

DAVID Y. IGE
Governor

JOSH GREEN
Lt. Governor



JAMES J. NAKATANI
Executive Director

ITEM D-4

STATE OF HAWAII
AGRIBUSINESS DEVELOPMENT CORPORATION
235 S. Beretania Street, Room 205
Honolulu, HI 96813
Phone: (808) 586-0186 Fax: (808) 586-0189

March 16, 2022



Subject: Request for reconsideration of the January 31, 2018 Board authorization for the Kekaha Agriculture Association (KAA) to pursue a declaratory order to designate a portion of the Agribusiness Development Corporation's (ADC) Kekaha lands as Important Agricultural Lands in accordance with Chapter 205, Hawaii Revised Statutes (HRS), and to certify ADC's authorization as the landowner of lands set aside for control and management of ADC via Executive Order No. 4007, rather than the Department of Land and Natural Resources

Authority: Sections 163D-4(a)(18), 171-2(11), and 171-11, HRS

Location: Kekaha, Island of Kauai, Hawaii

Land Area: Portions of the Mānā plain lands, approximately 12,123 acres

Tax Map Key: (4) 1-2-02-01

Land Status: Encumbered by Governor's Executive Order No. 4007 to ADC for the public purpose of Agriculture and related purposes.

Trust Land Status: Ceded land under Section 5(b) lands of the Hawaii Admission Act
Yes No

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution? Yes No

Character of Use: Agricultural

Land Doc. Type: N/A

Term: N/A

BACKGROUND:

In 2003, ADC acquired approximately 12,860.642 gross acres of land in Kekaha, Waimea, Kauai by way of Executive Order No. 4007, which set aside public land for the following public purposes:

FOR AGRICULTURAL AND RELATED PURPOSES, to be under the

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control and management of the Agribusiness Development Corporation, a public body corporate and politic and an instrumentality and agency of the State of Hawaii, being that parcel of land situate at Kekaha, Waimea, Kauai, Hawaii, identified as "Portion of the Government (Crown) Land of Waimea," containing a gross area of 12,860.642 acres and a net area of 12,592.133 acres

SUBJECT, HOWEVER, to the condition that upon cancellation of this executive order or in the event of non-use or abandonment of the premises or any portion thereof for a continuous period of one (1) year, or for any reason whatsoever, the Agribusiness Development Corporation shall, within a reasonable time, restore the premises to a condition satisfactory and acceptable to the Department of Land and Natural Resources, State of Hawaii.

SUBJECT, FURTHER, to disapproval by the Legislature by two-thirds vote of either the Senate or the House of Representatives or by majority vote of both, in any regular or special session next following the date of this Executive Order.

See Exhibit "A".

In 2005, the Hawai'i State Legislature enacted Part III of the Land Use Commission act, codified as sections 205-41 to 205-52, HRS, entitled "Important Agricultural Lands" for the stated purposes of conserving and protecting agricultural lands, promoting diversified agriculture, increasing agricultural self-sufficiency, and assuring the availability of agriculturally suitable lands. Section 205-41, HRS.

There are two ways to achieve important agricultural land designation: 1) by identification of public lands, and designation of such public lands, by the department of agriculture (HDOA) and the department of land and natural resources (DLNR) as important agricultural lands, before December 31, 2009 pursuant to section 205-44.5, HRS; or 2) by a farmer or landowner petition to the Land Use Commission pursuant to section 205-45, HRS. HDOA and DLNR, to date, have not identified any lands in Kekaha as important agricultural lands pursuant to section 205-44.5, HRS.

The benefits to be obtained from important agricultural land designation include protecting land from being used for non-agricultural purposes; allows the landowner to develop farm dwellings and employee housing; and provides income tax incentives to promote economic sustainability of agricultural enterprises.

KAA is an agricultural cooperative formed under chapter 421, HRS. The members of KAA are agricultural producers. "Agricultural products" include floricultural, horticultural, viticultural, forestry, nut, coffee, dairy, livestock, poultry, bee, farm or plantation products, and fish and aquacultural commodities. Section 421-1, HRS. KAA members have long-term agricultural land licenses/leases with ADC, and have historically expended millions of dollars for Kekaha agricultural infrastructure operation and maintenance.

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In 2018, KAA proposed to voluntarily petition the Land Use Commission (LUC) for a declaratory order pursuant to section 205-45, HRS, designating portions of the Mānā plain lands as important agricultural lands. Prior to submitting the petition, KAA asked the ADC Board to authorize KAA, as farmers, to seek important agricultural land designation for ADC lands within the Mānā plain. KAA sought ADC's approval, as the landowner, to comply with section 15-15-121(b)(1), *Hawaii Administrative Rules* (HAR), which requires authorization from the applicable landowner.

The term "landowner" is not defined in chapter 205, HRS, but is defined in the Land Use Commission Rules as "a person or party with a fee simple interest in the land." Section 15-15-03, HAR. In an abundance of caution, ADC approached DLNR by way of letter dated January 22, 2018, and broached the subject of fee simple ownership of lands set aside to ADC by executive order. The letter asked for DLNR's assistance in working towards designating the ADC lands as important agricultural lands through KAA's petition. See Exhibit "B".

The request to authorize KAA's petition was presented to the ADC Board on January 31, 2018. DLNR had not responded to ADC's letter by the January 31, 2018 ADC Board meeting. Following KAA's presentation, the Board authorized KAA to submit a petition to the LUC, conditioned upon DLNR's approval. See Exhibit "C".

KAA filed a petition with the Land Use Commission on December 2, 2021. A hearing was held on December 23, 2021. At the hearing, the LUC raised several issues that needed clarification before the petition could proceed. The LUC continued the hearing to a date after April 2022 to address the issues. By way of letter dated February 2, 2022, the LUC asked the parties to brief specifically identified issues by March 30, 2022. See Exhibit "D". One of the questions raised by the LUC was who should represent the landowner, ADC or DLNR?

After extensive research, it would appear that ADC, by virtue of the executive order, stands in the shoes of the State for purposes of fee simple ownership.

REQUEST:

That the ADC Board, as the de facto landowner of lands set aside for the public purpose of agricultural and related purposes, reauthorize and support KAA's petition for declaratory order to designate approximately 12,123 acres of ADC lands as important agricultural lands.

DISCUSSION:

Based on the plain language of Executive Order No. 4007, "the Governor of the State of Hawaii," by virtue of the authority granted in Section 171-11, HRS, "and every other

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authority me hereunto enabling, do hereby order that the public land hereinafter described be, and the same is, hereby set aside for the following public purposes: FOR AGRICULTURAL AND RELATED PURPOSES[.]” Executive Order No. 4007 goes on to allow for disapproval of the executive order “by the Legislature by two-thirds vote of either the Senate or the House of Representatives or by majority vote of both, in any regular or special session next following the date of this Executive Order.”

Section 171-11, HRS, provides 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[.]” (Emphasis added.) Accordingly, based on HRS section 171-11, land set aside for a public purpose by way of executive order to ADC, has already received the approval of the Board of Land and Natural Resources (BLNR), and the Legislature.

Section 171-11, HRS, further provides that lands so set aside for a public purpose, “shall be managed by the department, agency, city and county, county, or other political subdivisions of the State having jurisdiction thereof, unless otherwise provided by law.” (Emphasis added.) Pursuant to section 171-11, HRS, and Executive Order No. 4007, ADC is the agency given jurisdiction over the Kekaha lands.

However, lands given the status of “public lands” under chapter 171, HRS, do not include, “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[.]” Section 171-2(11), HRS.

While DLNR “shall manage, administer, and exercise control over public lands” pursuant to section 171-3(a), HRS, ADC was given these same powers through Executive Order No. 4007 and through the exemption of public land status to those lands set aside to ADC pursuant to section 171-2(11), HRS. DLNR and ADC are on equal footing in regards to matters involving lands subject to an executive order.

Executive Order No. 4007 returns the Kekaha lands to public land status, subject to certain prior conditions. Those conditions are cancellation of the executive order; or in the event of non-use or abandonment of the premises or any portion thereof for a continuous one year period; or for any reason whatsoever; and upon restoration of the premises to a condition satisfactory and acceptable to DLNR. Once any of these conditions are met, the lands again become subject to section 171-11, HRS, which states:

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

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the lands shall be withdrawn and the lands shall be returned to the department [of land and natural resources].

Until such time as the conditions establishing the right to reversion are met, the lands subject to executive order are under ADC jurisdiction. Such jurisdiction was given to ADC by the Governor with the approval of BLNR and the Hawaii legislature.

RECOMMENDATION:

Accordingly, it is recommended that this Board:

- 1) Reauthorize the Kekaha Agriculture Association to pursue a declaratory order to designate 12,123 acres of Agribusiness Development Corporation's Kekaha lands as Important Agricultural Lands in accordance with Chapter 205, HRS;
- 2) Consent or certify, on behalf of the State of Hawai'i as the fee simple landowner authorized by Executive Order No. 4007, ADC's approval and support of KAA's Petition for Declaratory Order to Designate Important Agricultural Lands under Docket No. DR 21-76; and
- 3) Authorize the ADC staff to assist and cooperate with KAA as necessary to secure the designation of the Mānā plain lands as important agricultural lands.

Respectfully Submitted,

James J. Nakatani
Executive Director

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EXHIBIT A

Governor's Executive Order No. 4007

[see following pages]

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EXHIBIT B

ADC Letter to DLNR Chairperson Suzanne Case Regarding Designation of Kekaha
Lands as Important Agricultural Lands by Petition

[see following page]

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EXHIBIT C

Minutes of ADC Board of Directors Meeting on January 31, 2018

[see highlighted on following pages]

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EXHIBIT D

Land Use Commission Briefs Requested at the December 23, 2021 Hearings on Docket
No. DR21-75

[see following pages]