

Act 90 Working Group Report to the Legislature

Introduction

Act 139, Session Laws of Hawaii ("SLH") 2021, established the Act 90 Working Group to:

- (1) Ascertain the process and status of the transfer of non-agricultural park lands from the Department of Land and Natural Resources ("DLNR") to the Department of Agriculture ("DOA") pursuant to Act 90, SLH 2003, and Chapter 166E, Hawaii Revised Statutes ("HRS"), regarding non-agricultural park lands; and
- (2) Determine the challenges and potential remedies necessary to facilitate the process of fulfilling the purposes of Act 90, SLH 2003.

The Act 90 Working Group ("Working Group") was tasked with conducting its work through meetings, informational briefings, and consultation with lessees of state non-agricultural park lands, lessees of state agricultural lands, and the public.

The members of the Working Group were as follows:

- (1) The Chairs of the Senate Water and Land Committee (Senator Lorraine Inouye) and House Water and Land Committee (Representative David Tarnas), who served as co-chairs of the Working Group;
- (2) The Vice Chairs of the Senate Water and Land Committee (Senator Gilbert Keith-Agaran) and House Water and Land Committee (Representative Patrick Pihana Branco);
- (3) The Chairperson of the Board of Land and Natural Resources (Chair Suzanne Case);
- (4) The Administrator of the Division of Forestry and Wildlife of the Department of Land and Natural Resources (David Smith);
- (5) The Administrator of the Land Division of the Department of Land and Natural Resources (Russell Tsuji);
- (6) The Chairperson of the Board of Agriculture or the chairperson's designee (Deputy Morris M. Atta, Deputy to the Chairperson); and
- (7) The Administrator of the Agricultural Resource Management Division of the Department of Agriculture or the Administrator's designee (Linda H. Murai, designee for the Administrator).

The Working Group met five times, on August 16th and 23rd, September 9th, October 14th, and November 17th. Meetings were publicly broadcast live and as recordings on the House of Representatives' streaming video channel. Written and live (audio and audiovisual) public testimony was accepted at each meeting. Public written testimony is publicly archived on the Working Group webpage at the State Capitol website.

The Working Group also received documents from DOA and DLNR that provide detailed updates on the status of Act 90 land transfers, the process of transfers, and the nature of DLNR and DOA engagement with lessees and lease contracts on non-agricultural park lands. These documents are also publicly archived on the Working Group webpage at the State Capitol website.

Background

In 2003, the Legislature found that public lands classified for agricultural use by DLNR should be transferred to and managed by DOA for the development of farms on a widespread of a basis as possible, consistent with Article XI, Section 10, of the State Constitution. Act 90 provides that non-agricultural park lands may be transferred from DLNR to DOA upon the mutual agreement of the Board of Agriculture ("BOA") and the Board of Land and Natural Resources ("BLNR").

Accordingly, Act 90, SLH 2003 (Act 90), was passed to transfer non-agricultural park lands from DLNR to DOA upon the mutual agreement of the BLNR and BOA. Since the passage of Act 90, over nineteen thousand acres have been transferred from DLNR to DOA, including 242 land parcels. Other agricultural lands classified as "non-agricultural park lands" or pasture lands remain held by DLNR.

DLNR and DOA then began to coordinate the transfer of lands. DOA took the position that Act 90 precluded the transfer of any lease or permit when:

- (1) The lessee or permittee was not in full compliance with the terms and conditions of the lease or permit;
- (2) The lessee or permittee was in arrears in the payment of rent or taxes or other obligations owed to the State or any county; or
- (3) The lessee's or permittee's operation was not economically viable, as determined by the transfer conditions specified in Hawaii Administrative Rules ("HAR") §4-158-9).

DLNR and DOA agreed to prioritize the transfer of encumbered lands (i.e., those subject to a general lease or revocable permit) with existing agricultural operations, and focused on lands used for crop production, nurseries, and other diversified agriculture, before addressing pasture lands and unencumbered lands.

To date, 242 parcels under 181 general leases or revocable permits have been transferred from DLNR to DOA. According to DLNR, over one hundred thousand acres of pasture and other agricultural land (183 revocable permits or general leases) remain under DLNR management statewide. Of these lands, DLNR considers 111 parcels eligible for potential transfer to DOA, subject to DOA's acceptance. DLNR has identified fifteen parcels which DLNR would consider eligible for transfer if an easement were provided to allow DLNR and/or the public to access an adjacent parcel. DLNR also considers fifty-seven encumbrances (general leases or revocable permits) ineligible due to DLNR priorities on those lands.

Challenges and Findings

The Working Group heard testimony from lessees of pasture lands held under DLNR, many who expressed frustration over the years they have spent for a transfer to DOA. Some expressed appreciation for DLNR's stewardship of multiple land uses, including historic preservation, reforestation, and conservation. Others expressed a lack of trust in DLNR's commitment to agriculture as a priority, stating their concerns that DLNR would reallocate the leased lands for reforestation purposes; DLNR's reforestation management is ineffective land stewardship; and short lease terms on state land limit the lessees' ability to invest in long-term improvements.

The Working Group finds that lands under DLNR used primarily and exclusively for agricultural purposes should be transferred to DOA, following the processes and conditions pursuant to Act 90.

The Working Group further finds that agricultural lands under DLNR which have multiple uses, such as for conservation, public recreation, and other public purposes in accordance with DLNR's mission, should remain under DLNR's management.

The Working Group also finds that improved collaborative working relationships between DLNR, DOA, and lessees of multi-use agricultural lands will facilitate the management or co-management of these DLNR multi-use parcels to benefit public values, including food production, conservation, and natural resource management.

The Working Group finds that multi-use lands can support sustainable land management, including natural resource conservation, at a reduced cost to the State. These "win-win-win" multi-uses are enhanced when DLNR and DOA collaborate with lessees of pasture lands to steward lands and harness additional funding to support multiple uses, such as by using Natural Resources Conservation Service programs and similar opportunities.

The Working Group further finds that maintaining easements to non-agricultural park lands under DLNR is a challenge impeding some Act 90 transfers. Preservation of a DLNR easement on these lands requires DLNR to procure and bear the cost of a professional land surveyor to prepare a map and metes and bounds description of the easement corridor.

Although the leases from both departments cannot exceed sixty-five years and allows the departments to, at the end of the lease term, take ownership of any improvements on the leased land or require their removal at the lessee's cost, the Working Group finds that two important differences between how the departments' manage their leases are how they extend lease terms and determine rent.

- (1) Regarding lease extensions:
 - (A) Pursuant to Section 171-36(b), HRS, DLNR is authorized to amend and extend leases with BLNR's approval if the extension is needed to amortize the cost of improvements (e.g. a mortgage loan or cost of self-financed improvements);
 - (B) Under chapter 166E, HRS, and HAR chapter 4-158, DOA has greater flexibility to extend its leases. DOA leases can be extended if the lessee complies with the provisions of the current lease; and
 - (C) HAR §4-158-8 to §4-158-12 also specifically allows DOA to extend or convert the leases transferred under Act 90 to new DOA leases with terms that can range from thirty-five to sixty-five years.
- (2) Regarding rent determination:
 - (A) For leases of lands under DLNR, all rents are set at fair market value according to an appraisal, and all leases are issued at public auction (Section 171-17, HRS). DLNR revocable permits, which are month-to-month dispositions that cover most of agricultural lands under DLNR, can be negotiated with lessees rather than requiring a public auction. Also, BLNR can approve any rent amounts under revocable permits that serve "the best interests of the State" (Section 171-55, HRS);
 - (B) For leases of lands under DOA, rents can either be set at the fair market value as determined by an independent appraisal, or the Administrator of the Agricultural Resource Management Division can recommend that the BOA adjust the appraised value or rent schedule based on the specific lease. For example, rent can be adjusted by factoring the uses of the lands (e.g. for crops which require heavy initial capital investments or are of low yield value) or by factoring in unproductive acreage on the lands (HAR §4-158-21). If significant improvements and/or preparation is required for commencing agricultural operations on a DOA-leased property, lease rent for up to two years may be waived or credited for the lessee; and
 - (C) DOA leases of non-agricultural park lands can be issued by negotiation rather than public auction if BOA finds that "the public interest demands the disposition as provided by section 171-18, HRS", the statute which describes the use of revenues from ceded lands (HAR §4-158-22).

Recommendations

The Working Group recommends proposing legislation that:

- (1) Authorizes DOA to inquire with DLNR, prior to offering a lease, regarding any easements required for DLNR to access its landlocked forest reserves or other DLNR assets on the lands subject to the lease;
- (2) Authorizes BLNR to:
 - (A) Amend and extend existing pasture leases for furtherance of public purposes that are the responsibility of the department to promote, including promoting sustainable food production and preserving and enhancing natural resource and public use values, for up to a sixty-five-year lease term;
 - (B) Issue new pasture leases by negotiation, if the lands are already under pasture use and lease issuance by negotiation furthers public purposes; and
 - (C) Develop agricultural and pastoral lease rents based on the value of its agricultural uses;
- (3) Requires DLNR's Division of Forestry and Wildlife to seek BLNR's approval before taking land out of pasture leases for reforestation purposes. Also requires the Division of Forestry and Wildlife to submit a funded action plan for reforestation purposes on former pasture lease land to the BLNR; and
- (4) Facilitates collaborative relationships between DLNR, DOA, and lessees of multi-use agricultural lands by:
 - (A) Revising DLNR land classifications to include "agricultural multi-use", defined to include lands with agricultural value as well as natural resource, conservation, and/or public recreation values; and
 - (B) Creating and funding a multi-use lands specialist position to collaborate with DOA, DLNR, and multi-use land tenants and to leverage the Natural Resources Conservation Service and other funding sources to support natural land stewardship, reforestation, and other public purposes on agricultural multi-use lands.