

LAND USE COMMISSION
STATE OF HAWAI'I

Hearing held on February 11, 2021
Commencing at 9:00 a.m.

Held via ZOOM by Interactive Conference Technology

VII. Call to Order

VIII. CONTINUED ACTION (IF NECESSARY)
CITY AND COUNTY OF HONOLULU IMPORTANT
AGRICULTURAL LANDS DESIGNATION

IX. DISCUSSION ON LUC'S REPRESENTATION BY THE
ATTORNEY GENERAL'S OFFICE

VI. ADJOURNMENT

Before: Jean Marie McManus, Hawaii CSR #156

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1 APPEARANCES:

2 JONATHAN LIKEKE SCHEUER, Chair (Oahu)
3 NANCY CABRAL, Vice Chair (Big Island)
4 EDMUND ACZON, Vice Chair (Oahu)
5 GARY OKUDA (Oahu)
6 LEE OHIGASHI (Maui)
7 ARNOLD WONG (Oahu)
8 DAWN CHANG (Oahu)
9 DAN GIOVANNI (Kauai)

10 STAFF:

11 LINDA CHOW, ESQ.
12 Deputy Attorney General
13 DANIEL ORODENKER, Executive Officer
14 RILEY K. HAKODA, Chief Clerk
15 SCOTT DERRICKSON, Chief Planner
16 NATASHA A. QUINONES, Program Specialist

17 BRIAN YEE, ESQ.
18 Office of Planning
19 RODNEY FUNAKOSHI, Planning Program Administrator
20 State of Hawaii

21 DINA WONG, Department of Planning and Permitting
22 RAY YOUNG, Department of Planning and Permitting
23 City and County of Honolulu

24 EARL YAMAMOTO, Planner
25 Department of Agriculture
State of Hawaii

1 CHAIRPERSON SCHEUER: Aloha mai kakou.
2 Good morning.

3 This is the February 11, 2021 Land Use
4 Commission meeting, which is being held using
5 interactive conference technology linking
6 videoconference participants and other interested
7 individuals of the public via the ZOOM internet
8 conferencing program to comply with State and County
9 official operational directives during the COVID-9
10 pandemic. Members of the public are viewing the
11 meeting via the ZOOM webinar platform.

12 For all meeting participants, I would like
13 to stress to everyone the importance of talking
14 slowly, clearly and directly into your microphone.
15 Before speaking, please state your name and identify
16 yourself for the record. Also please be aware that
17 all meeting participants are being recorded on the
18 digital record of this ZOOM meeting. Your continued
19 participation is your implied consent to be part of
20 this public record. If you do not wish to be part of
21 the public record, you should exit the meeting now.

22 The ZOOM conferencing technology allows the
23 Parties and each participating Commissioner
24 individual remote access to meeting proceedings via
25 their own individual personal digital devices. Also

1 please note that due to matters entirely outside of
2 our control, for instance, the time that Spectrum
3 decided to do work on my street a few months ago,
4 occasional disruptions to connectivity may occur for
5 one or more members of the meeting at any given time.
6 If such disruptions occur, please let us know, and be
7 patient as we try to restore the audio/video signals
8 to effectively conduct business during the pandemic.

9 For members of the public who are
10 participating by telephone, and when I indicate the
11 appearance for public testimony, public testimony is
12 allowed, you can use the key sequence *9 to raise
13 your hand, and *6 to ask to be muted.

14 My name is Jonathan Likeke Scheuer, and I
15 have the honor of currently serving as the State Land
16 Use Commission Chair, along with me Commissioners
17 Aczon, Chang, Okuda and Wong, our Land Use Commission
18 Executive Officer Dan Orodener, Chief Planner Scott
19 Derrickson, Chief Clerk Riley Hakoda, Deputy Attorney
20 General of the week, Linda Chow, Program Specialist
21 Natasha Quinoes, and our Court Reporter Jean McManus
22 are all on the Island of Oahu. Commissioner Cabral
23 is on Hawaii Island, Commissioner Ohigashi is on
24 Maui, and Commissioner Giovanni is on Kauai. We
25 currently have eight seated members of a possible

1 nine.

2 We are now going to move to our next agenda
3 item which we deferred yesterday, the City and County
4 of Honolulu Important Agricultural Lands designation
5 matter.

6 Mr. Hakoda or Mr. Derrickson, is there
7 public testimony on this matter?

8 CHIEF CLERK: Mr. Chair, from the
9 Department of Agriculture, State of Hawaii, and also
10 from the State Office of Planning and those have been
11 posted to the website.

12 CHAIRPERSON SCHEUER: Did the
13 representative from -- this is an overview briefing
14 from Mr. Orodener, but did the representative from
15 the Department of Agriculture wish to -- I suppose,
16 Mr. Yamamoto, do you wish to provide testimony?

17 MR. YAMAMOTO: Right now, beyond what --
18 Earl Yamamoto, Department of Agriculture, Planner.
19 You mean, giving testimony right now beyond what we
20 have submitted in writing? I don't have anything
21 prepared to say orally.

22 CHAIRPERSON SCHEUER: That's all right.

23 Mr. Hakoda, you also indicated OP had filed
24 on this matter?

25 CHIEF CLERK: Yes, Mr. Chair.

1 CHAIRPERSON SCHEUER: So this portion of
2 our meeting is a briefing, it's not an action item.
3 We're going to be briefed by Mr. Orodenker on this.
4 So normally procedurally, right, we hear from parties
5 and then OP weighs in, but I'm going to offer
6 opportunity for OP to offer any testimony given the
7 nature of this general item. OP.

8 MR. YEE: I believe as this process is
9 moving forward, our comments might be better
10 addressed at a later time.

11 CHAIRPERSON SCHEUER: Without that, then
12 I'm going to turn it over to Mr. Orodenker to state
13 our position.

14 EXECUTIVE OFFICER: Thank you, Mr. Chair.
15 The reason that I --

16 CHAIRPERSON SCHEUER: Excuse me, Dan.
17 I didn't ask for any other members of the
18 public, I apologize.

19 Are there any other members of the public
20 who are participating in this meeting via the
21 attendee function in the ZOOM meeting who wishes to
22 testify on this matter? If so, please use the "raise
23 hand" function or click *9 on the phone if you're
24 calling in.

25 Is there anybody in the public who wishes

1 to testify on this matter? Seeing none.

2 I apologize for my mistake and
3 interruption.

4 Mr. Orodener, please proceed.

5 EXECUTIVE OFFICER: What has got us here
6 today is a County submittal, City and County of
7 Honolulu submittal under Section 205-47 of the Hawaii
8 Administrative Rules, identification of Important
9 Agricultural Lands County process.

10 As we have never received a submittal from
11 a County under 205-47 prior to this, staff thought it
12 would be good for us to brief the Commissioners on
13 how we are to view and handle a County submittal.

14 And our intention is to kind of go through
15 the law and how staff perceives the law should be
16 applied and the rules should be applied to handle
17 this submittal.

18 I would caution the Commissioners, once
19 again, and we're going to "screen share" here with a
20 PowerPoint presentation that is also available for
21 the public and anyone else at our offices, if
22 requested.

23 I would caution the Commissioners and the
24 County and OP and DOA to look at this matter a little
25 bit differently than a private sector submittal. And

1 what I mean by that, and we will see as I go through
2 this, is that under a private sector submittal, by
3 the time the matter comes before the Commission,
4 staff and the private sector landowners have ensured
5 that the proper process was followed in making the
6 submittal. And the requirements for private sector
7 submittal are not that much different from any other
8 petition by a private landowner.

9 The County submittal on the other hand is
10 quite different. County designations -- hold on,
11 having a few technical difficulties here.

12 I got it now.

13 County designations are governed by Section
14 205-47 to 49 of the Hawaii Revised Statutes, and the
15 rules governing the process are set forth in Section
16 15-15-125 and 15-15-126 Hawaii Administrative Rules.

17 Under Section 205-47 HRS the County submits
18 to the Land Use Commission the proposed designation
19 of lands within the County that are appropriate for
20 IAL designation.

21 One of the key words here is "proposed".
22 As you'll see as we go through this, what the County
23 has submitted is really a recommendation, and we have
24 to view it as such.

25 The reason that we've only had one of these

1 is that the have Counties viewed this as an unfunded
2 mandate, and as a result, they have not been anxious
3 to perform the process to designate IAL lands within
4 the Counties. And as you will see, this is quite
5 involved and takes quite a bit of effort.

6 There is a requirement that the Counties
7 submit their proposals within a certain time, whether
8 or not that time has run is unclear, and I'm not sure
9 if it is actually applicable at this stage.

10 There is potential though that -- and the
11 Commission should be aware of this -- that someone
12 could object that these submissions are untimely.

13 Section 205-9 provides a limitation on the
14 power by the Counties to designate land or to
15 recommend designation of land within their County.
16 If the landowner has already voluntarily designated
17 more than half of its land to Important Agricultural
18 Land, the County may not designate any more of the
19 landowner's land under Section 205-47, the County's
20 process.

21 And that is why, Commissioners, that we've
22 seen so many private sector submittals on Important
23 Agricultural Land. And it's because a lot of large
24 landowners in particular felt that they wanted to be
25 in control over which of their lands would be

1 designated IAL and which would not, so there was a
2 scramble at first to designate land before the
3 Counties could do their designation.

4 Now, let's dig down a little bit deeper
5 into 205-47, which contains the process for the
6 County Planning Department and designation. And this
7 process is not simply an examination of the land and
8 the County in relation to the 205-44 criteria that we
9 are all familiar with, the Important Agricultural
10 Land designation.

11 Part of what is important for the Land Use
12 Commission to ensure that the Counties have done is
13 they must follow all of these other requirements in
14 assembling their recommendation. There must be
15 notice to all the landowners whose lands may be
16 subject to examination -- subject to examination for
17 inclusion.

18 They have to undertake a public outreach
19 program prior to reaching their conclusions.

20 They have to develop a matrix setting forth
21 how the criteria for designation are applied. Then
22 they can develop maps and then they can obtain County
23 Council approval of what they've done.

24 And then they must submit a complete record
25 of the proceedings and methodology that they use to

1 the Land Use Commission.

2 If the County doesn't follow this process,
3 I believe that a submittal can be rejected as
4 insufficient or flawed.

5 Part of what the Commission's
6 responsibility is, is to examine the processes that
7 the County used to see that it met the criteria of
8 205-47.

9 In more detail 205-47(a) requires the
10 County identify and map potential IAL land based on
11 the criteria contained in 205-44. We have worked
12 with that before.

13 Section (b) requires that the map be
14 developed -- and this is where the public
15 participation is important as well as other
16 agencies -- in consultation and cooperation with
17 landowners, Department of Agriculture, agricultural
18 interest groups, including representative from the
19 Hawaii Farm Bureau Federation and other agricultural
20 organizations.

21 The United States Department of
22 Agriculture, Natural Resources Conservation Service,
23 the Office of Planning and other groups as necessary.

24 So the minimum is that they had to have
25 consulted with those listed, and based on what they

1 uncovered, other groups as necessary, so kind of
2 creating a specific and a nonspecific requirement for
3 them to discuss the matter with various members of
4 the community.

5 Section 205-47(c) sets forth a number of
6 very specific and wide ranging requirements for
7 public meetings and outreach that must be undertaken
8 by the County Planning Departments and must be
9 identified in their submittal.

10 And once again, this goes back to the
11 additional scrutiny that the Land Use Commission has
12 to undertake in looking at a County submittal. Each
13 County, through its Planning Department, shall
14 develop an inclusive process for public involvement.
15 So there has to be some evidence that a process was
16 developed, including a series of public meetings
17 throughout the identification and mapping process.
18 Again, there must be evidence of public meetings.

19 The Planning Departments may also establish
20 one or more citizens advisory committee on Important
21 Agricultural Lands to develop further public input,
22 or utilize an existing process such as the general
23 plans, development plans or community plans.

24 Once again, this section sort of lays out a
25 specific and nonspecific process, and this is where

1 some of the Land Use Commission's discretion comes
2 into play with regard to whether or not the County
3 process was sufficient.

4 By the way, Commissioners, if there are any
5 questions, I don't mind taking them in the course of
6 my discussion rather than waiting until the end.

7 205-47(d) requires notice. The County has
8 to notify all the landowners of the process, not just
9 that they're doing it, but what the process is, and
10 requires them to take into account lands that have
11 already been designated IAL as we previously
12 discussed.

13 It also sets forth the basic criteria for
14 making a determination on what lands should be
15 designated IAL.

16 And once again, I keep emphasizing this.
17 This is to develop a recommendation that goes to the
18 Land Use Commission.

19 In formulating the final recommendations --
20 once again, the word "recommendation" is used -- to
21 the respect of County Council, the Planning
22 Department shall report on the manner in which the
23 Important Agricultural Lands mapping relates to
24 supports and is consistent with the:

25 Standards and criteria set forth in 205-44;

1 County's adopted land use plans;
2 Comments received from government agencies
3 and others identified in subsection (b);

4 The viability of existing agribusiness; and
5 Representations or position statements of
6 the owners.

7 Whether or not any one of the criteria --
8 it also requires the County Departments to submit its
9 findings for approval of the County Council, by the
10 way.

11 Whether or not any one of the criteria is
12 paramount is unclear, but the County must address why
13 or why not a user did not use each of these criteria.

14 So it's not that the County has to give
15 equal weight to all of these, as with 205-44, it can
16 be a weighted examination. In other words, one of
17 the most common ways we have seen this done is that
18 various criteria are given various numerical scores,
19 and in the end, everything is all added up and a
20 baseline is met.

21 Unlike the private sector process where
22 we're just determining whether or not the lands
23 proposed to be designated meet the criteria set in
24 205-44, one of the questions that the Commission has
25 to examine is has the County adhered to all of the

1 requirements of 205-47 in developing its maps and in
2 its submittal. This includes both as procedural and
3 substantive requirements.

4 So the County has to show that it met with
5 all the required community groups and agencies and
6 noticed all the interested parties. And it also has
7 to be completely transparent on what criteria and
8 methodology is used to apply the criteria in 205-44,
9 and that it applied those criteria in an objective
10 manner to reach its final conclusions and ultimate
11 determinations.

12 Section 205-44, just to refresh everybody's
13 memory, contains the criteria for the identification
14 of Important Agriculture Lands, and they're listed
15 here in 205-44. I crossed out section (b) because
16 we're not operating under (b) because this is a
17 County submittal and it's not a Declaratory Order
18 submitted under 205-45 by a private landowner.

19 There is some flexibility, and this is
20 where the Counties can exercise a lot of discretion
21 in determining what criteria are most important, and
22 (indecipherable) -- have developed matrixes to
23 indicate how they apply the criteria and what weight
24 they give to the various criteria in 205-44.

25 Once again, not all the criteria has to be

1 met. Weighing the standards and criteria with each
2 other to meet the constitutional mandate proposed in
3 Article XI, Section 3 of the State Constitution is
4 the ultimate goal.

5 A weighted system is encouraged, given
6 different numerical values that can be added up and
7 used to see if the land qualifies for designation.

8 In reviewing the County's submittal, it is
9 therefore key to examine what criteria were used in
10 the process, and whether they were applied in an
11 evenhanded manner to the parcels identified as the
12 ones to be designated.

13 That doesn't mean there can't be
14 exceptions. The only caution to that, precautionary
15 note, is that if there is an exception and our own
16 land is selected for designated for some reason, they
17 have to explain exactly why there was an exception
18 made, and the Commission has to determine if they
19 were reasonable for the exception, reasons for an
20 exception were reasonable and not arbitrary.

21 Section 205-48 sets forth the procedure
22 necessary for the Land Use Commission to process the
23 County's submittal.

24 They have to submit their maps to the Land
25 Use Commission, and OP and DOA must comment and make

1 recommendations.

2 205-48(c) is a reiteration of the criteria
3 that must be applied, but this time it's directed at
4 the State, the Land Use Commission for review.

5 So this is where you begin to see the
6 intention of the statute was to provide the Land Use
7 Commission with the ability to do a de novo review of
8 the County's process and decisionmaking.

9 205-49 really gives -- this section as well
10 as 205-49 really gives the Land Use Commission the
11 power to make its own decision on whether the County
12 properly applied the criteria, and whether or not all
13 or part of the designation was legitimate.

14 405-49, Commission's designation of IAL.

15 After we received the maps and the
16 recommendations from the Department of Agriculture
17 and the Office of Planning, along with all of the
18 other information that was utilized by the Department
19 of Planning to develop those maps, the Commission
20 shall then proceed to identify and designate
21 Important Agricultural Lands subject to Section
22 205-45.

23 This section clarifies that it is the
24 responsibility of the Commission to actually
25 designate, and the County's submittal is a

1 recommendation, it's part of a process that the
2 Commission must complete based on its own analysis of
3 the evidence before it.

4 So the submittal by the County is not
5 actually the designation. Again, submission by the
6 County is a recommendation, and the Land Use
7 Commission is empowered to adjust, deny or approve
8 that recommendation in its entirety based on the
9 evidence before it.

10 205-49(A) criteria, once again, this is --
11 the only reason that this is up is that we are again
12 seeing that the County submittal is actually
13 classified as a recommendation.

14 205-49(a) again, any decision regarding the
15 designation of land as Important Agricultural Lands
16 has to be based upon written findings of facts and
17 conclusions of law presented at at least one public
18 hearing conducted in the County where the land is
19 located in accordance with Chapter 91.

20 One of the other things here is that the
21 approval must be by two-thirds of the membership
22 which the Commission is entitled.

23 So it is similar to a dba. It's not a
24 simple majority. In our case we need at least six
25 votes to approve.

1 Now we can turn to our rules with regard to
2 County submittals. Subchapter 14 of Section 15-15,
3 Important Agricultural Lands.

4 15-15-125 and 15-15-126 are the specific
5 rules that govern the designation of IAL under the
6 County identification process.

7 COMMISSIONER OKUDA: Before you move onto
8 that, can I ask a question?

9 This deals with decisionmaking process.
10 What's the standard of review that we would apply?

11 In other words, what level of deference are
12 we to give to the County in making its decision?
13 Because, you know, like when I look at 205-47(e),
14 which that section says:

15 The Important Agricultural Lands map shall
16 be submitted to the County Council for
17 decisionmaking. The County Council shall adopt the
18 maps with or without changes by resolution. The
19 adopted map shall be transmitted to the Land Use
20 Commission for further action pursuant to Section
21 205-48.

22 The language about recommendations and
23 things like that, you're correct, it's in the
24 statute, but a lot of the criteria in 205-47 precedes
25 this subparagraph (e) and so the reason I'm asking

1 the question is, you have all of these things
2 submitted to the County Council. The County Council
3 who are the elected representatives of the County
4 make a decision. I mean, where in the statute or the
5 case law does it say that, you know, we're not
6 supposed to give deference to the County Council?

7 EXECUTIVE OFFICER: First of all, I think
8 we all have to recognize that to be kind, this was a
9 very poorly drafted piece of legislature.

10 COMMISSIONER OKUDA: Yeah, I agree, and I'm
11 not trying to --

12 EXECUTIVE OFFICER: -- and to answer your
13 question to a certain extent, Commissioner Okuda, the
14 problem with that paragraph (e) in 205-47 is if you
15 go to 205-49(a), which talks about designation, it
16 says:

17 After the receipt of the maps of eligible
18 Important Agricultural Lands from the Counties, and
19 the recommendations of the Department of Agriculture,
20 the Commission then proceeds to -- the kind of theme
21 that runs through this whole thing is that it's
22 recommendations.

23 I would -- from a practical standpoint, I
24 think that as we are not the facts assembling body or
25 we haven't done our own fact finding on this, that

1 we're relying on the Counties to do the fact finding.

2 There is a significant amount of deference
3 that we should be giving to the County's
4 recommendations, but there is no case law on it.
5 This is the first time that we've ever looked at one
6 of these.

7 COMMISSIONER OKUDA: Well, Dan, I only
8 raise that because, you know, although I know we all
9 try to do our jobs diligently, the County Council is
10 the elected body of the citizens; and so, you know,
11 if that sentence, or this Section 205-47(e) wasn't in
12 the statute, in other words, if there wasn't the
13 provision for submission to a County Council, and it
14 says for decisionmaking, right? And there wasn't a
15 specific decisionmaking by resolution, which is, you
16 know, something that has the force of law, well,
17 then, you know, I could see less discretion being
18 given to the County Planning Department.

19 But where you have a legislative body
20 elected by the citizens, you know, making a decision
21 that this apparently should be the public policy of
22 the County, I mean, what kind of deference are we
23 supposed to give to the County Council? And what
24 authority do we have not to give deference?

25 I'm not saying we ignore all evaluation,

1 but it's a question of, you know, to what extent
2 should we not be giving deference to what the elected
3 people have rendered, whether we like it or not,
4 yeah?

5 EXECUTIVE OFFICER: Well, I feel the best
6 way for me to answer that question is, to be
7 perfectly honest, I don't know. I think that's
8 something the Commissioners should discuss during the
9 hearing process and vote their consciences on it.

10 I can say, though, that part of the
11 reason -- if you go back to legislative history --
12 part of the reason it was set up this way was to a
13 certain extent to remove politics from the ultimate
14 decision. And that's why the Land Use Commission is
15 the final arbiter of the discussion, I believe. But
16 that's just my opinion.

17 I don't know the answer, Gary, I honestly
18 don't. The statute is unclear. We're trying to
19 figure our way through this. Once again, I
20 believe -- I mean personally, you know, it depends on
21 the severity of the evidence that the County Council
22 has made a mistake.

23 I don't think that you'll see staff -- I
24 mean, staff is not going to redo what the County did.
25 So for all intents and purposes, we are giving them a

1 lot of deference.

2 I think one of the things that we're trying
3 to convey, staff is trying to convey with regard to
4 this, is that our primary burden, our first threshold
5 is to see whether the County actually adhered to the
6 proper process, the Planning Departments. Assuming
7 that they did, and there is no evidence to indicate
8 that there's some fault with their recommendations,
9 I'm not sure staff would recommend varying from it
10 very much at all.

11 And I was going to discuss this in a minute
12 or two. The question is whether any of the
13 landowners are going to come in and object.

14 CHAIRPERSON SCHEUER: There is a hand
15 raised by Commissioner Ohigashi as well.

16 EXECUTIVE OFFICER: Anyway --

17 COMMISSIONER OKUDA: Thank you. You and I
18 can write a law review article on this later on after
19 we all retire.

20 EXECUTIVE OFFICER: That works for me.

21 CHAIRPERSON SCHEUER: We will be right by
22 the members of this call and no one else.

23 Commissioner Ohigashi, followed by
24 Commissioner Giovanni.

25 COMMISSIONER OHIGASHI: I'm concerned about

1 that these are recommendations, and your comment that
2 we can review them de novo. Does that mean that --
3 maybe I'm getting ahead of myself.

4 Landowners come in and object. It would be
5 essentially an intervenor contested case process.
6 Because it would seem like our decision would affect
7 the property rights of the individual landowner, and
8 elevate this process, it seems to me, to some sort of
9 contested case.

10 EXECUTIVE OFFICER: Well, that's a very
11 good question. It's something that I was going to
12 address further on in the discussion.

13 The answer to your question is probably,
14 yes. And even though the rules don't -- the statute
15 doesn't set that out, the rules actually provide for
16 this to be a rulemaking process rather than a
17 declaratory ruling. And under those circumstances, a
18 landowner has the right to bring in evidence, data
19 and make its case with regard to, in this case, what
20 we are going to call a rule.

21 Whether that elevates itself to a level of
22 contested case hearing is, by law, is questionable.
23 I would think that this Commission would want to give
24 landowners an opportunity to have due process and
25 have their position fully heard and fleshed out. And

1 it's not outside of boundaries of this Commission to
2 hold a quasi-judicial process to handle that. I mean
3 I think the Commission could do that if it so chose.
4 Landowners who object are technically not intervenors
5 as this is not a district boundary amendment
6 proceeding. And the statute lays out that it's
7 either a declaratory ruling, or a rulemaking in this
8 case.

9 So technically there is no right to
10 intervention, but I would be recalcitrant if I did
11 not say that it's my opinion that due process would
12 require that we give every landowner who has a
13 concern a full hearing on this.

14 CHAIRPERSON SCHEUER: Commissioner
15 Ohigashi, did you have a followup? Otherwise
16 Commissioner Giovanni.

17 COMMISSIONER OHIGASHI: Just had a comment.
18 It would mean that there is a potential for multiple
19 landowners to object to the designation; and if we
20 are given -- are required to give them due process,
21 it may require us to spend years on one particular
22 designation. I mean, I know we have 365-days, but --

23 EXECUTIVE OFFICER: Staff is aware of that,
24 and that's why we have so many days scheduled for
25 hearings on this. I'm not sure how long it will take

1 us to get through various landowner objections, but,
2 Commissioner Ohigashi, it kind of is what it is.

3 COMMISSIONER OHIGASHI: One last question
4 is that, assuming that the Commission wants to move a
5 line say, well, it should be a little bit over here
6 to the left, the line, and it's a recommendation, and
7 that's what we want to do.

8 Do we have to refer it back to --

9 EXECUTIVE OFFICER: That's why I --

10 COMMISSIONER OHIGASHI: -- or do we have
11 that ability, because it's only a recommendation to
12 actually move lines on any kind of --

13 EXECUTIVE OFFICER: I think that's actually
14 up to the Commission. I believe that there is a very
15 strong argument that you do have the ability to move
16 the lines, but if the Commission is uncomfortable
17 with that, it can send the matter back to Counties
18 for re-review based on the evidence that is received.

19 CHAIRPERSON SCHEUER: I'm going to call on
20 Commissioner Giovanni, followed by Wong, followed by
21 Deputy Attorney General.

22 COMMISSIONER GIOVANNI: In this slide that
23 you have up, it refers to public hearing. Would it
24 be a physical hearing, or can it be by virtual
25 meeting like we're having these days?

1 EXECUTIVE OFFICER: Well, that's actually a
2 question for the Attorney General. Our dba hearings
3 are supposed to be in the County where the land is
4 on. I'm assuming for the moment that the Governor's
5 Emergency Proclamation covers this process as well as
6 the dba process, holding it by ZOOM.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Giovanni. Commissioner Wong.

9 COMMISSIONER WONG: Thank you, Chair.

10 The question I have following up with
11 Commissioner Ohigashi, I was assuming that there is a
12 timeline on this for a year, X amount of dates to do
13 this IAL.

14 EXECUTIVE OFFICER: 365 days.

15 COMMISSIONER WONG: So following up yours
16 and Commissioner Ohigashi's statement, if an
17 individual landowner comes aboard and contests it, do
18 we take each case individually? And how would that
19 change the timeline.

20 EXECUTIVE OFFICER: Well, once again,
21 that's at the discretion of the Commission. Staff is
22 prepared to take -- and I think that we would have to
23 at least give each landowner the ability to put on
24 their case. So to a certain extent, you are taking
25 each parcel individually, if there is an objection.

1 The final determination can be at a single
2 hearing, I believe, but we do have to give every
3 landowner the opportunity to make its case.

4 COMMISSIONER WONG: Okay. So following
5 Commissioner Ohigashi, so let's just say we finish
6 all the landowners and do everything, and put
7 packages back up. But we do give it back to the
8 County. We're moving the line left or right.

9 Does that come into our timeline too? Or
10 does it like stop the clock?

11 EXECUTIVE OFFICER: We have to make a final
12 determination within 365 days with the ability for
13 180 days expansion at the discretion of the Chair.

14 COMMISSIONER WONG: And the other question
15 I have is, if I remember our IAL language, we can
16 accept, modify and deny; correct?

17 Executive officer: Yes.

18 COMMISSIONER WONG: Okay, that's all.
19 Thank you, Chair; thank you, Dan.

20 CHAIRPERSON SCHEUER: Ms. Chow.

21 MS. CHOW: I think some of the questions
22 being raised by the Commissioners is answered by the
23 statutory provision that's on the screen right now,
24 205-49(a). So when the underlying portion says it's
25 to be done, the decision to be done by written

1 findings of facts and conclusion of law, generally
2 findings of facts and conclusion of law contusion are
3 not done in connection with --

4 CHAIRPERSON SCHEUER: Ms. Chow, it's hard
5 to hear you. There's something with your microphone.

6 MS. CHOW: Let me try putting both in. Is
7 that any better now?

8 CHAIRPERSON SCHEUER: Not really. It's
9 about the same.

10 MS. CHOW: Okay. Let me try my audio
11 settings.

12 CHAIRPERSON SCHEUER: You, however, do not
13 appear to be a cat.

14 MS. CHOW: Okay, well, that's good.
15 How's this, any better?

16 CHAIRPERSON SCHEUER: Just proceed. Just
17 know that it's soft.

18 MS. CHOW: I apologize for that.

19 So the provision that's on the screen right
20 now talks about written findings of fact and
21 conclusions of law that the Commission has to make in
22 connection with any decision it makes. That would
23 tend to indicate that the decision is more of a
24 declaratory order, rather than as a rulemaking type
25 procedure, but ultimately the decision that is to be

1 made the Commission, according to the statute, is
2 that the subject land meets the standard and criteria
3 set forth in 205-44. And so I think this would
4 indicate that it is a de novo review by the
5 Commission, because you ultimately need to make the
6 decision that it meets the standards and criteria.

7 To the degree where individual landowners
8 challenge their inclusion in the IAL designation,
9 it's up to the Commission to decide whether or not
10 those particular lands meet the standards and
11 criteria, and on that basis, would be included or not
12 included in the designation.

13 CHAIRPERSON SCHEUER: Thank you, Ms. Chow.

14 Other questions at this time, or should we
15 ask Mr. Orodener to proceed?

16 Why don't you proceed, Dan.

17 EXECUTIVE OFFICER: Thank you, Chair.

18 With regard to our rulings, once again,
19 15-15-125 and 15-15-126 governs the County
20 identification process. For the most part, the rules
21 track Chapter 205. And if the rules are confusing or
22 they don't track 205, you're looking at the guys who
23 wrote them, so feel free to beam them up on them.

24 15-15-125(A): There's once again a
25 reiteration of the timing.

1 CHAIRPERSON SCHEUER: The Chair will note
2 we never wait for that invitation.

3 EXECUTIVE OFFICER: I'm just telling you.
4 I should have worn my flak suit today.

5 So this is where the 365 days and the
6 180 days extension are set forth in our rules.

7 It also sets forth it is the Counties'
8 obligation to submit a complete record of their
9 proceedings to the Commission. And I would note for
10 any County representative, that we hope that that was
11 done, and that we are relying on the County to make
12 its case at any hearings that are held on this
13 matter.

14 15-15-125(B) sets forth the requirements of
15 the submittal.

16 One of the keys, again, in this is that we
17 require the County to submit evidence that it has
18 utilized an inclusive process for public involvement
19 in the identification of potential lands, and the
20 development of maps.

21 When we drafted the rules, we wanted to
22 reiterate that this is an inclusive process and not
23 something that was done by the Counties without
24 public input.

25 Again, Section (4) they have to show us

1 evidence that they have taken reasonable action to
2 notify each owner of those lands by mail or posted
3 notice, and evidence that the agricultural lands
4 mapping relates to, supports and is consistent with
5 same criteria that are set forth in the statute. In
6 other words, 205-44 criteria;

7 That their adopted land use plans adhere to
8 that process or are consistent with that process,
9 that they have received comments from government
10 agencies and the others identified in 47(b); and

11 Again, the viability of existing
12 agribusiness; and

13 The representation of position statements
14 of the owners of lands subject to the potential
15 designation, and any other relevant information.

16 Just based on anecdotal evidence, the
17 County, in this case the County has at least received
18 comments and position statements from the owners of
19 the land that are subject to potential designation.

20 When the County was going through this
21 process, we were contacted by a significant number of
22 landowners asking us questions about the process.
23 And I would think that any landowners who received
24 the proper notice had the opportunity to comment, but
25 that has to be determined in the course of the

1 proceedings before us.

2 Now, 15-15-125(D) is kind of interesting
3 because it defines the process as modified
4 rulemaking. 15-15-125 says specifically provides
5 that the proceeding go will be conducted as
6 rulemaking under 15-15-109.

7 And 15-15-109 sets forth a process that has
8 safeguards in it to allow landowners to make their
9 case. Specifically:

10 The witness may submit testimony and shall
11 be given a reasonable opportunity to present
12 testimony.

13 Section (e) in particular provides that all
14 interested persons shall be afforded an opportunity
15 to submit data, views or arguments orally or in
16 writing. This can be done up to ten days after the
17 close of the hearing, which is kind of interesting.

18 So we theoretically could hold the hearing,
19 and then for ten days not know whether we have to
20 hold another one.

21 We will be scheduling accordingly, if we do
22 not see any evidence that someone wishes to submit
23 arguments or request a hearing within that ten-day
24 period, we will then schedule for decisionmaking and
25 further deliberation. But we will talk about process

1 in a minute, but the intention is that the Commission
2 will hear the County and DOA and OP, and then not
3 render a decision at the conclusion of those
4 presentations, but give the landowners the time to
5 submit requests or submit arguments up to ten days
6 afterwards.

7 And this was discussed earlier, what are
8 the Commission's options in rendering decisions under
9 15-15-125?

10 The Commission may remand the matter back
11 to the County for further review or clarification;

12 Adopt the recommendations from the County
13 in its entirety;

14 Or based on evidence presented, amend or
15 revise the County recommendation and proposal to
16 exclude or include certain lands from designation as
17 Important Agricultural Lands.

18 This is not all that different from a
19 special permit that we received from the County in
20 actuality. Those three options are available to the
21 Commissioners with a special permit, although the
22 last section, Section (3) with a special permit is
23 limited in that we can, you know, add conditions to a
24 special permit, but we can't completely revise the
25 County recommendations.

1 So this is a familiar process to the
2 Commission.

3 What All This Means In Application.

4 So what is going to happen from here is
5 that we will be scheduling a hearing, and it's
6 already on the calendar, to make its case that it's
7 met the requirements of Chapter 205 in making its
8 recommendations.

9 The LUC has the obligation, during the
10 course of that hearing, to examine the County's
11 submittal and any oral testimony to ensure that there
12 has been adherence to the procedural and substantive
13 requirements.

14 OP and DOA will also be given opportunity
15 to respond and present their positions.

16 And because these are rulemaking
17 proceedings, interested parties will have to be given
18 a reasonable opportunity to testify, and have the
19 right to submit data, views, and argument.

20 So what we will do, we will schedule and
21 hold an initial hearing to allow public testimony,
22 and the County to make its presentation and case, and
23 for OP and DOA to present their positions.

24 Then we will not render a decision at the
25 end of those presentations, and we will entertain

1 requests by landowners or interested parties for a
2 period of up to ten days afterward to make a
3 presentation and submit evidence to support their
4 position.

5 If we receive such request, the LUC staff
6 will then schedule a, quote/unquote, hearing date for
7 those requests to be heard and decided upon, and once
8 we have heard all that evidence, the LUC will
9 schedule another hearing to allow for final decision
10 on the County recommendations and the maps provided.

11 After that, a written decision and order,
12 findings of fact and conclusions of law will be
13 prepared, and another meeting scheduled for its
14 adoption.

15 And that is all I have at the moment. Are
16 there any questions?

17 CHAIRPERSON SCHEUER: I'm going to first
18 acknowledge that there's a question put into the
19 question and answer. This is a somewhat funky thing
20 that is an artifact of us having a virtual meeting.
21 We are in a formal public meeting right now.
22 Normally a member of the public wouldn't be able to
23 suddenly intervene in the deliberations that the
24 Commission is having and ask a question. It's sort
25 of the digital equivalent of standing up in the back

1 of the room, "hey, what about this?"

2 And I don't know that there is a ZOOM way
3 to turn it off, or if it's appropriate to. That
4 said, we recognize there's interest and concern on
5 the subject. I would encourage the person with the
6 question to directly call the LUC office and reach
7 out, and I can also ask the LUC staff to respond in
8 the Q and A with the appropriate contact information.

9 Having said that, I'm going to call on
10 Commissioner Chang.

11 COMMISSIONER CHANG: Thank you, Mr. Chair.
12 Thank you.

13 Dan, I've got a question about the
14 procedural steps that you provided us.

15 So do we know how the City is going to
16 present their IAL, this matter? Is it going to be by
17 the various districts so that community members will
18 attend -- I don't know how long this is going to
19 take, and I'm just wondering if we're taking public
20 comments, is the community going to have to attend
21 every meeting to ensure that the particular area that
22 they live in and the property that's being designated
23 is going to be -- that they have an opportunity to
24 participate in that?

25 EXECUTIVE OFFICER: That's a very good

1 question, Commissioner Chang.

2 We don't know exactly how the County is
3 planning on presenting their case with regard to
4 this. I would strongly urge any Commissioners who
5 have any thoughts or concerns to contact, or to
6 express them here rather, and we will -- staff will
7 then make every effort to discuss the matter with the
8 County to expedite the proceedings.

9 COMMISSIONER CHANG: And do you know
10 whether the County is going to present to us as
11 evidence all of the community comments and any,
12 especially notifications from landowners, and whether
13 landowners participated in both their community
14 outreach process as well as the Planning Commission
15 process?

16 I just want to make sure that we are
17 hearing -- that they've been given due process both
18 at the County level as well as at our level.

19 EXECUTIVE OFFICER: I understood,
20 Commissioner, and I think that's one of the
21 obligations of the Commission. That information is
22 actually contained in the submittal, in the written
23 submittal. So we will -- that's available for
24 review, and we will be -- staff will also be
25 reviewing that as well.

1 COMMISSIONER CHANG: Okay. So that I will
2 expect the County, that when they do their
3 presentation, that there is reference to the record
4 below on when they're going through the various areas
5 identifying, especially in particular, landowners'
6 comments and their participation.

7 Thank you. I don't have any other
8 questions.

9 CHAIRPERSON SCHEUER: Thank you,
10 Commissioner Chang.

11 Commissioner Ohigashi.

12 COMMISSIONER OHIGASHI: Dan, I still am
13 kind of concerned. The legislature has designated
14 this as a rulemaking process as well as our rules and
15 regulations. However, because we're an
16 administrative agency, we're governed by the APA, and
17 my recollection is that contested cases, there is a
18 definition of what a contested case is in that. And
19 just because you label it a rulemaking process, does
20 not mean necessarily that it is covered under
21 rulemaking.

22 It's a definition in the APA that rules
23 whether or not it's a contested case. So my concern
24 is that we are to proceed under rulemaking process.
25 We get our Deputy Attorney General to render us an

1 opinion that this is not a contested case, and it's
2 strictly rulemaking, and that we would not have to
3 offer, for example, landowners the opportunity to
4 test the evidence that was presented before the
5 County Council, before the Planning Commission. It
6 seems to me that if they're allowed to call witnesses
7 to bolster their opinion and the record, are those
8 witnesses going to be expert witnesses?

9 Do we limit them to the three-minute rule?
10 If there's going to be any kind of real due process,
11 we're going to have to do that.

12 And who gets to cross-examine these
13 witnesses?

14 And whether or not they're allowed -- going
15 back to my first thing -- whether or not they're
16 allowed to test the evidence given to the Planning
17 Commission or the County Council.

18 Those are my concerns.

19 EXECUTIVE OFFICER: They're legitimate
20 concerns, Commissioner Ohigashi, and they almost
21 mirror a conversation that I had with house
22 leadership at the time that this was moving. And the
23 response -- and I will never forget it -- that I got
24 from Senate leadership on that particular day was
25 literally a shrug.

1 So I think that the message -- and I was
2 not -- I was representing a landowner back in those
3 days, I was not representing the Land Use Commission.

4 I think the answer to your question is that
5 we have to use our best efforts, our best conscious
6 and the advice of counsel to determine how we are to
7 handle this, because it has not been tested. It's
8 unclear.

9 And once again, I would remind everyone
10 that the legislative history on this is that on the
11 floor when Ezra Kanofo was urging passage of this
12 bill, he recognized that the bill was flawed and that
13 it would need to come back to the legislature to be
14 fixed, which they never did.

15 CHAIRPERSON SCHEUER: Commissioners?

16 Commissioner Cabral.

17 VICE CHAIR CABRAL: Thank you, Chair.

18 And I read all of the data that came,
19 including that very informative letter that was sent
20 from Department of Agriculture, I think yesterday we
21 got. And I had a couple of questions when I read all
22 of it.

23 First off, especially in this light which
24 we just went through, I read all of those 23 screens
25 the other night, and there's clearly a lot of

1 conflict. I was even aware of it. And then of
2 course some of it is pointed out, but there is, you
3 know, unclarity, uncertainty on it.

4 So it's really terrifying to think that we
5 are going to enter into to making these decisions
6 when the County is going to propose land, which in
7 some ways almost a matter of taking of land. You
8 know, when the private owner brings it to us, that's
9 their decision. I know they're possibly being
10 motivated for protecting of their other lands,
11 because of that incentive of the no more than 50
12 percent.

13 But when the County presents it, it's
14 almost a matter of taking, and I think we are going
15 to find a lot of problems. So I'm glad to hear that
16 Dan and the staff are working on trying to make this
17 clear.

18 But I also have a really big question. It
19 seems like if the lands that have been designated, I
20 guess that's Honolulu, some of them are as small as
21 two acres. So there is no size limitation on what
22 the County could bring forward that they would want
23 to put in designated land; is that correct?

24 CHAIRPERSON SCHEUER: I'm going to ask Dan
25 to respond to this question. I recognize

1 Commissioner Chang has a question, but I'm going to
2 call for a break after Dan's response.

3 EXECUTIVE OFFICER: First of all, I would
4 like to emphasize that, once again, I don't mean to
5 overstep my bounds with regard to this, that the
6 classification of this is that taking is a little
7 extreme.

8 Once again, IAL designation is more of a
9 planning process. It does not change the rights or
10 ability of a landowner with regard to existing
11 agricultural land.

12 So saying it's a taking is a little -- may
13 be a little extreme.

14 With regard to your question on size, the
15 only way, for instance, if you have a two-acre parcel
16 in the middle of, say, surrounded by 300-acre parcels
17 that are all agriculture, and the County sweeps that
18 up in its designation of a larger area, including
19 this two-acre parcel are to be designated IAL, they
20 have the ability to do that.

21 The only time that they would be prevented
22 from doing that would be if the landowner of that
23 two-acre parcel had already designated 1.1 acres of
24 that parcel IAL already.

25 The landowner's concern with Important

1 Agricultural Lands, to a certain extent, is based on
2 a perception that at some point in time the
3 designation will become more important than it
4 currently is.

5 IAL designations do not carry much --
6 there's a slightly elevated examination of the
7 criteria for determining whether or not you're going
8 to urbanize a piece of Important Agricultural Land,
9 than there is normal agricultural land.

10 But in terms of the uses that may be put to
11 the property, they're no different from what uses you
12 could put regular agricultural land to. So there is
13 no real change in the use as a result of this
14 designation.

15 VICE CHAIR CABRAL: I can appreciate that,
16 but part of my thought is -- and I know there is tax
17 advantages to doing this clearly, which are massive.

18 I have four acres, and I lease 190 acres,
19 but my four acres, so in this sense, the government
20 could come in and take over two acres of that if they
21 wanted to, and at that point I would consider it to
22 be a taking of the land because I would no longer be
23 able to put an ohana house on it or something else.

24 But when you get down to those small sizes
25 that gets really scary to me, but it's going to be

1 what it's going to be.

2 I can appreciate we need to preserve the
3 agricultural land, and I'm working hard on that
4 myself personally, so thank you very much for the
5 explanations, although sometimes not clear when
6 there's multiple answers to the same question. Thank
7 you.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Cabral.

10 It is 10:04. I'm going to call for a
11 ten-minute recess and we're going to reconvene at
12 10:14.

13 (Recess taken.)

14 CHAIRPERSON SCHEUER: Aloha everyone, it's
15 10:14. We're back in session.

16 COMMISSIONER WONG: Mr. Chair, we've got to
17 wait for Commissioner Cabral.

18 CHAIRPERSON SCHEUER: We're back in
19 session, and I'm calling on Commissioner Chang who
20 has a question.

21 COMMISSIONER CHANG: Thank you, Mr. Chair.

22 Dan, while I concur with you that this is
23 not a taking, but does the IAL designation -- I think
24 Commissioner Cabral's perception and her concerns are
25 probably shared by many.

1 When I read through the County submittal
2 about future unanticipated consequences landowners
3 are concerned about, you know, will there be future
4 restrictions.

5 So I guess my question is probably more
6 suited to Linda, Deputy Attorney General.

7 One: Is there a right by a private
8 landowner to file a lawsuit against Land Use
9 Commission for the designation of IAL? If so, is
10 that lawsuit filed under Chapter 91 if it's
11 rulemaking, since it's rulemaking, or is it filed as
12 a dec action?

13 MS. CHOW: Sorry, trying to unmute myself.

14 So it will not be a Chapter 91. I don't
15 believe it's a rulemaking procedure, as I stated
16 previously. At best or worst, it's a dec action. It
17 may even indicate on the face of the statute that it
18 is -- could be a contested case proceeding, the
19 reference to Chapter 91 includes rulemaking
20 proceedings, declaratory proceedings, as well as
21 contested case proceedings. So it's not clear what
22 the reference to Chapter 91 was intended to -- what
23 process it was intended to be.

24 The indications are that it would not be
25 rulemaking. So could be a dec action, in which case,

1 if they disagree with the decision of the LUC as a
2 dec action, it would be filed as a 91-14 appeal -- I
3 think it's 91-14. But it would be an administrative
4 appeal to the circuit courts of the decision.

5 COMMISSIONER CHANG: Thank you, Linda. I
6 appreciate the comment.

7 CHAIRPERSON SCHEUER: Commissioners, any
8 further questions?

9 My question for Dan. I think you actually
10 sort of largely addressed this in the response to
11 Commissioner Cabral's question.

12 It's been my perception through my
13 involvement with the IAL, that while there might be a
14 benefit, and according to the City's calculations,
15 five landowners have benefitted from the tax breaks
16 or tax credits, rather, that at least for the large
17 parcels of land, which are beyond the County's
18 ability to rezone, we require six votes for a dba
19 regardless of whether it's IAL or not.

20 So is there actually any burden whatsoever
21 if a landowner, other than perhaps perceptions of the
22 landowner whose parcel is designated by the County as
23 IAL?

24 EXECUTIVE OFFICER: Mr. Chair, is there any
25 what?

1 CHAIRPERSON SCHEUER: Is there any
2 additional burden or restriction on the use of their
3 land whatsoever?

4 EXECUTIVE OFFICER: No, none whatsoever.
5 No additional restrictions or burdens.

6 CHAIRPERSON SCHEUER: Even if they chose to
7 seek urbanization of their land?

8 EXECUTIVE OFFICER: That is correct.

9 CHAIRPERSON SCHEUER: They still will
10 require the same evidentiary burden as if they were
11 not so designated?

12 EXECUTIVE OFFICER: There is some
13 language -- and I can't remember which statutory
14 section it is -- in my mind it clarifies the criteria
15 with regard to the reclassifying land, or a
16 petitioner reclassifying land when it's been
17 designated IAL.

18 So even the Supreme Court has recognized
19 that at this stage it's not a significantly higher
20 burden.

21 CHAIRPERSON SCHEUER: So I guess my follow
22 up is, is one possible response, say hypothetically,
23 if somebody could make -- if somebody said, well, the
24 County's wishing to designate my land. They've
25 proposed in front of LUC, so my rights are at issue.

1 I would like to intervene on this case.

2 One possible response is your rights are
3 not at issue, there's no actual change.

4 EXECUTIVE OFFICER: That's correct.

5 CHAIRPERSON SCHEUER: Commissioner Chang.

6 COMMISSIONER CHANG: One final question.

7 If it requires six votes, what is the
8 consequence of not the six votes? Because this is
9 not a petition where there is a default. So what's
10 the consequence of no action by LUC?

11 EXECUTIVE OFFICER: I don't think -- I
12 mean, once again, I'm not sure what the answer would
13 be. Might want to direct that to our Attorney
14 General, but I'm not aware of any default provision
15 that would say this is automatically adopted. I'm
16 not sure. I'm really not sure what happens after
17 that.

18 MS. CHOW: Generally I think it would be,
19 because the issue would be --

20 CHAIRPERSON SCHEUER: Ms. Chow.

21 MS. CHOW: I'm sorry.

22 Because the motion would be to designate
23 the land, if the motion does not pass, then the land
24 would not be designated.

25 I agree with Mr. Orodanker.

1 CHAIRPERSON SCHEUER: Commissioner Wong,
2 before I call on you, Commissioner Wong, I'm going to
3 note that an attendee has their hands up in the
4 attendee room, however, public testimony on this
5 matter was closed earlier.

6 If you have a question, then you should
7 reach out to the LUC staff, and I believe that some
8 of that contact information has been already put into
9 the Q and A function.

10 I realize it's a little weird, it feels
11 like just another virtual meeting, but it's actually
12 a public hearing.

13 Commissioner Wong.

14 COMMISSIONER WONG: Following up on
15 Commissioner Chang's question that the AG explained,
16 so if we do not have six votes, and it was only five
17 votes, the question is -- I mean, do we keep on going
18 through the process of saying -- does it go back to
19 the County, and the County got to resubmit? Or how
20 does that process work in this rulemaking?

21 CHAIRPERSON SCHEUER: That's a question for
22 whom?

23 COMMISSIONER WONG: AG is fine.

24 CHAIRPERSON SCHEUER: Or for the
25 legislature, do we want to direct it towards the

1 legislature?

2 MS. CHOW: Probably be the best way to do
3 it. I think it just depends, because like any other
4 motion, it could always be a new motion to accept the
5 designation, could be broad, more information could
6 be presented to the Commission and a motion could be
7 broad.

8 It could be sent back to the County. I
9 think there is options that would be available to the
10 Commission at the time, if an initial vote does not
11 pass.

12 COMMISSIONER WONG: Thank you, AG; thank
13 you, Chair.

14 CHAIRPERSON SCHEUER: Commissioners, staff,
15 I'm going to note that the recording of the meeting
16 has been paused. It indicates on the top of the
17 screen.

18 Commissioner Chang, this is your second
19 last question?

20 COMMISSIONER CHANG: I'm sorry, so sorry.
21 As questions come up, something comes to mind. This
22 is probably -- maybe this is a procedural question.

23 So are we taking each TMK as an action, or
24 is this the entire County proposal? I mean, because
25 a lot of -- there's individual landowners, so

1 procedurally, I'm looking at County's submittal of
2 all of the TMKs. There's hundreds, hundreds,
3 hundreds of TMKs.

4 So procedurally how are we going to take
5 action on the County's request?

6 EXECUTIVE OFFICER: Staff believes that the
7 way this is intended to be handled is that we take
8 the County submittal as a whole, and that if
9 individual landowners have objections with regard to
10 a specific parcel, that we would then take up the
11 County's determination on that individual parcel, but
12 we are not intending to go parcel by parcel.

13 CHAIRPERSON SCHEUER: Commissioner
14 Ohigashi.

15 COMMISSIONER OHIGASHI: I guess a legal
16 question. Who has standing to appeal a dec action?

17 MS. CHOW: Generally with a dec action, you
18 would have to declare who the parties are to the dec
19 action. So it would be whoever was a party to the
20 dec action.

21 COMMISSIONER OHIGASHI: Following up on
22 Dawn's last question. So are the landowners who
23 object or indicate, are they parties to the dec
24 action?

25 MS. CHOW: I would think they would have to

1 be, because it's their land that is the subject of
2 the petition. So I think they would have standing.

3 COMMISSIONER OHIGASHI: Would that be
4 required in any findings of fact, conclusions of law
5 that we recognize them as parties; or is that a rule
6 that we need to establish?

7 MS. CHOW: I would have to think about
8 that. I think ideally you would want to identify
9 them, because you would have to identify the lands
10 that are being classified or reclassified as IAL
11 lands. And so when you do that, naturally you should
12 also be identifying the landowner. And since the
13 lands are subject to the decision, the landowners are
14 subject to the decision as well and would be
15 considered either interested parties or parties to
16 the decision.

17 COMMISSIONER OHIGASHI: Should we have a
18 procedure worked out prior to the hearing of the
19 County's IAL Petition, I guess, for that to create,
20 actually create that purpose too? How would that
21 work?

22 MS. CHOW: Sure, I mean, obviously we would
23 want to work with staff to try to create a process to
24 have this go as smoothly as possible and to try to
25 set everything up ahead of time.

1 COMMISSIONER OHIGASHI: Thank you.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Ohigashi.

4 Commissioners, are there further questions?
5 Commissioner Chang.

6 COMMISSIONER CHANG: I'm not going to say
7 this is my last question.

8 So, Linda, procedurally, because I would
9 assume like under Town, the Town case, you don't have
10 to be a party to the original action, but you could
11 have, for purposes of standing, you could be an
12 adjoining landowner. So we could have these
13 landowners, but are they appealing the entire IAL
14 designation, or do you just appeal -- I mean, how do
15 you bifurcate their particular property, if we're
16 going to take this up as one action by the City?

17 MS. CHOW: You know, generally if they were
18 one of several people who are involved in it, when
19 they bring their petition or their action for
20 administrative appeal, they would challenge certain
21 findings, and generally it would be the findings that
22 would relate only to their property.

23 To the degree that findings are not
24 challenged, then they would still stand on appeal.
25 So in effect, it would be to the entire designation,

1 but it would only be generally with regards to the
2 parts that pertain to their particular property.
3 Maybe a procedure could be worked out where it might
4 be better to try to subdivide them, how these
5 petitions are brought to the Commission instead of as
6 one giant petition, maybe it could be, you know,
7 portions to go first, and then the next kind of
8 thing, to give the Commission a chance to maybe iron
9 out some of the procedural issues on a smaller basis
10 before they take on the lion's share of the lands.

11 COMMISSIONER CHANG: Obviously you have a
12 lot -- Dan and his staff and AG have a lot to work
13 out, because I'm just not really clear. I know what
14 the City did was they took them by, whether we call
15 it mokus, but they looked at different areas. So
16 however vast -- obviously, we're raising questions
17 which will hopefully ultimately help facilitate the
18 process.

19 But there's a lot of uncertainty and
20 unanswered, but thank you. I appreciate the
21 comments.

22 CHAIRPERSON SCHEUER: Commissioner Chang,
23 just as to comment on your question. Sort of like
24 substantive issues against that, one of the
25 substantive issues against that is not beyond just

1 just notice if you were appealing, who do you notice?
2 But for agricultural enterprises to be successful in
3 the long term, they often depend on having
4 neighboring agriculture enterprises in sufficient
5 scale in terms of like supportive businesses and
6 infrastructure.

7 And so while an individual might want to
8 opt out, it's hard to talk about the constitutional
9 goal of protecting Important Agricultural Lands
10 without looking at actual agriculture as well, and
11 how those are addressed.

12 Commissioners, is there anything further on
13 this item and the briefing from Mr. Orodener on this
14 very complex issue?

15 If there is none, we're going to leave this
16 agenda item and go to the final item on our agenda,
17 which is a discussion of the LUC's representation by
18 the Attorney General's office.

19 I, as the Chair, requested at the last
20 meeting that this item be put on our agenda to allow
21 discussion by Commissioners regarding the
22 representation the Commission receives from the
23 Attorney General's office to assess and evaluate the
24 situation, make any recommendations as a body that
25 might help in how our proceedings are conducted.

1 With that, I'm happy to open up the floor
2 to discussions of the Commissioners.

3 COMMISSIONER WONG: Not saying that AG's
4 office has been -- it's been very difficult for me,
5 because, you know, remotely it's hard for me -- I
6 mean, I see Linda now, I see Bill, I see all the
7 different AGs, but it's hard for me -- I would like
8 to work with one Attorney General instead. You know,
9 how we had Diane before.

10 Just because -- I mean, Linda kind of know
11 my nuances already, but it would be better if we have
12 only one Attorney General to understand each of our
13 nuances and where we're headed for.

14 So for me, I would like to just work with
15 one AG if possible. That's all I wanted to say,
16 Chair.

17 CHAIRPERSON SCHEUER: Are there other
18 comments from the Commissioners? Commissioner Okuda

19 COMMISSIONER OKUDA: Mr. Chair, thank you.

20 I think my own personal view is that, you
21 know, we've kind of delegated to you as Chair, and to
22 the Executive Officer to take the actions that you
23 believe that are -- move the Commission's work along
24 efficiently and lawfully.

25 So, you know, I know there's a concern

1 about rotating Attorney Generals. I can appreciate,
2 you know, the arguments on both sides. I would leave
3 it to you and the Executive Officer, if you folks
4 want to consult with the Attorney General, or
5 whomever you want to consult with on this issue, to
6 go ahead and do it.

7 You know, again, there's good points and
8 bad points for different ways of handling this, but I
9 think especially when you're dealing with an agency
10 that is more quasi-judicial than anything else, there
11 is a real benefit to have institutional knowledge and
12 institutional memory, and sometimes that
13 institutional memory cannot be reduced simply on a
14 running log on a case, so that even if you have
15 rotating people that can read the log and know what's
16 going on because oftentimes we as human beings, we
17 don't often write down because at the time that these
18 might not be real significant to them, but later on
19 when something significant does come up, we reach
20 back into the memory we have, hopefully we're
21 competent enough to do that, and that experience, you
22 know, informs us and makes us better advised as
23 lawyers to our clients.

24 So I kind of agree with Commissioner Wong,
25 that if it we're balancing a rotating group of

1 attorneys and, you know, there's benefits to that
2 too, there's benefits to that, but if we weigh that
3 against the benefit if we have a competent attorney
4 who is primarily assigned to the Commission, I think
5 that's in the best interest of the State, especially
6 in reducing liability from future lawsuits or claims.
7 Because, let's face it, if we exercise our discretion
8 within the law, usually we won't get into trouble
9 either an affirmative claim for dollar damages or
10 anything else.

11 I believe the real exposure to government
12 agencies to claims is failure to follow process or
13 procedure. And a good evidence, in my -- you know,
14 when I was suing another agency of the State of
15 Hawaii, and I promise you it's been resolved, years
16 ago before I got on the Commission, the big deal I
17 made was the fact that when you went to the different
18 bureaucrats, you got different results, and that was
19 a constitutional due process violation, and that
20 created the problem.

21 So I believe on basis on a whole, having
22 somebody who would have the primary ability to have
23 institutional memory, institutional knowledge is a
24 benefit to the State, but I leave it up to you, Mr.
25 Chair, and the Executive Officer, to consult with

1 whomever you would want to consult on this, and
2 that's all I have to say. Thank you.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Okuda.

5 Commissioner Giovanni, you raised your hand
6 but then lowered it. You're muted, Commissioner.

7 COMMISSIONER GIOVANNI: Sorry, Chair.

8 I raised my hand because I was going to ask
9 commissioner Okuda to expand on his comments, and
10 then he did it automatically. I didn't have to ask.

11 CHAIRPERSON SCHEUER: Thank you.

12 Deputy Attorney Chow.

13 MS. CHOW: I would like to explain some of
14 our background and the experience that we bring to
15 the Commission.

16 So right now we have seven Deputy Attorneys
17 General, and we provide advice to the Board of Land
18 and Natural Resources, and the Commission on Water
19 Resource Management.

20 So we are used to giving advice to agencies
21 that are involved in quasi-judicial proceedings and
22 decisionmaking all the time. We do the Land Board on
23 a rotating basis.

24 And as far as Commissioner Wong's comment
25 about us getting to know the nuances of the

1 Commissioners, you know, I think we all set to do
2 that with the board members. We've all had
3 experience with the board members. We've all gotten
4 to know them very well, both through personal
5 meetings and even in ZOOM meetings.

6 And so I think that will come in time.
7 Certainly we know some of your tendencies already,
8 and we will just get to know that better. But I
9 think the real forte in having us staff either way
10 that we are is that at least five of the seven Deputy
11 Attorneys General have over ten years of experience
12 each advising boards and commissions. So we know
13 Sunshine law, we know procedures, and we know
14 contested cases. We know those types of issues very
15 well.

16 And so we also bring our background in the
17 diverse speciality areas that we work in.

18 One of our Deputies is our acquisition guru
19 in the division. She knows how to do acquisitions
20 inside and out using all various means --

21 CHAIRPERSON SCHEUER: Ms. Chow, if I may.
22 And if you are concerned with my cutting you off, you
23 can say just, I want to continue to speak and I will
24 allow you to do so.

25 MS. CHOW: I would like to continue to

1 speak.

2 CHAIRPERSON SCHEUER: Go ahead.

3 MS. CHOW: So I think we have a lot to
4 offer the Commission. And, you know, frankly, right
5 now we don't have the staffing ability to dedicate
6 one Deputy Attorney General to just the LUC, and that
7 really is the bottom line for us.

8 CHAIRPERSON SCHEUER: Commissioner Okuda.

9 COMMISSIONER OKUDA: Ms. Chow, we all
10 appreciate the budget issues, and like I say, I'm not
11 advocating one way or the other. It's just that I
12 think there are benefits to having somebody whose
13 primary focus is on the Commission.

14 And if I can just raise just one point.
15 And I'm not saying this governs in every case. But
16 what I found, being on the Commission, and I know,
17 Ms. Chow, I know you from decades ago from private
18 practice, so I know you come from a private practice
19 background also. Let me preface what I'm about to
20 say.

21 I mean, we are going to follow the law as
22 Commissioners without prejudice, or without
23 favoritism or fear from anyone. So please don't take
24 this as, you know, any predetermination of anything.

25 But after awhile, when we as human beings

1 deal with certain people, we get an idea of -- I'm
2 not saying who we can trust, but we get an idea based
3 on the body of work that lawyers or planners or other
4 people present to us about the people who we need to
5 delve a little bit more deeper into what's being
6 submitted, and other things which -- I'm not saying
7 we would shirk our duty or be flippant about it or
8 just be lazy about it, but there are some people who,
9 frankly speaking, you know -- I don't want to say you
10 can rely on them more, but it's the life experience
11 we bring. And so all I'm suggesting is just to
12 please consider -- that's all I'm asking -- please
13 consider the benefit that somebody would have,
14 because, let's face it, the cast of characters that
15 appear in front of Land Use Commission, many times
16 it's the same cast of characters. And I know some
17 fellow lawyers in private practice, if they get a
18 judge who they've never been in front of before, and
19 that judge really doesn't know them, there are some
20 lawyers in the practice who believe that they think
21 they can take liberties with trying to get away with
22 things because that judge hasn't dealt with them
23 before.

24 While on the other hand, when you
25 repeatedly appear in front of the same judge, like if

1 you're repeatedly appearing before the same attorney
2 general, there's a human factor thing, which is, if
3 you are sloppy in your work, or God forbid you lie,
4 you know, human beings sometimes feel little bit more
5 constrained that they don't want a bad reputation.

6 So all I'm suggesting is just to please
7 consider the fact that there might be this benefit to
8 having somebody more permanent than less permanent.

9 Thank you, Mr. Chair.

10 CHAIRPERSON SCHEUER: Commissioner Aczon
11 followed by Commissioner Ohigashi.

12 VICE CHAIR ACZON: Thank you, Mr. Chair. I
13 just want to echo Commissioner Wong's sentiment, and
14 for me also, personally, my preference is to stick to
15 one attorney general, which brings us institutional
16 knowledge from previous cases.

17 I wouldn't want -- if I'm appearing in a
18 court of law, I wouldn't want different lawyers
19 representing me every time I show up in court.

20 Interestingly, Deputy AG Chow mentioned
21 about each of them have some personal views and
22 personal experience that brings to the table, and
23 sometimes those personal views and personal
24 experience kind of conflict with each other.

25 I raise it up with our Second Officer about

1 at one point there were two conflicting opinions
2 given by two different AGs, and that's the reason why
3 also I raised it up to our Executive officer. I
4 think we should have one AG represent us.

5 So again, you know, and I also want to echo
6 Commissioner Okuda that, you know, I kind of leave it
7 up to the Second Officer and the Chair to work with
8 the Attorney General on this issue.

9 But if you ask me my personal preference,
10 that's my personal preference.

11 Thank you, Mr. Chair.

12 CHAIRPERSON SCHEUER: Thank you very much,
13 Commissioner Aczon.

14 Commissioner Ohigashi.

15 COMMISSIONER OHIGASHI: I'm in a position
16 where I find myself for the first time being a
17 client, and as a client, I think that we should be
18 able to express our views and choose and have an
19 opportunity to have a hand in determining our
20 representation.

21 Be that as it may, every attorney/client
22 relationship I know that there are rough spots, or
23 difficult things that hurt them. I think that a
24 fruitful way of dealing with this issue would be to
25 have, as everybody says, have our Executive Officer

1 and ave our Chairman speak with the Attorney General
2 himself to discuss what the client would need and
3 what we expect, and how that would be delivered for
4 proof of a better manner as thinking we're clients.

5 So I think that Ms. Chow has to speak for
6 her division and her, I guess, her people that are
7 within her division. However, I think that an
8 overall discussion as far as taking place between our
9 Board and the Attorney General herself or perhaps
10 First Deputy. That's all I have to say.

11 CHAIRPERSON SCHEUER: Thank you very much,
12 Commissioner Ohigashi.

13 Ms. Chow.

14 MS. CHOW: So I just want to respond to
15 Commissioner Ohigashi. And it is always the
16 prerogative of the Commission and the Executive
17 Director to speak to the Attorney General herself.

18 I did actually speak to the First Deputy
19 about this situation, and she actually approves of
20 the way that we are staffing the Land Use Commission
21 at this time.

22 CHAIRPERSON SCHEUER: Commissioners, if
23 there's nothing further, I feel that I have a good
24 sense from -- Commissioner Giovanni.

25 COMMISSIONER GIOVANNI: Thank you, Chair.

1 I just wanted to weigh in with my fellow
2 Commissioners. I find myself in absolute agreement
3 surprisingly with Commissioner Wong, not surprisingly
4 with Commissioner Aczon and Commissioner Okuda. I
5 would prefer that we have -- and I do appreciate the
6 arguments made by Ms. Chow, and I'm sensitive to that
7 as well, but just in terms of functioning of the
8 Commission, consistency of how we move forward, I
9 would favor, if we could, to have a dedicated
10 Assistant Attorney General work with our Commission.

11 CHAIRPERSON SCHEUER: Thank you,
12 Commissioner Giovanni.

13 Commissioner Cabral.

14 VICE CHAIR CABRAL: I agree. It's more
15 comfortable, and it's nicer and it's -- and I have a
16 feeling of more reliability when I have the same
17 person because, again, as has been stated, we have
18 more of a trust or a feel for somebody we have gotten
19 familiar with.

20 But at the same time, being the capitalist
21 that I am, if the government could spend less money,
22 I'm going to be really happy.

23 So I can appreciate that there's going to
24 be decisions being made, and we're not all going to
25 be as comfy as we might have been before the pandemic

1 because the money is going to be even tighter, and
2 maybe there should be cuts. Even if we get more
3 loans, let's get more efficient. So I would love to
4 have the same person, and I would love it if that
5 consideration are being made when assignments are
6 being given. When assignments are given out, maybe
7 that's administratively something in their office
8 they could do. Hey, you're the first person to
9 always go if you're free and you don't have some
10 massive schedule you've already done.

11 And, Linda, you're great, so be on the top
12 of the list for us, and come on down, and we would
13 have the second person.

14 So maybe administratively instead of it
15 being this, oh, just send anybody, it could be some
16 kind of a better priority on how your folks operate
17 and administratively send people.

18 Love to have the same person, but I can
19 appreciate that may not be the most costly and
20 efficient. So thank you.

21 CHAIRPERSON SCHEUER: Thank you,
22 Commissioner Cabral.

23 Anything further, Commissioners? If not, I
24 have a sense of where my fellow Commissioners are,
25 that gives me a good feeling that the kinds of issues

1 we can raise along with Mr. Orodener to the Attorney
2 General herself.

3 I will say that I'm appreciative of all my
4 Commissioners' responses, as well as from Ms. Chow.

5 For me personally, this after a few
6 incidences, one where I was having to correct the
7 Attorney General on points of law, which I think was
8 an effect of having them rotating through, as well as
9 a couple incidents which I can only fairly qualify as
10 outburst, which I think were partially a result of
11 the rotating.

12 So it's a concern. We're happy to have a
13 productive and useful discussion about it, and I
14 thank you for your indulgence in considering this
15 agenda item.

16 Mr. Orodener, is there anything further on
17 our agenda?

18 EXECUTIVE OFFICER: No, Mr. Chair, there
19 are no other matters on the agenda.

20 CHAIRPERSON SCHEUER: Seeing nothing
21 further, I declare this meeting adjourned. Thank you
22 very much.

23 (The proceedings were adjourned at 10:50
24 p.m.)

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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on February 11, 2021, at 9:00 a.m.,
the proceedings contained herein was taken down by me
in machine shorthand and was thereafter reduced to
typewriting under my supervision; that the foregoing
represents, to the best of my ability, a true and
correct copy of the proceedings had in the foregoing
matter.

I further certify that I am not of counsel for
any of the parties hereto, nor in any way interested
in the outcome of the cause named in this caption.

Dated this 11th day of February, 2021, in
Honolulu, Hawaii.

/s/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156