

**Avoiding the Next Hokulia: The Debate over Hawai'i's Agricultural Subdivisions**

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I. INTRODUCTION

As an island state with finite land resources, Hawai'i struggles with balancing two competing and equally important interests: housing for Hawai'i's people and preservation of agricultural lands. Enshrined in Hawai'i's Constitution is a mandate to conserve and protect important agricultural lands.<sup>1</sup> Hawai'i's State Land Use Law<sup>2</sup> and county codes share power over agricultural lands. Under this regime, county practices reveal the blending of preservation and urbanization needs in the form of agricultural subdivisions.

Recently, controversy intensified over the legality of one agricultural subdivision, Hokuli'a. The proposed project, a luxury residential subdivision centered around a golf course, to be built on 1,550 acres of state-zoned agricultural land, prompted renewed concerns over appropriate development within the agricultural district. In the debate over Hokuli'a, two key problems with Hawai'i land use rose to prominence. The first problem is that not all agricultural lands are created equal; the agricultural district has long been a holding zone for half the land in the state,<sup>3</sup> the majority of which is not suitable for agriculture. Marginal agricultural lands should be put to better use: in this case, housing.

The second problem is that the State Land Use Law<sup>4</sup> governing the agricultural district contains a loophole so large that entire subdivisions have been squeezing through it for decades. The requirement that residences in the agricultural district be "farm dwellings"<sup>5</sup> is not specific enough to preclude agricultural subdivisions. If subdivisions are truly inappropriate uses of agricultural district lands, then the Hawai'i State Legislature must amend the State Land Use Law.<sup>6</sup>

This paper will attempt to reconcile the competing needs of agricultural preservation and necessary development. Part II explores the state of agricultural land in Hawai'i today and the current controversy surrounding Hokuli'a. Part III examines legislative and judicial attempts to solve the two problems surrounding land use in the agricultural district: first, the identification of important agricultural lands; and, second, the lack of clarity in the State Land Use Law governing development on

agricultural land. Part IV recommends a course of action for balancing the competing needs of preservation and urbanization in Hawai'i. Part V concludes with a request that the Hawai'i State Legislature clarify the policies behind its land use designations.

II. BACKGROUND

A. The State of Agricultural Land in Hawai'i

Agricultural land is the most amenable to housing development. Much of this land is level and already serviced by water, electricity, and roads. Some of the land is also not suited for farming<sup>7</sup> and might not belong in the district to begin with. Of the 1.9 million acres in the district, only one-quarter are classified as A or B (prime) lands.<sup>8</sup> In fact, the agricultural district is regarded as a "catch-all" district; lands not easily classified as urban, conservation, or agriculture are "put into [the] agricultur[al] district] by default."<sup>9</sup> The agricultural district thus "contains far more acreage than will ever be actively cultivated and thousands of acres that are poorly suited to any kind of farming."<sup>10</sup>

Development in the agricultural district is nothing new.<sup>11</sup> Even those most opposed to the practice recognize that the counties "have allowed numerous agricultural subdivisions to be built [even] without any apparent agricultural connection."<sup>12</sup> Big Island Mayor Harry Kim explained, "Everybody knows that [agricultural subdivisions are] an abuse of the 'word' ag, but it is not an abuse of the zoning. It is legal."<sup>13</sup> Indeed, the agricultural-less agricultural subdivision "has been a standard"<sup>14</sup> throughout the counties. This standard practice went unchallenged in the courts until Lyle Anderson's Hokuli'a Project.<sup>15</sup>

B. Hokuli'a

Perched 1,250 feet above Kealakekua Bay on the Island of Hawai'i sits the now idle Hokuli'a development.<sup>16</sup> The development spans 1,550 acres of predominantly agricultural district land classified by the state as C, D, and E (marginal) land.<sup>17</sup> Those who have seen the land characterize it as unsuitable for agriculture. Craig Watase, president of Mark Development and past president of the Building Industry Association asserted, "[N]othing was growing out there, not even weeds."<sup>18</sup> Others note the following:

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The Hokuli'a project land is "agricultural" only in the most liberal sense of the word. It is mostly scrub kiawe on the thinnest layers of "soil" over lava. That soil . . . cannot sustain virtually any meaningful agricultural use except for grazing a few head of cattle, and then only during Kona's wet season. The previous owners abandoned even this limited use as impractical.<sup>19</sup>

Despite starting off with land of such limited agricultural capacity, the developers offered prospective homebuyers a range of agricultural activities to engage in, including choosing "from a list of crops approved by the developer . . . [and farming] their own land . . . or allow[ing] the homeowners' association to take care of their crops."<sup>20</sup>

The Lyle Anderson Company's plans included a 730-lot development, golf course, guest lodge, and shoreline park.<sup>21</sup> Between 1993 and 1997, developer The Lyle Anderson Company, Inc. received "Hawai'i County official assurances . . . after . . . 30 public hearings and county planning, zoning, permitting and subdivision approvals."<sup>22</sup> The developer entered into a development agreement<sup>23</sup> with Hawai'i County<sup>24</sup> and subsequently spent hundreds of millions of dollars on the Hokuli'a project.<sup>25</sup> Lyle Anderson thought he had done everything necessary to ensure his right to proceed with his development.<sup>26</sup>

Two groups (Protect Keopuka Ohana and a group of Kona residents led by Jack Kelly) sued to enjoin the development as, *inter alia*, an illegal use of agricultural district land.<sup>27</sup> After a bench trial in July, 2003, a Third Circuit Court judge declared that the development violated Hawai'i Revised Statutes ("HRS") section 205<sup>28</sup> and enjoined "any further construction activities or development" on the project site until 1250 Oceanside Partners obtains from the state Land Use Commission (LUC) a reclassification of the project land from agricultural to urban.<sup>29</sup> The order was unexpected and shocking to both sides.<sup>30</sup>

Reaction to the decision and order was immediate. A steady stream of letters to the editor

praised the decision and chastised 1250 Oceanside Partners' "flouting," "skirting around," "violating", or "ignoring" state law.<sup>31</sup> Other reactions were just as passionate in criticizing the unfairness of the decision and order.<sup>32</sup> Lawyers, real estate agents, developers, and landowners voiced concern that the decision would create uncertainty in Hawai'i's land use system.<sup>33</sup> To them, the decision reinforced Hawai'i's reputation as "anti-business and anti-development,"<sup>34</sup> creating a "chilling effect on anyone considering investing in Hawaii."<sup>35</sup> Even Governor Linda Lingle chose sides, stating, "Which side is going to win out in this judicial proceeding [the appeal of the Hokuli'a decision and order] remains to be seen, but the fact is the classification system that we have not only allowed this to happen, it encouraged it to happen."<sup>36</sup>

As Lingle suggests, the root of the problem is the law governing land in the agricultural district. In order to prevent another Hokuli'a, whether one views the situation as a miscarriage of justice or as a misuse of agricultural land, two solutions are needed. The first is to identify the most important agricultural lands, provide incentives for agricultural preservation, and reclassify some of the remaining non-important agricultural lands to the rural district to facilitate development.<sup>37</sup> The second is to strengthen the existing definitions regarding uses in the agricultural district.<sup>38</sup> Without this multi-faceted approach, reconciliation of preservation and housing needs will remain elusive.

#### IV. ANALYSIS

##### A. Responses to the First Problem: The Legislative Attempt to Identify Important Agricultural Lands

Hawai'i's Constitution expresses the following commitment to agricultural lands and agriculture in general:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.

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Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.<sup>39</sup>

Despite such a clear mandate, the Hawai'i State Legislature has not yet taken the first step to conserving and protecting agricultural lands: it has not yet created "standards and criteria" to identify important agricultural lands ("IALs").<sup>40</sup> In Summer 2001, in an effort to remedy this shortcoming, the State House Committees on Agriculture and Water, Land Use, and Hawaiian Affairs convened the Agricultural Working Group ("AWG") to address the long-standing mandate and to draft legislation for consideration by the 2004 Legislature.<sup>41</sup> During the 2004 legislative session, the AWG presented its package, House Bill 2800 and Senate Bill 3052 ("HB 2800/SB 3052").<sup>42</sup>

HB 2800/SB 3052 finally identifies as IALs the following:

- (1) [Lands that a]re capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
- (2) [Lands that c]ontribute to the economic base of the State and produce agricultural commodities for export or local consumption; or
- (3) [Lands that a]re needed to promote the expansion of agricultural activities and income for the future, even if not currently in production.<sup>43</sup>

The Bill also sets forth standards and criteria for identifying IALs.<sup>44</sup> The counties are in charge of designating IALs, supervised by the LUC.<sup>45</sup> The LUC may also independently identify IALs in each county.<sup>46</sup> The Bill also contains a crucial express declaration that its intent is to ensure "[t]hat agricultural incentive programs to promote

agricultural viability . . . and the long-term use and protection of important agricultural lands for agricultural use shall be developed concurrently with the process of identifying important agricultural lands."<sup>47</sup> One important question did remain, however. After incentives are created and important and non-important agricultural lands are identified through AWG's new process, the non-important agricultural lands will remain in the agricultural district.<sup>48</sup> The AWG's legislative package was a momentous achievement; were it not trapped in committee and deferred,<sup>49</sup> it would have ended a twenty-six year old struggle.<sup>50</sup>

#### B. Responses to the Second Problem: The Judicial Attempt to Clarify HRS § 205

Building in the agricultural district will most likely continue, because HRS section 205 does not expressly forbid it,<sup>51</sup> but conflicts over development in the agricultural district will increase. These conflicts will inevitably center around a loophole in the State Land Use Law. Specifically, HRS section 205-4.5 permits residences, referred to simply as "farm dwellings,"<sup>52</sup> in the agricultural district, if they are accessory to the other uses enumerated in HRS section 205-2(d)<sup>53</sup> though not necessarily "on the same premises as the agricultural activities to which they are accessory."<sup>54</sup> HRS section 205-4.5 further defines "farm dwelling" as a "single-family dwelling located on and used in connection with a farm . . . where agricultural activity provides income to the family occupying the dwelling."<sup>55</sup> The HRS does not specify how much income a family must derive from agricultural activity.<sup>56</sup> Likewise, the Hawaii Administrative Rules ("HAR") are silent on the matter.<sup>57</sup>

The counties are charged under HRS section 205-12 with the ultimate enforcement of HRS section 205-4.5.<sup>58</sup> The counties wield tremendous power in deciding which farm dwellings or larger agricultural subdivisions comply with the state land use law.<sup>59</sup> Of the four counties, all but Maui County allow farm dwellings and even agricultural subdivisions in the state Agricultural District in their county codes.<sup>60</sup> Hawai'i County, Kaua'i County, and the City and County of Honolulu, all define "farm dwelling"<sup>61</sup> similarly to HRS section 205-4.5. These codes have not attempted to close the HRS section 205-4.5 loophole at the county level. As HRS section 205

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stands now, it is not illegal to build houses or even entire subdivisions in the agricultural district in three counties, especially with county approval.<sup>62</sup>

Nevertheless, a well respected Third Circuit Judge halted the Hokuli'a project, declaring it an illegal use of agricultural land.<sup>63</sup> The judge found as fact the following:

22. Oceanside's legal disclosure of the land use for which property is being offered for sale is a "high-quality community to be enhanced with agriculture." The agricultural component of the project will be located in common areas and roadways. Some agriculture may occur on easements on lots if deemed necessary and appropriate by the homeowners' association. The intended agricultural use is to enhance the beauty of Hokuli'a. "Buyers should not expect material financial benefits from agricultural activities."<sup>64</sup>

29. [A] lot owner need only place 20% of his/her one-acre lot in active agriculture . . . .<sup>65</sup>

Based on these facts, the judge concluded that "Hokuli'a residences are not farm dwellings,"<sup>66</sup> that "[t]he primary use and activities within the agricultural lots are not agriculture; and, [f]urthermore, the agricultural use and activities are insubstantial."<sup>67</sup> The judge concluded that de minimus agriculture would not satisfy HRS section 205's requirements and that it would be an "absurd result that the Legislature could not have intended."<sup>68</sup> This conclusion in the Decision and Order invites the question, what did the legislature intend?

HRS section 205's legislative history<sup>69</sup> and State Attorney General's opinions are helpful extrinsic aids to its interpretation. There is no legislative history on HRS section 205-4.5's farm dwelling requirement that defines how much land must be put into, or how much income must be derived from, agricultural production.<sup>70</sup> Moreover, legislative history surrounding the creation of and amendments to HRS section 205 reveal that prime and marginal agricultural lands did not receive the same amount of concern.<sup>71</sup>

In 1961, the Committee on Lands and Natural Resources remarked that its goal in creating the State LUC was primarily to "protect productive agricultural lands . . . through state zoning."<sup>72</sup> In 1976, the legislature amended HRS section 205 to give only fertile Class A and B agricultural lands "additional protection . . . [against county approval of] agricultural subdivisions."<sup>73</sup> House Representative Kawakami dismissed concern over the development of agricultural subdivisions throughout Hawai'i, stating that they were "not anything new[; i]t has been going on for years."<sup>74</sup> His main concern was that agricultural subdivisions were "getting to a point where [they were] occurring on . . . prime lands."<sup>75</sup>

Lastly, in 1980, the legislature emphasized the distinction between prime and marginal lands and vigorously debated the uses appropriate within marginal lands. During floor debate over allowing golf courses as permitted uses in marginal agricultural lands, Senator Young opposed the bill by saying, "I would rather see a proposal utilizing marginal agricultural lands for . . . housing . . . . [T]here is a lot of frustration and anger out there. Hawaii's families want, more than anything else, to be able to own a home."<sup>76</sup> Senator Kawasaki, who supported the bill, nevertheless bemoaned the following state of affairs: "It seems to me, using land, even marginal land, as agricultural subdivision [sic] is one that is more profitable [than golf courses] . . . . What worries me is that there's not much effort around here . . . to make the creation of [agricultural] subdivisions easier . . . ."<sup>77</sup> It's clear that the Legislature might not see a problem with allowing subdivisions on marginal agricultural land.

The State Attorney General's Office also views prime and marginal agricultural land uses differently. The Attorney General's oft-quoted 1975 opinion about agricultural subdivisions' being an abuse of HRS section 205 relates only to prime agricultural land.<sup>78</sup> A quotation from the opinion, which follows, is silent on whether an agricultural subdivision on marginal lands would be an abuse of state law:

[W]e conclude that the proposed subdivision of 141.456 acres of substantially prime agricultural land at Mokuleia into sixty-five lots that

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appear to be too small for economically feasible agricultural use is, in all likelihood, intended for purposes contrary to the Legislature's stated goal of preservation of prime agricultural land . . . and may be an attempted circumvention of the land use district amendment procedure . . . [The] City and County of Honolulu . . . should disapprove the subdivision application.<sup>79</sup>

The legislature and LUC have not amended their laws and regulations to close the agricultural land use loophole.<sup>80</sup> Legislative history reveals acceptance and even encouragement of agricultural subdivisions on marginal land.<sup>81</sup> The Attorney General's opinion discouraged agricultural subdivisions only on prime land.<sup>82</sup> Taken together, these records suggest one conclusion: the legislature would not consider agricultural subdivisions like Hokulia to work an "absurd result" under HRS section 205. An agricultural subdivision on marginal land, with 20% of each lot engaged in active agriculture, producing even de minimus income, satisfies HRS section 205.

#### V. RECOMMENDATION

What happened with Hokuli'a affects "everyone from the individual lot owner who is going to build a family home all the way through major developers."<sup>83</sup> Preventing the next Hokuli'a requires a three-step approach. First, the legislature should pass the next iteration of HB 2800/SB 3052.<sup>84</sup> Second, the legislature should reclassify some of the non-important agricultural lands to the rural district. Those lands would be better utilized for housing. Third, with the pressure to build on highly productive agricultural lands thus relieved, the legislature must close the loophole in HRS section 205-4.5 so that development in the agricultural district is truly related to farm production.

Possible requirements for farm dwellings could include a specific income derived from agricultural activity and a minimum lot size. Other states require certain percentages of gross income or dollar amounts resulting from agricultural activity.<sup>85</sup> Also, requiring a minimum lot size would discourage fragmentation of agricultural land into parcels too small to support productive farming. The minimum

lot size should correspond to the "minimum size of commercial farms in the area[.]"<sup>86</sup> which, in Hawai'i, is around five<sup>87</sup> to ten acres.<sup>88</sup> The bottom line is that the legislature must clarify Hawai'i's land use laws to make sure certain lands are used for the public benefit to which they are best suited, whether it be agriculture or housing.

#### VI. CONCLUSION

The perception that Hawai'i is at an agricultural land-use "crossroads"<sup>89</sup> stems from the uneasy realization that the state has not demonstrated a commitment to agriculture as part of its land use framework. As Donna Wong points out, there is no "agricultural ethic" in Hawai'i.<sup>90</sup> In order for a balance between urbanization and agricultural preservation to exist, the state must "do more than simply protect agricultural land: [it] must undertake to protect agriculture itself."<sup>91</sup> Without commitment to agriculture as an industry, stopping development in the name of protecting agriculture is disingenuous.

There is a balancing process involved in true agricultural preservation. The forces of conservation and control must give in to the forces of development and growth, and vice versa:

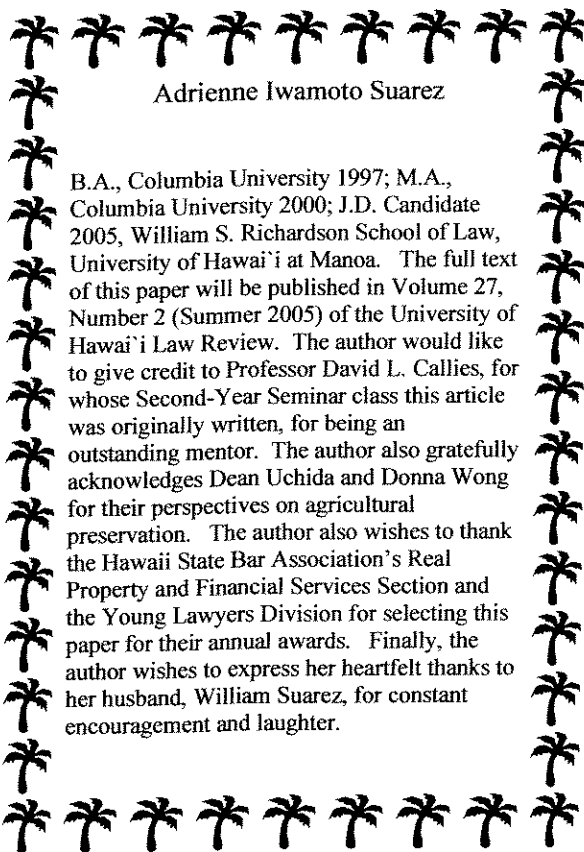
[Agricultural ]and . . . is both a resource and a commodity . . . Conservationists who view land as only a resource are ignoring the social and economic impact that would come with any massive restrictions on the free alienability [of] land. But land speculators who view land as only a commodity are ignoring public realization that our finite supply of land can no longer be dealt with in the free-wheeling ways of our frontier ancestors."<sup>92</sup>

Each side will yield to the other only if clear policy reasons for the compromise exist. Only then can land use decisions proceed in a principled and purposeful way.

In time, Hokuli'a and other subdivisions like it will be land use relics, reflecting a period in Hawai'i's history when the appropriate uses for two million acres of land were yet unclarified. The agricultural subdivision would seem to be just the rational outcome of a combination of the following

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forces: no state commitment to agriculture as an industry, vague land use laws, and the inexorable push to put land to its highest and best use. Hawai'i now has the opportunity to get to the root of its agricultural land use problem. The state must take responsibility for the future of its economy and citizens' wellbeing by formulating the real policies underlying its land use designations.



<sup>1</sup>See HAW. CONST. art. XI, § 3.

<sup>2</sup>See HAW. REV. STAT. § 205-1 to -18 (2001).

<sup>3</sup>See DAVID L. CALLIES, REGULATING PARADISE 7 (1984) ("Hawaii's land area is divided into four district classifications roughly as follows: urban, 5 percent; agricultural, 47 percent; conservation, 47 percent; and rural, 1 percent.") (citation omitted).

<sup>4</sup>HAW. REV. STAT. § 205-1 to -18 (2001).

<sup>5</sup>Id. § 205-4.5.

<sup>6</sup>See *infra* Part V.

<sup>7</sup>See HAW. REV. STAT. § 205-2(d).

<sup>8</sup>See Floor Debate on H.B. 1063, 13th Leg., Reg. Sess. (1985) reprinted in 1985 HAW. HOUSE J. 689, 691 (Statement of Sen. Aki).

Both LESA and ALISH grade land according to soil quality and availability of water. Telephone interview with Donna Wong, Executive Director, Hawaii's Thousand Friends (Apr. 26, 2004). These systems were put in place during the reign of plantation agriculture. Telephone interview with Dean Uchida, Executive Director, Land Use Research Foundation (Apr. 26, 2004).

<sup>9</sup>Bruce Dunford, Lingle Aims to Reevaluate Farm Land Designations, HONOLULU STAR-BULLETIN, Sept. 29, 2003, at A5 (quoting Linda Lingle); Richard Borreca, Lingle Tells Developers to Cultivate Legislators, HONOLULU STAR-BULLETIN, Oct. 16, 2003, at A8 ("Lingle said that agriculture land is used as the catch-all category for all land that doesn't fit in another land use designation.").

<sup>10</sup>AMERICAN PLANNING ASSOCIATION, HAWAII CHAPTER, DRAFT: RENEWING HAWAII'S LAND USE SYSTEM, Dec. 3, 2003; see also DAVID L. CALLIES, PRESERVING PARADISE 14 (1994) ("Hawaii has, by several hundred thousand acres, more land classified for agricultural use than it can conceivably use or need for the next fifty years at least.").

<sup>11</sup>See Borreca, *supra* note 9, at A8. ("Using land zoned for agriculture for 'gentleman farms' and exclusive residences is nothing new, Lingle said.").

<sup>12</sup>DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND AND WATER USE CONTROLS IN HAWAII 51 (1997).

<sup>13</sup>Stu Dawrs, Restoring Faith, HONOLULU WEEKLY, Mar. 21, 2001, at 8 (quoting Big Island Mayor Harry Kim).

<sup>14</sup>Edwin Tanji, Planning Director Says Buyers of Parcels on Former Pioneer Mill Fields Need to Be Farming, MAUI NEWS, available at <http://www.maui-tomorrow.org/issuespages/ag/conversion.html> (last visited Feb. 21, 2005).

<sup>15</sup>See *infra* Part II.B.

<sup>16</sup>See Timothy Hurley, Ruling Revives Anti-Business Tag, HONOLULU ADVERTISER, Sept. 11, 2002, at A1.

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<sup>17</sup>See Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint (Sept. 9, 2003) (3d Cir. Ct., Haw.); see also David Callies, Case for Hokuli'a: Let the Public Judge, HONOLULU ADVERTISER, Sept. 21, 2003, at B3.

<sup>18</sup>Dunford, supra note 9, at A5.

<sup>19</sup>Callies, supra note 17, at B3.

<sup>20</sup>Lyn Danninger, Hokulia Workers Face Layoffs, HONOLULU STAR-BULLETIN, Sept. 18, 2003, at C1. (The developer has a nursery of coffee trees and native Hawaiian hardwood seedlings.)

<sup>21</sup>See Rod Thompson, Big Island's Hokulia Development Halted, HONOLULU STAR-BULLETIN, Sept. 10, 2003, at A3.

<sup>22</sup>Callies, supra note 17, at B3.

<sup>23</sup>In Hawai'i, the process for entering into a development agreement is codified in HAW. REV. STAT. § 46-121 to -132 (1993).

<sup>24</sup>See Lyn Danninger, Hokulia Supporters Say Ruling on Land Use Damaging, HONOLULU STAR-BULLETIN, Nov. 26, 2003, at C1; see also Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint 14 (Sept. 9, 2003) (3d Cir. Ct., Haw.).

<sup>25</sup>See Callies, supra note 17, at B3.

<sup>26</sup>It would appear that 1250 Oceanside Partners acquired vested rights to proceed with their development, and government is equitably estopped from repudiating its prior assurances. See County of Kauai v. Pacific Standard Life Ins., 65 Haw. 318, 653 P.2d 766 (1982) for the following:

The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

Id. at 327, 653 P.2d at 774 (citing Life of the Land v. City Council, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980)).

<sup>27</sup>Other issues included Clean Water Act violations and treatment of native Hawaiian burials and other cultural sites on the property. See Kevin Dayton, Judge Stops Construction at Hokuli'a, HONOLULU ADVERTISER, Sept. 10, 2003, at A12. These issues are beyond the scope of this paper.

<sup>28</sup>See Kelly v. 1250 Oceanside Partners at 15-16.

<sup>29</sup>Id. at 30.

<sup>30</sup>See Terrence Sing, Hokulia Developer Files Motion to Allow Project to Continue, PACIFIC BUSINESS NEWS, Sept. 26,

2003, at 50. ([Oceanside Partners Vice President Dick Frye said,] "None of us, including the plaintiffs, expected the judge to rule the way he did.").

<sup>31</sup>See Jack Kelly, Letter to the Editor, Slowing Creeping Urban Growth on Our Ag Lands, HONOLULU ADVERTISER, Sept. 16, 2003, at A9; Karina Umehara, Letter to the Editor, Hokulia Developers Ignored Hawaii's Laws, HONOLULU STAR-BULLETIN, Sept. 17, 2003, at A12; Matt Binder, Letter to the Editor, Hokuli'a Developer Should Play by Rules, HONOLULU ADVERTISER, Sept. 17, 2003, at A19; Ralph Johansen, Letter to the Editor, Hokuli'a Developer Got What Was Coming, HONOLULU ADVERTISER, Sept. 18, 2003, at A13.

<sup>32</sup>See Vicki Viotti, Ruling Heats up Land-Use Debate, HONOLULU ADVERTISER, Sept. 22, 2003, at A1, A2; Lyn Danninger, Interim Plan for Hokulia is Too Late, Attorney Says, HONOLULU STAR-BULLETIN, Sept. 24, 2003, at C5.

<sup>33</sup>See Danninger, supra note 24, at C1 ("A number of projects have been put on hold already . . ." [President of Hawaii Leeward Planning Conference John] Ray said.").

<sup>34</sup>Hurley, supra note 16, at A1.

<sup>35</sup>Danninger, supra note 20, at C5.

<sup>36</sup>Dunford, supra note 9, at A5.

<sup>37</sup>See infra Part V.

<sup>38</sup>See id.

<sup>39</sup>HAW. CONST. art. XI, § 3.

<sup>40</sup>See Save Sunset Beach Coalition v. City & County of Honolulu, 102 Haw. 465, 476, 78 P.3d 1, 13 (2003) (holding that the Article XI, Section 3 mandate was "inoperative" and not "self-executing").

<sup>41</sup>See H.C.R. 157, 22d Leg., Reg. Sess. (Haw. 2003).

<sup>42</sup>See H.B. 2800, 22d Leg., Reg. Sess. (Haw. 2004); S.B. 3052, 22d Leg., Reg. Sess. (Haw. 2004).

<sup>43</sup>Id.

<sup>44</sup>See id. Land meeting these standards and criteria include land currently in agriculture, land with good soil quality and growing conditions, land already identified as prime or productive under such systems as ALISH and LSB, lands associated with traditional native Hawaiian agricultural uses, lands with sufficient water, land whose designation as important is consistent with county general and community plans, land that contributes to a critical mass of agricultural land, land with or close to agricultural infrastructure, land that will provide a margin for future agricultural needs, and land voluntarily designated as important by the landowner.

<sup>45</sup>See id.

<sup>46</sup>See id.

<sup>47</sup>Id.

<sup>48</sup>See S. COMM. REP. NO. 455, 22d Leg., Reg. Sess. (Haw. 2004), which states the following:

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Lastly, your Committees recognizing the lands in the agricultural district as a valuable resource and realizing that lands in the agricultural district will be designated IALs, find it imperative to declare that it is the intent of this bill that the lands remaining in the agricultural district after the designation of IALs remain in the agricultural district. *Id.*

<sup>49</sup>See Hawaii State Legislature, 2004 Legislative Session, Bill Status, available at <http://www.capitol.hawaii.gov/session2004/status/HB2800.asp> (last visited Feb. 21, 2005); <http://www.capitol.hawaii.gov/session2004/status/SB3052.asp> (last visited Feb. 21, 2005).

<sup>50</sup>H. R. 201, 22d Leg., Reg. Sess. (Haw. 2004).

<sup>51</sup>See *infra* notes 52-59 and accompanying text.

<sup>52</sup>HAW. REV. STAT. § 205-2(d) (2001).

<sup>53</sup>These other uses could be cultivation of crops, orchards, forage, forestry, animal husbandry, mills, storage facilities, roadside stands, wind-generated energy production, small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities, and golf courses. See HAW. REV. STAT. § 205-2(d).

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* § 205-4.5(a)(4).

<sup>56</sup>See *id.* See also Callies, *supra* note 17, at B3.

<sup>57</sup>See HAW. ADMIN. R. § 15-15-03 (1999).

<sup>58</sup>See HAW. REV. STAT. § 205-12, which reads as follows:

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations. *Id.*

<sup>59</sup>See SEN. STAND. COMM. REP. NO. 568, 10th Leg., Reg. Sess. (1980) reprinted in 1980 HAW. HOUSE J. 1528, 1529 (“Your Committees [on Water, Land Use, Development and Hawaiian Affairs and Agriculture] note that the counties have the primary responsibility in the enforcement of land use district regulations including the enforcement of the restriction on use and the condition relating to agricultural districts under section 205-4.5.”) (emphasis added).

<sup>60</sup>Maui County has enacted interim restrictions prohibiting agricultural subdivisions and setting forth criteria for determining which farm dwellings support bona fide agricultural uses. See MAUI, HAW., CODE OF THE COUNTY OF MAUI, §§ 18.50.010 to .040, § 19.30A.050(b)(2)(a) to -(c) (1991)

<sup>61</sup>See, e.g. HAWAII, HAW., HAWAII COUNTY CODE, § 25-5-67(b) (1995) (Hawai'i County defines a “farm dwelling” as a “single-family dwelling located on or used in connection with a farm or if the agricultural activity provides income to the family occupying the dwelling.”); see also KAUI, HAW., REVISED

ORDINANCES OF THE COUNTY OF KAUAI §§ 8-7.2, 8-7.5 (1976) (Kauai County allows “single family detached dwellings” as of right in their agricultural zones. There is no requirement that agricultural activity provide a certain level of income to the family occupying the dwelling. The only limitation on residences in the agricultural zone is density.); see also HONOLULU, HAW., LAND USE ORDINANCE, § 21-3.50-3(a)(8) (2003) (The City and County of Honolulu allows subdivisions of farm dwellings in its agricultural zones. The Land Use Ordinance for the county requires that those building these subdivisions assess the “feasib[ility] of agricultural use” on their lots and limits the density of farm dwellings. The City and County of Honolulu does not further require any level of income that agricultural activity must provide to the family occupying the farm dwelling.)

<sup>62</sup>See *supra* notes 56-59 and accompanying text.

<sup>63</sup>See Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint (Sept. 9, 2003) (3d Cir. Ct., Haw.).

<sup>64</sup>*Id.* at 6 (citations omitted).

<sup>65</sup>*Id.* at 7.

<sup>66</sup>*Id.* at 17.

<sup>67</sup>*Id.* at 15.

<sup>68</sup>*Id.* at 16 (citing Kim v. Contractor's License Bd., 88 Hawai'i 264, 270, 965 P.2d 806, 812 (1998) (holding that the legislature is presumed not to intend an absurd result)).

<sup>69</sup>See Kim 88 Hawai'i at 269, 965 P.2d at 811.

<sup>70</sup>See Callies, *supra* note 17, at B3.

<sup>71</sup>See *infra* notes 72-77 and accompanying text.

<sup>72</sup>S. STAND. COMM. REP. 580, 1st Leg., Gen. Sess. (1961), reprinted in 1961 HAW. SEN. J. 883, 883 (emphasis added).

<sup>73</sup>S. CONF. COMM. REP. 2-76, 8th Leg., Reg. Sess. (1976), reprinted in 1976 HAW. SEN. J. 836, 836.

<sup>74</sup>Floor Debate on H.B. 3262-76, 8th Leg., Reg. Sess. (1976), reprinted in 1976 HAW. HOUSE J. 480, 482 (Statement of Rep. Kawakami).

<sup>75</sup>*Id.*

<sup>76</sup>Floor Debate on H.B. 1063, 13th Leg., Reg. Sess. (1985), reprinted in 1985 HAW. SEN. J. 689, 692-693 (Statement of Sen. Young).

<sup>77</sup>*Id.* at 699.

<sup>78</sup>See *infra*, note 79 and accompanying text.

<sup>79</sup>Haw. Op. Att'y Gen. 75-8 (Sept. 3, 1975) (emphasis added).

<sup>80</sup>See Callies, *supra* note 17, at B3 for the following:

The state legislature has entertained many formal proposals to amend the law and close what some construe as a loophole

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permitting agricultural subdivision projects on state-classified agricultural land, but it has declined to do so. The state Land Use Commission recently heard a similar proposal to limit the kinds of dwellings and maximize the income that an agricultural lot must have and generate. It also declined to amend its rules. *Id.*

The Legislature has amended HRS § 205-4.5 five times and has not made any major changes to the vague "farm dwelling" requirement. See Act of May 31, 1977, No. 136, § 1, 9th Leg., Reg. Sess. (1977), reprinted in 1977 HAW. SESS. LAWS 243, 243 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001)); Act of Apr. 17, 1980, No. 24, § 3, 10th Leg., Reg. Sess. (1980), reprinted in 1977 HAW. SESS. LAWS 33, 35-36 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001)); Act of June 12, 1982, No. 217, § 1, 11th Leg., Reg. Sess., (1982), reprinted in 1982 HAW. SESS. LAWS 402, 402-03 (codified as amended at HAW. REV. STAT. § 205-4.5 (year)); Act of June 18, 1991, No. 281, § 3, 16th Leg., Reg. Sess. (1991), reprinted in 1991 HAW. SESS. LAWS 673, 674-75 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001)); Act of June 21, 1997, No. 258, § 11, 19th Leg., Reg. Sess. (1997), reprinted in 1997 HAW. SESS. LAWS 568, 572-73 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001)).

The Land Use Commission does not often amend the Hawaii Administrative Rules. The Hawaii Administrative Rules pertaining to the Land Use Commission were last amended in 2000 and 1986, with minor amendments in the interim. The Land Use Commission has not amended the Hawaii Administrative Rules to clarify the "farm dwelling" requirement. Land Use Commission Planner Bert Saruwatari explained that the Land Use Commission will take its cues from the legislature and make amendments to Hawaii Administrative Rules as amendments to HRS accumulate. The Land Use Commission has also waited to see whether legislation to clarify "farm dwelling" passed, in which case it would amend the Hawaii Administrative Rules, but, as explained *supra* this note, that has not happened yet. Telephone interview with Bert Saruwatari, Planner, Land Use Commission, (Apr. 29, 2004).

<sup>81</sup>See *supra* notes 72-77 and accompanying text.

<sup>82</sup>See *supra* note 79 and accompanying text.

<sup>83</sup>See Danninger, *supra* note 32, at C5 ("[President of the Maryl Group Inc Mark] Richards said, 'There are profound implications on what county permits are worth . . . [A developer] may have done everything that the law says [she] needs to do, then a judge can say "no."').")

<sup>84</sup>See H.B. 2800, 22d Leg., Reg. Sess. (Haw. 2004); S.B. 3052, 22d Leg., Reg. Sess. (Haw. 2004).

<sup>85</sup>See, e.g., DEL. CODE ANN. § 8333 (Michie 1989) (requiring, among other things, that land actively devoted to agriculture generate \$10,000 per year); IDAHO CODE § 63-604 (Michie 2002) (requiring, for taxation purposes, that agriculturally zoned land "produces for sale or home consumption the equivalent of fifteen percent (15%) or more of the owners' or lessees' annual gross income; or . . . gross revenues in the immediately preceding year of one thousand dollars (\$1,000) or

more."); 505 ILL. COMP. STAT. ANN. § 5/3.06 (West 2004) (defining "active farmer[s]" to be those individuals "actively involved in the day-to-day operation or management of a farm and deriving at least 50% of [their] income from such management or operation").

<sup>86</sup>Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 420-22 (2002).

<sup>87</sup>See Myrl Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L. Q. 401, 428 (1987) (referring to ECKBO, DEAN, AUSTIN, & WILLIAMS, INC., STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW 80 (1969)).

<sup>88</sup>See Sean Hao, *Hawai'i's Farms Smaller, But More Profitable*, HONOLULU ADVERTISER, Feb. 21, 2004, at A7 ("64% of Hawai'i farms were ten acres or less . . .").

<sup>89</sup>The crossroads metaphor appears in the following articles: Ronna Bolante, *Standing at the Crossroads*, HAWAII BUSINESS, Nov. 2003, at 42; Jack Kelly, *Agriculture in Hawai'i at the Crossroads: It's Decision Time for Hawai'i's Sustainable Future*, available at <http://www.hawaiiislandjournal.com/stories/10b03d.html> (last visited Feb. 21, 2005).

<sup>90</sup>Telephone Interview with Donna Wong, Executive Director, Hawai'i's Thousand Friends (Apr. 26, 2004).

<sup>91</sup>Duncan, *supra* note 87, at 401.

<sup>92</sup>*Id.* at 409.

