

[Letter dated June 20, 2008, from attorney David Kimo Frankel to Senator Jill Tokuda concerning SB 2646, this year's important agricultural lands bill. The bill is still being reviewed by Gov. Lingle, who must decide whether to veto it or sign it into law.]

Senator Tokuda,

You did a far more effective job in making your case regarding Senate Bill 2646 on Island Insights last week than I did. But in doing so, you made a number of statements that are not accurate. You said that you would be willing to meet and discuss these issues at a later date. I would like to ask for such a meeting. In the mean time, let me point out our areas of disagreement and ask for you to provide the specific legal citations that indicate that I am incorrect.

Homerule & Consistency with County Plans

You argued that the 15% of the land that may be proposed to be removed from the agricultural district and into the rural district needs to comply with the relevant county general plan and its accompanying community, development or community development plan. That statement is not accurate.

First, developers will argue that the language in SB 2646 for HRS § 205-45(b)(2) requires consistency with county plans only for those lands being placed in the urban district – not the rural district. *See also, proposed HRS § 205-45(e)(2)*. There is a well established legal principle that if the legislature explicitly states something for one area (e.g. the urban district), the clear implication is that it is not required for the other (e.g., the rural district).

Second, you argued that another bill enacted by the legislature requires that reclassification be consistent with county plans. Nevertheless, the *proposed HRS § 205-45(b)* specifically states that its provisions apply "any law to the contrary notwithstanding." So, developers will argue that this new requirement of consistency from another bill does not trump the language found in SB 2646.

It is true, however, that consistency with county plans is required in the rare event that a petitioner attempts to use credits from a previously approved designated of important agricultural lands at a later date. HRS § 205-45(h).

At one point during the Island Insights program, you argued that the State Land Use Law could not require that activities in the rural district be consistent with county general plans and community plans etc. You even said that as a land use attorney, I should know this; that county jurisdiction is exclusive only in the urban district. Your argument is belied in part by the language found in the *proposed HRS § 205-45(h)*, which does in fact require such consistency in one limited circumstance in the rural district. More importantly, you appear not to understand that the Land Use Law gives the counties the power to enact stricter laws in the rural and agricultural districts than provided in HRS Chapter 205 or the Land Use Commission's rules. *Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Hawai`i. 465, 481-2, 78 P.3d 1, 17-18 (2003); HRS § 205-5(b). There is nothing that would have stopped the Legislature from requiring consistency with county plans in the rural district – except the demands of large

landowners.

Unfortunately, what SB 2646 does is allow a large landowner to easily convert large chunks of land into the rural district. At that point, many landowners would not need the land to be rezoned – or require any discretionary county approval that includes meaningful public participation. They can simply subdivide the land – entirely escaping all meaningful public review. County governments would be unable to prevent these subdivisions, regardless of the impacts to traffic, police and fire services, and natural resources.

The biggest mistake the State Legislature made regarding the State Land Use Law was when (now disgraced) Senator Aki pushed through a special interest amendment to HRS Chapter 205 to allow golf courses to be built in the agricultural district. That provision spurred the proliferation of golf courses and sprawling subdivisions on good agricultural land. A few years ago, the Legislature fixed this mistake. SB 2646, by facilitating the reclassification of land into districts that allow golf courses, will spur more such development on land currently classified as agricultural.

Criteria for Reclassification

You argued that the LUC will be able to deny 85-15 reclassifications and that the LUC will be able to develop criteria by which to judge whether to reclassify land pursuant to the 85-15 scheme.

There are two basic principles of law that you need to understand. First, an agency cannot reject a petition unless there is a basis in law to do so. Second, an agency may not adopt a rule that conflicts with its statutory mandate.

SB 2646 gives the LUC only three (and a half) criteria to reject an 85-15 reclassification:

- 1) land proposed to be placed in the urban district is consistent with county plans;
- 2) the "important" agricultural land is important;
- 3) the reclassified land meets the (very loose standards) articulated in 205-2; and
- 4) if using credits at a later date, lands reclassified to the rural and conservation district have to be consistent with county plans.

Developers will argue that the LUC does not have the right to deny a petition due to concerns regarding historic sites, natural resources, traffic and other infrastructure issues. They will argue that the *proposed HRS § 205-45(k)* does not give the LUC the authority to mandate additional criteria. Nor does *proposed HRS § 205-45(k)* require that the LUC adopt any such rules.

Contested Case Hearings

You argued that citizens and community groups retain the right to request a contested case hearing through the declaratory petition process. That claim is terribly misleading.

Let me describe three cases I have litigated.

First, in August 2000, I filed a petition for a declaratory order from the LUC. It was granted. You can find the order at http://luc.state.hi.us/declar_orders/dr00-23sierra_club.pdf.

The landowner appealed. One of the basis of the landowner's appeal was that the LUC issued the declaratory order without a contested case hearing. The third circuit court affirmed the LUC's decision. No contested case hearing was required to render a declaratory order. Second, around 2005, I represented Life of the Land and a number of other organizations challenging the importation of a genetically modified algae. The Board of Agriculture refused to allow the community groups a contested case hearing. The first circuit court held that the community groups had no right to a contested case hearing despite the threat posed to the environment and members of the groups. Third, I represent a cultural descendant to burials at Ward Village's shops project (where Whole Foods is proposed). DLNR concluded that a cultural descendant had no right to request a contested case hearing regarding a decision to remove previously identified burials. The first circuit court affirmed, although the case is on appeal.

These three cases make it clear that (1) agencies are reluctant to grant contested case hearings; and (2) the courts often do not require them.

Currently, reclassification petitions are contested case hearings. HAR § 15-15-52 The standard applied for granting intervention is not the same standard as for deciding whether to conduct a contested case hearing for a declaratory petition. It will be much, much more difficult for citizens to be allowed to participate in a contested case hearing over these 85-15 declaratory petitions.

Essentially, what this means is that citizens are locked out of the planning process. They are denied the right to cross examine the developer's witnesses. They are denied the right to present their case.

Tax Credits for Taro Farmers

You argued that the tax credits available for "regulatory processing, studies and legal and other consultant services related to obtaining or retaining sufficient water for agricultural activities" will help the taro farmers trying to restore water to their fields in East Maui and elsewhere. Taro farmers do not need tax credits. They need water. Tax credits for "regulatory processing, studies and legal and other consultant services related to obtaining or retaining sufficient water for agricultural activities" benefit Alexander & Baldwin and the largest landowners. Given their incomes, taro farmers won't and can't use such credits.

You and Dean have made a good argument that the State should be assisting farmers. Our dispute is whether this aid should be packaged with a huge financial bonanza for the largest landowners in the state. This aid will facilitate inappropriate development, locking the public out of the process, and diminishing homerule.

Sincerely,

David Kimo Frankel