

CHAPTER 205
LAND USE COMMISSION

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Note

Prior law: L 1961, c 187.

Acquisition of important agricultural lands owned by the Galbraith Estate; department of land and natural resources powers, etc. L 2008, c 234, §§8 to 10.

Department of transportation's bridge rehabilitation and replacement program; temporary exemption from certain construction requirements of this chapter through June 30, 2017 or until completion. L 2012, c 218.

Judiciary report to 2019 legislature on change in judicial proceedings made by L 2016, c 48. L 2016, c 48, §11.

Cross References

Acquisition of important agricultural lands, see §§163D-31 to 163D-33.

Private agricultural parks, see chapter 169.

Law Journals and Reviews

Maha'ulepu v. Land Use Commission: A Symbol of Change; Hawaii's Land Use Law Allows Golf Course Development on Prime Agricultural Land by Special Use Permit. 13 UH L. Rev. 205.

Honolulu's Ohana Zoning Law: To Ohana or Not to Ohana. 13 UH L. Rev. 505.

The Lum Court, Land Use, and the Environment: A Survey of Hawai'i Case Law 1983 to 1991. 14 UH L. Rev. 119.

Residential Use of Hawai'i's Conservation District. 14 UH L. Rev. 633.

Dolan v. City of Tigard: Individual Property Rights v. Land Management Systems. 17 UH L. Rev. 193.

Is Agricultural Land in Hawai'i "Ripe" for a Takings Analysis? 24 UH L. Rev. 121 (2001).

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions. 27 UH L. Rev. 441 (2005).

Ala Loop and the Private Right of Action Under Hawai'i Constitution Article XI, Section 9: Charting a Path Toward a Cohesive Enforcement Scheme. 33 UH L. Rev. 367 (2010).

A Self-Executing Article XI, Section 9--The Door For a Bivens Action for Environmental Rights? 34 UH L. Rev. 187 (2012).

Demolition of Native Rights and Self Determination: Act 55's Devastating Impact through the Development of Hawaii's Public Lands. 35 UH L. Rev. 297 (2013).

The (Somewhat) False Hope of Comprehensive Planning. 37 UH L. Rev. 39 (2015).

Case Notes

Religious Land Use and Institutionalized Persons Act of 2000, assuming it was constitutional, did not facially invalidate Hawaii's land use law. 229 F. Supp. 2d 1056 (2002).

Article XI, §9 of the Hawaii constitution is self-executing, and §205-12 imposes "reasonable limitations and regulations" that were applicable to the case which allowed the private right of action to enforce this chapter. 123 H. 391, 235 P.3d 1103 (2010).

Charter school failed to establish that community association's claim under this chapter was moot, and even if the case was moot, the public interest exception applied as (1) appeals court ruling that there was no private right of action under this chapter injected the requisite degree of public concern; (2) public officials needed guidance as to whether private citizens have a private right of action to enforce this chapter; and (3) given the volume of land in this State and the frequency with which issues relating to this chapter have been litigated, the question of private party enforcement was likely to recur in the future. 123 H. 391, 235 P.3d 1103 (2010).

In the circumstances of the case, article XI, §9 of the Hawaii constitution created a private right of action to enforce this chapter, and the legislature confirmed the existence of that right of action by enacting §607-25, which allows for the recovery of attorneys' fees in such actions. 123 H. 391, 235 P.3d 1103 (2010).

This chapter is a law relating to environmental quality within the meaning of article XI, §9 of the Hawaii constitution. 123 H. 391, 235 P.3d 1103 (2010).

As no private cause of action exists to enforce this chapter, appellants lacked standing to prosecute their claim under this chapter against landowner and circuit court lacked subject matter jurisdiction to consider this claim. 119 H. 164 (App.), 194 P.3d 1126 (2008).

Provisions of chapter provide authority to issue special use permits for golf courses on prime agricultural lands. 71 H. 332, 790 P.2d 906.

"[PART I. GENERALLY]

Law Journals and Reviews

Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions. 27 UH L. Rev. 441 (2005).

§205-1 Establishment of the commission. There shall be a state land use commission, hereinafter called the commission. The commission shall consist of nine members who shall hold no other public office and shall be appointed in the manner and serve for the term set forth in section 26-34. One member shall be appointed from each of the counties and the remainder shall be appointed at large; provided that one member shall have substantial experience or expertise in traditional Hawaiian land usage and knowledge of cultural land practices. The commission shall elect its chairperson from one of its members. The members shall receive no compensation for their services on the commission, but shall be reimbursed for actual expenses incurred in the performance of their duties. Six affirmative votes shall be necessary for any boundary amendment.

The commission shall be a part of the department of business, economic development, and tourism for administration purposes, as provided for in section 26-35.

The commission may engage employees necessary to perform its duties, including administrative personnel and an executive officer. The executive officer shall be appointed by the commission and the executive officer's position shall be exempt from civil service. Departments of the state government shall make available to the commission such data, facilities, and personnel as are necessary for it to perform its duties. The commission may receive and utilize gifts and any funds from the federal or other governmental agencies. It shall adopt rules guiding its conduct, maintain a record of its activities and accomplishments, and make recommendations to the governor and to the legislature through the governor. [L 1963, c 205, pt of §2; Supp, §98H-1; HRS §205-1; am L 1975, c 193, §2; am L 1976, c 43, §1; gen ch 1985; am L 1987, c 336, §7; am L 1990, c 293, §8; gen ch 1993; am L 2006, c 296, §1]

Cross References

Commission placed in department of business, economic development, and tourism, see §26-18.

Commissions, generally, see §26-34.

Case Notes

A member of the land use commission did not qualify as a de facto officer, where, among other things, the senate rejected the member's nomination for a second term, which effectively

served as public notice that the member was ineligible to serve as a holdover member. 132 H. 184, 320 P.3d 849 (2013).

The intermediate court of appeals erred in determining that a member of the land use commission continued to serve as a valid holdover after the senate's rejection of the member's nomination for a second term; the member's actions with respect to a petition to reclassify land were invalid. 132 H. 184, 320 P.3d 849 (2013).

" **§205-2 Districting and classification of lands.** (a)

There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts. The commission shall set standards for determining the boundaries of each district, provided that:

- (1) In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included;
- (2) In the establishment of boundaries for rural districts, areas of land composed primarily of small farms mixed with very low density residential lots, which may be shown by a minimum density of not more than one house per one-half acre and a minimum lot size of not less than one-half acre shall be included, except as herein provided;
- (3) In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and
- (4) In the establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in Act 234, section 2, Session Laws of Hawaii 1957, are renamed "conservation districts" and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to Act 234, section 2, Session Laws of Hawaii 1957, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.

In establishing the boundaries of the districts in each county, the commission shall give consideration to the master plan or general plan of the county.

(b) Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.

In addition, urban districts shall include geothermal resources exploration and geothermal resources development, as defined under section 182-1, as permissible uses.

(c) Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre, except as provided by county ordinance pursuant to section 46-4(c), in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with low density residential lots except that within a subdivision, as defined in section 484-1, the commission for good cause may allow one lot of less than one-half acre, but not less than eighteen thousand five hundred square feet, or an equivalent residential density, within a rural subdivision and permit the construction of one dwelling on such lot; provided that all other dwellings in the subdivision shall have a minimum lot size of one-half acre or 21,780 square feet. Such petition for variance may be processed under the special permit procedure. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics. Rural districts shall also include golf courses, golf driving ranges, and golf-related facilities.

In addition to the uses listed in this subsection, rural districts shall include geothermal resources exploration and geothermal resources development, as defined under section 182-1, as permissible uses.

(d) Agricultural districts shall include:

- (1) Activities or uses as characterized by the cultivation of crops, crops for bioenergy, orchards, forage, and forestry;
- (2) Farming activities or uses related to animal husbandry and game and fish propagation;
- (3) Aquaculture, which means the production of aquatic plant and animal life within ponds and other bodies of water;
- (4) Wind generated energy production for public, private, and commercial use;
- (5) Biofuel production, as described in section 205-4.5(a)(16), for public, private, and commercial use;
- (6) Solar energy facilities; provided that:
 - (A) This paragraph shall apply only to land with soil classified by the land study bureau's detailed

- land classification as overall (master) productivity rating class B, C, D, or E; and
- (B) Solar energy facilities placed within land with soil classified as overall productivity rating class B or C shall not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser, unless a special use permit is granted pursuant to section 205-6;
- (7) Bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, including farm dwellings as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, agricultural-energy facilities as defined in section 205-4.5(a)(17), vehicle and equipment storage areas, and plantation community subdivisions as defined in section 205-4.5(a)(12);
 - (8) Wind machines and wind farms;
 - (9) Small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land; provided that these facilities shall not be used as or equipped for use as living quarters or dwellings;
 - (10) Agricultural parks;
 - (11) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors; provided that the agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-5;
 - (12) Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least

three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2;

- (13) Open area recreational facilities;
- (14) Geothermal resources exploration and geothermal resources development, as defined under section 182-1;
- (15) Agricultural-based commercial operations, including:
 - (A) A roadside stand that is not an enclosed structure, owned and operated by a producer for the display and sale of agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii;
 - (B) Retail activities in an enclosed structure owned and operated by a producer for the display and sale of agricultural products grown in Hawaii, value-added products that were produced using agricultural products grown in Hawaii, logo items related to the producer's agricultural operations, and other food items; and
 - (C) A retail food establishment owned and operated by a producer and permitted under title 11, chapter 12 of the rules of the department of health that prepares and serves food at retail using products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii.

The owner of an agricultural-based commercial operation shall certify, upon request of an officer or agent charged with enforcement of this chapter under section 205-12, that the agricultural products displayed or sold by the operation meet the requirements of this paragraph; and

- (16) Hydroelectric facilities as described in section 205-4.5(a)(23).

Agricultural districts shall not include golf courses and golf driving ranges, except as provided in section 205-4.5(d).

Agricultural districts include areas that are not used for, or that are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

(e) Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach

reserves; conserving indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept. Conservation districts shall also include areas for geothermal resources exploration and geothermal resources development, as defined under section 182-1. [L 1963, c 205, pt of §2; Supp, §98H-2; HRS §205-2; am L 1969, c 182, §5; am L 1975, c 193, §3; am L 1977, c 140, §1 and c 163, §1; am L 1980, c 24, §2; am L 1985, c 298, §2; am L 1987, c 82, §3; am L 1989, c 5, §2; am L 1991, c 191, §1 and c 281, §2; am L 1995, c 69, §8; am L 2005, c 205, §2; am L 2006, c 237, §3 and c 250, §1; am L 2007, c 159, §2; am L 2008, c 31, §2 and c 145, §2; am L 2011, c 217, §2; am L 2012, c 97, §6, c 113, §2, c 167, §1, and c 329, §3; am L 2014, c 55, §2; am L 2015, c 228, §2; am L 2016, c 173, §2]

Note

"Title 11, chapter 12 of the rules of the department of health" referred to in subsection (d)(15)(C) is repealed. For present provisions, see chapter 11-50, Hawaii Administrative Rules.

Cross References

Districts, generally, see chapter 4.

Attorney General Opinions

Uses within agricultural districts. Att. Gen. Op. 62-33, 62-38.

Dwellings permissible under this section are further defined by regulations established under §205-7. Att. Gen. Op. 75-8.

Law Journals and Reviews

Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions. 27 UH L. Rev. 441 (2005).

" **§205-3 Retention of district boundaries.** Land use district boundaries existing as of June 2, 1975, shall continue

in full force and effect subject to amendment as provided in this chapter or order of a court of competent jurisdiction based upon any litigation filed prior to July 1, 1975, or filed within thirty days after service of a certified copy of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later. [L 1963, c 205, pt of §2; Supp, §98H-3; am L 1975, c 193, §4; HRS §205-3]

Revision Note

"June 2, 1975" substituted for "the effective date of this Act".

Attorney General Opinions

Statute contemplates and authorizes changes in classification as originally proposed and as finally adopted, and to require new notice and hearing whenever there is any change is too burdensome. Att. Gen. Op. 71-2.

" **§205-3.1 Amendments to district boundaries.** (a) District boundary amendments involving lands in the conservation district, land areas greater than fifteen acres, or lands delineated as important agricultural lands shall be processed by the land use commission pursuant to section 205-4.

(b) Any department or agency of the State, and department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified may petition the appropriate county land use decision-making authority of the county in which the land is situated for a change in the boundary of a district involving lands less than fifteen acres presently in the rural and urban districts and lands less than fifteen acres in the agricultural district that are not designated as important agricultural lands.

(c) District boundary amendments involving land areas of fifteen acres or less, except as provided in subsection (b), shall be determined by the appropriate county land use decision-making authority for the district and shall not require consideration by the land use commission pursuant to section 205-4; provided that such boundary amendments and approved uses are consistent with this chapter. The appropriate county land use decision-making authority may consolidate proceedings to amend state land use district boundaries pursuant to this subsection, with county proceedings to amend the general plan, development plan, zoning of the affected land, or such other proceedings. Appropriate ordinances and rules to allow

consolidation of such proceedings may be developed by the county land use decision-making authority.

(d) The county land use decision-making authority shall serve a copy of the application for a district boundary amendment to the land use commission and the department of business, economic development, and tourism and shall notify the commission and the department of the time and place of the hearing and the proposed amendments scheduled to be heard at the hearing. A change in the state land use district boundaries pursuant to this subsection shall become effective on the day designated by the county land use decision-making authority in its decision. Within sixty days of the effective date of any decision to amend state land use district boundaries by the county land use decision-making authority, the decision and the description and map of the affected property shall be transmitted to the land use commission and the department of business, economic development, and tourism by the county planning director. [L 1985, c 230, §3; am L 1987, c 336, §7; am L 1990, c 293, §8; am L 2005, c 183, §3]

Law Journals and Reviews

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

Case Notes

As section required county review of developer's 14.5 ± acre change of zone request, trial court did not err in concluding that county council properly approved developer's boundary amendment. 91 H. 94, 979 P.2d 1120.

" **[\$205-3.5] Reclassification of land contiguous to an agricultural district; approval conditions.** (a) Any decision approving a petition for a boundary amendment pursuant to this chapter where lands in the petition area are contiguous or adjacent to lands in the agricultural district, shall include the following conditions in the decision granting approval:

- (1) A prohibition on any action that would interfere with or restrain farming operations; provided the farming operations are conducted in a manner consistent with generally accepted agricultural and management practices on adjacent or contiguous lands in the agricultural district; and
- (2) Notification to all prospective developers or purchasers of land or interest in land in the petition

area and subsequent notification to lessees or tenants of the land, that farming operations and practices on adjacent or contiguous land in the agricultural district are protected under chapter 165, the Hawaii right to farm act, and that the notice shall be included in any disclosure required for the sale or transfer of real property or any interest in real property.

(b) For purposes of this section, "farming operation" shall have the same meaning as provided in section 165-2. [L 2008, c 124, §1]

" **§205-4 Amendments to district boundaries involving land areas greater than fifteen acres.** (a) Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district. This section applies to all petitions for changes in district boundaries of lands within conservation districts, lands designated or sought to be designated as important agricultural lands, and lands greater than fifteen acres in the agricultural, rural, and urban districts, except as provided in section 201H-38. The land use commission shall adopt rules pursuant to chapter 91 to implement section 201H-38.

(b) Upon proper filing of a petition pursuant to subsection (a) the commission shall, within not less than sixty and not more than one hundred and eighty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, as applicable.

(c) Any other provision of law to the contrary notwithstanding, notice of the hearing together with a copy of the petition shall be served on the county planning commission and the county planning department of the county in which the land is located and all persons with a property interest in the land as recorded in the county's real property tax records. In addition, notice of the hearing shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and public notice shall be given at least once in the county in which the land sought to be redistricted is situated as well as once statewide at least thirty days in advance of the hearing. The notice shall comply with section 91-9, shall indicate the time and place that maps showing the proposed district boundary may be inspected, and further shall inform all interested persons of their rights under subsection (e).

(d) Any other provisions of law to the contrary notwithstanding, prior to hearing of a petition the commission and its staff may view and inspect any land which is the subject of the petition.

(e) Any other provisions of law to the contrary notwithstanding, agencies and persons may intervene in the proceedings in accordance with this subsection.

(1) The petitioner, the office of planning, and the county planning department shall in every case appear as parties and make recommendations relative to the proposed boundary change.

(2) All departments and agencies of the State and of the county in which the land is situated shall be admitted as parties upon timely application for intervention.

(3) All persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

(4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, provided that the commission or its hearing officer if one is appointed may deny an application to intervene when in the commission's or hearing officer's sound discretion it appears that: (A) the position of the applicant for intervention concerning the proposed change is substantially the same as the position of a party already admitted to the proceeding; and (B) the admission of additional parties will render the proceedings inefficient and unmanageable. A person whose application to intervene is denied may appeal such denial to the circuit court pursuant to section 91-14.

(5) The commission shall pursuant to chapter 91 adopt rules governing the intervention of agencies and persons under this subsection. Such rules shall without limitation establish: (A) the information to be set forth in any application for intervention; (B) time limits within which such applications shall be filed; and (C) reasonable filing fees to accompany such applications.

(f) Together with other witnesses that the commission may desire to hear at the hearing, it shall allow a representative of a citizen or a community group to testify who indicates a

desire to express the view of such citizen or community group concerning the proposed boundary change.

(g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(h) No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17. Six affirmative votes of the commission shall be necessary for any boundary amendment under this section.

(i) Parties to proceedings to amend land use district boundaries may obtain judicial review thereof in the manner set forth in section 91-14, provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of the evidence.

(j) At the hearing, all parties may enter into appropriate stipulations as to findings of fact, conclusions of law, and conditions of reclassification concerning the proposed boundary change. The commission may but shall not be required to approve such stipulations based on the evidence adduced. [L 1963, c 205, pt of §2; am L 1965, c 32, §2; Supp, §98H-4; HRS §205-4; am L 1972, c 187, §2; am L 1975, c 193, §5; am L 1976, c 4, §1; am L 1985, c 230, §4; am L 1986, c 93, §1; am L 1987, c 336, §7; am L 1988, c 352, §2; am L 1989, c 261, §10; am L 1990, c 261, §1; am L 1995, c 235, §1; am L 1996, c 299, §3; am L 1997, c 350, §15; am L 1998, c 2, §60; am L 2005, c 183, §4; am L 2007, c 249, §15]

Attorney General Opinions

The commission may be empowered to impose conditions on reclassifications and to impose sanctions for violation of the conditions, and the conditions may be made to run with the land. Att. Gen. Op. 72-8.

Proposal to subdivide agricultural land into agriculturally unfeasible small lots would violate intent of chapter. Att. Gen. Op. 75-8.

Law Journals and Reviews

The Scramble to Protect the American Dream in Paradise: Is Affordable Housing Possible in Hawaii? 10 HBJ, no. 13, at 37 (2007).

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

Case Notes

Proceeding for amendment to boundaries challenged by adjoining landowner is a contested case within meaning of §91-1(5). 55 H. 538, 524 P.2d 84.

Provision that commission shall render decision within forty-five and ninety days after the public hearing is mandatory and decision rendered after the time period is void. 55 H. 538, 524 P.2d 84.

The adoption or amendment of boundaries is not a rule-making process within meaning of §91-1(4). 55 H. 538, 524 P.2d 84.

Person entitled under prior law to petition for change in boundary. 57 H. 84, 549 P.2d 737.

Where landlord seeks to evict tenants who exercise their rights to appear and testify at a public hearing, defense of retaliatory eviction is available. 59 H. 104, 577 P.2d 326.

Commission rules re intervention and "final order" for purposes of appeal, construed. 63 H. 529, 631 P.2d 588.

Proposal for recreational theme park on agricultural land was more properly the subject of a boundary amendment under this section, rather than a special permit. 64 H. 265, 639 P.2d 1079.

The intermediate court of appeals erred in determining that a member of the land use commission continued to serve as a valid holdover after the senate's rejection of the member's nomination for a second term; the member's actions with respect to a petition to reclassify land were invalid. 132 H. 184, 320 P.3d 849 (2013).

The land use commission lacked the six affirmative votes required to approve a petition to reclassify land because a commission member was disqualified from participating in the petition proceedings following the senate's rejection of the member's nomination for a second term. 132 H. 184, 320 P.3d 849 (2013).

" **§205-4.1 Fees.** The commission may establish reasonable fees for the filing of boundary amendment petitions and petitions for intervention to cover the cost of processing thereof and for the reproduction of maps and documents. The commission also may assess a reasonable fee or require reimbursements to be made for court reporter expenses, the inexcusable absence of a party from a boundary amendment proceeding, and any other reimbursements for hearing expenses as determined by the commission. Any fees collected shall be deposited to the credit of the general fund. [L 1983, c 49, §2; am L 1999, c 260, §1]

" **§205-4.5 Permissible uses within the agricultural districts.** (a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock, including poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use;
- (4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;
- (5) Public institutions and buildings that are necessary for agricultural practices;
- (6) Public and private open area types of recreational uses, including day camps, picnic grounds, parks, and riding stables, but not including dragstrips,

- airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;
- (7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants, corporation yards, or other similar structures;
 - (8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;
 - (9) Agricultural-based commercial operations as described in section 205-2(d)(15);
 - (10) Buildings and uses, including mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses and are permitted under section 205-2(d);
 - (11) Agricultural parks;
 - (12) Plantation community subdivisions, which as used in this chapter means an established subdivision or cluster of employee housing, community buildings, and agricultural support buildings on land currently or formerly owned, leased, or operated by a sugar or pineapple plantation; provided that the existing structures may be used or rehabilitated for use, and new employee housing and agricultural support buildings may be allowed on land within the subdivision as follows:
 - (A) The employee housing is occupied by employees or former employees of the plantation who have a property interest in the land;
 - (B) The employee housing units not owned by their occupants shall be rented or leased at affordable rates for agricultural workers; or
 - (C) The agricultural support buildings shall be rented or leased to agricultural business operators or agricultural support services;
 - (13) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors;

provided that the agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-5;

- (14) Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2;
- (15) Wind energy facilities, including the appurtenances associated with the production and transmission of wind generated energy; provided that the wind energy facilities and appurtenances are compatible with agriculture uses and cause minimal adverse impact on agricultural land;
- (16) Biofuel processing facilities, including the appurtenances associated with the production and refining of biofuels that is normally considered directly accessory and secondary to the growing of the energy feedstock; provided that biofuel processing facilities and appurtenances do not adversely impact agricultural land and other agricultural uses in the vicinity.

For the purposes of this paragraph:

"Appurtenances" means operational infrastructure of the appropriate type and scale for economic commercial storage and distribution, and other similar handling of feedstock, fuels, and other products of biofuel processing facilities.

"Biofuel processing facility" means a facility that produces liquid or gaseous fuels from organic sources such as biomass crops, agricultural residues, and oil crops, including palm, canola, soybean, and waste cooking oils; grease; food wastes; and animal residues and wastes that can be used to generate energy;

- (17) Agricultural-energy facilities, including appurtenances necessary for an agricultural-energy

enterprise; provided that the primary activity of the agricultural-energy enterprise is agricultural activity. To be considered the primary activity of an agricultural-energy enterprise, the total acreage devoted to agricultural activity shall be not less than ninety per cent of the total acreage of the agricultural-energy enterprise. The agricultural-energy facility shall be limited to lands owned, leased, licensed, or operated by the entity conducting the agricultural activity.

As used in this paragraph:

"Agricultural activity" means any activity described in paragraphs (1) to (3) of this subsection.

"Agricultural-energy enterprise" means an enterprise that integrally incorporates an agricultural activity with an agricultural-energy facility.

"Agricultural-energy facility" means a facility that generates, stores, or distributes renewable energy as defined in section 269-91 or renewable fuel including electrical or thermal energy or liquid or gaseous fuels from products of agricultural activities from agricultural lands located in the State.

"Appurtenances" means operational infrastructure of the appropriate type and scale for the economic commercial generation, storage, distribution, and other similar handling of energy, including equipment, feedstock, fuels, and other products of agricultural-energy facilities;

- (18) Construction and operation of wireless communication antennas; provided that, for the purposes of this paragraph, "wireless communication antenna" means communications equipment that is either freestanding or placed upon or attached to an already existing structure and that transmits and receives electromagnetic radio signals used in the provision of all types of wireless communications services; provided further that nothing in this paragraph shall be construed to permit the construction of any new structure that is not deemed a permitted use under this subsection;
- (19) Agricultural education programs conducted on a farming operation as defined in section 165-2, for the education and participation of the general public; provided that the agricultural education programs are accessory and secondary to the principal agricultural use of the parcels or lots on which the agricultural

education programs are to occur and do not interfere with surrounding farm operations. For the purposes of this paragraph, "agricultural education programs" means activities or events designed to promote knowledge and understanding of agricultural activities and practices conducted on a farming operation as defined in section 165-2;

- (20) Solar energy facilities that do not occupy more than ten per cent of the acreage of the parcel, or twenty acres of land, whichever is lesser or for which a special use permit is granted pursuant to section 205-6; provided that this use shall not be permitted on lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A unless the solar energy facilities are:
 - (A) Located on a paved or unpaved road in existence as of December 31, 2013, and the parcel of land upon which the paved or unpaved road is located has a valid county agriculture tax dedication status or a valid agricultural conservation easement;
 - (B) Placed in a manner that still allows vehicular traffic to use the road; and
 - (C) Granted a special use permit by the commission pursuant to section 205-6;
- (21) Solar energy facilities on lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating B or C for which a special use permit is granted pursuant to section 205-6; provided that:
 - (A) The area occupied by the solar energy facilities is also made available for compatible agricultural activities at a lease rate that is at least fifty per cent below the fair market rent for comparable properties;
 - (B) Proof of financial security to decommission the facility is provided to the satisfaction of the appropriate county planning commission prior to date of commencement of commercial generation; and
 - (C) Solar energy facilities shall be decommissioned at the owner's expense according to the following requirements:
 - (i) Removal of all equipment related to the solar energy facility within twelve months

of the conclusion of operation or useful life; and

- (ii) Restoration of the disturbed earth to substantially the same physical condition as existed prior to the development of the solar energy facility.

For the purposes of this paragraph, "agricultural activities" means the activities described in paragraphs (1) to (3);

- (22) Geothermal resources exploration and geothermal resources development, as defined under section 182-1; or
- (23) Hydroelectric facilities, including the appurtenances associated with the production and transmission of hydroelectric energy, subject to section 205-2; provided that the hydroelectric facilities and their appurtenances:
 - (A) Shall consist of a small hydropower facility as defined by the United States Department of Energy, including:
 - (i) Impoundment facilities using a dam to store water in a reservoir;
 - (ii) A diversion or run-of-river facility that channels a portion of a river through a canal or channel; and
 - (iii) Pumped storage facilities that store energy by pumping water uphill to a reservoir at higher elevation from a reservoir at a lower elevation to be released to turn a turbine to generate electricity;
 - (B) Comply with the state water code, chapter 174C;
 - (C) Shall, if over five hundred kilowatts in hydroelectric generating capacity, have the approval of the commission on water resource management, including a new instream flow standard established for any new hydroelectric facility; and
 - (D) Do not impact or impede the use of agricultural land or the availability of surface or ground water for all uses on all parcels that are served by the ground water sources or streams for which hydroelectric facilities are considered.

(b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. Any other law to the contrary notwithstanding, no subdivision of land within the

agricultural district with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless those A and B lands within the subdivision are made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

Any deed, lease, agreement of sale, mortgage, or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition, as prescribed in this section that these restrictions and conditions shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.

If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee in obtaining mortgage financing from any of the mortgage lending agencies set forth in the following paragraph, and the requirement is the sole reason for failure to obtain mortgage financing, then the requirement of encumbrances shall, insofar as such mortgage financing is jeopardized, be conditionally waived by the appropriate county enforcement officer; provided that the conditional waiver shall become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender.

The mortgage lending agencies referred to in the preceding paragraph are the Federal Housing Administration, Federal National Mortgage Association, Veterans Administration, Small Business Administration, United States Department of Agriculture, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, and any other federal, state, or private mortgage lending agency qualified to do business in Hawaii, and their respective successors and assigns.

(c) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

(d) Notwithstanding any other provision of this chapter to the contrary, golf courses and golf driving ranges approved by a county before July 1, 2005, for development within the agricultural district shall be permitted uses within the agricultural district.

(e) Notwithstanding any other provision of this chapter to the contrary, plantation community subdivisions as defined in this section shall be permitted uses within the agricultural district, and section 205-8 shall not apply.

[(f)] Notwithstanding any other law to the contrary, agricultural lands may be subdivided and leased for the agricultural uses or activities permitted in subsection (a); provided that:

- (1) The principal use of the leased land is agriculture;
- (2) No permanent or temporary dwellings or farm dwellings, including trailers and campers, are constructed on the leased area. This restriction shall not prohibit the construction of storage sheds, equipment sheds, or other structures appropriate to the agricultural activity carried on within the lot; and
- (3) The lease term for a subdivided lot shall be for at least as long as the greater of:
 - (A) The minimum real property tax agricultural dedication period of the county in which the subdivided lot is located; or
 - (B) Five years.

Lots created and leased pursuant to this section shall be legal lots of record for mortgage lending purposes and shall be exempt from county subdivision standards. [L 1976, c 199, §1; am L 1977, c 136, §1; am L 1980, c 24, §3; am L 1982, c 217, §1; am L 1991, c 281, §3; am L 1997, c 258, §11; am L 2005, c 205, §3; am L 2006, c 237, §4, c 250, §2, and c 271, §1; am L 2007, c 159, §3 and c 171, §1; am L 2008, c 145, §3; am L 2009, c 53, §1; am L 2011, c 217, §3; am L 2012, c 97, §7, c 113, §3, c 167, §2, and c 329, §4; am L 2014, c 52, §1 and c 55, §3; am L 2015, c 228, §3; am L 2016, c 173, §3]

Note

Any solar energy facility permitted under L 2014, c 52 as of June 30, 2019, shall continue to be permissible under the provisions of c 52 until the end of its operable life. L 2014, c 52, §3(2).

The following acts exempted their amendments from the June 30, 2019 repeal and reenactment condition of L 2014, c 52, §3(1):

L 2014, c 55. L 2014, c 55, §5, as amended by L 2016, c 55, §52.

L 2015, c 228. L 2015, c 228, §5.

L 2016, c 173. L 2016, c 173, §5.

Law Journals and Reviews

Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions. 27 UH L. Rev. 441 (2005).

Case Notes

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), assuming it was constitutional, did not facially invalidate Hawaii's land use law, where plaintiffs challenged this section and §205-6 to the extent the sections required a religious organization to obtain a special use permit, as violations of the "equal terms" and "nondiscrimination" provisions of the RLUIPA. 229 F. Supp. 2d 1056 (2002).

"Communications equipment buildings" and "utility lines" in subsection (a)(7) do not encompass "telecommunications antennas" or "transmission antennas" such as a cellular telephone tower; public utility thus had to apply for a special permit under §205-6 to place the tower in a state agricultural district. 90 H. 384, 978 P.2d 822.

Under subsection (a)(4) and (10), a chimney and garage are permitted as accessories to a farm dwelling; however, utilizing the chimney to conceal an antenna and the garage to house communication equipment were not permitted uses under either subsection (a)(4) or (10). 106 H. 343, 104 P.3d 930 (2005).

Under the circumstances of the case, the residence and the chimney with the concealed antenna constituted a "communications equipment building" and, thus, were permitted uses under subsection (a)(7); also, as the garage was not abnormally large and was designed specifically to store the communications equipment for the concealed antenna, utilizing the permitted garage structure to house the communications equipment for the antenna was a permitted use under subsection (a)(7). 106 H. 343, 104 P.3d 930 (2005).

" **§205-4.6 Private restrictions on agricultural uses and activities; not allowed.** (a) Agricultural uses and activities as defined in sections 205-2(d) and 205-4.5(a) on lands classified as agricultural shall not be restricted by any private agreement contained in any:

- (1) Deed, agreement of sale, or other conveyance of land recorded in the bureau of conveyances after July 8, 2003, that subject such agricultural lands to any servitude, including but not limited to covenants, easements, or equitable and reciprocal negative servitudes; and
- (2) Condominium declaration, map, bylaws, and other documents executed and submitted in accordance with chapter 514A or 514B.

Any such private restriction limiting or prohibiting agricultural use or activity shall be voidable, subject to special restrictions enacted by the county ordinance pursuant to section 46-4; except that restrictions taken to protect

environmental or cultural resources, agricultural leases, utility easements, and access easements shall not be subject to this section.

(b) For purposes of this section, "agricultural leases" means leases where the leased land is primarily utilized for purposes set forth in section 205-4.5(a). [L Sp 2003, c 5, §2; am L 2004, c 170, §1; am L 2014, c 49, §2]

Note

Applicability of 2014 amendment. L 2014, c 49, §10.

Law Journals and Reviews

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

" **§205-5 Zoning.** (a) Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C.

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Each county shall adopt ordinances setting forth procedures and requirements, including provisions for enforcement, penalties, and administrative oversight, for the review and permitting of agricultural tourism uses and activities as an accessory use on a working farm, or farming operation as defined in section 165-2. Ordinances shall include but not be limited to:

- (1) Requirements for access to a farm, including road width, road surface, and parking;
- (2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants;
- (3) Activities that may be offered by the farming operation for visitors;
- (4) Days and hours of operation; and
- (5) Automatic termination of the accessory use upon the cessation of the farming operation.

Each county may require an environmental assessment under chapter 343 as a condition to any agricultural tourism use and

activity. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall be determined by each county by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein. If the county finds that unreasonable economic hardship to the owner or lessee of land cannot otherwise be prevented or where land utilization is improved, the county may allow lot sizes of less than the minimum lot size as specified by law for lots created by a consolidation of existing lots within an agricultural district and the resubdivision thereof; provided that the consolidation and resubdivision do not result in an increase in the number of lots over the number existing prior to consolidation; and provided further that in no event shall a lot which is equal to or exceeds the minimum lot size of one acre be less than that minimum after the consolidation and resubdivision action. The county may also allow lot sizes of less than the minimum lot size as specified by law for lots created or used for plantation community subdivisions as defined in section 205-4.5(a)(12), for public, private, and quasi-public utility purposes, and for lots resulting from the subdivision of abandoned roadways and railroad easements.

(c) Unless authorized by special permit issued pursuant to this chapter, only the following uses shall be permitted within rural districts:

- (1) Low density residential uses;
- (2) Agricultural uses;
- (3) Golf courses, golf driving ranges, and golf-related facilities;
- (4) Public, quasi-public, and public utility facilities; and
- (5) Geothermal resources exploration and geothermal resources development, as defined under section 182-1.

In addition, the minimum lot size for any low density residential use shall be one-half acre and there shall be but one dwelling house per one-half acre, except as provided for in section 205-2. [L 1963, c 205, pt of §2; Supp, §98H-5; HRS §205-5; am L 1969, c 232, §1; am L 1977, c 140, §2; am L 1978, c 165, §1; am L 1991, c 281, §4; am L 1994, c 270, §2; am L 2005, c 205, §4; am L 2006, c 237, §5 and c 250, §3; am L 2012, c 97, §8 and c 329, §5]

Attorney General Opinions

Minimum lot size in agricultural districts. Att. Gen. Op. 62-33.

Cited in opinion that enforcement of land uses in conservation districts lies with department of land and natural resources, and not with counties. Att. Gen. Op. 70-22.

Law Journals and Reviews

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

" **§§205-5.1 to 205-5.3 REPEALED.** L 2012, c 97, §§9 to 11.

Note

The repeal of §§205-5.1 to 205-5.3 shall not affect any geothermal resources producer who operates in the area of a subzone on April 30, 2012, and the producer shall continue to operate in accordance with the lease with the board of land and natural resources. L 2012, c 97, §12.

" **§205-6 Special permit.** (a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning, and the department of agriculture for their review and comment.

(b) The planning commission, upon consultation with the central coordinating agency, except in counties where the planning commission is advisory only in which case the central coordinating agency, shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The county planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

(c) The county planning commission may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter; provided that a use proposed for designated important agricultural lands shall

not conflict with any part of this chapter. A decision in favor of the applicant shall require a majority vote of the total membership of the county planning commission.

(d) Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.

(e) A copy of the decision, together with the complete record of the proceeding before the county planning commission on all special permit requests involving a land area greater than fifteen acres or for lands designated as important agricultural lands, shall be transmitted to the land use commission within sixty days after the decision is rendered.

Within forty-five days after receipt of the complete record from the county planning commission, the land use commission shall act to approve, approve with modification, or deny the petition. A denial either by the county planning commission or by the land use commission, or a modification by the land use commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure.

(f) Land uses substantially involving or supporting educational ecotourism, related to the preservation of native Hawaiian endangered, threatened, proposed, and candidate species, that are allowed in an approved habitat conservation plan under section 195D-21 or safe harbor agreement under section 195D-22, which are not identified as permissible uses within the agricultural district under sections 205-2 and 205-4.5, may be permitted in the agricultural district by special permit under this section, on lands with soils classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U. [L 1963, c 205, pt of §2; Supp, §98H-6; HRS §205-6; am L 1970, c 136, §1; am L 1976, c 4, §2; am L 1978, c 166, §1; am L 1979, c 221, §1; gen ch 1985; am L 1998, c 237, §6; am L 2005, c 183, §5]

Rules of Court

Appeal to circuit court, see HRCF rule 72.

Attorney General Opinions

Special permits cannot be granted to authorize uses which have effect of making boundary change or creating new district. Att. Gen. Op. 63-37.

Authority of land use commission to modify permit approved by county commission discussed. Att. Gen. Op. 68-30.

Land use commission is not authorized to review county planning commission's denial of request for modification of special permit. Att. Gen. Op. 77-4.

Law Journals and Reviews

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

Ala Loop and the Private Right of Action Under Hawai'i Constitution Article XI, Section 9: Charting a Path Toward a Cohesive Enforcement Scheme. 33 UH L. Rev. 367 (2010).

A Self-Executing Article XI, Section 9--The Door For a Bivens Action for Environmental Rights? 34 UH L. Rev. 187 (2012).

Case Notes

Where plaintiffs alleged violations of Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and made other claims based on county planning commission's denial of a special use permit sought under this section: among other things, no Eleventh Amendment immunity for the county; RLUIPA, assuming it was constitutional, did not facially invalidate Hawaii's land use law; strict scrutiny test would apply in assessing county's past actions in further proceedings in the case. 229 F. Supp. 2d 1056 (2002).

Former provision requiring that a public hearing on an application for a special permit be held within one hundred twenty days was directory not mandatory. 62 H. 666, 619 P.2d 95.

Validity of attaching conditions for approval of special permit. 62 H. 666, 619 P.2d 95.

Recreational theme park on agricultural land was not "unusual and reasonable use" which would qualify for special permit. 64 H. 265, 639 P.2d 1079.

"Communications equipment buildings" and "utility lines" in §205-4.5(a)(7) do not encompass "telecommunications antennas" or "transmission antennas" such as a cellular telephone tower; public utility thus had to apply for a special permit under this section to place the tower in a state agricultural district. 90 H. 384, 978 P.2d 822.

Where land use commission's imposition of restrictive condition - a termination date of July 31, 2012 for the deposit of municipal solid waste at the Waimanalo Gulch Sanitary Landfill - in its approval of special use permit was not supported by substantial evidence in the record, condition could not stand; matter remanded to land use commission. 127 H. 5, 275 P.3d 809 (2012).

Appellee Kauai County planning commission's public trust duty under article XI, §1 of the Hawaii constitution, coupled with the State's power to create and delegate duties to the counties, established that appellee had a duty to conserve and protect water resources in considering whether to issue a special permit to appellant water bottling company. 130 H. 407 (App.), 312 P.3d 283 (2013).

" **§205-7 Adoption, amendment or repeal of rules.** The land use commission shall adopt, amend or repeal rules relating to matters within its jurisdiction in the manner prescribed in chapter 91. [L 1963, c 205, pt of §2; Supp, §98H-7; HRS §205-7; am L 1975, c 193, §6]

Cross References

Administrative procedure, see chapter 91.

" **§205-8 Nonconforming uses.** The lawful use of land or buildings existing on the date of establishment of any interim agricultural district and rural district in final form may be continued although the use, including lot size, does not conform to this chapter; provided that no nonconforming building shall be replaced, reconstructed, or enlarged or changed to another nonconforming use and no nonconforming use of land shall be expanded or changed to another nonconforming use. In addition, if any nonconforming use of land or building is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited. [L 1963, c 205, pt of §2; Supp, §98H-8; HRS §205-8]

" **§§205-9 to 11 REPEALED.** L 1975, c 193, §§7 to 9.

" **§205-12 Enforcement.** The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all

violations. [L 1963, c 205, pt of §2; Supp, §98H-12; HRS §205-12; am L 1976, c 199, §2]

Attorney General Opinions

Counties' responsibility for enforcement includes taking necessary actions against violators; such enforcement covers all land use district classifications and land use district regulations, except those relating to conservation districts. Att. Gen. Op. 70-22.

Law Journals and Reviews

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:" Addressing an Impermissible Use of Hawai'i's Agricultural District. 25 UH L. Rev. 199 (2002).

Ala Loop and the Private Right of Action Under Hawai'i Constitution Article XI, Section 9: Charting a Path Toward a Cohesive Enforcement Scheme. 33 UH L. Rev. 367 (2010).

Case Notes

In the circumstances of the case, article XI, §9 of the Hawaii constitution created a private right of action to enforce chapter 205, and the legislature confirmed the existence of that right of action by enacting §607-25, which allows for the recovery of attorneys' fees in such actions; chapter 205 is a law relating to environmental quality within the meaning of article XI, §9, §9 is self-executing, and this section imposes "reasonable limitations and regulations" that were applicable to the case which allowed the private right of action to enforce chapter 205. 123 H. 391, 235 P.3d 1103 (2010).

" **§205-13 Penalty for violation.** Any person who violates any provision under section 205-4.5, or any regulation established relating thereto, shall be fined not more than \$5,000, and any person who violates any other provision of this chapter, or any regulation established relating thereto, shall be fined not more than \$1,000.

If any person cited for a violation under this chapter fails to remove such violation within six months of such citation and the violation continues to exist, such person shall be subject to a citation for a new and separate violation. There shall be a fine of not more than \$5,000 for any additional violation.

Prior to the issuance of any citation for a violation, the appropriate enforcement officer or agency shall notify the

violator and the mortgagee, if any, of such violation, and the violator or the mortgagee, if any, shall have not more than sixty days to cure the violation before citation for a violation is issued. [L 1963, c 205, pt of §2; Supp, §98H-13; HRS §205-13; am L 1976, c 199, §3]

" **§205-14 REPEALED.** L 2016, c 52, §5.

" **§205-15 Conflict.** Except as specifically provided by this chapter and the rules adopted thereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected. [L 1963, c 205, pt of §2; Supp, §98H-15; HRS §205-15; am L 1995, c 11, §11 and c 69, §11]

" **§205-16 Compliance with the Hawaii state plan.** No amendment to any land use district boundary nor any other action by the land use commission shall be adopted unless such amendment or other action conforms to the Hawaii state plan. [L 1975, c 193, §12; am L 1985, c 230, §5]

" **§§205-16.1, 16.2 REPEALED.** L 1985, c 230, §§6, 7.

" **§205-17 Land use commission decision-making criteria.** In its review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider the following:

- (1) The extent to which the proposed reclassification conforms to the applicable goals, objectives, and policies of the Hawaii state plan and relates to the applicable priority guidelines of the Hawaii state plan and the adopted functional plans;
- (2) The extent to which the proposed reclassification conforms to the applicable district standards;
- (3) The impact of the proposed reclassification on the following areas of state concern:
 - (A) Preservation or maintenance of important natural systems or habitats;
 - (B) Maintenance of valued cultural, historical, or natural resources;
 - (C) Maintenance of other natural resources relevant to Hawaii's economy, including agricultural resources;
 - (D) Commitment of state funds and resources;
 - (E) Provision for employment opportunities and economic development; and

- (F) Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups;
- (4) The standards and criteria for the reclassification or rezoning of important agricultural lands in section 205-50;
- (5) The county general plan and all community, development, or community development plans adopted pursuant to the county general plan, as they relate to the land that is the subject of the reclassification petition; and
- (6) The representations and commitments made by the petitioner in securing a boundary change. [L 1985, c 230, §1; am L 1990, c 261, §2; am L 2005, c 183, §6; am L 2008, c 26, §1]

Law Journals and Reviews

The Scramble to Protect the American Dream in Paradise: Is Affordable Housing Possible in Hawaii? 10 HBJ, no. 13, at 37 (2007).

When Nobody Asks: The Toxic Legacy of Oahu's Pineapple Lands. 29 UH L. Rev. 553 (2007).

Case Notes

In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the land use commission, in its review of a petition for reclassification of district boundaries, must, at a minimum, make specific findings and conclusions as to the identity and scope of the valued cultural, historical, or natural resources, the extent those resources will be affected or impaired by the proposed action, and any feasible action the commission may take to reasonably protect such native Hawaiian rights if they are found to exist. 94 H. 31, 7 P.3d 1068.

Where land use commission allowed petitioner to direct the manner in which customary and traditional native Hawaiian practices would be preserved and protected by the proposed development, prior to any specific findings and conclusions by the commission as to the effect of the proposed reclassification on such practices, the commission failed to satisfy its statutory and constitutional obligations; in delegating its duty to protect native Hawaiian rights, the commission delegated a non-delegable duty and thereby acted in excess of its authority. 94 H. 31, 7 P.3d 1068.

Where land use commission failed to enter any definitive findings or conclusions as to the extent of the native Hawaiian practitioners' exercise of customary and traditional practices in the subject area nor made any specific findings or conclusions regarding the effects on or the impairment of any Hawaii constitution, article XII, §7 uses, or the feasibility of the protection of those uses, the commission, as a matter of law, failed to satisfy its statutory and constitutional obligations. 94 H. 31, 7 P.3d 1068.

" **§205-18 Periodic review of districts.** The office of planning shall undertake a review of the classification and districting of all lands in the State, within five years from December 31, 1985, and every fifth year thereafter. The office, in its five-year boundary review, shall focus its efforts on reviewing the Hawaii state plan, county general plans, and county development and community plans. Upon completion of the five-year boundary review, the office shall submit a report of the findings to the commission. The office may initiate state land use boundary amendments which it deems appropriate to conform to these plans. The office may seek assistance of appropriate state and county agencies and may employ consultants and undertake studies in making this review. [L 1985, c 230, §2; am L 1987, c 336, §7; am L 1988, c 352, §3; am L 1996, c 299, §3]

" **[[§205-19] Contested cases.** *[Section repealed July 1, 2019. L 2016, c 48, §14.]* (a) Chapter 91 shall apply to every contested case arising under this chapter except where chapter 91 conflicts with this chapter, in which case this chapter shall apply. Any other law to the contrary notwithstanding, including chapter 91, any contested case under this chapter shall be appealed from a final decision and order or a preliminary ruling that is of the nature defined by section 91-14(a) upon the record directly to the supreme court for final decision. Only a person aggrieved in a contested case proceeding provided for in this chapter may appeal from the final decision and order or preliminary ruling. For the purposes of this section, the term "person aggrieved" includes an agency that is a party to a contested case proceeding before that agency or another agency.

(b) The court shall give priority to contested case appeals of significant statewide importance over all other civil or administrative appeals or matters and shall decide these appeals as expeditiously as possible. [L 2016, c 48, §3]

Note

Judiciary report to 2019 legislature on change in judicial proceedings made by L 2016, c 48. L 2016, c 48, §11.

"PART II. SHORELINE SETBACKS

§§205-31 to 37 REPEALED. L 1986, c 258, §3.

Cross References

For present provisions, see §§205A-41 to 49.

"[PART III.] IMPORTANT AGRICULTURAL LANDS

Note

Acquisition of important agricultural lands owned by the Galbraith Estate; department of land and natural resources powers, etc. L 2008, c 234, §§8 to 10.

Cross References

Acquisition of important agricultural lands, see §§163D-31 to 163D-33.

Acquisition of resource value lands, see chapter 173A.

Legacy land conservation commission, see §§173A-2.4 to 173A-2.6.

Law Journals and Reviews

Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions. 27 UH L. Rev. 441 (2005).

[\$205-41] Declaration of policy. It is 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. [L 2005, c 183, pt of §2]

Note

L 2005, c 183, §§9 and 10 provide:

"SECTION 9. (a) It is the intent of this Act [enacting sections 205-41 to 205-52 and amending sections 205-3.1, 205-4, 205-6, and 205-17, Hawaii Revised Statutes]:

- (1) That agricultural incentive programs to promote agricultural viability, sustained growth of the agricultural industry, and the long-term use and protection of important agricultural lands for agricultural use shall be developed concurrently with the process of identifying important agricultural lands as required under section 2 of this Act [sections 205-41 to 205-52]; and
- (2) That the designation of important agricultural lands and adoption of maps by the land use commission pursuant to section 2 of this Act [sections 205-41 to 205-52] shall take effect only upon the enactment of legislation establishing incentives and protections for important agricultural lands contemplated by section [205-46] and shall be satisfied by:
 - (A) Providing a declaration of satisfaction within the Act that establishes incentives for important agricultural lands; or
 - (B) Having the legislature adopt a concurrent resolution declaring the satisfaction of implementing incentives for important agricultural lands by identifying the specific measures or Acts that establish incentives for important agricultural lands.

(b) Pursuant to section [205-46], Hawaii Revised Statutes, the department of agriculture, with the assistance of the department of taxation, shall contract appropriate meeting facilitation and cost-benefit analysis services to develop and recommend a package of proposals for agricultural incentives and other measures that promote agricultural viability, sustained growth of the agricultural industry, and the long-term use and protection of important agricultural lands.

The department of agriculture, in consultation with the department of taxation, shall use consultants to promote a facilitated meeting process and deliberation and seek the assistance and input from the Hawaii Farm Bureau Federation, landowners, affected state and county agencies, other stakeholders, and persons with relevant expertise that are necessary to develop and implement a comprehensive and integrated framework of incentives and programs that will promote agricultural viability, sustained growth of the agricultural industry, and the long-term use and protection of

important agricultural lands for agricultural use in Hawaii, including tax policy, agricultural business development and financing, marketing, and agricultural land use techniques. The meeting facilitators shall ensure that stakeholder discussions are inclusive and use a consistent voting procedure.

The department of agriculture shall report stakeholder findings and recommendations, including proposed legislation and a recommended minimum criteria for determining when the "enactment of legislation establishing incentives and protection" has occurred for the purposes of this Act, to the legislature no later than twenty days before the convening of the regular session of 2007. The report shall include an analysis of the impacts and benefits of its recommendations, a record of the stakeholder group's process and deliberations, and shall provide the supporting rationale for the incentives being proposed.

(c) Incentives and other programs to promote agricultural viability, sustained growth of the agricultural industry, and the long-term use and protection of important agricultural lands for agricultural use in Hawaii by farmers and landowners to be considered by the department of agriculture shall include but not be limited to the following:

- (1) Assistance in identifying federal, state, and private grant and loan resources for agricultural business planning and operations, assistance with grant and loan application processes, and the processing of grants and loans;
- (2) Real property tax systems that support the needs of agriculture, including property tax assessment of land and improvements used or held only for use in agriculture based on agricultural use value rather than fair market value;
- (3) Reduced infrastructure requirements and facilitated building permit processes for the construction of dedicated agricultural structures;
- (4) Tax incentives that include but are not limited to:
 - (A) Tax credits for the sale or donation of agricultural easements on important agricultural lands; and
 - (B) General excise tax exemption for retail sales of farm produce;
- (5) Incentives that promote investment in agricultural businesses or value-added agricultural development, and other agricultural financing mechanisms;
- (6) Incentives and programs that promote long-term or permanent agricultural land protection, and the establishment of a dedicated funding source for these programs;

- (7) Establishment of a permanent state revolving fund, escalating tax credits based on the tax revenues generated by increased investment or agricultural activities conducted on important agricultural lands, and dedicated funding sources to provide moneys for incentives and other programs;
- (8) Establishment of a means to analyze the conformity of state-funded projects with the intent and purposes of part I of this Act [sections 205-41 to 205-52], and a mechanism for mitigation measures when projects are not in conformance;
- (9) Institution of a requirement for the preparation of an agricultural impact statement that would include mitigation measures for adverse impacts for proposed state or county rulemaking that may affect agricultural activities, operations, and agricultural businesses on important agricultural lands; and
- (10) Other programs to carry out the intent of part I of this Act [sections 205-41 to 205-52].

SECTION 10. Within one year of the adoption of maps of important agricultural lands by the land use commission for the lands within the jurisdiction of each county, all state agencies shall report to the department of agriculture on the impact of projects and programs on the designated important agricultural lands and sustained agricultural use of these lands. State agencies shall develop implementation programs, as needed, to ensure that their programs are supportive of agriculture and consistent with the intent and purposes of this Act."

" **[§205-42] Important agricultural lands; definition and objectives.** (a) As used in this part, unless the context otherwise requires, "important agricultural lands" means those lands, identified pursuant to this part, that:

- (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.

(b) The objective for the identification of important agricultural lands is to identify and plan for the maintenance of a strategic agricultural land resource base that can support a diversity of agricultural activities and opportunities that expand agricultural income and job opportunities and increase

agricultural self-sufficiency for current and future generations. To achieve this objective, the State shall:

- (1) Promote agricultural development and land use planning that delineates blocks of productive agricultural land and areas of agricultural activity for protection from the encroachment of nonagricultural uses; and
- (2) Establish incentives that promote:
 - (A) Agricultural viability;
 - (B) Sustained growth of the agriculture industry; and
 - (C) The long-term agricultural use and protection of these productive agricultural lands. [L 2005, c 183, pt of §2]

" **§205-43 Important agricultural lands; policies.** State and county agricultural policies, tax policies, land use plans, ordinances, and rules shall promote the long-term viability of agricultural use of important agricultural lands and shall be consistent with and implement the following policies:

- (1) Promote the retention of important agricultural lands in blocks of contiguous, intact, and functional land units large enough to allow flexibility in agricultural production and management;
- (2) Discourage the fragmentation of important agricultural lands and the conversion of these lands to nonagricultural uses;
- (3) Direct nonagricultural uses and activities from important agricultural lands to other areas and ensure that uses on important agricultural lands are actually agricultural uses;
- (4) Limit physical improvements on important agricultural lands to maintain affordability of these lands for agricultural purposes;
- (5) Provide a basic level of infrastructure and services on important agricultural lands limited to the minimum necessary to support agricultural uses and activities;
- (6) Facilitate the long-term dedication of important agricultural lands for future agricultural use through the use of incentives;
- (7) Facilitate the access of farmers to important agricultural lands for long-term viable agricultural use; and
- (8) Promote the maintenance of essential agricultural infrastructure systems, including irrigation systems. [L 2005, c 183, pt of §2]

" **§205-44 Standards and criteria for the identification of important agricultural lands.** (a) The standards and criteria

in this section shall be used to identify important agricultural lands. Lands identified as important agricultural lands need not meet every standard and criteria listed in subsection (c). Rather, lands meeting any of the criteria in subsection (c) shall be given initial consideration; provided that the designation of important agricultural lands shall be made by weighing the standards and criteria with each other to meet the constitutionally mandated purposes in article XI, section 3, of the Hawaii constitution and the objectives and policies for important agricultural lands in sections 205-42 and 205-43.

(b) In a petition for a declaratory order submitted under section 205-45 that seeks to both designate lands as important agricultural lands and reclassify lands in the agricultural district to the rural, conservation, or urban district, the lands shall be deemed qualified for designation as important agricultural land if the commission reasonably finds that the lands meet at least the criteria of subsection (c)(5) and (7) of this section.

If a petition seeks to only designate land as important agricultural lands, then the commission shall evaluate the lands in accordance with subsection (a).

(c) The standards and criteria shall be as follows:

- (1) Land currently used for agricultural production;
- (2) Land with soil qualities and growing conditions that support agricultural production of food, fiber, or fuel- and energy-producing crops;
- (3) Land identified under agricultural productivity rating systems, such as the agricultural lands of importance to the State of Hawaii (ALISH) system adopted by the board of agriculture on January 28, 1977;
- (4) Land types associated with traditional native Hawaiian agricultural uses, such as taro cultivation, or unique agricultural crops and uses, such as coffee, vineyards, aquaculture, and energy production;
- (5) Land with sufficient quantities of water to support viable agricultural production;
- (6) Land whose designation as important agricultural lands is consistent with general, development, and community plans of the county;
- (7) Land that contributes to maintaining a critical land mass important to agricultural operating productivity; and
- (8) Land with or near support infrastructure conducive to agricultural productivity, such as transportation to markets, water, or power. [L 2005, c 183, pt of §2; am L 2008, c 233, §18]

" **[§205-44.5] Important agricultural lands; public lands.**

(a) Notwithstanding any law to the contrary, before December 31, 2009, the department of agriculture and the department of land and natural resources shall collaborate to identify public lands as defined under section 171-2 that should be designated important agricultural lands as defined in section 205-42 and shall cause to be prepared maps delineating those lands. In making the designations, the departments shall use the standards and criteria of section 205-44.

(b) The designation of important agricultural lands pursuant to this section shall not be subject to the district boundary amendment procedures of section 205-3.1 or 205-4 or declaratory order procedures of section 205-45.

(c) Notwithstanding any law to the contrary, beginning January 1, 2010, after receipt of the maps of public lands identified as important agricultural lands pursuant to subsection (a), the commission shall designate the public lands as important agricultural lands and adopt the maps of those public lands. Upon designation, the public lands shall be subject to this chapter. [L 2008, c 233, §2]

" **§205-45 Petition by farmer or landowner.** (a) A farmer or landowner with lands qualifying under section 205-44 may file with the commission a petition for declaratory order to designate the lands as important agricultural lands. The petition may be filed at any time in the designation process.

(b) Any law to the contrary notwithstanding, within the same petition for declaratory order as described in subsection (a), the petitioner may seek a reclassification of land in the agricultural district to the rural, urban, or conservation district, or a combination thereof; provided that:

- (1) The land sought to be reclassified to the rural, urban, or conservation district is within the same county as the land sought to be designated as important agricultural lands;
- (2) If the reclassification of the land is proposed to the urban district, that reclassification to urban is consistent with the relevant county general and community, development, or community development plans; and
- (3) The total acreage of the land sought to be designated or reclassified in the petition complies with the following proportions:
 - (A) At least eighty-five per cent of the total acreage is sought to be designated as important agricultural land; and

(B) The remainder of the acreage is sought to be reclassified to the rural, urban, or conservation district.

(c) The petition for declaratory order shall be submitted in accordance with subchapter 14 of the commission's rules and shall include:

- (1) Tax map key numbers of the land to be designated as important agricultural lands and, if applicable, the land to be reclassified from the agricultural district to the rural, urban, or conservation district, along with verification and authorization from the applicable landowners;
- (2) Proof of qualification for designation as important agricultural lands under section 205-44, respecting a regional perspective;
- (3) The current or planned agricultural use of the area sought to be designated as important agricultural lands; and
- (4) If applicable, the current or planned use of the area sought to be reclassified to the rural, urban, or conservation district.

(d) Prior to the commission considering a petition for a declaratory order to designate important agricultural land in combination with the reclassification of agricultural land to the rural, urban, or conservation district, the petitioner shall submit to the commission a certification issued by the department of agriculture as to the quality of the land for which designation as important agricultural land is being sought.

(e) The commission shall review the petition and the accompanying submissions to evaluate the qualifications of the land for designation as important agricultural lands in accordance with section 205-44.

If the petition also seeks the reclassification of land to the rural, urban, or conservation district, the commission shall review the petition and accompanying submissions to evaluate:

- (1) The suitability of the land for the reclassification in accordance with section 205-2;
- (2) If the reclassification of the land is proposed to the urban district, that reclassification to urban is consistent with the relevant county general and community, development, or community development plans; and
- (3) Compliance with the other provisions of subsection (b).

If the commission, after its review, finds that the designation and, if applicable, reclassification sought in the

petition should be approved, the commission shall vote, by a two-thirds majority of the members of the commission, to issue a declaratory order designating the petitioner's identified lands as important agricultural lands and, if applicable, reclassifying the petitioner's identified land from the agricultural district to the rural, urban, or conservation district. The commission may include reasonable conditions in the declaratory order.

With respect to a petition that seeks to both designate important agricultural lands and reclassify agricultural lands to the rural, urban, or conservation district, if the commission finds that either the designation or reclassification as proposed by the petitioner should not be approved, the commission shall deny the petition in its entirety.

(f) The designation or reclassification of land pursuant to subsection (a) or (b) shall not be subject to the district boundary amendment procedures of sections 205-3.1 and 205-4 or become effective prior to legislative enactment of protection and incentive measures for important agricultural land and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawaii 2005.

(g) Farmers or landowners with lands qualifying under section 205-44 may file petitions for a declaratory order to designate lands as important agricultural lands following the legislative enactment of protection and incentive measures for important agricultural lands and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawaii 2005.

(h) A petitioner granted a declaratory order that designates important agricultural land, whether or not combined with the reclassification of land to the rural, urban, or conservation district, shall earn credits if the amount of land reclassified to the rural, urban, or conservation district is less than fifteen per cent of the total acreage of land subject to the order. The "total acreage of land subject to the order" means the total acreage designated as important agricultural land and, if applicable, reclassified to the rural, urban, or conservation district by the declaratory order.

The credits shall equal the difference between the following, rounded to the nearer tenth of an acre:

- (1) The number that is fifteen per cent of the total acreage of land subject to the order; less
- (2) The amount of the petitioner's land that is reclassified from the agricultural district to the rural, urban, or conservation district by the declaratory order.

A petitioner with credits earned within a county may petition the commission for a declaratory order to reclassify

any of the petitioner's other land in the same county from the agricultural district to the rural, urban, or conservation district until the credits are exhausted or expired. The "petitioner's other land in the same county" means land owned by the petitioner that is in the same county as the land designated or reclassified under the petition. The commission may issue the declaratory order if it finds that the land is suitable for reclassification in accordance with section 205-2 and that the reclassification is consistent with the relevant county general and community, development, or community development plans. The petitioner may petition for such reclassification until all of the petitioner's credits are exhausted. Any unexhausted credits shall expire and become unusable ten years after the granting of the declaratory order that designated the important agricultural land and, if applicable, reclassified land to the rural, urban, or conservation district.

A petitioner with unused and unexhausted credits shall not transfer the credits to another person.

(i) Notwithstanding any other law to the contrary, the land use commission may grant declaratory orders pursuant to this section before the commission receives from any county a map delineating recommended important agricultural lands.

(j) Land designated as important agricultural land pursuant to a declaratory order that both designates land as important agricultural land and reclassifies land in the agricultural district to the rural, urban, or conservation district, or a combination thereof pursuant to this section shall be redesignated only with the prior authorization of the legislature. The authorization shall be expressed by the adoption of a concurrent resolution approved by a two-thirds vote of each house of the legislature voting separately. When making its decision, the legislature shall consider the standards and criteria in section 205-50.

(k) The commission may adopt rules pursuant to chapter 91 to effectuate this section. [L 2005, c 183, pt of §2; am L 2008, c 233, §19]

Note

Section 9 of Act 183, Session Laws of Hawaii 2005, is printed after §205-41.

Designations made pursuant to this section take effect at any time after incentives and protections for important agricultural lands and agricultural viability are enacted. L 2005, c 183, §14(1).

Land use commission rules, see chapter 15-15, Hawaii Administrative Rules.

" **[\$205-45.5] Important agricultural land; farm dwellings and employee housing.** A landowner whose agricultural lands are designated as important agricultural lands may develop, construct, and maintain farm dwellings and employee housing for farmers, employees, and their immediate family members on these lands; provided that:

- (1) The farm dwellings and employee housing units shall be used exclusively by farmers and their immediate family members who actively and currently farm on important agricultural land upon which the dwelling is situated; provided further that the immediate family members of a farmer may live in separate dwelling units situated on the same designated land;
- (2) Employee housing units shall be used exclusively by employees and their immediate family members who actively and currently work on important agricultural land upon which the housing unit is situated; provided further that the immediate family members of the employee shall not live in separate housing units and shall live with the employee;
- (3) The total land area upon which the farm dwellings and employee housing units and all appurtenances are situated shall not occupy more than five per cent of the total important agricultural land area controlled by the farmer or the employee's employer or fifty acres, whichever is less;
- (4) The farm dwellings and employee housing units shall meet all applicable building code requirements;
- (5) Notwithstanding section 205-4.5(a)(12), the landowner shall not plan or develop a residential subdivision on the important agricultural land;
- (6) Consideration may be given to the cluster development of farm dwellings and employee housing units to maximize the land area available for agricultural production; and
- (7) The plans for farm dwellings and employee housing units shall be supported by agricultural plans that are approved by the department of agriculture. [L 2008, c 233, §2]

" **[\$205-46] Incentives for important agricultural lands.**

(a) To achieve the long-term agricultural viability and use of important agricultural lands, the State and each county shall ensure that their:

- (1) Agricultural development, land use, water use, regulatory, tax, and land protection policies; and

(2) Permitting and approval procedures, enable and promote the economic sustainability of agriculture.

Agricultural operations occurring on important agricultural lands shall be eligible for incentives and protections provided by the State and counties pursuant to this section to promote the viability of agricultural enterprise on important agricultural lands and to assure the availability of important agricultural lands for long-term agricultural use.

(b) State and county incentive programs shall provide preference to important agricultural lands and agricultural businesses on important agricultural lands. The State and each county shall cooperate in program development to prevent duplication of and to streamline and consolidate access to programs and services for agricultural businesses located on important agricultural lands.

(c) Incentive and protection programs shall be designed to provide a mutually supporting framework of programs and measures that enhance agricultural viability on important agricultural lands, including but not limited to:

- (1) Grant assistance;
- (2) Real property tax systems that support the needs of agriculture, including property tax assessments based on agricultural use valuation;
- (3) Reduced infrastructure requirements and facilitated building permit processes for dedicated agricultural structures;
- (4) Tax incentives to offset operational costs, promote agricultural business viability, and promote the long-term protection of important agricultural lands;
- (5) Agricultural business planning, marketing, and implementation grants;
- (6) Tax incentives and programs for equity investments and financing for agricultural operations, including agricultural irrigation systems;
- (7) Other programs and mechanisms that promote investment in agricultural businesses or agricultural land protection, such as the purchase of development rights;
- (8) State funding mechanisms to fund business viability and land protection programs;
- (9) Water regulations and policies that provide farmers of important agricultural lands access to adequate and cost-effective sources of water;
- (10) Other measures that would ensure that state capital investments, projects, programs, and rules are consistent with this part; and

(11) Agricultural education and training for new farmers; upgrading the skills of existing farmers and other agriculture-related employees through the use of mentoring, business incubators, and public or private scholarships; and increasing the returns of farming by adding value to food processing and other tools and methods.

(d) State and county agencies shall review the protection and incentive measures enacted for important agricultural lands and agricultural viability pursuant to this chapter at least every five years to:

- (1) Determine their effectiveness in sustaining agriculture in Hawaii, assuring agricultural diversification, and increasing agricultural self-sufficiency;
- (2) Determine whether the effectiveness of tax credits or incentive programs will be enhanced by creating revolving funds or increasing rates based upon the tax revenues generated by enhanced investment and agricultural activities on important agricultural lands; and
- (3) Modify measures and programs as needed.

(e) This section shall apply only to those lands designated as important agricultural lands pursuant to sections 205-45 and 205-49. [L 2005, c 183, pt of §2]

" **[§205-46.5] Agricultural processing facilities; permits; priority.** (a) Any agency subject to this chapter or title 13 that issues permits shall establish and implement a procedure for the priority processing of permit applications and renewals, at no additional cost to the applicant, for agricultural processing facilities that process crops or livestock from an agribusiness; provided that the majority of the lands held, owned, or used by the agribusiness shall be land designated as important agricultural lands pursuant to this part, excluding lands held, owned, or used by the agribusiness in a conservation district.

Any priority permit processing procedure established pursuant to this section shall not provide or imply that any permit application filed under the priority processing procedure shall be automatically approved.

(b) As used in this section, "agribusiness" means a business primarily engaged in the care and production of livestock, livestock products, poultry, poultry products, apiary, horticultural or floricultural products, the planting, cultivating, and harvesting of crops or trees, or the farming or

ranching of any plant or animal species in a controlled salt, brackish, or fresh water environment. [L 2008, c 233, §11]

" **[\$205-47] Identification of important agricultural lands; county process.** [See Note below.]

(a) Each county shall identify and map potential important agricultural lands within its jurisdiction based on the standards and criteria in section 205-44 and the intent of this part, except lands that have been designated, through the state land use, zoning, or county planning process, for urban use by the State or county.

(b) Each county shall develop maps of potential lands to be considered for designation as important agricultural lands in consultation and cooperation with landowners, the department of agriculture, agricultural interest groups, including representatives from the Hawaii Farm Bureau Federation and other agricultural organizations, the United States Department of Agriculture - Natural Resources Conservation Service, the office of planning, and other groups as necessary.

(c) Each county, through its planning department, shall develop an inclusive process for public involvement in the identification of potential lands and the development of maps of lands to be recommended as important agricultural lands, including a series of public meetings throughout the identification and mapping process. The planning departments may also establish one or more citizen advisory committees on important agricultural lands to provide further public input, utilize an existing process (such as general plan, development plan, community plan), or employ appropriate existing and adopted general plan, development plan, or community plan maps.

(d) The counties shall take notice of those lands that have already been designated as important agricultural lands by the commission.

Upon identification of potential lands to be recommended to the county council as potential important agricultural lands, the counties shall take reasonable action to notify each owner of those lands by mail or posted notice on the affected lands to inform them of the potential designation of their lands.

In formulating its final recommendations to the respective county councils, the planning departments shall report on the manner in which the important agricultural lands mapping relates to, supports, and is consistent with the:

- (1) Standards and criteria set forth in section 205-44;
- (2) County's adopted land use plans, as applied to both the identification and exclusion of important agricultural lands from such designation;
- (3) Comments received from government agencies and others identified in subsection (b);

- (4) Viability of existing agribusinesses; and
- (5) Representations or position statements of the owners whose lands are subject to the potential designation.
- (e) The important agricultural lands maps shall be submitted to the county council for decision-making. The county council shall adopt the maps, with or without changes, by resolution. The adopted maps shall be transmitted to the land use commission for further action pursuant to section 205-48. [L 2005, c 183, pt of §2]

Note

L 2005, c 183, §7 provides:

"SECTION 7. Each county shall submit its report and maps with recommendations for lands eligible for designation as important agricultural lands to the land use commission no later than sixty months from the date of county receipt of state funds appropriated for the identification process. Upon receipt of the county maps, the land use commission shall review and adopt maps designating important agricultural lands to the State in accordance with section [205-49]."

Designations made pursuant to this section take effect three years after incentives and protections for important agricultural lands and agricultural viability are enacted. L 2005, c 183, §14(2).

" **[§205-48] Receipt of maps of eligible important agricultural lands; land use commission.** (a) The land use commission shall receive the county recommendations and maps delineating those lands eligible to be designated important agricultural lands no sooner than the effective date of the legislative enactment of protection and incentive measures for important agricultural lands and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawaii 2005.

(b) The department of agriculture and the office of planning shall review the county report and recommendations and provide comments to the land use commission within forty-five days of the receipt of the report and maps by the land use commission. The land use commission may also consult with the department of agriculture and the office of planning as needed.

(c) State agency review shall be based on an evaluation of the degree that the:

- (1) County recommendations result in an identified resource base that meets the definition of important agricultural land and the objectives and policies for important agricultural lands in sections 205-42 and 205-43; and

- (2) County has met the minimum standards and criteria for the identification and mapping process in sections 205-44 and 205-47. [L 2005, c 183, pt of §2]

Note

Section 9 of Act 183, Session Laws of Hawaii 2005, is printed after §205-41.

" **[\$205-49] Designation of important agricultural lands; adoption of important agricultural lands maps.** (a) After receipt of the maps of eligible important agricultural lands from the counties and the recommendations of the department of agriculture and the office of planning, the commission shall then proceed to identify and designate important agricultural lands, subject to section 205-45. The decision shall consider the county maps of eligible important agricultural lands; declaratory orders issued by the commission designating important agricultural lands during the three year period following the enactment of legislation establishing incentives and protections contemplated under section 205-46, as provided in section 9 of Act 183, Session Laws of Hawaii 2005; landowner position statements and representations; and any other relevant information.

In designating important agricultural lands in the State, pursuant to the recommendations of individual counties, the commission shall consider the extent to which:

- (1) The proposed lands meet the standards and criteria under section 205-44;
- (2) The proposed designation is necessary to meet the objectives and policies for important agricultural lands in sections 205-42 and 205-43; and
- (3) The commission has designated lands as important agricultural lands, pursuant to section 205-45; provided that if the majority of landowners' landholdings is already designated as important agricultural lands, excluding lands held in the conservation district, pursuant to section 205-45 or any other provision of this part, the commission shall not designate any additional lands of that landowner as important agricultural lands except by a petition pursuant to section 205-45.

Any decision regarding the designation of lands as important agricultural lands and the adoption of maps of those lands pursuant to this section shall be based upon written findings of fact and conclusions of law, presented in at least one public hearing conducted in the county where the land is

located in accordance with chapter 91, that the subject lands meet the standards and criteria set forth in section 205-44 and shall be approved by two-thirds of the membership to which the commission is entitled.

(b) Copies of the maps of important agricultural lands adopted under this section shall be transmitted to each county planning department and county council, the department of agriculture, the agribusiness development corporation, the office of planning, and other state agencies involved in land use matters. The maps of important agricultural lands shall guide all decision-making on the proposed reclassification or rezoning of important agricultural lands, state agricultural development programs, and other state and county land use planning and decision-making.

(c) The land use commission shall have the sole authority to interpret the adopted map boundaries delineating the important agricultural lands.

(d) The land use commission may designate lands as important agricultural lands and adopt maps for a designation pursuant to:

- (1) A farmer or landowner petition for declaratory ruling under section 205-45 at any time; or
- (2) The county process for identifying and recommending lands for important agricultural lands under section 205-47 no sooner than three years, after the enactment of legislation establishing incentives and protections contemplated under section 205-46, as provided in section 9 of Act 183, Session Laws of Hawaii 2005. [L 2005, c 183, pt of §2]

Note

Section 9 of Act 183, Session Laws of Hawaii 2005, is printed after §205-41.

" **§205-50 Standards and criteria for the reclassification or rezoning of important agricultural lands.** (a) Any land use district boundary amendment or change in zoning involving important agricultural lands identified pursuant to this chapter shall be subject to this section.

(b) Upon acceptance by the county for processing, any application for a special permit involving important agricultural lands shall be referred to the department of agriculture and the office of planning for review and comment.

(c) Any decision by the land use commission or county pursuant to this section shall specifically consider the following standards and criteria:

- (1) The relative importance of the land for agriculture based on the stock of similarly suited lands in the area and the State as a whole;
 - (2) The proposed district boundary amendment or zone change will not harm the productivity or viability of existing agricultural activity in the area, or adversely affect the viability of other agricultural activities or operations that share infrastructure, processing, marketing, or other production-related costs or facilities with the agricultural activities on the land in question;
 - (3) The district boundary amendment or zone change will not cause the fragmentation of or intrusion of nonagricultural uses into largely intact areas of lands identified by the State as important agricultural lands that create residual parcels of a size that would preclude viable agricultural use;
 - (4) The public benefit to be derived from the proposed action is justified by a need for additional lands for nonagricultural purposes; and
 - (5) The impact of the proposed district boundary amendment or zone change on the necessity and capacity of state and county agencies to provide and support additional agricultural infrastructure or services in the area.
- (d) Any decision pursuant to this section shall be based upon a determination that:
- (1) On balance, the public benefit from the proposed district boundary amendment or zone change outweighs the benefits of retaining the land for agricultural purposes; and
 - (2) The proposed action will have no significant impact upon the viability of agricultural operations on adjacent agricultural lands.
- (e) The standards and criteria of this section shall be in addition to:
- (1) The decision-making criteria of section 205-17 governing decisions of the land use commission under this chapter; and
 - (2) The decision-making criteria adopted by each county to govern decisions of county decision-making authorities under this chapter.
- (f) Any decision of the land use commission and any decision of any county on a land use district boundary amendment or change in zoning involving important agricultural lands shall be approved by the body responsible for the decision by a two-thirds vote of the membership to which the body is entitled.

(g) A farmer or landowner with qualifying lands may also petition the land use commission to remove the "important agricultural lands" designation from lands if a sufficient supply of water is no longer available to allow profitable farming of the land due to governmental actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control. If the "important agricultural lands" were designated by a declaratory order in combination with the reclassification of land in the agricultural district to the rural, urban, or conservation district pursuant to section 205-45, the commission shall not remove the designation unless the legislature provides prior authorization by adoption of a concurrent resolution in accordance with section 205-45. [L 2005, c 183, pt of §2; am L 2008, c 233, §20]

" **[§205-51] Important agricultural lands; county ordinances.**

(a) Each county shall adopt ordinances that reduce infrastructure standards for important agricultural lands no later than the effective date of the legislative enactment of protection and incentive measures for important agricultural lands and agricultural viability, as provided in section 9 of Act 183, Session Laws of Hawaii 2005.

(b) For counties without ordinances adopted pursuant to subsection (a), important agricultural lands designated pursuant to this part may be subdivided without county processing or standards; provided that:

- (1) None of the resulting lots shall be used solely for residential occupancy; and
- (2) The leasehold lots shall return to the original lot of record upon expiration or termination of the lease. [L 2005, c 183, pt of §2]

Note

Section 9 of Act 183, Session Laws of Hawaii 2005, is printed after §205-41.

" **§205-52 Periodic review and amendment of important agricultural lands maps.** The maps delineating important agricultural lands shall be reviewed in conjunction with the county general plan and community, development, or community development plan revision process, or at least once every ten years following the adoption of the maps by the land use commission; provided that the maps shall not be reviewed more than once every five years. Any review and amendment of the maps of important agricultural lands shall be conducted in accordance with this part. In these periodic reviews or

petitions by the farmers or landowners for declaratory rulings, the "important agricultural lands" designation shall be removed from those important agricultural lands where the commission has issued a declaratory order that a sufficient supply of water is no longer available to allow profitable farming of these lands due to governmental actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control; provided that, if the "important agricultural lands" were designated by a declaratory order in combination with the reclassification of land in the agricultural district to the rural, urban, or conservation district pursuant to section 205-45, the commission shall not remove the designation unless the legislature provides prior authorization by adoption of a concurrent resolution in accordance with section 205-45. [L 2005, c 183, pt of §2; am L 2008, c 233, §21]