ACT 5

S.B. NO. 255

A Bill for an Act Relating to Agriculture.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Article XI, section 3, of the Hawaii State Constitution, mandates the State to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." The constitution also mandates the legislature to provide standards and criteria to accomplish these objectives.

The State, recognizing the critical importance of agricultural lands, has established the agricultural district as one of the four major land classifications in

which all lands in Hawaii must be placed. Section 205-2, Hawaii Revised Statutes, sets forth the allowable activities in an agricultural district including "the cultivation of crops, orchards, forage, and forestry".

However, classification and protection of agricultural lands has been subverted and undermined by the development of "gentleman farming estates", whereby the primary purpose of activity upon these lands is not agricultural, but luxury residential. Moreover, these developments place restrictive covenants, including imposing height restriction on growing crops in agricultural subdivisions and other private agreements that restrict or even prohibit bona fide agricultural activities on agricultural lands. Such practices and covenants are repugnant to public policy as enunciated by Article XI, section 3, of the State Constitution.

Section 1-5, Hawaii Revised Statutes, grants individuals the ability to contract away any of their legal rights so long as the renouncement does not affect others' rights and "is not contrary to the public good." The legislature finds that restrictive covenants against agriculture uses are contrary to the public good because the intent of the State Constitution, and the intent of land use laws, as shown below by their history, demonstrate that these covenants dismantle the protections and conservation that are embodied in Hawaii's laws.

In 1961, the State of Hawaii was revolutionary in its approach to planning and growth when it passed the Land Use Law, chapter 205, Hawaii Revised Statutes. In passing the Land Use Law, the senate noted in Senate Standing Committee Report No. 580, on Senate Bill 937:

> The purpose of this bill is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes and to facilitate sound and economical urban development in order to promote the economy and general welfare of the state, and to insure the efficient expenditure of public funds . . . .
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> The state's highly productive agricultural lands are jeopardized by normal economic laws which encourage land owners to place their own particular pieces of land to the most profitable current use for which they can find a market. Long term agricultural leases are expiring annually. Because of the pressure for urbanization the land owners are reluctant to continue long term renewals of such leases, and the lessee is therefor discouraged to develop the land to its maximum agricultural production. If exclusive agricultural zones are not established to preserve and protect prime agricultural land from infringement by none-agricultural [sic] uses, the possibility of land speculation through inflated or artificial land prices may jeopardize the existence of major agricultural companies or activities. The most effective protection for prime agricultural lands, preservation of open space and direction for urban growth, is through state zoning.

Also important to note is that chapter 205, Hawaii Revised Statutes, was specifically enacted in an effort to manage growth on islands of limited resources. Act 187, Session Laws of Hawaii 1961, reads:

> Scattered subdivisions with expensive, yet reduced, public services; the shifting of prime agricultural lands into nonrevenue [sic] producing residential uses when other lands are available that could serve adequately the urban needs; . . . these are evidences of the need for public concern and action.

In 1976, the legislature noted, in Senate Standing Committee Report No. 662-76, on House Bill 3262-76, that the requirements of the Land Use Law had been skirted, and as such, it amended the Land Use Law to clarify that urban type residential subdivisions are not authorized on agricultural land.

The purpose of the agricultural district classification is to control the uses of the land for agricultural purposes. This purpose is being frustrated by the development of urban type residential communities in the guise of agricultural subdivisions. To discourage abuse of this purpose, the bill, as amended, more clearly defines the uses permitted within the agricultural district. Except for such uses permitted under special use permits in Section 205-6, and for nonconforming uses permitted in section 205-8, uses not permitted shall be prohibited.

Most revealing as to the efforts to curb against development upon agricultural lands is the procedural history for the enactment of Article XI, section 3, of the State Constitution. Fearing that urbanization and abuses would weaken the protections meant to be provided to agricultural lands, the committee deleted language referring to farm and home ownership, and instead focused on the need to protect and promote agricultural lands.

The State Constitutional Convention of 1978 noted in its proceedings:

Your Committee deleted the provision in Section 5 of Article X dealing with the use of public lands for farm and home ownership. It was generally understood, based on a letter opinion by the attorney general, that the phrase "farm and home ownership" meant both farm or home ownership. The inconsistency of this interpretation, with a renewed emphasis on preserving valuable and important agricultural lands, and the recommendation of the chairman of the board of agriculture convinced your Committee to delete the provision on farm and home ownership.

In response to increasing concerns regarding the future of agriculture in the State, your Committee has amended Section 5 of Article X, entitled "Farm and Home Ownership," by revising it to "Agricultural Lands" and by amending it to provide policy direction to the State. Moreover, the section has been amended to safeguard existing agricultural lands designated by the state Department of Agriculture as "prime," "unique" or "other important" and classified as agricultural by the state Land Use Commission. Thus the reclassification of these lands will now require, in addition to approval by the state Land Use Commission or other body assigned this function, the approval of the legislature by two thirds of each house.

Your Committee provided further protection for important agricultural lands by requiring that the lands be protected and maintained for bona fide or good faith agricultural use and that only support facilities necessary for agricultural use of such lands be permitted.

While Article XI, section 3, of the Hawaii State Constitution was adopted in 1978, and at that time the concern was over the large prime agricultural parcels of the sugar and pineapple industries, since that time, the focus of concern has shifted, for we have seen subdivisions and gentleman farmer estates, with golf courses, orchards, and gated communities proliferate upon agricultural lands. Thus, whereas previously the concern was over the promotion of the agricultural industry through its lands, we currently are dealing with a planning issue of urban-like uses occupying agricultural lands. It is for these reasons that the legislature finds that the courts of this State should not be availed upon to enforce these private agreements that contravene public policy.

SECTION 2. Chapter 205, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§205- Private restrictions on agricultural uses and activities; not allowed.** Agricultural uses and activities as defined in sections 205-2(d) and 205-4.5(a) on lands classified as agricultural shall not be restricted by any private agreement contained in any deed, lease, agreement of sale, or other conveyance of land recorded in the bureau of conveyances after the effective date of this section, that subject such agricultural lands to any servitude, including but not limited to covenants, easements, or equitable and reciprocal negative servitudes. Any such private restriction limiting or prohibiting agricultural use or activity shall be voidable subject to special restrictions enacted by the county ordinance pursuant to section 46-4, except that restrictions taken to protect environmental or cultural resources shall not be void or voidable."

SECTION 3. New statutory material is underscored.[1]

SECTION 4. This Act shall not be applied so as to impair any contract existing as of the effective date of this Act in a manner violative of either the Hawaii Constitution or Article I, section 10, of the United States Constitution.

SECTION 5. This Act shall take effect upon its approval.

(Vetoed by Governor and veto overridden by Legislature on July 8, 2003.)

Note

1. Edited pursuant to HRS §23G-16.5.