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DEPARTMENT OF LAND AND NATURAL RESOURCES

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THE SENATE
HOUSE OF REPRESENTATIVES
THE THIRTY-FIRST LEGISLATURE
INTERIM of 2021

MINUTES
for the
ACT 90 WORKING GROUP
INFORMATIONAL BRIEFING: Monday, August 16, 2021 (1:00 p.m.)
Via Videoconference

CALL TO ORDER: The meeting was called to order on Monday, August 16, 2021 at 1:00 p.m. by Act 90 Working Group Co-Chair Representative David A. Tarnas. The meeting was conducted virtually via Zoom due to the current health risk of exposure to COVID-19.

Chair Tarnas announced that his Co-Chair Senator Lorraine R. Inouye was not able to attend the meeting and Bradford Knowlton, Senate Committee Clerk was attending on her behalf.

VIRTUALLY PRESENT:

Act 90 Working Group Members:

House Committee on Water and Land:

Representative David A. Tarnas, District 7, Co-Chair
Representative Patrick Pihana Branco, District 50, Vice Chair

Senate Committee on Water and Land:

Bradford Knowlton, Senate Committee Clerk (for Senator Lorraine R. Inouye, Co-Chair)
Senator Gilbert S.C. Keith-Agaran, District 5, Vice Chair

Department of Agriculture:

Morris Atta, Deputy to the Chairperson
Linda Murai, Agriculture Resource Management Division

Department of Land and Natural Resources:

Suzanne Case, Chairperson
Robert Masuda, First Deputy Director
Russell Tsuji, Land Division Administrator
Kevin Moore, Land Division Assistant Administrator
Ian Hirokawa, Land Division Special Projects Coordinator
Gordon Heit, Land Division Hawaii Island District Land Agent
David Smith, Forestry and Wildlife Division Administrator
Steven Bergfeld, Forestry and Wildlife Division Hawaii Branch Manager

OTHERS VIRTUALLY PRESENT: (As acknowledged by Chair Tarnas)

Robin, House of Representatives staff
Technical staff

ABSENT:

Senator Lorraine R. Inouye, District 4, Co-Chair
(Represented at the meeting by Bradford Knowlton, Senate Committee Clerk)

BACKGROUND:

This working group is set up by Act 139, House Bill 469 to ascertain the process and status of the transfer of non-agricultural park lands from the Department of Land and Natural Resources (DLNR) to the Department of Agriculture (DOA) pursuant to Act 90, Session Laws of Hawaii 2003 (Act 90) and Chapter 166E.

The second task of the working group is to determine the challenges and potential remedies necessary to facilitate the process of fulfilling the purposes of Act 90.

The Working Group seeks to get a better understanding of DLNR's land management of agriculture lands and how it is characterized in terms of food production, ecosystems services, reforestation, habitat conservation, cultural use, public access, recreational use, and other considerations.

The next meeting will be held in one week on Monday, August 23 and will include testimony from lessees to provide their perspective and experience with both DLNR and DOA.

DISCUSSION:

DEPARTMENT OF AGRICULTURE:

Deputy Atta spoke on behalf of DOA and outlined the transfer process under Act 90 which began in 2003. Recent issues involve the suitability of pasture lands and whether unencumbered lands are to be considered.

Land parcels deemed appropriate for transfer from DLNR to DOA require approval by both the Board of Land and Natural Resources and the Board of Agriculture. Lessees must be compliant under the existing DLNR lease terms and the leased lands are subject to due diligence review by DOA staff to determine the suitability of transfer and management by DOA. Parcels must be economically viable and agricultural (ag) leases issued by DLNR, and must contain a minimum of 1-2 acres of actual farming area with the income generated primarily from farming activity on the land.

The total acreage of parcels transferred to DOA under Act 90 is currently 19,000 acres. A detailed worksheet including the list of parcels on each island was submitted to the committee for review.

DOA regulates leases with annual inspections, however site visits are currently conducted on a complaint basis or as needed due to staff shortages.

Lessees under DOA management can request changes to their property including proposed construction or installation of improvements, assignments, early termination, and extensions to amortize any cost of improvements.

When issuing a lease by statute, DOA is required to rely on independent appraisals to determine lease rent. Due to the restriction of land use under DOA being solely for agricultural purposes, the appraisal values when deriving lease rents can be perceived as more favorable than fair market rent.

Vacant parcels received from DLNR are subject to public auction by default, however DOA has the authority to negotiate directly when a finding of public purpose is found by the Board of Agriculture.

DOA offered no comment on DLNR's management of the land prior to transfer.

Chair Tarnas thanked Deputy Atta for his explanation of DOA's land management process and the worksheets summarizing the parcels transferred under Act 90. These briefing materials will be finalized and made available to the working group members and the public. The floor was opened for questions to DOA.

Senator Agaran requested more information about how DOA manages changes or improvements to the property and whether rent is affected, or whether an extension can be granted to allow for additional improvements.

Deputy Atta explained lessees can amortize the cost of improvements. Usually if a property requires infrastructure work it would occur at the beginning of the lease term. DOA does have provisions for lease rent waiver for up to 2 years to allow the lessee to invest whatever capital is needed to bring the property to a condition suitable for farming activity. Both DLNR and DOA have provisions in place to compensate and give aid to lessees if natural disasters occur or need assistance.

Senator Agaran pointed out that Deputy Morris previously worked at DLNR in the Land Division. He asked whether there are notable differences between DLNR and DOA's authority with regards to approving changes and improvements to an existing lease.

Deputy Atta said DOA's focus is on the agricultural activity on the property, however in terms of power and authority both DLNR and DOA are relatively similar. [differences: direct lease extensions on a finding of public purpose; appraisals at ag prices]

Senator Agaran asked if an extension would still be based on the statutory limits.

Deputy Atta confirmed DOA's lease terms are set by statute. No special or additional allowances can be made.

Senator Agaran thanked the Chair and had no further questions.

Chair Tarnas asked if DOA has the authority to do lease extensions, but only up to the statutory limit for a specified type of land. He asked for clarification on whether there is a difference between ag park land and non ag park land.

Deputy Atta confirmed there is a difference - ag park land has a limit of 55 years and non ag park land leases can be extended up to 65 years.

Chair Tarnas asked if lease extensions are only up to those specified maximums.

Deputy Atta confirmed that is correct.

Chair Tarnas asked if the extensions are tied to investments by Lessees?

Deputy Atta said DOA's Board takes it into consideration especially if it's being financed by an institution that requires the additional time to amortize the cost of improvements.

Chair Tarnas thanked Deputy Atta and asked if there were additional questions for DOA.

Chair Case asked the Land Division to clarify whether DLNR's lease extensions are also 65 years for non ag park lands, and if necessary, to amortize a mortgage or improvements if there is a time limit.

Land Administrator Tsuji explained that DLNR usually looks at future improvements and the extension is subject to Land Board approval which is also limited to 65 years.

Administrator Tsuji also addressed the previous question from Senator Agaran regarding amendments to leases and how easily they can be accommodated. DLNR agriculture leases are currently required to go to public auction. There is a case law that prohibits any form of amendment to an auction lease with the theory being that it was published at the time of auction, therefore it's not fair to other potential bidders to change the terms and conditions. The Supreme Court ruled that amending the lease is prohibited. Land Division addressed this concern in past legislation and requested to be able to directly negotiate lease terms like DOA to amend it with Board approval.

Chair Tarnas thanked DLNR for their explanation. There were no additional questions for DOA so the discussion was passed to DLNR, Chair Case.

DEPARTMENT OF LAND AND NATURAL RESOURCES:

Chair Case shared her screen and gave a PowerPoint presentation on behalf of DLNR.

Act 90 transfers non-agricultural park lands by mutual agreement from DLNR to DOA. Both departments have different missions with constitutional requirements consistent with the Governor's Sustainable Hawaii plan. DLNR manages public trust resources to conserve and protect Hawaii's natural cultural resources and provide sustainable development for self-sufficiency and use. DOA's focus is pursuing agricultural self-sufficiency and diversified agriculture in Hawaii.

DLNR is in full compliance with Act 90 and has transferred or is currently in the process of transferring the mutually agreed lands.

Kauai – 37 leases, totaling 538 acres
Oahu – 88 leases, totaling 1,417 acres
Maui – 19 leases, totaling 1,317 acres
Hawaii – 86 leases, totaling 15, 812 acres

Total 237 leases including revocable permits and vacant parcels totaling 19,104 acres.

There are parcels that DOA has identified for transfer, but that DLNR does not agree with due to the potential public trust forestry and wildlife or recreational use of the lands. DLNR is working with DOA to transfer former sugar and pineapple lands, and supports agriculture projects like the

feedlot in Ewa and dairy facilities in Hilo and ag lands in Lalamilo and preservation of the East Kauai irrigation system.

DLNR does not want to displace anyone and is trying to collaborate on multiple use areas which include grazing, forestry, hunting, access, and renewable energy projects.

Land parcels pending reviews include DOA's recent list as of November 2019:

Kauai – 35 reviews requested by DOA.

30 pending DOA file review & site inspection.

1 transfer completed.

21 identified by DOFAW as important for reforestation, forest carbon, public hunting, access to mauka managed lands, public recreation, wetland habitat, nene habitat.

Oahu – 3 reviews requested by DOA.

1 pending DOA file review and site inspection.

1 transfer approved by BLNR, EO paperwork nearly completed.

1 parcel to be retained by DLNR: East Kapolei / UH West Oahu Rail TOD.

Maui – 32 reviews requested by DOA.

25 pending DOA file review and site inspection.

7 transfers completed.

3 identified by DOFAW as important for native forest, shoreline and forest access, stream protection, and historic trails.

Hawaii Island – 52 reviews requested by DOA.

52 pending DOA file review and site inspection.

1 RP cancelled by the RP holder, BLNR approved for set-aside to forest reserve.

11 identified by DOFAW important for forest protection.

DLNR's land transfer process is done by an executive order or set-aside. Land Board approval is required, and after a survey map is obtained, the executive order is sent to the Governor for execution. Note all executive orders are subject to legislative disapproval and the entire process can take years to complete.

Chair Case outlined the reasons lessees may favor transfer from DLNR to DOA's management.

Favorable lease rents.

Chapter 171 requires DLNR to appraise it at the highest and best use, whereas DOA can allow for fair market value for agricultural use.

Future security:

DOA can offer future security and flexibility by allowing conversion of revocable permits to direct leases. Chapter 171 requires DLNR to hold public auctions and cannot directly negotiate

lease terms. Chair Case noted that DLNR has flexibility in issuing revocable permits, however many farmers and ranchers want to farm and utilize the land as long as possible and prefer the security of a direct lease.

Agricultural leases can exclude other trust uses:

DOA has expertise in agricultural uses whereas DLNR's priority is public trust values of natural and cultural resources, public recreation, and fair income generation. Chair Case pointed out this broader interest is why DLNR would like to retain management of multiple use lands.

Multiple use land includes areas that have native forests that can be negatively impacted by human and animal activity such as farming. DLNR's concern is the depletion of these forest areas critical to combat climate change and hopes through proper management to help with the reforestation and preservation of the natural resources.

Chair Case presented a graph of the negative impacts to Hawaii citing before humans there was 84% native vegetation and about 16% barren lava. Today over half of the land is converted to nonnative uses.

DLNR seeks to help manage the land between the urban zoned and rural areas through the division of Forestry and Wildlife. These lands include natural area reserves, game management areas and sanctuaries. DLNR also works in the watershed partnership in which many ranchers are members.

Chair Case emphasized caution in the definition of ag lands as they are not all the same. There are agricultural lands, lands in other zones that have agricultural use, and agricultural zoned lands.

There are basically four land use districts: agricultural, conservation, rural, and urban. Native forests can be zoned agricultural. DLNR believes these lands are more suitable for protection through programs like forest legacy and forest stewardship, which can have agreements for multiple use and allow for forest protection.

Multiple use lands are important for access through agricultural lands for public hunting and native Hawaiian gathering. Joint management is important and can aid in the protection of trees on grazing lands in forested areas. DLNR can do joint fencing projects with ranchers which both benefits the lessee and protects the land.

The forest stewardship program is supported by the legislature. It is a 10-year program that provides cost reimbursement for landowners under a long-term lease for privately owned or public lands with a 5-acre minimum which must be forested or have the potential for reforestation. The incentives are 50% reimbursement for creation of management plan and 50% reimbursement of practices. A mixture of forestry and agriculture is possible such as in agroforestry and silvopasture.

Climate change issues such as forest carbon and soil erosion are ways DLNR can offer aid, and game and non-game management areas are good opportunities for income generation as well as public hunting.

Chair Tarnas thanked Chair Case for DLNR's presentation. The floor was opened to questions.

Chair Tarnas returned to the issue of DOA's ability to directly negotiate lease rents as opposed to DLNR who must hold a public auction.

Deputy Atta confirmed DLNR is restricted to public auction for their leases and the case law prohibits the changing of terms in any publicly auctioned lease. DOA's process to issue leases is by default public auction unless there is a specific finding that it's in the interest of the public to directly negotiate. DOA can also entertain a conversion of a DLNR lease to DOA. If there are less than 10 years left, the lease can be terminated, and a new DOA lease issued to mitigate against any disruption of activities.

Chair Tarnas thanked Deputy Atta. The floor was opened to questions.

Chair Case deferred to the Land Division for additional comment. She noted that DLNR is flexible in revocable permits, however leases must be by public auction.

Senator Agaran asked a question that was inaudible. Chair Tarnas asked him to please repeat but Chair Case interpreted the question to be whether revocable permits from DLNR can be transferred to DOA as long-term leases. Chair Case deferred to DOA.

Deputy Atta responded that a revocable permit is converted to a new lease from DOA and, if there is a request to continue ongoing activities, they can take it to DOA's Board for approval of public purpose that supports the direct negotiation of a long-term lease option.

Chair Case agreed that the permittee can have an easier process of conversion to a direct lease through DOA given the direct negotiation option.

Chair Tarnas thanked both DLNR and DOA and deferred to Senator Agaran as to whether his question had been answered. Senator Agaran said he was satisfied.

Chair Tarnas turned discussion back to DLNR Chair Case and Land Division.

Administrator Tsuji had no additional comments. Assistant Land Administrator Moore asked a question of DOA: If a lease is maxed out at 65 years, when it is transferred over, does it start a fresh term or is it still kept at 65?

Deputy Atta asked his staff Linda Murai to confirm or correct him, but he was under the assumption it would start as a brand-new lease. Ms. Murai confirmed it would be considered a

brand-new lease with 35 years and have the eligibility for an additional 30-year extension for a total of 65 years. Assistant Administrator Moore thanked DOA.

No other questions were raised.

DLNR Forestry and Wildlife Administrator Smith commented that DLNR would like to retain properties such as those in South Kona as many can be used for access and contain a lot of native forest attributes. DLNR would like to preserve the forest zoned areas and remove animal and human activity for native forests to regenerate, but is not trying to displace anyone. DLNR is willing to work with ranchers in multiple use areas.

Chair Tarnas thanked DOFAW and asked a question on behalf of frustrated parties who had parcels taken out of pastoral use for reforestation. Due to lack of financial support and staff support, the property went to weeds. Ranchers and farmers were frustrated at the lack of proper management by DLNR when they could use the land. Chair Tarnas asked if this is an ongoing challenge?

Administrator Smith responded that he is not aware of the circumstances of that incident. He noted there are parcels DOFAW has received such as for mitigation for the Daniel K. Inouye highway project where the parcel encroached on palila critical habitat. Pasture parcels were set aside for mamane reforestation to make up for that loss and, from a legal standpoint, there had to be a tradeoff for the highway to be built. Unfortunately, reforestation could not be done immediately at that time. Note: 269 acres restored at Kaohe unit, 103k trees planted; over 900 volunteers; Pu'u Mali 400 acres restored; 146k trees planted; over 1500 volunteers; both showing good natural regeneration as well; carbon sequestration project with Pono Pacific to complete the reforestation area. Administrator Smith said those incidents occurred outside of DLNR.

Chair Tarnas thanked Administrator Smith for the explanation.

Chair Case had nothing to add.

Chair Tarnas requested both DLNR and DOA collaborate on the creation of a briefing document to release to the working group and the public for clarity.

Last call for questions: None.

ANNOUNCEMENT OF NEXT MEETING:

Monday, August 23, 2021 from 1:00 p.m. – 4:00 p.m., the Working Group will convene for a Lessee Testimony Hearing, at which DLNR and DOA lessees are invited to share with each other their experiences of the Departments' lease management programs.

Public testimony: None.

ADJOURNMENT:

The meeting was adjourned at 2:06 p.m.