CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

121 WAIANUENUE AVENUE
P.O. BOX 686
HILO, HAWAII 96721-0686
TELEPHONE 808.935.6644 FAX 808.935.7975
WWW.CARLSMITH.COM

KGARSON@CARLSMITH.COM

October 13, 2022

VIA E-MAIL BLNR.TESTIMONY@HAWAII.GOV

Chairperson Suzanne Case and
Members of the Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawai‘i 96809

Re: October 14, 2022 Board of Land and Natural Resources Meeting
Agenda Item K.2: Request for Approval to hold Statewide Public Hearings to Amend and Compile Title 13, Chapter 5, Hawai‘i Administrative Rules regarding the Conservation District

Dear Chairperson Case and Members of the Board of Land and Natural Resources ("**Board**"):

The undersigned represents a landowner with several lots within the Conservation District in the County and Island of Hawai‘i and who may be impacted by the proposed amendments to Hawai‘i Administrative Rules, Title 13, Chapter 5 (the "**Proposed Rules**").

Of particular concern to our client is the new definition of a "Legal lot of record" proposed in the Department of Land and Natural Resources Hawai‘i Administrative Rules ("**HAR**") section 13-5-2 Definitions: *"Legal lot of record" means a lot or parcel that was created through compliance with land use laws and regulations in effect at the time of creation."*

This definition is important, since if otherwise allowed by the particular subzone, section 13-5-41(b) provides that "[n]ot more than one single-family residence shall be authorized within the conservation district on a Legal lot of record."

A. "Land use laws and regulations in effect at the time of creation" is ambiguous and burdensome.

"Land use laws and regulations in effect at the time of creation" is ambiguous as the phrase "land use laws" is not defined therein. The definition fails to recognize that legal lots of record can be created through several means, in addition to compliance with the land use laws and regulations in effect at the time of creation. If the Proposed Rules are adopted without revision, they will exclude lots created by Court Order in partition actions. The definition also fails to take into account that prior to the enactment of the present-day subdivision codes, land

was conveyed by means of a Deed and property description whereby the parties, location and identity of the land could be ascertained. These older conveyances were not completed pursuant to "land use laws", but instead were recognized by common law, all before the creation of lots was formally regulated by a subdivision code.

In acknowledging the "legality" of certain lots, the County of Hawai'i has codified a process to recognize lots which pre-exist the subdivision code for consolidation and re-subdivision purposes, since the County's first Subdivision Code was not enacted until 1944. See Exhibit 1 [Ord No. 02-110] and Exhibit 2 [Hawaii County Code Section 23-118].

Amongst other matters the County of Hawai'i will essentially recognize pre-existing lots which were (1) created and recorded prior to November 22, 1944 [the enactment of the Subdivision Code]; (2) lots created by Court order; (3) lots created through evidence of a properly recorded Deed and/or Subdivision Plat, and depicted on a County of Hawai'i Tax Map, and individually assessed for real property taxation purposes.

Any definition of "Legal lot of record" in the Proposed Rules should similarly include any lot or parcel created or recognized as a separate pre-existing lot prior to the enactment of the Conservation District statutory scheme in 1961, provided however, that the pre-existing lot is recognized as such by a County.

B. Pending Applications Should Not be Governed by the Proposed Rules

Also omitted from the proposed Amendments to Title 13, Chapter 5 is the effect the Proposed Rules would have on pending applications, or where a Draft Environmental Assessment/Draft EIS (or any other prerequisite to the filing of a Conservation District Use Application) has been submitted to an accepting authority/approving agency or department. We note that when the Environmental Council (now the Environmental Advisory Council) amended its rules with respect to the environmental review process, to avoid confusion over treatment of pending applications, the amended rules contained a specific provision excepting the application of the new rules to actions that were at a certain stage in the process, and we would urge the Board to consider the insertion of such a "grandfather" provision.

Thank you for allowing us to submit this testimony for your consideration.

Sincerely,

Katherine A. Garson

Enclosure(s)

cc: Client

4864-1743-1352.3.071498-00001

COUNTY OF HAWAI'I STATE OF HAWAI'I

BILL NO. 213
Draft 3

ORDINANCE NO. 02 110

AN ORDINANCE AMENDING CHAPTER 23 OF THE HAWAI'I COUNTY CODE 1983 (1995 EDITION) RELATING TO PRE-EXISTING LOTS.

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF HAWAI'I:

SECTION 1. FINDINGS. The law regarding lots that pre-exist the subdivision code, and their use for consolidation and re-subdivision, needs clarification. The purpose of this measure is to specify the criteria by which a pre-existing lot is certified by the planning director and to state how certain uses will be accounted for during a consolidation/resubdivision action. This is particularly true for "lots" that are claimed to result from leases or other temporary arrangements, such as units within abandoned plantation camps. The council should clarify that units within abandoned plantation camps cannot be considered as pre-existing lots.

Control over the creation of lots—the subdivision of land into units that can be sold separately—is an essential tool of modern planning. The Subdivision Code ensures that when land is subdivided, the new lots have adequate access, drainage, and other infrastructure. The Subdivision Code specifies the minimum requirements for subdivision, such as road standards. The County has many examples of infrastructure problems from subdivisions developed before there was a strong subdivision code. The Zoning Code works with the Subdivision Code to specify the minimum area and dimension of lots. This is the basic control of density. Lot sizes are a basic difference between agricultural and urban areas.

The County's first Subdivision Code was enacted in 1944. On January 8, 1948, the subdivision law was amended so that the lease, as well as the sale of lots, must conform to the

Subdivision Code. Until December 21, 1966, the County exempted the subdivision of agricultural lands in excess of twenty-acre plots. Furthermore, the State Legislature passed Act 90 (SLH 1972) effective in 1973, requiring that any plan for subdivision must be subject to approval of the planning department before it could be partitioned by the court.

The County has recognized the legal validity of lots created by sale or other transfer of fee simple interest before the creation of lots was formally regulated by the Subdivision Code and also lots created by court partitioning prior to the statutory requirement for planning department approval. All grants and awards of land from the government created separate "lots" when they were conveyed. When portions of those properties were later sold or otherwise permanently transferred, if in full compliance with the laws of the time, new lots were created with the new boundaries. When an owner sold, devised, or otherwise permanently transferred a portion of a lot, it was clearly the intent to make a permanent separation of one part of the property from another. If the County did not recognize the creation of a separate lot by such actions that occurred before the first Subdivision Code or court action, the owners of the areas in question would not own separate properties, and might be co-tenants in one larger lot.

Property that was only leased separately is different. The leasing of a portion of a lot does not imply the intent to permanently create a separate legal entity. The owner takes back the area at the end of the lease. By law, when the owner of a fee interest also acquires the leasehold interest, the leasehold interest "merges" into the fee interest, and no longer constitutes a separate interest. Simerson v. Simerson, 20 Haw. 57 (1910).

The Planning Department has, however, in the past, recognized some pre-existing lots based upon leases, or other temporary arrangements, in certain circumstances. This was done primarily in allowing existing plantation camps to be converted to fee ownership. This preserved existing communities after the demise of the sugar plantations. It allowed the residents of the camps to purchase their homes, in furtherance of the general public policy in favor of home ownership.

While some vacant lots were also recognized, these lots were within existing communities. All of the existing camps—those that contain residences—have now been subdivided and transferred.

The Council finds that recognizing lots based upon leases may be abused to create new development that is not in conformance with the subdivision and zoning codes. In particular, if "lots" are recognized in long-abandoned plantation camps and these "lots" are then developed without following the regular subdivision and zoning codes, this undermines the public health, safety, and welfare, and the public interest in the orderly development of land.

The rationale for recognizing the continuing existence of lots that pre-date the Subdivision Code is that if the land has already been divided and developed, recognizing the lots does not contradict the purposes and spirit of the Code. Akai v. Lewis, 37 Haw. 374, 379 (1946). Obviously, to allow subdivision of areas based upon small "lots" whose separate use has long been abandoned would contradict the purposes of the subdivision law.

At one time, there were many plantation camps scattered around the island which were closed and abandoned because the companies and workers wanted a higher quality of housing. At one time, the camps did contain residential dwellings. The employees typically did not have long-term or recorded leases to the dwellings. When employees occupied the dwellings as an incident of employment, without a separate contract giving a set term of occupancy, the use of the home was not even considered a lease. Ecija v. Paauhau Sugar Plantation Co., 26 Haw. 42 (1921). The owners have demonstrated that they had no long-term intent or expectation to retain the separate identity of the units within the camps by their actions in demolishing them and putting the land back to agricultural use. For the most part, these areas are in large-lot agricultural zoning, and have been for many years. The owners of areas containing abandoned plantation camps have no reasonable expectation that the individual units in these camps can now be revived and used to subdivide the surrounding agricultural land to lots that do not conform to the subdivision and zoning codes.

Past County actions in recognizing pre-existing lots based upon leases might not have adequately considered the significance of other statutes. After 1859, the laws of the Kingdom, and later the Territory, required the recordation of leases with a term of more than a year. Unrecorded leases with a term of more than a year were not valid against third parties without notice. From 1911 on, Territorial law required that when property was subdivided to be sold or leased by lots, the plan of the subdivision would have to be recorded with the Bureau of Conveyances.

The Council finds that there is some lack of certainty and clarity in the present law. By enacting this ordinance, it does not imply that the law presently recognizes abandoned plantation camps or other abandoned leasehold interests as pre-existing lots.

The ordinance creates two basic leasehold exceptions: property that contains a legal dwelling; and property continuously leased as a separate unit. The first exception recognizes the public policy in favor of converting leasehold residential interests to fee ownership. See Chapter 516, H.R.S. The exception for property continuously leased recognizes that this shows a continued intent to treat the property as a separate unit, and that the lease did not merge into the fee.

Another related issue in consolidation and resubdivision is the use of lots that were not created to be building sites, such as road lots, flume lots, or railroad rights-of-way. Section 23-7 of the Subdivision Code provides that the normal standards of the Code do not apply if a consolidation and resubdivision does not create a greater number of lots. The rationale for this exception is that the potential for additional development does not result if no additional lots are created. But this exception should not apply to the conversion of lots not meant for buildings to lots that can be used for dwellings and other substantial structures, by the consolidation and resubdivision process.

SECTION 2. Chapter 23, Article 1, Section 23-3 of the Hawai'i County Code 1983 (1995 Edition), is amended by adding the following new definitions to be appropriately inserted and to read as follows:

( ) "Conforming" means compliance with the requirements of the applicable zoning district, including minimum building site area and minimum dimensions."

"( ) "Pre-existing lot" means a specific area of land that will be treated as a legal lot of record based on criteria set forth in this chapter.

SECTION 3. Chapter 23 of the Hawai'i County Code 1983 (1995 Edition) is amended by adding a new article, entitled Pre-Existing Lots, to read as follows:

"**Article 11. Pre-Existing Lots.**

Section 23-117. Purpose.

The purpose of this article is to specify the criteria by which a pre-existing lot may be recognized and to state how certain uses will be accounted for during a consolidation/resubdivision action.

Section 23-118. Criteria to determine a pre-existing lot.

The director shall certify that a lot is pre-existing if the lot meets one of the following criteria:

(a) The lot was created and recorded prior to November 22, 1944 or the lot was created through court order (e.g. partition) prior to July 1, 1973, and the lot had never been legally consolidated, provided that no pre-existing lot shall be recognized based upon a lease except for a lease which complied with all other applicable laws when made, including Territorial statutes regulating the sale or lease of property by lot number or block number, and on _____ (the effective date of this ordinance), the proposed lot contains a legal dwelling, or has been continuously leased since January 8, 1948, as a separate unit.

(b) The lot was created prior to December 21, 1966, as an agricultural lot in excess of twenty acres pursuant to county ordinance.

Section 23-119. Proof.

The owner of property seeking certification as a pre-existing lot shall provide reasonable evidence to meet the criteria set forth therein, provided that recognition of a lot based on a lease shall be supported by evidence that a valid lease was in existence on January 8, 1948, which specifies the boundaries of the claimed lot with reasonable certainty.

Section 23-120. Use of certain pre-existing lots in consolidation and resubdivision.

A pre-existing lot that was created for use as a road lot, a railroad right-of-way, a flume line, or a pole anchor, shall be excluded for calculating the number of lots in applying section 23-7, unless it is conforming, except to create road lots or other non-buildable lots."

SECTION 4. Sections 2 and 3 shall not affect any pre-existing lots recognized by official action of the director, or within any subdivision which had received tentative or final approval, prior to the effective date of this ordinance.

SECTION 5. Severability. If any provision of this ordinance or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are declared to be severable.

SECTION 6. The Clerk of the County of Hawai'i is directed to insert the effective date of this ordinance in this article.

SECTION 7. This ordinance shall take effect upon its approval.

INTRODUCED BY:

COUNCIL MEMBER, COUNTY OF HAWAI'I

Hilo, Hawai'i
Date of Introduction: July 31, 2002
Date of 1st Reading: July 31, 2002
Date of 2nd Reading: September 11, 2002
Effective Date: September 25, 2002
REFERENCE: Comm. 608.15

OFFICE OF THE COUNTY CLERK
County of Hawaii
Hilo, Hawaii

Introduced By: Bobby Jean Leithead-Todd
Date Introduced: July 31, 2002
First Reading: July 31, 2002
Published: N/A

REMARKS:
8/4/02-held over for public hearing.
8/28/02-public hearing.

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Arakaki	X			
Chung	X			
Elarionoff	X			
Jacobson	X			
Leithead-Todd	X			
Pisicchio	X			
Safarik	X			
Tyler	X			
Yagong	X			
	9	0	0	0

Second Reading: September 11, 2002
To Mayor: September 17, 2002
Returned: September 25, 2002
Effective: September 25, 2002
Published: October 9, 2002

REMARKS:

(DRAFT 3)

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Arakaki	X			
Chung	X			
Elarionoff	X			
Jacobson	X			
Leithead-Todd	X			
Pisicchio	X			
Safarik	X			
Tyler	X			
Yagong			X	
	8	0	1	0

I DO HEREBY CERTIFY that the foregoing BILL was adopted by the County Council published as indicated above.

APPROVED AS TO
FORM AND LEGALITY:

DEPUTY CORPORATION COUNSEL
COUNTY OF HAWAII

Date 9/24/02

COUNCIL CHAIRMAN

COUNTY CLERK

Bill No.: 213 (Draft 3)
Reference: C-608.15/PC-82
Ord No.: 02 110

Approved/Disapproved this 25th *day*
of September, *20* 02.

MAYOR, COUNTY OF HAWAII

Section 23-118. Criteria to determine a pre-existing lot.

The director shall certify that a lot is pre-existing if the lot meets one of the following criteria:

(a) The lot was created and recorded prior to November 22, 1944 or the lot was created through court order (e.g. partition) prior to July 1, 1973, and the lot had never been legally consolidated, provided that no pre-existing lot shall be recognized based upon a lease except for a lease which complied with all other applicable laws when made, including Territorial statutes regulating the sale or lease of property by lot number or block number, and on September 25, 2002, the proposed lot contains a legal dwelling, or has been continuously leased since January 8, 1948, as a separate unit.

(b) The lot was created prior to December 21, 1966, as an agricultural lot in excess of twenty acres pursuant to County ordinance.

(c) The lot was created through evidence of a properly prepared deed and/or subdivision plat for fee simple ownership of such lot to a grantee other than the grantor or a grantor's trust which deed was recorded at the State of Hawai'i Bureau of Conveyances or with the Registrar of the Land Court prior to May 1, 1999, and was subsequently depicted on a County of Hawai'i Tax Map, was issued a tax map parcel number therefor, and was individually assessed for real property taxation purposes.

(2002, ord 02-110, sec 3; am 2018, ord 18-12, sec 1.)