

HAWAII DEPARTMENT OF AGRICULTURE

STATUS OF ACT 90, SLH 2003 IMPLEMENTATION – (as of July 16, 2021)

1. Land Transfers: Description of Process

Act 90, SLH 2003, established the Non-agricultural Park Lands Program within the Hawaii Department of Agriculture (HDOA) as the legislature found that **certain public lands classified for agricultural use by the Department of Land and Natural Resources (DLNR)** should be transferred to the HDOA in a manner consistent with article XI, section 10, of the State Constitution. These public lands for agricultural use would be for the development of farms on as widespread a basis as possible in accordance with procedures and limitations prescribed by law. Therefore, Chapter 166-E, Non-Agricultural Park Lands, Hawaii Revised Statutes (HRS) was established to ensure the long-term productive use of public lands classified by DLNR for agricultural purposes, which were leased or available to be leased by DLNR, AND that these agricultural lands should be transferred to and managed by the HDOA. The underlying rationale of the Act is to ensure proper management and promotion of agriculture by entrusting the oversight of agricultural activities on public lands to the state agency vested with the constitutional mandate and authority to do so.

HDOA notes that while Act 90 always contemplated the transfer of all lands suitable or appropriate for agricultural use to be transferred, initial priority was given to existing agricultural operations. Recently, the consideration of lands with pasture use and newly unencumbered status have been included in the transfer process on a limited basis only, and unencumbered but potentially suitable lands that have been vacant for a significant period of time have not been included in the lists of targeted transfers. Encumbered lands primarily consist of parcels occupied pursuant to a lease or revocable permit. Of the leases and revocable permits currently managed by HDOA, an estimated 20% are for pasture use. The remaining 80% is for diversified agriculture that includes food production, nursery, and other such as facilities.

The following are conditions and criteria for transfer of public lands for agricultural use to HDOA:

A. There must be **mutual agreement and approval by the Board of Agriculture (BOA) and the Board of Land and Natural Resources (BLNR)**.

B. The primary qualifying conditions for encumbered Non-agricultural Park Lands include but are not limited to the following:

1) The lessee or permittee shall perform in full compliance with the existing lease or permit;

2) The lessee or permittee shall not be in arrears in the payment of taxes, rents or other obligations owed to the State or any county;

3) The lessee's or permittee's agricultural operation shall be economically viable.

According to the lease, since the majority of the income is to be from the farming activity on the

land, then the land area should be at least 1 to 2 acres and larger **of farmable area** depending on the planned crops to be produced.

C. Agricultural lands for transfer shall be viable for farming. For example, topography and soil shall be conducive and viable for farming. Conditions that are likely to be deemed not acceptable include lands which are predominantly, without limitation: on steep cliffs or severe slopes; within streams, riverbeds, beaches, or oceans; on lava flows; on easements, remnant lands, landfills, ditches, and estuaries, roadways, etc.

D. Generally, landlocked parcels with no legal access are unacceptable for transfer, however, landlocked parcels may be considered if lessee/permittee is the fee landowner of an adjacent lot that has legal access.

E. Land Use Zoning – must include farming as an allowable use - e.g., Preservation zoned lands prohibits farming, so that we would not be able to accept Preservation lands for transfer.

F. Availability of basic infrastructure such as water and electrical power.

2. Status of Land Transfers

To date, DLNR has transferred to DOA a total of 19,067 acres of land. *

	Non-Ag Park Parcels		
	Acreage	Parcels	GL/RP
Oahu	1,658	89	81
Hawaii	15,765	91	54
Maui	1,033	19	11
Kauai	549	41	33
Molokai	<u>286</u>	<u>2</u>	<u>2</u>
Totals	19,291	242	181

*Please see attached spreadsheet for parcel information details. Please note that: “GL” means general lease and “RP” means revocable permit; multiple TMKs within the same row indicates that a lease or RP includes multiple parcels; blanks in column A indicate vacant land; and color coding is for internal use only.

Status for ongoing proposed agricultural lands for transfer to HDOA:

BOA Chair Shimabukuro-Geiser, BLNR Chair Case, and their respective staff met on several occasions to compile lists of potential transfers for each county. Initial lists for each county were compiled by DLNR and forwarded to HDOA for review and acceptance. The list for Hawaii County was compiled last by request of DLNR, due to the large number of parcels with potential conservation value. We agreed that the initial review process would not be prioritized and information for the targeted parcels would be transmitted in small batches of 3 to 5 leases or revocable permits (RP), and DLNR would decide which information to transmit, unless otherwise requested by HDOA. Proposed candidates for transfer with mutual agreement require approvals by both the BLNR and BOA. DLNR removed any listed properties initially included, that it subsequently determined should not be considered for transfer due to potential

conservation or other value. The transfers not accepted by HDOA include those with issues that do not meet our agricultural suitability criteria described above.

Kauai and Maui: DLNR provided file information for targeted leases and revocable permits (RP). HDOA recently completed file reviews and site visits for those proposed transfers. On May 25, 2021, BOA approved those leases and RPs to be transferred from DLNR to HDOA. BLNR approval and Governor's approval and issuance of executive order setting aside the lands to HDOA is pending.

Hawaii Island: On December 30, 2020, HDOA sent a request for due diligence information, including pertinent lease and RP file information, to DLNR regarding the parcels targeted for transfer from DLNR to DOA in the County of Hawaii. HDOA continues to collaborate with DLNR to obtain that information while pursuing the other available due diligence information to ensure timely transfer of those lands. The Hawaii County proposed transfer list contained over 50 leases and/or RPs.

Unencumbered Agricultural Lands: As indicated in our approved BOA board submittals dating back to 2003 regarding Act 90 transfers, revealed that a significant number of unencumbered or vacant lands were previously included in the lists of parcels proposed for transfer. We continue to work with DLNR on reviewing these and other unencumbered lands that may be identified for possible future transfer to HDOA. Not all the unencumbered lands are suitable for transfer due to issues with location (e.g., landlocked with no direct access to roads), topography (too steep, in gulches, in streams, etc.), lack of access to water and/or electricity, etc. We realized further due diligence was required to determine whether the agricultural vacant lands on the lists are acceptable for farming activities and transfer to DOA. In remote locations, the boundaries of unencumbered vacant lands are not staked or identified which may require surveying and mapping for leasing purposes. DLNR may have other encumbered and unencumbered agricultural parcels in its inventory which were overlooked that could be appropriate for farming and offered for transfer. In the future, as additional agricultural lands (encumbered or unencumbered) come to light for possible transfer, DOA and DLNR will continue efforts to comply with Act 90.

3. DLNR Management of Lands

HDOA lacks sufficient information to provide responses for lands that continue to remain under DLNR's jurisdiction.

4. HDOA Engagement with Lessees

Pursuant to Chapter 166-E, Non-Agricultural Park Lands, Hawaii Revised Statutes (HRS) and Chapter 4-158, Hawaii Administrative Rules, HDOA engages with and provides significant support to its agricultural lessees. With our subject matter expertise for agricultural operations and needs, HDOA's management of its non-agricultural park lands is based on prudent public land management principles and promotes sound agricultural practices with support from and in collaboration with various industry resources, such as the USDA, UH-CTAHR, Hawaii Farm Bureau, Hawaii Farmers Union United, and other industry organizations. HDOA's property managers maintain regular contact with its lessees to resolve any issue or concern in a timely

manner. Lessees are notified of any significant matter pertaining to compliance with material terms of their respective lease and, if possible are provided reasonable opportunities to resolve those matters, if necessary. If possible, solutions for the issue or concern that are compatible with and appropriate for the agricultural operations are sought to ensure the continued viability of the Lessee's business. HDOA's engagement with farmers is guided by the Department's underlying mission to support, protect, and promote agriculture to ensure food security and sustainability for Hawaii.

Further questions from Chair Tarnas:

Lessees' previous comments and testimony indicate that HDOA is a better landlord for agriculturalists than DLNR. The goal of this section is to understand why.

HDOA's management structure for non-agricultural park lands was set up in accordance with Act 90. As such, Act 90 was not just about mandating the transfer; it was also about setting up the framework of the institution at HDOA which would receive the lands. Thus, if the transfers are now not all being completed, one thing which could be considered as further action on Act 90 is an adjustment of the management framework options available for HDOA for these non-agricultural park lands so that DLNR would be more comfortable transferring certain lands to an institutional structure that is better equipped to jointly manage for DLNR/HDOA mutual goals.

Additional details which may be related to this:

What are HDOA's lease terms? (Including length, policy on lease improvements, policy on rental adjustments?)

- **RESPONSE:** Pursuant to HAR§4-158-19, HDOA leases terms cannot be less than 15 years nor more than 65 years. Construction of all improvements must be approved by the Agricultural Resources Management Division Administrator and HDOA has the option of accepting ownership of the improvements or requiring removal at cost, at the termination of the lease. The BOA can make and must approve all rental adjustments for special circumstances. The property is leased on an "as is" basis" and if significant improvements and/or preparation is required for commencing agricultural operations, lease rent for up to 2 years may be waived/credited for the lessee.

Could HDOA provide the WG with a sample/typical lease term document?

- **RESPONSE:** Yes, please see attached HDOA standard lease form.

How does HDOA determine lease rent for tenants?

- **RESPONSE:** The lease rent valuations are ordinarily determined by independent appraisal pursuant to HAR§4-158-21. However, HDOA can also allow an employee of the department who is qualified to appraise lands to perform such valuations for public auction leases. HDOA currently lacks the capacity to conduct in-house staff appraisals due to the elimination of the appraiser position several years ago.

How does HDOA handle a lease ending when a lessee seeks to continue leasing that parcel? What options does HDOA have? What options does the tenant have?

- RESPONSE: HAR§4-158-10 allows a lessee to extend the lease up to a maximum of 65 years if the lessee is in compliance with the provisions of the current lease. HAR§4-158-9 allows a lessee on a lease transferred from DLNR to convert it to a new 35-year (maximum 65-year) HDOA lease, if the BOA determines it is in the public interest to do so to ensure long term viable agricultural activity. A lessee on a transferred DLNR lease may request a conversion if the remaining term on the lease is less than 10 years, but more than 5 years, and is in compliance with the provisions of the current lease.

Relatedly, when leases end or are extended or renewed, what is HDOA's policy regarding any improvements the lessee has made to the parcel?

- RESPONSE: All improvements on the premises are responsibility of the lessee, whether the improvements were existing on the premises when the lessee was awarded the lease, or the lessee installed the improvement during the term of the lease. As indicated previously, HDOA has the option at the end of the lease of either accepting ownership of the improvements or requiring its removal at cost.

Other considerations:

Does HDOA manage any parcels "jointly" – i.e., for natural resource considerations such as native plant/animal habitat or forest restoration, in addition to food production? If so, how is this handled?

- RESPONSE: HDOA and DLNR collaboratively manages agricultural activities and natural resource priorities in numerous situations statewide. Most of these collaborations involve the impact of invasive species, natural hazard mitigation, and/or dam safety. In the case of invasive species, HDOA and DLNR jointly addresses the control of invasive species primarily through the Hawaii Invasive Species Council, regardless of where the threats are found. DLNR continues to regulate dam safety for HDOA managed irrigation systems and farmers. HDOA also continues to collaborate with DLNR in matters pertaining to native Hawaiian practices and hunting access over HDOA managed lands. If DLNR determines that conservation activities requiring exclusive control need to occur on any portion of lands managed by HDOA, it can seek voluntary cooperation of the lessee or use its authority to compel withdrawal of areas identified for such activities.

Does HDOA consider forestry "agriculture"? If so, are any parcels managed for native forestry?

- RESPONSE: While HAR§4-158-1 includes the planting, cultivating, and harvesting of trees in the definition of "agricultural activities," it does not include "forestry" as it is commonly defined elsewhere.

How does HDOA deal with access easements (i.e., for shoreline, public forest, or public hunting area)? When a parcel is transferred from DLNR to DOA but an access easement is required, how is his handled by HDOA? Are there challenges with this from HDOA's perspective?

- RESPONSE: All lands transferred to HDOA for management is subject to any pre-existing access easements, and any lessee must honor those encumbrances. If an easement is needed to preserve accessibility for natural resources management,

cultural practices, and/or community benefit, DLNR would survey and identify the location of the easement. DLNR would condition the transfer with a reservation of an easement in the executive order setting it aside to HDOA. Access easements over HDOA lands have presented no additional or greater challenges other than the usual land management responsibilities associated with public land management.