BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of	**DOCKET NO. A18-805**
Kenneth Stanley Church and Joan Evelyn Hildal filed with the LUC on July 20th, 2018 To Amend the Land Use District Boundary of Certain Lands Situated at Wailea, County and State of Hawai'i, Consisting of 3.5 Acres from the State Conservation District to the Agricultural District, Tax Map Key(s) No(s). (3) 2-9-003; 028, 060	**PETITIONER(s) MOTION-** **-That the LUC ADOPT A SECOND ORDER FOR THE ISSUANCE OF ANTICIPATED NEGATIVE DECLARATION OR ANTICIPATED FINDING OF NO SIGNIFICANT IMPACT ;** -DECLARATION OF KENNETH STANLEY CHURCH; CERTIFICATE OF SERVICE

PETITIONER(S) MOTION FOR ISSUANCE OF A SECOND NEGATIVE DECLARATION OR ANTICIPATED FINDING OF NO SIGNIFICANT IMPACT

Petitioner(s) Kenneth Stanley Church and Joan Evelyn Hildal (the "**Petitioner(s)**"), respectfully submit this Motion for the issuance of a second Anticipated Negative Declaration or Anticipated Finding of No Significant Impact which was first adopted by the Land Use Commission in a Decision And Order dated on the 30th day of April 2019 herein referred to as the "**First AFONSI Declaration**") **or** whatever is determined to be appropriate by the Land Use Commission in order that the Draft EA be published and examined by the public for comment.

On April 30th, 2019 the Land Use Commission issued a Decision and Order that it made a Determination of AFONSI for Petitioner's submitted draft EA (the **"First Draft EA"**) pursuant to Chapter 343 HRS, Hawai'i Revised Statutes ("**HRS**") which was warranted in this Docket; which First Draft EA was subsequently filed with the State of Hawai'i Department of Health, Office Environmental Quality Control ("**OEQC**") by the Land Use Commission's administrative staff, with the LUC's

Decision and Order (the "**First Decision and Order**") . The First Draft EA and First AFONSI Declaration was filed pursuant to Chapters 205 and 343, HRS, and Hawai'i Administrative Rules ("**HAR**") Chapter 15-15 (Commission Rules) and Chapter 11-200 (the "**Old EA/EIS Rules**").

For reasons unknown to the Petitioner(s) the Draft EA was never published by the OEQC up to July 30, 2019 (nor since) and after a period of around ninety days (90) since the Land Use Commission's First Decision and Order having passed which was followed by the filing of the First Draft EA with the OEQC.

On July 30, 2019 Governor David Ige signed into law HAR Chapter 11-200.1 (the "**New EA/EIS Rules**"), and repealed the former EA/EIS Rules, effective August 9, 2019. The New EA/EIS Rules provide, in pertinent part, that they.....

> *"shall apply immediately upon taking effect" ,*

and that the former EA/EIS Rules....

> *'shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of the New EA/EIS Rules'.* See HAR s/s 11-200.1-32(a), (b).

The OEQC apparently has clarified that, for the purposes of HAR s/s 11-200.1-32, the *'environmental review of ....applicant actions'* commences upon *inter alia,* publication of a draft EA by the OEQC.

It was first required by the Administrative Office of the Land Use Commission, several months earlier, of the Petitioner(s), that the Petitioner(s) provide extra copies of the First Draft EA, which the Land Use Commission issued the First AFONSI Declaration for in order, that if the Land Use Commission determined that an AFONSI was determined, that a copy of the First Daft EA could be supplied to the OEQC with a copy of its First Decision and Order for publication by the OEQC

in the next available publication of the Environmental Notice. The Petitioner(s) have noted that the Land Use Commission is the *'Lead Agency'* described in HAR 15-15 and is believed by the Petitioner(s) to be the submitting authority (the **"Lead Agency"**) and that it is the controlling authority authorized to submit a draft EA and its AFONSI.

While it is understood by the Petitioner(s) that the Land Use Commission (the *Lead Agency's* Administrative Staff) forwarded the First Draft EA for the Petition to the OEQC requesting that it be published in the Environmental Notice several months ago it was not published. Therefore, it appears to the Petitioner(s) that the, environmental review of Petitioner(s) project may now be required to be processed under the New EA/EIS Rules. Therefore, if it is Determined by the Land Use Commission to be necessary, the Petitioner(s) hereby propose to amend the First Draft EA to conform to the New EA/EIS Rules to the extent necessary for full consideration of, and action for, an AFONSI Motion and Declaration (the "**New AFONSI Declaration**") in a timely way at the next scheduled Land Use Commission meeting on the Island of Hawai'i.

Petitioner(s) note that, with respect to the significance criteria set forth in HAR s/s 11-200.1-13, the analysis and conclusions set forth in the attached (a) Petitioner(s) Memorandum Regarding Chapter 343, Hawai'i Revised Statutes Significance Criteria, filed and supplied with this Motion as Exhibit 1, and (b) the First Draft EA which resulted in the Land Use Commission's First AFONSI Motion remain valid and well supported. Petitioner(s) further note that the substantive contents of the First Draft EA comply with the New EA/EIS Rules.

Since a period beginning around the end of April 2019 the Petitioner(s) have written four (4) letters to the Administrative Office of the Land Use Commission. Two (2) of those letters (June 2, 2019 and July 7, 2019 were sent by both email and USPS) specifically requested reasoning why the First Draft EA has not yet been published and if necessary, that the Land Use Commission Administrative Staff identify specifically what deficiencies existed in the First Draft EA in keeping with the Land

Use Commission's Decision and Order dated April 30th, 2019 which stated, in part,.....

> *"Orders and directs the Petitioner to work with Land Use Commission staff to put together all the documents required by OEQC under HAR s/s11-200-11.1 for publication of an environmental assessment and a 30-day public review and comment period."*

The Petitioner(s) attempts "*to work with Land Use Commission staff to put together all the documents required by OEQC under HAR s/s11-200-11.1 for publication of an environmental assessment and a 30-day public review and comment period*" in the form of the referenced June 3, 2019 and July 7, 2019 letters was unsuccessful as no response from the Administrative Office of the Land Use Commission was received by the Petitioner(s).

Also the Petitioner(s) have identified to the Administrative Office of the Land Use Commission that HAR 15-15 requires that the Administrative Office of the Land Use Commission advise petitioners, in writing, **within thirty days specifically** identifying any deficiencies in a Petition (the "**Petition**") which was submitted, in this case Petition A18-805 over one (1) year ago. **This has not occurred** for reasons also unknown to the Petitioner(s). It is recognized by the Petitioner(s) that a FONSI is one remaining element of the Petition that remains outstanding. HAR 15-15 appears deficient in this regard as no remedy in the Rules appears to exists to trigger the thirty (30) day reply if it does not occur.

In regard to possible Petition deficiencies the Petitioner(s) have formally requested during a period exceeding one (1) year and in at least four (4) letters sent, that the Administrative Office of the Land Use Commission identify specifically what deficiencies exist in the Petition in order that corrections may be made and thereafter the Petition may be treated as a properly filed Petition and dealt with in an efficient and timely way. No reply in this regard has been received by the Petitioner(s) nor have several of the referred letters been published on the Land

Use Commission web site's tab which generally has shown all correspondence relating to the Petition.

The Petitioner(s) believe that they have unsuccessfully used reasonable effort ...

> *"to work with Land Use Commission staff to put together all the documents required by OEQC under HAR s/s11-200-11.1 for publication of an environmental assessment and a 30-day public review and comment period."*

The Petitioner(s) desire that the Petition advance and be processed and Determined in a timely way. The Petitioner(s) recognize that publication of a draft EA is a necessary preliminary step in that process and that a FONSI is also a necessary element to the Petition. The Petitioner(s) request that the Land Use Commission Order that its Administrative Office determine whether amendments and/or additions to the First Draft EA are necessary and formally identify to the Petitioner(s) what amendments, if any, are required within thirty (30) days of its consideration of this Motion.

The Petitioner(s) further request that the Land Use Commission Order that its Administrative Office determine whether the form and contents of the existing the Petition which was submitted to the Land Use Commission's Administrative Office by the Petitioner(s) is sufficient to be deemed a complete Petition within thirty (30) days of its consideration of this Motion.

If, when considering this Motion, amendments to the First Draft EA are determined to be required in order that it comply with the New Rules the Petitioner(s) propose that the Land Use Commission consider and adopt the following ...

> *Motion of proposed (1) amendments, described herein, and (2) supplement be added into the text of the First Draft EA verbatim and without further substantive amendments and resubmitted to the LUC's Administrative Office and that its Administrative Office review the amendments to ensure verbatim content*

*(described herein) and then forward the New Draft EA and the Land Use Commissions New Determination of AFONSI to the OEQC, (the **"New AFONSI"**), and that the LUC request that it be published in the next available Environmental Notice.*

The term *"substantive amendments"* is intended to describe that the *"table of Contents"* in the Petition may also be allowed to be considered by the LUC's Administrative Office to be amended where deemed necessary and inform the Petitioner(s), in writing, in this regard.

The Petitioner(s) are concerned that this may.....

1. require the re-drafting, re-publication and re-presentation of hundreds (100(s)) of repeated pages of documents and electronic forms with very little substantive change thereto,
2. distribution of the New EA to the various authorities etc. to again,
3. be re-examined by all of the parties and authorities involved,
4. the additional use of everyone's resources repeating a process which should have already been completed,
5. result in continued uncertainty, cost and delay of use and investments to the Petitioner(s) property which is the subject of the Petition.

The Petitioner(s) welcome any suggestions and orders by the Land Use Commission that may assist in moving the Petition's determination process forward.

In the interest of the efficient use of the Land Use Commission's time the Petitioner(s) have drafted and offer a supplement (the **"Supplement"**) to be inserted, verbatim, into the First Draft EA, if determined to be necessary. It is proposed that Page 1 of the Draft EA, which already states.....

"Draft Environmental Assessment ("EA")
Re: the Petition 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.",

be amended to have the following text inserted therein in standard text form

.....

*"On April 30th, 2019 the Land Use Commission issued a Decision and Order that it made a Determination of an AFONSI for Petitioner's submitted draft EA pursuant to Chapter 343 HRS, Hawai'i Revised Statutes ("**HRS**") and that it be submitted to the OEQC for publication. Subsequently, before it was published, On July 30, 2019 Governor David Ige signed into law HAR Chapter 11-200.1 (the "**New EA/EIS Rules**"), and repealed the Old EA/EIS Rules, effective August 9, 2019. The New EA/EIS Rules provide, in pertinent part, that they "shall apply immediately upon taking effect" and that the Old EA/EIS Rules 'shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of the New EA/EIS Rules'. See HAR s/s 11-200.1-32(a), (b). OEQC has clarified that, for the purposes of HAR s/s 11-200.1-32, the 'environmental review of ....applicant actions' commences upon inter alia, publication of a draft EA with OEQC. Therefore the Petitioner(s), as defined subsequently herein, have added new additional language to this Draft EA, in order that it comply with the New EA/EIS Rules (the **"Supplement"**). The Supplement may be found, as additional added pages, at the very end of this Draft EA."*

In the interest of efficiency the Petitioner(s) request that rather than re-drafting and re-publishing the First EA the Land Use Commission consider that it issue a Decision and Order that it has determined that the amended first page of the First Draft EA and the enclosed Memorandum be added to the First EA and are sufficient to meet the New EA/EIS Rules and the Memorandum is to be part of the First Draft EA and forward its Decision and Order, (1) the described proposed amendments and (2) the Memorandum to the OEQC for publication with the previously Land Use Commission supplied First Draft EA.....

or alternatively.....

the Petitioner's request that the Land Use Commission make a part of the requested Decision and Order another instruction to the Administrative Office of the Land Use Commission that it formally respond to the referred Petitioner(s) three (3) written requests and that the *Land Use Commission staff'* reasonably assist the Petitioner(s) *'to put together all the documents required by OEQC under HAR s/s11-200-11.1 for publication of an environmental assessment and a 30-day public review and comment period.'* and any other information required for either the Draft EA or the Petition in order that it may be accepted as a complete petition according to HAR 15-15.

Finally, it has become obvious to the Petitioner(s) that there may exist concern with at lease some of the Commissioner(s) that the Petition and other similar petitions to redistrict State Conservation Lands to the State Agricultural District may facilitate urban sprawl and therefore Urban districting may be considered as an option. This has been stated in the Land Use Commission's Official Proceedings during another similar petition recently. Perhaps the Petition hearing is the proper place for the following but since, during the Commission's deliberation period, discussion by Commissioner(s) have occurred in hearings for motions on draft EA's this Petitioner(s)' commentary text is inserted herein.

The Petitioner(s) existing and intended land use is not urban in nature but agricultural and the living space of the residence on the Property is not as large as may have been believed by Commissioner(s) nor is the addition of a swimming pool part of the Petitioner(s)' current plan.

Conservation districting of land does not generally prevent the construction of residences on them whether intended to be used accessory to agriculture or for general residential use whether associated with agriculture or not . The permitting process is first an administrative approval function by the DLNR followed by County

permitting. The DLNR has already issued a permit for the Petitioner(s) residence on TMK (3) 2-9-003 060 and a residence was approved by the DLNR around 2009 that allowed the previous owner of the other contiguous lot, that is also part of the Petition, for TMK Lot (3) 2-9-003 029 to be constructed. That home was had an indoor living space twice as big as the Petitioner(s)' residence but was never built.

Furthermore no subdivision of land is proposed. The Petitioner(s) two (2) lots are both pre-existing legal lots of record and are zoned Agricultural by the County. As just stated both lots have already been assessed by the DLNR and residences have been permitted on both lots. It is obvious that rezoning the Property to the State's Agricultural District will not likely have an effect on whether residences are located on either of the lots on a continuing basis. The substantial orchard plantings on the Property also will likely continue to exist irrespective of the land's zoning as an agricultural use.

The Petition describes that.....

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***

(bold and underline added by the Petitioner(s) to the quoted texts found herein).....

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

The Petititioner(s) believe that the Land Use Commission is a form of **agency** that is contemplated in the above quotes and that the DLNR is a State **agency**. The Property is a "***agriculturally suitable***". The Petitioner(s) agricultural use of the Property is for both **personal**, "***self-sufficency***", and intended modest **commercial**

agricultural production which will add to the **State's "*self-sufficency*"** in food production. The Petitioner(s) use of the Property is for "***diversified agriculture***".

The Petition describes that the DLNR has not given the requested assurance to the Petitioner(s) (a requested Determination that agriculture is an allowed use) and the DLNR has not "***promoted***" the Property's continuing agricultural use the way the State's laws intended but rather seemingly and unreasonably resisted the Petitioner(s) use of the Property for agriculture for a prolonged period of time and.....

The State's LUC enabling Statute *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 given ***greater*** priority provided in the HRStatute or HARules which result from the Statute and resultantly by its administrative authorities. 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 word *"capacity"* does not imply *volume* of production nor does it describe a current use. Volume of production is relevant to the size of a property and not its *'capacity for intensive cultivation'*. By reasonable extension neither the referenced State's Constitution nor **HRS require that only large commercial agricultural operations on large parcels of land be zoned in the State's** Agricultural District but rather '***those lands with a high capacity*** *for intensive cultivation'*.

The Petitioner(s) have taken note that Commissioner(s) have implied, during Official Proceedings, that Conservation Districted lands are of a treasured status and by implication the rezoning of the State's Conservation Lands is to be treated with the

highest degree of protection. The Petitioner(s) cannot find any reference in the above quoted Constitution and Statutes that place any Districting of land to be of greater importance than when considering zoning petitions for land into the State's Agricultural District.

A reference to the size of a property and whether the use is for personal agriculture or commercial agriculture was also discussed as concerning the Commission during recent Land Use Commission Official Proceedings. The Petitioner(s) believe that HRS 205(3) makes it clear that "*the **greatest possible protection shall be given to those lands with a high capacity** for intensive cultivation".* It is a fact that while the Property's districting in the State Conservation Districted did not initially interfere with the agricultural use of the Property recent administration by the DLNR has made the agricultural use and uses incidental and accessory to agricultural use **delayed, tenuous, tedius, difficult, expensive to realize,** and **uncertain**.

Today the DLNR does not appear to the Petitioner(s) to have a clear and evenly applied policy regarding the Property's use for Allowed Nonconforming Agriculture as its Statute and Rules contemplated when the Conservation District was overlaid on the Property. This has resulted in significant delays to the Petitioner(s) agricultural use of the Property. It has resulted in uncertainty in investing in agricultural uses and uses incidental and accessory to agriculture. Finally the DLNR has not formally issued and/or, both to the Petitioner(s) and State and County authorities, and Board of Land and Natural Resources representatives (the **"BLNR"**), a formally requested Determination that the Property qualifies for Allowed agricultural use without any formal permit being issued. When the Petitioner(s) requested that their requested Determination be referred to the BLNR by the DLNR, that request was effectively denied.

The Property has a *'high capacity for intensive cultivation'* which is an established historical and current use fact **.** The Property is classified in the ALISH system as ***"Prime Agricultural Land"***. The ALISH definition of Prime refers that it has the *'**capacity** for intensive cultivation'*. 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'*** and.....

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, *ref., LUC HRS 205-2 (3).*

*"(d) Agricultural district **shall** include:*
*(1) Activities or **uses** as characterized by the **cultivation of crops**, crops for bioenergy, **orchards**, forage, and forestry,"*

The Petitioner(s) are **also** ***'using'*** the Property for the ***'cultivation of crops'*** and an ***'orchard'*** and the Property has a ***'high capacity for intensive cultivation'*** which is a historical fact and is confirmed by its ALISH classification as 'Prime Agricultural land'. Again no reference in the Statute describes the size of a property as a criteria for classification and it seemingly describes typical agricultural activities irrespective of the size of a property.

The LUC enabling Rule HAR §15-15-01 **Purpose Rule** 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.**"*

Particular reference is made to.....

*"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"***

The Property is ***best suited*** for agriculture. None of the values expressed in HAR 15-15-20's Conservation District apply to the Property in a more substantive way than HAR 15-15-19's expressed Agricultural District values.

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.***

Throughout the above quoted.....

- State's Constitution,
- its HRStatutues and
- the Land Use Commission's HARules

it is clear to the Petitioner(s) that a land's ***"capacity"*** for agriculture is of primary consideration and not particularly.....

- its current use,

- whether the use is for personal self sufficiency or commercial production of crops,
- intensity/volume of use or,
- the Property's size.

The Petitioner(s) are concerned that it does not appear that the Commissioner(s)' comments during its Official Proceedings reflect what the Petitioner(s) believe exist, as stated above.

None-the-less the Property is currently in substantial agricultural use. The Petitioner(s) plans are to continue to expand the agricultural use of the Property with additional food crops, orchard plantings and the further development of a potted plant nursery and development and propagation of plants that are well suited to the coastal environment. The food production will be for both personal use and additional production is intended to be sold in local farmer markets and donated to the Food Bank.

Land Use Commissioner(s) have **also** expressed that the size of an agricultural home and accessory structures such as swimming pool may, by implication, unfavorably concern them when considering rezoning of State Conservation Districted Lands in its Official Proceedings. The Petitioner(s) home is substantially less in size than that which is allowed by the County of Hawaii for farm dwellings.

While it is true that the Maximum Developable Area (the "**MDA**"), which is a Conservation District consideration, is approximately 5,000 sq. ft., is described in the Petition, the actual indoor living space of the residence is more in the order of 50 ft. X 35 ft. plus small extensions (a total floor area under 2,000 sq. ft.). The balance of the area is lanai space, an outdoor cooking area, a basement area and a car port with the provision for the possibility of a future swimming pool. There exists no restriction on the addition of swimming pools whether the land is zoned Conservation or Agricultural by the State or County but, unlike County Agriculturally zoned land, in the Conservation District all current (living space, car ports, lanai

space etc.) or likely future uses (*cumulative effects over time)* are to be calculated into the MDA which is not to exceed 5,000 sq. ft. of developed area.

The Petitioner(s) do not have a swimming pool nor is the construction of a pool in their current plans. The Petitioner(s) application to the DLNR for a residence and the supporting EA describe the possibility of a pool because the EA Rules state a requirement generally that *'cumulative' effects over time'*, are to be considered. As the DLNR Rules only allow a MDA of 5,000 sq. ft. and such includes swimming pools the Petitioner(s) designed their home's MDA to include the possibility of a swimming pool in the future otherwise it would never be allowed if the home already had a size up to 5,000 sq. ft. including lanai(s), accessory structures etc.

We apologize to the Commission that our Petition, the draft EA, our Motions to the Land Use Commission and our presentations at Official proceedings may seem repetitive and unprofessional. We request patience and understanding. The Property is relatively small in size but the burden required by the Law is the same whether it is 3 acres or 300 acres. We are simply two (2) retired people trying to comply with the law and develop a meaningful existence in our retirement years. The DLNR has not been forthcoming in assisting that the Petitioner(s) may plan and invest in their reasonable agricultural land uses and uses incidental and accessory to agriculture to be consistent with the State's Laws and the DLNR's Rules despite the Petitioner(s) reasonable efforts to insure such over a prolonged period of time.

We cannot afford professional assistance in advancing the Petition. The extreme burden of DLNR administration of the Property was unanticipated when we purchased the Property and it is the primary driver to the Petition.

Within two (2) months after purchasing the Property we applied to be allowed agricultural use of the Property by the DLNR. A residence was not applied for until over two and one half (2 1/2) years later. We are not property developers nor are we speculators. We are not cleverly twisting the Laws and the Rules to suit an

underlying motive. We always intended to use the Property for agriculture and eventually have our primary residence thereon.

By example.....
The first application to the DLNR for the planting of just twelve (12) fruit trees in the grassy *'open former field area'* required extreme detail in the written application including the species of plants, a map of the intended planting area etc., and finally, after considerable delay, a description of what we intended to do with the twelve (12) shovel full(s) of dirt removed from the planting holes. From that point on it only got more difficult and confusing.

The DLNR also required that we provide a **new** professional botanical study of the Property in order that we may proceed with our plans. The DLNR stated that a bird may have dropped an endangered plant seed on to the Property since the last study was done, around 2005, which now needed to be identified before we proceeded. We reminded the DLNR that the grassy field area was regularly mowed. None-the-less we were required to update the recent and existing professional study of the Property before proceeding with our plans . The Petition describes in detail that it got a lot worse, to the point of extreme thereafter. By further example when we applied for a garden area of 2,000 sq. ft. we were initially only permitted to grow '*native and endemic species of garden plants*'. Further formal communications occurred over months until we were allowed general species of garden plants.

When we applied for a permit to build an 'agricultural use storage and processing structure' including sanitary facilities, the DLNR first denied the application and subsequently strongly resisted that it be approved by the Board of Land and Natural Resources.

It is very obvious that the DLNR does not .....

ref., the State's Constitution...

'place a priority' on** preserving and **promoting** **suitable agricultural lands for agricultural uses'

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

Our intention, when we purchased the Property was always to use it for agriculture. We recognized that the Property continued to exist in agricultural use after it was overlaid by the Conservation District. We asked the DLNR to allow the same benefit to us as their Statute and Rules were confusing to read and resulted in uncertainty to us. The DLNR sent us on a goose chase for years without ever formally issuing a requested Determination that the Property did qualify for Allowed agricultural use to this date which is now four (4) years since we first raised the matter.

The fact that the Property is a *'near shoreline property'* ought not to be the predominate factor for the Property's continuing Conservation District zoning. There exist a very large number of similar, former sugar cane, properties on the Hamakua coast that are zoned in the State's Agricultural District. The Property cannot be seen from general public use areas. There is no recorded reasoning why the Property was zoned Conservation.

A period of fifty (50) years has expired since the Property was first zoned Conservation. During that period neither the State nor the County have identified any planned use of the Property that would be beneficial to the General Public. The Property cannot even be seen from public use areas. Structures have been approved by the DLNR and the County and alread exist. These have been placed at a maximum distance from the coastal pali and well past the one hundered (100) year erosion rate. More recently the DLNR has strongly resisted the Petitioner(s) agricultural use of the Property which is very clearly a characteristic of the Property

that is beneficial when no other beneficial use has been identified by it or the County.

The Property is located in a gated community of seven (7) lots. The County's zoning for the lots in the subdivision is A20-a. The State's zoning for most of the lots in the subdivision is Agriculture. Therefore it serves very little benefit to the general public that it remain Conservation District zoned.

This Motion describes in detail that the State's Constitution, its Laws, the Commissions Rules and the County's zoning of the Property strongly support the Petitioned rezoning. We have described in detail in this Motion, the Petition and the Draft EA that the supporting Rules state ***"Shall"*** (discretion is not allowed) and the Law states the word ***"greatest"*** and the State's Constitution asks that its administrative authorities, ***preserve, protect and promote agriculture***. That is what we are asking the Commission to effectively do.

Not only that we have offered an improvement over the existing Allowed situation. We have offered the proposed *'buffer zone'*, if the Petition is allowed that would separate cultivated field areas from the makai area of the Property. This would clearly be an improvement that will not exist if the Petition is denied.

Finally the Petition describes that the LUC is not bound by **precedence** in law and therefore there ought not be concern in such regard for future petitions which may be advanced to it. No new use of the Property is proposed. The rezoning ought not raise a public outcry against the Commission's allowing a new and/or a more intense use of land. The change in zoning will simply bring the Property's use into consistency with its zoning. The State's goal of preserving a 'buffer zone' of State Land between all properties and the ocean, a continuous band of land around all of the islands, exists and will be **improved** if the Petition is allowed.

The Petitioner(s), the administrative authorities, the general public and the Professional community will no longer suffer the existing uncertainty and confusion

that has resulted from the Property's zoning which has resulted in little, if any, identified public benefit.

So here we find ourselves again before the Commission repeating a step which should have already been completed **as the Commission has previously ordered**. The Commissioners are suffering again to reheare the matter. The State and County are suffering added cost. We are suffering delay and added cost.

DATED: Wailea, Hawai'i, August 28, 2019.

Kenneth Stanley Church

and

Joan Evelyn Hildal

EXHIBIT 1

Memorandum to supplement the EA in support of LUC Docket A18-805 Regarding Chapter 343, Hawaii Revised Statutes Significance Criteria

Pursuant to a revised Chapter 343 this analyzes the Petitioners Project (the "**Project**"), proposed that Tax Map Key(s) No(s).: (3) 2-9-003; 029, 060 (the "**Property**"), under the Significant Criteria set forth in Hawaii Administrative Rules ("**HAR**") s/s 11-200-12(b). For the following reasons set forth more fully in the previously submitted Draft Environmental Assessment ("**Draft EA**").

Particularly the Project is not anticipated to have significant impacts on anything because **no new use of the Property is proposed or contemplated**. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and where required appropriately permitted by the State and the County. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring the Property's zoning into consistency with existing ***Allowed*** uses.

The word ***"Allowed"*** when shown in **bold** and ***italic*** text form throughout this Memorandum refers that .....

> *HRS 183C-2 (Definition of Nonconforming use) and HRS 183C-5 (Nonconforming use Statute requirement) and resulting HAR 13-5-2 (Definition of Nonconforming use) and HAR 13-5-7 (Nonconforming use Rule)*

any preexisting use of land before it was overlaid by the State's Conservation District was ***Allowed*** to continue in perpetuity irrespective of whether such use was interrupted, without limitation to the length of the interrupted period. This was further established in a State Auditor's report to the Governor which is exhibited to the Petition and the Draft EA.

1. HAR s/s 11-200-12(b)(1): *The Project will not involve an irrevocable commitment or loss or destruction of any natural or cultural resources.*

The Property is located in the State's Conservation District. The Property was in intense agricultural production when it was overlaid by the State's Conservation District. The Petitioners are conducting ***Allowed*** intense agricultural use of the Property. **No new use is contemplated for the Property.**

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and/or where required (such as structures) have been appropriately permitted. Therefore agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas allowed to be maintained as such. A *'deed restriction'* is proposed, in the Petition, intended to restrict the cultivation of soils in the *buffer zone* area.

The Property is zoned A-20a by the County of Hawai'i. The Property is designated as *Prime Agricultural* in the State of Hawai'i's ALISH land classification system. The Property is also in the County Administered SMA.

No valuable natural or cultural resource would be committed or lost as no new use is contemplated nor is likely. The Property is a fully developed agricultural Property

comprised of two (2) lots with a residence, an agriculture use storage and processing structure, a large orchard, a potted plant nursery and a cultivated field area and crops.

No archaeological sites exist on the Property of interest to SHIPD. The Property lays makai of a very high and steep coastal pali, bluff, property which is owned by the State of Hawai'i. The shoreline consists of waves washing against the bluff in places and in other places intermittent wave washed boulder fields exist. To promote shoreline access would be irresponsible due to the hazardous conditions that exist.

The Property is located in a private gated community of seven lots with only two other residences existing and a large commercial greenhouse operation. No shoreline access exists and no cultural practices relating to traditional fishing and the like exist.

The Petitioned re-zoning from the State's Conservation District to the State's Agricultural District *will not involve an irrevocable commitment or loss or destruction of any natural or cultural resources.*

2. HAR s/s 11-200-12(b)(2): *The Project will not curtain the range of beneficial uses of the environment.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The Property is located in the State's Conservation District. The Property was in intense agricultural production when it was overlaid by the State's Conservation District. HAR 13-5-7's Nonconforming Use Rule ***Allowed*** that the agricultural use of the Property may continue in perpetuity. The Petitioners are conducting intense agricultural use of the Property. **No new use is contemplated for the Property.**

The Petitioned re-zoning from the State's Conservation District to the State's Agricultural District *will not curtain the range of beneficial uses of the environment.* Rather the Petitioned re-zoning will bring the ***Allowed*** agricultural use of the Property into consistency with its zoning. The Property is zoned A-20a by the County of Hawai'i. The Property is designated as *Prime Agricultural* in the State of Hawai'i's ALISH land classification system.

The Property is a fully developed agricultural lot with a residence, an agriculture use storage and processing structure, a large orchard, a potted plant nursery and a cultivated field area and crops.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area. The bluff and pali property which separates the Property from the ocean is owned by the State.

No archaeological sites exist on the Property of interest to SHIPD. The Property lays makai of a very high and steep coastal pali, bluff, property. The shoreline consists of waves washing against the bluff in places and in other places wave washed boulder fields exist. To promote shoreline access would be irresponsible due to the hazardous conditions that exist. The Property is located in a private

gated community of seven (7) lots with only two (2) other residences existing and a large commercial greenhouse operation. No shoreline access exists and no cultural practices relating to traditional fishing and the like exist.

The Property's characteristics and its environment are best suited for agricultural use and uses accessory and incidental to agriculture. No restriction of the beneficial uses of the environment would occur as a result of the Project as no new use is contemplated for the Property.

The Project involves the reclassification of approximately 3.5 acres of privately owned SLU Conservation District Land, and will not impact the public's access to or beneficial use of conservation resources.

The Project *will not curtain the range of beneficial uses of the environment.*

3. HAR s/s 11-200-12(b)(3): *The Project will not conflict with the State's long-term environmental policies.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The State's long-term environmental policies are set forth in Chapter 344, Hawai'i Revised Statutes. The broad goals of this policy are to conserve natural resources and enhance the quality of life. The Project is ***Allowed*** and already exists and is basically environmentally benign.

No scenic views exist from public use areas either of the Property or the ocean beyond as the coastal highway in the area of the Property is cut deeply through a hillside which blocks all views. Furthermore agricultural use of the Property is consistent with the agricultural character and historic use of most properties in the area. Agricultural use is not considered to interfere with the historical and scenic character of the area.

The Petitioners intend to continue the existing ***Allowed*** agricultural use of the Property. The Petitioners have invested their time and financial resources into developing the existing agricultural uses and uses incidental and accessory to the agricultural use of the Property. No new use is contemplated nor is likely. The State continues to own and control the earlier referred coastal pali property which separates the Property from the Pacific Ocean. The Property also lays in the County Administered SMA. Any significant further development of the Property would require a SMA determination by the County to be *'exempt , allowed or not allowed'.*

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The Project *will not conflict with the State's long-term environmental policies.*

4. HAR s/s 11-200-12(b)(4): *The Project will not substantially affect the economic or social welfare of the community or State.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The Property is already a fully developed agricultural use Property.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed in the Petition intended to restrict the cultivation of soils in the *buffer zone* area.

The Project *will not affect the economic or social welfare of the community or State.*

5. HAR s/s 11-200-12(b)(5): *The Project does not substantially affect public health in any detrimental way.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of

the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The Property is already a fully developed agricultural use Property.

The Project *will not substantially affect public health in any detrimental way.*

6. HAR s/s 11-200-12(b)(6): *The Project will not involve substantial secondary impacts, such as population changes or effects on public facilities.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The Project *will not involve substantial secondary impacts, such as population changes or effects on public facilities.*

7. HAR s/s 11-200-12(b)(7): *The Project will not involve a substantial degradation of environmental quality.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The Project *will not involve a substantial degradation of environmental quality.*

8. HAR s/s 11-200-12(b)(8): *The Project will not substantially affect any rare, threatened or endangered species of flora or fauna or habitat.*

The existing Draft EA, published on the LUC web site for the Petition is supported by two professional botanical and archaeological studies. The professional studies have established that *no rare, threatened or endangered species of flora or fauna or habitat* exist on the Property.

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an

Allowed use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The historical use of the Property included the cultivation of its soils for agricultural crop production and a former railroad which crossed the Property. The orchard area of the Property is comprised of orchard trees with regularly mowed grasses thereunder. The cultivated field portion of the Property is used for agricultural crops. The Project *will not substantially affect any rare, threatened or endangered species of flora or fauna or habitat.*

9. HAR s/s 11-200-12(b)(9): *The Project is not one which is individually limited but cumulatively may have considerable effect upon the environment or involves a commitment for larger actions.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali

property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The Project *is not one which is individually limited but cumulatively may have considerable effect upon the environment or involves a commitment for larger actions.*

10. HAR s/s 11-200-12(b)(10): *The Project will not detrimentally affect air or water quality or ambient noise levels.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The Project *will not detrimentally affect air or water quality or ambient noise levels.*

11. HAR s/s 11-200-12(b)(11): *The Project does not affect nor would it likely to be damaged as a result of being located in environmentally sensitive areas such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal area.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

The existing ***Allowed*** agricultural use of the Property includes the cultivation of the soils of the Property for the raising of crops. The historic cultivated area of the Property extended makai to the top of the bluff where begins the State owned pali property. The Project, if allowed, contemplates that a *'buffer zone'* be established along the coastal pali property that would be maintained in woody orchard species and maintained grasses with no bare soil areas existing. A *'deed restriction'* is proposed intended to restrict the cultivation of soils in the *buffer zone* area.

The Property is located in the County administered SMA zone. Any structures that may be built on the Property in the future will require SMA approval or exemption. A consultants study is on file at the County wherein an assessment of long term coastal/bluff erosion was considered. A set back of 80 ft. was recommended for any structures on the Property.

The Project *does not affect nor would it likely to be damaged as a result of being located in environmentally sensitive areas such as a flood plain, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh water or coastal area* particularly because no new use is contemplated nor likely. The Property is already a fully developed agricultural use Property. The Project contemplates that a

'*buffer zone*' be established to protect any existing sensitive areas from soil erosion and sudden land fall.

12. HAR s/s 11-200-12(b)(12): *The Project will not require substantial energy consumption.*

Particularly the Project is not anticipated to have significant impacts on anything because no new use of the Property is proposed or contemplated. Any impact of the agricultural use and uses incidental and accessory to the agricultural use already exists as ***Allowed*** and appropriately permitted. Agriculture is already an ***Allowed*** use of the Property. The Petitioned rezoning will simply bring its zoning into consistency with its existing ***Allowed*** use.

No new use is contemplated. The existing structures on the Property are supported by photo voltaic electrical and battery storage supply.
The Project *will not require substantial energy consumption.*

Dated September 3, 2019 in Wailea, Hawai'i

Kenneth Stanley Church

Joan Evelyn Hildal

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of Kenneth Stanley Church and Joan Evelyn Hildal filed with the LUC on July 20th, 2018 To Amend the Land Use District Boundary of Certain Lands Situated at Wailea, County and State of Hawai'i, Consisting of 3.5 Acres from the State Conservation District to the Agricultural District, Tax Map Key(s) No. (3) 2-9-003; 928m 060	CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that due service of the within documents [(1) the Motion to the Land Use Commission, (2) the Memorandum to Scott Derrickson and (3) this Certificate of Service)] were made by depositing the same with the United States Mail, postage prepaid, or by hand delivery, (as shown below) on August 28 and 29, 2019 to:

Land Use Commission
Scott A.K. Derrickson, AICP – Planner
235 S Beretana St. Ste. 406
Honolulu, Hawaii 96813

[Via U.S. Mail, postage prepaid]

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Acting Director
Office of Planning
State of Hawai'i
235 South Beretania Street, 6th Floor
Honolulu, HI 96813

[Via U.S. Mail, postage prepaid]

DAWN TAKEUCHI-APUNA, ESQ.
Deputy Attorney General
Department of the Attorney General
425 Queen Street

[Via U.S. Mail, postage prepaid]

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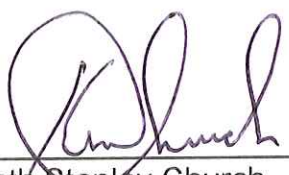
Attorney for County of Hawai'i Windward Planning Commission

DATED: Wailea, Hawai'i, September 3, 2019



Kenneth Stanley Church