

# Executive Summary

Vested with the responsibility of enacting state laws and appropriating public funds, the Legislature is focused on transparency, accountability, and the proper functioning of state government. Critical to this responsibility is oversight over state departments and agencies.

Two recent performance audits conducted by the State Auditor at the direction of the Legislature made critical findings regarding the Special Land and Development Fund (SLDF) within the Department of Land and Natural Resources (DLNR) and the Agribusiness Development Corporation (ADC). The Auditor's findings and recommendations were contained in Audit Report No. 19-12 (regarding SLDF) and Audit Report No. 21-01 (regarding ADC). After reviewing Audit Report Nos. 19-12 and 21-01, the House of Representatives determined that further investigation was needed to evaluate and address these state agencies and more specifically, the management, oversight, and disposition of public lands.

The House Investigative Committee (Committee) was established on April 29, 2021, by adoption of House Resolution No. 164, Regular Session of 2021 (HR164), and Committee membership was finalized on June 16, 2021. The Committee was tasked with submitting its written findings and recommendations, including any proposed legislation, to the House of Representatives for the 2022 legislative session. The Committee received hundreds of thousands of pages of documents from numerous state agencies. In addition, the Committee conducted 18 public hearings with 22 subpoenaed witnesses. The Committee wishes to acknowledge the leadership and staff of DLNR and ADC and their openness to working with the Committee over these past months.

The Committee's work focused on Audit Report Nos. 19-12 and 21-01 and the audited agencies: DLNR and ADC. During the Committee's investigation, it became apparent that the State Auditor had intentionally omitted relevant findings from the subject audits. These shortcomings led the Committee to question the analysis of the Office of the State Auditor and to seek further information. Unfortunately, the State Auditor refused all attempts to engage in a productive discussion, including resorting to litigation. Based on the limited information received from the Office of the State Auditor, the Committee recommends further independent investigation of the operations of the Office of the Auditor and recommends legislation to improve transparency and collaboration with the Office of the Auditor.

The Committee's deep dive into the operations of DLNR and ADC revealed common themes and challenges in the management of public lands. Among the Committee's recommendations that apply to both agencies are the needs for strategic planning, changes to statutory authority, publishing of written policies and procedures, and updates to lease agreements. The Committee made additional recommendations specific to each agency, as summarized in Chapter 5.

Finally, the Committee drafted proposed legislation for both DLNR and ADC to provide clear legislative intent and authority to assist each agency in carrying out their statutory functions. For DLNR, the Committee recommends that the Legislature:

- (1) Make consistent the various lease extension statutory language in Chapter 171, Hawaii Revised Statutes (HRS), specifically by:
  - (A) Allowing all types of leases to be extended, but requiring that all lease extensions, regardless of whether those leases were obtained through direct negotiation or the public auction process, use the most current lease form and leasing practices and policies, including provisions to allow the State to be paid its fair share of sublease income;
  - (B) Allowing the State to charge rent premiums on extended leases to compensate the State for forgoing the reversionary interest and incorporate the value of the improvements on the property; and
  - (C) Requiring a lessee to pay for the appraisal required for the reopening of rent in the extended lease term and precluding the lessee from protesting the rent so determined; and
- (2) Allow DLNR to negotiate direct leases for five to 10 years with a basic appraisal process for those properties where there is no interest in the public auction as determined by responses to a Request for Interest solicitation or by holding a public auction.

For ADC, the Committee recommends amending Chapter 163D, HRS, to refocus, update, and streamline ADC's authorizing statute to reflect the current state of agriculture and focus on Hawaii's needs for local agricultural products in addition to exports. Specifically, the Committee recommends the following changes to Chapter 163D, HRS:

- (1) ADC should prioritize lease agreements designed to increase the production of local agricultural products for local consumption and supporting small farmers, while continuing to focus on commercial exports;
- (2) Align plans and projects with recently set goals for the purchase of local agriculture products for local consumption;
- (3) Deemphasize marketing and emphasize production for local consumption; and
- (4) Amend ADC's powers, duties, and responsibilities to repeal duplicative functions performed by other agencies.

The Committee also recommends that ADC coordinate and administer programs to increase local production of agricultural products for local consumption, reduce the State's reliance on imported agricultural products, and increase access to farmland and related infrastructure for local farmers and cooperatives.

By introducing the above statutory changes for legislative consideration and by working closely with DLNR and ADC throughout the 2022 Regular Session, the Committee intends to continue its oversight function, thereby improving transparency and accountability within state government.

# Chapter 5: Recommendations

## RECOMMENDATIONS RELATED TO THE DEPARTMENT OF LAND AND NATURAL RESOURCES

- (1) DLNR's Land Division should prioritize developing a strategic plan for DLNR's revenue-generating lands since these provide the majority of SLDF's revenues and fund significant portions of DLNR's programs;
- (2) The Legislature should regularize and make consistent the various lease extension statutory language in Chapter 171, HRS. The Legislature should also amend the lease extension laws to specifically:
  - (A) Allow all types of leases to be extended, but requiring that all lease extensions, regardless of whether those leases were obtained through direct negotiation or the public auction process, use the most current lease form and leasing practices and policies, including provisions to allow the State to be paid its fair share of sublease income;
  - (B) Allow the State to charge rent premiums on extended leases to compensate the State for forgoing the reversionary interest and incorporate the value of the improvements on the property; and
  - (C) Require a lessee to pay for the appraisal required for the reopening of rent in the extended lease term and preclude the lessee from protesting the rent so determined;
- (3) DLNR should create a standardized lease template that incorporates statutory provisions and current industry leasing terms and practices, including provisions to address environmental issues in the event environmental mitigation is needed. DLNR should use this standardized lease template for all new leases and to update its current leases;
- (4) For those properties where there is no interest in the public auction as determined by responses to a Request for Interest solicitation or by holding a public auction, DLNR should be allowed to negotiate direct leases for five to 10 years with a basic appraisal process;
- (5) DLNR should require third-party inspectors to conduct physical inspections of all leased properties every five years to ensure compliance with lease terms. DLNR should choose the inspectors and require the lessee to pay the inspection fee and make the corrections recommended in the inspection report;
- (6) DLNR should continue to develop and update its policies and procedures;
- (7) DLNR and BLNR should continue the recently instituted practice of annually reviewing the status and plans of each RP by county;

- (8) DLNR should continue its training for members of BLNR on the State's open meetings law (Sunshine Law), ethics, and Native Hawaiian law and add training sessions on contested case hearings, the procurement code, and individual sessions with the leadership of each DLNR division, bureau, and office. BLNR should also continue its conflicts of interest training and continue to ensure that there is access to a deputy attorney general at every board meeting to answer questions about conflicts of interest;
- (9) DLNR should maintain/adopt the accounting practices that KMH LLP recommended as it assisted DLNR in organizing its financial records for future financial audits;
- (10) DLNR should continue to follow up on recommendations provided by N&K CPAs, Inc. in its audits of DLNR's financial statements for fiscal years ending June 30, 2017, 2018, 2019, 2020, 2021, and 2022;
- (11) There should be additional inquiry into the public land trust and ceded land revenues by the appropriate House legislative committees;
- (12) The Legislature should consider whether there needs to be further follow up on the review and examination of contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving SLDF between the period beginning July 1, 2015, through June 30, 2017, since the Auditor did not focus on all of these matters in Audit Report No. 19-12;
- (13) DLNR and the Attorney General should complete their work to correct and remove the forged easement on Kauai; and
- (14) DLNR should follow up regarding the potential loss of non-profit status of its lessees and its impact on leases. DLNR should also examine its practices surrounding non-profits, including its preference or discount for non-profits.

## RECOMMENDATIONS RELATED TO THE AGRIBUSINESS DEVELOPMENT CORPORATION

- (1) Chapter 163D, HRS, should be amended to refocus, update, and streamline ADC's authorizing statute to reflect the current state of farming and focus on Hawaii's needs for local agricultural products in addition to export products. Specifically, the Committee recommends:
  - (A) Having ADC prioritize entering into lease agreements designed to increase the production of local agricultural products for local consumption and supporting small farmers, while continuing to focus on commercial exports;
  - (B) Aligning plans and projects with recently set goals for the purchasing of local agriculture products for local consumption;

- (C) Making various changes throughout Chapter 163D, HRS, to deemphasize marketing and emphasize production for local consumption; and
  - (D) Amending ADC's powers, duties, and responsibilities to repeal functions performed by other agencies;
- (2) ADC should coordinate and administer programs to increase local production of agricultural products for local consumption, reduce the State's reliance on imported agricultural products, and increase access to farmland and related infrastructure for local farmers and cooperatives;
- (3) ADC should update its mission statement based on the changes made in this Report and every five years thereafter;
- (4) By July 1, 2024, ADC, in coordination with DOA, should prepare and post on its website, a Hawaii Agribusiness Plan that is specific to ADC and its focus. The Plan should specifically include:
- (A) An inventory of agricultural lands within the purview of ADC with suitable adequate water resources that are or will become available and can be used to meet present and future agricultural production needs;
  - (B) An inventory of available agricultural infrastructure such as irrigation systems, drainage systems, processing facilities, and other accessory facilities that are controlled by ADC;
  - (C) An analysis and plan for how these lands can be used to increase local production to replace imported products in a manner that complements existing local producers and increases Hawaii's agricultural self-sufficiency; and
  - (D) Strategies for federal, state, county, and community stakeholder actions that will promote the development and enhancement of Hawaii's agricultural industries.

ADC, in coordination with DOA, should update the Hawaii Agribusiness Plan every five years thereafter. All other statutory requirements for the Hawaii Agribusiness Plan should be repealed since these functions are currently performed by other agencies. However, DOA should work with the Legislature to increase its analysis of imported agricultural products;

- (5) ADC should develop goals, objectives, policies, and priority guidelines that articulate and outline an agribusiness development strategy. The goals developed for ADC's agribusiness development strategy should include specific one-, five-, and ten-year objectives and measurable outcomes. These objectives and measurable outcomes should have annual performance goals and measures upon which ADC can be evaluated annually to determine whether it is on track to meet the objectives and measurable outcomes. The Hawaii

Agribusiness Plan should also include metrics, timeframes, and budget expectations as part of ADC's agribusiness development strategy;

- (6) By July 1, 2022, ADC should work with the Office of Planning and Sustainable Development or a consultant to draft a final plan;
- (7) The Legislature should appropriate \$100,000 for a consultant to assist in preparing and finalizing the Hawaii Agribusiness Plan, including the facilitation of community stakeholder involvement;
- (8) ADC, in coordination with DOA, should develop short- and long-range plans to help ADC tenants and surrounding properties;
- (9) ADC should prepare or coordinate the preparation of business and agricultural development plans, as provided by section 163D-7, HRS, for each project;
- (10) In general, DOA and ADC should work with the Office of Planning and Sustainable Development, or evaluate retaining consultants and other outside technical assistance, if necessary, to develop the Hawaii Agribusiness Plan, short- and long-term strategic plans, business and agricultural development plans, and other tasks necessary to carry out the purposes of Chapter 163D, HRS;
- (11) ADC should submit a report of its plans and activities to the Legislature and Governor 20 days before each legislative session, as required by section 163D-19, HRS;
- (12) The ADC Board should be required to and continue its efforts to annually conduct performance evaluations of the Executive Director and staff and clarify the delegation of ADC Board authority to the Executive Director;
- (13) ADC should fill vacant staff positions with qualified persons in a timely manner. The vacant asset manager position should be funded;
- (14) The membership of the ADC Board should be amended by:
  - (A) Adding two additional members to be appointed by the Governor;
  - (B) Requiring that at least:
    - (i) Three board members have substantial experience in local food production;
    - (ii) One board member has substantial experience in organic and natural farming practices; and
    - (iii) One board member has demonstrated expertise in Native Hawaiian traditional and customary agricultural practices; and
  - (C) Requiring the Governor to consult with appropriate government and community agricultural stakeholders, such as the Office of Hawaiian Affairs, University of Hawaii West Oahu Sustainable Community Food

Systems Program, Hawaii Farm Bureau, Hawaii Farmers Union United, Hawaii Organic Farmers Association, Hawaii Crop Improvement Association, and Hawaii Cattlemen's Council, when appointing board members.

- (15) By July 1, 2023, ADC should develop robust and detailed written policies and procedures on ADC board oversight, land and other ADC-owned property disposition application processes, property management, and file and document management in accordance with recommendation 18 under Audit Report No. 21-01. These robust and detailed written policies and procedures should also address:
- (A) The application process for the use of ADC's lands and other assets, including its process for evaluating applications;
  - (B) ADC's administration and enforcement of the terms and conditions of licenses, permits, rights of entry, and other conveyance instruments, including those relating to inspections, notices of default, termination, eviction, and appeal rights;
  - (C) Criteria and other procedures to create subsidiaries;
  - (D) Criteria and other procedures for any coventure in qualified securities of an agricultural enterprise and to make direct investment in an agricultural enterprise;
  - (E) Criteria and other procedures to exercise ADC's right of withdrawal from licenses, permits, and rights of entry;
  - (F) When ADC must obtain affirmative approval from the BOA for agricultural projects, agricultural development plans, and project facility programs involving substantive matters or matters of public concern; and
  - (G) Criteria and other procedures to apply and qualify for rent credits.
- ADC should maintain, periodically update, and post on its website these written policies and procedures;
- (16) ADC should be required to hold its Board meetings with hybrid in-person and virtual participation allowed;
- (17) The Legislature should appropriate sufficient funds to enable virtual and remote participation in Board meetings;
- (18) ADC should create:
- (A) An electronic database system that includes an inventory of ADC's lands, improvements, and other assets. The database should include all information reasonably necessary to manage those assets, such as the material terms of licenses, permits, rights of entry, and other agreements

to use or occupy ADC assets; and should allow ADC to generate reports necessary for management of its assets, such as current tenant lists, vacancy rates, rent rolls, rent reopening dates, and license, permit, or right of entry termination dates; and

- (B) A filing system (or electronic document management system) that maintains documents in an organized manner and allows for the efficient retrieval of documents and/or files;
- (19) ADC should develop a standardized lease or license template that includes provisions to address environmental issues in the event environmental mitigation is needed. Specifically, ADC should be required to test the soils of all its lands and lessees and licensees should be required to remediate soil before vacating ADC lands or terminating the lease;
- (20) ADC should facilitate the establishment of a tenant agricultural cooperative association for its lands on Oahu, similar to the agricultural cooperative associations comprised of ADC tenants on Kauai. All tenants should be required to join and pay dues to the association, (similar to Common Area Maintenance). The association should be governed by a board of tenants of ADC lands and be responsible for security expenses;
- (21) Until a tenant agricultural cooperative association is established on ADC's Oahu lands, the Committee recommends that \$500,000 be appropriated for security of ADC's vacant property;
- (22) ADC should evaluate the need to procure insurance against loss in connection with ADC-owned properties, pursuant to recommendation 22 under Audit Report No. 21-01;
- (23) The ADC Board should attend training on the State's open meetings law (the Sunshine Law), and ADC should increase training on the Hawaii Procurement Code and property management, legal issues, and agriculture trends;
- (24) \$250,000 should be appropriated, if necessary, for a financial consultant to help ADC address any recommendations that may come from the financial audit scheduled to be completed by Accuity LLP pursuant to Act 29, SLH 2019;
- (25) An accountant position should be added to ADC to help manage its financial records moving forward;
- (26) The Office of the Auditor should immediately direct Accuity LLP to complete its financial audit of ADC and provide this audit to the Legislature; and
- (27) Funds should be appropriated to DOA to contract with an independent third-party auditing firm to perform an independent performance audit of ADC's Kauai land and water infrastructure portfolio beginning in 2024, after ADC has completed its follow up review with the Office of the Auditor and has had two



years to address the findings and implement the recommendations of Audit Report No. 21-01, as well as implement the recommendations set forth by this Committee.

## RECOMMENDATIONS RELATED TO THE OFFICE OF THE AUDITOR

- (1) The Office of the Auditor should: (1) update its 2014 *Manual of Guides* to be consistent with the most current version of the *Government Auditing Standards* issued by the Comptroller General of the United States; (2) publish its most updated *Manual of Guides* to the Office's website; (3) provide all contractors with a copy of the Office's *Manual of Guides*; and (4) ensure that all employees of the Office of the Auditor receive regular training to maintain best practices consistent with the *Government Auditing Standards* and require that new employees, especially those with limited government auditing experience, be trained in accordance with these *Standards*;
- (2) The Office of the Auditor should be required to provide audited agencies with a draft audit report that includes the Auditor's findings and recommendations at least 30 days before the exit interview;
- (3) Section 23-9.5, HRS, should be amended to require the Auditor to disclose information, evidence, and requested documents to investigative committees after audit reports have been issued;
- (4) Legislation should be passed to clarify that the Office of the Auditor is not allowed to shield documents from public disclosure, such as recorded interviews, when other safeguards or requirements are met under other laws that require or warrant disclosure;
- (5) Legislation should be passed to clarify that cooperation with a legislative investigative committee is not an ethics violation that jeopardizes a potential witness;
- (6) The Office of the Auditor should exercise a higher standard of professional judgment to avoid sensationalizing reports and making misleading or false statements and ensure that its audit reports are properly supported by sufficient and appropriate evidence;
- (7) The House of Representatives and/or Legislature should require the Office of the Auditor to submit reports to the Legislature on:
  - (A) The expenditure and/or lapsing of the \$1,000,000 appropriated for the audit work conducted pursuant to Act 1, Special Session Laws of Hawaii 2017, including any litigation costs involving disputes with any contractors hired by the Office of the Auditor pursuant to Act 1, by June 30, 2022; and

- (B) The outcomes and costs involving its dispute with BKD, LLP, including mediation and/or litigation costs and the agencies that paid for those costs, including the sources of funding, when the matter is resolved;
- (8) Further investigation of the Office of the Auditor should be conducted by an independent third party that can conduct a thorough performance audit of the Office of the Auditor;
- (9) The Department of the Attorney General should investigate questions and concerns raised in this Report;
- (10) The Legislature should establish greater collaboration with and oversight of the Office of the Auditor through the establishment of an Audit Committee similar to the audit committees described by the Charters of the City and County of Honolulu and the County of Kauai. This Audit Committee should have authority to advise the Auditor on the formulation of the plan of audits proposed to be conducted by the Auditor; conduct of audits; follow up of audits; selection of private contractors to perform audits for the Auditor; evaluation of preliminary audit findings and recommendations and agency, officer, or employee responses to the preliminary findings and recommendations; and evaluation of the Auditor's performance during each fiscal year. This Audit Committee should further require the Office of the Auditor to obtain approval for any litigation and identify the source of funding for the lawsuit; and
- (11) The Auditor should be required to consult with the relevant House and Senate subject matter chairs as part of the oversight body to better determine the scope of audits directed or requested by the Legislature, House of Representatives, or Senate.

## RECOMMENDATIONS RELATED TO FUTURE HOUSE CHAPTER 21 INVESTIGATIVE COMMITTEES

- (1) If a future Chapter 21 investigative committee is established to address broad, complex topics or long-standing issues, the investigative committee should be established to operate for a longer period of time, permitting the committee longer than seven months to investigate, deliberate, and submit its finding and recommendations to the House of Representatives;
- (2) Membership of future Chapter 21 investigative committees should comprise of subject matter chairs and vice-chairs related to the subject matter being investigated by the committee; and
- (3) The House of Representatives should consider establishing a formal standing committee that could work over the course of a legislative biennium to consider complicated topics of deep concern to the Legislature. The House of Representatives should examine the different types of investigative committees used by Congress and other state legislatures.