THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

KA NU HOU

FROM THE CHAIR

MAY 2014

Aloha Section Members:

Welcome to the first 2014 issue of Ka Nu Hou, the semi-annual newsletter of the Real Property and Financial Services Section of the Hawaii State Bar Association ("RPFSS"). RPFSS has over 450 members and is the largest section in the HSBA.

We started the year off with three exceptional brown bag sessions, all of which were well-attended. David Rair thoroughly discussed the federal lending regulations in January. In February, Heather Conahan and James Starshak presented real property issues and techniques with respect to estate planning, which, by the way, had the highest number of attendees and callers in the history of RPFSS. Finally, Miki Okumura and Michael O'Malley gave an outstanding presentation on tax issues for real estate attorneys. Many thanks to all of our excellent speakers and for your continued participation!

We have a few more upcoming brown bag sessions this year, one of which will be the Legislative Update in July, as well as the highly anticipated two-day "Updates in Real Estate Transactions" CLE seminar this week.

We encourage you to peruse through and navigate our fairly new website, in which you will find video recordings and materials from past brown bag sessions, upcoming events, useful links and much more: http://www.hawaiirealpropertysection.com. We are always open to any comments on improvements to the website you might have. Please send them to rpfss.hawaii@gmail.com.

Our featured author in this issue is Melissa Kolonie, currently a law student at the William S. Richardson School of Law and the honorable recipient of the Real Property and Financial Services Section SYS Award. Congratulations to Melissa!

It has been a great year so far and we're looking forward to a fantastic rest of 2014.

Aloha,
Wes Chang, Chair
Real Property and Financial Services Section

In this Issue:

"Save the Date":

Thursday, May 8 and Friday, May 9, 9:00 am to 5:30 p.m. – "Updates in Real Estate Transactions" CLE Seminar at the Hyatt Regency Waikiki, Kou Ballroom

Friday, June 20, 12:00 p.m. to 1:00 p.m. – Brown Bag Presentation in the HSBA Conference Room, 1100 Alakea Street, Suite 1000, Speaker(s) from Pitluck Kido & Aipa, LLP on the Hawaii Association of Realtors Forms update (Board Meeting to follow)

Friday, July 18, 12:00 p.m. to 1:00 p.m. – Brown Bag Presentation in the HEI Training Room #2 in the ASB Tower, 1001 Bishop Street, Speakers David Rair & an associate from Pitluck Kido & Aipa, LLP on the Legislative Update (Board Meeting to follow)

Friday, September 19, 12:00 p.m. to 1:00 p.m. – Brown Bag Presentation in the HSBA Conference Room, 1100 Alakea Street, Suite 1000, Speaker Morris Atta on the Honolulu Authority for Rapid Transportation update (Board Meeting to follow)

PROTECTING FARMLAND IN HAWAIʻI: AN ANALYSIS OF LEGAL OPTIONS FOR THE STATE TO EXERCISE EMINENT DOMAIN TO PROTECT AGRICULTURAL LANDS FROM DEVELOPMENT, AND ALTERNATIVES

Melissa Kolonie

Spring 2013 – Second Year Seminar

Professor Denise Antolini

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PROTECTING FARMLAND IN HAWAI'I: AN ANALYSIS OF LEGAL OPTIONS FOR THE STATE TO EXERCISE EMINENT DOMAIN TO PROTECT AGRICULTURAL LANDS FROM DEVELOPMENT, AND ALTERNATIVES

Melissa Kolonie

I. INTRODUCTION

What if the supply boats stop coming to Hawai'i and the only thing that prime agricultural land grows is houses? The land in the islands is a natural resource that the ancient Hawaiians deeply valued and utilized to survive. The State of Hawai'i holds natural resources, including agricultural land, in public trust.[1] The state and counties have inherent police powers, including the power to condemn private property for a public use.[2] The public use test is met when "the overall objective of the project comprises a public benefit."[3] The Constitution of the State of Hawai'i states that "all public natural resources are held in trust by the State for the benefit of the people."[4] If the public trust is threatened by development, can the state condemn private property to conserve agricultural land and to further the purposes of public trust?

In 2012 on Oahu, two major development projects took fertile agricultural land out of production. The Land Use Commission ("LUC") approved the reclassification of Ho'opili, 1,500 acres of fertile agricultural land in 'Ewa, to urban for the development of homes, and industrial, commercial and mixed-use areas.[5] According to Duane Shimogawa of Pacific Business News, "In 2007, Ho'opili land produced more than 40 percent of O'ahu's fresh broccoli, beans, romaine lettuce and zucchini, along with more than 70 percent of O'ahu's fresh corn, cantaloupe, pumpkin and honeydew."[6] Also in 2012, the LUC approved the reclassification of Koa Ridge in Mililani, 800 acres of fertile agricultural land to urban, for the construction of homes, a medical center, offices, retail establishments, and other development.[7] According to Duane Shimogawa, "[the] State Department of Agriculture [("DOA")] statistics estimate[d] that the land Koa Ridge would occupy . . . generate[d] cash crops valued at more

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[1] HAW. CONST. art. XI, § 1.

[2] HAW. REV. STAT. § 101-2 (2012).

[3] Kelo v. City of New London, 545 U.S. 469, 479–80 (2005).

[4] HAW. CONST. art. XI, § 1.

[5] Duane Shimogawa, *What's next for Koa Ridge, Hoopili developments?*, PACIFIC BUSINESS NEWS (June 15, 2012), *available at* http://www.bizjournals.com/pacific/print-edition/2012/06/15/whats-next-for-koa-ridge-hoopili.html?page=all.

[6] *Id.*

[7] *Id.*

than $1 million annually."[8] Although 2012 was a trying year for agricultural land on O'ahu, it was not always this way. There was a time when the state rescued agricultural land from the threat of development to preserve it for farming, evidenced by the Waiāhole condemnation discussed later in this paper.

Condemnation is a great power that should only be utilized in the most extreme cases. This paper seeks to address how the state can condemn private agricultural lands to protect it from development, and recommends alternatives. The second section provides a factual background of the history of land tenure and food production in Hawai'i, present food production in Hawai'i, and the present ownership of agricultural land in Hawai'i. The third section provides a legal background of the origin of the state's power to protect agricultural lands including eminent domain, the public trust doctrine, and constitutional and statutory protections. The fourth section discusses two examples of government entities that exercised their power of eminent domain to protect agricultural land from residential development, and compares the examples to a voluntary land conservation transaction. The fifth section offers recommendations on how the state can structure agricultural land condemnation, analyzes the strengths and weaknesses of condemnation of agricultural land to protect it from development, and provides a brief overview of alternatives to condemnation. The sixth section provides conclusions to the overall discussion of condemnation of agricultural land today.

II. FACTUAL BACKGROUND: FOOD PRODUCTION AND LAND OWNERSHIP IN HAWAI'I

This section provides an overview of the history of food production and land tenure in pre-contact Hawai'i, current food production in Hawai'i, and the ownership of agricultural land in Hawai'i.

A. A Brief History of Food Production and Land Tenure in Pre-Contact Hawai'i

Ancient Hawaiians utilized farming and fishing to produce food to feed the entire population. Most historians estimate the ancient Hawaiian population to be 300,000, but "some have calculated the Hawaiian population as high as one million."[9] When Captain James Cook arrived to the Hawaiian Islands in 1778,[10] the "land and water resources were . . . by no means fully developed[;]"[11] "only the best arable land, capable of cultivation by the gardening methods practice by the natives were actually utilized."[12] Handy and Handy[13] said, "[a]s their staff of life or basis of diet ('ai) was taro or sweet

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[8] *Id.*

[9] Richard Borreca, *Kamehameha Dynasty Confronts World of Change*, STAR-BULLETIN (June 16, 1999), *available at* http://archives.starbulletin.com/1999/06/16/millennium/index.html.

[10] VANESSA COLLINRIDGE, CAPTAIN COOK: THE LIFE, DEATH AND LEGACY OF HISTORY'S GREATEST EXPLORER 300 (Ebury Press 2003).

[11] E.S. CRAIGHILL HANDY, ELIZABETH G. HANDY & MARY K. PUKUI, NATIVE PLANTERS IN OLD HAWAI'I 280 (Bishop Museum Press 1991).

[12] *Id.*

potato, so the basic factor in the political economy of the Hawaiians was land (‘aina) on which to grow these staples, particularly irrigable land for wet taro or rich lava soils suitable for dry taro."[14] The land was divided into Moku, which is a major division of the island.[15] The Moku were divided into Ahupua‘a, which is a tract of land that typically extended from the upper range of the mountains into the ocean.[16] Each Ahupua‘a varied in size and shape, had fixed boundaries, and were comprised of smaller divisions called ‘ili, which was land allotted to families that cultivated and lived on the land.[17]

The staple of the Hawaiian diet was taro.[18] Handy and Handy wrote, “[t]he cultivation of wet taro required elaborate development of banked, leveled plots, or lo‘i, in which taro could be grown flooded, and irrigation ditches to bring water from springs and streams.”[19] Among other foods, they also grew sweet potato, yam, banana, sugar cane, breadfruit, and coconut.[20] Hawaiians raised and hunted pigs,[21] dogs,[22] birds,[23] and seafood.[24] In addition to food, Hawai‘i used certain plants for building materials, weapons, tools, knives, utensils, surfboards, and medicines.[25]

In Hawai‘i, the chief “of an island held the land; but even for him the concept was not one of ‘owning’ it, but of being trustee under Kane and Lono, the nature gods who caused the land to be fruitful.”[26] Western contact transformed this way of life. Carol Wilcox wrote, “A century after Cook–meaning a hundred years into the period of Western contact–sugar plantations started to dominate the landscape.”[27] “The Hawaiian monarchy supported the sugar industry”[28] and made diplomatic efforts to

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[13] E.S. Craighill Handy and Elizabeth G. Handy.

[14] HANDY, HANDY & PUKUI, *supra* note 11, at 277.

[15] *Id.* at 46.

[16] *Id.* at 48.

[17] *Id.* at 49.

[18] *Id.* at 73.

[19] *Id.* at 16.

[20] *Id.* at 13.

[21] *Id.* at 250.

[22] *Id.* at 244.

[23] *Id.* at 256-59.

[24] *Id.* at 259.

[25] *Id.* at 237-40.

[26] *Id.* at 41.

[27] CAROL WILCOX, SUGAR WATER – HAWAII’S PLANTATION DITCHES 1 (University of Hawaii Press, 1997).

reduce or remove import taxes from products sent to the United States from Hawai‘i.[29] In 1848, King Kamehameha III divided land among the kings, chiefs, commoners, and government, and made it private property.[30] Tenants claimed parcels of land that the monarchy allotted under the new law.[31] The monarchy gave the tenants title in fee simple "to the lands they were then cultivating for their own use[.]"[32] In 1962, the State of Hawai‘i established the State Land Commission to classify and regulate the land, to preserve "agricultural lands against urban encroachment [and to protect] recreational, wild life and scenic areas."[33] Over two hundred years after western contact, the ancient Hawaiian land tenure system became non-existent.

B. Modern Land Classification, and Food Production in and Imports to Hawai‘i

The State of Hawai‘i takes a different approach to land than the Kingdom of Hawai‘i did. The main Hawaiian islands are comprised of 4,112,388[34] acres of land, with four types of state-designated land classifications that overlay every acre.[35] The LUC is statutorily required to classify all land in the state as either urban, conservation, agricultural, or rural.[36] The LUC sets standards for determining the boundaries of each district.[37] When the LUC establishes the "boundaries of agricultural districts[,] the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation."[38]

Approximately 1,928,318 acres of land in Hawai‘i are classified as agriculture.[39] The agricultural lands in Hawai‘i include lands suitable for the cultivation of crops, farming activities related to animal husbandry, aquaculture, wind energy production, biofuel production, timber cultivation,

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[28] *Id.* at 15.

[29] *Id.* at 1.

[30] This land division is referred to as the Great Mahele. *Id.* at 15.

[31] These parcels are referred to as Kuleana land. HANDY, HANDY & PUKUI, *supra* note 11, at 53.

[32] *Id.* at 54 (Bishop Museum Press 1991).

[33] DONALD D. KILOLANI MITCHELL, RESOURCE UNITS IN HAWAIIAN CULTURE, 265 (Kamehameha Sch. Press, 1992).

[34] State of Haw., *2011 State of Haw. Databook*, Table 6.03 (2011), *available at* http://hawaii.gov/dbedt/info/economic/databook/db2011/.

[35] *Id.*

[36] HAW. REV. STAT. § 205-2(a) (2012).

[37] *Id.*

[38] *Id.* at § 205-2(a)(3).

[39] State of Haw., *supra* note 34.

agriculture-support activities, open area recreational facilities, and land with significant potential for agriculture uses.[40] Of land classified as agricultural, the landowners utilize 1,110,000 acres, or fifty-seven percent of the land, for crops and pasture.[41] The landowners utilize 87,400 acres, or 4.5 percent of that land, for crops.[42] And of that, landowners utilize 52,900 acres, or 2.7 percent of the land, for food crops.[43] Within those 52,900 acres, landowners farm 8,000 of the acres for coffee.[44] Landowners utilize only 2.3 percent of the land in Hawai‘i that is classified as agriculture for food crops.[45] If more agricultural land in Hawai‘i was farmed for food crops, Hawai‘i could be less dependent on food imports and more self-sufficient.

Hawai‘i is highly dependent on food imports. The state imports approximately 85 to 90 percent of its food.[46] Currently, Hawai‘i is self-sufficient in only some fruit and vegetable crops.[47] The Food and Agriculture Organization of the United Nations defines "[t]he [c]oncept of food self-sufficiency . . . to mean the extent to which a country [or state] can satisfy its food needs from its own domestic production."[48] The Office of Planning within the state Department of Business Economic Development & Tourism ("DBEDT") stated that "[i]n the 1970s, Hawai‘i was self-sufficient in eggs and milk with 240 egg farms and 120 milk operations."[49] In Hawai‘i today, however, there are only about 100 egg

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[40] HAW. REV. STAT. § 205-2(d) (2012).

[41] U.S. Dept. of Agric. – Nat'l Agric. Statistics Serv., *SUMMARY: Acreage in Crop and Total Farm Acreage, by Cnty., 2006-2010*, *available at* http://www.nass.usda.gov/Statistics_by_State/Hawaii/Publications/Annual_Statistical_Bulletin/stat10-08.pdf.

[42] *Id.*

[43] This number was calculated by excluding sugar cane (34,500 acres) from the crop acreage. This number includes pineapples (undisclosed, but acreage added to the "all other crops" category), vegetable and melons (2,700 acres), fruits (4,100 acres), coffee (8,000 acres), macadamia nuts (17,000), and "all other crops" (21,100 acres). "All other crops" includes non-published vegetable commodities, ginger root, pineapple, taro, seed crops, feed and forage crops (excluding pineapple feed products), flowers, nursery products, noni, kava, and others. *Id*

[44] *Id.*

[45] Calculated by subtracting the 8,000 acres of coffee from the 52,900 acres of food crops, which equals 44,900, and dividing that number by the total acres of agricultural land, 1,928,318. This equals 0.02328454, and is rounded down to 2.3%.

[46] State of Haw. – Dept. of Bus., Econ. Dev. & Tourism – Office of Planning, *Increased Food Security and Food Self Sufficiency Strategy*, ii (Oct. 2012).

[47] *Id.*

[48] *Id.*, (citing Food and Agricultural Organization of the United Nations, *Implications of Economic Policy for Food Security: A Training Manual, Training Materials for Agricultural Planning 40*, 4.2.1 (1999)).

[49] *Id.* at ii.

farms, two milk operations, and a decline of livestock, hog, and pig production.[50] In its *Increased Food Security and Food Self Sufficiency Strategy* ("Strategy"), published in 2012, DBEDT reported that "Hawaii has become less food self-sufficient over the past thirty years."[51]

Hawai'i's lack of food self-sufficiency has many negative implications. DBEDT explained that Hawai'i's dependence on imported food makes the state vulnerable to "natural disasters and global events that might disrupt shipping and the food supply."[52] If Hawai'i replaced 10% of the food it currently imports with food grown locally, "$94 million would be realized at the farm-gate which would generate an economy-wide impact of an additional $188 million in sales, $47 million in earnings, $6 million in state tax revenues, and more than 2,300 jobs."[53] If Hawai'i invests in programs that support food self-sufficiency, the state will see economic, health, social, and environmental benefits.[54]

To address the issue of food self-sufficiency, the State of Hawai'i published the Strategy in accordance with the increased food security/self-sufficiency theme within the 2010 *Hawai'i Comprehensive Economic Development Strategy*.[55] The Strategy has three objectives for the state to increase food self-sufficiency, including to "increase demand for and access to locally grown food, [to] increase production of locally grown food, [and] to provide policy and organizational support to meet food self-sufficiency needs.[56] DBEDT identified major issues associated with increasing food self-sufficiency, including land, water, energy, labor, research, distribution, food safety, and pest control.[57] According to DBEDT, "[f]armers have difficulty obtaining long term leases and reasonable lease rents[, and t]here is pressure on the use of important agricultural land for higher value purposes."[58] DBEDT also provided that "State agricultural park programs help to provide land to farmers at reasonable lease rents."[59] Last year the LUC approved thousands of acres of fertile agricultural lands to be reclassified to urban, an example that highlights the problem that DBEDT spoke to, of pressure on the use of agricultural land for higher value purposes, such as residential development.

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[50] *Id.*

[51] *Id.* at 3.

[52] *Id.* at ii.

[53] These numbers are based on a 30% farm share. *Id.*

[54] *Id.* at 3.

[55] *Id.* at 1.

[56] *Id.* at ii.

[57] *Id.* at 16.

[58] *Id.*

[59] *Id.*

C. Agricultural Land Ownership in Hawai‘i

In Hawai‘i today, a few large landowners own the majority of agricultural land. Together, the state and federal government, own over 2 million acres of land in Hawai‘i. The State of Hawai‘i owns 1.54 million acres of land.[60] The Federal government owns 531,000 acres of land in Hawai‘i.[61]

Kamehameha Schools (“KS”) is the third largest landowner in Hawai‘i, behind the state and the federal government.[62] KS owns a little over nine percent, or 181,000 acres of agricultural land in Hawai‘i.[63] Princess Bernice Pauahi Bishop created the Kamehameha Schools trust and endowed it with the land.[64] The Land Assets Division of Kamehameha School is responsible for managing the land and in 2009 created the *Strategic Agricultural Plan*, which “provides a vision and a guide for the short-and long-term management of roughly 181,000 acres of agricultural lands, 88,000 acres of which have significant potential for agricultural uses.”[65]

Alexander & Baldwin (“A&B”) is the fourth largest landowner in Hawai‘i.[66] A&B is a real estate and land company that develops and sells real property, primarily in Hawai‘i.[67] In 2011, A&B owned approximately 57,910 acres of agricultural land.[68] According to its website, Hawaiian Commercial & Sugar Company, a subsidiary of A&B, cultivates sugarcane on 36,000 acres in Central Maui.[69]

As mentioned earlier, in 2012, the LUC approved a significant amount of agricultural land to be reclassified to urban for the Ho‘opili and Koa Ridge development projects. The LUC’s approval to convert prime agricultural lands to urban development should concern citizens and the state government.

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[60] Jeanne Cooper, *Hawaii’s top 10 largest landowners*, SF GATE (July 29, 2012), *available at* http://www.sfgate.com/hawaii/alohafriday/article/Hawaii-s-top-10-largest-landowners-3671077.php.

[61] *Id.*

[62] *Id.*

[63] *Land*, KAMEHAMEHA SCH. (Mar. 1, 2013, 8:40 AM), http://www.ksbe.edu/land/.

[64] *Id.*

[65] *Id.*

[66] Cooper, *supra* note 60.

[67] *What we do*, ALEXANDER & BALDWIN, INC. (Mar. 1, 2013, 9:17 AM), http://www.alexander baldwin.com/our-company/what-we-do/

[68] *Overview*, A&B PROP. INC. (Feb. 22, 2011), *available at* http://www.valueplays.net/wp-content/uploads/Properties.pdf.

[69] *Agribusiness*, ALEXANDER & BALDWIN, INC. (Mar. 1, 2013, 9:17 AM), http://www.alexander baldwin.com/businesses/agribusiness/

Reducing the amount of prime agricultural land is not aligned with the state's strategy to increase food self-sufficiency. If A&B petitions the LUC to reclassify the boundary district from agricultural to urban, should the state exercise its power of eminent domain to protect the prime agricultural land from development, and to keep it in agriculture?

III. LEGAL BACKGROUND: ORIGINS OF THE STATE'S POWER TO PROTECT AGRICULTURAL LANDS

This section provides an overview of Hawai'i's power to protect agricultural lands derived from the Hawai'i State Constitution, the Public Trust Doctrine, and statutory law.

A. Legal Framework for Hawai'i's Power of Eminent Domain

Eminent domain in Hawai'i is rooted in legal tradition. The power of eminent domain is said to have originated with the seventeenth century legal scholar, Grotius.[70] He "believed that the state possessed the power to take or destroy property for the benefit of the social unit, but he believed that when the state so acted, it was obligated to compensate the injured property owner for his losses."[71] Eminent domain is defined as "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking."[72]

According to John E. Nowak and Ronald D. Rotunda, "the just compensation clause of the [F]ifth [A]mendment to the U.S. Constitution was built upon this concept of a moral obligation to pay for governmental interference with private property."[73] According to the Supreme Court, "[the] Fifth Amendment [to the United States Constitution] imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner."[74] The Hawai'i Constitution has a similar provision.[75] Put more simply, a governmental body can take private property, but it must meet the public purpose test and justly compensate the property owner.[76] This concept is the backbone of eminent domain law in the United States at the federal and state level.

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[70] BLACK'S LAW DICTIONARY 601(9th ed. 2009) (quoting John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.11, at 424–25 (4th ed. 1991)).

[71] *Id.*

[72] BLACK'S LAW DICTIONARY 601 (9th ed. 2009).

[73] *Id.*, (quoting John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.11, at 424–25 (4th ed. 1991)).

[74] Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2013).

[75] *See* HAW. CONST. ART. 1, § 20.

[76] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

1. *Hawai‘i State Law: Eminent Domain*

Since 1955, under chapter eight of the Revised Laws of Hawai‘i,[77] the state, and the four counties, may exercise the power of eminent domain to condemn, or take property, from a landowner for a public use.[78] The state's power of eminent domain is derived from the states' inherent police powers under the United States Constitution, and is limited by the Fifth and Fourteenth Amendments.[79] The Hawai‘i State Constitution,[80] and the Hawai‘i Revised Statutes[81] provide further guidance on the power. The state condemnation statute provides, "[p]rivate property may be taken for public use."[82]

The Hawai‘i State Legislature ("Legislature") is the primary authority for the exercise of eminent domain.[83] The Legislature may grant the power of eminent domain to specific agencies to carry out their duties.[84] These agencies may exercise eminent domain, but the acquisition may be subject to restrictions including, but not limited to, the approval of the Governor,[85] the Legislature's adoption of a resolution declaring that the acquisition is in the public interest,[86] or formal findings by an appropriate commission that the condemnation is in the public interest.[87] The judiciary grants great deference to the Legislature in reviewing what the Legislature has determined to be a public use when it is challenged in court.[88] According to the Hawai‘i Supreme Court, "Courts will not substitute their judgment for the legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[89]

In Hawai‘i, the State Constitution grants the counties control over the local government

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[77] R.L.H.1955, § 8-32.

[78] HAW. REV. STAT. § 101-2 (2012).

[79] *See* Penn Cent. Transp. Co. v. City of N.Y, 438 U.S. 104 (1978).

[80] *See* HAW. CONST. ART. 1, § 20.

[81] HAW. REV. STAT. § 101-2 (2012).

[82] *Id.*

[83] Kashiwa v. Chang, 46 Haw. 279, 282 (1963).

[84] *See* HAW. REV. STAT. §§ 101-4, 41 (2012).

[85] *See Id.* at § 277-3.

[86] *Id.* at § 206-19.

[87] *See Id.* at § 101-43.

[88] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

[89] Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 68 (1985) (citing Hawaii Housing Authority v. Midkiff, *supra*, 104 S.Ct. at 2329 (quoting United States v. Gettysburg Electric Railway Co., 160 U.S. 668, 680 (1896))).

structure and organization, which includes condemnation.[90] The Legislature granted the counties the power of eminent domain.[91] The county condemnation statute provides, "[e]ach county shall have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so."[92]

Although expressly permitted by law, when governmental bodies take private property from a landowner, legal issues typically arise in two primary areas: the legitimacy of the public purpose, and the value of the compensation. The courts determine the value of the compensation, and the public purpose of the condemnation is determined by the Legislature. The "attorney general of the State may, at the request of the head of any department of the State, or as otherwise provided by law, institute proceedings for the condemnation of property . . ."[93] At the beginning of a condemnation proceeding, the state is required to serve the owner of the land to be condemned a summons and a copy of the state's complaint.[94] The court determines "all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the property."[95] The court assesses compensation and damages based on the property's actual value at the date of summons.[96] The Legislature has broad authority in determining public purpose; however, landowners challenge condemnations in both federal and state courts based on a variety of legal issues.

2. *Federal Court Challenges to the Exercise of Eminent Domain*

Landowners who challenge Hawai'i's exercise of eminent domain under federal law, make their cases under the Fifth and Fourteenth Amendments to the United States Constitution. Under the Fourteenth Amendment to the United States Constitution, no person shall be deprived of property without the due process of law.[97] Under the Fifth Amendment of the United States Constitution, no person shall be deprived of property without just compensation.[98]

The eminent domain standard has become less strict, from a "public use"[99] standard to a

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[90] HAW. CONST. ART. 8, § 2.

[91] HAW. REV. STAT. § 46-1.5(6) (2012).

[92] *Id.*

[93] *Id.* at § 101-14.

[94] *Id.* at. § 101-20.

[95] *Id.* at § 101-22.

[96] *Id.* at § 101-24.

[97] U.S. CONST. amend. XIV.

[98] U.S. CONST. amend. V.

[99] *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

"rationally related to a conceivable public purpose"[100] standard. In 1979, *Midkiff v. Tom* addressed the constitutionality of the Hawai'i Land Reform Act.[101] The plaintiffs in *Midkiff* were the Trustees of the Estate of Bernice Pauahi Bishop.[102] The Trustees challenged the constitutionality of Chapter 516 of the Hawai'i Revised Statutes, which "authorize[d] the use of the State's power of eminent domain to permit lessees of residential lots to acquire the fee simple title to their homes."[103] "The Trustees object[ed] to the application of [the] land reform statute to the Bishop Estate lands."[104] In this case, the United States District Court for the District of Hawai'i broadened the "public use" requirement of a condemnation action to include "public interest" for actions brought under the Fifth and Fourteenth Amendment challenging the exercise of eminent domain.[105] The court granted summary judgment for the defendant.[106] According to Amy Keuogg, "[t]his decision limited judicial review of eminent domain questions to determining if a taking is arbitrary and capricious, given the economic rationales underlying the legislature's determination."[107] In 1983, the Ninth Circuit Court of Appeals ("Ninth Circuit") reversed the District Court's ruling and held that the Hawai'i Land Reform Act "violated the public use limitation of the Fifth and Fourteenth Amendments."[108]

The Hawai'i Housing Authority and private parties intervened and appealed the Ninth Circuit's decision.[109] In 1984, one year later, the Supreme Court reversed the Ninth Circuit.[110] In *Hawaii Housing Authority v. Midkiff*, the Supreme Court of the United States held, "[w]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, a compensated taking is not prohibited by the Public Use Clause."[111] The Court further held,

> [t]he mere fact that property taken outright by eminent domain is

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[100] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 230-31 (1984).

[101] Midkiff v. Tom, 471 F.Supp. 871, 881 (D. Haw. 1979).

[102] *Id.* at 872.

[103] *Id.* at 873-74.

[104] *Id.* at 874.

[105] *Id.* at 881.

[106] Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979).

[107] Amy E. Keuogg, *Hawaii Housing Authority v. Midkiff: The Public Use Requirement in Eminent Domain*, 47 Ohio St. L.J. 521, 529 (1984).

[108] Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983).

[109] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[110] *Id.*

[111] *Id.* at 230.

> transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. Government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause. And the fact that a state legislature, and not Congress, made the public use determination does not mean that judicial deference is less appropriate.[112]

The Court in *Hawaii Housing Authority* transformed the public use standard into a "rationally related to a conceivable public purpose" standard.[113] The Court held that it is the ends that need to meet the public purpose test, and the means used to getting to the ends don't hold weight in analyzing the public purpose.[114] The Court stated, "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[115] The Court further explained, "[j]udicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[116] In *Midkiff*, the legislature concluded "that the general welfare of the people of Hawai[ʻ]i was served by condemning the land of large landholder-lessors and allowing the lessees to purchase that land from the State"[117] and "that the present system was injurious to the social and economic health of the community."[118]

From this line of cases, on a constitutional challenge a state legislature will be given deference to its decision,[119] and the exercise of eminent domain needs only to be rationally related to a conceivable public purpose;[120] a rather broad standard. *Midkiff* has been upheld by the Court and remains as the law of the land.[121]

3. *Hawaiʻi Court Challenges to the Exercise of Eminent Domain*

In Hawaiʻi, the Legislature has broad power to determine what public use means and to exercise

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[112] *Id.* at 230-31.

[113] *Id.*

[114] *Id.* at 230.

[115] *Id.* at 240.

[116] *Id.* at 244.

[117] Midkiff v. Tom, 483 F. Supp. 68 (D. Hawaii 1979).

[118] *Id.*

[119] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984).

[120] *Id.* at 230.

[121] *See* Kelo v. City of New London, Conn., 545 U.S. 469, 488 (2005).

its power of eminent domain to achieve goals for the benefit of the public. Actions that individuals bring in state court challenge the State's exercise of eminent domain when "a finding of public use is manifestly wrong."[122] To prevail, the landowner must show that the condemnation was "solely for a private purpose,"[123] or the governing body "lack[s] … any sort of plan, [or uses the] plan as pretext for nonpublic purposes."[124]

In 1988, the Supreme Court of Hawai'i held in *City and County of Honolulu v. F.E. Trotter, Inc.*, that "[t]he State's power of eminent domain is limited only to the extent that the purpose of the taking is rationally related to the public objective sought, and just compensation must be paid for the property."[125] The holding in this case reflects the U.S. Supreme Court's holding in *Midkiff*.

In 2004, the Supreme Court of Hawai'i in *State v. Viglielmo*, quoted the United States Supreme Court and declared, "states are free to interpret their own constitutional protections more broadly, as long as the restraints on private property 'do not amount to a taking without just compensation or contravene any other federal constitutional provision.'"[126] Legislative bodies vested with the power of eminent domain have broad discretion in determining what uses will benefit the public and what land is necessary to facilitate those uses.[127]

In 2008, the Court decided *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*.[128] The C & J Coupe Family Limited Partnership challenged the County of Honolulu's action to condemn its property for use as a public highway.[129] The Court held, "even where the government's stated purpose is a 'classic' one, where the actual purpose is to 'confer[ ] a private benefit on a particular private party[,]' the condemnation is forbidden."[130]

> As a general rule, the right to declare what shall be deemed a public use is vested in the legislature; and consequently, when the public nature of a use

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[122] Cnty. of Haw. v. C & J Coupe Family Ltd. Partnership, 124 Haw. 281, 293 (2010) (internal quotation marks and citations omitted).

[123] David L. Callies, *Compulsory Purchase in Haw.: What's a Public Purpose?*, 6-Jun HAW. B.J. 6, 9 (2002).

[124] *Id.*

[125] City and Cnty. of Honolulu v. F.E. Trotter, Inc., 70 Haw. 18, 21 (1988).

[126] State v. Viglielmo, 105 Haw. 197, 208 (2004) (quoting PruneYard Shopping Center v. Robins, 447 U.S. 74, 81, 100 (1980)).

[127] Cnty. of Hawai'i v. C & J Coupe Family Ltd. Partnership, 119 Haw. 352, 374 (2008).

[128] *Id.* at 352.

[129] *Id.*

[130] *Id.* at 385 (citing Kelo, 545 U.S. at 477 (2005)).

> for which a taking has been authorized by law is disputed, the question as it presents itself to the courts is whether the legislature might reasonably have considered the use public, not whether the use is public. This rule rests on the presumption that a use is public if the legislature has declared it to be such.[131]

The Court solidified the great deference the Court shall give to "legislative findings and declarations of public use in connection with takings of private property."[132]

The Legislature is also tasked with protecting the public trust for the benefit of present and future generations.[133] Eminent domain is one tool the state may utilize to ensure the public trust is preserved for future generations.

B. Legal Framework for the Public Trust Doctrine in Hawai'i

The Public Trust Doctrine in Hawai'i is rooted in the ancient Roman law, and expanded by the Hawai'i State Constitution, and statutory and case law.

1. *Public Trust Doctrine Origins*

The Public Trust Doctrine originated in Roman law.[134] According to the Institutes of Justinian, "[b]y the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea."[135] The English common law borrowed from the Romans and formed the idea of the public trust, "under which the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people."[136] After the American Revolution, the equal footing doctrine passed trust resources previously owned by the Crown to the American public.[137] Zachary C. Kleinsasser said, "[e]ach state was thus vested with the duty to hold public resources in trust for the people of the state. The purpose of the trust was to preserve certain

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[131] *Id.* at 374 (quoting Haw. Hous. Auth. v. Chiyo Ajimine, 39 Haw. 543, 549 (1952)).

[132] *Id.* at 374-75 (quoting Haw. Hous. Auth. v. Chiyo Ajimine, 39 Haw. 543, 550 (1952)).

[133] HAW. CONST. art. XI § 1.

[134] Nat'l Audubon Society v. Super. Ct., 33 Cal.3d 419, 434 (Cal. 1983) (quoting Institutes of Justinian 2.1.1).

[135] *Id.* at 433.

[136] *Id.* at 434, (internal quotations omitted) (quoting Colberg, Inc. v. State of Cal. ex rel. Dept. Pub. Works 67 Cal.2d 408, 416 (Cal. 1967)).

[137] Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 424 (2005) (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472-74 (1988)).

resources in a manner that made them available to the public for use."[138] Hawai'i's Public Trust doctrine reflects ancient Roman law,[139] as well as the ancient Hawaiian land tenure system.[140]

2. *Hawai'i Constitutional Public Trust Doctrine*

In 1978, the Legislature added the Public Trust Doctrine to the Constitution of the State of Hawai'i, which describes the duty of the state to hold all public natural resources in trust for the benefit of the people.[141]

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[142]

In 2006, the Hawai'i Supreme Court stated, "[i]n construing the provisions of the constitution, 'the general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written.'"[143] In construing the words of the Public Trust Doctrine as they are written, the state has the responsibility to conserve and protect all of Hawai'i's natural resources for the benefit of the present and future generations, which includes agricultural land.[144]

The concept of the Public Trust Doctrine in Hawai'i dates back to the ancient Hawaiian land tenure system.[145]

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[138] *Id.* (citing Phillips Petroleum, 484 U.S. at 474-74; *infra* Part VI.B; Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892)); and Susan D. Baer, *The Public Trust Doctrine--A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources,* 15 B.C. ENVTL. AFF. L. REV. 385, 386-87 (1988).

[139] *See* Nat'l Audubon Society v. Super. Ct., 33 Cal.3d 419, 433 (Cal. 1983) (quoting Institutes of Justinian 2.1.1).

[140] *See* Kent D. Morihara, *Haw. Constitution Article XI Section 1: The Conservation, Protection, and Use of Natural Resources,* 19 U. HAW. L. REV. 177, 202 (1997).

[141] *See* HAW. CONST. art. XI § 1.

[142] *Id.*

[143] Kelly v. 1250 Oceanside Partners, 111 Haw. 205, 223 (2006) (quoting Taomae v. Lingle, 108 Haw. 245, 251 (2005) (citing Watland v. Lingle, 104 Haw. 128, 139 (2004))).

[144] *See* HAW. CONST. art. XI § 1.

[145] *See* Morihara, *supra* note 140.

> In the ancient Hawaiian land tenure system, all lands, from the mountain to the sea, were held subject to two interests: the interest of the public to benefit from natural resources, and the interest in conserving these natural resources for the benefit of future generations.[146]

The state has mimicked this tradition, and although the state does not own all lands from the mountain to the sea, the state owns a significant portion and is responsible for protecting the natural resources for public benefit.

3. *Hawai'i Public Trust Doctrine Litigation*

Present case law well establishes that the state has a duty under the Public Trust Doctrine to protect water resources for the present and future generations.[147] Past litigation has led to the Court's establishment of rules regarding the state's responsibility for the Public Trust and how the Court will analyze future cases.

In 1982, in *Robinson v. Ariyoshi*, the Hawai'i Supreme Court held that the Public Trust extends beyond navigable waters, to all waterways.[148] The Court eloquently explained,

> The sovereign's reservation of the ownership of surface waters at the time of the Mahele served to impose a public trust upon those waters, that is, the public interest in the waters of the kingdom was understood to necessitate a retention of authority and the imposition of a concomitant duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses.[149]

Robinson extended the reach of what is traditionally thought to be within the scope of the Public Trust Doctrine, navigable waters, to all waterways of Hawai'i.

In 2000, the Court reviewed *In re Water Use Permit Applications*, an appeal from a Commission on Water Resource Management decision from a contested case hearing regarding petitions to amend the interim instream flow standards, water use permit applications, and water reservation petitions.[150] In its decision, the Court quoted the Supreme Court of Arizona, which said,

> just as private trustees are judicially accountable to their beneficiaries for

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[146] *Id.*

[147] Kelly v. 1250 Oceanside Partners, 111 Haw. 205, 223 (2006).

[148] Robinson v. Ariyoshi, 65 Haw. 641, 676 (1982).

[149] *Id.* at 644.

[150] In re Water Use Applications, 94 Haw. 97, 110 (2000).

> dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. The beneficiaries of the public trust are not just present generations but those to come.[151]

Although the legislative and executive branches are tasked with carrying out the goals of the Public Trust Doctrine, in 2004, in *In re Waiola O Molokai*, the Court held that "[t]he ultimate authority to interpret and defend the public trust in Hawai'i rests with the state courts."[152] In this case, the Department of Hawaiian Home Lands, Office of Hawaiian Affairs, and various individual intervenors appealed a "Commission on Water Resource Management decision granting a ranch's [. . .] application for a water use permit and authorizing the chairperson of the Commission to issue well construction and pump installation permits."[153] The Court explained that, "agency decisions affecting public trust resources carry a presumption of validity."[154] The Court also confirmed "that 'any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.'"[155] *In re Waiola O Molokai* was an important case because it laid out standards as to what parts of government are accountable to the Public Trust, and reaffirmed the presumption in favor of public use, access, and enjoyment, when balancing public and private purposes.

In 2006, in *Kelly v. 1250 Oceanside Partners*, a cultural heritage organization brought action against the County of Hawai'i and Department of Health and alleged it "violated the public trust doctrine by failing to prevent [a] developer from violating water quality standards relating to coastal waters."[156] The Court decided it is "[t]he duty of the State under the public trust doctrine to promote Hawai'i's water resources incorporates the duty to promote the development and utilization of water resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."[157] The *Kelly* court went on to explain that "[t]he duty of the State under the public trust doctrine to maximize Hawai'i's water resource's social and economic benefits includes the protection of the resource in its natural state."[158] This case is important because it reiterates that the state should incorporate conservation, state self-sufficiency, and protection of resources in its natural state, while maximizing the state's social and economic benefits.

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[151] *Id.* at 143 (citing Arizona Cent. for Law in Pub. Interest v. Hassell, 172 Ariz. 356, 837 (Ariz. Ct. App.1991)).

[152] In re Waiola O Molokai, 103 Haw. 401, 421 (2004) (citing State v. Quitog, 85 Haw. 128, 130 n. 3 (1997)).

[153] *Id.* at 401.

[154] *Id.* at 421.

[155] In re Waiola O Molokai, 103 Haw. 401, 432 (2004) (quoting In re Water Use Permit Applications, 94 Haw. 97, 142 (2000)).

[156] Kelly v. 1250 Oceanside Partners, 111 Haw. 205 (2006).

[157] *Id.* at HN 9.

[158] *Id.* at HN 10.

In Hawai‘i, although most of the litigation pertaining to the Public Trust Doctrine has revolved around water resources, that Public Trust Doctrine stretches far beyond water resources and also includes all public natural resources, including land, air, minerals and energy sources, as evidenced by the Hawai‘i Constitution.[159]

C. Constitutional and Statutory Protections for Agricultural Lands in Hawai‘i[160]

Many protections for agricultural lands in Hawai‘i exist under the Constitution, statutes, plans created by the state, and the DOA.

1. *Hawai‘i State Constitution*

The Hawai‘i State Constitution is the foundation for agricultural land protection in Hawai‘i. Article XI, section three of the Hawai‘i State Constitution governs the state with regard to agriculture.[161]

> 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.[162]

In 2005, the Legislature enacted Act 183 to establish standards, criteria, and methods to identify important agricultural lands (IAL).[163] In 2008, the Legislature enacted Act 233, to establish incentives to meet the requirements of Act 183.[164] The Constitution is the base for the policies and programs

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[159] HAW. CONST. art. XI § 1 states,

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

[160] Legal framework is outlined from the *Increased Food Security and Food Self Sufficiency Strategy*. State of Haw. – Dept. of Bus., Econ. Dev. and Tourism – Office of Planning, *Increased Food Security and Food Self Sufficiency Strategy*, 5-8 (Oct. 2012).

[161] HAW. CONST. art. XI, Sec. 3.

[162] *Id.*

[163] Act 183, 2005 Sess. Laws Haw.

[164] Act 233, 2008 Sess. Laws Haw.

discussed in the following sections.

2. *Hawai‘i State Plan*

In 1978, the Legislature enacted the Hawai‘i State Planning Act to

> improve the planning process in this State, to increase the effectiveness of government and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the State.[165]

The Office of Planning described "[t]he Hawai‘i State Plan [("Plan")] . . . [as] a long-range comprehensive plan that establishes the goals, objectives, priorities, policies, and implementation measures for the long-term development of the State of Hawai‘i."[166] The Plan consists of three parts: 1) overall theme, goals, objectives, and policies; 2) planning coordination and implementation; and 3) functional plans.[167] The Office of Planning explained that "[f]unctional plans set forth the policies, statewide guidelines, and priorities within a specific field of activity, . . . [and] are developed by the state agency primarily responsible for a given functional area, which include[s] agriculture . . ."[168] The Plan laid the foundation for the State Agricultural Functional Plan.

3. *State Agricultural Functional Plan*

In 1991, the DOA prepared the State Agricultural Functional Plan ("Ag Plan").[169] The Ag Plan encourages the "[g]rowth and development of diversified agriculture throughout the State,"[170] and "an agricultural industry that constitutes a dynamic and essential component of Hawai‘i's strategic, economic, and social well-being."[171] The Office of Planning stated that "[t]he [Ag Plan] sets forth the policies, programs, and projects for implementing the agricultural and agricultural related objectives policies, and priority guidelines contained in the Hawai‘i State Plan."[172] The Ag Plan contains

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[165] HAW. REV. STAT. § 226-1 (2012).

[166] State of Haw. – Dept. of Bus., Econ. Dev. and Tourism – Office of Planning, *supra* note 46 at 5.

[167] *Hawaii State Planning Act*, STATE OF HAW. – DEPT. OF BUS., ECON. DEV. AND TOURISM – OFFICE OF PLANNING (Apr. 20, 2013, 1:08 PM), http://planning.hawaii.gov/hawaii-state-planning-act//.

[168] *Id.*

[169] State of Haw. – Dept. of Agric., *The Haw. State Plan – Agric. – State Functional Plan - 1991*, *available at* http://hawaii.gov/dbedt/op/HiStatePlan/Agriculture.pdf.

[170] HAW. REV. STAT. § 226-7(2) (2012).

[171] *Id.* at § 226-7(3).

[172] State of Haw. – Dept. of Bus., Econ. Dev. and Tourism – Office of Planning, *supra* note 46 at 6.

objectives, including the achievement of: 1) productive agricultural use of lands most suitable and needed for agriculture;[173] 2) maximum degree of public understanding and support of agriculture in Hawai‘i;[174] and 3) adequate support services and infrastructure to meet agricultural needs.[175] The *A New Day in Hawai‘i Plan* reflects the Ag Plan.

4. *A New Day in Hawai‘i Plan*

In 2010, before Neil Abercrombie was elected Governor, he developed the *A New Day in Hawai‘i Plan.*[176] He developed the plan based on values and priorities that individuals expressed to him on his campaign trail.[177] The plan includes a section on agriculture that "calls for an Agricultural Renaissance within the State of Hawai‘i."[178] The goal of the plan is to produce more food locally, "protect green space, support thriving rural communities, reduce the risk of invasive species, and make us more secure against disruptions to our food supply lines."[179] The plan is not policy, but rather a compilation of ideas to improve the State of Hawai‘i.

5. *Department of Agriculture*

Plans and policies of the state are realized through the actions of the responsible state agencies. The DOA is responsible for the implementation of the Ag Plan.[180] The purpose of the DOA is to enhance and promote Hawai‘i's agriculture and aquaculture industries.[181] The DOA has three divisions, which include: 1) agricultural development; 2) agricultural loan; and 3) agricultural resource management.[182] The Agricultural Development Division promotes the economic viability of commercial agriculture in Hawai‘i, facilitates "the development and expansion of marketing opportunities for targeted agricultural and processed products; and provid[es] timely, accurate and useful

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[173] State of Haw. – Dept. of Agric., *supra* note 169 at III-20.

[174] *Id.* at III-28.

[175] *Id.* at III-36

[176] Neil Abercrombie, *A New Day in Hawaii – A Comprehensive Plan*, 1 (2010) *available at* http://governor.hawaii.gov/wp-content/uploads/2012/09/AFG_ANewDayinHawaii_2010.pdf.

[177] *Id.*

[178] State of Haw. – Dept. of Bus., Econ. Dev. and Tourism – Office of Planning, *supra* note 46 at 6.

[179] Neil Abercrombie, *supra* note 176 at 24-26.

[180] State of Haw. – Dept. of Agric., *supra* note 169.

[181] HAW. REV. STAT § 141-1 (2012).

[182] *Organization*, STATE OF HAW. – DEP'T OF AGRIC. (Mar. 1, 2013, 10:53 AM), http://hdoa.hawaii.gov/organization/.

statistics."[183] The Agricultural Loan Division promotes "agricultural and aquacultural development of the State by providing credit at reasonable rates and terms to qualifying individuals or entities."[184] The division does this by establishing "a revolving loan fund, [and making] credit . . . available by supplementing private lender sector loan funds or by providing direct funding."[185] The Agricultural Resource Management Division "[a]dministers the development and management of key agricultural resources."[186] In addition to divisions, the DOA has an attached agency, the Agribusiness Development Corporation (ADC) that furthers the Department's mission.

6. *Agribusiness Development Corporation*

The Legislature established the ADC in 1994 "to coordinate the development of Hawai'i's agricultural industry and to facilitate its transition from a dual-crop (sugar and pineapple) industry to a diversified, multi-crop and animal industry."[187] The purpose of the ADC is "to create a vehicle and process to make optimal use of agricultural assets for the economic, environmental, and social benefit of the people of Hawaii."[188] The goals of ADC are to: 1) "[t]ransition former plantation land and water systems for diversified agriculture;"[189] 2) "[i]nitiate development of facilities and provide support as necessary for successful diversified agriculture,"[190] and 3) "[p]rovide solutions to certain bottleneck issues facing the agriculture industry."[191] Within goal one, objective one is to "[a]cquire and manage selected high-value agriculture lands, water systems, and infrastructure."[192] The Legislature granted the ADC the power to issue revenue bonds, subject to the Governor's approval.[193] The ADC may also

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[183] *Agricultural Development Division*, STATE OF HAW. – DEP'T OF AGRIC. (Mar. 1, 2013, 10:55 AM), http://hdoa.hawaii.gov/add/.

[184] *Agricultural Loan Division*, STATE OF HAW. – DEP'T OF AGRIC. (Mar. 1, 2013, 10:57 AM), http://hdoa.hawaii.gov/agl/.

[185] *Id.*

[186] *Agricultural Resource Management Division*, STATE OF HAW. – DEP'T OF AGRIC. (Mar. 1, 2013, 10:58 AM), http://hdoa.hawaii.gov/arm/.

[187] State of Haw. – Dep't of Agric., *Agribusiness Development Corporation Strategic Plan*, at 2 (Oct. 15, 2008), *available at* http://hdoa.hawaii.gov/wp-content/uploads/2013/01/ADC-Strategic-Plan.pdf.

[188] HAW. REV. STAT. § 163D-1 (2012).

[189] *Agribusiness Development Corporation*, STATE OF HAW. – DEP'T OF AGRIC. (Apr. 20, 2013, 3:30 PM), http://hdoa.hawaii.gov/chairpersons-office/agribusiness-development-corporation/.

[190] *Id.*

[191] *Id.*

[192] State of Haw. – Dep't of Agric., *supra* note 187 at 1.

[193] HAW. REV. STAT. § 163D-9 (2012).

acquire important agricultural lands, subject to the authorization of the Legislature.[194] The important agricultural lands may be used for "the protection of agricultural lands, public land banking, or the promotion of farm ownership and diversified agriculture."[195] Currently, the ADC has projects on all of the main islands of Hawai'i.[196]

7. *Important Agricultural Lands*

The LUC is responsible for designating land that fits Important Agricultural Lands (IAL) criteria as IAL.[197] In 2005, the Legislature enacted Act 183 to implement "Article XI, Section 3 of the Hawai'i State Constitution by establishing standards, criteria, and mechanisms to identify IAL and to develop incentives to promote the retention of IAL for viable agricultural use over the long term."[198] The Legislature established policies and procedures to identify IAL,[199] and declared that,

> the people of Hawaii have a substantial interest in the health and sustainability of agriculture as an industry in the State. There is a compelling state interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use to achieve the purposes of: (1) Conserving and protecting agricultural lands; (2) Promoting diversified agriculture; (3) Increasing agricultural self-sufficiency; and (4) Assuring the availability of agriculturally suitable lands, pursuant to article XI, section 3, of the Hawaii state constitution.[200]

As of June 20, 2012, the LUC had designated 89,859 acres[201] of agricultural land as IAL.

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[194] *Id.* at § 163D-31.

[195] *Id.*

[196] State of Haw. – Dep't of Agric., *supra* note 189.

[197] HAW. REV. STAT. § 205-45(e) (2012).

[198] State of Haw. – Dep't of Bus., Econ. Dev. & Tourism – Office of Planning, *supra* note 46 at 7.

[199] *Id.*

[200] HAW. REV. STAT. § 205-41 (2012).

[201] The acreage includes: 3,773 acres owned by Alexander & Baldwin in Koloa, Kauai, 1,533 acres owned by Mahaulepu Farm LLC in Koloa, Kauai, 679 acres owned by Castle and Cook Homes Hawaii Inc., on Central and North Shore, Oahu, 27,102 acres owned by Alexander & Baldwin in Central Maui, and 56,772 acres owned by Parker Ranch, Inc. in South Kohala, Hawai'i Island. State of Haw. – Dep't of Agric. (Apr. 20, 2013, 2:10 PM), http://hdoa.hawaii.gov/wp-content/uploads/2013/02/IAL-Lands-6-20-12.pdf.

The state has strong policies favoring productive agriculture land and food self-sufficiency. However, the Legislature has not granted the DOA the explicit power of eminent domain. If the DOA had the option to condemn agricultural land, the ADC could issue revenue bonds to fund the condemnation, subject to the approval of the Governor. Under those circumstances, the DOA could protect agricultural lands from residential development, similar to the case studies in the following section.

IV. CASE STUDIES: PROTECTING AGRICULTURAL LAND FROM RESIDENTIAL DEVELOPMENT

This section discusses three examples in which governmental entities acquired agricultural land to protect it from residential development, that include Waiāhole, the town of Brookhaven, New York, and the Galbraith Estate.

A. Case Study - Waiāhole Valley: A Rural Condemnation Story from the 1970s

Waiāhole means "water of the ahole fish."[202] Waiāhole Valley ("Waiāhole") is located on the windward side of Oahu.[203] Traditionally, "there were . . . lo'i throughout the seaward lowlands of Waiāhole."[204] In the 1970s, Waiāhole was "largely undeveloped and consisted of residences and farming under short-term leases or oral agreements."[205] The Marks Estate held Waiāhole Valley[206] and "sold rights to develop Waiāhole valley for residential use."[207] This sale "sparked public outcry against the proposed urbanization of rural agricultural lands,"[208] and led to the state condemnation of the land.

> In 1977, . . . [G]overnor [George Ariyoshi] authorized the Hawaii housing authority to acquire the Marks estate in furtherance of the public purpose of preserving the rural agricultural nature of the valley. . . . In 1978, the Hawaii housing authority adopted a resolution setting forth its policies for the future use of Waiāhole valley that stated that the valley would be developed as a farming community and include residential, commercial, community, and public facilities uses, and that viable agricultural lands would be developed to the fullest potential feasible. Following the

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[202] HANDY, HANDY & PUKUI, *supra* note 11, at 452.

[203] Kevin O'Leary, *Waiahole Dream*, Honolulu Weekly (Mar. 3, 2010), *available at* http://honoluluweekly.com/feature/2010/03/waiahole-dream/.

[204] HANDY, HANDY & PUKUI, *supra* note 11, at 453.

[205] S.B. 3072, 26th Leg., Reg. Sess. (Haw. 2012).

[206] *Id.*

[207] *Id.*

[208] *Id.*

> completion of condemnation proceedings in 1986, the housing finance and development corporation constructed infrastructure and subdivided the valley into what is now known as the Waiāhole valley agricultural park and residential lots subdivision.[209]

The agricultural park is "about 590 acres with a final subdivision of 143 agricultural and residential lots."[210] In 1993, the Legislature "authorized the department of land and natural resources to convey ten additional parcels in Waiahole valley to the housing finance and development corporation."[211] In 1998, Governor Ben Cayetano "gave 93 leases to Waiāhole-Waikane Community Association president David Chinen, [which ended] a 21-year quest for ag[ricultural] and residential land in the valley."[212]

In the 1970s, the state initially condemned Waiāhole to save it from development and to further agricultural use of the land. Today, the state is trying to further the goal of maintaining agricultural use of the land by transferring it from the Hawai'i Housing Finance and Development Corporation ("HHFDC") to the ADC.[213] In 2012, the State Legislature sought to transfer the title of Waiāhole from HHFDC to the ADC to fulfill the public purpose of maintaining the agricultural nature of the valley[214] because ADC "is a more appropriate state agency to develop Waiahole Valley Agricultural Park to its fullest potential."[215] However, the Senate Committee on Ways and Means deferred the measure.[216]

The Waiāhole condemnation is a good example of how the state can exercise its power of eminent domain to further a public purpose. In this case, the HHFDC condemned Waiāhole to save it from development. The HHFDC was able to do this because the Legislature granted it explicit powers of eminent domain, and the Governor Ariyoshi authorized the acquisition.[217] In addition to the agricultural values of the land, the state was influenced to purchase Waiāhole based on potential residential, commercial, community, and public facilities use as well.[218] To date, neither the state nor

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[209] *Id.*

[210] Tim Ryan, *Waiāhole & Waikane – Worth the Fight, Worth the Wait*, STARBULLETIN (July 13, 1998), *available at* http://archives.starbulletin.com/98/07/13/features/story2.html.

[211] S.B. 3072, 26th Leg., Reg. Sess. (Haw. 2012).

[212] Ryan, *supra* note 210.

[213] S.B. 3072, 26th Leg., Reg. Sess. (Haw. 2012).

[214] *Id.*

[215] STAND. COM. REP. NO. 2387, 26th Leg., Reg. Sess. (Haw. 2012).

[216] *Archived Legislative Reports – SB 3072 SD 1*, STATE OF HAW. – LEGISLATURE (Apr. 20, 2013, 4:35 PM), http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=3072&year=2012.

[217] HAW. REV. STAT. § 356D-15(a)(3) (2012).

[218] S.B. 3072, 26th Leg., Reg. Sess. (Haw. 2012).

county has condemned agricultural land to save it from development, purely based on the agricultural values of the land.[219] However, the town of Brookhaven in New York condemned agricultural land based purely on the agricultural values of the land and prevailed against challenges brought by the landowner.

B. Case Study – New York: Condemnation To Protect Agricultural Land from Development

In 2006, the town of Brookhaven ("Town") in New York condemned farmland that was slated for development.[220] The Supreme Court, Appellate Division, Second Department of New York ("Court"), in *Aspen Creek Estates, Ltd. V. Town of Brookhaven,*[221] stated that condemnation of farmland that had been slated for development in order to preserve its use as farmland serves a legitimate public purpose.[222] The farmland was a 39-acre parcel that Aspen Creek Estates, Ltd. ("Aspen Creek") purchased to develop homes.[223] The property was located in the Manorville Farmland Protection area, which is approximately 500 acres of working farms, and "has been described as 'the largest and most contiguous belt of productive agriculture land' remaining in the Town."[224] The issue in this case was whether the Town's condemnation of "the property in order to preserve its use as farmland serve[d] a legitimate public purpose, or [wa]s instead a pretext to improperly confer benefits upon private persons."[225]

Before the condemnation, the Town began efforts to acquire the property from the landowners previous to Aspen Creek.[226] On January 14, 2003, "the Town's Open Space Environmental Bond Act Committee approved the purchase of the development rights to the property from its former owners."[227] At the time, Aspen Creek was also negotiating the purchase of the property.[228] On February 6, 2003, the president of Aspen Creek "appeared before a Manorville civic group to discuss a proposal to subdivide

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[219] This statement is based on extensive research on Westlaw and LexisNexis, newspaper searches, and interviews.

[220] Aspen Creek Estates, Ltd. v. Town of Brookhaven, 47 A.D.3d 267 (N.Y. App. Div. 2007).

[221] *Id.*

[222] *Id.*

[223] *Id.* at 268-69.

[224] *Id.* at 269.

[225] *Id.*

[226] *Id.* at 270.

[227] *Id.*

[228] *Id.*

and build [nineteen] houses on the property."[229] The civic group advised the president of Aspen Creek "'that the Town was interested in preserving the entire area and that the parcel was a priority.'"[230]

On March 9, 2004, Aspen Creek outbid the town, and purchased the property for $1.4 million.[231] The Town then began negotiations with Aspen Creek to purchase its development rights to the property.[232] After Aspen creek rejected the Town's initial offer, the Town increased its offer to $3.52 million.[233] In January 2006, the Town increased its offer to $4.004 million, and tried to reach a compromise by discussing "allowing three lots to be developed so that [the president of Aspen Creek] and his two partners could build houses for themselves on the property."[234] The negotiations were unsuccessful and the Town began condemnation procedures.[235]

On January 24, 2006, the Town Board ("Board") of the Town adopted "a resolution expressing its intent to acquire the property and its development rights in order to ensure that it be 'maintained for farming and not developed.'"[236] On March 7, 2006, the Town held a hearing that was required by law on the proposed acquisition.[237] The Town representatives explained the purpose of the condemnation, and its prior attempts to acquire the property through negotiation with the landowner.[238] "Members of various civic associations, neighboring property owners, local residents, and Aspen Creek's president" were given the opportunity to present testimony.[239] Testimony provided that the property "was continuously farmed for over a century."[240] Further, [i]n the late 1800s the property was a hay farm," and more recently landowners grew "strawberries, corn, potatoes, cauliflower, . . . string beans," pumpkins and sunflowers.[241] "The farmhouse on the property predates 1858, and has been

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[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 269.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.*

recommended for landmark designation by the Town's Historic District Advisory Committee."[242] The property has a rich history of farming, and is important to the community, as evidenced by the testimony. In addition, "the Town, in partnership with the County of Suffolk, had acquired the development rights to four farms in the Manorville protection area," which preserved "approximately 112 acres of farmland."[243]

On March 21, 2006, the Board voted to acquire the title to the property through the exercise of eminent domain.[244]

> [T]he Board declared that the property was being acquired, . . . to preserve open space and agricultural resources, protect and promote continuation of agriculture in the Town, ensure the continued sale of fresh, locally grown produce, and prevent conflicts between residential homeowners and adjacent farmowners. The Board also found that preserving the property would "have a positive impact on the environment and surrounding community by ensuring the protection of scenic vistas and the rural character of the area, and helping to achieve the protection of the 500–acre Manorville Farm Protection Area, a high priority preservation target."[245]

Aspen Creek petitioned the court to review the Town's determination.[246] Aspen Creek advanced four arguments.[247] The most relevant argument that Aspen Creek made "claimed that the Town's determination violated the Eminent Domain Procedure Law because its true intent was to take the subject property to lease to private farmers."[248] The Court addressed and rejected the first three

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[242] *Id.*

[243] *Id.* at 270.

[244] *Id.* at 271.

[245] *Id.*

[246] *Id.*

[247] Aspen Creek alleged that the Town failed to comply with notice requirements "of the purpose of the condemnation and a reasonable opportunity to testify and present evidence at the hearing." Aspen Creek also alleged, "that application of the [Eminent Domain Procedure Law ("EDPL")] was unconstitutional as applied to Aspen Creek because it did not afford it an opportunity to cross examine the proponents of the condemnation." Aspen Creek further alleged "that the Board had failed to fulfill its obligations under [State Environmental Quality Review Act ("SEQRA")] in issuing a negative declaration concluding that the condemnation would have no significant environmental impact." Finally, Aspen Creek "claimed that the Town's determination violated the EDPL because its true intent was to take the subject property to lease to private farmers." *Id.*

[248] *Id.*

arguments,[249] then focused on the fourth argument, and analyzed whether the condemnation would serve a public purpose.[250]

The Court found that it was clear that "the Town's stated reasons for acquiring the property—preserving farmland and maintaining open space and scenic vistas—[were] all legitimate public purposes."[251] The Court concluded "the preservation of farmland confers a benefit upon the public, since it enables residents of the Town to enjoy locally grown produce and scenic views."[252] In the opinion, the Court referenced a letter that expressed,

> land suitable for farming is an irreplaceable natural resource with soil and topographic characteristics that have been enhanced by generations of agricultural use. When such land is converted to residential or other more developed uses that do not require those special characteristics, a critical community resource is permanently lost to the citizens of the area and the county at large.[253]

The Court also referenced the declared public policy of the state to "'promote, foster, and encourage the agricultural industry' and to acquire interests and rights in real property for the preservation of open space and enhancement of natural resources, including agricultural lands."[254]

The Court rejected all of Aspen Creek's arguments, and distinguished this case from cases it relied on. The Court stated that "Aspen Creek relie[d] upon *Kelo*[255] to argue that the condemnation of its property either serves no public benefit, or is a pretext to benefit private individuals, because it was not part of a carefully considered development plan."[256] The Court distinguished this matter from *Kelo*

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[249] The Court rejected the "contention that it did not receive adequate notice of the public hearing, and that its president Anthony Kaywood was denied a reasonable opportunity to testify and present evidence." The Court found "no merit to Aspen Creek's argument that the EDPL is unconstitutional as applied in this case." The Court explained that "the statute does not give parties adversely affected by a proposed taking the right to an adversarial hearing at which government officials can be cross examined." The Court also found "the petitioner's contention that the Town failed to comply with the requirements of SEQRA in adopting its findings and determination [was] without merit." *Id.* at 272-73.

[250] *Id.* at 274.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.* 274-75.

[255] Kelo v. City of New London, Conn., 545 U.S. 469 (2005).

[256] Aspen Creek Estates, Ltd. v. Town of Brookhaven, 47 A.D.3d 267, 276 (N.Y. App. Div. 2007).

by pointing out that the proposed taking was not for economic development.[257] Rather, "the purpose of the condemnation of Aspen Creek's property is the preservation of farmland, and the concomitant preservation of openspace and scenic vistas."[258] The Court further rejected the argument by demonstrating "neither *Kelo*, nor this Court's recent decision in *Matter of 49 WB, LLC v. Village of Haverstra*[259] . . . requires that a proposed condemnation for the preservation of farmland be part of a comprehensive development plan."[260] The Court went on to say that even though the record does not contain evidence "pertaining to how the Town intends to use the property after the acquisition, the possibility that the Town may sell or lease the land to a farmer does not make the proposed condemnation a pretext for improperly conferring a private benefit."[261] The Court closed by quoting precedent that said, "[i]t is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill [the public] purpose.'"[262]

Hawai'i has similar policies pertaining to agricultural protection and has a broad definition of public purpose. Although neither the state, nor any county, has attempted to condemn agricultural land to protect it from development, purely driven by the agricultural values of the land, after *Aspen Creek*, the idea seems realistic. New York law is of course not binding on Hawai'i, however, Hawai'i courts look to other jurisdictions if precedent does not exist on the issue. If a landowner wishes to conserve its land, as was the case with the Galbraith Estate, then condemnation is not necessary.

C. Case Study- Galbraith Estate: Recent Voluntary Land Conservation in Hawai'i, and a Brief Overview of Voluntary Land Conservation

The Galbraith Estate is a prime example of a successful conservation transaction by a willing landowner, a land trust, governmental agencies, and public support. When a landowner wants to conserve certain values of its land, yet retain economic value of the development rights, the landowner may sell its land to a conservation organization, or put a conservation easement on its land.[263] As James W. Ely and Jon W. Bruce eloquently stated, "[a] conservation easement is designed to preserve servient

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[257] *Id.*

[258] *Id.*

[259] In the Matter of 49 WB, LLC v. Vill. of Haverstra, 44 A.D.3d 226 (N.Y. App. Div. 2007).

[260] Aspen Creek Estates, Ltd. v. Town of Brookhaven, 47 A.D.3d 267, 276 (N.Y. App. Div. 2007).

[261] *Id.* at 277.

[262] *Id.* at 278.

[263] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

land in an undeveloped or natural state."[264] Conservation easements are binding obligations that run with the land in perpetuity, and may be used to preserve open space, scenic views, wildlife habitats, outdoor recreation areas, farmland and working forests.[265] Generally, the landowner grants the conservation easement to a land trust or to a governmental agency.[266] The landowner retains title to the land, but the conservation easement restricts the landowner from exercising certain rights on the property inconsistent with the binding agreement.[267] Alternatively, the landowner may sell its property to a conservation organization, or to a governmental agency.

If a landowner wants to sell its property to an entity that will preserve and protect the land, the landowner may work with a land trust, conservation organization such as the Nature Conservancy, or a governmental agency. For example, the Trust for Public Land (TPL) "helps structure, negotiate, and complete land transactions."[268] "TPL buys land from willing landowners and then transfers it to public agencies, land trusts, or other groups for permanent protection."[269] TPL does not actually retain ownership of the land, but rather secures funding, purchases the land, and places it in good hands. TPL stated that "[p]ublic agencies appreciate that TPL can often secure transaction funding and provide the extra staff, financial expertise, and legal support needed to move quickly."[270] Governmental agencies are benefitted by working with willing sellers, rather than condemning property, because they can get a better deal.[271]

In working with land trusts and willing sellers, governmental agencies can secure additional funding for the purchase that it would not have received if it were to condemn the property. In voluntary conservation transactions, the landowner is not adversarial, and the organizations involved work together to achieve the common goal of conservation.

In 2004, Del Monte stopped growing pineapple on land in Wahiawa, O'ahu, owned by the estate

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[264] James W. Ely, Jr. & Jon W. Bruce, *Conservation Easements*, THE LAW OF EASEMENTS & LICENSES IN LAND § 12:2 (2013).

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Conservation Transactions*, TRUST FOR PUBLIC LAND (Mar. 2, 2013, 9:15 AM), http://www.tpl.org/ what-we-do/services/conservation-transactions/.

[269] *Id.*

[270] *Id.*

[271] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

of George Galbraith.[272] The land is classified agricultural and the property surrounds Kūkaniloko, the royal birthing site that is one of the most significant cultural sites on O'ahu.[273] The Bank of Hawai'i, Corp. was the trustee for the Galbraith Estate, and in 2008 worked with "Canadian developer Dennis Blain [who attempted] to purchase the land and convert it into five-acre parcels."[274] On June 25, 2008, the deal to sell the land to Blain fell through and the Bank of Hawai'i, Corp. looked to re-market the land.[275]

Then-Senator Russell Kokubun, now Chairman of the Hawai'i DOA, stated, "'[t]he general sentiment in the community is that it (Blain's proposal) [was] an inappropriate use of the land[.']"[276] Senator Kokubun further expressed the "'need to invest and preserve lands of great importance . . . [because i]t just makes a lot of sense for ensuring the long-term viability of agriculture on O'ahu.'"[277]

With help from multiple public and private entities, in 2012, TPL facilitated the purchase of the Galbraith Estate.[278] The State of Hawai'i contributed $13 million from general obligation bonds.[279] The U.S. Army Garrison Hawai'i/DOD buffer program contributed $4.5 million.[280] The City & County of Honolulu contributed $4 million from the Clean Water & Natural Lands fund.[281] The Office of Hawaiian Affairs contributed $3 million.[282] And D.R. Horton – Schuler Division, the developer of Ho'opili,[283] contributed $500,000.[284] TPL assembled the sources of funding, however, if the landowner has not been a willing seller, but rather a governmental agency condemned the property, TPL would not

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[272] Press Release, Trust for Public Land, *Galbraith Estate in Central Oahu Protected for Farming* (Dec. 11, 2012), *available at* http://www.tpl.org/news/press-releases/2012-press-releases/galbraith-estate-protected.html.

[273] *Id.*

[274] Peter Boylan, *Push on to save Galbraith Estate*, HONOLULU ADVERTISER, June 26, 2008, *available at* http://the.honoluluadvertiser.com/article/2008/Jun/26/ln/hawaii806260349.html.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] Press Release, Trust for Public Land, *supra* note 272.

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] $500,000 was donated by D.R. Horton/Schuler, which plans to develop housing on Hoopili farmland. *See* Karleanne Matthews, *Ag Save*, HONOLULU WEEKLY (Dec. 19, 2012), *available at* http://honoluluweekly.com/diary/2012/12/ag-save-2/.

[284] Press Release, Trust for Public Land, *supra* note 272.

have been involved in the process.

The Galbraith Estate story is one of success. TPL transferred 1,200 acres of the Galbraith Estate to the ADC.[285] ADC's "plan is to provide large and small farming operations with long-term licenses."[286] TPL transferred the remaining 500 acres to OHA that surround Kūkaniloko, and OHA plans to protect the historic site.[287] Governor Neil Abercrombie expressed that the purchase will "reduce our reliance on food imports and increase our food security - an important part of [his] New Day Initiative."[288] The deal was so successful because the public recognized the importance of keeping the land in agriculture, and there was support and cooperation between the community, the government, TPL, and the landowner.[289]

If the Galbraith Estate was not willing to sell its property to the state, and instead wanted to sell its property to a developer, it is likely the state would not have been successful in acquiring the property. The state or county would have had to condemn the property, which is a costly and adversarial process. Further, TPL does not participate in transactions that involve condemnation.

In the case of the Galbraith Estate the state would have faced challenges in condemning the property. The land had an estimated value of $30-50 million, which the condemner would have had to pay.[290] Further, condemning agricultural land to protect it from development has not been challenged in Hawai'i courts under the public purpose test, and it is unknown which way the courts would sway if the landowner challenged the condemnation. Thus, if the Galbraith Estate had not been not a willing seller, it is likely that a condemnation would not have been successful due to the size and value of the land. The governmental entity initiating condemnation of the property would have had to pay more than it did with the TPL purchase, and it would have likely had a long and expensive court battle as well. In the end, working with a willing landowner is generally cheaper, quicker, and both sides achieve their goals. Although it is not the ideal situation for any parties involved, the government may condemn land if it is necessary to serve a legitimate public purpose.

V. RECOMMENDATIONS

This section makes recommendations to the state regarding how it could condemn agricultural land to protect it from development, analyzes the strengths and weaknesses of the recommendations, and offers alternatives to condemnation to protect agricultural land.

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[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

[290] Boylan, *supra* note 274.

A. Recommendations for the Condemnation of Agricultural Land

The recommendations below are basic suggestions on how the DOA could exercise eminent domain if the power was given to it by the Legislature, what the statutory framework could look like, issues the DOA should consider for its statutory framework, and how the DOA could fund the condemnation. The exercise of eminent domain is controversial, especially when the purpose is to block development.

1. *Power of Eminent Domain for the Department of Agriculture*

The Legislature should grant the DOA the explicit power of eminent domain to enable the DOA to carry out its statutory purpose of conserving and protecting agricultural lands, promoting diversified agriculture, increasing agricultural self-sufficiency, and ensuring the availability of agriculturally suitable lands.[291] The primary authority for exercise of a power of eminent domain resides in Legislature.[292] The state, or any agency of the state duly authorized to exercise the power of eminent domain,[293] may take private property for public use.[294] The Hawai'i Public Housing Authority,[295] the Board of Land and Natural Resources,[296] Irrigation Corporations,[297] the Director of Transportation,[298] and the Hawai'i Housing Finance and Development Corporation,[299] are examples of state agencies that have explicit powers of eminent domain to carry out the purposes of the respective agencies.

The DOA does not have explicit power of eminent domain. In order for the DOA to carry out its agency mission effectively and efficiently, the Legislature should grant the DOA the power of eminent domain. If the DOA had this power, it should only exercise the power under circumstances where condemnation is considered the last resort, similar to the HHFDC condemnation in Waiāhole. In order for the DOA to successfully condemn property, the DOA would need to promulgate rules for the condemnation process that align with statutory requirements, similar to the Town from *Aspen Creek.* There are many details that the DOA would need to consider before it could condemn property.

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[291] HAW. REV. STAT. § 141-1(8) (2012).

[292] Kashiwa v. Chang, 46 Haw. 279 (1963).

[293] HAW. REV. STAT. § 101-1 (2012).

[294] *Id.* at § 101-2.

[295] *Id.* at § 356D-15.

[296] *Id.* at § 206-19.

[297] *Id.* at § 101-41.

[298] *Id.* at § 277-3.

[299] *Id.* at § 201H-13.

2. *Statutory Framework and Issues to Consider for Condemnation Procedures*

The DOA would need to establish guidelines for choosing land to condemn. Senator Dela Cruz said the first step the DOA should take is to conduct an inventory of all of the agricultural land in the whole state, and to rank the lands.[300] This inventory and ranking could be modeled after TPL's *North Shore Greenprint,* which is "a plan for meeting local and regional conservation priorities."[301] TPL brought community members together to "collaborate to identify the types of land that best serve their goals—and to create strategies for protecting those places with interested landowners."[302] The DOA could model their inventory and ranking after the *North Shore Green print,* that "includes a detailed set of color-coded maps and action strategies."[303] The criterion for IAL would be a good place for the DOA to start to identify and rank the agricultural lands it may want to protect. IAL:

> (1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
>
> (2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
>
> (3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.[304]

In addition, the DOA should add, "at certain risk of being developed," to the guidelines for condemnation. Similar to the requirements for irrigation corporations,[305] the DOA should add a requirement stating that the Board of Agriculture must find that the proposed condemnation is in the public interest, that the proposed condemnation is necessary, and that the Department will use the property to further the purpose of the Department.

The DOA would need to address many issues before it could condemn property. The DOA would need to establish what would happen to the land after the DOA condemned the property. The DOA would need to decide if the ADC is the appropriate landholder of the condemned property, or if the DOA could transfer title of the land, with an agriculture easement attached to the property to a private entity. It should take into consideration existing infrastructure, irrigation sources, and access to

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[300] Interview with Donavan Dela Cruz, Hawaii State Senator, in Honolulu, Haw. (Apr. 10, 2013).

[301] Trust for Public Land & North Shore Community Land Trust, *The North Shore Greenprint: Kahuku to Ka'ena, Mauka to Makai* 2 (2012) *available at* http://cloud.tpl.org/pubs/convis-hi-northshore-greenprint.pdf.

[302] *Id.*

[303] *Id.*

[304] HAW. REV. STAT. § 205-42 (2012).

[305] *Id.* at § 101-43.

the property. It should also address issues regarding the leased property, including: 1) how much it would lease the property for; 2) whether it would want to limit leases to food producing farmers only; 3) how large the lots would be; and 4) whether the DOA could restrict farmers who produce food on the condemned land from exporting their goods outside of Hawai‘i. This addresses what farmers would be included, what the land could be used for, and how the property would be managed.

At the outset of the condemnation, the DOA should initiate partnerships with organizations for the purchase of agricultural land. Although land trusts do not work with condemned land, other non-profit organizations or public interest groups may want to support the efforts to preserve agricultural land, just as many organizations partnered together to make the Galbraith Estate purchase possible. Because purchasing land is costly, the DOA would need secure to large amounts of guaranteed funding to condemn land.

3. *Funding Mechanisms*

The state, or the ADC, could issue revenue bonds[306] for the amount of the condemnation. Revenue bonds are

> . . . all bonds payable solely from and secured by the revenue, or user taxes, or any combination of both, of an undertaking or loan program or any loan made thereunder for which bonds are issued and as otherwise provided in this part; provided that the term shall include all bonds issued by the director of finance under the authority of section 10(a), Act 339, Session Laws of Hawaii 1993, as amended, for the purposes of the hurricane bond loan fund.

Revenue bonds are paid back by the revenue from the project funded by the bonds. Ideally, the lease payments for the farmland would pay the bondholders back. In an interview with Hawai‘i State Senator Donovan Dela Cruz, he expressed concern over the feasibility of issuing revenue bonds for an agriculture land purchase.[307] He stated that he did not believe revenue from farm leases could pay the revenue bonds back.[308] Although revenue bonds may not be the best alternative, it is a funding option the state has.

The state could also issue general obligation bonds[309] to fund a condemnation. General obligation bonds are secured by the full faith and credit of the state.[310] State issued general obligation bonds are

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[306] *Id.* at §§ 39-51 – 39-76.

[307] Interview with Donavan Dela Cruz, Hawaii State Senator, in Honolulu, Haw. (Apr. 10, 2013).

[308] *Id.*

[309] HAW. REV. STAT. §§ 39-1 – 39-19 (2012).

[310] JOEL A. MINTZ, RONALD H. ROSENBERG & LARRY A. BAKKEN, FUNDAMENTALS OF MUNICIPAL FINANCE 2 (American Bar Association 2010).

paid back with sales and income taxes.[311] The public may be opposed to the state issuing general obligation bonds to purchase agricultural land because the taxpayers' money would be used to pay the bonds back.

In addition to bonds, the Legislature could fund condemnations with various taxes. Generally, the import tax law imposes taxes on importers or purchasers of goods to be sold.[312] In this instance, the Legislature could appropriate a percentage of the food import tax[313] to the program. The Legislature could also appropriate a percentage of Conveyance Tax to the program,[314] similar to the way the Legacy Land Conservation Program (LLCP) is funded.[315] If the Legislature appropriated a percentage of certain taxes to the DOA, the DOA would have a secure funding source year after year. Although the amount of funding the DOA would receive would vary based on the amount of the certain taxes collected, it would allow the DOA to rely on the funding, and diversify its funding sources. In addition to state taxes, the county could earmark a certain percentage of the real property tax[316] each year, similar to the Clean Water & Natural Lands Fund[317] that receives a half-percent of real property tax revenues.

In addition to receiving various tax dollars, the DOA could apply for state or county grants. LLCP funds are available for agricultural acquisitions. However, the DOA would need to supplement this funding for a large condemnation because the LLCP budget is usually only between two and five million dollars each year.[318] Funding could come from the county level as well. Clean Water & Natural Lands grants are also available for agricultural land acquisitions.[319] Because the act of condemning land is very costly, the DOA would need to utilize multiple sources of funding.

B. Strengths of Condemnation to Protect Agricultural Land

The benefit of having a strong DOA to identify prime agriculture land, and to recognize when it is threatened is great. Recently, two large pieces of agricultural land were reclassified from agriculture to urban for the Hoʻopili and Koa Ridge developments. If policy was in place to enable the DOA to take

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[311] *Id.*

[312] HAW. REV. STAT. § 18-238 (2012).

[313] The import tax is codified in HAW. REV. STAT. § 18-238 (2012).

[314] HAW. REV. STAT. § 247-7 (2012).

[315] *Id.* at § 13-140-1.

[316] *Id.* at § 246.

[317] HONOLULU, HAW., REV. ORDINANCES § 6-62 (2012).

[318] Telephone Interview with Molly Schmidt, Program Coordinator, Hawaii State Legacy Land Conservation Program (Apr. 19, 2013).

[319] HONOLULU, HAW., REV. ORDINANCES § 6-62 (2012).

action and exercise eminent domain to acquire these properties, and the DOA made the decision that the agricultural land should stay in agricultural production, thousands of acres of productive agricultural land could have been kept in production. These two examples are important to illustrate that if the DOA decided condemnation was necessary, the DOA should be able to act quickly, and without many roadblocks to acquire the agricultural land before it is reclassified to urban. The state technically could exercise eminent domain to acquire the Ho'opili and Koa Ridge properties today, but the value of the land is greater than it was when it was classified agricultural because land is appraised at highest and best use in its current state.[320] In these two instances, the highest and best use of land classified as urban, has substantially greater monetary value than the highest and best use of land classified as agricultural. Although the public would benefit from the DOA having the ability to act quickly on agricultural land protection, there are many weaknesses within the concept.

C. Weaknesses of Condemnation to Protect Agricultural Land

If the DOA condemns property to block development, issues that are likely to arise are lack of funding, court challenges by landowners, lack of support from the public, and political pressure on the DOA.[321] The first weakness in the plan to condemn land to protect its agricultural value is lack of funding. States and counties are traditionally underfunded, and when new expenses are added, the government must find a new source of funding for the program. This highlights a great weakness of condemnation because finding new sources of funding is challenging.

Large landowners who plan to develop large tracts of land in Hawai'i generally have a lot of money and political ties. As Eric K. Martinson & Bruce M. Nakaoka said, "[i]n an island state, ownership of an extremely limited amount of productive real estate has always been viewed as a foundation for economic, social and political influence."[322] Large developers will likely challenge a condemnation.[323] A court challenge would put additional burden on the state attorneys tasked with defending the condemnation. As mentioned previously, to prevail at court, the landowner must show that the condemnation would not serve a legitimate public purpose.[324] The state currently has programs

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[320] "Highest and best use" of property means that use which would give the property its highest cash market value on the valuation date. This may be the actual use of the property on that date or a use to which it was then adaptable and which would be anticipated with such reasonable certainty that it would enhance the market value on that date. Donald T. Morrison, *Highest and Best Use of Property Taken Under Eminent Domain*, 19 AM. JUR. PROOF OF FACTS 3d 613 (2013).

[321] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

[322] Eric K. Martinson & Bruce M. Nakaoka, *Compiling the Top 20 Wealthiest Landowners*, HAWAII BUSINESS, Nov. 2011, *available at* http://www.hawaiibusiness.com/Hawaii-Business/November-2001/Compiling-the-Top-20-Wealthiest-Landowners/.

[323] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

[324] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984).

and initiatives with the goal of increasing food self-sufficiency for the benefit of the public, therefore it is likely the courts would find a legitimate public purpose in condemning agricultural land to increase food self-sufficiency. However, the courts in Hawai'i have not been asked to determine whether exercising eminent domain to save agricultural land from development is a valid public purpose, so a positive ruling by the court is not guaranteed.[325]

Additionally, there could be a significant amount of political pressure on the DOA to condemn, or in the alternative, to not condemn certain land.[326] Land development is highly political in Hawai'i and it is likely that some developers have political influence. As said by George Cooper and Gavan Daws in the early 1990s,

> When we put together the names of developers and the politically well connected, the answer was immediately and strikingly obvious. In those real estate huis, among those real estate lawyers, among those groups of contractors, speculators, developers and landlords, are to be found the names of virtually the entire political power structure of Hawaii that evolved out of the "Democratic revolution."[327]

In addition to developer opposition, the DOA may also face opposition from construction trade unions, hotel unions, the Pacific Legal Foundation, as well as other property rights advocates.[328]

Because of its high cost, political implications, and opposition as mentioned earlier, condemnation of agricultural land to protect it from development presents many challenges. There are many options the DOA should explore before exercising eminent domain.

D. Alternatives to Condemnation to Protect Agricultural Land

Condemnation is a powerful tool, politically difficult, and should only be utilized as a last resort. The DOA should consider alternatives to condemnation if feasible. If condemnation is not an option to achieve its goals, other possibilities include, but are not limited to, land exchanges, voluntary land conservation, and public-private partnerships.[329]

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[325] This statement is based on Westlaw and LexisNexis research in which I was unable to find any cases related to condemnation of agricultural land to protect it from development in Hawaii.

[326] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

[327] GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 12 (University of Hawaii Press 1990).

[328] Interview with Lea Hong, Hawaiian Islands Program Director, Trust for Public Land, in Honolulu, Haw. (Apr. 11, 2013).

[329] Interview with Donavan Dela Cruz, Hawaii State Senator, in Honolulu, Haw. (Apr. 10, 2013).

1. *Land Exchange*

A land exchange is a voluntary transaction where two landowners trade land.[330] In Hawai'i, public land may be exchanged for private land if the exchange serves a public purpose.[331] The public land and private land to be exchanged is required by statute to be of substantially equal value.[332] If the private land is worth less than the public land, the private landowner is required by statute to pay the state the difference of the land values at the time of the exchange.[333] The exchange is subject to legislative approval.[334] The agency that participates in the exchange must submit a resolution to the Legislature detailing the exchange.[335] The DOA could initiate a land exchange if it identified agricultural land that a private party owned, and the DOA decided it would be in the public interest to hold title to the property. The DOA would then make an offer to exchange DOA land for the desired land, and the other landowner would have to consent. The land exchange option is inexpensive and could be a valuable tool for the DOA if the private party is willing to work with the DOA.

2. *Voluntary Land Conservation*

Voluntary land conservation occurs when a landowner wants to conserve certain values of its land, yet retain economic value of the development rights, the landowner may sell its land to a conservation organization or government entity, or put a conservation easement on its land. If a landowner wants to sell its property to an entity that will preserve and protect the land, the landowner may work with a land trust, conservation organization such as the Nature Conservancy, or a governmental agency, such as the DOA. With this alternative, the DOA could partner with non-profit organizations that could fundraise for the acquisition, and retain ownership of the land, similar to the Galbraith Estate purchase. This option would reduce the amount of funding the DOA would have to otherwise provide if it was purchasing the land without partners, and garner more public support for the project than it would if the DOA were to condemn land.

3. *Public-Private Partnership*

A public-private partnership is a partnership between a government entity and a private sector entity with the purpose of addressing certain issues the government entity may not be able to address on

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[330] HAW. REV. STAT. § 171-50 (2012). For an example of a land swap, *see* S.C.R. No. 20, 27th Leg., Reg. Sess. (Haw. 2013) *available at* http://www.capitol.hawaii.gov/session2013/bills/ SCR20_.pdf.

[331] HAW. REV. STAT. § 171-50(a) (2012).

[332] *Id.* at § 171-50(b).

[333] *Id.* at § 171-50(b).

[334] *Id.* at § 171-50(c).

[335] *Id.*

its own due to economic constraints.[336] The DOA could partner with a private entity to acquire agricultural land and manage it for food production. This option could be modeled after the Natural Area Partnership Program (NAPP).[337] Under the NAPP, the private landowner dedicates its land in perpetuity through transfer of fee title or a conservation easement to the state, and in return the state provides funding to manage the private lands that are dedicated to conservation.[338] Although the public-private partnership model would require the DOA to expend resources, if the public-private partnership furthers the mission of the DOA and the goal of the project, partnership is a good alternative to condemnation of agricultural land to protect it from development.

There are many other alternatives to condemnation that are not discussed in this paper. The three alternatives mentioned in this section are examples of how the state could creatively protect agricultural land without exercising eminent domain.

VI. CONCLUSION

Ancient Hawaiians utilized farming and fishing to produce food to feed the entire population. Today, Hawai‘i imports approximately 85 to 90 percent of its food,[339] and only 2.3 percent of the land in Hawai‘i that is classified as agriculture is utilized for food crops.[340] Hawai‘i’s dependence on imported food makes the state vulnerable to “natural disasters and global events that might disrupt shipping and the food supply.”[341] In 2012, the LUC approved the reclassification of 2,300 acres of agricultural land to urban, for two residential community development projects. Taking land out of agricultural production is not in the interest of the people of Hawai‘i.[342]

The power of eminent domain is great, and the state should exercise that power only when necessary for the public benefit. The DOA, the agency responsible for managing and enhancing agricultural productivity for the state, does not have the power to exercise eminent domain. The DOA is responsible for carrying out objectives in the AG Plan that includes the achievement of productive agricultural use of lands most suitable and needed for agriculture,[343] maximum degree of public

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[336] *See* S.B. 215 S.D. 1, 27th Leg., Reg. Sess. (Haw. 2013).

[337] The natural area partnership program to provide state funds on a two-for-one basis with private funds for the management of private lands that are dedicated to conservation. *See* HAW. REV. STAT. § 195-6.5 (2012).

[338] HAW. REV. STAT. § 195-6.5 (2012).

[339] State of Haw. – Dept. of Bus., Econ. Dev. & Tourism – Office of Planning, *supra* note 46 at ii.

[340] Calculated by subtracting the 8,000 acres of coffee from the 52,900 acres of food crops, which equals 44,900, and dividing that number by the total acres of agricultural land, 1,928,318. This equals 0.02328454, and is rounded down to 2.3%.

[341] State of Haw. – Dept. of Bus., Econ. Dev. & Tourism – Office of Planning, *supra* note 46.

[342] This is not intended to imply that residential communities are not important.

[343] State of Haw. – Dept. of Agric., *supra* note 169 at III-20.

understanding and support of agriculture in Hawai'i,[344] and adequate support services and infrastructure to meet agricultural needs.[345] The DOA is the agency best equipped to identify agricultural lands that are at risk of being developed and should have the same power that other agencies have that may condemn property valuable to the purpose of their agency and the public. The Legislature should explicitly grant the DOA the power of eminent domain in order to carry out its goal of protecting and preserving agricultural land.

One possible example of how the DOA could exercise eminent domain to protect agricultural land from development is on Maui. The Maui Tomorrow Foundation expressed concern because it believes that HC&S, an A&B subsidiary, plans to subdivide and develop many of the 35,000 acres now planted with sugarcane.[346] If the land were to meet the DOA's criteria set out in its policy to acquire agricultural land through eminent domain, and if A&B's plan is to develop the land and is unwilling to sell or work with conservation organizations, the DOA could begin condemnation proceedings before A&B petitions the LUC to reclassify its land to urban. The DOA would face many challenges if it decided condemnation was appropriate in this situation. A&B would likely oppose the condemnation, and challenge the action in court. Construction unions, property rights advocates, and members of the public would likely oppose the condemnation as well. In addition, the DOA would need to create enough funding for the purchase, which would require a lot of coordination, and support from the Legislature. It would not be an easy task, but if the DOA had the power of eminent domain, Legislative and political support, and enough funding, the condemnation could be successful. The DOA would be able to lease the land to farmers on Maui for diversified agriculture.

Although the state's power of eminent domain is an extreme option with many challenges, it is a tool that should not be taken off the table. The power is rooted deep in legal history and will always be an option if the outcome will benefit the public. The Legislature should grant the DOA the power of eminent domain to allow it to ensure that there is enough productive agricultural land in the state to support the people of the state.

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[344] *Id.* at III-28.

[345] *Id.* at III-36.

[346] Chris Hamilton, *Compromise Decided for E. Maui Streams*, THE MAUI NEWS, May 26, 2010, *available at* http://www.mauinews.com/page/content.detail/id/531872.html.

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