitute “[l]ands that were set aside by the governor” to ADC.⁴⁷

Accordingly, the KAA IAL are not “public lands” under HRS § 171-2(11).

2. HRS § 171-3, “Department of land and natural resources.”

Based on section 171-2(11), as discussed above, section 171-3 can be ruled out as providing any support for the notion that BLNR approval was required because the Petition does not involve HRS chapter 171 public lands. Under subsection 171-3(a), DLNR “shall manage, administer and exercise control over public lands[.]”⁴⁸ Similarly, under subsection 171-3(b), “[n]otwithstanding subsection (a), beginning January 1, 2010, the authority to manage, administer, and exercise control over any public lands that are designated important agricultural lands pursuant to section 205-44.5, shall be transferred to the department of agriculture.”⁴⁹

Neither provision applies because the KAA IAL is not on HRS chapter 171 public lands.

3. HRS § 171-11, “Public purposes, lands set aside by the governor, management.”

The following reviews key excerpts from section 171-11, in the order they appear in the statute, to demonstrate that none of these provisions, individually or in combination, require ADC to obtain BLNR approval prior to authorizing KAA to file the Petition.⁵⁰ To the

⁴⁷ HRS § 171-2(11); *see also* OPSD Dec. 17 comments (KAA IAL are not HRS chapter 171 “public lands”); *State v. Reis* 115 Hawaii 79, 84, 65 P.3d 980 (2007) (where a statute is clear and unambiguous, there is no reason to look beyond the statutory language).

⁴⁸ *Id.*

⁴⁹ *Id.* (emphasis added).

⁵⁰ Relevant excerpts from HRS § 171-11, “Public purposes, lands set aside by the governor; management,” are as follows (emphasis added):

[Para. 1] “The governor may, with the prior approval of the board of land and natural resources, set aside public lands to any department or agency of the State, the city and county, county, or other political subdivisions of the State for public use or purpose. All withdrawals of the lands or portions thereof so set aside shall be made by the governor.

. . .

[Para. 3] Lands while so set aside for such use or purpose or when acquired for roads and streets shall be managed by the department, agency, city and county, county, or other political subdivisions of the State having jurisdiction

contrary, they generally support, or do not provide a basis for opposing, the conclusion that BLNR approval is not required because ADC possesses the requisite “fee interest in the land.”

Under para. 1 of section 171-11, the Governor may set aside public lands with BLNR’s “prior approval.” EO 4007 set aside the Kekaha Ag Lands and confirms that BLNR approved the set aside. After BLNR approved EO 4007, any interest of BLNR in the Kekaha Ag Lands relevant to IAL designation was effectively assumed by ADC, thereby resulting in ADC having the requisite “fee interest in the land” as required by the Commission’s administrative

thereof, unless otherwise provided by law. Such department, agency of the State, the city and county, county, or other political subdivisions of the State in managing such lands shall be authorized to exercise all of the powers vested in the board in regard to the issuance of leases, easements, licenses, revocable permits, concessions, or rights of entry covering such lands for such use as may be consistent with the purposes for which the lands were set aside on the same terms, conditions, and restrictions applicable to the disposition of public lands, as provided by this chapter all such dispositions being subject to the prior approval of the board; provided that any nonrenewable dispositions granting rights for a period not in excess of fourteen days shall not require (1) the approval of the board or (2) public auction or public advertisement for sealed tenders; and provided further that disposition of lands set aside for use as agricultural parks pursuant to chapter 166 shall not be subject to the prior approval of the board. If at the time of the disposition of any such leases the board shall have approved the same, any order withdrawing or setting aside any or all of such lands for any other public purpose shall be made subject to such leases. Subject to section 5(f) of the Act of March 18, 1959 (73 Stat. 6), all proceeds from such lands shall be deposited into the appropriate funds provided by law.

[Para. 5] Whenever lands set aside for a public purpose to the various departments and agencies of the State, or to any city and county, county, or other political subdivisions of the State, or to the United States, are not being utilized or required for the public purpose stated, the order setting aside the lands shall be withdrawn and the lands shall be returned to the department. The governor may withdraw public lands and, with prior approval of the board of land and natural resources, set aside the withdrawn lands to another department or agency of the State, the city and county, county, or political subdivision of the State, or to the United States for public use or purpose, provided that no structure on such lands shall be built, demolished or altered until after the legislative action or inaction as hereinbelow provided.

[Para. 6] The power granted to the governor in this section to set aside or withdraw or withdraw and set aside public lands shall be exercised subject to disapproval by the legislature by two-thirds vote of either the senate or the house of representatives or by the majority vote of both, in any regular or special session next following the date of the setting aside or withdrawal, or withdrawal and setting aside.

[Para. 7] Whenever portions of lands set aside for a public purpose to the various departments and agencies of the State, or to any city and county, county, or other political subdivision of the State are not presently utilized or required for the public purpose stated, the board shall have the power, without withdrawing the order setting aside the lands, to dispose of any and all real property interest less than the fee in the portions of such lands where the disposition is for a use which is consistent or inconsistent with the purpose for which the land was set aside. All funds derived from disposition by the board shall be deposited in the general fund of the State or be paid to the appropriate account; provided that all such dispositions shall be with the prior written approval of the department, agency, city and county, county, or other political subdivisions of the State and the governor, and shall be undertaken in compliance with all other applicable sections of this chapter.”

rules. As noted below, this conclusion is reinforced by para. 5 insofar as it requires ADC to return the fee interest to DLNR under certain conditions, as discussed below.

Under para. 3 of section 171-11, the lands which have been set aside shall be “managed” by the applicable “agency” or other “political subdivision of the State having jurisdiction thereof, unless otherwise provided by law.” EO 4007 set aside the Kekaha Ag Lands to ADC and thus ADC is the applicable agency. EO 4007 states that the lands are to be under the “control and management” of ADC. This management by ADC supports the conclusion that ADC has the requisite fee interest in the Kekaha Ag Lands.

Also under para. 3, the agency receiving the set aside “shall be authorized to exercise all of the powers vested in” BLNR with regard to the issuance of leases, easements, licenses, and rights of entry. ADC routinely exercises such rights with regard to KAA and the Kekaha Ag Lands, which is consistent with ADC holding a fee interest in the Kekaha Ag Lands. By this language, as described by ADC it “stands in the shoes” of BLNR with regard to authorizing the Petition.⁵¹

Also under para. 3, the “disposition of lands set aside for use as agricultural parks pursuant to chapter 166 shall not be subject to the prior approval” of BLNR.⁵² On September 23, 2021, Governor Ige signed Executive Order No. 4660 (“E.O. 4660”) setting aside certain public lands in Kekaha, Hawaii, for “agriculture and related purposes.”⁵³ The lands set aside pursuant to E.O. 4660 were not included in the Petition. If the Petition is amended to include these lands, the amended Petition will not be subject to BLNR approval, which further indicates ADC has a fee interest in the land – this is another instance in which BLNR approval is not required with regard to set aside lands.

⁵¹ March 16 ADC staff submittal at 3.

⁵² *Id.* (emphasis added).

⁵³ *Id.*

Under para. 5 of section 171-11, whenever lands set aside “are not being utilized or required for the public purpose stated,” the set aside order “shall be withdrawn” and the lands “shall be returned” to DLNR.⁵⁴ The set aside order must be withdrawn because it confers an interest in the fee to the agency, in this case ADC – if it did not confer a fee interest, it would not need to be withdrawn. Similarly, the requirement to return the land, in this instance, indicates that EO 4007 resulted in ADC having a fee interest in the land insofar as ADC would have the obligation to return the land, and that obligation arises from its fee interest. This analysis reinforces the conclusion that ADC’s fee interest in the Kekaha Ag Lands is not equivalent to a reversionary interest – rather, it is a fee interest in the land that may be terminated under certain circumstances.⁵⁵

Under para. 6, the power of the governor to set aside lands is subject to disapproval by the Hawaii Legislature, further reinforcing that EO 4007 resulted in ADC having a fee interest in the Kekaha Ag Lands.

Finally, under para. 7, whenever set aside lands “are not presently used or required for the public purpose stated,” BLNR shall have the power “without withdrawing the order setting aside the lands, to dispose of any and all real property interest less than the fee[.]” In the context of the Petition, this indicates that if in the future the Kekaha Ag Lands are not required for agricultural purposes, then BLNR may step in and dispose of real property interests “less than the fee.” Such interests would be less than the fee because the greater interest in the fee resides with ADC based on EO 4007 and HRS chapter 171.

⁵⁴ *Id.* (emphasis added).

⁵⁵ *See* Tr. at 54, 56-59, 80 (discussing potential effect of a possible “reverter clause”).

4. HRS § 171-64.7, “Legislative approval of sale or gift of lands.”

Under this provision, with regard to “land that is set aside by the governor” to ADC, “no sale of lands . . . in fee simple” shall occur without prior approval of the Hawaii Legislature.⁵⁶ This provision assumes the agency (such as ADC), as recipient of the set aside, may seek a “sale of lands” in “fee simple.” To do so, however, ADC must first have a fee interest in the land. Like the language in para. 6 of section 171-11, discussed above, this further confirms that ADC holds the fee or has a fee interest in the Kekaha Ag Lands. Given that section 171-64.7 contemplates ADC having the power to sell the Kekaha Ag Lands, it is submitted that ADC’s fee interest in the Kekaha Ag Lands is more than sufficient to authorize KAA to file the Petition.

C. Responses to Issue Nos. 2, 3 and 4.

The foregoing analysis encompasses and responds to Issue Nos. 2, 3 and 4 in the Feb. 2 letter, which may be summarized as follows (Issue Nos. 1, 5, and 6 are addressed below).

1. Issue No. 2.

Issue No. 2(a) concerns whether BLNR approval was required prior to ADC authorizing KAA to file the Petition. For the reasons explained above, BLNR approval was not required prior to ADC authorizing KAA to file the Petition.

Issue No. 2(b) concerns whether the “characterization of the fee interest” in Issue No. 2 remains accurate. Issue No. 2 characterizes the fee interest as being held by “the State of Hawaii through its Board of Land and Natural Resources[.]” For the reasons explained above, that characterization of the fee interest is not accurate, ADC holds a fee interest in the land for purposes of authorizing the Petition, and BLNR approval was not required prior to ADC authorizing KAA to file the Petition.

⁵⁶ *Id.*

2. Issue No. 3.

Issue No. 3 concerns the “powers or authority” over the Kekaha Ag Lands granted to ADC through EO 4007. As explained above, under EO 4007 the lands are to be “under the control and management of ADC[.]”⁵⁷ In addition, EO 4007 is subject to the condition that upon cancellation of EO 4007, or “non-use or abandonment” of the premises for more than one year, or for “any reason whatsoever,” ADC shall “restore the premises to a condition satisfactory and acceptable to” DLNR. As explained above, both of these provisions in EO 4007 reinforce the conclusion that ADC was not required to obtain BLNR approval because EO 4007 effectively grants to ADC a fee interest in the land.

3. Issue No. 4.

Issue No. 4 concerns “the distinction between management authority granted on state lands vs. fee simple ownership.” As explained above, pursuant to EO 4007, and applicable provisions of HRS chapter 171, ADC has a fee interest in the land and is effectively the landowner for purposes of satisfying HRS § 205-45(c)(1) concerning a farmer petitioner obtaining the landowner’s consent. ADC is the landowner for purposes of a farmer petition and ADC has twice properly consented to the Petition as de facto landowner in this context. Accordingly, there is no basis for imposing the requirement of BLNR approval.

V. KAA PROPERLY FILED A FARMER PETITION (Issue No. 1)

Consistent with its position at the December 23, 2021 hearing before the Commission in this matter, KAA submits that it is a “farmer” within the meaning of that term for purposes of the filing of its Petition because KAA members are farmers and KAA is legally authorized to act as an agent on behalf of the KAA members. Accordingly, it was not required for the Petition to be filed by a “landowner” or jointly by a “farmer” and a “landowner.

⁵⁷ EO 4007 at 2.

As an initial matter, KAA properly filed the Petition as a farmer within the meaning of HRS § 205-45. KAA is a farmer organization. In 2003, KAA was formed as an agricultural cooperative pursuant to HRS chapter 421, “Agricultural Cooperative Associations.” KAA was incorporated by “bona fide producers of agricultural products.” In describing its purpose in its Articles of Incorporation, KAA states that it was formed in part to “promote effective and compatible agricultural/aquacultural business uses” of the Kekaha Ag Lands. KAA members are farmers engaged in agriculture and aquaculture and are KAA members are “bona fide producers of agricultural products.” At present, KAA members include Hartung Brothers, Inc., Corteva Agriscience, Kauai Shrimp, and Wines of Kauai.

In addition, pursuant to HRS § 421-9, “Powers,” subsection (a), an association formed under HRS chapter 421 “shall have the capacity to act possessed by natural persons”; and under subsection (b)(1) the association shall have the authority to act as an agent on behalf of its members. Thus KAA directly represents and speaks on behalf of its member farmers.

As between KAA filing the Petition as a farmer or ADC filing the Petition as a landowner, the former is more appropriate based on the subject matter of the Petition, i.e., tax benefits available to farmers. The Petition seeks to designate the KAA IAL as IAL. The majority of the KAA IAL is licensed to KAA members who are farmers. As farmers of the KAA IAL, they possess knowledge and information necessary to file and maintain the Petition. In addition, KAA is more directly aligned with the farmers’ interests in obtaining the potential benefits afforded by IAL designation. ADC has interests in agricultural lands across the State and the KAA farmers are focused on the KAA IAL. Accordingly, KAA properly filed the Petition.

Finally, because KAA properly filed the Petition as a farmer and there is no requirement that the Petition be filed by ADC as a landowner, there is no requirement for the Petition to have been filed jointly by ADC and KAA.

Thus, in response to Issue No. 1 KAA is a farmer organization comprised solely of farmers, KAA constitutes a “farmer” within the meaning of HRS § 205-45, and accordingly KAA properly filed the Petition as a farmer and it was not required for the Petition to be filed by a “landowner” or jointly by a “farmer” and a “landowner.”

VI. HRS § 205-44.5 DOES NOT APPLY TO THE KEKAHA AG LANDS (Issue No. 5)

In response to Issue No. 5, given that the KAA IAL is excepted from the definition of “public land” under HRS § 171-2, KAA properly filed the Petition under HRS § 205-45 and it was not required for the Petition to be filed pursuant to HRS § 205-44.5. Under HRS § 205-44.5, “Important agricultural lands; public lands,” subsection (a), DLNR and DOA shall “collaborate to identify public lands as defined under section 171-2” that should be designated as IAL.⁵⁸ The KAA IAL are not “public lands” under HRS § 171-2(11). Thus, HRS § 205-44.5 is inapplicable and the Petition is appropriately brought under HRS § 205-45.⁵⁹ In response to Issue No. 4, there is no requirement to comply with HRS § 205-44.5 with regard to the KAA IAL. Indeed, because the Kekaha Ag Lands are not public lands under HRS chapter 171, it would not be permissible for the Petition to have been filed under HRS § 205-44.5, and the Petition could only be properly filed pursuant to HRS § 205-45.

VII. INTERVENTION (Issue No. 6)

In response to Issue No. 6, KAA submits that the Commission should properly determine whether a party may intervene in this proceeding based on any applications, motions,

⁵⁸ *Id.* (emphasis added).

⁵⁹ *See* OPSD Dec. 17 comments at 2.

pleadings, or opposition filings, and the applicable statutes and administrative rules, and the record before the Commission at that time. This conclusion applies with regard to the Petition, which seeks IAL designation for state lands, and also may apply with regard to “individual parcels,” depending on the relevant facts and law. KAA declines to further speculate insofar as it is not aware of any motions to intervene or participate pending before the Commission at this time, and respectfully reserves all rights in that regard.

It is further noted that HRS § 205-47, “Identification of important agricultural lands; county process,” subsection (d) requires the counties to identify potential lands to be recommended as IAL and to “notify each owner of those lands by mail or posted notice on the affected lands” to inform them of the potential IAL designation. Although the Petition proceeds under HRS § 205-45, rather than HRS § 205-47, and this requirement does not apply, the record reflects that relevant State agencies and other stakeholders are aware of this proceeding.

Notably, the March 14 KIUC letter affirms that acreage for “critical components” of the WKEP are included in the Petition and KIUC encourages the ADC Board to reauthorize KAA to file the Petition.

VIII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission to:

(1) enter findings and conclusions of law in this proceeding consistent with the foregoing and the Petition, as appropriate and necessary;

(2) find that the Petition meets the applicable standards for a Petition for declaratory order to designate lands as IAL; and

(3) issue a declaratory order designating the KAA IAL as IAL.

DATED: Honolulu, Hawai'i, March 30, 2022.



DOUGLAS A. CODIGA
Attorney for Petitioner
KEKAHA AGRICULTURE ASSOCIATION