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STATE OF HAWAI'I

BEFORE THE LAND USE COMMISSION

STATE OF HAWAI'I

In the Matter of the Petition of

KEKAHA AGRICULTURE
ASSOCIATION, a Hawaii
agricultural cooperative,

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

DOCKET NO. DR 21-76

STATE OF HAWAI'I through its
BOARD OF LAND AND NATURAL
RESOURCES' MEMORANDUM
REGARDING KEKAHA
AGRICULTURE ASSOCIATION'S
PETITION FOR DECLARATORY
ORDER TO DESIGNATE IMPORTANT
AGRICULTURAL LANDS

CERTIFICATE OF SERVICE

STATE OF HAWAI'I THROUGH ITS BOARD OF LAND AND NATURAL RESOURCES'
MEMORANDUM REGARDING KEKAHA AGRICULTURE ASSOCIATION'S PETITION
FOR DECLARATORY ORDER
TO DESIGNATE IMPORTANT AGRICULTURAL LANDS

THE STATE OF HAWAI'I through its BOARD OF LAND AND NATURAL
RESOURCES ("BLNR"), respectfully submits its memorandum regarding KEKAHA
AGRICULTURE ASSOCIATION ("Petitioner" or "KAA")'s Petition for Declaratory
Order to Designate Important Agricultural Lands ("Petition").¹ Primarily on the basis of

¹ Since the December 2, 2021 Petition, KAA moved to amend said Petition on April 27, 2022.

lack of input of the BLNR in the current proposed designation involving a significant amount of public lands, the BLNR **OPPOSES** the Petition for the policy reasons stated below.

I. FACTUAL BACKGROUND

Without any notice by Petitioner KAA to the BLNR, or approval sought from the BLNR, the Land Use Commission (LUC)'s online pending docket for declaratory orders showed a Petition of Kekaha Agriculture Association for Declaratory Order to Designate Approximately 12,123 Acres at Kekaha, Kaua'i; TMK 4-1-2-002:001 Por. IAL. Petitioner seeks a declaratory order, citing Hawaii Revised Statutes (HRS) sections 205-44 and -45 and Hawaii Administrative Rules (HAR) sections 15-15-98, -99, -120, and -121 as authority to designate approximately 95% of the "Kekaha Ag Land" (i.e., the subject property) as Important Agricultural Lands (IAL).

Petitioner 'manages and operates agricultural infrastructure (e.g., irrigation water, drainage, roadways, and electric power systems) on land on Kaua'i referred to as the "Kekaha Ag Lands"' pursuant to a memorandum of agreement with the Agribusiness Development Corporation (ADC). The agreement is set to expire in the year 2028. Petition, p. 2, ¶ 3. The Petitioner states that the "State of Hawai'i owns the Kekaha Ag Lands." *Id.*

Executive Order No. 4007 (E.O. 4007) set aside a portion of TMK no. (4) 1-2-002:001 to the Agribusiness Development Corporation "for agricultural and related purposes" on September 16, 2003. The set aside was for "a gross area of 12,860.642 acres and a net area² of 12,592.133 acres" as compared with the entire parcel size of 12,996.7660

² E.O. 4007 excluded 268.509 acres, such as Kaumualii Highway (80.225 ac), Kokee Road (25.30 ac), Polihale Road (19.38 ac), Waimea Canyon Drive (30 ac.), among others. BLNR believes these excluded roads, wells, storage areas, etc. to be either under its own control, other political subdivisions, or private individuals.

acres as indicated by the County of Kaua‘i Real Property Assessment Office website for the TMK parcel. The county website indicates the State of Hawai‘i as the fee owner, but erroneously includes ADC.

Instead, the BLNR, on behalf of the State of Hawai‘i, is the fee owner to the approximately 12,123 acres Petitioner originally sought to designate as IAL.³ The BLNR is the head of the Department of Land and Natural Resources (DLNR), which manages and administers the public lands of the State. HRS sec. 26-15.

Despite Petitioner’s acknowledgment that the State of Hawaii owns the subject property, the BLNR was not consulted nor served by Petitioner any notification of petition for its intent to designate the approximately 12,123 acres of state land as IAL. Petitioner’s records show a prior attempt to designate Kekaha Ag Lands as IAL in 2018, followed by this current Petition. Nor has BLNR been informed by the ADC regarding this Petition or any modification.⁴ BLNR has neither been asked to agree to, nor concurred with, Petitioner’s designation.

In addition to being the fee owner, the BLNR owns and manages properties adjacent/abutting the subject property. The State of Hawai‘i (through the BLNR) is the fee simple landowner to a number of adjoining properties, many of which are zoned conservation. Moving from the mauka eastern edge of the subject property then proceeding northerly in a

³ Petitioner’s April 27, 2022 motion to amend its petition reduces the acreage for designation as IAL to 11,863 acres.

⁴ In ADC’s January 31, 2018 ADC Board meeting minutes, ADC states it “approached DLNR by way of letter dated January 22, 2018 about “the subject of fee simple ownership of lands set aside to ADC by executive order”. “DLNR had not responded to ADC’s letter by the January 31, 2018 ADC Board meeting.” KAA Brief in Response to Commission’s Feb. 2 Letter, Exhibit B (ADC Board Packet), p. 3 of 9. ADC allegedly asked DLNR for assistance in designating ADC lands through KAA’s petition. Lack of a response was apparently interpreted by ADC as approval by the BLNR and that ADC is the fee simple owner.

clockwise direction around the perimeter of the proposed designated property, the State owns the following properties:

- TMK no. (4) 1-2-002:027 Agricultural lot (48.777 ac)
- TMK no. (4) 1-2-002:029 Por Hawaiian Home Land of Waimea (25.686 ac)
- TMK no. (4) 1-2-001:006 Puu Ka Pele Forest Reserve (4,898.988 ac)
- TMK no. (4) 1-2-001:001 Beach Reserve (431.0 ac)
- TMK no. (4) 1-2-002:024 Portion of Bonham Air Base/Polihale State Park (132.48 ac)
- TMK no. (4) 1-2-002:025 Former Mana Airport (69.562 ac)
- TMK no. (4) 1-2-002:009 Dump (35.67 ac)
- TMK no. (4) 1-2-002:036 State of Hawaii Leased Land (66.788 ac)
- TMK no. (4) 1-2-002:040 Kaumualii Hwy (132.58 ac)
- TMK no. (4) 1-2-002:032 Kuhio Hwy (28.63 ac)
- TMK no. (4) 1-2-002:007 Kaumualii Hwy (16.40 ac)
- TMK no. (4) 1-2-006:018 State of Hawaii Waimea Heights House Lots (57.6930 ac)
- TMK no. (4) 1-2-011:016 Off Waimea Canyon Dr. (5.01 ac)
- TMK no. (4) 1-5-001:002 State Agricultural lot (3,867.6210 ac)
- TMK no. (4) 1-2-001:003 Puu Ka Pele (527.422 ac)

Adjoining lands to the subject property are over 10,244 acres in area according to TMK information on the Kaua‘i County Real Property website showing the “State of Hawaii” as fee owner.

As far as can be determined, this is the first instance of state public lands being proposed by a person or entity other than the DLNR or Department of Agriculture.⁵

II. POLICY CONSIDERATIONS AGAINST DESIGNATION BY DECLARATORY ORDER IN DR 21-76

There are at least three procedures for designation of state public lands in LUC statutes and rules: by boundary amendment in HRS section 205-4, by collaboration of the Department of Agriculture and DLNR in HRS section 205-44.5, and by petition by a farmer or landowner for

⁵ Petitioner states,

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.

KAA’s Brief in Response to Commission’s letter dated February 2, 2022, dated March 30, 2022 (“KAA’s response to LUC”), *see* p. 3, ¶ 1.

declaratory order in HRS section 205-45. Of the three, the latter appears to be less rigorous to ascertaining the rights and position of any landowner if the petition is made by a “farmer”.

A. The BLNR through DLNR exercises fee simple ownership on behalf of the State.

Petitioner erroneously refers in its Petition to the ADC as the fee owner giving authorization in its petition.⁶ When public lands are set aside by executive order under HRS section 171-11, the State of Hawai‘i continues to own all the property, and has the reversionary management interest. Under Executive Order (E.O.) 4007, the ADC was given management authority for TMK no. (4) 1-2-002:001. E.O. 4007 mandates that public lands be set aside for the following public purposes:

For agriculture and related purposes, to be under the *control* and *management* of the Agribusiness Development Corporation...Subject, however, to the condition that upon cancellation of this executive order or in the event that 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. (Emphasis added).

As stated, E.O. 4007 did not and does not transfer an absolute fee simple ownership⁷ of the subject property to the Agribusiness Development Corporation (“ADC”); but merely transfers *control* and *management* of the subject property.⁸ Although the ADC may issue a

⁶ Petition, p. 5, ¶ 1; KAA’s response to LUC

⁷ “With fee simple ownership the grantee or successful claimant became entitled to all the incidents and privileges which attach to that status by operation of the common law or Hawaiian custom and usage.” *State by Kobayashi v. Zimring*, 58 Haw. 106, 139, 566 P.2d 725, 744 (1977) Black’s Law Dictionary defines “fee simple” as the “term applying to total ownership of land and all of the buildings on it.”

⁸ If the State intended to transfer fee simple ownership and the department, agency, or political subdivision possessed powers conferred by the Legislature which allowed it to own land, then a warranty deed or even a quitclaim could suffice; or the Legislature could create an exception to the definition of “public land” in HRS sec. 171-2 to remove the land from chapter 171 controls. This is not the case here.

land disposition such as a lease, easement, license, revocable permit, etc., unless the disposition is for less than 14 days, an agency given managerial jurisdiction such as the ADC is still required under section 171-11 to seek the BLNR's prior approval before such a land disposition may be made, ensuring that the disposition is be consistent with the public purpose that the lands were set aside under the executive order.

Under HRS section 171-11, if set aside lands are either not used or required for the described public use in the E.O., the BLNR has the prerogative to make any further land disposition less than the fee interest for purposes that are either consistent or inconsistent with those in the E.O. Land set aside may also be cancelled or withdrawn, the latter of which previously occurred for E.O. 4007 on September 17, 2010, under E.O. 4330, as signed by then-Governor Linda Lingle, and subject to disapproval of the Legislature by two-thirds vote.⁹

B. DR 21-76 sets a precedent for designation of public lands without BLNR input

Without having been given an opportunity to discuss the merits or pitfalls of Petitioner's petition, the BLNR is concerned with this treatment of public lands going forward. As public lands under the BLNR's jurisdiction have not yet been designated as IAL, we are particularly concerned of the implications of designation by this process. A precedent may be set which includes confusing and seemingly contradictory treatment in procedures and notice requirements.

Lands owned by the State of Hawai'i are being declared IAL without any consultation, evaluation, or input by the BLNR as to other attributes of the public lands – including the presence of historic or prehistoric remains, historical properties, sites of cultural significance; geological features, rare, endangered,

⁹ On Sept. 8, 2006, BLNR approved the withdrawal of 19,500 square feet.

threatened, or indigenous species; introduced species which impact any natural resource; access for traditional and customary practices, hunting, fishing, water, the statewide trail system, endangered species, or any reserved interest in the property, such as minerals and metallic mines, or native rights. The proposal does not address or appear to be required to specifically address, the effects of designation on the State's adjoining properties and easements.

C. Designation under DR 21-76 has unintended consequences to public lands without BLNR input

If designated as IAL, Part III of HRS chapter 205 allows a number of incentives to follow, including tax credits, farm dwellings and employee housing, processing facilities. *See* HRS sections 205-45.5, -46, -46.5. Housing and dwellings are examples of structures not usually allowed by the BLNR, as being inconsistent with the public purpose of a set aside under an E.O., or most public land dispositions under HRS chapter 171.

BLNR's representation of the State is under the Constitution and through statute, includes public trust duties and responsibilities to public lands and associated natural resources. None of these responsibilities should be supplanted by the private interests of KAA, nor can the DLNR's agency expertise or representation be substituted by other state or county agencies. The further transfer of management upon designation could cause a conflict between agencies if their constitutional and statutory mandates are taken into account.

In contrast, reclassification of the lands to IAL without BLNR approval materially impacts BLNR's authority under HRS section 171-11, as the authority to manage,

administer, and exercise control over public lands designated IAL is transferred to the Department of Agriculture. HRS section 171-3. This differs from any cancellation or withdrawal of lands from a section 171-11 set aside, which would enable the State through the BLNR to set aside the lands to another state or county agency, or allow any other disposition.

D. Qualifications of Petitioner KAA under HRS section 205-45

As an agricultural cooperative managing agricultural infrastructure, KAA is not a farmer, although it may be composed of farmers. Petition, p. 2, ¶¶ 2, 3.

KAA is also not a landowner, and as stated above, operates under a managerial agreement with ADC rather than hold a traditional property interest in land. As far as we are aware, KAA has not disclosed this agreement with ADC by which it exercises its management of Kekaha Ag Lands. The agreement will lapse in about six years.

Given the extensive amount of state lands proposed for designation by Petitioner, which qualifications under HRS section 205-45 appear marginal, we believe that under the circumstances, denial of the Petition or Amended Petition (if amendment is granted) at this juncture is warranted.

III. CONCLUSION

Based on the above, respectfully, it is the testimony of the BLNR that the appropriate outcome is for the Land Use Commission to deny this Petition, or Petition as amended.

DATED: Honolulu, Hawai'i, May 3, 2022

Suzanne D. Case

SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that on this date a copy of the foregoing document was
duly served upon the following parties, via U.S. Mail, postage prepaid, as set forth below:

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