



LAND USE COMMISSION  
STATE OF HAWAII

2022 JUN -6 P 1: 15

BEFORE THE LAND USE COMMISSION  
OF THE 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,  
Kaua'i;  
TMK 4-1-2-002:001 Por

DOCKET NO. DR 21-76

ORDER GRANTING PETITIONER'S  
ORAL MOTION TO WITHDRAW ITS  
PETITION FOR DECLARATORY  
ORDER AND EXHIBIT A; AND  
CERTIFICATE OF SERVICE

**ORDER GRANTING PETITIONER'S ORAL MOTION TO WITHDRAW  
ITS PETITION FOR DECLARATORY ORDER, AND EXHIBIT A**

AND

CERTIFICATE OF SERVICE



LAND USE COMMISSION  
STATE OF HAWAII

2022 JUN -6 P 1:16

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**ORDER GRANTING PETITIONER'S ORAL MOTION  
TO WITHDRAW ITS PETITION FOR DECLARATORY  
ORDER, AND EXHIBIT A**

On December 2, 2021, Kekaha Agriculture Association ("Petitioner" or "KAA"), through their attorney Douglas A. Codiga Esq., filed a Petition For Declaratory Order ("Petition"); Verification of Petition, pursuant to Hawai'i Revised Statutes ("HRS") §§205-44 and -45 and Hawai'i Administrative Rules ("HAR"), §15-15-98, -999, -120 and -121; to designate approximately 12, 123 acres of land at Kekaha, Kaua`i ("KAA IAL") as Important Agricultural Lands ("IAL"). During continued proceedings on this Petition on May 11, 2022, Mr. Codiga made an oral motion before the Land Use Commission to withdraw KAA's Petition for Declaratory Order.

This Commission having heard and examined the testimony and evidence presented by Petitioners, the State Office of Planning and Sustainable Development ("OPSD"), the County of

Kaua'i ("County"); the Department of Agriculture ("DOA") and the filings and public testimony submitted via electronic mail during hearings on December 23, 2021 via ZOOM interactive conference technology and on May 11, 2022 at the Hilton Garden Inn, Kapaa, Kauai, along with the pleadings filed herein, hereby makes the following Findings of Fact, Conclusions of Law, and Decision and Order granting the oral motion of Petitioner to withdraw its Petition.

### FINDINGS OF FACT

#### Procedural Matters

1. On December 2, 2021, Kekaha Agriculture Association ("Petitioner" or "KAA"), through their attorney Douglas A. Codiga Esq., filed a Petition For Declaratory Order ("Petition"); Verification of Petition, pursuant to Hawai'i Revised Statutes ("HRS") §§205-44 and -45 and Hawai'i Administrative Rules ("HAR"), §15-15-98, -999, -120 and -121; and Exhibits "A"- "D", and Certificate of Service and paid Petitioner's filing fee with cashier's check for \$1000.
2. On December 6, 2021, the Commission received Agribusiness Development Corporation's ("ADC") testimony in support of the Petition..
3. On December 13, 2021, the Commission mailed an agenda and hearing notice for a meeting on December 23, 2021 to the Petitioner; and, the Statewide, email, and Kaua'i mailing lists.
4. On December 15, 2021, the Commission received OPSD's Response to the Petition.
5. On December 16, 2021, the Commission received County and DOA's Responses to the Petition.
6. On December 17, 2021, the Commission received ADC and OPSD's Supplemental Responses to the Petition

7. On December 20, 2021, the Commission received public testimony via electronic mail, from Sunrise Capital - Kaua`i Shrimp.
8. On December 23, 2021, the Commission met via ZOOM interactive virtual technology, to consider the Petition pursuant to HAR §15-15-100. Douglas A. Codiga, Esq., appeared on behalf of Petitioner and Tom Schnell - PBR Hawai`i (Petitioner's Consultant), and Josh Uyehara, President of Board of Directors, KAA, who were also present.
9. OPSD and County were present at the proceeding. Alison Kato, Esq. appeared with Lorene Maki, Planner and Mary Alice Evans, Director on behalf of OPSD; and Laura Barzilai, Esq. for County.
10. At the meeting, the LUC heard public testimony requesting a deferral of this matter from Beth Tokioka - Kaua`i Island Utility Cooperative ("KIUC") and William J. Ailā Jr. – Chairman of Hawaiian Homes Commission and Director of the Department of Hawaiian Home Lands.
11. Commissioner Okuda disclosed that he knew and had worked with Commissioners of the Hawaiian Homes Commission. There were no objections to his continued participation in the proceedings.
12. At the meeting the LUC considered the propriety of continuing the hearing after being advised that the Department of Hawaiian Home Lands ("DHHL") was considering requesting a potential contested case hearing. Deputy Attorney General ("DAG") Linda Chow acknowledged the concern and described the procedures to be followed if the contested case request was conditional and Chair Scheuer afforded the Parties an opportunity to question the matter. There were no questions.

13. Mr. Codiga offered ADC's James Nakatani, Executive Director and Myra Kaichi, Senior Executive Assistant as witnesses to respond to questions on ADC's authority.
14. Commissioner Okuda disclosed that he knew Ms. Kaichi and Mr. Nakatani from previous work. There were no objections to his continued participation in the proceedings.
15. Mr. Codiga also offered KAA's Josh Uyeda- KAA President, Board of Directors, as witness to respond to questions on KAA.
16. During the December 23, 2021 proceedings, unanswered issues of jurisdictions, ownership and management authority to pursue the requested land designation action arose and Chair Scheuer expressed his desire to defer this matter till better information could be provided to the Commission to base their decision upon.
17. Chair Scheuer queried the Parties to seek their positions on the matter. County and OPSD agreed that the matter should be deferred. Discussion ensued to clarify the distinction between management of the land and fee simple ownership and the Executive Order delegating control and management to ADC.
18. Following the discussion and proceedings, Chair Scheuer entertained a motion to defer.
19. A motion was made and seconded to defer this matter and have LUC staff prepare a letter to the Parties to summarize and brief the issues for the Commission and it received the affirmative votes required by HAR §15-15-13 (6 ayes - 0 nays - 2 excused, 8 Commissioners seated of 9 positions).
20. On February 2, 2022, the Commission mailed a letter requesting position statements on matters that the Commissioners needed clarification on to the Office of Planning and Sustainable Development, the County of Kaua'i Planning Department, the Kekaha

Agriculture Association, the Department of Hawaiian Home Lands and the Agribusiness Development Corporation.

21. On February 28, 2022, the Commission mailed a letter requesting a position statement on matters that the Commissioners needed clarification on from DOA after it was discovered that DOA had been inadvertently omitted on the 2/2/2022 letter mailout.
22. On March 21, 2022, the Commission received County of Kauai's Statement of No Position.
23. On March 29, 2022, the Commission received OPSD's Statement of No Position.
24. On March 30, 2022, the Commission received ADC's response to the LUC request for Briefs and DOA's Statement of No Position.
25. On March 30, 2022, the Commission also received KAA's Brief in Response to the Commission's February 2, 2022 letter.
26. On April 27, 2022, the Commission received Petitioner's Motion to Amend Petition for Declaratory Order to Designate IAL and Exhibits 1, A and B.
27. On May 5, 2022, the Commission mailed the May 11-12, 2022 Meeting Agenda notice to the Parties, the Statewide and Kaua'i mail and email list. The Commission also sent notice to the Lt. Governor's office and posted the notice on the State e-calendar and the LUC website.
28. On May 4, 2022, the Commission received the Department of Land and Natural Resources ("DLNR") and Board of Land and Natural Resources ("BLNR") Memorandum regarding KAA's Petition for Declaratory Order.
29. On May 5, 2022, the Commission received a letter from ADC regarding the BLNR's 5/4/2022 memorandum.

30. On May 6, 2022, the Commission received Petitioner's Letter regarding withdrawal of its Petition.
31. From May 2, 2022 to May 6, 2022, the Commission received public testimony from
- o Richard Loero - Kokee Farms, LLC
  - o Anthony K. Pajela- Garden Island Security, Inc.
  - o Dan Lord, MGR- Lords Electric LLC
  - o Harold Edwards- ITC Water Management, Inc.
  - o Matt Andros- Andros Engineering Corp.
  - o Kalaniumi H. Martin- Umi's Farm
  - o Maurice A. Munechika- Wines of Kauai, LLC
  - o Alec Sou- Aloun Farm, Inc
  - o Lafe Young- Wai Engineering, Inc.
  - o Wallace Johnson- Hawaii Labor Solutions
  - o Mark Stoutemyer- Corteva Agriscience/ Hawaii Research Center

PETITIONER'S ORAL MOTION TO WITHDRAW KAA'S PETITION FOR  
DECLARATORY ORDER.

32. On May 11, 2022, Mr. Codiga orally moved to withdraw the KAA Petition for IAL designation and the Commission heard public testimony from DLNR Deputy Attorney Colin Lau opposing the request to withdraw the IAL Petition.
33. County stated that it was in favor of the Motion and believed the record was sufficient for the Commission to decide upon.
34. OPSD stated that it noted DLNR's objection but supported the Motion to Withdraw.
35. DOA took no position on the Motion.
36. In its discussion of the Petition, the Commission noted, among other things, that in accordance with section 15-15-50.6 (b), HAR, the withdrawal of a declaratory order in this matter would allow for the Petitioner to refile the Petition within one year after the granting of the motion for withdrawal. However, Mr. Codiga represented that KAA recognized after considering the information contained in the memorandum provided by the DLNR/BLNR that additional groundwork was needed before seeking an IAL

designation and that granting of his motion to withdraw would allow time to allow the Parties involved to cooperatively work together.

37. Thereafter, a motion was made and seconded to approve Petitioner's oral motion to withdraw the KAA Petition for IAL designation Petition pursuant to section 15-15-100(a)(1)(C), HAR. Following discussion by the Commissioners, a vote was taken on this motion. There being a vote tally of 7 ayes, 0 nays, and 2 excused, the motion carried

#### CONCLUSIONS OF LAW

1. Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

#### Jurisdiction

2. HRS §91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
3. Petitioners are interested persons pursuant to HRS §91-8 and HAR §15-15-98(a), and thus have standing to bring this Petition before the Commission.
4. The Commission has jurisdiction to issue this declaratory order. HRS §91-8, as implemented by the Commission's administrative rules, HAR §§15-15-98 through 15-15-104.1, authorize the Commission to issue a declaratory order "as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual



situation.” The Commission’s statutes, the applicability of which are put at issue in this Petition, are those sections of HRS Chapter 205 that govern the authority to reclassify land.

5. HAR §15-15-98(c) allows the Commission to issue a declaratory order “...without notice of hearing” to terminate a controversy or to remove uncertainty. The Commission concluded that based on the facts presented at the meeting, the pleadings filed, together with the exhibits, the opportunity of Petitioner to present their views, and the fact that neither Petitioner requested a hearing pursuant to HAR §15-15-103, a hearing is not necessary before issuing a declaratory order in this matter.
6. HAR §15-15-100(a)(1)(D) provides that the Commission can deny the petition where “the petition requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission.”
7. The Commission relied on this authority to determine that the declaratory ruling process was proper. Without limiting the foregoing, the Commission concluded that the declaratory ruling procedure could be invoked by the Petitioner’s in this matter.

“Based on the text and structure of the statute, its legislative history, and relevant caselaw, we agree with Wal-Mart that the declaratory ruling procedure was not intended to be utilized to seek review of agency determinations that have already been made and which have not been timely appealed.

HRS § 91-8, entitled “Declaratory rulings by agencies,” provides that:

Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders

disposing of petitions in such cases shall have the same status as other agency orders.

HRS § 91–8 (emphasis added).

As both the title (“Declaratory rulings by agencies”) and the pertinent text (“a declaratory order as to the applicability [of a statute, agency rule, or order]”) make clear, the declaratory ruling procedure of HRS § 91–8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions for which other means of review are available. Reading HRS § 91–8 in a common sense fashion, and bearing in mind the plain meaning of the term “applicability,” it cannot seriously be maintained that the procedure was intended to review already-made agency decisions. For such decisions, like the DPP Director's issuance of the CUP to Wal–Mart, the agency has already spoken as to the “applicability” of the relevant law to the factual circumstances at hand—implicitly or explicitly it has found the relevant legal requirements to be met. There is no longer a question of how the relevant laws, in this case the LUO, “apply.”

Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu,

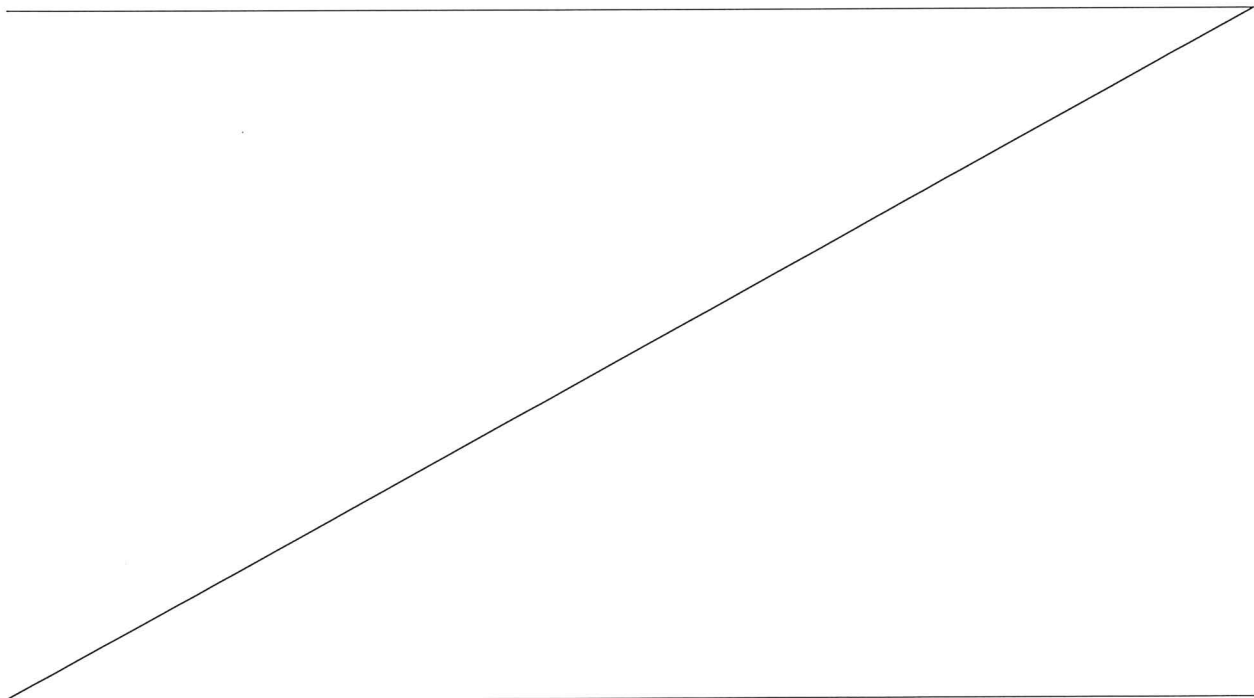
114 Haw. 184, 196–97, 159 P.3d 143, 155–56 (Hawaii 2007).

8. Pursuant to HRS § 205-44(a), the Commission has the authority to designate lands as IAL so long as any of the criteria in HRS § 205-44(c) are met.
9. The generally applicable formal requirements for a petition for declaratory order are set forth in HAR§ 15-15-99
10. Pursuant to HAR §15-15-70 Motions:
  - (a) Any party may make motions before, during, or after the close of a hearing .
  - (m) Orders granting, denying or otherwise disposing of motions, including motions to amend decisions and orders relating to district boundary amendments and to special permits, shall be signed by the chairperson or any vice chairperson, or the 15-70 §15-15-72 presiding officer, or the hearings officer, as .the case may be.

**DECISION AND ORDER**

This Commission, having duly considered the Petition, the oral and/or written comments of Petitioner, OPSD, the DOA, the County of Kaua`i Planning Department, DLNR, ADC and the KAA, and a motion having been made at a meeting on May 11, 2022, in Līhu`e, Kaua`i, Hawai`i, and the motion having received the affirmative votes required by HAR § 15-15-13 and HRS § 205-45(e), and there being good cause for the motion,

HEREBY ORDERS that the Petitioner’s Oral Request to Withdraw Petitioner’s Motion to Designate Important Agricultural Lands for the Petition Area, consisting of approximately 12,123 acres of land, situated at Kekaha, Kaua`i, Hawai`i, identified as Tax Map Key No. 4-1-2-002:001, situated at Kekaha, Island and County of Kaua`i (“Petition Area”), and shown approximately on Exhibit “A,” attached hereto and incorporated by reference herein, shall be granted.



ADOPTION OF DECLARATORY ORDER

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, O'ahu, Hawai'i, this 6th day of June, 2022, per motion on May 11,  
2022.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII

/s/ Linda L.W. Chow

\_\_\_\_\_  
Deputy Attorney General

By

  
\_\_\_\_\_  
JONATHAN LIKEKE SCHEUER  
Chairperson and Commissioner

Filed and effective on:

6/6/2022

Certified by:



\_\_\_\_\_  
DANIEL ORODENKER  
Executive Officer



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TMK 4-1-2-002:001 Por

DOCKET NO. DR 21-76

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that an **ORDER GRANTING PETITIONER'S ORAL MOTION TO WITHDRAW ITS PETITION FOR DECLARATORY ORDER** was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

CERT.  
MAIL

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Dated: Honolulu, Hawai'i, 6/6/2022



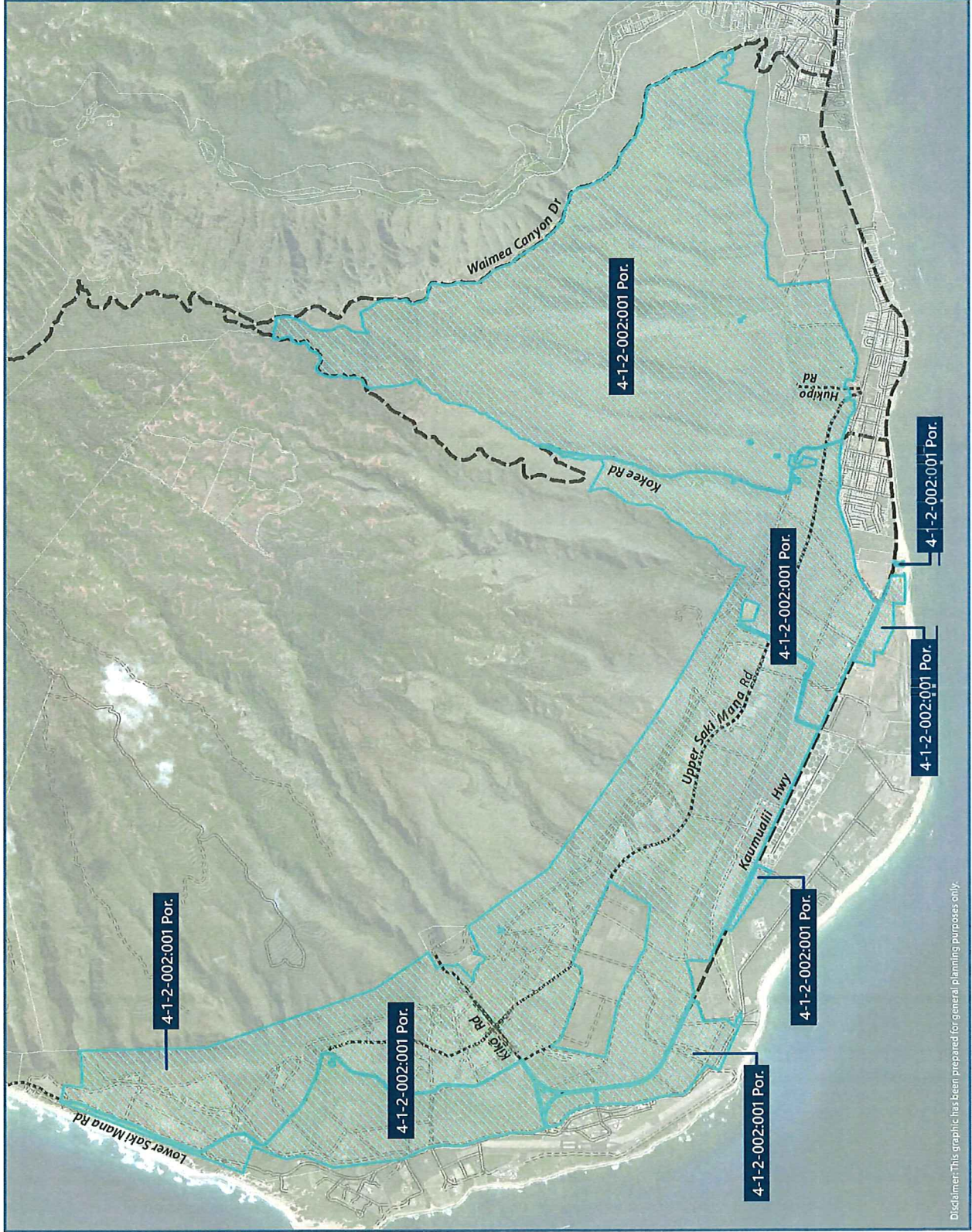
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DANIEL E. ORODENKER  
Executive Officer

**LEGEND**

- Proposed IAL Land
- Major Road
- Key Road
- Paved Road
- Unpaved Road

Source:  
County of Kauai,  
ESRI BaseMap.



Disclaimer: This graphic has been prepared for general planning purposes only.

**EXHIBIT A**

**TMK PARCELS AND PROPOSED IAL**

**KAA IMPORTANT AG LAND**

KEKAHA AGRICULTURE ASSOCIATION  
ISLAND OF KAUAI

NORTH  
LINEAR SCALE (FEET)  
0 1,000 2,000 4,000

