

**DRAFT E.A.**

**Re: Petition A18 805 submitted to the Land Use Commission for the State of Hawaii to rezone TMK(s) 3 2-9-003; 029, 060 from the State Conservation District to the State Agricultural District, a TMK map and County's Property Description is attached as *exhibit 14*.**

<b>Index.....</b>	<b>Page #</b>
<b>TMK description of Property</b>	<b>6</b>
<b>Identification of Petitioner(s), address, contact info</b>	<b>6</b>
<b>Approving agency</b>	<b>6</b>
<b>List of Acronyms</b>	<b>8</b>
<b>Forward and abstract</b>	<b>9</b>
<b>The EA in detail</b>	<b>14</b>
<b>Consideration of previous FONSI's</b>	<b>50</b>
<b>Property description with contiguous properties and history</b>	<b>52</b>
<b>Additional background information</b>	<b>58</b>
<b>Cultural Impact Analysis: Ka Pa'akai 0 Ka 'Ama assessment</b>	<b>60</b>
<b>Recent ownership history</b>	<b>61</b>
<b>Land use designations</b>	<b>61</b>
<b>HAR 11-200-12 significance criteria</b>	<b>63</b>
<b>Social, Cultural and Economic setting</b>	<b>64</b>
<b>Archaeology, Historical and Cultural resources</b>	<b>65</b>
<b>Beneficial uses of the environment</b>	<b>70</b>
<b>States long term environmental policies</b>	<b>72</b>
<b>Conserve natural resources</b>	<b>73</b>
<b>Quality of life</b>	<b>74</b>
<b>Communities</b>	<b>75</b>
<b>Reduce drain on Natural Resources</b>	<b>76</b>
<b>Affects economic and social welfare etc.</b>	<b>89</b>
<b>Public health</b>	<b>89</b>
<b>Secondary impacts - population, public facilities</b>	<b>90</b>
<b>Degradation of environmental quality</b>	<b>90</b>
<b>Cumulative effect</b>	<b>90</b>
<b>Affects rare, threated etc. spcies and habitat</b>	<b>91</b>
<b>Affects air or water quality</b>	<b>92</b>

Environmentally sensitive area	92
Scenic vistas	93
Energy consumption	94
<b>SMA consideration analysis</b>	<b>94</b>
<b>Geology</b>	<b>94</b>
<b>Soils</b>	<b>95</b>
<b>Climate</b>	<b>96</b>
<b>Hydrology and drainage</b>	<b>97</b>
<b>Water quality</b>	<b>98</b>
<b>Flora and fauna</b>	<b>99</b>
<b>Air quality</b>	<b>99</b>
<b>Noise</b>	<b>100</b>
<b>Scenic resources</b>	<b>100</b>
<b>Social, cultural and economic setting</b>	<b>101</b>
<b>Socioeconomic characterists</b>	<b>101</b>
<b>Adjacent land uses</b>	<b>102</b>
<b>Public facilities and services</b>	<b>103</b>
<b>Roads</b>	<b>103</b>
<b>Water systems</b>	<b>104</b>
<b>Protective</b>	<b>104</b>
<b>Schools</b>	<b>105</b>
<b>Power and communication systems</b>	<b>105</b>
<b>Wastewater</b>	<b>106</b>
<b>Solid waste</b>	<b>106</b>
<b>Archeology, historic and cultural resources</b>	<b>106</b>
<b>Summary</b>	<b>110</b>
<b>Short and long term impacts</b>	<b>110</b>
<b>Alternatives</b>	<b>111</b>
<b>Relationship to land use plans and policies</b>	<b>113</b>
<b>State Land use district</b>	<b>113</b>

State's Constitution	114
HRS 205	114
HAR 15-15	116
HAR 15-15-19 Agricultural district	117
HAR 15-15-19 vs. -20's Conservation district	121
HAR 15-15-20 Conservation district standards	123
Hawaii's State plan HRS 226	130
226-7 Objectives -agriculture	130
226-11 Objectives -physical environment	130
226-12 Objectives -scenic and historic	130
226-13 Objectives for the physical environment	135
Hawaii's Coastal zone management program	137
County General Plan	138
Required permits and approvals	139
Further SMA discussion	139
Historic	141
Scenic	147
Coastal ecosystems	148
Economic uses	149
Potential impacts and mitigation measures	150
Coastal hazards	151
Managing development	152
Public participation	153
Beach protection	154
Marine resources	155
Consultation with State and County agencies and general public	156
DLNR	156
County and State Offices of Planning	157
Councilor Valerie T. Poindexter	160
Adjacent lot owners	160

<b>State LUC official mailing list</b>	<b>161</b>
<b>OEQC representative Tom Eisen</b>	<b>161</b>
<b>Links to other relevant FONSI(s)</b>	<b>162</b>
<b>Exhibit list</b>	<b>163</b>

**This draft EA is submitted to the Land Use Commission for the State of Hawaii intended in support of Petition A18 805 to rezone TMK(s) 3 2-9-003; 029, 060 from the State Conservation District to the State Agricultural District**

**Date: July 2018**

TMK's : (3) 2-9-003; 060 (herein also referred to as the "**North lot**") and contiguous TMK's 029 (herein also referred to as the "**Middle lot**").

When both TMK's are referred to jointly(collectively) herein they will be referred to as the "**Property**". Lot 029 is 1.116 acres in size and Lot 060 is 2.252 acres in size, **total 3.368 acres**.

The Property is located on the east side of the Island of Hawaii, approximately 14.5 miles north of Hilo.

**Petitioner(s)**

Name / Agency: Ken Church and Joan Hildal, husband and wife, herein referred to as the "**Petitioner(s)**"

Address: P.O. Box 100014, Hakalau, Hi. 96710

- Contact Person & Title: same as above
- Email: dockline3@yahoo.ca
- Interest in Property: joint owners

**Approving Agency:**

**Mailing Address:**

State of Hawai'i Land Use Commission

Dept. of Planning Business, Economic Development & Tourism  
P.O. Box 2359  
Honolulu, Hawai`i 96804-2359

**Office Location and contact information of Approving Agency:**

State Office Tower  
Leiopapa A Kamehameha  
235 South Beretania Street, Room 406  
Honolulu, Hawai`i 96813

**Telephone:** (808) 587-3822

**Fax:** (808) 587-3827

**Email:** [dbedt.luc.web@hawaii.gov](mailto:dbedt.luc.web@hawaii.gov)

**LIST OF ACRONYMS.....**

Land use Commission “**LUC**”

Department of Land and Natural Resources “**DLNR**”

Board of Land and Natural Resources “**BLNR**”

Office of Conservation and Coastal Lands “**OCCL**”

Conservation District use Application “**CDUA**”

Conservation District use Permit “**CDUP**”

Site Plan Approval “**SPA**”

Environmental Assessment “**EA**”

EA - Finding of no significant impact “**FONSI**”

Tax Map Key “**TMK**”

Hawaii Administrative Rule(s) “**HAR**”

Special Management Area “**SMA**”



**Forward and abstract:**

The Petition that this EA is intended to support is to rezone the Property from the State Conservation District to the State Agricultural District.

The Property.....

- 1) is currently in agricultural use,
- 2) has a residence under construction on it and,
- 3) has a 720 s.f. storage and processing structure accessory to the agricultural use of the Property on it.

The Property is now fully developed for agricultural use with a residence and an agricultural use storage and processing structure. No new use is contemplated nor is likely. No zoning change at the County level is petitioned as the Property is zoned A-20a by the County which is an agricultural use designation.

The former owners of the Property unsuccessfully petitioned the LUC in 2005 that the, then grassy, open field, undeveloped, Property be rezoned from the State's Conservation District to the State's Agricultural District. A DLNR representative testified to the LUC describing its belief that the Property would benefit from the DLNR's continuing administrative role in considering the uses of the Property, particularly the DLNR representative cited concerns regarding.....

- the future placement of structures away from the Coastal pali,
- erosion and,
- scenic views.

As the Property is now fully developed with DLNR and County approved structures on it the Petitioner(s) believe that the DLNR's role in administering the Property's uses no longer serves a compelling continuing purpose that the Property remain in the State's Conservation District.

Throughout this EA the term "*HR Statute and HARule allowed*" will be found. The reference is to the **Hawaii Revised Statute** relating to the State Conservation District ("HRS") 183C-5 Nonconforming uses **and** HAR 13-5-7 Nonconforming use Rule.

**Note:** the Petitioner(s) have variably added highlights to quoted texts throughout the EA and Petition in order to bring emphasis to certain portions of the quoted text that the Petitioner(s) believe are particularly relevant to the discussion/analysis of the EA.

HRS 183C-5 states.....

*"Neither this chapter nor any rules adopted hereunder shall prohibit **the continuance** of the lawful use of any building, premises, or land for any trade, industrial, residential, or other purpose for which the building, premises, or land was used on October 1, 1964, or at the time any rule adopted under authority of this part takes effect. All such existing uses shall be **nonconforming uses**. Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, the construction of a single family residence. Any structures may be subject to conditions to ensure they are consistent with the surrounding environment."*

HRS 183C-3 Definitions clause describes, in part.....

*"**Nonconforming use** means the lawful use of any building, premises or land for any trade, industry, residence or other purposes which is the same as and no greater than that established **prior to** October 1, 1964, or **prior to** the inclusion of the building, premises, or land within the conservation district."*

The discussion in the EA and the Petition evidences and points to a State Auditor General's report to the Governor, which brings certainty that HRS 183-C (the law which governs the DLNR, which administers the uses of State Conservation Districted lands), intended that **any previous use of land** that occurred before the creation of the State

Conservation District be continued to be allowed without conditional permitting being considered/ applied by the DLNR or the County and not just the use of the land immediately **at the time** that the land was zoned into the State Conservation District.

The Property was cleared and prepared for agricultural use dating from a period in the mid-1800's. **Of significance** to the EA and Petition the *historical* agricultural use included the cultivation of the Property's soils right up to the top of the makai coastal pali property. While the historical sugar cane **agricultural** farming operation ceased in 1992 the Property continues to benefit from the *HRS 183C allowed* agricultural use to this day without any conditional use permitting being required.

**As an incentive** to the LUC and others that may consider this EA and Petition, **if the rezoning is allowed**, the Petitioner(s) have offered that a *"buffer zone"* be established to be maintained in woody plants and grasses where no cultivation of the soils would occur in order to protect the environment from agricultural waste, pesticides, fertilizers and soil erosion on to the State owned pali property and into the ocean and on to its reefs below, *ref., exhibit 22, pictures* showing various cultivated and field crop areas of the Property.

HAR 13-5, the DLNR's administrative rules, which govern its administration of State Conservation Districted lands, gains its authority from HRS 183-C, which states.....

*HAR 13-5-7 Nonconforming use Rule*

*"§13-5-7 Nonconforming uses and structures.*

*(a) **This chapter shall not prohibit the continuance, or repair and maintenance, of nonconforming land uses and structures as **defined** in this chapter. "***

Agriculture is **defined** as a land use in HAR §13-5-23, L-1 Agriculture Rule.....

*"(D-1) Agriculture, within an area of more than one acre, **defined** as the planting, cultivating, and harvesting of horticultural crops, floricultural crops, or forest products, or animal husbandry. "*

The Petitioner(s) have provided evidence to the DLNR and the County, including historical: maps, pictures, field use records and the like in order that they be allowed agricultural use of the Property without formal administrative review and/or conditional permitting of such use being applied by either.

**Introduction: In brief.....** Therefore the EA and Petition, which the EA is intended to support, may not be what they first appear to be to the readers of this EA. **Particularly no new land use is contemplated nor is likely to result from the Petition if allowed.** The Property is fully developed for agricultural use and uses incidental and accessory to such use. The existing agricultural use and structures on the Property commit the Property to continuing long term agricultural use.

As described, and of particular significance to the Environmental impact Assessment, if the Petitioned rezoning is allowed, the Petition offers a **reduction in the intensity** of the **existing "HRStatute and HARule allowed"** agricultural use of the Property. **A buffer zone is offered** that will be maintained in grasses and woody plants separating the intense agricultural use area of the Property from the ocean-side coastal pali property, which pali is owned by the State *ref., exhibit 22, pictures* cultivated field crop areas of the Property.

**If the Petition is allowed,** the allowed intensity of the agricultural use of the Property will decrease in the immediate area of the coastal pali, effectively a *buffer zone* will be maintained in grasses and agricultural plant species along with existing wild growth that do not require regular cultivation of the soils in the buffer zone area *ie. woody plants*. The Property will be rezoned into the State's Agricultural District. The Property's use will be consistent with its zoning and will be administered by the County. Confusion regarding the proper use of the Property at all administrative levels and including the general public, will cease. This will represent an improvement over the current situation.

**If the Petition is denied,** the **'allowed'** intensity of the agricultural use of the Property will continue to exist. No *buffer zone* will be established. The land's uses will be administered

by the DLNR and the County of Hawaii. Cultivation of the Property's soils immediately adjacent to the coastal pali will continue to be '*allowed*'. This may result in an increased potential for erosion of soils, agricultural waste, pesticides, fertilizers and the like on to the coastal pali and inevitably into the ocean and its reefs which lie below the Property. Confusion regarding the proper use of the Property at all State and County administrative levels and including the Petitioners, the adjacent property owners and the general public, will continue.

**The State of Hawaii's Department of Agriculture** developed the ALISH classification system of lands suitable for agricultural zoning, in part, in order to assist the regulatory authorities in the consideration of proper zoning of lands and the State and County's administration of same. The abbreviated term 'ALISH' means 'Agricultural Lands of Importance to the State of Hawaii'. The Property is described in the ALISH classification of agricultural suitability as "*Prime*" meaning that '*it has the capacity, soil type and moisture supply for intense cultivation of agricultural crops if managed properly.*'

Since purchasing the Property in 2014 the Petitioner(s) have used the Property for agricultural use now for over four years. Initially a few orchard species plants were added. Subsequently beginning in 2016 the Petitioner(s) began intensifying and increasing the agricultural uses of the Property. The increased use included field crops of pineapples, sweet potatoes, dragon fruit, fruiting orchard species, bananas, coconuts, ginger, bamboo, plant development and propagation. In 2015 the Petitioner(s) constructed a DLNR and County approved 720 sq. ft. agricultural use storage and processing structure on the Property.

While agricultural uses are already extensive the Petitioner(s) intend to continue to expand their agricultural use of the Property. **The Petitioner(s) do not intend to create the impression that a large farming operation exists or may exist.** The Property is relatively small in size. The intended agricultural use is modest, due, in part, to the small size of the Property. The Petitioner(s) agricultural use of the Property only adds a

supplemental income and personal agricultural use of the Property and a more meaningful retirement lifestyle to the Petitioner(s).

**The Petition proposes an improvement over the existing situation. A buffer zone is offered** by the Petitioner(s) **to separate and limit** the scope of the **"HR Statute and HARule allowed"** agricultural use area of the Property away from the coastal pali if the Petition is allowed. The Petitioner(s) believe that this will result in a benefit to the State, the County, the Petitioner(s), the environment and the community by reducing the potential for the earlier described soil erosion etc. ocean-ward, pali erosion and subsidence and sudden cliff fall and eliminate confusion **and** confusion regarding allowed use.

**The EA in detail:**

While it is generally believed that State Conservation Districted land's use is highly restricted, the Property does not fit neatly in what the general public understands Conservation Districted lands to be. The EA and the Petition describe that there exists a general **incorrect** perception that State Conservation Districted land(s) ought to be preserved in their natural state and not developed or used, except for public use and enjoyment of their natural state, scenic views, preservation of botanical and/or historic and/or archaeological features etc.

Specifically the Petitioner(s) have identified to the State and County administrative authorities and adjacent land owners that agriculture is a **Statute and Rule allowed** use of the Property without formal administrative review and *conditional permitting* by the DLNR as is normally the case for State Conservation Districted lands, and particularly coastal and near coastal lands such as the Property.

The Property's zoning in the State's Conservation District has resulted, and continues to result, in general **confusion** for the Petitioner(s), the various administrative regulatory authorities and the community and has effectively resulted in.....

1. delayed land use,
2. uncertainty of land use,
3. loss of economic benefit,
4. added costs,
5. uncertainty of the security of investments that the Petitioner(s) have made in the Property,
6. delayed forward land use planning,
7. an enormous volume of correspondence exchanged between the Petitioner(s) and the regulatory authorities etc.
8. a continuing waste of the neighbouring property owner's, community's and the general public's time and resources,
9. a continuing waste of scarce DLNR, County and LUC administrative resources administering the Property's use and zoning designation.

The Property's *HRStatute and HARule allowed* use does not appear consistent with its current zoning nor is its agricultural use consistently recognized as *allowed* by the administrative authorities and the general public.

**The described general *confusion* lies at the heart of what the Petitioner(s) have experienced, therefore the Petitioner(s) have Petitioned the LUC that the Property be rezoned from the State's Conservation District to the State's Agricultural District in order to ease and secure the Petitioner(s) agricultural use and investments in the Property.**

The sometimes overlapping jurisdictional administrative authorities and complicated Rules are difficult to understand and properly adhere to and to navigate through the State and County administrative processes. This has resulted in the Petitioner(s) wasting time and both the State and County's administrative resources unnecessarily particularly regarding the agricultural use of the Property. The DLNR's Rules for uses are particularly tedious in submitted evidence required and application processes which sometimes can extend

through periods measured in years **with an uncertain outcome delaying land use on an ongoing basis.**

Requests for informal meetings and/or correspondence planning discussion exchanges between the DLNR's OCCL and the Petitioner(s) were effectively denied by the OCCL which rather required the more formal approach to land use planning through formally submitted applications and the like. Even then formal Petitioner(s) requests and applications often resulted in unanswered questions resulting in repeated correspondence in a seemed unending stream of communications sometimes over period measured in years.

The Petitioner(s) have concluded that **the DLNR does not have a clear, evenly applied, administrative policy regarding its administration of its Rules, HAR 13-5-7**

Nonconforming Use Rule and HAR 13-5-30 requests for official Determinations **and** the application of HRS 183C-5., *ref., exhibit 17, item K-1, its page 4, BLNR meeting.*

On-the-other-hand the Petitioner(s) have found that County administrative processes are much easier to navigate. The County has always encouraged informal meetings and has processed formal communications, requests and applications in a timely and clear manner.

The Petitioner(s) have concluded that their use of the Property for efficient agriculture would benefit substantially if the Property was rezoned.

In the case of the Petitioner(s) nonconforming agricultural land use, **a seemed "HRStatute and HARule allowed"** use, the DLNR administered processes resulted in loss of use of the Property for intended increasing agricultural use for a period measured in years despite the Petitioner(s) exchanging hundreds of pages of written communications with the DLNR's OCCL administrative authority during the period requesting a **"Determination"**, *ref., HAR 13-5-30* (the DLNR's Land Use Rule), regarding whether or not the Property qualified for **allowed** nonconforming agricultural use according to HAR 13-5-7's Nonconforming Use Rule, *ref., exhibit 23, first formal requested Determination.*



While the Petitioner(s) eventually came to believe that the Property did qualify for allowed nonconforming agricultural use they sought the requested "**Determination**" in order to secure their investment in the Property's agricultural use and uses incidental and/or accessory to same. Furthermore they sought to remove the likelihood that their agricultural use may result in a fine applied against their use or the hassle and cost of defending their use of the Property. The Petitioner(s) repeatedly sought clarity from the OCCL and instead got uncertainty, obfuscation and delay. **The very obvious lack of clear communications from the DLNR, resulting in uncertainty, is of great concern to the Petitioner(s) and, in part, also lays at the heart of the reasoning that the Petitioner(s) have sought that the Property be rezoned.**

**Generally the resulting confusion and uncertainty .....**

- exposes the Petitioner(s), and continues to expose the Petitioner(s), to the potential for fines administered by the DLNR on a continuing basis as the **DLNR does not appear to have a clear and/or evenly applied interpretation of its own administrative rules in such regards, ., ref., exhibit 17, item K-1, page 4.**
- is also a problem for the general public and particularly the local community as there exists a general perception that Conservation Districted lands use for agriculture including the cultivation of soils in coastal areas is a violation of State and County laws.

**The Petitioner(s) assert the confusion exists as .....**

- it has been their direct experience of **same**,
- the immediate previous Property owner(s), the McCully(s) described their experience of **same**,
- the administrator of the sugar cane farming operation, which existed on the Property up to 1992, described **same**,
- other property owners, immediately adjacent to the Property have described **same**,

- realtors have described **same**,
- visitors to the Property have described **same**,
- the State's Auditor General has described **same**,
- land use planning professionals have described **same** (the Petitioner(s) have discussed this directly with at least seven professionals),
- the County of Hawaii's planning department representatives have described **same** to the Petitioner(s),
- the County's elected representative, Valarie Poindexter for the district of the Property, has described **same**,
- Land Use Commissioners generally described **same** during the former Property owner(s) LUC petition A05 757 during the period from 2005-6.

The Petitioner(s) believe that confusion will not change unless the Property is rezoned to the State's Agricultural District. The Petition and this EA describes that the Property's current zoning in the State's Conservation District does not provide a significant benefit to the public and its use for agriculture appears to many confusingly in conflict with its zoning.

The State and the County have variably implemented zoning overlays on historically agriculturally used lands, along the Hamakua Coast progressively, over the last 70 years, including the Property. It would seem, generally and variably, that there was an intention to apply a higher level of administrative **review** of new land uses of coastal properties in the area between Hilo and Hakalau for various reasons which reasoning, in the case of the Property, was never recorded by either the County nor the State, *ref., exhibit 1, County representative's, Norman Hayashi, testimony to LUC in its entirety.*

Generally testimony to the LUC in a hearing in 2005 by a County of Hawaii Planning Department representative, Mr. Hayashi, (quoted in detail later herein) appears to describe that the Property's zoning resulted from the State and County's desire to generally preserve

scenic open space along the Hamakua Coast. **It is noteworthy that he did not identify erosion concerns.** Confusingly the word *scenic* implies that an area can be *seen* from public areas. In the case of the Property there does not exist views towards the Property from public use areas.

Conflicting with the generality of the described testimony and adding to the described confusion, it has been the Petitioner(s) experience that similar coastal lands leading north of Hakalau and variably between Hilo and Hakalau were zoned variably for continuing agricultural use and other lands were allowed to continue agricultural use as a nonconforming use. **This further supports the Petitioner(s) belief that erosion was not a concern to the regulators when the Property was first zoned into the State's Conservation District.**

The County's testimony in *exhibit 1*, to the LUC describes that existing land uses were not intended to suffer the new added layer of DLNR or County administrative review process when the new districting occurred. In the case of the State such uses continued to be *allowed* as nonconforming uses. Particularly *exhibit 1, County testimony to the LUC*, describes that while the County "designated" the coastal and near coastal lands along the Hamakua coast "*Open*" in its General Plan first in 1971 for land zoning it intended that existing agriculture continue to be allowed on such lands as they were zoned A20-a.

**Further and continuing to add to the confusion**, despite the referenced, *exhibit 1*, County representative testimony to the LUC the Petitioner(s) spoke to Jeff Darrow, a land use Planner with the County. He described that the County's 'designation' of "Open" described by Mr. Hayashi may be easily misunderstood. Confusingly being 'designated' "Open" vs. being zoned "Open" may be two distinctly different descriptions/classifications. **Mr. Darrow emphasized that the Property is zoned A20-a, ref., also exhibit 4, County letter**, and that if zoned "Open" (which he stated that the Property is not) the land's use would be highly restricted by the County which seems to the Petitioner(s) to be correct.....

*ref., exhibit 18, an excerpt from the County General Plan's Open designation section and exhibit 19, LUPAG map North Hilo District and ref., exhibit 4, County letter.*

Mr. Hayashi did describe to the LUC in 2005 that agriculture is an allowed use of the Property.....

*ref., exhibit 1, beginning on page 6....., its line 23...*

*"A. In 1971. And that was our first comprehensive General Plan. It was both a policy document as well as a map form. The map was a component of the General Plan.*

*Now, at that time we decided to place the lands, many of the lands along the shoreline or coastline and **designate** a strip of those areas open would be a band of open designation for those areas that were not urban in nature.*

*This particular property was one of those areas. At that time we did not necessarily designate -- the open designation did not necessarily coincide with the state land use Conservation District line.*

*However, back in 2005 when we started the review of the 2005 General Plan there was a policy decision to designate a majority of the lands within the state land use Conservation District into the County's General Plan conservation area or an open area.*

*For this particular area the open designation was still retained. We do have also areas such as that are basically areas for preservation like areas mauka of the Kealakekua Bay which is designates Conservation District. And we designated those areas as conservation on our General Plan. So there are two categories, conservation and open.*

*The Conservation District in our General Plan is conservation in the true sense of the word. These areas are areas of natural reserves or watershed areas, areas of preservation. Those areas are designated conservation on the General Plan.*

*Other areas along the Hamakua Coast and along the shoreline we just designated areas open. These areas are basically for recreation purposes or areas that are basically shoreline properties."*

The Property is not an area 'of natural reserves or watershed areas, areas of preservation'. Rather the Property ended up being **designated** Open by the County in its General Plan because it was '**basically a near shoreline property**'.

Resuming Mr. Hayashi's testimony.....

*Now, as far as the county's open designation the General Plan open designation, we do allow agricultural lands or agricultural uses. This is one of the policies of the General Plan. The General Plan in the policy states agricultural uses may be permitted within the areas designated open."*

The Petitioner(s) examined the Policy section of the County's General Plan for **Open** zoned lands. Confusingly **it does not** describe that agriculture is allowed on **Open 'designated'** lands.....

### **"14.8.3 Policies**

*(a) Open space shall reflect and be in keeping with the goals, policies, and standards set forth in the other elements of the General Plan.*

*(b) Open space in urban areas shall be established and provided through zoning and subdivision regulations.*

*(c) Encourage the identification, evaluation, and designation of natural areas.*

*(d) Zoning, subdivision and other applicable ordinances shall provide for and protect open space areas.*

*(e) Amend the Zoning Code to create a category for lands that should be kept in a largely natural state, but that may not be in the Conservation District, such as certain important view-planes, buffer areas, and very steep slopes."*

Resuming now with Mr. Hayashi's testimony.....

*"So in this particular case the current designation of the land zoned designation which is **agricultural 20 acres** and the proposed use of the property for agricultural purposes would be consistent with the county's open designation on the General Plan.".....*

Continuing with Mr. Hayashi's testimony, *ref., exhibit 1, page 14, lines 14.....,*

*"THE WITNESS: Okay. We have to understand that although this land is designated open on the General Plan, the county's designation is **agriculture 20 acres**. So they can do agricultural use. **They can have agricultural related structures like the surround shades, that kind of stuff.***

***They can also have farm dwellings or in this particular case because these lands are preexisting prior to 1976 they can have single-family dwellings on it....."***

Generally what is described above is confusing to everyone. The Petitioner(s) believe that land zoning ought to be consistent with an *allowed* use in order that transparency and certainty for everyone may exist.

Generally the DLNR is the primary administrative body which reviews State Conservation Districted land uses and the like such as the Property before being reviewed by the County, if required. **The described general confusion begins at the DLNR's administrative**

**level, its OCCL.** The Petition and this EA describe that it has been the Petitioner(s) experience that the DLNR does not have a clear and evenly applied policy regarding **"HRStatute and HARule allowed"** nonconforming agricultural use of lands which it administers which is consistent with its own Statute, HRS 183-C and Rules HAR 13-5. **It is no wonder that the general confusion, that the Petitioner(s) describe, has resulted all the way down through the State and County administrative authorities, the land use professional community, the general public and the local community.**

Particularly, after **two years of exchanged written communications** between the DLNR and the Petitioner(s), the DLNR's OCCL only issued a letter to the Petitioner(s), *ref., exhibit 5, DLNR letter*, describing that it had **previously allowed** that the Petitioner(s) may use the Property for agriculture **after** the Petitioner(s) informed the OCCL that they intended to advance their requested Determination that the Property qualified under HAR 13-5-7's Nonconforming Use Rule for agriculture to a higher level of authority.

The Petition describes that the only communication that the DLNR's OCCL **previously** issued in this regard was a *"Determination"* that the Petitioner(s) may grow *"sugar cane"* which was never requested by the Petitioner(s). Seemingly the OCCL determined that only the growing of sugar cane was allowed by its Nonconforming use Rule and not agriculture. When the Petitioner(s) formally requested that their requested Determination be referred to a higher level of authority to the BLNR it was denied by the OCCL, *ref., exhibit 5, DLNR letter*.

The goals of the State and County, when the Property was first zoned into the State's Conservation District, seems to have been the restriction/regulating of **new** uses of coastal properties, and near coastal such as the Property, through zoning. The Petition evidences that no assessment of the physical characteristics of the Property was conducted by either the State or the County before the Property was zoned into both the State's Conservation District and the County's *Open/A20-a* District. In each authority's case the authorities were dealing with huge tracts of land when considering zoning.

Official State and County records appear to indicate that the Property was first zoned into the State's Conservation District in the 1960's. At that time it does not appear that the County had a General Plan. It seems that coastal lands and near coastal lands in certain areas along the Hamakua Coast were zoned Conservation with the stroke of a pen on a map without particular consideration to their characteristics regarding suitability for Agriculture zoning or Conservation zoning. Thereafter in 1971 the County developed its General Plan.

Testimony to the LUC in 2005 by the County's representative, Norman Hayashi, indicated that the County 'designated' the land Open in 1971 in its General Plan without a recorded reason. It is likely that no particular consideration was given to the characteristics of the Property measured against HRS 205 and State and County HARules was specifically applied. HRS 205 identified that in considering zoning the Agricultural District's boundaries would encompass lands with a *'high capacity for agricultural production'* be given the **"greatest"** priority. Both today and in 1971 the land had the characteristic of a capacity to produce sustained *'high yields of crops on a continuous basis'* and, in fact, was producing same at that time and had for some continuous period around 100 years previously.

The administrative office of the LUC described to the Petitioner(s) that the Property's State zoning was determined to be the mauka boundary of the Property between the State's Agricultural district and the State's Conservation district in the 1970's.

Mr. Hayashi's testimony went on to describe that the County again adopted a new General Plan in 1989 and again in 2005. He stated that in 1989 the County's new General Plan did not mirror the existing State Conservation District line which was the mauka border of the Property. It was likely still just a line on a map with no reference yet to property lines. Rather the only consideration remained at that time that it was a near coastal Property in agricultural use like most similar Hamakua coastal lands.



Mr. Hayashi's testimony went on further to describe that when the County again adopted a new General Plan in 2005 it specifically identified the mauka border of the Property as being the dividing line between the County Agricultural district and the County Open district. **He referred that the County did this to reflect the existing State Conservation District line which already existed on the mauka side of the Property.**

Mr. Hayashi also described the development of the "Northeast Hawaii Community Plan" which was adopted in 1979. He went on to describe that...

*"The ag zoning for this area and other properties along the Hamakua Coast that were in sugar production were designated **zoned agricultural 20 acres since 1968.**"*

The transcript, *exhibit 1*, describes that a general **"green belt"** was identified on a map back in the 1960's by the State, ref., *bottom of page(11-12)*, a general un-described line on a map that was not consistent with property boundaries lines. If an owner of property, that was generally in the **"green belt"**, may write to the LUC for an official **"boundary determination"**, ref., HAR 15-15-22(b) in order that a determination of where the boundary line lay be made by the LUC's Executive Officer. The Executive Officer is required to consider HAR 15-15-22 Interpretation of district boundaries Rule against **"all applicable commission records"**, ref., HAR 15-15-22(d), and issue a **"boundary interpretation"**.

Seemingly rather than assess individual properties characteristics and/or preexisting uses and the land's suitability for the planned zoning, properties were zoned without on-site inspections/evaluations against the planned new zoning Rules which describe characteristics and/or ongoing uses of such land to assist in applying Statute required zoning, ref., HAR 15-15-19's Agricultural Rule or -20's Conservation District Rule which describe such characteristics of land for applying zoning of land.

Rather the resulting State and County Rules and Regulations provided a pathway for.....

(1) correction for incorrect zoning through petitions to the LUC or,  
(2) evidencing to the DLNR that "**HR Statute and HARule allowed**" past uses of such properties may continue as '**allowed**' nonconforming uses if a land owner so chose, *ref.*, *HAR 13-5-7's Nonconforming Use Rule's section (f)*.....

*"The burden of **proof** to **establish** that the land use or structure is legally nonconforming shall be on the applicant".*

Also see *exhibit 7, OCCL letter* to Petitioner(s).

The Petition and the EA describe that the Petitioner(s) first chose option (2). The Petitioner(s) submitted an application to the DLNR's OCCL with evidenciary **proof** and requested a Determination, *ref.*, *HAR 13-5-30, Permits, generally Rule*, in order **to establish** that the Property qualified for agricultural use under *HAR 13-5-7's Nonconforming Use Rule.*, *ref.*, *exhibit 23, letter*. The exchange of correspondence in regards to same spanned a period greater than two years without a result which was satisfactory to the Petitioner(s). The Petitioner(s) are now proceeding with option (1).

When the zoning Rules were established the authorities were likely faced with the problem that if they created a zoning regulation which restricted/eliminated **existing** land uses, such as agriculture, **they probably would have been forced to buy the lands or pay compensation to land owners**. This is well established in land use law characterized with term/word descriptions such as *eminent domain, taking of land* and *inverse condemnation*.

Later in this EA and the Petition it is described that such restrictions would also be in conflict with the State's Constitution which places a priority on agricultural self sufficiency of the State **and**.....

*HRS 205-2 (3) Districting and Classification of Lands* which states.....

*"In establishing of the boundaries of agricultural districts the **greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and,**"*

It is difficult to understand how the Property which had "**a high capacity for intensive cultivation**", and a long-standing history of intense agricultural production, could have resulted in its zoning in the State's Conservation District. The meaning of the term "**a high capacity for intensive cultivation**" is suitably described in the State of Hawaii's ALISH classification of lands which is described in more detail later herein.

It seems clear that the LUC enabling HRStatute intended to protect "*lands with a high capacity for intensive cultivation*" through the "*establishing district boundaries*" by zoning agricultural suitable lands in the State's Agricultural District. The Petitioner(s) believe that the only reasonable explanation that their Property was zoned in the State's Conservation District was that.....

1. either a proper '*on site*' visit to the Property by the County or the State to assess its characteristics and use did not occur when it was zoned in the State's Conservation District over 50 years ago or,
2. there was an intention to limit the development of **new** structures and land uses through an added layer of administrative authority. The Petitioner(s) believe that this was due to public use considerations or scenic views from public use areas. *ref., exhibit 1, page 7, beginning on line 25.....*

***"Other areas along the Hamakua Coast and along the shoreline we just designated areas open. These areas are basically for recreation purposes or areas that are basically shoreline properties."***

The Petitioner(s) believe that therefore that scenic concerns were the primary reason the Property was zoned into the State's Conservation District. Such concern was likely

intended to be administered through the DLNR's administrative permitting particularly relative to the placement of structures. It is clear that soil erosion seaward was not an issue as the Property was in agricultural use at the time and it was allowed to continue without restriction or any particular administrative regulation as ***"HRStatute and HARule allowed"***.

The Petition and this EA evidence that the Property's ***agricultural*** values have not been ***protected*** by the Property's zoning in the State's Conservation District, *ref., HRS 205-2 (3) Districting and Classification of Lands* which states.....

*"In establishing of the boundaries of agricultural districts the **greatest possible protection** shall be given to those lands with a high capacity for intensive cultivation; and,"*

The Petition and this EA describe that the opposite has occurred. The Petitioner(s) sought a "Determination" from the DLNR that the Property qualified for allowed nonconforming agricultural use. The DLNR resisted issuing the requested Determination for a period measured in years without ever giving a clear response to the Petitioner(s) repeated requests regarding same. When the Petitioner(s) finally requested that the applied for Determination be referred to the BLNR that request was denied, *ref., exhibit 5, OCCL letter*. The result was not that *"In establishing of the boundaries of agricultural districts the **greatest possible protection** shall be given to those lands with a high capacity for intensive cultivation"* as a result of the Property being zoned into the State's Conservation District as is required by HRS 205-2(3).

As described there may have been an intention to restrict **new** uses of certain coastal and near coastal lands, such as added structures, leading north from Hilo along the Hamakua coast but ***no intention to restrict continuing agricultural uses***. Now, over 50 years on, the physical characteristics of the Property have changed. It is now a fully developed agricultural use Property **including fully permitted ag. related structures thereon**. The Petitioner(s) believe that the administration of further development of the Property by the

DLNR is now sufficiently completed that its continuing administration of use of the Property is no longer necessary.

The Property is now fully developed with approved and *seemingly approved*.....

1. a 720 sq. ft. agricultural use storage and processing structure,
2. a residence which is currently under construction,
3. County approved septic systems
4. access roads,
5. County water supply,
6. cultivated field crop areas,
7. woody orchard plant species,
8. bananas, ginger, bamboo, dragon fruit,
9. a potted plant nursery area,
10. various woody plant species under evaluation for propagation/sale etc.
11. solar p.v. electrical installation etc.

There exist no scenic views either towards the Property or the ocean from public use areas as the coastal highway is cut deeply through a hillside in the area of the Property, *ref., exhibit 20, two pictures.*

The Petitioner(s) believe that they have also *somewhat* established that agricultural use is accepted now by the DLNR. Agriculture, by its very nature, may include the cultivation of soils (*the word somewhat is meant to imply that the DLNR never issued the requested Determination but rather finally issued a letter describing that it had previously allowed agricultural use of the Property*). A Determination that agriculture was an allowed use was requested and was never issued. **It is obvious** that the DLNR's administration of the Property did not ***“allow and encourage the highest economic use”*** of the Property.

Clearly the zoning authorities were not considering the potential for soil erosion or the interruption of agricultural activities as the reasoning for the Property's zoning in the State's Conservation District. **There must have been other(s) characteristic/(s) of the Property which the authorities intended to Preserve and Protect (without an on-site inspection), such as scenic views, which do not exist either.**

A complete and professional archaeological, historical and botanical study of the Property was conducted. Nothing that needed Preserving or Protecting was identified. The professional studies are contained as *exhibits in exhibits 2 and 3* to this EA. Also the DLNR administration has subsequently permitted structures on the Property with specific consideration to limiting size, location and scenic views from neighboring lots. While at the time of the Property's zoning in the period dating from the 1960(s) archaeological, historical, botanical, potential for coastal pali landslides and scenic characteristics or planned public use of the Property may have been intended to be further considered by the authorities **they no longer apply to the Property today.** The Property is now a fully developed agricultural use Property.

The Petition and later in this EA provide an analysis of the Property(s) characteristics against the characteristics described in HAR 15-15-19 Agricultural Districting Rule and HAR 15-15-20's Conservation Districting Rule. The Petitioner(s) believe that none of the Rules will be found to compellingly apply to the Property that require its continued zoning in the State's Conservation District. Furthermore **the Petitioner(s) have offered an improvement over the existing allowed uses**, the provision of a **buffer zone** along the coastal pali, where no cultivation of the soils of the buffer zone area would continue to be allowed if the Petition is granted.

It is described herein that the regulators created the confusing web of language in the zoning rules and regulations. On the one hand the regulators seemed to want to regulate **new** uses of coastal agricultural lands, like the Property, without restricting **existing** uses. Therefore in order to avoid conflicting with the State's Constitution and its Statutes, which

may have resulted in the cost of the *"taking of land"* to be borne by the public, the existing current web of confusing regulations appear to have evolved. Even more confusing, same was done, without a detailed analysis of individual properties characteristics measured against LUC zoning Rules.

The Petitioner(s) believe that the Petitioned rezoning is now appropriate as the Property is now fully developed as an agricultural use Property with structures thereon already fully approved by all of the regulating authorities and existing and planned agricultural use. The Petitioner(s) believe that continuing administration of the Property's use by the DLNR serves no compelling purpose measured against characteristics of the Property as described in HAR 15-15-20 Conservation District Rules vs. HAR 15-15-19 Agricultural District Rules and HRS 205.

The question may emerge whether allowing the Petition to rezone the Property will set a precedent? The Petition **evidences**, in its text by reference to case law, that neither the LUC nor the DLNR are bound by precedence. On-the-other-hand **precedence may be found not to be such a bad thing if it removes uncertainty and increases transparency in land use regulation ie....**

- State and County regulative Authorities,
- the land use professional community,
- realtors,
- land owners,
- the general public.

Come now the Petitioner(s) today, after suffering variable levels of years of loss of use, uncertainty and frustration in securing their agricultural use of the Property, **after having wasted their time and valuable public administrative and personal resources**, offering a **buffer zone** restricting cultivation of the Property's soils in the area of the coastal pali, in return for the Petitioned rezoning of the Property. The Petitioner(s) hope that this added inducement may persuade the regulators to correct a problem that seems that they created in the first place. Effectively **the Petitioner(s) have offered a reduction in the intensity of the existing "HRStatute and HARule allowed" agricultural use of the Property.**

Not only, if allowed, this will effect a benefit to the environment and by extension to the State, the County and the community at large but it will also remove the uncertainty of regulation which is described by the Petitioner(s) in the Petition and this EA to exist and ease and formally secure their agricultural use of the Property.

The **buffer zone** that is proposed will separate the area of cultivated soils from the coastal pali which agricultural use is believed to be a **"HRStatute and HARule allowed"** use. The suitability/favorability of a **buffer zone** by the DLNR, if a Petition is allowed, is described in the Petition, with excerpts of **quoted testimony by a DLNR representative, Sam Lemmo, to the LUC.** Particularly after a site visit by the Administrator of the OCCL and the LUC Commissioners, in January of 2006, the DLNR representative described that this would be an outcome that would be acceptable to the DLNR after **his on-site observation of the characteristics of the Property** which, at that time, was being generally maintained as an open space with grasses covering the field area of the Property. His advice to the LUC was that the DLNR believed that the Property would continue to benefit from the DLNR's administration as he described that the placement (location) of structures was a concern.

The Petitioner(s) existing agricultural use of the Property has relied on HAR 13-5-7's Nonconforming Use Rule which describes that a **previous** land use, which existed before the Conservation District was overlaid on it, is **"HRStatute and HARule allowed"** as a



nonconforming use. The Property's area was a former sugar cane field dating from the era around 1850. The DLNR and the County have been aware of the Property's current nonconforming agricultural use for the current period exceeding two years.

The proposed buffer zone will represent **a reduction in the *allowed* intensity of agricultural use** of the Property and the potential of resulting erosion of soils ocean-ward and pali subsidence. Since first zoning of the Property, coastal lands and near coastal lands like the Property, dating since the 1960(s), in the State's Conservation District it has become an increasing concern of the State, the County and the community that erosion of soils ocean-ward and protection of the environment are now substantially more important today than were formerly. The Petitioned rezoning will bring the Property's zoning into conformance with its use and reduce the potential for soil erosion ocean-ward.

**It is not surprising that generally, the State and County regulatory authorities, the public and land use professional community and particularly even the DLNR, its OCCL and the BLNR have a misconception regarding "*HRStatute and HARule allowed*" and/or allowable land uses within the State's Conservation District.** This is described in a report that the State Auditor General provided to the Governor in 1992. The report is exhibited hereto as *exhibit 6*.

The following represent **selected excerpts** of text from that report which are believed by the Petitioner(s) to be applicable to the existing situation which are useful in consideration of the Petition and this EA. While the State Auditor's report was specifically intended to deal with nonconforming residential use of State Conservation Districted land the report describes that it equally applies to other "*HRStatute and HARule allowed*" nonconforming land uses, *ref., exhibit 6*, the State Auditors review of Conservation District regulations, beginning on it's page 15.....

*"Citizens concerned with preserving the natural wonders of the state have turned to the land use law (Chapter 205, Hawaii Revised Statutes) and the forest and water*

*reserve zones law (Section 183-41, HRS) for help in protecting the conservation district. It is in these laws that scenic and natural values find their expression. **But the laws, and the rules adopted under them, are bound to disappoint many.** They do not have, as some might wish, an orientation that is purely preservationist. Instead, the laws contain the dual public purposes of preservation and conservation. Preservation seeks to protect land areas from any kind of development, while conservation seeks to manage natural resources and **fully use them.***

*The **dual public** purposes of preservation and conservation are apparent in the land use law and the forest and water reserve zones law. The land use law speaks of “protecting,” “preserving,” and “conserving”; it also speaks of uses “not detrimental to a multiple use conservation concept.” In multiple use, **land is used for two or more purposes** (for example, water conservation, timber production, and foraging) **in order to increase the benefits derived from an area.**” .....*

(reference is made here by the State Auditor to the Hawaii, Legislative Reference Bureau, Public Land Policy in Hawaii: The Multiple-Use Approach, Report No. 1, 1965 (Rev. 1969), Honolulu, page7.)

*“The forest and water reserve zones law requires DLNR both to “maintain, improve, protect, limit the future use of, or otherwise conserve open spaces” and to **“allow and encourage the highest economic use”** consistent with maintaining pure water supplies.” .....*

It is clear to the Petitioner(s) that the DLNR's administration of the Property has not **'allowed and encouraged its highest economic use'.**

Continuing with the Auditor's report.....

*“The **dual public purposes** of preservation and conservation can also be found in the **Constitution of the State of Hawaii**: For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals, and energy sources, **and shall promote the development and utilization of these resources** in a manner consistent with their conservation **and in furtherance of the self-sufficiency of the State.**”...*

The Auditor refers to Article XI, Section 1, the Constitution of the State of Hawaii. The Petitioner(s) believe that their use of the Property for agriculture and uses incidental and accessory to agriculture **clearly fall** within the referenced .....

- (1) State Constitution purpose/policy guide and,
- (2) HRS 183c-5, Nonconforming Use law and,
- (3) HAR 13-5-7's Nonconforming Use Rule.

The Auditor's report goes on to state.....

*“Concerned citizens have wondered if residential construction violates the intent of the conservation district. The Legislature, through the forest and water reserve zones law, apparently intended to allow residences. The provisions of **nonconforming use** in that law permit **certain preexisting** residential **uses** to continue and allow certain land previously intended for residential use to be developed in that manner. That law also names residences as a possible permitted land use in the conservation district.”*

***"The land use law and the forest and water reserve zones law therefore cannot now protect the conservation district to the degree some might want. This chapter suggests some improvements to make the regulatory framework more effective. But ultimately the protection desired by many citizens cannot be achieved without taking additional steps."***

While the State Auditor's report focused on residential construction in the State's Conservation District, the nonconforming use Rule that captures such use equally applies to all past land uses, *ref., page 30, Auditor's Report.....*

*"The first statutory definition of nonconforming use is consistent with **usual regulatory practice**. It "grandfathers" uses that existed prior to the enactment of the law."*

The Property's capacity for **intense 'high volume' agricultural production** dates from the 1850's when the land was cleared and agricultural use began, *ref., exhibit 21, 1905 map of "cane fields" which area included the Property.*

HAR 13-5-7's Nonconforming Use Rule states.....

*"§13-5-7 Nonconforming uses and structures.*

*(a) **This chapter shall not prohibit the continuance**, or repair and maintenance, of nonconforming land uses and structures as **defined** in this chapter. "*

Agriculture is **defined** as a land use in HAR §13-5-23, L-1 Agriculture Rule.....

*"(D-1) Agriculture, within an area of more than one acre, **defined** as the planting, cultivating, and harvesting of horticultural crops, floricultural crops, or forest products, or animal husbandry."*

**In the case of the State the LUC zoned the Property in the State's Conservation District and the DLNR created HARules** to administer such lands around a period dating first in the 1960's (HAR 13-2 and subsequently 13-5) and amended them again in the 1990's and again around 2012..... effectively the Conservation District Rules, HAR 13-5-7's Nonconforming Use Rule today allows preexisting land uses to continue to be **allowed** without the administrative authority of the DLNR to be applied against such land use **in perpetuity**, *ref., HAR 13-5-7 Nonconforming Use Rule.*

**In the case of the County** it created its Rules. The County has described that the Property is zoned as A20-a, an agricultural use designation.

**In the case of the Property** it has continued in agricultural use since the mid-1850's through to present despite whatever confusion regarding its subsequent zoning occurred without the regulators expressing an intention to restrict same in any way whatsoever. However today the Petitioner(s) encountered considerable resistance in securing continuing "*HRStatute and HARule allowed*" agricultural use through DLNR administered processes.

The Petition and this EA describe that it has been the Petitioner(s) experience that the State (the DLNR) may be **persuaded, reminded and prodded** into accepting that agricultural use of the Property today is already a "*HRStatute and HARule allowed*" use without any permitting requirements. It has been the Petitioner(s) experience that there exists not only a misconception by the general public, the land use professional community but the State and County regulators also appear to believe that Conservation Districted lands, particularly, are not to be used for agriculture without substantial administrative review and conditions of use being applied.

**During petition A05 757 the LUCommissioners, the LUC's administrative office, the former Property owner(s), the State Office of Planning, the County Office of Planning, the Attorney General's representative to the LUC, the DLNR's witness to Petition A05 757 and land use professionals that testified to the LUC did not appear to identify and consider that the Property already qualified for allowed nonconforming agricultural use without permitting restrictions being applied. Even the quoted Auditor General in his report identified that everyone is confused!**

It ought not be required that the confusion and uncertainty continue to exist. The Petitioner(s) believe that the Petition is properly placed with the LUC to rezone the Property into the State's Agricultural District.

It took the Petitioner(s) over two years of written communications, consisting of hundreds of pages of text, between them and the DLNR to *seemingly* establish that the Property the end no formal application (CDUA, SPA or the like) or management plan was required to be provided.

The Petitioner(s) believe that the current "*HRStatute and HARule allowed*" nonconforming use has always been provided for in the DLNR's Rules however the Rules also provide a lot of discretionary authority to the DLNR which may also result in large fines being applied against property owners for violations which it may believe exist. Despite the Petitioner(s) repeated attempts to resolve that the Property qualified for nonconforming agriculture and uses accessory and incidental to same with the OCCL the OCCL obfuscated its responses leaving the Petitioner(s) in an uncertain situation which exists to this day.

Around the time of the *exhibit 5, January 27th, 2017, DLNR/OCCL letter* the Petitioner(s) sought advice from the OCCL regarding uses incidental to the agricultural use of the Property. That request was effectively ignored by the OCCL. The Petitioner(s) ceased further correspondence with the OCCL regarding same and nonconforming agricultural use at that time and began to explore the possibility to Petition the LUC that the Property be rezoned into the State's Agricultural District in order to bring certainty and security in their investments in the Property.

The Petitioner(s) have described that the DLNR lacks a clear and transparent policy regarding *allowed* nonconforming land use. Therefore so long as the Property remains zoned in the State's Conservation District the Petitioner(s) believe that uncertainty regarding their investments in their agricultural use and uses incidental and accessory to such use of the Property remain at risk.

As described the general public have been confused into believing that "**Conservation Districted**" land uses are highly regulated and generally restricted conditional use be applied by the authorities. While that applies to **new** land uses it does not apply to **preexisting** and permitted land uses.

Today the Northeast Hawaii Community Development Plan and the County General Plan LUPAG Map "*Open*" designations relate to the State Land Use Conservation District preexisting designation for the Property. The County's representative **Norman Hayashi** testified to the LUC on August 12, 2005 during the McCully(s) **very similar petition** A05 757, describing how the Property became designated "*Open*" in the County's General Plan and yet agriculture use is allowed by the County. The soils of the Property are designated as "Prime" in the ALISH soils classification system. County as the Property is zoned A20'a by the County.

Perhaps of some relevance, from a State zoning perspective, agricultural use of coastal and near coastal lands extending north from Hakalau were generally not similarly zoned comparable to lands extending from Hilo to Hakalau. Extending northward of Hakalau, generally, the State's border between Agricultural zoned lands and Conservation District zoned lines appears to begin at the top of the coastal pali, *ref., exhibit 8, LUC Ninole boundary interpretation.....*

*"For your information, the designation of the subject parcels was established on August 4, 1969, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. As depicted on the official State Land Use (SLU) District Boundaries Map H-59. Papaaloe Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural. Any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation Distinct."*

The Petitioner(s) have found that the Ninole boundary interpretation is not unique but is seemingly generally applied in the Papaaloe Quadrangle.

The Petitioner(s) have been unable to discover why, generally, lands comparable to the Property, which both were Prime Agricultural lands according to the ALISH system of classification, north of Hakalau were generally zoned differently than lands extending from Hilo to Hakalau. At that time all such lands were in similar agricultural production and existed along the Coastal Highway which had intermittent scenic views across same towards the ocean. However, to add clarity, the ALISH system of classification is dated subsequent to the Property's zoning in the State's Conservation District.

- 1) If it was the intention of the regulators to insure that **structures** were only developed substantially away from the coastal pali due to pali erosion and landfall considerations the zoning regulations ought to be similar along the entire coast?
  
- 2) If the intention was to limit **agricultural** use due to erosion of soils concerns for coastal and near coastal properties the zoning regulations would be similar along the coast and agricultural use would not be allowed in the Rules without a high level of administrative considerations being applied?
  
- 3) If the intention was to preserve **scenic views** through the limiting of structures on properties between Hilo and Hakalau or agricultural uses of same that consideration is no longer applicable as approved structures now exist on the Property which is now fully developed and there does not exist scenic views of the Property or the ocean beyond anyway from public use areas? And - agriculture has always been a ***"HRStatute and HARule allowed"*** use of the Property.
  
- 4) If the intention was to preserve and protect against new uses of lands in order to consider protection of **archaeological, historical, botanical characteristics** of lands the zoning would likely be similar along the entire Hamakua coast? In any event professional studies of the Property regarding same have since been conducted and filed with State and County authorities. No characteristics regarding same were identified that need further protection.



5) If the intention was to reserve a possibility for future coastal **public use** areas the zoning would likely be similar along the entire Hamakua coast?

6) If the intention was to reserve a possibility for future coastal **public use** areas in the area between Hilo and Hamakua such use ought to have been identified by now and steps taken by the regulators/authorities to identify such? There exist two public use coastal areas in the vicinity of the Property. Kolekole gulch public park lies approximately 1000 ft. to the south of the Property (it is presently closed and unused). Hakalau gulch public park lies to the north of the Property approximately 1/2 mile (it also is presently closed and unused).

Just like **public use** of the Property has not resulted during the past 50 years it is unlikely that there will be any public use consideration of the area of the Property in the future. The only access to the Property is an easement, for access and utility purposes, crossing a neighboring lot which is privately owned. The area between Hakalau and Kolekole gulch is all privately owned, fenced and security gated. There exist no public access areas nor do public views to or across the properties towards the ocean exist. The ocean-side pali is high and steep with wave washed boulder fields at the water line. Public use of such area would be extremely dangerous and should be discouraged. No beach areas exist. The Petitioner(s) believe that there does not exist today any interest in public use of any kind regarding the area of the Property nor is it likely to exist in the future as, again, the Property and the surrounding lots are privately owned.

7) If the intention was to provide a mechanism for **rezoning** of appropriate properties that no longer require the added level of DLNR administrative review as they are now fully developed that is where the Petition finds its place today.

It is true that the Property is not void of resources that may fall within the **discretionary** ("***may***") described districting standards found in HAR 15-15-20's Conservation Districting

Standards. However there is nothing so unique about such resources that differentiate them from many similar properties that are not zoned in the State's Conservation District. Therefore the added level of protection by the zoning does not measure sufficiently against the **mandatory** and preemptive ("**shall**") standard in HAR 15-15-19's Agricultural District Standard that lands that are particularly suitable for agricultural production be zoned in the Agricultural District.

The presently existing characteristics of the Property have changed since when the Property was zoned in the State's Conservation District . It is now a fully developed, long term, agricultural use Property with supporting use structures, a residence and an agricultural use storage and processing structure. The structures placement on the Property were fully considered by the administrative authorities against.....

- concerns relating to the potential for erosion, pali subsidence and landfall,
- scenic views from neighboring properties,
- the foot print size of the structures were designed to meet the requirements that such structures effect a reduced intensity of land use when compared to State Agricultural Districted lands which reduced intensity is a requirement of Conservation District permitted structures.

The Petitioner(s) submit, therefore, that the Property's present characteristics no longer benefit from the administrative protection by their remaining in the State's Conservation District. The Property is now a fully developed agricultural use Property. The Petitioner(s) submit that the Property's zoning ought to reflect its use. As a further incentive a '**buffer zone**' is offered which represents a substantial improvement over the existing "**HRStatute and HARule allowed**" situation. The Petitioner's hold that the State, County, general public, environment and the Petitioners would now be better served if the Property was rezoned into the State's Agricultural District.

Perhaps it is relevant that the Property is located in an **unusual extension** of the Papaikou Quadrangle which Quadrangle extends north from Hilo and ends around Hakalau.

Generally the area beginning at Kolekole gulch extending north to Hakalau comprise the area of the unusual extension to the Quadrangle.

The coastal properties to the north of Hakalau are in the Papaaloa Quadrangle, *ref., exhibit 16 Quadrangle map*. It seems to the Petitioner(s) that the Quadrangle map line separating the Papaaloa Quadrangle from the Papaikou Quadrangle was used by the regulating authorities in their goal to preserve scenic views towards the ocean in the area leading from Hilo to Hakalau. Confusingly leading north from Hakalau many very similar properties to the Petitioned Property have residential structures on them located a very short distance from the coastal pali. Generally coastal properties from Hilo Bay leading north have a view **to and from** Hilo Bay. However such is not applicable to the Property, *ref., exhibit 16 Quadrangle map*.

**HRStatute, HAR 15-15 LUC Rules and County Rules are all consistent with and effectively support the Petitioned rezoning.....**

Effectively, in reverse order, the **Rules** are promulgated and gain their authority from the **Statute** and the Statute is a law consistent with the **Constitution**. The Petitioner(s) believe that no Rule ought to conflict with the Statute from which the Rules are promulgated.

**The State Constitution** requires.....

that it's '***agencies place a priority***' on preserving and **promoting** suitable agricultural lands for agricultural uses in its section 11.3 Agricultural lands.....

***“The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.”***

The Petitioner(s) agricultural use of the Property is for both **personal**, *self-sufficiency*, and intended **commercial** agricultural production which will add to the State's *self-sufficiency* in food production.

**The State's LUC enabling Statute Law** *LUC HRS 205-2 (3)* states that.....

*"In establishing of the boundaries of agricultural districts the **greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and,**"*

The word *greatest* does not need definition. Effectively the word *greatest* means that there be **no other** land zoning characteristic of *greater* priority provided in the Statute or HARules which result from the Statute. The Statute is succinct in requiring that '*in establishing district boundaries*' **no other** land zoning designation than '*Agricultural*' be given to land if it has a '*high capacity for intensive cultivation.*'

**The Property has a '*high capacity for intensive cultivation*'** which is an established fact. For certain HRS 205 does not state any characteristic of lands being considered for Conservation Districting requiring that they be given **equal or greater** protection than land that has a '*high capacity for intensive cultivation be zoned in the Agricultural District.*' HRS 205 sections (d) and (e) go on to list various characteristics of lands to be zoned into the State's Agricultural and Conservation Districts.

The listed characteristics clearly go on to describe that the Property ought to be zoned in the State's Agricultural District more compellingly than in the State's Conservation District. On the-other-hand if the County or State have a plan for public use of the Property in any way what-so-ever it is incumbent on them to identify same. The Property has been zoned in the State's Conservation District for over 50 years and neither the State nor the County have identified same.

Particularly the flow of HRS 205-2 first describes what districts are to be established in its section (a) quoted above. HRS 205-2 then goes on through its subsequent section (d) *Agricultural districts shall include*: to describe **uses** in (d) (1) rather than the earlier described **capacity** characteristic.....

*"(d) Agricultural district shall include:*

*(1) Activities or **uses** as characterized by the **cultivation of crops**, crops for bioenergy, **orchards**, forage, and forestry,"*

The Agricultural section (d) goes on to describe in its clauses (2) - (11) various other uses, activities and services that characterize what the ***Agricultural district shall include***.

The Petitioner(s) are **using** the Property for the '***cultivation of crops***' and an '***orchard***' and the Property has a '***high capacity for intensive cultivation***.'

Comparatively section (e) Conservation district describes.....

*"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 recreation purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept."*

Agricultural use is an *allowed* and *existing* use of the Property. The Property is fully developed with structures and agricultural plantings. No particular *scenic or open space* resources exist that need protection. No *archaeological, historical or botanical characteristics* have been identified that need the protection of Conservation district zoning. *Soil erosion* cannot be reasonably argued to be a characteristic that needs protection against as.... agriculture, tilling of the soil etc., is an allowed use.

In summary of HRS 205-2 Districting and classification of lands.....

The lawmakers clearly intended that the LUC implement its Rules, to provide a preferential priority *"greatest protection be given"* that lands with a *'high capacity for intensive cultivation'* be zoned agricultural. There does not exist any more compelling characteristic in the Conservation district section that the Property remain in the Conservation district.

**The LUC enabling Rule** HAR §15-15-01 Purpose Rule seemingly confirms that the Statute is to be administered as preemptive to the Rules.....

*"This chapter governs the practice and procedure before the land use commission, and shall be construed to secure the just and efficient determination of every proceeding. This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawai'i. The rules under this chapter are promulgated pursuant to authority provided by sections 205-1 and 205-7, HRS."*

**The LUC enabling Rule** HAR 15-15-04 Rule also establishes how the LUC design district boundary Rules in a preferential order. Particularly.....

§15-15-04 Grammatical usage. ....

(c) The word *"shall"* is **always mandatory**.

(d) The word "may" is always permissive.

The Petitioner(s) believe that the word "may" implies a **discretionary** authority to the LUC and the word "shall" implies a **mandatory** requirement.

The Petitioner(s) believe that the following Rules are particularly relevant to the Petition in this regard, *ref., HAR 15-15.....*

**The LUC enabling Rules**, Rule HAR 15-15-19 and -04.....

*15-15-19 Standards for determining "A" agricultural district boundaries. Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards **shall** apply:*

*(1) It **shall** include lands with a **high capacity** for agricultural production;*

*§15-15-04 Grammatical usage. ....*

*(c) The word "shall" is always **mandatory**.*

*(d) The word "may" is always **permissive**.*

Herein may lie an inconsistency between HRS 205 and HAR 15-15. HRS states that "*in establishing district boundaries the **greatest possible protection** be given to lands with a **high capacity** for intensive cultivation',"* whereas HAR 15-15 Rules both for State Conservation District and State Agricultural District Rules state at their beginning.....

*"Except as otherwise provided in this chapter,".*

It is not clear to the Petitioner(s) whether there exists another section in HAR 15-15's Rules whether it is "*otherwise provided in this chapter*" that lands with a "*high capacity for intensive cultivation*" may be appropriately zoned or, in the case of the Property, remain zoned in the State's Conservation District however, referring back to the Statute HRS 205-2 (3) states that.....

*"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,**"*

While it is indisputable that the word *greatest* is succinct there may also exist the discretionary consideration that the term.... "*the **greatest possible protection be given to lands with a high capacity for intensive cultivation***" has not suffered a reduction in *protection* by the Property's zoning in the State's Conservation District. However the required protection is described to apply to the '*establishment of agricultural district boundaries*' and not the '*establishment of conservation district boundaries*'.

It has been the Petitioner(s) experience that the Property's zoning has resulted in delayed and uncertainty of use. Furthermore its zoning in the Conservation district did not '*protect*' its '*Statute allowed*' nonconforming agricultural use, for a prolonged period of time despite the Petitioner(s) attempts to resolve same with the DLNR but rather "*limited*" such use seemingly because the DLNR does not have a clear and evenly applied policy regarding such use.

Because both HAR 15-15-19 and -20 Rules which promulgate from HRS 205 contain the words "*shall*" and "*may*" in their Rules a balance of *discretionary* consideration is presumably allowed regarding certain characteristics of land described with the term "*may*". The Petitioner(s) believe, therefore, that one needs to refer back to the earlier quoted HRS 205-2 (3) in determining whether any of the "*mandatory*" ("*shall*") considerations in the HAR 15-15-20 Conservation District Rules outweigh the HAR



15-15-19 Agricultural District Rules as they apply to the current characteristics of the Property, which is now a fully developed agricultural use Property.....

*"(1) It shall include lands with a **high capacity** for agricultural production;"*

The stipulation in the Statute..... *"in establishing district boundaries the **greatest possible protection** be given to lands with a high capacity for intensive cultivation"* is believed by the Petitioner(s) to be preemptive.

The Property has a *"**high capacity for agricultural production**"* relevant to its size. This is not just a statement by the Petitioner(s) but is evidenced in the ALISH classification of the Property and also its history of agricultural production.

The word *capacity* refers as a standard measured against the physical size of a property and the word *capacity* will be specifically referred to and discussed in the ALISH classification and definition paragraphs below. The Property has a history of *intense* cultivation exceeding one hundred (100) years, *ref., exhibit 12, John Cross letter* (the former agribusiness manager of the Property), and *exhibit 13, ALISH description* of what constitutes *prime agricultural land* and *exhibit 11, ALISH map*, which identifies the Property's area as 'Prime Agricultural Land' and the County's designation of zoning of the Property as A-20a.

*Prime agricultural land* is defined in the ALSH system, *ref., exhibit 13, ALISH definition of Prime Agricultural Land, page 3.....*

*"PRIME AGRICULTURAL LAND is **land best suited** for the production of food, feed, forage and fiber crops. **The land has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed, including water management, according to modern farming methods.**"*

By inference the Property has a "**capacity**" to "**produce sustained high yields of crops economically**". Comparatively *HRS 205-2 (3)* states.....

*"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,**"*

The Petitioner(s) believe that the Petition is properly placed with the LUC and the Petitioned rezoning is consistent with the State's Constitution, the Statutes and the Rules describing that the Property now be rezoned to the State's Agricultural District.

The Petitioner(s) believe that the Petition is offering to add a new level of **protection** to the "**HRStatute and HARule allowed**" agricultural use of the Property, a **buffer zone**, is offered.

**Consideration of previous relevant determinations (FONSI's)**

HRS s/s 11-200-13 (a) Department of Health Environmental Impact Statement Rules state.....

*"Chapter 343, HRS, provides that whenever an agency proposes to implement an action or receives a request for approval, the agency may consider and, when applicable and appropriate, incorporate by reference, **in whole or in part, previous determinations of whether a statement is required, and previously accepted statements.**"*

*(b) Previous determinations and previously accepted statements may be incorporated by applicants and agencies whenever the information contained therein is pertinent to the decision at hand and has logical relevancy and bearing to the action being considered.*

*(c) Agencies shall not, without considerable preexamination and comparison, use past determinations and previous statements to apply to the action at hand. The action for which a determination is sought shall be thoroughly reviewed prior to the use of previous determinations and previously accepted statements. Further, when previous determinations and previous statements are considered or incorporated by reference, they shall be substantially similar to and relevant to the action then being considered."*

The Petitioner(s) request that the LUC approve that the following FONSI(s) be incorporated by reference in this EA as relevant and applicable.

FONSI #1, exhibited hereto as **exhibit 2**, a 2005 FONSI in support of the McCully(s) 2005 petition, A05 757, to the LUC to rezone 3 TMK lots, which included in part all of the area of the Property, from the State's Conservation District to the State's Agricultural District. Effectively the Petitioner(s) describe that the FONSI described that the rezoning of the Property to the State's Agricultural District would have No Significant Impact.

FONSI #2, exhibited hereto as **exhibit 3**, a 2016 FONSI in support of the Petitioner(s) CDUA-CDUP for a residence on the Property. Particularly the Petitioner(s) 2016 FONSI described that the planned residence was intended to support their **"HRStatute and HARule allowed"** nonconforming agricultural uses of the Property in over 40 places therein. Effectively the Petitioner(s) describe that the FONSI to also be relevant and applicable to this EA and the Petition.

**Note:** the electronic version of this EA contains both of the above referenced FONSI's in whole. The hard copies of this EA references *on-line* location references where the exhibited FONSI(s) may be found. The Petitioner(s) discussed this with Tom Eisen of the Department of Environmental Quality Control on January 25, 2019 by telephone. He indicated that such was reasonable, actually he expressed preference, but he also stated that it was up to the LUC to make a final determination of same. Therefore, for reference,

the existing FONSI(s) may be found exhibited to the electronic version of this EA and on-line at.....

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2016-07-08-HA-FEA-Church-Single-Family-Residence.pdf](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2016-07-08-HA-FEA-Church-Single-Family-Residence.pdf)

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2005-06-23-HA-FEA-McCully-40-Kam-Ave-Conservation-Lands.PDF](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2005-06-23-HA-FEA-McCully-40-Kam-Ave-Conservation-Lands.PDF)

**Property description, along with contiguous properties and history:**

The Petitioner(s) purchased the Property in 2014 from the McCully(s).

The McCully(s) petitioned the LUC in 2005, petition A05 757 that the LUC rezone the Property from the State's Conservation District to the State's Agricultural District. That petition was supported by a FONSI which is exhibited hereto as *exhibit 2 in the EA's electronic version but not in the hard paper copy*. The LUC denied that Petition. There is a discussion of the LUC's reasoning for the denial which is included later in this EA. The Petitioner(s) describe that the reasoning for the LUC denying the McCully(s) petition no longer applies to the existing characteristics of the Property and its permitted and/or allowed uses.

The Property lays makai of the coastal highway approximately 14.5 miles north of Hilo.

Access to the Property from the coastal highway is on a security gated paved driveway which crosses a neighboring, privately owned, property on an eased area.

At the time of the purchase of the Property, it was maintained in field grasses and limited agricultural plantings. Since that time the Petitioner(s) have increasingly implemented

agricultural uses of the Property including cultivated field crops, woody orchard species, a potted plant nursery and specimen plantings of woody plants have been planted which are generally intended for use for growing on, propagation use and/or sale. Personal agricultural use of the Property is also intended by the Petitioner(s).

The Petitioner(s) have build a 720 square ft. agricultural use storage and processing structure on the Property and a residence is currently under construction also. The structures were properly reviewed, allowed and/or permitted by the DLNR and the County.

The Property is zoned in the Resource subzone of the State's Conservation District. The Property is designated "*Open*" by the General Plan Land Use Pattern Allocation Guide.

The Property is zoned Agricultural (A-20a) by the County, *ref., exhibit 4, County Letter*. The Property is bounded on its makai side by the edge of a high ocean-side pali property (ranging between 100 to 140 feet above mean sea level and variably around 100 feet in width) which is characteristic of the Hilo - Hāmākua Coastline.

The pali leading down to the high water mark belong to the State of Hawai`i and is also zoned in the State Conservation District. Effectively the Property is not ocean front as it is separated from the ocean by the pali property. Effectively, if this Petition is allowed, there remains a strip of State owned land separating the Property from the Ocean.

The center of Puahanui Stream serves as the Northern boundary of the Property and TMK: (3) 2-9-003; 013 serves as the Southern boundary. The Puahanui Stream is an intermittent stream. The only area of the Puahanui Stream that is zoned in the State Conservation District is the area where it crosses the Property. On the agricultural zoned and use lot immediately mauka of the Property no area of the stream is zoned in the State's Conservation District.

The Property is bounded mauka by four parcels, TMKs: (3) 2-9-003: 048, 049, 050 and 051. The Property is separated from the coastal highway by the mauka properties. The mauka properties are all zoned in the State's Agricultural district and as A20-a by the County. The lot immediately mauka to the Property has a large agricultural use greenhouse on it. It is a substantial agribusiness employing several people. The owners also reside in a residence on that lot.

Lot 013, which shares a southern border with the Property is zoned similar to the Property as Conservation and is also separated from the coastal highway by the mauka properties. Lot 013 is undeveloped, however the current owner has stated an intention to build a residence on it. A copy of the Petition and this EA has been provided to that land owner. That property owner has directly stated to the Petitioner(s) support for the Petitioned rezoning.

The above described properties, including the Property, are located in a private, **security gated**, subdivision with no public views or access.

The 7 lot subdivision area and the ocean beyond cannot be seen from the coastal highway as the highway is cut deeply through a hillside along its boundary with the properties in the subdivision, *ref., exhibit 20, pictures.*

There also exists another 32 acre property beginning at the center of Puahanui Stream and extending northward. That property is similar in characteristics to the Property. It spans the entire distance between the coastal highway and the ocean-side pali property which pali property is also owned by the State. The Petitioner(s) believe a portion of the 32 acre property is also zoned in the State's Conservation District, however, no boundary interpretation appears to exist which defines what portion of that lot is in the Conservation District. That property is fenced and maintained in field grasses.

The Property and the other described lots herein lie in an area bounded by Kolekole gulch to the south and the village of Hakalau to the north. The area is also bounded by the coastal highway mauka and is bordered makai by the ocean-side pali property(s) which are owned by the State.

All of the above described properties are believed to be zoned A20-a by the County of Hawaii.

All of the above described properties were in agricultural use (sugar cane production) since a period beginning in the mid 1850 period to 1992.

The properties which are contiguous to the ocean-side pali are also in the County's SMA area.

An incidental use to the historic agricultural use of all of the properties included the deep cultivation of the soils during the period of sugar cane production.

In the case of the properties which lie adjacent, makai, to the ocean-side pali property the cultivation of the soils included the area immediately up to the top of the ocean-side pali properties.

Historically there did not exist any particular State or County regulations to mitigate the effect of eroded soil, which resulted from the agricultural use the properties.

The County of Hawaii issued a SMA letter of Determination to the Petitioner(s) that identifies that agriculture is allowed on the area of the Property, *ref. exhibit 4 County letter.*

The DLNR has been responsible for administering the land uses of all of the properties zoned in the State's Conservation District since a period beginning in the 1960's through its

administration of Hawaii Administrative Rules ("HAR") 13-2 and subsequently a more recent amended version, HAR 13-5.

Only the properties, described above, which share a boundary with the ocean-side pali are either partially or entirely zoned in the State's Conservation District.

Conservation Districted land's rule, HAR 13-5-7's Nonconforming Use Rule, provides that *uses of land* which existed at any time before properties were zoned into the State's Conservation District may continue as "**Statute and Rule allowed nonconforming uses**" without any formal review and permitting administered by the DLNR. Unlike other land use zoning restrictions in other districted lands there is no provision in HAR 13-5 which prohibits resumption of properly evidenced historical land uses, when/if interrupted for a period of years.

The Petitioner(s) are aware that the DLNR has reviewed and formally *allowed* the resumption of nonconforming land uses on lands which uses were interrupted for a period of many years (principally residential use). In at least one case, however, agriculture also was recognized as a "**HRStatute and HARule allowed**" nonconforming use that may be resumed, *ref., exhibit 17, its item K-1 on page 4, Sam Lemmo, Administrator, OCCL testimony to the BLNR.*

The Petitioner(s) point particularly to the above referenced *exhibit 17's item K-1* as a very clear and comparable example that lays at the heart of the confusion and uncertainty of agricultural use of the Property which the Petitioner(s) experienced when they also requested of **Mr. Lemmo** that the OCCL issue a Determination, according to HAR 13-5-30's Land Use Rule, that the Property qualified for "**HRStatute and HARule allowed**" nonconforming agricultural use.

After exchanging correspondence regarding same with the OCCL for a period exceeding two years the requested Determination was never issued by the OCCL. It is clear to the



Petitioner(s) that the DLNR does not clearly and evenly apply its HAR 13-5-7 Nonconforming Use Rule. The Petitioner(s) formally appealed that Mr. Lemmo refer the requested Determination to the BLNR. That request was denied by Mr. Lemmo, *ref., exhibit 5, OCCL letter*. The Petitioner(s) subsequently filed the Petition to the LUC that the Property be rezoned from the State's Conservation District to the State's Agricultural District with the incentive of an offered buffer zone separating the intense agricultural use area from the State owned Pali property which is owned by the State.

Particularly the Petitioner(s) believe that they have reasonably evidenced with all of the appropriate regulatory authorities that "**agriculture**" was the historical land use. The Petitioner(s) have supplied such evidence in the form of maps, aerial photos, field plans and a letter from the field manager for the Property to the DLNR and the County of Hawaii's Planning Office.

The DLNR wrote a letter to the Petitioner(s) in January of 2016 stating that it had '**previously**' allowed that the Petitioner(s) may conduct nonconforming agricultural use of the Property, *ref., exhibit 5, DLNR letter*. HAR 13-5 does not provide for the DLNR to administratively review or restrict such use.

The Property is presently fully developed for uses accessory and incidental to the agricultural use of the Property. The Petitioner(s) intend to continue to expand the agricultural use of the Property.

The described land uses that have been implemented on the Property represent a long term commitment of the Property's use to agriculture.

The Petitioner(s) **first** inquired of the DLNR during a period of 2014-2015 what "**proof**" was required in order to establish that the Property qualified for "**HRStatute and HARule allowed**" nonconforming agricultural use. The DLNR advised that '*photos and records*'

were sufficient. The Petitioner(s) supplied such evidence to the DLNR and the County Office of Planning and identified that they are using the Property for agricultural use.

The DLNR **finally** wrote a letter to the Petitioner(s) in January of 2016 describing that it had previously "**allowed**" that they may use the Property for nonconforming agricultural use, *ref., exhibit 7, DLNR letter.*

**Additional background information:**

The Petitioner(s) have filed Petition A18 805 with the State LUC and copies with the County of Hawaii and State Planning Department (the submission of the Petition was around July of 2018). The Property is already fully developed in agricultural use including uses accessory and incidental to the agricultural use of the Property. **No new use is contemplated or likely** and therefore the Petitioner(s) believe there will not be any **significant effect** resulting from the Petitioned rezoning and/or the Property's continuing agricultural use.

The Petitioner(s) describe that the various State and County agencies that are consulted in regards to such an EA were already invited to comment on the very similar 2005 McCully(s) EA for LUC Petition, A05 757, for a very similar Petition which included the Property and the South Lot. In that petition the LUC filed a FONSI, *ref., exhibit 2 FONSI*, in the event that the Property was subsequently rezoned from the State's Conservation District to the State's Agricultural District.

Comparative to today's situation, during the time of the McCully(s) petition, no particular substantial/intensive land use existed on the Property. The Property can generally be described at that time as an open field area which had field grass growing on it and limited agricultural plantings which Property was also regularly mowed. The Property had some volunteer woody plant growth along its northern border and along the coastal pali. The McCully(s), the DLNR and the LUC seemed unaware that the Property qualified for

***"HRStatute and HARule allowed"*** nonconforming agricultural use according to HAR 13-5-7's Nonconforming use Rule.

In the LUC's denial of the McCully(s) petition the potential for erosion of the property's soils and pali subsidence were cited, in part, as reasoning supporting the denial and that the development and placement of structures and the Property's uses, would be better considered through the DLNR administrative permitting role.

During the LUC hearings a witness, the administrator of the OCCL, testified a DLNR position that the land ought to remain in the Conservation District in order to monitor and control future development of structures on the property. The DLNR's representative testified that, in the event that the LUC allow the petitioned re-zoning into the State's Agricultural District, at a minimum, a 40 ft. buffer zone be provided that remained in the State's Conservation District. Effectively the Petition describes that a "deed restriction" or other suitable instrument be provided that prevents the cultivation of the soils of the Property in the buffer zone area in perpetuity.

Comparative to the current Petition the McCully(s) petition described **contemplated** land uses including a farm dwelling (a residence) and a greenhouse. This Petition describes that the Property is now fully developed for agricultural uses with field crops, woody orchard species, nursery plant production along with a potted plant nursery. No new land uses are contemplated nor are they likely as the Property has been fully committed to long term agricultural use and uses accessory and incidental to such use.

The soils of the property are classified as ***"Prime Agricultural land"*** under the ALISH classification system. The Property's soils are deep and fertile. The Property receives adequate rainfall to support agricultural use. The Property is not particularly steep. The Property cannot be seen from public use areas. The Petitioner(s) describe that there exists no public benefit that the Property remain in the State Conservation District.

**A CULTURAL IMPACT ANALYSIS:** *Ka Pa 'akai O Ka 'Ama* assessment and EA(s) and FONSI(s) are on file with the LUC for the property which the Petitioner(s) submit are relevant to the applied for re-zoning. The Archaeological study exhibited in *exhibits 2 and 3* meets the current requirements in the law.

**It has been the Petitioner(s) experience that the DLNR lacks a clear and evenly applied policy regarding administratively recognizing and allowing nonconforming agricultural use of property** in cases properly evidenced to it. The DLNR's administration of the agricultural use of the Property has added an enormous burden, tedium, cost, delay and economic loss of the use of the Property for agriculture and uses accessory and incidental to such use.

The Petitioner(s) applied for an official Determination according to HAR 13-5-30's Rule that the Property qualified for nonconforming agricultural use without a satisfactory result. The exchange of written communications in this regard exceeded a period of two years. The administrative burden of DLNR administration is the same whether it be for a large property with a lot of economic potential and a small property such as the Property. This disproportionate burden substantially reduces the viability of the Petitioner(s) rightful Property use.

More recently, in 2016, the Petitioner(s) filed an EA for their planned residence on the Property. That EA described in some 40 places that the residence was intended in order to support the Petitioner(s) agricultural use of the Property. The DLNR accepted that EA and determined a Finding of No Significant Impact, *ref., exhibit 3, FONSI*.

The Petitioners have also mailed a description of the re-zoning Petition to the LUC's State's "*Official mailing list*" which is comprised of some 250 interested parties. The LUC's website on the Petition's page does not presently describe any party's concerns or resistance. To the contrary both the County and the State Offices of Planning issued letters supporting that no additional EA and FONSI be required. However the LUC ruled on January 23rd, 2019 that a new EA be submitted and reviewed.

## **RECENT OWNERSHIP HISTORY**

From 1992 to 2014 the McCully(s) owned the Property. In July of 2014 the McCully(s) sold the Property to the Petitioner(s).

## **LAND USE DESIGNATIONS**

The Property is situated within the State Land Use Conservation District **Resource** sub-zone.

The Property is zoned A20-a by the County of Hawaii, an agricultural use designation, *ref., exhibit 4, County letter.* .

The Property is also located within the Special Management Area (SMA) and the Property lies immediately mauka of a State property which State property has frontage along the coastline.

The Property's zoning by the State and the County is confusing, to say the least, which lies at the heart of what the Petitioner(s) have experienced. Effectively the State and the County have variably implemented zoning overlays on land along the Hamakua Coast progressively, over the last 70 years. It would seem, generally, that there was an intention to intermittently restrict land uses of coastal properties in the area.

While the goals of the State and County were the restriction/regulating of the use of coastal properties, through zoning, the regulators were faced with the problem that if they created a regulation which restricted existing uses, such as agriculture, they probably

would have been forced to buy the lands. Therefore the regulators seemingly created confusing zoning rules and regulations which continue to this day.

Effectively the Conservation District Rules, HAR 13-5 allows preexisting land uses to continue to be "***HR Statute and HARule allowed***" without the administrative function of the DLNR to be applied against such property's use in perpetuity, *ref., HAR 13-5-7 Nonconforming Use Rule*. In the case of the County it created a land description known, in the case of the Property, as A20-a, an agricultural use designation.

Mr. Hayashi's testimony in *exhibit 1* describes the County's zoning as A20-a. It has been the Petitioner(s) experience that County and the State may be persuaded, reminded and prodded into accepting that agricultural use of the Property today is already a "***HR Statute and HARule allowed***" use without any permitting requirements, the general public have been confused into believing that Conservation Districted and Open described land uses are to be highly regulated.

Particularly *exhibit 6, a State of Hawaii's report to the Governor*, describes that confusion exists regarding allowed agricultural uses of the Property.....

Today the Northeast Hawaii Community Development Plan and the County General Plan LUPAG Map *Open* ' designations relate to the State Land Use Conservation District designation for the Property. The County's representative **Norman Hayashi** testified to the LUC on August 12, 2005 during the McCully(s) **very similar petition** A05 757, describing how the Property became designated "*Open*" in the County's General Plan and yet agriculture use is still allowed by the County, *ref., exhibit 1, LUC testimony*.

What appears to be described, in reference to the Property, is that the County, first simply captured coastal lands, with the stroke of a pen on a map without specific reference to property boundary lines. Subsequently the County more specifically defined the *open*

zoned lands border lines as being lands that had been zoned in the State Conservation District many years earlier when it developed the County's General Plan which exist today.

Perhaps of some relevance, generally, the County zoning border between Agricultural lands and Conservation District lines began at the top of the coastal pali, *ref., exhibit 8, Ninole boundary interpretation.....*

*"For your information, the designation of the subject parcels was established on August 4, 1969, and in accordance to Hawaii Administrative Rules Subchapter 16, 15-15-111. As depicted on the official State Land Use (SLU) District Boundaries Map H-59. Papaaloa Quadrangle, the landward portion of the subject parcels was designated SLU Agricultural. Any coastal lands from the "Top of Sea Pali" was deemed SLU Conservation District."*

The Petitioner(s) have been unable to discover why, generally, lands comparable to the Property, which both were Prime Agricultural lands according to the ALISH system of classification, north of Hakalau were zoned differently than lands extending from Hilo to Hakalau.

#### **HAR 11-200-12 Significance criteria**

*(a) In considering the significance of potential environmental effects, agencies shall consider the sum of effects on the quality of the environment, and shall evaluate the overall and cumulative effects of an **action**.*

**Overview.....** The proposed **action** is that the Property be rezoned from the State's Conservation District to the State's Agricultural District. **No new land use is proposed nor is likely.** The Property is already fully developed as an agricultural use Property including agricultural plantings, an existing agricultural use storage and processing

structure and a residence is under construction. The agricultural use is a ***"HRStatute and HARule allowed"*** use according to HAR 13-5-7's Nonconforming Use Rule which allows that the Property qualifies for agricultural use in perpetuity. HAR 13-5-7's Nonconforming Use Rule provides that such agricultural use includes the ***"HRStatute and HARule allowed"*** right to cultivate the Property's soils immediately adjacent to the ocean-side pali property which is owned by the State. The Petitioner(s) intend to fully develop and utilize the Property's agricultural resources whether the Petition is allowed or not, however a buffer zone is offered to reduce the intensity of the land's use immediately mauka of the State owned pali property.

*(b) In determining whether an action may have a significant effect on the environment, the agency shall consider every phase of a proposed action, the expected consequences, both primary and secondary and the cumulative as well as the short-term and long-term effects of the action. In most instances, an action shall be determined to have a significant effect on the environment if it:*

*(1) Involves an irrevocable commitment to loss or destruction of any natural or cultural resources,*

## **Social, Cultural and Economic Setting**

### **Socioeconomic Characteristics**

*Setting.....*

Hawai'i County's population increased by more than 56,000 persons between 1980 and 2000. Between 1980 and 1990, Hawai'i Island's population increased 30.7 percent, and increased by 23.6 percent between 1990 and 2000. The April 1, 2000 population figure for Hawai'i County was 148,677 according to census figures compiled by the County of Hawai'i, Department of Research and Development.

The South Hilo district had a population of 47,386 in 2000 which represented approximately 32 percent of the total population for Hawai'i Island. The City of Hilo is the



largest population center on the island with the main offices of the County government, branch offices of Federal and State agencies located there. The island's major deep draft harbor and international airport are also

located in Hilo. In addition to industrial, commercial and social service activities, the University of Hawai'i Hilo and Hawai'i Community College and affiliated research programs play an important role in Hilo's economy.

Hilo and the rest of the East Hawai'i communities are adjusting to the loss of the sugar industry in the mid 1990's. The continuation of agriculture in the district has required a major shift from large scale single-commodity production to smaller scale, multi-commodity 29 multi-market base. The shift to diversified agriculture is characterized by larger numbers of self-employed and smaller scale independent businesses.

#### *Potential Impacts and Mitigation Measures*

Other properties in the immediate vicinity of the Property are utilized for a variety of diversified agricultural activities including a certified orchid nursery, the propagation of foliage stock and the cultivation of edible ginger and Chinese taro as well as residential uses. The rezoning will not have any significant effect on the socioeconomic characteristics of the area.

### **Archeology, Historic and Cultural Resources**

#### *Setting*

An archaeological assessment of the property was conducted by Rechtman Consulting, LLC, in July of 2004. The Property was systematically and intensively examined, and one site (SIHP Site 50-10-26-24212) (two historic-period railroad features) were discovered. These features were

identified as a possible railroad grade section and a railroad trestle abutment. A copy of the consultant's report can be found as *exhibited hereto as an exhibit to exhibit 2 and 3*.

In summarizing its findings, the archaeological consultant states the following:

*“Systematic survey of three parcels (TMK 3-2-9-03: 13, 29 60) produced no evidence of traditional Hawaiian remains or evidence that the area was currently being accessed for the exercise of traditional and customary practices.”*

*“One historic era site-SIHP Site 24212, was recorded. The site contains two features associated with the Hamakua Division of Hilo Railroad-Hawaii Consolidated Railway which were recorded in the northwestern portion of the Property. One is a possible section of railroad grade and the other is a railroad trestle abutment. The features were in active use by the railroad from 1911 to 1946. Their primary function was to facilitate the transport of raw sugar from the many mills along the Hilo and Hamakua Coasts to the harbor at Hilo Bay. In later years, they also served the secondary function of facilitating tourism.”*

The archaeological consultant provided the following significance evaluation and treatment recommendations:

*“Site 24212 is considered significant under Criteria D for the information it has yielded regarding early twentieth century agriculture (sugar cane production), transportation infrastructure. As the current inventory survey project recorded Site 24212 in detail, however, no further work is recommended.”*

*“In the unlikely event that archaeological resources are encountered during future development activities at TMK: 3-2-9-03: 13, 29, and 60, work in the immediate area of the discovery should be halted and DLNR-SHPD contacted as outlined in Hawaii Administrative Rules 13§13-275-12.”*

By letter dated December 22, 2004, DLNR-SHPD accepted and agreed with the archaeological consultant's recommended treatment of Site 24212 and noted that the consultant's report was adequate to meet the requirements of Section 13-276, HAR. The report was accepted as final. Rechtman Consulting, LLC, also conducted a cultural assessment for the Property. Archival and documentary information was reviewed, including Mahele Land Awards and Grants and historic maps.

This research did not reveal any documentation of any previous or ongoing traditional or customary practices. The area was historically known as Hilo-pali-Ku (Hilo of the upright cliffs) and there are a few accounts that indicate this area, which encompasses the sheer cliffs stretching along the

Hāmākua Coast from the Wailuku River to Waipi`o and beyond, once supported a large pre-contact Hawaiian population that subsisted on crops

This research did not reveal any documentation of any previous or ongoing traditional or customary practices. The area was historically known as Hilo-pali-Ku (Hilo of the upright cliffs) and there are a few accounts that indicate this area, which encompasses the sheer cliffs stretching along the

Hāmākua Coast from the Wailuku River to Waipi`o and beyond, once supported a large pre-contact Hawaiian population that subsisted on crops such as taro, sweet potato, banana, and coconut. Other agricultural resources such as `awa, bamboo and sugarcane were also cultivated on the kula lands

that stretched from South Hilo to Hāmākua. In the second half of the nineteenth century, the transportation difficulties that had delayed the large-scale commercial exploitation of the kula lands were overcome and sugarcane plantations replaced the subsistence agriculture and grazing as the dominant land use.

In order to identify cultural resources and potential traditional cultural practices associated with the Property and this portion of the Wailea ahupua`a, the consultant contacted Ululan

Sherlock of the Office of Hawaiian Affairs (OHA) and Kepa Maly of Kumu Pono Associates in June of 2004.

Neither had any specific information relative to the Property. However, OHA suggested contacting the Laupahoehoe Hawaiian Civic Club. Lucille Chung and Walter Victor were contacted, and they, in turn, referred the consultant to Jack or Waich Ouye, Yukio Takeya and Lorraine Mendoza, who were contacted in June and July of 2004.

The interviewees recalled that the railway used to run across the property until the Kolekole Bridge was destroyed by the tsunami of 1946. On the adjacent property to the south of the 7 lot subdivision, **there used to be a pig farm** that was used by camp residents and a trail that accessed the shore. This trail allowed the residents and local fisherman access to the shoreline below the pali that bounds the property to the East. This trail was not located on the Property nor did it cross such Property.

The consultant summarized its findings regarding cultural resources relating to the Property as follows: “None of the organizations or individuals that were contacted had any information relative to the existence of traditional cultural properties in the immediate vicinity of the Petition Area; nor did they provide any information indicating past or current use of the area for traditional and customary practices. It is unlikely that there are any traditional **utilized for sugarcane cultivation and associated transportation for over 100 years**. Any traditional Hawaiian features that may have been associated with former cultural practices that may have occurred in the Property would have been destroyed by the sugarcane cultivation and related uses.”

Petitioner(s) interviewed the field manager of the agricultural farming business which occupied the Property up to 1992. The field manager stated that this particular Property and the surrounding 7 lot subdivision was maintained as a **‘seed farm’** for their agricultural business for over 40 years

and all public access from all directions was strictly prohibited in order to not contaminate the seed production on the Property. Thus there exists no recent history of public access to the Property or the subdivision mauka after the closure of the railroad around 1950.

A complete copy of the Archaeological Inventory Survey and Limited Cultural Assessment of TMKs: (3) 2-9-003: 013, 029, and 060 is provided as *exhibited hereto as exhibited in the EA/FONSI exhibits 2 and 3*. The comment letter from the State Historic Preservation Division dated December 22, 2004 and a supplemental letter from the consultant Rechtman Consulting, LLC, dated January 24, 2005 are also included therein.

#### *Potential Impacts*

There were no cultural or historic properties, other than Site 24212, identified in the Property area. There were also no traditional or customary cultural practices found to be associated with the Property. The Petitioned rezoning is therefore anticipated to have “no effect” on significant historic sites or traditional and customary cultural practices. The Historic use of the Property was for Agriculture. The Petitioned rezoning will not have any significant adverse impact on the **Archeology, Historic and Cultural Resources**. No new use is contemplated nor is it likely. The agricultural use of the Property is already a ***“HRStatute and HARule allowed”*** use. (the Historic use).

The agricultural use of the Property will contribute very modestly but none-the-less positively to the economy in general. There exists a shift to diversified agriculture in the region as characterized by larger numbers of small agricultural lots.

The proposed **action** is that the Property be rezoned from the State's Conservation District to the State's Agricultural District. **No new land use is proposed nor is likely.** The Property is already fully developed as an agricultural use Property including agricultural plantings, an existing agricultural use storage and processing structure and a residence is under construction. The agricultural use is a ***“HRStatute and HARule allowed”*** use

according to HAR 13-5-7's Nonconforming Use Rule which allows that the Property qualifies for agricultural use in perpetuity.

HAR 13-5-7's Nonconforming Use Rule provides that such agricultural use includes the "***HRStatute and HARule allowed***" right to cultivate the Property's soils immediately adjacent to the ocean-side pali property which is owned by the State. The Petitioner(s) intend to fully develop and utilize the Property's agricultural resources whether the Petition is allowed or not.

**If the Petition is allowed** a 40 ft. wide "*buffer zone*" is proposed between the pali and the cultivated soil areas of the Property. The proposed *buffer zone* will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion and pali subsidence and landfall. **Effectively the intensity of agricultural use of the buffer zone area will decrease.** The Petitioned rezoning will not result in *an irrevocable commitment to loss or destruction of any natural or cultural resources*. The Property's use for agriculture is already a "***HRStatute and HARule allowed***" right in perpetuity. Historical agricultural use of the Property, including the cultivation of its soils are likely to have destroyed any natural or cultural resources on the Property, if in fact, they ever did exist. There exists a botanical study and an archaeological study for the Property *found as exhibits in exhibits 2 and 3*. Particularly nothing was identified that required further protection. The Petitioned rezoning will bring the Property's long-standing use for agriculture into conformance with its zoning.

**If the Petition is denied** the Petitioner(s) will continue to be "***HRStatute and HARule allowed***" to cultivate the soils in the described *buffer zone* area. An increased potential for erosion of soil and pali subsidence and landfall will continue to exist, a possibility for a negative effect on the environment, which undoubtedly does not serve the interest of the State, the County nor the community.

(2) *Curtails the range of beneficial uses of the environment,*

**The Petitioned rezoning will *curtail the range of beneficial uses of the environment* in a way that is beneficial to the environment. This will be a Significant Positive Effect.**

The proposed **action** is that the Property be rezoned from the State's Conservation District to the State's Agricultural District. **No new land use is proposed nor is likely.** The Property is already fully developed as an agricultural use Property including agricultural plantings, an existing agricultural use storage and processing structure and a residence is under construction. The agricultural use is a "***HRStatute and HARule allowed***" use which allows that the Property qualifies for agricultural use in perpetuity. HAR 13-5-7's Nonconforming Use Rule provides that such agricultural use includes the "***HRStatute and HARule allowed***" right to cultivate the Property's soils immediately adjacent to the ocean-side pali property which is owned by the State. The Petitioner(s) intend to fully develop and utilize the Property's agricultural resources whether the Petition is allowed or not but the Petitioner(s) offer to reduce the intensity of the agricultural use area immediately mauka of the State owned pali property is contingent on the Petitioned rezoning of the Property to the State's Agricultural District.

**Particularly, if the Petition is allowed**, a 40 ft. wide "*buffer zone*" is proposed between the "***HRStatute and HARule allowed***" cultivated area and the ocean-side makai pali property. The proposed *buffer zone* will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion and pali erosion, subsidence and landfall. **Effectively the intensity of agricultural use of the buffer zone area will decrease.** The Property's use for agriculture is already a "***HRStatute and HARule allowed***" right in perpetuity. The Petitioned rezoning will bring the Property's long-standing use for agriculture into conformance with its zoning.

**If the Petition is denied** the Petitioner(s) will continue to be "***HRStatute and HARule allowed***" to cultivate the soils in the described *buffer zone* area. An increased potential for erosion of soil, pali subsidence and landfall will continue to exist. This is a possibility for a

negative effect on the environment, which undoubtedly does not serve the interest of the State, the County nor the community.

*(3) Conflicts with the state's long-term environmental policies or goals and guidelines as expressed in chapter 344 HRS, and any revisions thereof and amendments thereto court decisions, or executive orders,*

*[§344-1] Purpose. The purpose of this chapter is to establish a state policy which will encourage productive and enjoyable harmony between people and their environment, **promote efforts which will prevent or eliminate damage to the environment** and biosphere and stimulate the health and welfare of humanity, and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii.*

**If the Petition is allowed.....**

The Petitioned rezoning will ***promote efforts which will prevent or eliminate damage to the environment***. This will be a **Significant Positive Effect**. Agriculture is already a ***"HRStatute and HARule allowed"*** use on the Property according to HAR 13-5-7's Nonconforming Use Rule. The ***"HRStatute and HARule allowed"*** agricultural use of the Property includes the right to cultivate the Property's soils immediately adjacent to the Property's border with the ocean-side pali property makai. The Petitioner(s) have established substantial agricultural use of the Property. No new land use is anticipated nor is believed to be likely.

Furthermore the Petitioner(s) are proposing an improvement over the existing ***"HRStatute and HARule allowed"*** conditions. A ***buffer zone*** is proposed that will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion, pali subsidence and landfall. **Effectively the intensity of agricultural use of the buffer zone area will decrease.**



**If the Petition is denied.....**

The "*HRStatute and HARule allowed*" agricultural use of the Property will continue. The "*HRStatute and HARule allowed*" right to cultivate the Property's soils in the vicinity of the makai boundary of the Property with the ocean-side pali will continue. An increased potential for erosion of soil, pali subsidence and landfall will continue to exist, a possibility for a negative effect on the environment, which undoubtedly does not serve the environment well nor the interest of the State, the County nor the community.

*[§344-3] Environmental policy. It shall be the policy of the State, through its programs, authorities, and resources to:*

*(1) Conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii.*

**If the Petition is allowed.....**

The Petitioned rezoning will *conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii.*

This will be a **Significant Positive Effect**. Agriculture is already a "*HRStatute and HARule allowed*" use on the Property according to HAR 13-5-7's Nonconforming Use

Rule. The ***"HRStatute and HARule allowed"*** agricultural use of the Property includes the right to cultivate the Property's soils immediately adjacent to the Property's border with the ocean-side pali property makai. The Petitioner(s) have established substantial agricultural use of the Property. No new land use is anticipated nor is believed to be likely.

Furthermore the Petitioner(s) are proposing an improvement over the existing ***"HRStatute and HARule allowed"*** conditions. A ***buffer zone*** is proposed that will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion, pali subsidence and landfall. The Petition provides that a ***buffer zone*** stipulation to the Petition be negotiated between the State and County Offices of Planning and the Petitioner(s) and incorporated into the Petition considerations by the LUC. **Effectively the intensity of agricultural use of the buffer zone area will decrease.**

**If the Petition is denied.....**

The ***"HRStatute and HARule allowed"*** agricultural use of the Property will continue. The ***"HRStatute and HARule allowed"*** right to cultivate the Property's soils in the vicinity of the makai boundary of the Property with the ocean-side pali will continue. An increased potential for erosion of soil, pali subsidence and landfall will continue to exist, a possibility for a negative effect on the environment, which undoubtedly does not serve the environment well nor the interest of the State, the County nor the community.

(2) *Enhance the quality of life by:*

(A) *Setting population limits so that the interaction between the natural and artificial environments and the population is mutually beneficial;*

Not applicable.

(B) *Creating opportunities for the residents of Hawaii to improve their quality of*

*life through diverse economic activities which are stable and in balance with the physical and social environments;*

**If allowed** the Petitioned rezoning will bring the Property's zoning into line with its **"HRStatute and HARule allowed"** use. The proposed buffer zone will result in **an improvement** over the existing **"HRStatute and HARule allowed"** conditions of the Property. Effectively it will keep the agricultural use more *in balance with the physical and social environments*.

**If denied** the Property's agricultural use will continue to exist as a nonconforming use. The resulting *economic activities* will likely be *less in balance with the physical and social environments*.

LUC rule HAR15-15-28 Statement of intent states.....

*"This subchapter is intended to expedite the eventual elimination of existing uses or structures that are not in conformity with the provisions of subchapter 3 because their **continued existence violates basic concepts of health, safety, and welfare as well as principles of good land use**. However, in applying subchapter 3, no elimination of nonconforming uses or structures shall be effected so as to cause unreasonable interference with established property **rights**."*

The Petitioned rezoning will bring the Property's agricultural use into conformity to its zoning. The *continued existence* of the **"HRStatute and HARule allowed"** agricultural use will no longer **violate basic concepts of health, safety, and welfare as well as principles of good land use**.

*(C) Establishing communities which provide a sense of identity, wise use of land, efficient transportation, and aesthetic and social satisfaction in harmony with the natural environment which is uniquely Hawaiian; and*

**If allowed** the Petitioned rezoning will bring the Property's zoning into line with its "***HRStatute and HARule allowed***" use. The proposed buffer zone will keep the agricultural use *in balance with the Community*. The area around the Property is an agricultural community.

**If denied** the Property's use will continue to exist as a nonconforming use.

LUC rule HAR15-15-28 Statement of intent states.....

*"This subchapter is intended to expedite the eventual elimination of existing uses or structures that are not in conformity with the provisions of subchapter 3 because their continued existence violates basic concepts of health, safety, and welfare as well as principles of good land use. However, in applying subchapter 3, no elimination of nonconforming uses or structures shall be effected so as to cause unreasonable interference with established property rights."*

The Petitioned rezoning will bring the Property's agricultural use into conformity to its zoning. The *continued existence* of the "***HRStatute and HARule allowed***" agricultural use will no longer *violate basic concepts of health, safety, and welfare as well as principles of good land use*.

*(D) Establishing a commitment on the part of each person to protect and enhance Hawaii's environment and reduce the drain on nonrenewable resources.*

**§344-4 Guidelines.** *In pursuance of the state policy to conserve the natural resources and enhance the quality of life, all agencies, in the development of programs, shall, insofar as practicable, consider the following guidelines:*

*(1) Population.*

*(A) Recognize population impact as a major factor in environmental degradation and adopt guidelines to alleviate this impact and minimize future degradation;*

*(B) Recognize optimum population levels for counties and districts within the State, keeping in mind that these will change with technology and circumstance, and adopt guidelines to limit population to the levels determined.*

*(2) Land, water, mineral, visual, air, and other natural resources.*

*(A) Encourage management practices which conserve and fully utilize all natural resources;*

**If the Petition is allowed.....**

The Petitioned rezoning will *encourage management practices which conserve and fully utilize all natural resources*. This will be a **Significant Positive Effect**. Agriculture is already a **"HRStatute and HARule allowed"** use on the Property according to HAR 13-5-7's Nonconforming Use Rule. The **"HRStatute and HARule allowed"** agricultural use of the Property includes the right to cultivate the Property's soils immediately adjacent to the Property's border with the ocean-side pali property makai. The Petitioner(s) have established substantial agricultural use of the Property. No new land use is anticipated nor is believed to be likely.

Furthermore the Petitioner(s) are proposing an improvement over the existing **"HRStatute and HARule allowed"** conditions. A **buffer zone** is proposed that will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion, pali subsidence and landfall. The Petition provides that a **buffer zone** stipulation be incorporated into the Petition considerations by the LUC. **Effectively the intensity of agricultural use of the buffer zone area will decrease.**

**If the Petition is denied.....**

The **"HRStatute and HARule allowed"** agricultural use of the Property will continue.

The "*HRStatute and HARule allowed*" right to cultivate the Property's soils in the vicinity of the makai boundary of the Property with the ocean-side pali will continue. An increased potential for erosion of soil, pali subsidence and landfall will continue to exist, a possibility for a negative effect on the environment, which undoubtedly does not serve the environment well nor the interest of the State, the County nor the community.

*(B) Promote irrigation and waste water management practices which conserve and fully utilize vital water resources;*

The Property already receives adequate rainfall to support the existing agricultural use of the Property.

*(C) Promote the recycling of waste water;*

Not applicable.

*(D) Encourage management practices which conserve and protect watersheds and water sources, forest, and open space areas;*

**If the Petition is allowed.....**

The Petitioned rezoning will *encourage management practices which conserve and protect watersheds and water sources, forest, and open space areas*; This will be a **Significant Positive Effect**. Agriculture is already a "*HRStatute and HARule allowed*" use on the Property according to HAR 13-5-7's Nonconforming Use Rule. The "*HRStatute and HARule allowed*" agricultural use of the Property includes the right to cultivate the Property's soils immediately adjacent to the Property's border with the ocean-side pali property makai. The Petitioner(s) have established substantial agricultural use of the Property. No new land use is anticipated nor is believed to be likely.

The Petitioner(s) are proposing an improvement over the existing "*HRStatute and HARule allowed*" conditions. A *buffer zone* is proposed that will be maintained in grasses and woody plant species in order to reduce the potential effect of soil erosion, pali

subsidence and landfall. The Petition provides that a *buffer zone* stipulation to the Petition be negotiated between the State and County Offices of Planning and the Petitioner(s) and incorporated into the Petition considerations by the LUC. **Effectively the intensity of agricultural use of the buffer zone area will decrease.**

**If the Petition is denied.....**

The "*HRStatute and HARule allowed*" agricultural use of the Property will continue. The "*HRStatute and HARule allowed*" right to cultivate the Property's soils in the vicinity of the makai boundary of the Property with the ocean-side pali will continue. An increased potential for erosion of soil, pali subsidence and landfall will continue to exist, a possible negative effect on the environment, which undoubtedly does not serve the environment well nor the interest of the State, the County nor the community.

*(E) Establish and maintain natural area preserves, wildlife preserves, forest reserves, marine preserves, and unique ecological preserves;*

Botanical and archaeological studies of the Property have occurred. No significant elements or plants were identified that need *preserving*. When the Property was first considered to be zoned into the State's Conservation District it was in intense agricultural use and had been for over 100 years previously. The State determined to allow that agricultural use be allowed to continue as **the State also desired to preserve/reserve and protect agriculturally suitable lands for agricultural use**. The soils of the Property are designated to be "Prime" according to the ALSISH classification system, *ref., exhibit 11 ALSISH map*.

**If allowed** the Petitioned rezoning will bring the Property's zoning into line with its "*HRStatute and HARule allowed*" use. The Statute and the Rules provide that any prior use of the Property continues to be allowed as a nonconforming use. The soils of the Property have been cultivated for agricultural use for a period around 150 years. The natural area that previously existed no longer exists. Even the small area of the gulch at the north end of the Property was substantially modified when a railroad was built which

crossed the Property and the gulch. The stream was diverted along a new channel which was created. Subsequently the stream reverted to its original path.

During the period before mechanization was introduced to the farm industry the area of the slopes leading into the gulch was used for agriculture as manual labor could go where machines later did not, *ref., exhibit 21, 1905 field map*. Therefore, it is believed by the Petitioner(s) that, agricultural use of that area continues to be an allowed use today. The proposed buffer zone will reduce the intensity of the agricultural use area immediately adjacent to the coastal pali property. It is further noteworthy that the area of the stream/gulch that lays immediately mauka of the Property is not zoned in the State's Conservation District but rather in the State's Agricultural District which is what is proposed in the Petition to apply to the Property. The steam is listed as an intermittent stream by the U.S. Geological Survey.

**If denied** the Property's agricultural use will continue to exist as a nonconforming use. No buffer zone along the coastal pali will be established.

*(F) Maintain an integrated system of state land use planning which coordinates the state and county general plans;*

The State has the Property zoned in the State's Conservation District which Rules '**allow**' that it may be used for nonconforming agriculture. The County's zoning for the Property is A20-a. Agriculture is an allowed use.

**If allowed** the Petitioned rezoning will bring the land's use into conformance with its zoning.

**If denied** the Property's agricultural use will continue to exist as a nonconforming use.

*(G) Promote the optimal use of solid wastes through programs of waste prevention, energy resource recovery, and recycling so that all our wastes become utilized.*



The Petitioner(s) endeavor to minimize all waste through Best Management Practices. This will continue whether the Petitioned rezoning is allowed or not. Agricultural waste is composted on site and used in support of the agricultural use of the Property.

*(3) Flora and fauna.*

*(A) Protect endangered species of indigenous plants and animals and introduce new plants or animals only upon assurance of negligible ecological hazard;*

The botanical consultants report *exhibited in exhibit 2 and 3* describe that there does not exist any particular endangered plant or animal species on the Property. The Petitioner(s) use of the Property for agriculture, **whether the Petition is allowed or not**, will remain unchanged. Agricultural use of the Property is already an ***"HRStatute and HARule allowed"*** use. The State has also identified that agriculturally suitable lands are to be preserved for same use.

*(B) Foster the planting of native as well as other trees, shrubs, and flowering plants compatible to the enhancement of our environment.*

The Petitioner(s) intend to continue to use the Property for agricultural use. As the Petitioner(s) will reside on the Property it is likely that the physical environment will be improved over time through the planting of esthetically pleasing plants in areas. Various orchard species woody plants already exist on the Property. Such plants are *compatible to the enhancement of the environment*. The Petitioner(s) intend to identify and develop, for propagation and sale, orchard and non orchard woody plant species that are compatible with windy coastal conditions and the salty air which result from the wave washed boulder fields below the Property. The Petitioner(s) have already identified several plant species which **are and are not** compatible with the coastal environment.

**If the Petition is allowed**..... an improvement over the exiting situation will result. The general area of the Property and the proposed buffer zone area will be utilized for woody

plant species which are *compatible to the enhancement of the environment*.

**If the Petition is denied**..... cultivation of the soils of the buffer zone area will continue to be an "HRStatute and HARule allowed" use which is not as *compatible to the enhancement of the environment*.

(4) *Parks, recreation, and open space.*

(A) *Establish, preserve and maintain scenic, historic, cultural, park and recreation areas, including the shorelines, for public recreational, educational, and scientific uses;*

Archaeological and botanical studies have been conducted for the Property. No *scenic, historic or cultural* elements were identified that needed further protection.

The Property is located in a private, gated subdivision. No public views exist either toward the property or the ocean beyond. The Petitioner(s) intend to continue to use the Property for agricultural use. The State owned ocean-side pali property is steep and dangerous ranging in height generally exceeding 100 ft. Any attempt to promote access to the wave washed boulder fields below the Property would be irresponsible.

The scenic area of the Property will continue unchanged. Agriculture is already and allowed use. The proposed buffer zone will further enhance the scenic nature of the Property as its use will be particularly for woody plant species and maintained grasses.

**Whether the Petition is allowed or not**, the existing situation will remain unchanged. Agricultural use of the Property is already an "***HRStatute and HARule allowed***" use. The State has also identified that agriculturally suitable lands are to be preserved for same use.

(B) *Protect the shorelines of the State from encroachment of artificial improvements, structures, and activities;*

Fully permitted structures already exist on the Property.

**If the Petition is allowed**..... with the provision of the described buffer zone it will provide for an added level of protection to the shoreline of the State. The intensity of the agricultural *activities* of the Property's area in the proposed buffer zone area will decrease, a likely **improvement** over the existing "*HRStatute and HARule allowed*" site conditions.

**If the Petition is denied**..... no such added level of protection to the shoreline of the State which may result from the "*HRStatute and HARule allowed*" agricultural *activities*.

*(C) Promote open space in view of its natural beauty not only as a natural resource but as an ennobling, living environment for its people.*

Agriculture is already a "*HRStatute and HARule allowed*" use. The State has also identified a priority to promote and preserve the agricultural use of its lands that are particularly suitable for agriculture. The area of the Property has been identified by the State's ALISH classification system as "*Prime*".

**If the Petition is allowed** ..... with the provision of the described buffer zone it will provide for an added level of scenic open space. This will result in an **improvement** over the existing "*HRStatute and HARule allowed*" site conditions.

**If the Petition is denied**..... no such added level of *scenic open space* of the buffer zone area is provided.

*(5) Economic development.*

*(A) Encourage industries in Hawaii which would be in harmony with our environment;*

The Petitioner(s) believe that their use of the Property for agriculture is in harmony with

the local environment.

The State has also identified a priority to promote and preserve the agricultural use of its lands that are particularly suitable for agriculture. The area of the Property has been identified by the State's ALISH classification system as "*Prime*".

**If the Petition is allowed**..... the Petitioner(s) will be encouraged to continue to invest their time and money pursuing their agricultural use of the Property. **This will be a positive effect.**

**If the Petition is denied**..... the Petitioner(s) agricultural use of the Property will continue in uncertainty of use. **This will be a negative effect.**

*(B) Promote and foster the agricultural industry of the State; and preserve and conserve productive agricultural lands;*

Agriculture is already a "*HRStatute and HARule allowed*" use.

**If the Petition is allowed**..... the Petitioner(s) will be encouraged to continue to invest their time and money pursuing their agricultural use of the Property. **This will be a positive effect.**

The Petitioned rezoning will further *promote and foster the agricultural industry of the State*; The Petitioner(s) believe that it is incumbent on the State's administrative authorities to allow the Petition which will further *preserve and conserve productive agricultural lands*.

The Petitioner(s) believe that it is incumbent on the authorities to *preserve and conserve productive agricultural lands* such as the Property.

**If the Petition is denied**..... the Petitioner(s) agricultural use of the Property will

continue in uncertainty of use. **This will be a negative effect.** The continuing uncertainty will not *preserve and conserve productive agricultural lands* such as the Property.

(C) *Encourage federal activities in Hawaii to protect the environment;*

Not applicable.

Agriculture is already a "**HRStatute and HARule allowed**" use.

(D) *Encourage all industries including the fishing, aquaculture, oceanography, recreation, and forest products industries to protect the environment;*

Agriculture is already a "**HRStatute and HARule allowed**" use.

**If the Petition is allowed**, it will securitize the Petitioner(s) investments in their agricultural use of the Property and thus encourage its agricultural use. **This will be a positive effect.**

**If the Petition is denied**..... the State will not effectively *Encourage all industries* such as the agricultural use of the Property. **This will be a negative effect.**

(E) *Establish visitor destination areas with planning controls which shall include but not be limited to the number of rooms;*

Not applicable.

Agriculture is already a "**HRStatute and HARule allowed**" use.

(F) *Promote and foster the aquaculture industry of the State; and preserve and conserve productive aquacultural lands.*

Not applicable.

Agriculture is already a ***"HRStatute and HARule allowed"*** use.

*(6) Transportation.*

*(A) Encourage transportation systems in harmony with the lifestyle of the people and environment of the State;*

Not applicable.

Agriculture is already a ***"HRStatute and HARule allowed"*** use.

*(B) Adopt guidelines to alleviate environmental degradation caused by motor vehicles;*

Not applicable.

Agriculture is already a ***"HRStatute and HARule allowed"*** use.

*(C) Encourage public and private vehicles and transportation systems to conserve energy, reduce pollution emission, including noise, and provide safe and convenient accommodations for their users.*

Not applicable.

Agriculture is already a ***"HRStatute and HARule allowed"*** use.

*(7) Energy.*

*(A) Encourage the efficient use of energy resources.*

The Petitioner(s) have designed the structures on the Property to utilize p.v. power.

Agriculture is already a ***"HRStatute and HARule allowed"*** use.

*(8) Community life and housing.*

*(A) Foster lifestyles compatible with the environment; preserve the variety of lifestyles traditional to Hawaii through the design and maintenance of neighborhoods which reflect the culture and mores of the community;*

Agriculture is already a "**HRStatute and HARule allowed**" use.

The Petitioner(s) believe that their land use is *compatible with the environment; and preserves the variety of lifestyles traditional to Hawaii through the design and maintenance of neighborhoods which reflect the culture and mores of the community;*

**The Petition, if allowed**, will securitize the Petitioner(s) investments in their agricultural use of the Property and thus encourage its agricultural use. **This will be a positive effect.**

**If the Petition is denied.....** **This will be a negative effect.**

*(B) Develop communities which provide a sense of identity and social satisfaction in harmony with the environment and provide internal opportunities for shopping, employment, education, and recreation;*

*(C) Encourage the reduction of environmental pollution which may degrade a community;*

*(D) Foster safe, sanitary, and decent homes;*

*(E) Recognize community appearances as major economic and aesthetic assets of the counties and the State; encourage green belts, plantings, and landscape plans and designs in urban areas; and preserve and promote mountain-to-ocean vistas.*

Agriculture is already a "**HRStatute and HARule allowed**" use.

The Petitioner(s) believe that their agricultural use and uses incidental and accessory to agriculture of the Property are compatible with (B), (C), (D) and (E).

**If the Petition is allowed** it will be a positive effect.

**If the Petition is denied** will be a negative effect.

*(9) Education and culture.*

*(A) Foster culture and the arts and promote their linkage to the enhancement of the environment;*

*(B) Encourage both formal and informal environmental education to all age groups.*

Agriculture is already a "***HRStatute and HARule allowed***" use.

The Petitioner(s) believe that their agricultural use and uses incidental and accessory to agriculture of the Property are comparable with section (9) (A) and (B).

**If the Petition is allowed** will be a positive effect.

**If the Petition is denied** will be a negative effect.

*(10) Citizen participation.*

*(A) Encourage all individuals in the State to adopt a moral ethic to respect the natural environment; to reduce waste and excessive consumption; and to fulfill the responsibility as trustees of the environment for the present and succeeding generations; and*

Agriculture is already a "***HRStatute and HARule allowed***" use.

**If the Petition is allowed** will be a positive effect. The Petitioner(s) have proposed a deed restriction for a buffer zone that would reduce the intensity of the agricultural use of the Property which will reduce the potential for soil erosion and pali subsidence and landfall in perpetuity.



**If the Petition is denied** will be a negative effect. The deed restriction would eliminate any rights that exist that allow cultivation of the soils immediately adjacent to the pali in perpetuity.

*(B) Provide for expanding citizen participation in the decision making process so it continually embraces more citizens and more issues.*

Agriculture is already a "***HRStatute and HARule allowed***" use.

Not applicable. The Property is privately owned. **Whether the Petition is allowed or not** will not likely have an effect on government administrative functions or programs.

**Now resuming HAR 11-200-12's Significance criteria Rule at it's section (4).....**

*(4) Substantially affects the economic welfare social welfare, and cultural practices of the community or State.*

Agriculture is already a "***HRStatute and HARule allowed***" use.

No new land use is contemplated nor is likely. The existing agricultural use including incidental and accessory uses are already an "HRStatute and HARule allowed" use. The agricultural use is likely to continue **whether the Petition is allowed or not** and will have no particular effect on the *economic welfare social welfare, and cultural practices of the community or State.*

*(5) Substantially affects public health,*

Agriculture is already a "***HRStatute and HARule allowed***" use.

No new land use is contemplated nor is likely. The agricultural use is likely to continue

**whether the Petition is allowed or not** and will have no effect on *public health*.

*(6) Involves substantial secondary impacts, such as population changes or effects on public facilities.*

No new land use is contemplated nor is likely. The existing agricultural use is already a **"HRStatute and HARule allowed"** use. The agricultural use is likely to continue **whether the Petition is allowed or not** and will not likely result in *substantial secondary impacts*.

*(7) Involves a substantial degradation of environmental quality;*

No new land use is contemplated nor is likely. The existing agricultural use is already a **"HRStatute and HARule allowed"** use. The agricultural use is likely to continue whether the Petition is allowed or not.

**If the Petition is allowed**, provides for a buffer zone between that will be maintained in grasses and woody plants. The buffer zone will reduce *degradation of environmental quality* resulting from the existing agricultural use of the Property. This will be a **positive** effect on *environmental quality*.

**If the Petition is denied**, the deed restriction will not exist and the resulting **potential** for soil erosion, pali subsidence and landfall will continue to exist. This will be a **negative** effect.

*(8) Is individually limited but cumulatively has considerable effect upon the environment or involves a commitment for larger actions.*

No new land use is contemplated nor is likely. Agriculture is already a **"HRStatute and HARule allowed"** use. The agricultural use is likely to continue whether the Petition is allowed or not.

**If the Petition is allowed**, provides for a buffer zone that will be maintained in grasses and

woody plants. The buffer zone will reduce the intensity of the agricultural use of the Property's *effect upon the environment*. This will be a **positive** effect on *environmental quality*. No new land use is planned. The Property's agricultural uses and uses incidental and accessory to agriculture fully commit the Property to long term agriculture whether the Petition is allowed or not *involve a commitment for larger actions*.

The question may emerge whether allowing the Petition to rezone the Property will set a precedent? The Petition **evidences**, in its text by reference to case law, that neither the LUC nor the DLNR are bound by precedence. On-the-other-hand **precedence may be found not to be such a bad thing if it removes uncertainty and increases transparency in land use regulation ie....**

- State and County regulative Authorities,
- the land use professional community,
- realtors,
- land owners,
- the general public.

**If the Petition is denied**, the deed restriction will not exist and the resulting **potential** for soil erosion, pali subsidance and landfall will continue to exist. This will be a **negative** effect on *environmental quality*.

*(9) Substantially affects a rare, threatened, or endangered species, or its habitat,*

No new land use is contemplated nor is likely. Agriculture is already a **"HRStatute and HARule allowed"** use. The agricultural use is likely to continue whether the Petition is allowed or not. No *rare, threatened, or endangered species* exist on the Property. The Petition, if allowed, provides for a buffer zone between that will be maintained in grasses and woody plants. The buffer zone will provide an improvement over the existing "HRStatute and HARule allowed" site conditions. A botanical study was conducted on the Property. No *rare, threatened, or endangered species* was identified.

**If the Petition is allowed**, provides for a buffer zone between that will be maintained in grasses and woody plants. The buffer zone will provide that the area adjacent to the coastal pali will be more conducive to the harboring of *rare, threatened, or endangered species* that may not result if the "HRStatute and HARule allowed" agricultural use of the Property continues to exist. This will be a **positive** effect on *rare, threatened, or endangered species*, and their *habitat*.

**If the Petition is denied**, the deed restriction will not exist and the potential for a reduction in the habitat for *rare, threatened, or endangered species* may result. This will be a **negative** effect.

*(10) Detrimentially affects air or water quality or ambient noise levels;*

No new land use is contemplated nor is likely. Agriculture is already a "***HRStatute and HARule allowed***" use. The agricultural use is likely to continue whether the Petition is allowed or not.

**If the Petition is allowed** the likelihood of soil erosion and pali subsidance, affecting *water quality*, will be reduced, a buffer zone is provided, which will have a **positive effect** on *water quality*. There will likely be **very little positive or negative effect** on *ambient noise levels* or effects on *air quality*.

**If the Petition is denied**, the deed restriction will not exist and the resulting **potential** for soil erosion, pali subsidance and landfall will continue to exist. This will be a **negative** effect on *water quality*. There will likely be **very little positive or negative effect** on *ambient noise levels* or effects on *air quality*.

*(11) Affects or is likely to suffer damage by being located in an environmentally sensitive area such as a flood plain, tsunami zone beach erosion-prone area, geologically hazardous land, estuary fresh water, or coastal waters;*

The Property is not located in a flood plain or tsunami zone. While the Property is in a

beach erosion-prone area the water line adjacent to the pali is comprised of boulders. No access exists to the shoreline area as the pali is high and steep. No new land use is contemplated nor is likely. Agriculture is already a "*HRStatute and HARule allowed*" use. The agricultural use is likely to continue whether the Petition is allowed or not.

**The Petition, if allowed**, provides for a buffer zone between the agricultural use area and the pali and ocean below. The buffer zone will be maintained in grasses and woody plants. The buffer zone will provide an improvement over the existing "*HRStatute and HARule allowed*" site conditions. Particularly soil erosion and the potential for pali subsidence will be reduced through the provision of the buffer zone. **This will be a positive effect** on the State owned pali property, the high water mark boulder field area and the *coastal waters* beyond.

**If the Petition is denied**, the deed restriction will not exist and the resulting **potential** for soil erosion, pali subsidence and landfall will continue to exist. This will be a **negative** effect on the State owned pali property, the high water mark boulder field area and the *coastal waters* beyond.

*(12) Substantially affects scenic vistas and viewplanes identified in county or state plans or studies;*

No new land use is contemplated nor is likely. The existing agricultural use including incidental and accessory uses are already a "*HRStatute and HARule allowed*" uses. The agricultural use is likely to continue whether the Petition is allowed or not. The area of the Property does not lie within *viewplanes identified in county or state plans or studies*.

Neither the Property nor the ocean beyond cannot be seen from public use areas. Therefore the Petition, **whether allowed or denied** will have no effect on *viewplanes identified in county or state plans or studies*.

*(13) Requires substantial energy consumption.*

No new land use is contemplated nor is likely. Agriculture is already a "***HRStatute and HARule allowed***" use. The agricultural use is likely to continue whether the Petition is allowed or not. The structures on the Property are equipped with p.v. electric power.

The Petition, **whether allowed or denied** will have no significant effect on *energy consumption*.

**The following is an additional analysis of the proposed rezoning measured against SMA requirements.** The Property is located in the SMA district. The following generally has more detail than the preceding analysis.

Particularly the fact that Agriculture is already a "***HRStatute and HARule allowed***" use applies to all of the following analysis without repeating at each category of analysis.

- **Geology.....**

The Property is located on the lower eastern slopes of Mauna Kea and consists of the Hāmākua volcanic series. These lava flows are chiefly basaltic with layers of Pahala ash. (Stems and Macdonald, 1946.) The Island of Hawai'i is susceptible to four main types of natural hazards including tsunami, volcanism, seismic activity and hurricanes. Volcanic hazard, as assessed by the United States Geological Survey, is "8" on a scale of ascending risk 9 to 1. The zone "8" designation includes the lower slopes of Mauna Kea, most of which have not been affected by lava flows for the past 10,000 years. (Heliker, 1990.)

The Island of Hawai'i is one of the most seismically active areas in the world and has experienced more than twenty large earthquakes (magnitude 6 or larger) over the past 166 years, the most recent occurring in October of 2006. (Wyss and Koyanagi, 1992.)

Magnitude 6 earthquakes can be expected to cause structural damage to non-reinforced

buildings. The Building Code rating for the entire Island of Hawai`i` is seismic Zone 4, which has the highest risk for seismic activity.

Three significant hurricanes have affected the Island of Hawai`i` over the past 50 years. Damage from hurricanes results from coastal waves/surge and high winds. The Project site is not within a coastal hazard area for hurricanes or tsunami inundation. The hazards from hurricane winds are far more extensive and unpredictable than the water hazard. Winds may blow from variable directions and may be amplified by topographic conditions. (County of Hawai`i, 2003.)

Shoreline areas in Hawai`i, particularly those on the northeast side exposed to the prevailing winds and heaviest wave attack, are subject to shoreline retreat. The rate of retreat in Hawaii has been estimated at an average rate of a couple of inches a year. (Macdonald and Abbott, 1977.) Some locations may experience sudden and rapid retreat due to land slides which may be associated with sea cliff collapse.

Helicopter and physical site reconnaissance was conducted by Yogi Kwong Engineers("YKE") in November of 2005. Based on the reconnaissance, a review of various historical and topographic photos and maps and the height of the pali, YKE has concluded that a 70-foot setback from the top of the pali appears sufficient to protect the proposed improvements from potential coastal hazards caused by intensive or storm wave action, tsunami, and related coastal flooding, *ref. exhibit 9, YKE letter.*

- **Soils**

*Environmental Setting*

The soils of the Property are classified as Hilo silty clay loam with 0 to 10 percent slopes ("HoC") by the U.S. Department of Agriculture Soil Conservation Service ("SCS") Soil Survey. (U.S. Soil Conservation Service, 1973.)

Under the Agricultural Lands of Importance to the State of Hawaii (“ALISH”) classification system, there are four categories: prime, unique, other important agricultural lands and unrated. The Property is designated prime agricultural lands under the ALISH system, *ref., exhibit 13 description of the ALISH classification system*, as are other similar properties along the Hilo - Hāmākua Coast that were Historically utilized for intensive cultivation of agricultural crops. *ref. exhibit 11, ALISH Map.*

Short term impacts to the soils on the Property of agricultural use will always exist due to the ongoing agricultural use of the Property but that will exist whether the Petitioned rezoning occurs or not.

**If the Petition is allowed**, will result in a buffer zone being maintained in grasses and woody plants **that will represent an improvement over the existing situation.**

**If the Petition is denied** no buffer zone will be provided. The potential for soil erosion, pali subsidance and landfall will continue to exist. This will represent the potential for a **negative effect.**

- **Climate**

*Environmental Setting.....*

Hawai`i's climate is generally characterized as mild with uniform temperatures, moderate humidity, and two identifiable seasons. The "summer" season, between May and October, is generally warmer and drier. The "winter" season, between October and April, is cooler and wetter. The

Property is situated along the "windward" side of the Island of Hawai`i, which is exposed to northeasterly trade winds that cause relatively high rainfall (approximately 150 inches annually).



The average monthly minimum temperature in this area of the Hilo-Hāmākua Coast ranges from the low to high 60s (degrees Fahrenheit) while the average monthly maximum temperature ranges from the high 70s to the high 80s. (University of Hawai`i Press, 1983.)

*Potential Impacts and Mitigation Measures*

The Petitioned rezoning **whether allowed or not will not have any impact on the climatic conditions** in the area of the Property. The rezoning will not result in a new land use. Agriculture is already an existing "HRStatute and HARule allowed" use.

- **Hydrology and Drainage**

*Environmental Setting.....*

The Island of Hawai`i is generally characterized as having basal groundwater floating on salt water. The aquifer system underlying The Project area has a sustainable yield of approximately 150 million gallons per day. (County of Hawai`i Department of Water Supply, 1991.)

According to the Flood Insurance Rate Map ("FIRM") prepared by the Federal Emergency Management Agency dated September 16, 1988, the Project Area is situated within Flood Zone "X" (areas determined to be outside the 500 year flood plain). The center of Puahanui Stream serves as the northern boundary of the Property and is encumbered with a watercourse easement which dated from the sugar cane days and likely effective flushing of harvested materials through flumes.

*Potential Impacts and Mitigation Measures*

**If the Petition is allowed** the proposed buffer zone will represent **an improvement over the existing situation** and will assist in reducing the potential for soil erosion into the ocean below.

**If the Petition is denied** it may result in a **negative effect** on the potential for soil erosion.

- **Water Quality**

*Environmental Setting.....*

The center of Puahanui Stream serves as the Northern boundary of TMK No.: (3) 2-9-003:060. The Pacific Ocean lies immediately below the high pali, which serves as the Eastern boundary of the Property. Puahanui Stream appears to be an unnamed intermittent stream on U.S. Geological Survey Maps and was not included in the Hawai'i Stream Assessment conducted from 1988-1990, which inventoried and assessed available information on Hawai'i's streams in four resource categories: aquatic resources, riparian resources, cultural resources and recreational resources.

The coastal waters fronting the subject property are classified "A" by the State of Hawai'i. These waters are to be protected for recreational purposes and aesthetic enjoyment.

*Potential Impacts and Mitigation Measures.....*

The Petitioned rezoning is not expected to have any direct impact on Puahanui Stream. The agricultural use of the Property is already an "HRStatute and HARule allowed" use. No new use is contemplated nor is likely.

The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property.**

**If the Petition is allowed** the proposed buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** which will represent **an improvement over the existing situation** and will assist in reducing the potential for *water* contamination issues.

**If the Petition is denied** the proposed buffer zone will not be established. Intensive agricultural use of the entire property will continue to be an "HRStatute and HARule allowed" use. This will result in the potential for **negative effects** on *water quality*.

The structures on the Property are serviced by individual wastewater systems which were approved by the Department of Health, which will limit the potential for the discharge of any wastewater into near-shore marine waters.

The Island of Hawai`i is generally characterized as having basal groundwater floating on salt water. The aquifer system underlying The Property has a sustainable yield of approximately 150 million gallons per day. (County of Hawai`i Department of Water Supply, 1991.)

- **Flora and Fauna**

*Environmental Setting*.....

Most of the Property has been extensively utilized for intensive cultivation of agricultural crops for a period of approximately 100 years. Exhibited is a 2014 biological assessment update to the earlier described biological assessment, *ref., exhibit 10*.

No new use is contemplated nor is it likely. The agricultural use of the Property is already an "HRStatute and HARule allowed" use.

**If the Petition is allowed** the provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** and provide for a better environment for the **Flora and Fauna** that is existing or likely to exist on the Property.

**If the Petition is denied** no deed restriction providing for a buffer zone will exist. This may result in a **negative effect** on flora and fauna.

- **Air Quality**

*Environmental Setting*.....

The Project area and surrounding area is affected by pollutants derived from the volcanic emissions from the ongoing Kilauea eruption. Other sources of air pollutants to a limited

degree include vehicle exhaust emissions along the Hawai'i Belt Road. In general, however, the ambient air quality of the Property meets all Federal and State standards as evidenced by its designation as an "attainment" area by the State Department of Health, Clean Air Branch.

*Potential Impacts and Mitigation Measures*

No new use is contemplated nor is it likely. The agricultural use of the Property is already a "**HRStatute and HARule allowed**" use. The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** and provide for improved air quality.

- **Noise**

*Environmental Setting*.....

Ambient noise levels at the Property are low to moderate and are typical for a rural agricultural area near the ocean. The primary noise generators in the area are the wind, ocean waves, vehicles on the Hawai'i Belt Road and vehicles entering the Property.

*Potential Impacts and Mitigation Measures*

No new use is contemplated nor is it likely. The agricultural use of the Property is already a "**HRStatute and HARule allowed**" use. The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** and provide for **less noise** that may result from more intense agricultural use of the Property.

- **Scenic Resources**

*Environmental Setting*

The predominant scenic views in the vicinity of the Property are of the Pacific Ocean, the high, near vertical pali and the wave washed boulder field shoreline area. No beach area exists at the waterline. There are no views of the Property from the Hawai'i Belt Road because the road is cut deeply below grade along an embankment mauka of the Property, *ref., exhibit 20 pictures.*

The Property is situated between two sites listed as examples of natural beauty in the Hawai'i County General Plan: Kolekole Gulch and Hakalau Bay/Gulch. Hakalau Bay/Gulch is situated approximately 5,000 feet north of the Property and Kolekole Gulch is situated approximately 1,200 feet south of the Property.

*Potential Impacts and Mitigation Measures*

No new use is contemplated nor is it likely. The agricultural use of the Property is already a **"HR Statute and HARule allowed"** use. The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** and provide for better scenic resources of the site and surrounding community.

Finally the term 'Scenic' implies that the Property can be seen by the General Public which is described herein to not be the case as there exists no public views of the Property.

**Social, Cultural and Economic Setting**

• **Socioeconomic Characteristics**

*Setting*.....

Hawai'i County's population increased by more than 56,000 persons between 1980 and 2000. Between 1980 and 1990, Hawai'i Island's population increased 30.7 percent, and increased by 23.6 percent between 1990 and 2000. The April 1, 2000 population figure for Hawai'i County was 148,677 according to census figures compiled by the County of Hawai'i, Department of Research and Development.

The South Hilo district had a population of 47,386 in 2000 which represented approximately 32 percent of the total population for Hawai'i Island. The City of Hilo is the largest population center on the island with the main offices of the County government, branch offices of Federal and State agencies located there. The island's major deep draft harbor and international airport are also

located in Hilo. In addition to industrial, commercial and social service activities, the University of Hawai'i Hilo and Hawai'i Community College and affiliated research programs play an important role in Hilo's economy.

Hilo and the rest of the East Hawai'i communities are adjusting to the loss of the sugar industry in the mid 1990's. The continuation of agriculture in the district has required a major shift from large scale single-commodity production to smaller scale, multi-commodity 29 multi-market base. The shift to diversified agriculture is characterized by larger numbers of self-employed and smaller scale independent businesses.

*Potential Impacts and Mitigation Measures*

The agricultural use of the Property is already a "*HR Statute and HARule allowed*" use. No new use is contemplated nor is likely.

Other properties in the immediate vicinity of the Property are utilized for a variety of diversified agricultural activities including a certified orchid nursery, the propagation of foliage stock and the cultivation of edible ginger and Chinese taro as well as residential uses. The rezoning will not have any significant effect on the socioeconomic characteristics of the area.

No new use is contemplated nor is it likely. The agricultural use of the Property will contribute very modestly but none-the-less positively to the economy in general. There exists a shift to diversified agriculture in the region as characterized by larger numbers of small agricultural lots.

• **Adjacent Land Uses**

*Existing Setting.....*

The areas immediately West (mauka) of the Property are situated in the State Land Use Agricultural district. The areas immediately North, South, and East are designated Conservation.

The parcels immediately adjacent to the Property have the same general characteristics of the Property. Of the five adjoining parcels in the subdivision, three are currently vacant and two have been developed with single-family dwellings. An orchid nursery business has also been established on TMK No.: (3) 2-9-003: 048 along with a single family dwelling.

The adjoining communities of Hakalau and Honomu include a mixture of agriculture, residential and limited commercial uses. The majority of the residences in these communities are remnants of the former sugar plantation camps. A number of newer homes have been constructed on parcels Historically utilized for sugar production.

#### *Potential Impacts and Mitigation Measures*

The agricultural use of the Property is already a "**HRStatute and HARule allowed**" use. No new use is contemplated nor is likely.

The Property's agricultural use is consistent with the character of the parcels within the immediate vicinity of the Property. It is also consistent with the character of the neighboring Hakalau and Honomu communities. Other properties in the immediate vicinity of the Property are utilized for a variety of diversified agricultural activities including a certified orchid nursery, the propagation of foliage stock and the cultivation of edible ginger and Chinese taro as well as residential uses. The rezoning will not have any significant effect on the adjacent land uses.

The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property** but will continue to be used for woody orchard species and thus **continue to positively contribute to the economy of the region.**

#### **Public Facilities and Services**

- **Roads**

*Existing Setting.....*

Hawai'i Belt Road (Highway 19) is a State highway providing the major route for cross-island transportation. The State highway is situated approximately 360 feet west of the Property. An access and utility easement provides access to the Property's lots.

One of the easements is currently improved with a 12-foot wide pavement from the State highway down to the edge of the Property, which is the Middle lot.

*Potential Impacts and Mitigation Measures*

No significant impact on traffic or the highway system is anticipated. No new use is contemplated nor is it likely. The agricultural use of the Property is already a "***HR Statute and HARule allowed***" use. The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property.**

- **Water System**

*Existing Setting*

The County's Department of Water Supply has confirmed, by letter dated April 4, 2005, that water is available to the Project via an existing six-inch waterline along the Old Mamalahoa Highway, on the opposite side of the Hawai'i Belt Road. The previous property owners, the McCully(s), installed the necessary service laterals to serve the Property.

*Potential Impacts and Mitigation Measures*

The agricultural use of the Property is already a "***HR Statute and HARule allowed***" use. No new use is contemplated nor is likely. The provision of the buffer zone will represent **a reduction in the intensity of the agricultural use of the Property.** The Property generally receives sufficient rainfall to support the existing agricultural use of the Property.

- **Protective Services**



*Existing Setting*

The closest fire and police stations to the House Site are the district stations situated in the community of Laupahoehoe approximately 9 miles to the Northwest. The Property is also situated within the service area of the main police and fire stations that are approximately 19 miles away in Hilo.

*Potential Impacts and Mitigation Measures*

The agricultural use of the Property is already a "**HRStatute and HARule allowed**" use. No new use is contemplated nor is likely.

- **Schools**

*Existing Setting*

The Property is served by Kalanianaʻole School and Hilo High School. Kalanianaʻole School is located approximately 9 miles southeast and Hilo High School is located approximately 19 miles south of the Property.

*Potential Impacts and Mitigation Measures*

The agricultural use of the Property is already a "**HRStatute and HARule allowed**" use. No new use is contemplated nor is likely.

- **Power and Communication Systems**

*Setting*

The area of the subdivision in which the Property is located is serviced by the Hawaii Electric Light Company and Hawaiian Telecom as well as local cell phone communication towers. The Petitioner(s) have installed a P.V. system on the Property and intend to remain off grid electrically.

*Potential Impacts and Mitigation Measures*

The Petitioned rezoning will not have any significant adverse impact on the power and communication systems serving the region. The agricultural use of the Property is already a "*HRStatute and HARule allowed*" use. No new use is contemplated nor is likely.

- **Wastewater**

*Setting*

The Property is not within the service limits of the County waste-water disposal system.

*Potential Impacts and Mitigation Measures*

The Residence will dispose of septic water on site and will comply with County waste water septic permitting and requirements. The Petitioned rezoning will not have any adverse impact on wastewater. The agricultural use of the Property is already a "*HRStatute and HARule allowed*" use. No new use is contemplated nor is likely.

- **Solid Waste**

*Setting*

There is no municipal collection system for solid waste in the County of Hawai'i. The County provides a solid waste transfer station near Honomu, approximately 1 mile from the Project site.

*Potential Impacts and Mitigation Measures*

The Petitioned rezoning will not have any significant adverse impact on the solid waste systems serving the region. The agricultural use of the Property is already a "*HRStatute and HARule allowed*" use. No new use is contemplated nor is likely.

- **Archeology, Historic and Cultural Resources**

*Setting*

An archaeological assessment of the property was conducted by Rechtman Consulting, LLC, in July of 2004. The Property was systematically and intensively examined, and one

site (SIHP Site 50-10-26-24212) (two historic-period railroad features) were discovered. These features were identified as a possible railroad grade section and a railroad trestle abutment. A copy of the consultant's report can be found as *exhibited hereto as an exhibit to exhibit 2 and 3*.

In summarizing its findings, the archaeological consultant states the following:

*“Systematic survey of three parcels (TMK 3-2-9-03: 13, 29 60) produced no evidence of traditional Hawaiian remains or evidence that the area was currently being accessed for the exercise of traditional and customary practices.”*

*“One historic era site-SIHP Site 24212, was recorded. The site contains two features associated with the Hamakua Division of Hilo Railroad-Hawaii Consolidated Railway which were recorded in the northwestern portion of the Property. One is a possible section of railroad grade and the other is a railroad trestle abutment. The features were in active use by the railroad from 1911 to 1946. Their primary function was to facilitate the transport of raw sugar from the many mills along the Hilo and Hamakua Coasts to the harbor at Hilo Bay. In later years, they also served the secondary function of facilitating tourism.”*

The archaeological consultant provided the following significance evaluation and treatment recommendations:

*“Site 24212 is considered significant under Criteria D for the information it has yielded regarding early twentieth century agriculture (sugar cane production), transportation infrastructure. As the current inventory survey project recorded Site 24212 in detail, however, no further work is recommended.”*

*“In the unlikely event that archaeological resources are encountered during future development activities at TMK: 3-2-9-03: 13, 29, and 60, work in the immediate area of*

*the discovery should be halted and DLNR-SHPD contacted as outlined in Hawaii Administrative Rules 13§13-275-12.”*

By letter dated December 22, 2004, DLNR-SHPD accepted and agreed with the archaeological consultant’s recommended treatment of Site 24212 and noted that the consultant’s report was adequate to meet the requirements of Section 13-276, HAR. The report was accepted as final. Rechtman Consulting, LLC, also conducted a cultural assessment for the Property. Archival and documentary information was reviewed, including Mahele Land Awards and Grants and historic maps.

This research did not reveal any documentation of any previous or ongoing traditional or customary practices. The area was historically known as Hilo-pali-Ku (Hilo of the upright cliffs) and there are a few accounts that indicate this area, which encompasses the sheer cliffs stretching along the

Hāmākua Coast from the Wailuku River to Waipi’o and beyond, once supported a large pre-contact Hawaiian population that subsisted on crops such as taro, sweet potato, banana, and coconut. Other agricultural resources such as ‘awa, bamboo and sugarcane were also cultivated on the kula lands

that stretched from South Hilo to Hāmākua. In the second half of the nineteenth century, the transportation difficulties that had delayed the large-scale commercial exploitation of the kula lands were overcome and sugarcane plantations replaced the subsistence agriculture and grazing as the dominant land use.

In order to identify cultural resources and potential traditional cultural practices associated with the Property and this portion of the Wailea ahupua`a, the consultant contacted Ululan Sherlock of the Office of Hawaiian Affairs (OHA) and Kepa Maly of Kumu Pono Associates in June of 2004.

Neither had any specific information relative to the Property. However, OHA suggested contacting the Laupahoehoe Hawaiian Civic Club. Lucille Chung and Walter Victor were

contacted, and they, in turn, referred the consultant to Jack or Waich Ouye, Yukio Takeya and Lorraine Mendoza, who were contacted in June and July of 2004.

The interviewees recalled that the railway used to run across the property until the Kolekole Bridge was destroyed by the tsunami of 1946. On the adjacent property to the south of the 7 lot subdivision, **there used to be a pig farm** that was used by camp residents and a trail that accessed the shore. This trail allowed the residents and local fisherman access to the shoreline below the pali that bounds the property to the East. This trail was not located on the Property nor did it cross such Property.

The consultant summarized its findings regarding cultural resources relating to the Property as follows: “None of the organizations or individuals that were contacted had any information relative to the existence of traditional cultural properties in the immediate vicinity of the Petition Area; nor did they provide any information indicating past or current use of the area for traditional and customary practices. It is unlikely that there are any traditional or customary practices occurring in the Property **as the lands were utilized for sugarcane cultivation and associated transportation for over 100 years**. Any traditional Hawaiian features that may have been associated with former cultural practices that may have occurred on the Property would have been destroyed by the sugarcane cultivation and related uses.”

Petitioner(s) interviewed the field manager of the agricultural farming business which occupied the Property up to 1992. The field manager stated that this particular Property and the surrounding 7 lot subdivision was maintained as a *‘seed farm’* for their agricultural business for over 40 years and all public access from all directions was strictly prohibited in order to not contaminate the seed production on the Property. Thus there exists no recent history of public access to the Property or the subdivision mauka after the closure of the railroad around 1950.

A complete copy of the Archaeological Inventory Survey and Limited Cultural Assessment of TMKs: (3) 2-9-003: 013, 029, and 060 is provided as *exhibited hereto as exhibits in the EA exhibits 2 and 3*. The comment letter from the State Historic Preservation Division dated December 22, 2004 and a supplemental letter from the consultant Rechtman Consulting, LLC, dated January 24, 2005 are also included therein.

### *Potential Impacts*

There were no cultural or historic properties, other than Site 24212, identified in the Property area. There were also no traditional or customary cultural practices found to be associated with the Property. The Petitioned rezoning is therefore anticipated to have “no effect” on significant historic sites or traditional and customary cultural practices. The Historic use of the Property was for Agriculture. The Petitioned rezoning will not have any significant adverse impact on the **Archeology, Historic and Cultural Resources**. The agricultural use of the Property is already a *"HRStatute and HARule allowed"* use (the Historic use). No new use is contemplated nor is likely.

## **SUMMARY OF POTENTIAL ADVERSE ENVIRONMENTAL IMPACTS AND PROPOSED MITIGATION MEASURES**

- **Short Term Impacts**

The Petitioned rezoning will not have any adverse Environmental impact in the area of the Property. The agricultural use of the Property is already a *"HRStatute and HARule allowed"* use (the Historic use). No new use is contemplated nor is likely.

The Petitioner(s) propose that the earlier described buffer zone be established.

- **Long Term Impacts**

The Petitioned rezoning will not have any adverse Environmental impact in the area of the Property. The agricultural use of the Property is already a "*HRStatute and HARule allowed*" use (the Historic use). No new use is contemplated nor is likely.

The Petitioner(s) propose that the earlier described buffer zone be established.

The existing agricultural uses and uses accessory and incidental to such uses represent a long term commitment to the likely continuing agricultural uses of the Property. Having said that once the Property is rezoned into the State's agricultural district its uses will be administered through the County's administrative processes. **However the proposed buffer zone provided for also in a "deed restriction" or other suitable instrument provides a long term protection for the land adjacent immediately to the pali. Because the Property is also in the County's SMA zone that already provides an added level of review and permitting requirements by the County.**

## **ALTERNATIVES**

**Under the no action alternative,** The Property will remain in the State's Conservation District. The agricultural use of the Property is already a "*HRStatute and HARule allowed*" use (the Historic use). No new use is contemplated nor is likely. The agricultural use is intended to continue and expand. The Property is already fully developed with a residence and an agricultural use storage and processing structure. The potential for cultivation of the soils on the Property will continue to be "*HRStatute and HARule allowed*". No new use is contemplated nor is likely. The agricultural use of the Property is allowed right up to the Property's border with the ocean-side pali property.

The Petitioner(s) agricultural use of the Property and uses incidental and accessory to such use will continue to have to exist in certain degrees of uncertainty as the Petitioner(s) have generally found the DLNR to be unresponsive to many of their inquiries and even when

responses are given they are partial and often obfuscate the questions asked sometimes resulting in a string of communications without resolve over a period that has been sometimes measured in years. No buffer zone will be provided.

Confusion will continue to exist respecting the Property's zoning vs. its agricultural use.

**Generally the resulting confusion and uncertainty .....**

- exposes the Petitioner(s), and continues to expose the Petitioner(s), to the potential for fines administered by the DLNR on a continuing basis as the DLNR does not appear to have a clear and/or evenly applied interpretation of its own administrative rules in such regards,
- is also a problem for the general public and particularly the local community as there exists a general perception that Conservation Districted lands use for agriculture including the cultivation of soils in coastal areas is a violation of State and County laws.

The Petitioner(s) assert the confusion exists as .....

- it has been their direct experience of **same**,
- the immediate previous Property owner(s), the McCully(s) described their experience of **same**,
- the administrator of the sugar cane farming operation, which existed on the Property up to 1992, described **same**,
- other property owners, immediately adjacent to the Property have described **same**,
- realtors have described **same**,
- visitors to the Property have described **same**,
- the State's Auditor General has described **same**,
- land use planning professionals have described **same** (the Petitioner(s) have discussed this directly with at least seven professionals,



- the County of Hawaii's planning department representatives have described **same** to the Petitioner(s),
- the County's elected representative, Valarie Poindexter for the district of the Property, has described **same**,
- Land Use Commissioners generally described **same** during the former Property owner(s) LUC petition A05 757 during the period from 2005-6.

The Petitioner(s) believe that confusion will not change unless the Property is rezoned to the State's Agricultural District. The Petition and this EA describes that the Property's current zoning in the State's Conservation District does not provide a significant benefit to the public and its use for agriculture appears to many confusingly in conflict with its zoning.

#### **RELATIONSHIP TO LAND USE PLANS AND POLICIES**

The Petitioned rezoning's consistency with relevant State and County land use plans and policies is discussed below.

- **State Land Use District**

The State Land Use Law, Chapter 205, HRS, is intended *to preserve, protect, and encourage public health and welfare of Hawai'i's people. All lands in the State are classified into four land use districts by the SLUC: Urban, Agricultural, Conservation, and Rural.* The Petition Area is currently designated within the State Conservation District. This Petition requests the rezoning of the Property from the State's Conservation District to the State's Agricultural District.

The Petitioner(s) believe that **Hawaii's Constitution, HRS 205 LUC Statute, HAR 15-15 LUC Rules and County Rules are all consistent with and effectively support the Petitioned rezoning.....**

Effectively, in reverse order, the **Rules** are promulgated and gain their authority from the **Statute** and the Statute is a law consistent with the **Constitution**. The Petitioner(s) believe that no Rule ought to conflict with the Statute from which the Rules are promulgated.

- **The State Constitution** requires.....

that it's '*agencies place a priority*' on preserving and **promoting** suitable agricultural lands for agricultural uses in its section 11.3 Agricultural lands.....

*“The State shall conserve and protect agricultural lands, **promote** diversified agriculture, **increase agricultural self-sufficiency** and assure the availability of agriculturally suitable lands.”*

The Petitioner(s) agricultural use of the Property is for both **personal**, **self-sufficiency**, and intended **commercial** agricultural production which will add to the State's **self-sufficiency** in food production.

- **The State's LUC enabling Statute Law** LUC HRS 205-2 (3) states that.....

*"In establishing of the boundaries of agricultural districts the **greatest possible protection shall be given to those lands with a high capacity** for intensive cultivation; and,"*

The word **greatest** does not need definition. Effectively the word **greatest** means that there be **no other** land zoning characteristic of **greater** priority provided in the Statute or HARules which result from the Statute. The Statute is succinct in requiring that '*in establishing district boundaries*' **no other** land zoning designation than '**Agricultural**' be given to land if it has a '**high capacity for intensive cultivation.**'

The Property has a '*high capacity for intensive cultivation*' which is an established fact. For certain HRS 205 does not state any characteristic of lands being considered for Conservation Districting requiring that they be given **equal or greater** protection than land that has a '*high capacity for intensive cultivation be zoned in the Agricultural District*'. HRS 205 sections (d) and (e) go on to list various characteristics of lands to be zoned into the State's Agricultural and Conservation Districts.

The listed characteristics clearly go on to describe that the Property ought to be zoned in the State's Agricultural District more compellingly than in the State's Conservation District. On the-other-hand if the County or State have a plan for public use of the Property in any way what-so-ever it is incumbent on them to identify same. The Property has been zoned in the State's Conservation District for over 50 years and neither the State nor the County have identified same.

Particularly the flow of HRS 205-2 first describes what districts are to be established in its section (a) quoted above. HRS 205-2 then goes on through its subsequent section (d) *Agricultural districts shall include*: to describe **uses** in (d) (1) rather than the earlier described **capacity** characteristic.....

*"(d) Agricultural district shall include:*

*(1) Activities or **uses** as characterized by the **cultivation of crops**, crops for bioenergy, **orchards**, forage, and forestry,"*

The Agricultural section (d) goes on to describe in its clauses (2) - (11) various other uses, activities and services that characterize what the *Agricultural district shall include*.

The Petitioner(s) are **using** the Property for the '*cultivation of crops*' and an '*orchard*' and the Property has a '*high capacity for intensive cultivation*.'

Comparatively section (e) Conservation district describes.....

*"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 recreation purposes; other related activities; and other permitted uses not detrimental to a multiple use conservation concept."*

Agricultural use is an **allowed** and **existing** use of the Property. The Property is fully developed with structures and agricultural plantings. No particular *scenic or open space* resources exist that need protection. No **archaeological, historical or botanical characteristics** have been identified that need the protection of Conservation district zoning. **Soil erosion** cannot be reasonably argued to be a characteristic that needs protection against as.... agriculture, tilling of the soil etc., is an allowed use.

In summary of HRS 205-2 Districting and classification of lands.....

The lawmakers clearly intended that the LUC implement its Rules, to provide a preferential priority **"greatest protection be given"** that lands with a **'high capacity for intensive cultivation'** be zoned agricultural. There does not exist any more compelling characteristic in the Conservation district section that the Property remain in the Conservation district.

- **The LUC enabling Rule** HAR §15-15-01 Purpose Rule seemingly confirms that the Statute is to be administered as pre-emptive to the Rules.....

*"This chapter governs the practice and procedure before the land use commission, and shall be construed to secure the just and efficient*

*determination of every proceeding. This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses **to which they are best suited** in the interest of public health and welfare of the people of the State of Hawai'i. **The rules under this chapter are promulgated pursuant to authority provided by sections 205-1 and 205-7, HRS.**"*

- **The LUC enabling Rule** HAR 15-15-04 Rule also establishes how the LUC apply district boundary Rules in a preferential order. Particularly.....

*§15-15-04 Grammatical usage. ....*

*(c) The word "shall" is always mandatory.*

*(d) The word "may" is always permissive.*

The Petitioner(s) believe that the word "**may**" implies a **discretionary** authority to the LUC and the word "**shall**" implies a **mandatory** requirement.

The Petitioner(s) believe that the following Rules are particularly relevant to the Petition in this regard, *ref., HAR 15-15.....*

- **The LUC enabling Rules**, Rule HAR 15-15-19 and -04.....

*15-15-19 Standards for determining "A" agricultural district boundaries. Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply:*

*(1) It shall include lands with a **high capacity** for agricultural production;*

*§15-15-04 Grammatical usage. ....*

- (c) The word "**shall**" is always *mandatory*.
- (d) The word "**may**" is always *permissive*.

Herein may lie an inconsistency between HRS 205 and HAR 15-15. HRS states that "*in establishing district boundaries the **greatest possible protection** be given to lands with a **high capacity** for intensive cultivation', "* whereas HAR 15-15 Rules both for State Conservation District and State Agricultural District Rules state at their beginning.....

*"Except as otherwise provided in this chapter,"*

It is not clear to the Petitioner(s) whether there exists another section in HAR 15-15's Rules whether it is "*otherwise provided in this chapter*" that lands with a "**high capacity for intensive cultivation**" may be appropriately zoned or, in the case of the Property, remain zoned in the State's Conservation District however, referring back to the Statute HRS 205-2 (3) states that.....

*"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,"*

While it is indisputable that the word **greatest** is succinct there may also exist the discretionary consideration that the term.... "*the **greatest possible protection** be given to lands with a **high capacity** for intensive cultivation*" has not suffered a reduction in **protection** by the Property's zoning in the State's Conservation District. However the required protection is described to apply in the '**establishment of agricultural district boundaries**' and not the '*establishment of conservation district boundaries*'.

It has been the Petitioner(s) experience that the Property's zoning has resulted in delayed and uncertainty of use. Furthermore its zoning in the Conservation district did not '**protect**' its '**Statute allowed**' nonconforming agricultural use, for a prolonged period of time despite the Petitioner(s) attempts to resolve same with the DLNR but rather

*"limited"* such use seemingly because the DLNR does not have a clear and evenly applied policy regarding such use.

Because both HAR 15-15-19 and -20 Rules which promulgate from HRS 205 contain the words *"shall"* and *"may"* in their Rules a balance of *discretionary* consideration is presumably allowed regarding certain characteristics of land described with the term *"may"*. The Petitioner(s) believe, therefore, that one needs to refer back to the earlier quoted *HRS 205-2 (3)* in determining whether any of the *"mandatory" ("shall")* considerations in the HAR 15-15-20 Conservation District Rules outweigh the HAR 15-15-19 Agricultural District Rules as they apply to the current characteristics of the Property, which is now a fully developed agricultural use Property.....

- HAR 15-15-19 Agricultural District Rules.....

*"(1) It shall include lands with a high capacity for agricultural production;"*

The stipulation in the Statute..... *"in establishing district boundaries the greatest possible protection be given to lands with a high capacity for intensive cultivation"* is believed by the Petitioner(s) to be pre-emptive over HAR 15-15-20's Conservation District Rules.

The Property has a *"high capacity for agricultural production"* relevant to it's size. This is not just a statement by the Petitioner(s) but is evidenced in the ALISH classification of the Property and also its history of agricultural production.

The word *capacity* refers as a standard measured against the physical size of a property and the word *capacity* will be specifically referred to and discussed in the ALISH classification and definition paragraphs below. The Property has a history of *intense* cultivation exceeding one hundred (100) years, *ref., exhibit 12, John Cross letter* (the former agribusiness manager of the Property), and *exhibit 13, ALISH description* of what constitutes *prime agricultural land* and *exhibit 11, ALISH map*, which identifies the

Property's area as 'Prime Agricultural Land' and the County's designation of zoning of the Property as A-20a.

*Prime agricultural land* is defined in the ALSH system, *ref., exhibit 13, ALISH definition of Prime Agricultural Land, page 3.....*

*“PRIME AGRICULTURAL LAND is **land best suited** for the production of food, feed, forage and fiber crops. **The land has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed, including water management, according to modern farming methods.**”*

By inference the Property has a *"capacity"* to *"produce sustained high yields of crops economically"*. Comparatively *HRS 205-2 (3)* states.....

*"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,**"*

The Petitioner(s) believe that the Petition is properly placed with the LUC and the Petitioned rezoning is consistent with the State's Constitution, the Statutes and the Rules describing that the Property now be rezoned to the State's Agricultural District.

The Petitioner(s) believe that the Petition is offering to add a new level of *protection* to the *"HRStatute and HARule allowed"* agricultural use of the Property, a *buffer zone*, is offered.

The State does have a policy regarding the re-zoning of *land*, even State Conservation Districted *land*. Effectively HAR 15-15-19's Agricultural District Rules vs. HAR



15-15-20's Conservation Districted Rules embodies the State's policy regarding the re-zoning of *land*.

**Comparison of HAR 15-15-19 vs. -20 in more detail.....**

(the Petitioner(s) apologize for the repetitive nature of the following discussion, previous discussion only included certain of the Rules, particularly the agricultural sections **mandatory** Rules, this discussion covers both of the **mandatory** and **discretionary** Rules for Agriculture and Conservation)

Particularly HAR 15-15-19 states.....

**15-15-19 Standards for determining "A" agricultural district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "A" agricultural district, the following standards shall apply:

*(1) It **shall** include lands with a high capacity for agricultural production;*

This applies to the Property.

*(2) It **may** include lands with significant potential for grazing or for other agricultural uses;*

This also applies to the Property.

*(3) It **may** include lands surrounded by or contiguous to agricultural lands or which are not suited to agricultural and ancillary activities by reason of topography, soils, and other related characteristics; and*

The Property is bordered mauka by properties that are zoned in the \_\_\_\_\_ State Agricultural District and makai by a property that is zoned in the State Conservation District.

4) It **shall** include all lands designated important agricultural lands pursuant to part III of chapter 205, HRS.

This Property is not designated "important agricultural land"

Effectively the Rule (1) requires that it is “**mandatory**” that ‘**land with a high capacity for agricultural production shall be zoned as Agricultural**’, the term “**shall**” is described in the previously quoted HAR §15-15-04 Grammatical usage Rule.

The Property has a ‘*high capacity for agricultural production*’ relevant to it’s size, and it has a history of intense cultivation for agricultural production exceeding one hundred (100) years, *ref., exhibit 12, John Cross letter* (the former agribusiness manager of the Property), and *exhibit 13, ALISH description* of what constitutes **prime agricultural land** and *exhibited ALISH map* which identifies the Property’s area in ‘*Prime Agricultural Land*’ and the County’s designation of zoning of the Property as A-20A, *ref., exhibit 4, County letter.....*

“*The parcels are zoned Agricultural (A-20a).*”

The Property is “**capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology**”. This assertion is well established and evidenced by the Property’s past historic use for intense agricultural production dating back some one hundred (100) years and it’s ALISH classification as Prime Agricultural Land, *ref., exhibit 11, ALISH map 2017 for the Property* and *exhibited ALISH definition of Prime Agricultural Land, exhibit 13, on it’s page 2.....*

“*Three classes of agriculturally important lands were established for the State of Hawaii with the intent of facilitating the SCS effort to inventory prime farmlands nationally and adapting the classification to the types of agricultural activity in*

*Hawaii. These classes and their corresponding SCS (national) equivalents are: ”  
**Hawaii Classification System SCS Classification System”***

*”Prime Agricultural land Prime Farmland  
Unique Agricultural Land Unique Farmland  
Other Important Agricultural Additional Farmland of Statewide  
Land and Local Importance”*

*“The criteria for classification of PRIME AGRICULTURAL LAND are identical to the criteria established by SCS for national application. The criteria for UNIQUE AGRICULTURAL LAND and OTHER IMPORTANT AGRICULTURAL LAND were established cooperatively by the Soil Conservation Service in Hawaii, the College of Tropical Agriculture, and the State Department of Agriculture” .....*

Now turning to exhibited ALISH definition of Prime Agricultural Land, page 3.....

*“PRIME AGRICULTURAL LAND is **land best suited** for the production of food, feed, forage and fiber crops. **The land has the soil quality, growing season, and moisture supply needed to produce sustained high yields of crops economically when treated and managed, including water management, according to modern farming methods.**”*

### **Conservation District Standards**

The current **Resource** designation of the Property appears to designate that the Property **encompasses** one of the following areas described below. It bears reminding, however.....

This Petition requests the rezoning of the Property from the State's Conservation District to the State's Agricultural District. HRS 205 finds itself applied through the Rules of the

LUC in HAR 15-15-19's Agricultural District Standards and HAR 15-15-20'S Conservation District Standards.

The two District Standards are expressed in the Rules under "*discretionary*" and "*mandatory*" standards. HAR §15-15-04 Grammatical usage Rule.....

*"(a) Words used in the present tense include the future tense.*

*(b) The singular number includes the plural; and  
the plural, the singular.*

*(c) The word "shall" is always mandatory.*

*(d) The word "may" is always permissive.*

*(e) Terms not defined in this chapter shall have  
the meaning customarily assigned to them"*

**§15-15-20 Standards for determining "C" conservation district boundaries.** Except as otherwise provided in this chapter, in determining the boundaries for the "C" conservation district, the following standards shall apply:

*(1) It shall include lands necessary for protecting watersheds, water resources, and water supplies;*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **mandatory stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "*HRStatute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning.

The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "**HRStatute and HARule allowed**" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **mandatory stipulation (1)** above does not compellingly apply to the Property.

*(2) It may include lands susceptible to floods and soil erosion, lands undergoing major erosion damage and requiring corrective attention by the state and federal government, and lands necessary for the protection of the health and welfare of the public by reason of the land's susceptibility to inundation by tsunami and flooding, to volcanic activity, and landslides;*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **discretionary stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "**HRStatute and HARule allowed**" use on the Property. Particularly cultivation of the soils of the Property is included as an existing "**HRStatute and HARule allowed**" use. Therefore erosion concerns can hardly be described as a compelling characteristic that the Property remain in the State's Conservation District.

The Petitioned rezoning will bring the Property's use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "**HRStatute and HARule allowed**" nonconforming agricultural use of the Property, which

is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **discretionary stipulation (2)** above does not compellingly apply to the Property.

*(3) It **may** include lands used for national or state parks;*

This does not apply to the Property.

*(4) It **shall** include lands necessary for the conservation, preservation, and enhancement of scenic, cultural, historic, or archaeological sites and sites of unique hysiographic or ecologic significance;*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **mandatory stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "**HRStatute and HARule allowed**" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "**HRStatute and HARule allowed**" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **mandatory stipulation (4)** above does not compellingly apply to the Property.

*(5) It shall include lands necessary for providing and preserving parklands, wilderness and beach reserves, for conserving natural ecosystems of indigenous or endemic plants, fish, and wildlife, including those which are threatened or endangered, and for forestry and other related activities to these uses;*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **mandatory stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "**HRStatute and HARule allowed**" use of the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "**HRStatute and HARule allowed**" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **mandatory stipulation (5)** above does not compellingly apply to the Property.

*(6) It shall include lands having an elevation below the shoreline as stated by section 205A-I, HRS, marine waters, fish ponds, and tidepools of the State, and accreted portions of lands pursuant to sections 501-33 and 669-1, HRS, unless otherwise designated on the land use district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps;*

This stipulation does not apply to the Property.

*(7) It **shall** include lands with topography, soils, climate, or other related environmental factors that may not be normally adaptable or presently needed for urban, rural, or agricultural use, except when those lands constitute areas not contiguous to the conservation district;*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **mandatory stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "**HRStatute and HARule allowed**" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "**HRStatute and HARule allowed**" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **mandatory stipulation (7)** above does not compellingly apply to the Property.

*(8) It **may** include lands with a **general slope** of twenty per cent or more which provide for open space amenities or scenic values; and*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **discretionary stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "**HRStatute and HARule allowed**" use on the Property irrespective of its



**general slope** . The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "***HRStatute and HARule allowed***" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **discretionary stipulation (8)** above does not compellingly apply to the Property.

*(9) It may include lands suitable for farming, flower gardening, operation of nurseries or orchards, growing of commercial timber, grazing, hunting, and recreational uses including facilities accessory to those uses when the facilities are compatible with the natural physical environment.*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the above **discretionary stipulation**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "***HRStatute and HARule allowed***" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "***HRStatute and HARule allowed***" nonconforming agricultural use of the Property, which is provided for in HAR 13-5-7, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

Therefore the **discretionary stipulation (9)** above does not compellingly apply to the Property.

### **Hawai‘i State Plan**

The Hawai‘i State Plan, embodied in Chapter 226, HRS, serves as a guide for goals, objectives, policies, and priority guidelines for statewide planning. The Hawai‘i State Plan provides a basis for determining priorities, allocating limited resources, and improving coordination of State and County plans, policies, programs, projects, and regulatory activities. The Hawai‘i State Plan also directs the appropriate State agencies to prepare functional plans for their respective program areas. The proposed project is consistent with the following Hawai‘i State Plan objectives and policies:

- ***§226-7 Objectives and policies for the economy--agriculture.*** (a) *Planning for the State's economy with regard to agriculture shall be directed towards achievement of the following objectives:*
  - (1) *Viability of Hawaii's sugar and pineapple industries.*
  - (2) *Growth and development of diversified agriculture throughout the State.*
  - (3) *An agriculture industry that continues to constitute a dynamic and essential component of Hawaii's strategic, economic, and social well-being.*
- (b) *To achieve the agriculture objectives, it shall be the policy of this State to:*
  - (1) *Establish a clear direction for Hawaii's agriculture through stakeholder commitment and advocacy.*
  - (2) *Encourage agriculture by making the best use of natural resources.*
  - (3) *Provide the governor and the legislature with information and options needed for*

*prudent decision-making for the development of agriculture.*

*(4) Establish strong relationships between the agricultural and visitor industries for mutual marketing benefits.*

*(5) Foster increased public awareness and understanding of the contributions and benefits of agriculture as a major sector of Hawaii's economy.*

*(6) Seek the enactment and retention of federal and state legislation that benefits Hawaii's agricultural industries.*

*(7) Strengthen diversified agriculture by developing an effective promotion, marketing, and distribution system between Hawaii's food producers and consumers in the State, nation, and world.*

*(8) Support research and development activities that strengthen economic productivity in agriculture, stimulate greater efficiency, and enhance the development of new products and agricultural by-products.*

*(9) Enhance agricultural growth by providing public incentives and encouraging private initiatives.*

*(10) Assure the availability of agriculturally suitable lands with adequate water to accommodate present and future needs.*

*(11) Increase the attractiveness and opportunities for an agricultural education and livelihood.*

*(12) In addition to the State's priority on food, expand Hawaii's agricultural base by promoting growth and development of flowers, tropical fruits and plants, livestock, feed grains, forestry, food crops, aquaculture, and other potential enterprises.*

*(13) Promote economically competitive activities that increase Hawaii's agricultural self-sufficiency, including the increased purchase and use of Hawaii-grown food and food*

*products by residents, businesses, and governmental bodies as defined under section 103D-104.*

*(14) Promote and assist in the establishment of sound financial programs for diversified agriculture.*

*(15) Institute and support programs and activities to assist the entry of displaced agricultural workers into alternative agricultural or other employment.*

*(16) Facilitate the transition of agricultural lands in economically nonfeasible agricultural production to economically viable agricultural uses.*

*(17) Perpetuate, promote, and increase use of traditional Hawaiian farming systems, such as the use of loko i'a, māla, and irrigated lo'i, and growth of traditional Hawaiian crops, such as kalo, 'uala, and 'ulu.*

*(18) Increase and develop small-scale farms.*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with HRS §226-7 ***Objectives and policies for the economy--agriculture***. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already an "HRStatute and HARule allowed" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding ***"HRStatute and HARule allowed"*** nonconforming agricultural use of the Property, which is provided for in HAR 13-5, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

- **§226-11 Objectives and policies for the physical environment--land-based, shoreline, and marine resources.** (a) *Planning for the State's physical environment with regard to land-based, shoreline, and marine resources shall be directed towards achievement of the following objectives:*

(1) *Prudent use of Hawaii's land-based, shoreline, and marine resources.*

(2) *Effective protection of Hawaii's unique and fragile environmental resources.*

(b) *To achieve the land-based, shoreline, and marine resources objectives, it shall be the policy of this State to:*

(1) *Exercise an overall conservation ethic in the use of Hawaii's natural resources.*

(2) *Ensure compatibility between land-based and water-based activities and natural resources and ecological systems.*

(3) *Take into account the physical attributes of areas when planning and designing activities and facilities.*

(4) *Manage natural resources and environs to encourage their beneficial and multiple use without generating costly or irreparable environmental damage.*

(5) *Consider multiple uses in watershed areas, provided such uses do not detrimentally affect water quality and recharge functions.*

(6) *Encourage the protection of rare or endangered plant and animal species and habitats native to Hawaii.*

(7) *Provide public incentives that encourage private actions to protect significant natural resources from degradation or unnecessary depletion.*

(8) *Pursue compatible relationships among activities, facilities, and natural*

resources.

(9) *Promote increased accessibility and prudent use of inland and shoreline areas for public recreational, educational, and scientific purposes.*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with HRS §226-11 ***Objectives and policies for the physical environment--land-based, shoreline, and marine resources.*** No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already an "HRStatute and HARule allowed" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "***HRStatute and HARule allowed***" nonconforming agricultural use of the Property or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard for a period measured in years without a result satisfactory to the Petitioner(s).

- ***§226-12 Objective and policies for the physical environment--scenic, natural beauty, and historic resources.*** (a) *Planning for the State's physical environment shall be directed towards achievement of the objective of enhancement of Hawaii's scenic assets, natural beauty, and multi-cultural/historical resources.*

(b) *To achieve the scenic, natural beauty, and historic resources objective, it shall be the policy of this State to:*

(1) *Promote the preservation and restoration of significant natural and historic resources.*

(2) *Provide incentives to maintain and enhance historic, cultural, and scenic*

amenities.

(3) *Promote the preservation of views and vistas to enhance the visual and aesthetic enjoyment of mountains, ocean, scenic landscapes, and other natural features.*

(4) *Protect those special areas, structures, and elements that are an integral and functional part of Hawaii's ethnic and cultural heritage.*

(5) *Encourage the design of developments and activities that complement the natural beauty of the islands.*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with HRS §226-12 ***Objective and policies for the physical environment--scenic, natural beauty, and historic resources.*** No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already an "HRStatute and HARule allowed" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "***HRStatute and HARule allowed***" nonconforming agricultural use of the Property or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard for a period measured in years without a result satisfactory to the Petitioner(s).

- **§226-13 Objectives and policies for the physical environment--land, air, and water quality.** (a) *Planning for the State's physical environment with regard to land, air, and water quality shall be directed towards achievement of the following objectives:*

(1) *Maintenance and pursuit of improved quality in Hawaii's land, air, and water resources.*

(2) *Greater public awareness and appreciation of Hawaii's environmental resources.*

*(b) To achieve the land, air, and water quality objectives, it shall be the policy of this State to:*

*(1) Foster educational activities that promote a better understanding of Hawaii's limited environmental resources.*

*(2) Promote the proper management of Hawaii's land and water resources.*

*(3) Promote effective measures to achieve desired quality in Hawaii's surface, ground, and coastal waters.*

*(4) Encourage actions to maintain or improve aural and air quality levels to enhance the health and well-being of Hawaii's people.*

*(5) Reduce the threat to life and property from erosion, flooding, tsunamis, hurricanes, earthquakes, volcanic eruptions, and other natural or man-induced hazards and disasters.*

*(6) Encourage design and construction practices that enhance the physical qualities of Hawaii's communities.*

*(7) Encourage urban developments in close proximity to existing services and facilities.*

*(8) Foster recognition of the importance and value of the land, air, and water resources to Hawaii's people, their cultures and visitors.*

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with HRS §226-13 **Objectives and policies for the physical environment--land, air, and water quality.** No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already an "HRStatute and HARule allowed" use on the Property. The Petitioned rezoning will bring its use into



conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "*HRStatute and HARule allowed*" nonconforming agricultural use of the Property, which is provided for in HAR 13-5, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

**Hawai'i Coastal Zone Management Program** (also discussed earlier in the SMA section).....

The National Coastal Zone Management (CZM) Program was created through passage of the Coastal Zone Management Act of 1972. Hawai'i's CZM Program, adopted as Chapter 205A, HRS, provides a basis for protecting, restoring and responsibly developing coastal communities

and resources. The coastal zone management area is defined as all lands of the State and the area extending seaward from the shoreline to the limit of the State's police power and Island School Updated Master Plan Final Environmental Assessment management authority, including the United States territorial sea (Section 205A-1, HRS).

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with **Hawai'i Coastal Zone Management Program**. No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture is already a "*HRStatute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "*HRStatute and HARule allowed*" nonconforming agricultural use of the Property, which is provided for in HAR 13-5, or alternatively it has not conveyed same to the Petitioner(s) despite repeated

attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

The Petitioner(s) requested a Determination from the County of Hawaii regarding their agricultural use of the Property. The County issued a Determination, *ref., exhibit 4, County letter*, which stated that agricultural use of the Property was exempt from SMA regulations.

Particularly the Petitioned rezoning represents an improvement over the existing "*HR Statute and HARule allowed*" uses of the Property. Presently cultivation of the Property's soils immediately along the top of the coastal pali. A buffer zone is proposed that will be maintained in grasses and woody plants which represents a reduction in the intensity of land use adjacent to the coastal pali. Effectively the potential for erosion of the soils in the area of the coastal pali will be better managed and reduced.

### **General Plan for the County of Hawaii**

Earlier in the EA the Petitioner(s) pointed to the testimony of a former County Planning Department, Mr. Hayashi, to the LUC in 2005 regarding the Property, *ref., exhibit 1*. Mr. Hayashi described that the County designated the Property as "Open" in its General Plan. The County has described in the *exhibit 4, County letter* that the parcels are zoned Agricultural (A-20a). In a recent discussion with County Planning Department employee Jeff Darrow it was described to the Petitioner(s) that the A20-a designation is preemptive. Particularly the Property is not zoned "Open" by the County. This EA earlier describes that the Property's zoning and designation etc. is confusing for everyone and needs correction. The Petition, if allowed, will result in a correction which is satisfactory to the Petitioner(s).

The Petitioned rezoning of the Property from the State's Conservation District to the State Agricultural District is consistent with the County's General Plan.

No new land use is contemplated nor is it likely. The Property is already fully developed with agricultural use and uses accessory and/or incidental to agricultural use. Agriculture

is already a "*HRStatute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely. The current zoning of the Property in the State's Conservation District has resulted in uncertainty of use as the DLNR does not appear to have a clear policy regarding "*HRStatute and HARule allowed*" nonconforming agricultural use of the Property, which is provided for in HAR 13-5, or alternatively it has not conveyed same to the Petitioner(s) despite repeated attempts by the Petitioner(s) in this regard, for a period measured in years, without a result satisfactory to the Petitioner(s).

### **Required Permits and Approvals**

With the exception of the LUC approving the Petitioned rezoning the Petitioner(s) do not believe that any permits or approvals are required.

### **Further SMA guidelines discussion.....**

- **Recreational Resources**

*Objective: Provide coastal recreation opportunities accessible to the public.*

***Policies:***

*(A) Improve coordination and funding of coastal recreational planning and management;  
and*

*(B) Provide adequate, accessible and diverse recreational opportunities in the coastal zone management area by:*

- *Protecting coastal resources uniquely suited for recreational opportunities that cannot be provided in other areas;*

- *Require replacement of coastal resources having significant recreational value, including, but not limited to, surfing sites, fishponds and sand beaches, when such resources would be unavoidably damaged by development; or requiring reasonable monetary compensation to the State for recreation when replacement is not feasible or desirable;*
- *Providing and managing adequate public access, consistent with conservation of natural resources, to and along shorelines with recreational value;*
- *Providing an adequate supply of shoreline parks and other recreational facilities suitable for public recreation;*
- *Ensuring public recreational uses of county, state and federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources;*
- *Adopting water quality standards and regulating point and nonpoint sources of pollution to protect, and where feasible, restore the recreational value of coastal waters;*
- *Developing new shoreline recreational opportunities, where appropriate, such as artificial lagoons, artificial beaches, and artificial reefs for surfing and fishing; and*
- *Encouraging reasonable dedication of shoreline areas with recreational value for public use as part of discretionary approvals or permits by the land use commission, board of land natural resources, and county authorities; and crediting such dedication against the requirements of section 46-6.*

**Discussion:**

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4 County letter*.

Agriculture is already a "***HR Statute and HARule allowed***" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The objective is stated to provide coastal recreation opportunities accessible to the public. The Property is located in a private gated community. There is no public access to the Property nor to the shoreline below the Property as the area is bounded by high steep cliffs. There exists no beach at the waterline.

The Petitioner(s) interviewed the field manager of the agricultural farming business which occupied the Property up to 1992. The field manager stated that this particular Property and the surrounding 7 lot subdivision was maintained as a '***seed farm***' for their agricultural business for over 40 years and all public access from all directions was strictly prohibited in order to not contaminate the seed production on the Property. Thus there exists no recent history of public access to the Property or the subdivision to its West after the closure of the railroad around 1950.

The County's Planning Department and SMA process will allow the County to review, assess and regulate future new uses of the Property in detail.

- **Historic Resources**

***Objective:***

*Protect, preserve, and, where desirable, restore those natural and man made Historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.*

***Policies:***

- *Identify and analyze significant archaeological resources;*
- *Maximize information retention through preservation of remains and artifacts or salvage operations; and*
- *Support state goals for protection, restoration, interpretation, and display of historic resources.*

**Discussion:**

Agriculture is already a "***HR Statute and HARule allowed***" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter.*

The County Planning Department and SMA processes will allow the County to review, assess and regulate new land uses in detail. The Property was systematically surveyed for archaeological resources and one site was discovered. The Property included one historic period railroad feature. An additional historic-era railroad feature was located on TMK: (3) 2-9-003: 060. Due to the Property's previous agricultural use, it is highly unlikely that any additional subsurface archaeological resources exist there.

An archaeological assessment of the property was conducted by Rechtman Consulting, LLC, in July of 2004. Such Property was systematically and intensively examined, and one site (SHIP Site 50-10-26-24212) (two historic-period railroad features) were discovered. These features were identified as a possible railroad grade section and a railroad trestle abutment.

A copy of the consultant's report is *exhibited in exhibits 2 and 3* hereto.

In summarizing its findings, the archaeological consultant states the following:

*“Systematic survey of three parcels (TMK 3-2-9-03: 13, 29 60) produced no evidence of traditional Hawaiian remains or evidence that the area was currently being accessed for the exercise of traditional and customary practices.”*

*“One historic era site-SIHP Site 24212, was recorded. The site contains two features associated with the Hamakua Division of Hilo Railroad-Hawaii Consolidated Railway which were recorded in the northwestern portion of the Property. One is a possible section of railroad grade and the other is a railroad trestle abutment. The features were in active use by the railroad from 1911 to 1946. Their primary function was to facilitate the transport of raw sugar from the many mills along the Hilo and Hamakua Coasts to the harbor at Hilo Bay.”*

The archaeological consultant provided the following significance evaluation and treatment recommendations:

*“Site 24212 is considered significant under Criteria D for the information it has yielded regarding early twentieth century agriculture (sugar cane production), transportation infrastructure. As the current inventory survey project recorded Site 24212 in detail, however, no further work is recommended.”*

*“In the unlikely event that archaeological resources are encountered during future development activities at TMK: 3-2-9-03: 13, 29, and 60, work in the immediate area of the discovery should be halted and DLNR-SHPD contacted as outlined in Hawaii Administrative Rules 13§13-275-12.”*

By letter dated December 22, 2004, DLNR-SHPD accepted and agreed with

the archaeological consultant's recommended treatment of Site 24212 and noted that the consultant's report was adequate to meet the requirements of Section 13-276, HAR. The report was accepted as final.

Rechtman Consulting, LLC, also conducted a cultural assessment for the Property. Archival and documentary information was reviewed, including Mahele Land Awards and Grants and historic maps. This research did not reveal any documentation of any previous or ongoing traditional or customary practices. The area was historically known as Hilopali- Ku (Hilo of the upright cliffs) and there are a few accounts that indicate this area, which encompasses the sheer cliffs stretching along the Hāmākua Coast from the Wailuku River to Waipi`o and beyond, once supported a large pre-contact Hawaiian population that subsisted on crops such as taro, sweet potato, banana, and coconut. Other agricultural resources such as 'awa, bamboo and sugarcane were also cultivated on the kula lands that stretched from South Hilo to Hāmākua. In the second half of the nineteenth century, the transportation difficulties that had delayed the large-scale commercial exploitation of the kula lands were overcome and sugarcane plantations replaced the subsistence agriculture and grazing as the dominant land use.

In order to identify cultural resources and potential traditional cultural practices associated with The Project site and this portion of the Wailea ahupua`a, the consultant contacted Ululan Sherlock of the Office of Hawaiian Affairs (OHA) and Kepa Maly of Kumu Pono Associates in June of 2004. Neither had any specific information relative to the Property. However, OHA suggested contacting the Laupahoehoe Hawaiian Civic Club. Lucille Chung and Walter Victor were contacted, and they, in turn, referred the consultant to Jack or Waich Ouye, Yukio Takeya and Lorraine Mendoza, who were contacted in June and July of 2004.

The interviewees recalled that the railway used to run across the property until the Kolekole Bridge was destroyed by the tsunami of 1946. On the



adjacent property to the south, there used to be a pig farm that was used by camp residents and a trail that accessed the shore. This trail allowed the residents and local fisherman access to the shoreline below the pali that bounds the Property to the East. This trail was not located on the Property nor did it cross the Property.

The consultant summarized its findings regarding cultural resources relating to the Combined Property (using the referenced Property) as follows:

*“None of the organizations or individuals that were contacted had any information relative to the existence of traditional cultural properties in the immediate vicinity of the Petition Area; nor did they provide any information indicating past or current use of the area for traditional and customary practices. It is unlikely that there are any traditional or customary practices occurring in the Petition Area as the lands were utilized for sugarcane cultivation and associated transportation for over 100 years. Any traditional Hawaiian features that may have been associated with former cultural practices that may have occurred in the Petition Area would have been destroyed by the sugarcane cultivation and related uses.”*

A complete copy of the Archaeological Inventory Survey and Limited Cultural Assessment of TMKs: (3) 2-9-003: 013, 029, and 060 is provided *exhibited in exhibits 2 and 3 hereto*.

The comment letter from the State Historic Preservation Division dated December 22, 2004 and a supplemental letter from the consultant Rechtman Consulting, LLC, dated January 24, 2005 are also included therein.

## **Potential Impacts**

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4 County letter*.

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that may be beneficial to Historic elements which may exist on the Property.

There were no cultural or historic properties, other than Site 24212, identified in the Combined Property Area. There were also no traditional or customary cultural practices found to be associated with such property. Finally the Petitioner(s) interviewed the field manager of the agricultural farming business which occupied the Property up to 1992. The field manager stated that this particular Property was maintained as a *'seed farm'* for their agricultural business for over 40 years and all public access from all directions was strictly prohibited in order to not contaminate the seed production on the Property.

**It is noteworthy** that generally the existing *"HRStatute and HARule allowed"* **"Historic"** non-conforming agricultural uses of the property described herein already allow agriculture on a substantial area of the Property. **These reflect the "Historic" use of the Property as described throughout this EA.**

The Petitioner(s) intend to be a good stewards of the Property and use reasonable effort to mitigate negative effects to the Historic resources on/of the Property from both the "HRStatute and HARule allowed" non-conforming agricultural operations on the Property. The agricultural use of the Property is in keeping with the shift to diversified agriculture in the region as characterized by larger numbers of self-employed and smaller scale independent businesses.

The provision of the earlier described buffer zone will have positive effect on the *‘existing "HRStatute and HARule allowed" conditions’* of the Property which will generally be the same as the existing surrounding agricultural land uses.

- **Scenic & Open Space Resources**

**Objective:**

Protect, preserve, and, where desirable, restore or improve the quality of coastal scenic and open space resources.

**Policies:**

- Identify valued scenic resources in the coastal zone management area;
- Ensure that new development are compatible with their visual environment by designing and locating such developments to minimize the alteration of natural landforms and existing public views to and along the shoreline;
- Preserve, maintain, and , where desirable, improve and restore shoreline open space and scenic resources; and
- Encourage those developments that are not coastal dependent to locate in inland areas.

**Discussion:**

Agriculture is already a *"HRStatute and HARule allowed"* use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter.*

The County Planning Department and SMA review processes of future new uses will allow it to review, assess and regulate the Property's use in detail. There are no public views of

the Property or the ocean from the Hawai'i Belt Road because the road is cut below a high grade along an embankment mauka of the Property, *ref., exhibit .20 pictures.*

The Property is situated between two sites listed as examples of natural beauty in the Hawai'i County General Plan: Kolekole Gulch and Hakalau Bay/Gulch. Hakalau Bay/Gulch is situated approximately 5,000 feet north of the Property and Kolekole Gulch is situated approximately 1,200 feet south of the Property.

#### *Potential Impacts and Mitigation Measures*

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibited County letter.*

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that may be beneficial to the scenic and open space resources which may exist on the Property.

#### • **Coastal Ecosystems**

##### **Objective:**

Protect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems.

##### **Policies:**

- o Exercise an overall conservation ethic, and practice stewardship in the protection , use and development of marine and coastal resources;
- o Improve the technical basis for natural resource management;
- o Preserve valuable coastal ecosystems, including reefs, of significant biological or economic importance;

- o Minimize disruption or degradation of coastal water ecosystems by effective regulation of stream diversion, channelization and similar land and water uses, recognizing competing water needs; and

- o Promote water quantity and quality planning and management practices that reflect the tolerance of fresh water and marine ecosystems and maintain and enhance water quality through the development and implementation of point and nonpoint source water pollution control measures.

**Discussion:**

Agriculture is already a *"HR Statute and HARule allowed"* use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter.*

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will be beneficial to the Coastal ecosystem makai of the Property.

- **Economic Uses**

**Objective:**

Provide public or private facilities and improvements important to the State's economy in suitable locations.

**Policies:**

- o Concentrate coastal dependent development in appropriate areas;

- o Ensure that coastal development such as harbors and ports, and coastal related development such as visitor industry facilities and energy generating facilities, are located, designed, and constructed to minimize adverse social, visual, and environmental impacts in the coastal zone management area; and
  
- o Direct the location and expansion of coastal dependent developments to areas presently designated and used for such developments and permit reasonable long-term growth at such areas, and permit coastal dependent development outside of presently designated areas when:
  - o Use of presently designated locations is not feasible;
  
  - o Adverse environmental effects are minimized; and
  
  - o The development is important to the State's economy.

**Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter*.

**Potential Impacts and Mitigation Measures**

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

- **Coastal Hazards**

**Objective:**

Reduce hazard to life and property from tsunami, storm waves, stream flooding, erosion, subsidence, and pollution.

**Policies:**

- o Develop and communicate adequate information about storm wave, tsunami, flood erosion, subsidence, and point and nonpoint source pollution hazards

- o Ensure that development comply with requirements of the Federal Flood Insurance Program; and

- o Prevent coastal flooding from inland projects.

**Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

**The objective of** Hawaii Revised Statute "**HRS**" is to reduce hazard to life and property from tsunami, storm waves, flooding, erosion, subsidence, and pollution.

**Potential Impacts and Mitigation Measures**

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property. The buffer zone will reduce

soil erosion and the likelihood of cliff subsidence due to erosion of the area of the high wash of the waves below the coastal pali. The incidence of subsidence may also result in large trees falling into the ocean which may become a navigational hazard.

- **Managing Development**

**Objective:**

Improve the development review process, communication, and public participation in the management of coastal resources and hazards.

**Policies:**

- o Use, implement and enforce existing law effectively to the maximum extent possible in managing present and future coastal zone development;
- o Facilitate timely processing of applications for development permits and resolve overlapping or conflicting permit requirements; and
- o Communicate the potential short and long-term impacts of proposed significant coastal developments early in their life cycle and in terms understandable to the public to facilitate public participation in the planning and review process.

**Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter.*



## **Potential Impacts and Mitigation Measures**

No new use or further development of the Property is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

### **• Public Participation**

#### **Objective:**

Stimulate public awareness, education, and participation in coastal management.

#### **Policies:**

o Use, implement and enforce existing law effectively to the maximum extent possible in managing present and future coastal zone development;

o Facilitate timely processing of applications for development permits and resolve overlapping or conflicting permit requirements; and

o Communicate the potential short and long-term impacts of proposed significant coastal developments early in their life cycle and in terms understandable to the public to facilitate public participation in the planning and review process.

#### **Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter*.

### **Potential Impacts and Mitigation Measures**

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

The LUC administrative and related process allows opportunities for public participation, including the requirement for compliance with Chapter 343, Hawai'i' Revised Statutes. The Environmental Assessment process includes a public comment period during which members of the public may submit comments on the Project.

#### **• Beach Protection**

##### **Objective:**

Protect beaches for public use and recreation.

##### **Policies:**

- Locate new structures inland from the shoreline setback to conserve openspace, minimize interference with natural shoreline processes, and minimize loss of improvements due to erosion;
- Prohibit construction of private erosion-protection structures seaward of the shoreline, except when they result in improved aesthetic and engineering solutions to erosion at the sites and do not interfere with existing recreational and waterline activities; and
- Minimize the construction of public erosion-protection structures seaward of the shoreline.

**Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibit 4, County letter*. No beach areas exist makai of the Property.

**Potential Impacts and Mitigation Measures**

No new use is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

• **Marine Resources**

**Objective:**

Promote the protection, use, and development of marine and coastal resources assure their sustainability.

**Policies:**

- Ensure that the use and development of marine and coastal resources are ecologically and environmentally sound and economically beneficial'
  
- Coordinate the management of marine and coastal resources and activities to improve effectiveness and efficiency;
  
- Assert and articulate the interests of the state as a partner with federal agencies in the sound management of ocean resources within the United States exclusive economic zone;

- Promote research, study, and understanding of ocean processes, marine life, and other ocean resources in order to acquire and inventory information necessary to understand how ocean development activities relate to and impact upon ocean and coastal resources; and
- Encourage research and development of new, innovative technologies for exploring, using, or protecting marine and coastal resources.

**Discussion:**

Agriculture is already a "*HR Statute and HARule allowed*" use on the Property. The Petitioned rezoning will bring its use into conformance with its zoning. No new use is contemplated nor is likely.

The County of Hawaii reviewed a requested Determination regarding the Petitioner(s) agricultural use of the Property. The County issued a letter of Determination that the agricultural use of the Property was SMA exempt, *ref. exhibited County letter*.

**Potential Impacts and Mitigation Measures**

No new use or further development of the Property is contemplated, therefore there will be no new impacts and no mitigation measures are planned, however if the Petition is allowed a buffer zone will be provided that will reduce the intensity of agricultural use of the Property.

**Agencies and parties consulted.....**

• **DLNR consultation/comments.....**

In late December of 2016 the Petitioner(s) advised the DLNR by letter that they intended to Petition the LUC to rezone the Property from the State Conservation District to the

State Agricultural District inviting the DLNR's comments and/or issue a supporting letter. The OCCL's Administrator, Sam Lemmo responded on January 27, 2017, *ref., exhibit 5, letter stating in part .....*

*"You have also suggested that in lieu of a discussion with the Board, the Department may issue a supporting letter for your petition to the Land Use Commission for a boundary amendment to take your properties out of the Conservation District and put them in the Agricultural District. We are unable to accommodate this request, as this would be inappropriate. However if the Land Use Commission wished to seek our input on this matter, we would be happy to respond to any inquiry from them."*

Furthermore the letter stated that it would not accommodate the Petitioner(s) request that the matter be referred to the BLNR for consideration. **Unlike previous letters from the OCCL on the matter that letter was not copied to the Hawaii Board members nor the State or County Offices of Planning.**

- **County and State Offices of Planning comments.....**

In concert with the submission of LUC Petition A18 805 to the LUC in 2018 the Petitioner(s) also submitted a copy of same to the State and County Offices of Planning. Subsequently the Petitioner(s) also filed an amended motion to the LUC that the Offices of Planning accept an existing FONSI for a residence on the Property, which identified in some 40 places in it that the residence was intended, in part, to be used in support of the Petitioner(s) existing **"HR Statute and HARule allowed"** nonconforming agricultural use of the Property which agricultural use is also the subject of the Petition. Both the County and State Offices of Planning supported the subject motion to the LUC that it accept the existing FONSI for the residence on the Property. The LUC determined however on January 23rd, 2019 that it would be more appropriate that the Petition be supported by a new EA that specifically identified that a Petition was filed with the LUC for the rezoning.

The Petitioner(s) met with Jeff Darrow at the County office of Planning two times. Jeff described that he was familiar with the Petition and did not raise any particular objections. He offered an observation that it seemed to him that the, earlier referred to, Jan. 27th, 2017 letter from the DLNR, which is exhibited at the end of the end of the EA, seemingly did recognize that the Petitioner(s) may use the Property for agricultural use.

The Petitioner(s) responded that the letter referred that the DLNR *'had previously allowed'* the nonconforming agricultural use of the Property. The Petitioner(s) described to Jeff that the DLNR had very clearly obfuscated dealing with the matter succinctly over a period of 2 years of communications between the Petitioner(s) and the OCCL.

The Petitioner(s) had previously requested a clear **"Determination"** be issued that the DLNR recognized that the Property qualified for nonconforming agricultural use according to HAR 13-5-7's Nonconforming Use Rule and HAR 13-5-30's Permits, generally Rule. They identified that they sought the **"Determination"** in order to secure their investments in the Property's use for agriculture and uses incidental and accessory to the agricultural use and self assure that they were not in violation of the DLNR's Rules as considerable fines are regularly administered for violations of the DLNR's Rules. Furthermore the Petitioner(s) pointed Jeff to the previous letter from the OCCL **dated in the month of December preceding the January letter** that the OCCL stated in that letter.....

*'The Office of Conservation and Coastal Lands (OCCL) is in receipt of your inquiry regarding your non-conforming agricultural use. According to the information you provided it appears that you have determined that your non-conforming agriculturai/horticultural use of 3.2 acres of your property has been accepted by the DLNR as an allowed land use.'*

(emphasis added by the Petitioner(s))

At that point it was clear to the Petitioner(s) that the OCCL was not yet prepared to issue a clear "**Determination**" that the Property qualified for "**HRStatute and HARule allowed**" nonconforming agricultural use. Furthermore the Petitioner(s) identified to Jeff that the only "**Determination**" issued by the OCCL in such regard was that the Petitioner(s) were allowed to grow "**sugar cane**" which was never requested by them. The Petitioner(s) identified that they were highly suspicious of '*whatever the OCCL was up to*'. The Petitioner(s) identified to Jeff that all of the OCCL letters that they had received up to that point were copied to the State and County Offices of Planning yet the final Jan. 27th, 2017 did not indicated in its c.c. section that it had been circulated beyond the "chair" of the DLNR.

The Petitioner(s) further described to Jeff the OCCL's obfuscation to their repeated requests over the two year preceeding period and the inconsistencies and confusion resulting from the OCCL's letters. The Petitioner(s) stated that they believed that their right to use their Property for agriculture would continue to remain uncertainly lawful. Their request that the matter be referred to the BLNR for clarity was also **denied** by the OCCL in the January letter.

The Petitioner(s) believed that their Property rights were being interfered with wrongfully. They saw no point to continue to seek certainty through the DLNR processes. The Petitioner(s) considered advancing the matter before a court of compitent jurisdiction with a various claims including a claim of inverse condemnation or pursue a Petition to the LUC to rezone the Property. The Petitioner(s) determined the Petition route ought to be explored first.

Jeff further described a similar property in the area where the owner, Steve Shopshire, had received a CDUP for agricultural use of his similar, former sugar cane property, rather than a nonconforming use Determination. The Petitioner(s) described to Jeff that a CDUP was not an option that they were prepared to consider.

Jeff then suggested that the Petitioner(s) may wish to consider requesting a "Determination" from the LUC that the Property qualified for nonconforming agricultural use. The Petitioner(s) said that they would take that suggestion into consideration. Subsequently an examination of the LUC rules clearly describe that.....

*15-15-26 Permissible uses within the "C" conservation district. Uses of land within a conservation district shall be governed by the rules of the state department of land and natural resources, title 13, and chapter 183C, HRS*

Therefore the Petitioner(s) decided that the LUC did not have the authority to make the Determination. Furthermore the Petitioner(s) had already submitted the Petition to the LUC.

- **Subsequently the Petitioner(s) met with DISTRICT 1 - Valerie T. Poindexter, councilor for a Portion of South Hilo, North Hilo, Hāmākua, and Portion of Waimea, County of Hawaii at her office.**

Ms. Poindexter is the councilor for the District in which the Property is located. Ms. Poindexter indicated that she was aware that the Petitioner(s) had submitted a Petition to the LUC and copied the County and was aware of the Petition's general purpose. During the one hr. meeting she did not voice any particular concerns but voiced support for agricultural land use stating that she was a strong supporter of self sufficient agricultural use of lands in Hawaii whether for personal or commercial use.

- **Comments by other lot owners in the 7 lot subdivision in which the Property is located.....**

During the summer of 2018 the Petitioner(s) met with the members of the 7 lot subdivision properties where the Property is located (the Petitioner(s) own 2 lots and another party own 2 lots). All of the lot owners were in attendance at the meeting (one was by



conference call). The Petitioner(s) described that they were in the process of petitioning the LUC to re-zone the Property from the State's Conservation District to the State's Agricultural District. The Petitioner(s) described that no new land use was intended and that they believed that the rezoning would simply bring the Property's use into consistency with its zoning. The lot owners had a short discussion in this regard during the meeting.

The Petitioner(s) asked if the other lot owners had seen the various orchard and field crops which had been planted on the Property. All acknowledged that they were aware. The Petitioner(s) also described to them that the Petitioner(s) had identified that HAR 13-5-7 described that they believed that they may use the Property for nonconforming agriculture. The Petitioner(s) invited comments. No questions or comments were raised by the other lot owners. The Petitioner(s) closed the discussion by advising the lot owners that should any of them have any questions or concerns they may contact the Petitioner(s) and also described to them that eventually the Petition would be posted on the LUC web site which would also provide a conduit for input if they wished to not discuss it directly with us. The Petitioner(s) are not aware that any of the property owners have contacted the LUC's administrative office.

- **Official State and County Land Use mailing list.....**

In late 2018 the Petitioner(s) mailed an Official Notice of Petition filing to the 250 names on the list. The only feedback that the Petitioner(s) got resulting from that Notice was a letter from a local resident, who lives directly mauka of Hilo, who wrote a letter inquiring why we sent her the Notice? Subsequently we responded to her explaining that her name was on the mailing list. She did not state any objection to the land being re-zoned from the State's Conservation District to the State's Agricultural District.

- **Telephone discussion with Tom Eisen of the Hawaii Office of Environmental Quality Control.....**

On January 28th, 2019 the Petitioner(s) telephoned the Hawaii Office of Environmental

Quality Control and spoke with Mr. Eisen. The Petitioner(s) canvased him for advice regarding what parties would he suggest that we contact regarding our planned EA filing. He stated that he recalled our EA-FONSI for our residence on the Property which we reminded him described in some 40 places that the residence was intended to be used in support of their agricultural use of the Property. The Petitioner(s) described to him that there also existed a FONSI dating from a period around 2004-5 for a similar petition to the Petition to the LUC that the Property and one other lot in the 7 lot subdivision be rezoned from the State's Conservation District to the State Agricultural District. That EA and FONSI was effectively submitted by the prior property owners, Jim and Francine McCully in support of LUC petition A05 757.

The Petitioner(s) described to Mr. Eisen that they would like to refer to these existing FONSI's as being directly relevant to our Petition and also described that they would like to refer to these FONSI(s) by reference without directly copying their hundreds of pages of text and exhibits and submitting same as exhibits with our hard copies of the EA. He advised that would be acceptable (actually preferred) to/by his department but he also advised that a final acceptance of that format of presentation would be up to the LUC.

Links to the electronic versions of the previous two EA/FONSI(s) are as follows.....

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2016-07-08-HA-FEA-Church-Single-Family-Residence.pdf](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2016-07-08-HA-FEA-Church-Single-Family-Residence.pdf)

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2005-06-23-HA-FEA-McCully-40-Kam-Avenue-Conservation-Lands.PDF](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2005-06-23-HA-FEA-McCully-40-Kam-Avenue-Conservation-Lands.PDF)

Electronic versions of these two documents can also be found on the CD disc. supplied with this EA.

The Petitioner(s) also described to Mr. Eisen that they were already using the Property for

agriculture and that they believed that it was an *"HRStatute and HARule allowed"* specifically according to HAR 13-5-7's Nonconforming Use Rule. The Petitioner(s) explained that it seemed a little odd to seek a FONSI for an **existing** and seemed *"HRStatute and HARule allowed"* land use and that the Petitioner(s) were now simply seeking to have the Property rezoned into the agricultural district in order to bring the zoning into alignment with its existing use. The Petitioner(s) asked Tom what parties we ought to pre-consult with before submitting the EA to the LUC?

Tom advised that the above listed contacts would probably be sufficient, particularly if the Petitioner(s) referenced the existing McCully FONSI and the Petitioner(s) subsequent FONSI for a residence on the Property which included comment sections by various authorities.

**Exhibit list**

exhibit 1 - transcript LUC proceedings petition A05 757

exhibit 1a - notice of Petition A18 805 filing sent to the State official mailing list

exhibit 2 - 2005 FONSI link - (no hard copy provided)

exhibit 3 - 2016 FONSI link - (no hard copy provided)

exhibit 4 - County SMA letter

exhibit 5 - DLNR letter

exhibit 6 - State Auditor General's report to the Governor

exhibit 7 - OCCL letter

exhibit 8 - LUC Ninole boundary interpretation

exhibit 9 - Dr. Kwong letter

exhibit 10 - Botanical report 2014

exhibit 11 - ALISH map

exhibit 12 - John Cross letter

exhibit 13 - ALISH definition of Prime Agricultural Land

exhibit 14 - TMK map

No exhibit 15

exhibit 16 - Quadrangle map

exhibit 17 - BLNR meeting minutes - nonconforming use is Statute Allowed

exhibit 18 - County General Plan - Open zone

exhibit 19 - LUPAG map

exhibit 20 - pictures of view towards the Property from the coastal highway

exhibit 21 - picture of 1905 historic cane field map showing a close up of the area of the  
Property and the date of the map

exhibit 22 - pictures

exhibit 23 - request for a Determination